STATEMENT OF FACTS

Appellant Joseph B____ and Respondent Emily S____ were divorced by a Decree of Dissolution of Marriage dated July 16, 2014, which incorporated an Amended Parenting Plan [R 23 Para 1] for custody and visitation with the parties' two children: A___, born February 10, 2008 and E___, born April 14, 2009 [R 20, Introductory paragraph]. These children, now ages 10 and 11, were the subject of the Family Court proceeding below. Under this initial parenting plan, Ms. S____ was the residential parent, and was permitted to relocate to New York with the children. The Divorce Decree was registered in New York in 2015 [R 23, para 2]. Portions of the initial parenting plan were modified by a 2017 Stipulation and Consent Order [R 18-25].

On January 3, 2018, Joseph B____ filed a Modification petition in Livingston County Family Court, dated December 21, 2017 [R 26]. Mr. B____'s petition sought modification of the July 13, 2017 Consent Order [R 18]. That Order incorporated but did not merge the terms of a stipulation signed by the parties in May of that year [R 23]. The 2017 Stipulation and Order provide, *inter alia*, that Mr. B____ would have monthly telephone contact with the children for thirty minutes, or fifteen minutes per child [R 23, Para 3]. This was agreed by the parties to be "the only feasible plan for contact between father and children" [R 23, Para 3].

The reason for this limited contact stems from a long history of Mr. B____'s serious mental illnesses, including sex addiction [R 206, 3-5]; substance abuse [R 154, 15-20]; major depressive disorder, PTSD, insomnia [R. 164, 7-23]; acute anxiety [R143, 21]; issues with anger (which he himself describes as "rage") [R 200, 4 -7]; and unfettered access to an arsenal of weapons [R 169, 16 – 170, 5]. In addition, both children either exhibited behaviors or made disclosures to personnel at their school in Colorado [R 134,4-6], leading to an investigation of their father for sexual contact with not just one, but both of them. These behaviors and disclosures were corroborated when they were repeated to their counselor in New York [R 128, 6-8]. Here, an indicated CPS report was made in or about 2014 [R 126, 12-21], whereupon Mr. B____ absented himself entirely from his children's life for a period of three years [R 39, 18]. The CPS finding was later expunged [R 126, 15 – 127, 2], but remained on the record until 2016.

During the marriage, and in or about 2012, Appellant was twice hospitalized for suicidal thoughts, other psychiatric issues and substance abuse [R 154, 15-20]. Appellant's second hospitalization was at The Meadows facility in Arizona, where he was treated for substance abuse, sexual addiction and PTSD [R 206, 3-5]. Appellant was a patient for 5 weeks at the facility, but was terminated from the program after violating facility rules [R 159, 10-160, 2], by accessing a restricted area of the facility with a female patient [R 159, 22- 160, 2]. He lives with this female today [R 115, 2-11].

After his expulsion from The Meadows, Mr. B____ continued treatment for his sexual addiction for more than a year and a half [R 207, 6-13] by one Dr. Kleinsasser, an expert in sexual psychology [R 171, 10]. Mr. B____ himself has admitted to having a "sexual addiction," [R 163, 21-24] evidence of which was admitted at trial [R 184].

In 2013, the Department of Veteran's Affairs issued a decision approving the Appellant's application for his disability pension. The VA found that the Appellant was disabled due to major depressive disorder, sexual disorder, post-traumatic stress disorder and insomnia [R. 164, 7-23].

The 2014 parenting plan incorporated in the parties' Decree of Dissolution provided for contact visitation between Appellant and the children [R 20 para 1], but because of this host of already-existing issues, it expressly gave Ms. S____-Quinn the right to refuse visitation when, in her judgment, Mr. B____ was in an unstable mental state or under the influence of drugs or alcohol [R 20, Para. 2]. By agreeing to this parenting plan, Appellant acknowledged the serious state of his mental health, and that his access to the children being regulated by their mother was in their best interests. Mr. B____ last visited in person with the children in New York in or about March of 2014 [R 116, 10-15].

Early in 2014, while the family still lived in Colorado, the children made disclosures to the staff at their school concerning sexual contact with their father. This prompted school personnel to report the disclosures to the Colorado

authorities, who began an investigation against Mr. B____. The local Sheriff's Department served papers on Appellant [R 134, 4-6]. That same year, Respondent and the children relocated to New York.

Shortly after settling into their new home in Livingston County, the children began therapy with Stacey Herrick [R 134, 4-6] to whom the children made corroborating disclosures of sexual contact by their father. They were then five and six years old. Ms. Herrick provided a report to Appellant's Colorado attorney, including the disclosures made to her by the children [R 128, 6-8; 133, 18-24]. Although Ms. Herrick offered to speak with Mr. B____ for the sake of the children [R 128, 1-14], Appellant has refused to engage with her, either personally or through his various therapists [R 178, 2-8].

Based on these disclosures to investigators, police and the counselors, the New York State Child Protective authorities made an indicated finding against Mr. B____ in 2014 [R 126, 12-21]. In or about 2016, Appellant's New York counsel successfully expunged the New York CPS finding [R 126, 15 – 127, 2].

A. The Prior Proceedings

Appellant filed his first modification petition, in Colorado, in 2014. During the pendency of that proceeding, and around Christmas 2014, Appellant was advised that Ms. Herrick, the children's therapist, suggested he should accept responsibility for his behavior, and seek treatment for his mental health issues, before regular contact with the children should begin [R 202, 11 – 203, 4]. Clearly

enraged by that suggestion, and on January 21, 2015, Appellant sent the following email to Ms. S____-Quinn's attorney:

> "I will take unilateral action to remove any future connection or benefit to include support for college, benefits from my insurances, or residual income from my estate. I am prepared to transfer assets, destroy assets, renounce retirement/disability income, work overseas, or file for bankruptcy to ensure that the S____s do not profit further from robbing a father of his children." [R 219]

Rather than seek to assist his children in their treatment and recovery from their alleged abuse at his hands, he chose to threaten their mother [R 2-3, 9-23].

