Right to Counsel in Matrimonial Action

There is no absolute right to the assignment of counsel in a matrimonial action.[1] However, a party has an absolute right to proceed without an attorney and represent himself.[2] An unrepresented party is not entitled to any inference or benefit from the Court when such party eschews legal representation. Nor should the Court act as counsel to aid the unrepresented party.[3]

An indigent person involved in a custody dispute in family court is entitled to a court appointed attorney.[4]

The Judiciary Law requires the supreme court to appoint counsel for indigent litigants in the Supreme Court in the same manner as family court is required to appoint such counsel. It provides that whenever Supreme Court shall exercise jurisdiction over a matter which the Family Court could have exercised jurisdiction had such action been commenced in Family Court, Supreme Court shall appoint counsel for indigent persons in the same manner as required by section 262 of the Family Court Act.[5]

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[1] Merkle v. Merkle, 186 A.D.2d 67, 588 N.Y.S.2d 151 (1st Dep't 1992); Meara v. Meara, 104 A.D.3d 916, 960 N.Y.S.2d 911 (2d Dep't 2013),

[2] In Faulkner v. Faulkner, 19 A.D.3d 1092, 796 N.Y.S.2d 467 (4th Dep't 2005), the Appellate Division rejected the contention of defendant that Supreme Court erred in permitting him to proceed pro se following the withdrawal of his attorney. Defendant chose to proceed pro se after he either discharged his attorney or instigated and consented to the attorney's request to withdraw. The court advised defendant of the dangers of self-representation and offered him an adjournment to obtain new counsel. Thus “defendant was properly permitted to proceed pro se and he ‘may not now be heard to complain that he was prejudiced as a result thereof.’”

[3] In Davis v. Mutual of Omaha Ins. Co., 167 A.D.2d 714, 716, 562 N.Y.S.2d 883 (3d Dep't 1990) the Appellate Divison held that while plaintiff unquestionably had the right to represent herself, she did so at her peril. “‘A litigant appearing pro se acquires no greater right than any other litigant and such appearance may not be used to deprive [the] defendants of the same rights enjoyed by other defendants’” (Roundtree v. Singh, 143 A.D.2d 995, 996, 533 N.Y.S.2d 609 (2d Dep't 1988), quoting Morgan v. Sylvester, 125 F. Supp. 380, 388 (S.D. N.Y. 1954), judgment aff'd, 220 F.2d 758 (2d Cir. 1955).

[4] See Family Court Act §262.

[5] Judiciary Law §35 (8). It provides:

8. Whenever supreme court shall exercise jurisdiction over a matter which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto pursuant to law, and under circumstances whereby, if such proceedings were pending in family court, such court would be required by section two hundred sixty-two of the family court act to appoint counsel, supreme court shall also appoint counsel and such counsel shall be compensated in accordance with the

Thus, where custody or visitation is involved in a matrimonial action, the right to counsel is a fundamental right,[6] and unless that right is knowingly and intelligently waived,[7] or the error is harmless,[8] an order awarding custody will be reversed, where the court compels a party to proceed pro se.[9]

The failure to advise a party of the right to counsel and to an adjournment to obtain counsel before the court makes an order has been held to be reversible error.[10]

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provisions of this section.

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[6] See NY Fam Ct Act §262.

[7] See Tesoriero v. Tesoriero, 114 A.D.2d 1027, 495 N.Y.S.2d 465 (2d Dep't 1985) ; Lindenman v. Lindenman, 288 A.D.2d 352, 734 N.Y.S.2d 95 (2d Dep't 2001). Mastrandrea v. Mastrandrea, 268 A.D.2d 293, 702 N.Y.S.2d 19 (1st Dep't 2000).

[8] See McNeill v. Ressel, 258 A.D.2d 64, 692 N.Y.S.2d 735 (2d Dep't 1999),.

[9] See Patricia L. v. Steven L., 119 A.D.2d 221, 506 N.Y.S.2d 198 (2d Dep't 1986). See also Mahoney v. Doring, 256 A.D.2d 1112, 685 N.Y.S.2d 153 (4th Dep't 1998), upon default, the mother's appeal was not precluded.

[10] See generally Perez v. Arebalo, 13 A.D.3d 85, 786 N.Y.S.2d 441 (1st Dep't 2004); Patricia L. v. Steven L., 119 A.D.2d 221, 506 N.Y.S.2d 198 (2d Dep't 1986); Machado v. Del Villar, 299 A.D.2d 361, 751 N.Y.S.2d 489 (2d Dep't 2002); Mahoney v. Doring, 256 A.D.2d 1112, 685 N.Y.S.2d 153 (4th Dep't 1998); Gross v. Gross, 7 A.D.3d 711, 778 N.Y.S.2d 42 (2d Dep't 2004); Wilson v. Bennett, 282 A.D.2d 933, 724 N.Y.S.2d 520 (3d Dep't 2001); Sabat v. Sabat, 72 A.D.2d 585, 421 N.Y.S.2d 18 (2d Dep't 1979); Garrow v. Garrow, 61 A.D.2d 887, 402 N.Y.S.2d 877 (4th Dep't 1978); Hall v. Ladson, 18 A.D.3d 753, 797 N.Y.S.2d 756 (2d Dep't 2005).