Mr. B____'s first modification petition was dismissed by the Colorado Courts. Appellant did not seek further visitation or contact with the children for almost two years [R 116, 19-24].

Appellant filed his second petition to modify visitation in New York, on October 3, 2016, [R 20, intro paragraph], once the CPS record had been expunged. Throughout the proceedings below, Mr. B____, through counsel, argues that there is "no evidence" that there was any abuse of the children, clearly hanging his hat on the result of that administrative proceeding in both the instant and in the 2016 – 2017 proceedings.

The court set a hearing date for May 25, 2017 [R 21, 8]. After extensive discovery, disclosure, [and] exchange of information" [R 37, Line 17-19], the case was settled. In their stipulation of settlement dated May 24 and 25, 2017 [R P.20-22] the parties agreed, *inter alia*:

> "based on the exhibits, pleadings, and motions" on the record, "the only feasible plan for contact between father and children is by means of telephonic contact (not Facetime) once per month."
> [R 20, para. 3].
>
> Further, "Both parties agree that the calls may be recorded by either party and contemporaneously monitored by the mother who shall be present with the children during all calls." [R 20, Para. 4].

The May 2017 Stipulation contained two additional provisions relevant to this Appeal:

> "5. The Father, by entering into this Stipulation, is not agreeing to monthly telephone calls being a permanent solution to his visitation and relationship, and reserves his rights to seek such
> other and further contact as may be in the best interests of the children. [R 20, Para 5].
>
> [AND]
>
> "7. By executing the within agreement regarding telephonic contact, neither party agrees to otherwise waive, terminate or modify their rights under the Amended Parenting Plan, other than as specifically modified herein, the provisions of which remain in full force and effect." [R 21, Para 7].

Therefore, Ms. S____ retained the right to refuse or terminate visitation based on Mr. B____'s mental state, and she is now required to supervise all telephone visits. Ms. S____'s role as the gatekeeper between Appellant and the children was just as it should be. He knew that his former wife knew him better than anyone – she had been his "best friend" [R 219].

This stipulation was approved by the Court and reduced to a Consent Order on July 13, 2017.

B. The Instant Proceeding

Mr. B____'s petition to modify the Consent Order was filed on January 3, 2018, less than six months later.

1. Respondent's Motion to Dismiss

Through counsel, Respondent immediately filed a motion to dismiss the Petition for failure to state a cause of action, based on Mr. B____'s failure to plead a change of circumstances. The Court is respectfully referred to the Respondent's Motion to Dismiss, dated January 29, 2018; specifically, the allegation at number 10:

> "There is no showing in the petition that Petitioner's mental health status has improved to the point that he is in any way capable of engaging in a 'normal' relationship with the children." [R 10, para 10].

Only after the service of that motion did Appellant go about the business of constructing his case to demonstrate his "improved" mental health. In response to the motion, Appellant argued to the Family Court that the terms of paragraph 5, quoted above, mean that he would not ever have to show a change of circumstances in order to exercise his reserved "rights to seek such other and further contact as may be in the best interests of the children." [R 11, para. 4]. Appellant further urged that, "The only issue for this court to decide is what

contact between petitioner and the children is in the best interests of the children" [R 11, para. 4].

After a hearing on the motion in his written Decision and Order of April 3, 2018 [R 49], the Family Court determined that it was:

> "obliged to view this as a Stipulation allowing a Modification with no ***significant*** change of circumstances. Best interests of the children is the issue for the Court. Therefore, this Court will allow the Petition to go forward despite the ***lack of pleading*** a change of circumstances. However, the information at the time of the Stipulation was very strong that telephonic contact was the most that should be allowed. If that evidence has not changed, the Court would anticipate the same outcome." (Emphasis added.) [P. 50 Para. 2]

Hence, while not required to plead a substantial change of circumstances evidencing a real need for change, Mr. B____ would be required at trial to show that *some* circumstance had changed since the July 2017 Consent Order, and of course, prove by a preponderance of the evidence that it was in the best interests of the children that they should have increased visitation with him.

2. The Hearing

A Hearing was held on two days, August 15 and September 25, 2018. Margaret Graf Linsner, Esq. represented the children at trial, as she had in the 2017 proceeding.

At the hearing, Appellant's proof consisted of his own testimony, and the testimony of two other witnesses: his psychiatrist, Dr. Clark Jennings [R 136-57]; and his counselor, David Draxton [R 86-113]. By Appellant's own testimony, at

the time of the petition, he was not under the care of a psychologist, psychotherapist or counselor, and had not seen a talk therapist in 2016 or 2017 **[**R 209, 3]. This, despite recommendations by Dr. Jennings that he continue talk therapy [R 207, 24 – 208, 2]. Mr. B____ testified that he has seen only Dr. Jennings, once every three months, for medication management [R 142, 19-23], since the July 2017 Order, to the filing of his petition. Therefore, he was getting the exact same psychiatric (Dr. Jennings, quarterly) and psychological (none) care in July of 2017 as he was when he filed his modification petition six months later, making it virtually impossible for there to have been any change in his mental health.

Appellant did not present any evidence, through his care providers or otherwise, why it was in the best interests of the children to have increased contact with him. There was no testimony about how visits could or would contribute to the children's intellectual, educational, physical, religious, psychological or emotional development. His only testimony along these lines was that, "I can't play catch with my son telephonically, and I can't hug my daughter through a telephone" [R 123, 11-13], referring only to *his* needs and desires, not the needs of the children.

In fact, Appellant presented no testimony at all about the best interests of the children or their wishes. He testified that *he* was worried what the children might

be thinking [R 121, 6-19], and admitted that they have not asked to see him [R 176, 2-4] or even to spend more time on the phone with him [R 175, 6-8].

Only Dr. Jennings was qualified as an expert [R 140, 15-21]. While Dr. Jennings did present an opinion that the way Appellant "presents" causes no substantial impairment to Mr. B____'s ability to have a positive relationship with others [R 157 1-24], his only opinion concerning Mr. B____'s relationship with the children was that he had no "concerns in relation to parenting" as a result of Mr. B____'s "mildly restricted" range of emotional expression and the fact that he presents as "mildly anxious and rather sad." [R 157 1-11]. But presentation is only a single aspect of this man's complex psychological and psychiatric makeup. Furthermore, Dr. Jennings had no information about several aspects of Mr. B____'s history, including his substance abuse, bouts of rage, access to weapons or the fact that the children have a counselor. He also never reviewed any of Appellant's records, nor did he ever consult with any other care provider.

Mr. Draxton testified that he has been seeing Mr. B____ since March 2018, after the filing of the petition. He provided abundant testimony that his work with Appellant concerned these legal proceedings.

At the close of Mr. B____'s case below, Ms. S____'s counsel renewed the motion for dismissal of Appellant's petition, due to a failure of proof. Specifically, the motion was based on the following evidence adduced at trial:

“You heard from Mr. Draxton, you heard from Dr. Jennings, and you heard from Mr. B____. Interestingly you didn't hear from Dr. Kleinsasser You just heard Mr. B____ testify that he saw him for a year and a half and he – Mr. B____ offers that Dr. Kleinsasser said you don't have the
problems of sexual addiction. Well, why didn't Dr. Kleinsasser testify? Why wasn't he here to testify so the Court could hear him and so he could be subject to cross-examination.

You heard during the cross-examination of Mr. Draxton and Dr. Jennings that they based their opinions, your Honor, and conclusions on the self-reporting of Mr. B____. There were no independent records that they had access to or that Mr. B____ provided to them to give them any of the background information about prior treatment experiences, psychiatric and behavioral history and things of that nature. How reliable is their testimony under those circumstances? I would suggest to you that the Court should not give it any weight at all if it is only based on Mr. B____'s self-reporting. The -- throughout his testimony Mr. B____ basically has denied some of the most important diagnoses that he's had in the past.

And I would suggest to you that he is in denial. It is and I think a glimmer of hope is that some of this treatment is helping him, and I think that is good, but he is still in denial about past behaviors, your Honor. Which those past behaviors, through diagnoses, all of the prior psychiatric and medical records that were in our possession when we stipulated last June or July or whenever that was, those are all baked into the order that Mr. B____ is trying to get you to change. And based on the evidence that he has provided I think a very fair conclusion is he has not shown any change of circumstances whatsoever. Nothing is different. In fact, in some ways [his testimony] only reinforces the denial about past behaviors.

You have two e-mails from Mr. B____, one in which he admits to being sexually addicted. He has attempted to

> explain that away this afternoon. And another one in which he suggests that he was going to take steps to wreak economic harm on the Respondent. That's in evidence, as well.
>
> He testified the last time we were in court that he knew and understood what the disclosures were to the therapist by the children and yet he testified that he had no desire to reach out to the therapist. Reaching out to her to try to understand where she is coming from, that is not an admission of wrongdoing or guilt or any bad behavior, it would be something that a responsible parent who cares about their kids would do. He hasn't done that and he refuses to do it.
>
> And throughout this entire process and all of this evidence, your Honor, there has been not one shred of proof or evidence to suggest to you that granting his application is in the best interest of the children. For all of those reasons, your Honor, we are renewing our motion to dismiss his petition." [R 212-213]

AFC Linsner joined in the Respondent's renewed motion to dismiss the petition, stating: "I don't think there has been any testimony, nor would I anticipate there to be any testimony to show that it is in the best interest of the children to expand the visitation. So, I would join in [Respondent's] motion" [R 216, 25 – 217, 4].

The trial court agreed and said so, explicitly: "I made it clear in the decision [on the initial motion to dismiss] that I would need some demonstration of benefit to the children and no danger to the children to justify changing [the prior order], that that would be the justification for changing it" [R 217, 10-14]. "I don't see a demonstration of change. I don't see a demonstration of benefit to the children. I'm

going to grant the motion to dismiss" [R 217, 17-24]. The Court's order dismissing the Petition was entered on September 27, 2018.

3. This Appeal

The Appellant's notice of appeal was timely filed on October 22, 2018 [R 1]. The AFC at trial did not file any appeal on behalf of the children within the 35 days allowed for such filing under CPLR 5513. She had the opportunity to do so, having filed her application to be substituted on November 15, 2018, after the time to appeal had expired [R 6]. Ms. Linsner was substituted as AFC by Order of the Appellate Division dated December 27, 2018, to the AFC on appeal, Marybeth Barnet, Esq. [R 6-7]. Had she wanted to file a cross-appeal, she could have done so until January 11, 2019 under CPLR 1022. The substitute AFC did not file her notice of appeal until June 27, 2019, long after the time to do so had expired. She filed no motion to consolidate her appeal with Mr. B____'s or to extend the time to appeal. Furthermore, the brief submitted by the substitute AFC is in support of this appeal, contrary to the position of the AFC at trial.

POINT I: THERE IS NO PRESUMPTION IN FAVOR OF THE APPELLANT UNDER THE CIRCUMSTANCES

Introduction

There are important distinctions in the law between an initial custody determination and one for the modification of an existing Order. In an initial custody proceeding, where the contest is between parents, both parents are

presumed to be fit and to have the right to the care and custody of their children. McKinneys Dom. Rel. Law §240.1(a).

To modify custody or visitation, the parent seeking the change has the additional burden to show "a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child." Guillermo v. Agramonte, 137 A.D.3d 1767, 29 N.Y.S.3d 720, 721 (4th Dept. 2016), citing Matter of DiFiore v. Scott, 2 A.D.3D 1417, 770 N.Y.S.2d 248 (4th Dept. 2003).

In Weiss v. Weiss, 418 N.E. 2d 377, the Court of Appeals articulated the test for when the presumption applies. On this issue, the complete holding of Weiss is as follows:

> "[I]n initially prescribing or approving custodial arrangements, [and] absent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent in some manner has forfeited his or her right to such access (Strahl v. Strahl, 66 A.D.2d 571, 414 N.Y.S.2d 184, aff'd. 49 N.Y.2d 1036, 429 N.Y.S.2d 635, 407 N.E. 479), appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course." Weiss v. Weiss, 52 N.Y.2d 170, 175, 418 N.E. 2d 377, 380. (1981).

The holding in Weiss reveals first that the presumption always applies in an initial custody and visitation proceeding. Some of the cases cited by Appellant apply that presumption in a modification proceeding as well, with the caveat that no exceptional circumstances may be present. Twersky v. Twersky, 103 A.D.2d 775 (2nd Dept. 1984; Daghir v. Daghir, 82 A.D.2d 191 (2nd Dept. 1981).

"Where an Order of custody and visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances – since the time of the stipulation- has been established, and then only where a modification would be in the best interests of the children." Hight v. Hight, 19 A.D. 1159, 796 N.Y.S.2d 494 (4th Dept. 2005), McKenzie v. Polk, 166 A.D.3d 1529 (4th Dept. 2018). The issue of whether the parties "opted out" of this rule, allowing for Appellant to meet some other standard previously stipulated between the parties, was decided at Respondent's initial motion to dismiss. In its Decision & Order, the Family Court held that it was

> "obliged to view this as a Stipulation allowing a Modification with no ***significant*** change of circumstances. Best interests of the children is the issue for the Court. Therefore, this Court will allow the Petition to go forward despite the ***lack of pleading*** a change of circumstances. However the information at the time of the Stipulation was very strong that telephonic contact was the most that should be allowed." (Emphasis added.) [P. 50 Para. 2]

Therefore, Appellant was entitled to a hearing, despite his failure to plead a change of circumstances. At that hearing, however, Appellant would need to prove some change of circumstance between the Stipulation in May 2017 and the filing of his petition the following January. He would also need to "demonstrat[e] benefit to the children and no danger to the children to justify changing [the existing Order]" [R 217, 10-13].

In Kriegar v. McCarthy, 162 A.D.3d 1560, 78 N.Y.S.3d 566 (4th Dept 2018), this Court held that, when faced with a motion to dismiss a petition for modification of a prior custody and visitation order, "the court must give the pleading a liberal construction, accept the facts alleged therein as true, accord the nonmoving party the benefit of every favorable inference and determine only whether the facts fit within a cognizable legal theory." 162 A.D.3d at 1560. This is precisely what the Family Court did in its decision on Respondent's motion to dismiss, denying the motion and granting Appellant a hearing.

This does not mean, however, that the presumption automatically arose. In Weiss, the Court of Appeals goes on to articulate the essential test for whether the presumption will apply, namely, the "extraordinary circumstances" test. Weiss v. Weiss, 52 N.Y.2d 170, 175, 418 N.E. 2d 377, 380. (1981), citing Strahl v. Strahl, 66 A.D.2d 571, 414 N.Y.S.2d 184, affd. 49 N.Y.2d 1036, 429 N.Y.S.2d 635, 407 N.E.2d 479. Examples of these extraordinary circumstances are where it would be "inimical to the welfare of the children," or where a parent has "forfeited his or her right to such access." The record on appeal is replete with proof that both of these extraordinary circumstances are present here, as more fully described below.

a. The presumption applies as a matter of course when the court is prescribing or approving initial custodial arrangements.

There have been not one, but two prior agreements between these parties, where the Appellant's access to the children has been restricted by his own agreement [R p. 23, para 1 and 3]. The first time was in the parties' Amended

Parenting Plan, incorporated into their 2014 Decree of Dissolution. There, Mr. B____ had the right to visit the children physically, but he agreed that Ms. S____ should have a right of refusal, which was to be based on her impression of the Appellant's mental state at the time visits were requested by him [R 20, para. 2]. This right was specifically retained in the May 2017 Stipulation, to wit:

> "7. By executing the within agreement regarding telephonic contact, neither party agrees to otherwise waive, terminate or modify their rights under the Amended Parenting Plan, other than as specifically modified herein, the provisions of which remain in full force and effect" [R P. 21, Para 7].

In 2017, Mr. B____ agreed to even greater restrictions on his access to the children. Not only did he agree that telephonic contact with the children for 30 minutes per month was "the only feasible plan," but he further agreed that the children's mother "shall be present for all calls," between Mr. B____ and the children, and that she would have the right to terminate the call if the content was harmful or inappropriate [R 20, Para 4], effectively limiting him to supervised telephone visits. Therefore, Mr. B____ has twice now acknowledged that his own judgment was not adequate to provide for the protection and safety of the children.

In his response to Respondent's initial motion to dismiss, Mr. B____ attempted to equate the word "feasible" with something other than "safe," suggesting that he intended to agree to this restricted visitation for some unspecified, but limited time [R 12, 9]. However, the Family Court Judge made it abundantly clear that the "information at the time of the stipulation was very strong

that telephonic contact was ***the most that should be allowed.***" (emphasis added) [R 50]. The Court did not say, "the most that should be allowed at that time," or use any other qualifying language. Further, by the approval and incorporation of this stipulation into its Order, the Court held that these restrictions are in the best interests of the children. Dom. Rel. Law §240.1(a).

The trial court balanced the parties' stipulation wherein Appellant "reserve[d] his rights" [R 21, para 5], with the need to show a "real need for change," Guillermo v. Agramonte, 137 A.D.3d at 1768, by requiring Appellant to demonstrate only that a) *something* had changed since May of 2017; and b) that increased access to the children would be in the best interests of the children. [R 50]. This reduced burden of proof on Appellant's modification petition did not and should not now be held to erase the history of this case to produce an automatic *de novo* presumption at trial. Rather, the Family Court explicitly defined the level of change that would be Mr. B____'s to prove.

Surely Appellant and his attorney understood this to be the meaning of the Court's Decision and Order [R 50], because Mr. B____'s case consisted almost entirely of evidence designed to do just that.

b. The Appellant has forfeited his right to access to the children.

Exceptional circumstances exist where "the parent has in some manner forfeited his or her right to such access." Strahl v. Strahl, 66 A.D.2d at 574. The testimony and other evidence at trial was substantial, as it had been during the prior

proceeding, that Appellant had forfeited his access rights over the many years since the parties' separation and divorce.

These agreements and Appellant's conduct have created a downward trajectory of Appellant's access to the children. This has been the natural result of his own stipulation to continuing decreases in access, by "disappear[ing] from their lives without a trace" [R 121, 11], and by failing to even attempt a visit for over two years [R116, 19-24]. The exceptional circumstances arising from this conduct erodes his right to the benefit of any presumption.

c. There are compelling circumstances and substantial evidence showing visitation would be detrimental to the children.

Exceptional circumstances also exist where "the exercise of such right is inimical to the welfare of the children." Strahl v. Strahl, 66 A.D.2d at 574. Appellant's insistence that he "must be awarded visitation," completely ignores the exceptional circumstances described in his own testimony and that of his witnesses.

Appellant revealed his serious mental illness coupled with his affinity for weapons at trial. He testified that he owns between ten and twenty weapons, including revolvers, long arms and semiautomatic pistols [P.169, L16 – P. 170 L4]; and admitted that he has had to create a "safety plan" with his therapists [R 209, 18 – 210, 1] because of his mental illness and access to those weapons. Appellant testified that he continues to purchase guns, even during the pendency of his petition, and ammunition on a regular basis because he is, "a soldier" [R 201, 18 –

202, 10]. The Appellant has been retired from active military duty for many years, and his current profession is the Director of a military museum [R 115, 10 – 25].

When asked whether he brought a firearm to the March 2014 visit, he "plead the fifth" [R 169, 10 – 15]. During that visit, he became "enraged" [R 200, 4-5] with the Respondent's father at the mere suggestion that the parties use their attorneys to negotiate their property disputes. [R 199, 24 - 200, 10]. Thereafter, and by his own choosing, he did not have any contact with the children for three years [R 39, 18]. His explanation for having forfeited his right to visitation for so long was that, "I was not my best person in 2014" [R p. 116, L. 22], he knew he had to "wait until the point where [he] had the resources emotionally and financially to devote to that." [R P. 117, L 11-12].

Even giving Mr. B____ the benefit of every positive inference, including the implication that he spent those three years working to obtain such resources, in 2017, he again "agree[d], based on the exhibits, pleadings and motions submitted in this case," to supervised, telephone contact with the children for thirty minutes per month [R P. 20, Para, 2]. Between that stipulation and the date of his Petition six months later, he wasn't actually working to improve his mental health in any way at all. He saw his psychiatrist only quarterly, for medication management [142, 13-22], and he did not see a therapist at all during that entire time [R173, 1-13].

Dr. Jennings, the Appellant's treating physician, testified to the Appellant's various diagnoses as follows:

> "Major depressive disorder recurrent with mixed features associated with generalized anxiety disorder with elements of PTSD, insomnia disorder, and then his medical diagnoses included nasopharyngeal cancer, status post radiotherapy, complex hypothyroidism, gastroesophageal reflux disorder, and degenerative disk disease of the cervical spine and lumbar spine." [R 140, 25 – 141, 5 and 142, 5-8].

Appellant is prescribed the following medications; "Wellbutrin, Fetzima, Abilify, Ambien, and Diazepam . . . and Valium for managing acute anxiety" [R 143, 8-21] Appellant was, according to the doctor's testimony, on opioids for the "first several years I saw him" but then he allegedly stopped taking them about six months before the doctor's testimony on August 18, 2018. [R 148, 13-25].

If this testimony is true, Mr. B____ would have stopped taking opioids only after the filing of his January 2018 petition and after Respondent's motion to dismiss, in or about March, 2018, corresponding with the time he began counseling with David Draxton. There was no testimony that his "degenerative disk disease of the cervical spine and lumbar spine" [142, 5-8] has improved or is successfully being treated otherwise. To the contrary, David Draxton testified that Mr. B____ continues to suffer from "pain in his back that varies day to day" [R 95, 10-12].

Rather than accept any responsibility for his own actions at all, Mr. B____'s case was replete with evidence of his belief that it is the fault of the legal system [R110, 1-6], the diagnosis "put on him" while a patient at The Meadows [R 205,

23 – 206, 2 and 112, 21 – 25]; the children's counselor [R 182, 8-17] and Ms. S____'s father [181, 19 – 182, 14] that his access to the children is limited.

In all, Mr. B____'s case revealed a man who is seriously mentally ill with multiple diagnoses [R 152, 4-8], has an obsession with weapons, refuses to be accountable for his own actions, and who, despite the counselor and the attorney for the children's urging, has never done a single thing to help his children ameliorate the perceptions, if they are not facts, of his abuse of both of them. He is given to bouts of rage, abdicated any role in the children's life for years, threatens the Respondent when he does not get his way, and still reflexively views himself as "a soldier," even recognizing that he committed a crime by bringing a handgun into New York.

Conclusion

Based on all of the above, abundant extraordinary circumstances militate against any presumption being applied to the Appellant's petition for the modification of his access to his children. The Family Court properly dismissed his petition for lack of proof of any change of circumstances, or that increased access to the children would be in their best interests.

POINT 2. THE LOWER COURT DID NOT LEAVE APPELLANT WITHOUT MEANINGFUL CONTACT WITH THE CHILDREN

Appellant's assertion on appeal that he "must be awarded visitation," ignores the fact that he *has* visitation with the children. Mr. B____ confuses the failure to modify the existing order with the denial of any visitation. Matter of Diedrich v. Vandermallie, 90 A.D.3d 1511 (4th Dept. 2011); Crowell v. Livziey, 20 A.D.3d 923 (4th Dept. 2005); Parker v. Ford, 89 A.D.2d 806 (4th Dept. 1982). In all of these cases, the trial court was reversed because the non-custodial parent was given no visitation at all.

While the actual termination or suspension of visitation is ordinarily a drastic measure, Hotze v. Hotze, 57 A.D.2d 85394 N.Y.S.2d 753 (4th Dept. 1977), there are instances where it is appropriate for certain restrictions to be placed on a non-custodial parent's visitation.

"With respect to the analysis of the best interests of the child in the absence of any presumption, we note that visitation need not always include contact visitation." (Internal quotations omitted.) Rulinsky v. West, 107 A.D.3d 1507 (4th Dept. 2013). Rulinsky was a case concerning visitation with an incarcerated parent. There, regardless of the failure of the trial court to make a determination that the presumption in favor of visitation had been rebutted, this Appellate Division found that the record was adequate to "enable us to determine that the mother established by a preponderance of the evidence that, under all the circumstances, visitation

would be harmful to the child's welfare." Rulinsky, 107 A.D.3d 1509. The same is true here.

Ms. S____'s opposition to Appellant's application reflects her concern that any change in Appellant's contact with the children may risk the delicate balance struck in the parties' 2017 Stipulation and Consent Order. Where the parents have entered into a custody and visitation agreement, "[p]riority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded to that agreement." Eschbach v. Eschbach, 56 N.Y.2d at 171, 451 N.Y.S.2d 658, 436 N.E.2d 1260. This legal precept reinforces the Family Court's ruling on the Respondent's motion to dismiss: Mr. B____ had the burden to show that there was a good reason his prior agreement should be changed. This rule provides for stability in the child's life, which is naturally in the child's best interests. Friederwitzer v. Friederwitzer, 55 N.Y.S.2D 89, 447 N.Y.S.2d 893, 432 N.E.2d 765. This stability is captured in the prior Orders. While Ms. S____ did not put on any evidence of her own, through cross examination by her counsel and the AFC, substantial evidence was adduced at trial that nothing had changed since the 2017 stipulation and that there was no proof that contact visitation would be in the children's best interests.

In any matter involving the custody or visitation of children, the first concern, of course, "must be the interest of the child, not any supposed right of the parent." Hotze v. Hotze, 57 A.D.2d 85,87. Mr. Draxton's testimony was replete

with references to the "stress" being caused by the fact that Appellant does not see his children [R 92, 23 – 93, 14; 94, 4-9]. Dr. Jennings testified to Mr. B____'s intense frustration over his limited access [R 157, 12-15]. Remarkably, in a 216 page record, there is not a single word about how an increase in Mr. B____'s access to the children would be beneficial to *them;* rather, his testimony concentrated on how increased visitation with the children would be beneficial *to him,* reinforcing the testimony of Dr. Draxton that Mr. B____ was engaged in therapy to relieve his own stress and frustration [R 92,21 – 93,3], not for the sake of the children at all.

"When the exposure of the child to one of its parents presents a risk of physical harm or produces serious emotional strain or disturbance, visitation must be restricted, supervised, or even denied." Hotze v. Hotze, 57 A.D.2d at 87-88. There may never be a prosecution, an order of protection or other legal determination of the Appellant's alleged abuse of his children. Mr. B____ is outside the reach of the New York courts under Articles 8 and 10 of the Family Court Act, where remedies for his alleged abuse would lie. Family Court Act §154(c). That does not negate the question, however, as to whether he sexually abused them. They remain in counseling today [R 177, 7] because of Appellant's alleged conduct, revealed by both children when they were very young.

Finally, the visitation afforded the Appellant under the current arrangement gives him an opportunity to have the only "feasible" relationship with the children

he can have. In her statement at the close of Appellant's proof, the children's attorney said it best: "I don't think through the testimony that Mr. B____ has been able to show that the children are not having a meaningful relationship with their father." (R 216).

Conclusion

Based on all of the above, Respondent respectfully submits that Appellant presently has a meaningful a relationship and as much access to the children as is in their best interests; there is no basis to disturb the Family Court's decision.

POINT 3. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE PETITION.

"[A] custody [and visitation] determination is a matter entrusted primarily to the discretion of the trial court which is in the most advantageous position to evaluate the testimony, character, and sincerity of the parties." Santoro v. Santoro, 224 A.D.2d 510, 511, 638 N.Y.S.2d 478 (2nd Dept., 1996). The trial court's determination should not be disturbed unless it lacks a sound and substantial basis in the record. Eschbach v. Eschbach, 56 N.Y.2d at 173, 451 N.Y.S.2d 658, 436 N.E.2d 1260. Not only did the Family Court have ample basis for its Order of dismissal, but this Court has a sufficient record-basis to uphold it. As established above, there was no evidence that anything had changed from the time of the 2017 stipulation. The improvement of Appellant's mental health was the crucial issue.

Family Court is in the best position to evaluate the parties' testimony, character and sincerity." Edward II v. Renee II, 149 A.D.3d 1140., 31, N.Y.S.3d 290 (3rd Dept. 2016). Not only did Mr. B____ fail to meet his burden of proof at trial, but his testimony, and those of his witnesses combined to create a tempest of incredible, dismissive, defiant and even contradictory statements. For example, Appellant testified that he has known his present "partner" Ms. Hall, since *2014* [R 115, L 5-11]. However, he later testified that she is the woman [R 159, L 25 – 160, 2] who he was caught with *in 2012* while at the Meadows, causing his treatment there to be terminated. The "very intelligent" [R 95, 16-18] Mr. B____ testified that he forgot the name of his Colorado attorney [R128, 15-23] (the one who received the report from Ms. Herrick) [R 133, 18-24], and the names of two of his mental health providers [R 170, 14-23]. From the spring of 2017 until after the filing of his petition, Appellant failed to seek therapy for "no particular reason"[R 173, 14-16], and later, "because I got busy with school and work" [R209, 1-6]. He testified that he saw VA counselor Lanier, from 2015 to 2017 [R 170, 20-23], but also testified that he had no counselor other than Dr. Kleinsasser and Dr. Jennings between 2015 and 2017 [R 209, 9-17]. He also testified that his treatment with Dr. Kleinsasser was from 2013 to 2015 [R 170, 17-19]. He admitted that he had a sex addiction [R 163, 21-24], and even sought out treatment from a specialist [R 171, 10], but now denies ever having had this problem. These are just a few examples

of Mr. B____'s contradictory and sometimes misleading testimony. His witnesses were equally incredible.

Mr. Draxton testified that Appellant was, "very focused on this event, this trial coming up" [R 95, 7-8]. Similarly, Dr. Jennings testified that Mr. B____, "consistently discussed his frustration with the very limited contact he was able to have with [the children]" [R157, 14-15].

Appellant clearly orchestrated the testimony of his witnesses by telling them things he hoped they would testify to, and not giving them valuable information for both his treatment and these proceedings. "When a treating therapist has not reviewed the mental health records of the patient, and does not have a full understanding of the mental health concerns of other care providers concerning his patient, the Family Court should discredit the testimony of that therapist." In re Keith H., 135 A.D.3d 483 (1st Dept. 2016). Both care providers testified that their impressions and opinions concerning Appellant's mental state came exclusively from Mr. B____'s own reporting [Draxton: R 102, 23– 103, 7]; [Jennings: R 150, 6-13]. They did not consult with each other [R 102, 11-17]. Neither one has seen Mr. B____'s self-admittedly, "quite extensive" medical records [R 180, 2-10]. Mr. Draxton's testimony was incredible to the point of absurdity. In one breath, he testified that Mr. B____ had been "kicked out" of the Meadows [R 112, 2], and in the next said he did not recall giving that testimony [R 112, 16-24]. And, despite

Dr. Jennings' characterization of Appellant as a "very capable historian" [R 136-24-25], the witness was inadequately prepared to make that assessment, to wit:

Danger to the children: Neither one of these witnesses has ever been told of the existence of Stacy Herrick, the children's counselor [R 179, 5-14]. Strikingly, both witnesses testified that they had no idea why Mr. B____'s access to his children is limited [Draxton: R 110, 1-15]. Dr. Jennings has never even bothered to ask [R 157, 16-24]. Mr. B____ also failed to tell his mental health care providers about his issues with anger [Draxton: R 195, 14-16]; [Jennings: R 149, 17-22]; [R 199, 24 – 200, 10] or the fact that he owns a cache of weapons [Draxton: R 102, 5-7; Jennings 151, 23 – 152, 3].

Sex addiction: Mr. B____ was sure to tell both witnesses that he does not believe he has a sex addiction. Mr. Draxton joins in that opinion [R 108, 18-109, 25], notwithstanding the diagnosis given by the Department of Veteran's Affairs and The Meadows, Appellant's own previous endorsement of the diagnosis [R 184], and the fact that he "sought out" [R 207, 8-10] treatment by Dr. Kleinsesser, an expert in sexual psychology, for nearly two years ("end of 2013 through 2015") [R 170, 17-19].

Remarkably, Appellant rested his case without calling Dr. Kliensasser, his treating physician and a "specialist in sexual psychology" [R 171, 10], despite Appellant's testimony implying that the doctor felt he was cured of his sexual maladies [R 171, 3-12], and despite Dr. Jennings' recommendation during

treatment that he do so [R 201 19 – 205, 1]. Obviously, Mr. B____'s reporting to Dr. Jennings was that Dr. Kleinsasser felt he had overcome or never had a sex addiction, causing Dr. Jennings to suggest he call Dr. Kleinsasser to provide more "relevant testimony" [R 204, 19 – 205, 1]. The fact that this witness was never called undermines all of Appellant's and his witnesses testimony about having been either misdiagnosed or cured of his sexual addiction.

Drug and Alcohol Abuse: Appellant was diagnosed with and treated for substance abuse at The Meadows [R 154, 14-20]. Dr. Jennings testified on August 15, 2018 that Mr. B____ been using opiates prescribed for his pain for the first few years he saw him, but that Appellant reported to him that he had stopped using them "6 months ago" [R 148, 20-25]. This alleged discontinuation of narcotic pain relief for a serious spine disease coincides with the timing of his commencement of mental health treatment with Mr. Draxton in or about March 2018. But Mr. Draxton was not working on pain management with him [R 148, 13-16]. Dr Jennings did not consult with any of Appellant's other medical care providers, and there was no medical evidence that Appellant was no longer taking these drugs; only testimony from Dr. Jennings based on reporting from Mr. B____ [R 150, 6-13]. There were no medical records or testimony from the physician who actually prescribed those substances, and no corroborating evidence that the alleged pain management [R 148, 14-16] designed to replace the use of opioids was either undergone by Appellant or was successful.

Changing care providers: Dr. Jennings testified that Mr. B____'s treatment program had been "somewhat stagnated due to . . . frequent changes in providers." [R 154, 13-15] Mr. Draxton testified that Mr. B____ had been seeing him since March 12, 2018, and that he had seen him 15 – 16 times. [R 91, 10-18]. He also testified that he had seen Mr. B____ weekly or every other week, [R 93, 7-9] through July 18, 2018 [R 95, 2-4], or about once a week, while testifying on August 15. Significantly, there had been no session at all in the month leading up to trial. If his testimony that he saw Mr. Lanier from 2015-2017 is true, Appellant's termination of that therapy would have coincided with the signing of the stipulation during the prior proceeding [R 173, 6-10] as well.

David Draxton repeatedly [R 92, 21-93,3; 93, 10-14; 94, 4-9; 95, 3-8] testified that the issues of the stress of not being able to see his children was brought up at "every session" [R 108, 4-12] stating further that this was the "major focus" of his work with this counselor. [R 108, 15-18]. Contradicting his therapist, Mr. B____ tried to minimize this intent, testifying that he discussed contact with the children with Mr. Draxton,

> "only very briefly to say that I - - on the weeks that I do have phone calls with the kids to say that I did and that I enjoy them very much and that it was a high point of my week [R 179, 15-20].

Appellant's case was designed to show that his mental health had improved, and both witnesses testified that he was improving in one aspect or another because of their care. [Draxton: "affect and energy level" R 104, 20-21]; [Jennings:

R143,21-144,4]. It is important to note, however, that Dr. Jennings saw improvement from *the beginning of his care* of Appellant [R 123, 22-24] in 2014, NOT since May 2017, the date of the parties' stipulation. Dr. Jennings also testified that he has seen Mr. B____ with less frequency "as he has improved," beginning to see him quarterly *in 2015* [R 142, 21-23]. The testimony was therefore that Mr. B____'s condition improved prior to the last proceeding, and that he was on precisely the same treatment schedule he had at the time of his petition, and at the time of trial [R 142, 13-23]. Therefore, there is no evidence whatsoever that Appellant's mental state has improved since the 2017 Stipulation.

The conclusion cannot be avoided that Appellant only worked with Mr. Draxton for the purpose of litigation, that important information was not reported to either witness, and that these witnesses could not credibly testify to a change in Appellant's mental state since the 2017 Stipulation and order. Therefore, the testimony of both care providers should be discredited to the extent that it offers any opinion as to the Appellant's fitness to have increased visits with his children.

Conclusion

Based on all of the above, the Family Court was well within its considerable discretion in dismissing Appellant's petition.

POINT IV: The Family Court properly took a negative inference against Mr. B____ when he "plead the fifth."

Although every positive inference possible should be taken for the non-moving party in a motion to dismiss, some inferences are just impossible to place in a positive light. While a negative inference may not be taken against a criminal defendant for refusing to incriminate himself, this is not so in a civil case. El-Dehdan v. ElDehdan, 26 N.Y. 3d 19, 41 N.E.3d 340 (2015). Mr. B____ "plead the fifth" when asked whether he brought one of his extensive collection of firearms, including revolvers and semi-automatic pistols [R169, 16-24] to his last visit with the children in March of 2014. Because this is a civil action, and no criminal penalty can result, and because of the serious and directly relevant nature of the issue of the children's safety to this proceeding, the Family Court judge properly drew a negative inference against Appellant.

POINT V: The AFC's Brief should be disregarded on the theory of judicial estoppel.

To the extent that the issues raised in the brief of the Substitute AFC have not been addressed above, they are addressed here. A motion will be heard before the oral argument of this appeal for the AFC's Appeal and Brief to be stricken as untimely.

The AFC has filed a brief in support of a purported appeal she has filed on behalf of the children, after a single meeting with them [AFC's brief, page 5], and nearly six months after the time to file such an appeal was due.

Her arguments stand on a false premise, i.e.: "Hon. R Wiggins presiding, dismissed the father's petition for failure to show that "in person" visitation was in the best interest of the children." [AFC's Brief, page 1]. That Decision and Order did not mention a showing as to whether "in person" visitation was in the best interests of the child. This was not the burden actually placed on Appellant. The substitute AFC disregards the prior Orders, taking a position similar to Appellant's, assuming that a presumption should have been applied at trial.

Most importantly, though, she takes a position opposite to the position taken by the AFC at trial, where that position was successful. "Judicial estoppel may be invoked to prevent a party from 'inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding' " where the party had prevailed with respect to the earlier position. Lorenzo v. Kahn, 100 A.D.3d 1480, 1482 (4th Dept. 2012), quoting Zanghi v .Laborors Intl. Union of N. Am., AFL-CIO, 21 A.D.3d 130, 1372. Here, judicial estoppel applies because the attorney representing the children at the trial level in *both* of the prior New York proceedings between these parties, took the position that it was not in the best interests of the children to have increased visitation with their father. In fact, in her closing remarks, Ms. Linsner said:

> "I don't think through the testimony that Mr. B____ has been able to show that the children are not having a meaningful relationship with their father . . . I don't think there has been any testimony, nor would I anticipate there to be any testimony to show that it is in the best interest of the children to expand the visitation. So, I would join in [Respondent's] motion." [R 216, 9 – 217, 4].

The AFC at trial represented the children zealously throughout the proceedings, at times properly advising the Court that the children did want to see their father's likeness – to see what he looks like – not necessarily to be in his presence. Like the Family Court Judge, she was present at trial and had the opportunity to see and appreciate the witnesses' demeanor and judge their sincerity. She has been involved with this family for over three years. She argued on multiple occasions that the current visitation arrangement should not be expanded, including at the close of Appellant's proof, where she joined in the Respondent's renewed motion to dismiss the petition.

Finally, the AFC at trial had the opportunity to, but did not file an appeal within the time allowed for her to do so. Therefore, the brief of the substituted AFC should be disregarded, if it has not by the time of oral argument, been stricken.

CONCLUSION

Based on all of the above, the Order of the Livingston County Family Court dismissing the petition of Joseph B____ for the modification of the prior Consent Order, dated July 13, 2017, should be upheld.

DATED: September 9, 2019
Rochester, New York

Respectfully submitted,

_____

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