TO: Sasha Drobnick, Managing Attorney, DV LEAP

FROM: Gavin Campbell, Legal Intern, DV LEAP

DATE: May 26, 2017

RE: Recent Caselaw Relevant to *Erin V. v. Robert V.*

The principal question presented by the appeal appears to be whether the New York Court of Appeals ruling in *S.L. v. J.R.* (27 N.Y.3d 558, N.Y. 2016) is applicable to the fact pattern that emerged following the New York Appellate Division's remittitur of this case to the Supreme Court. The New York Appellate Division's interpretations of *S.L. v. J.R.*'s holdings thus far have been quite broad and generally favorable to Appellant's case and may be useful in providing support at oral argument. Among the thirteen cases where the Appellate Division cited *S.L. v. J.R.* in their opinion, eight have resulted in reversal and remittance to the Supreme Court, while only five have been affirmed. The appellate opinions from these cases are uniformly short (1-2 pages in length), which presents some difficulty in drawing in-depth factual and legal comparisons.

Of the reversed cases, certainly none present the exact fact pattern present in the case in question, but three of the cases in particular are supportive of the relief sought by Appellant. *Gentile v. Gentile* (149 A.D.3d 916, N.Y. App. Div. 2017) presents the fact pattern most similar to *Erin V. v. Robert V.*, turning on an insufficient investigator's opinion and the court's failure to provide the parties an opportunity to test the investigator's credibility. Two other cases present fewer factual similarities, but the Appellate Division granted the appellants not only a new hearing, but ordered that the hearing take place in front of a new judge. *See Lemon v. Faison*, 2017 WL 2126070 (N.Y. App. Div. 2017) (granting hearing in front of new judge where

previous trial court judge had acted as an "advocate" for one party); *Chess v. Lichtman* (N.Y. App. Div. 2017) (granting hearing in front of new judge where previous trial court judge had made inappropriate remarks about one party). One of the reversed cases is problematic factually in that the Appellate Division found that one party's "alienating" behaviors were supportive of a finding that a change in circumstances had occurred. *Laureano v. Wagner*, 49 N.Y.S.3d 630 (N.Y. App. Div. 2017). The other four reversed cases, discussed *infra*, are generally supportive of a broad reading of *S.L. v. J.R.*, but either the opinions lack sufficient detail to draw strong comparisons or are easily distinguishable.

Of the five affirmed cases, all discussed *infra*, four are easily distinguishable from *Erin V. v. Robert V.* as the appellant had consented (expressly or impliedly) to the limited proceeding or had failed to allege sufficient facts to support a modification. The fifth case, *Tony R. v. Stephanie D.*, seems to suggest a narrower reading of S.L. v. J.R.'s holdings than the interpretations of the other relevant cases. 45 N.Y.S.3d 463 (N.Y. App. Div. 2017). While *Gentile v. Gentile* appears more factually similar, *Tony R. v. Stephanie D.* provides some precedent for a less favorable interpretation if the Court is feeling disinclined towards Appellant's arguments.

I. REVERSED CASES SUPPORTING A BROAD READING OF *S.L. v. J.R.*

Gentile v. Gentile, 149 A.D.3d 916 (N.Y. App. Div. 2017)
Reversed and remitted to Family Court for hearing on father's petition to modify. Trial court had denied petition without a hearing based on evidence provided at court conferences and hearsay statements provided by the forensic evaluator which were offered in a way that did not allow the parties to test their credibility.

Lemon v. Faison, 2017 WL 2126070 (N.Y. App. Div. 2017)
Reversed and remitted to Family Court for modification of custody order in front of a new judge where petition was dismissed "without admission of any reliable or competent evidence and

without holding any type of fact-finding hearing whatsoever." Moreover, it noted that under *S.L. v. J.R.*, the trial court must have "articulated the factors and evidence material to its determination" (it was not clear to me from the briefs whether the trial court articulated the material factors and evidence in *Erin V. v. Robert V.*). Finally, N.Y. App. Div. found it necessary that the new hearing be held in front of a different judge as "at certain points during the proceedings, the Family Court Judge acted as an advocate for the mother."

Chess v. Lichtman, 46 N.Y.S.3d 209 (N.Y. App. Div. 2017)
Reversed and remitted to Family Court for hearing on mother's modification petition in front of a new judge where trial court had dismissed without a hearing. In particular, the trial court had looked to dismissal on procedural grounds of administrative hearing regarding sexual abuse allegations against father. The trial court felt that dismissal was sufficient to resolve the abuse allegations without an evidentiary hearing. N.Y. App. Div. disagreed and reversed to ensure a full hearing of the evidence before a new judge "in light of certain statements made by the court regarding the mother and the oldest child."

Laureano v. Wagner, 49 N.Y.S.3d 630 (N.Y. App. Div. 2017)
Reversed and remitted to Family Court for modification of custody order where trial court had "in effect, denied, without a hearing, the mother's petition." Note that among the few facts shared by N.Y. App. Div. was that the mother had "established her entitlement to a hearing by alleging, inter alia, that the father prevented her from visiting with or speaking to the child, and was attempting to alienate the child from her."

Jennifer J.H. v. Artrieo J.R., 48 N.Y.S.3d 748 (N.Y. App. Div. 2017)
Reversed and remitted to Family Court for modification of visitation order where trial court had relied solely on the recommendations of the child's therapist without holding a hearing (relying on *S.L. v. J.R*). This case involved a mother seeking only visitation rights rather than custody.

Athena H.M. v. Samuel M., 38 N.Y.S.3d 898 (N.Y. App. Div. 2016)
Reversed and remitted to Family Court for modification of custody order where trial court had granted motion to dismiss. N.Y. App. Div. held had presented sufficient evidence that entitled her to a full hearing. Notably, the child (presumably through a GAL or AAL) had supported the petition and asked the court for an in camera interview that was not provided the by the trial court.

King v. King, 43 N.Y.S.3d 822 (N.Y. App. Div. 2016)
Reversed and remitted for reconsideration of custody award where default judgment was entered against mother. Court ordered a full hearing to protect the best interests of the children where process was insufficient.

Fraser v. Fleary, 47 N.Y.S.3d 387 (N.Y. App. Div. 2017)
Reversed and remitted to Supreme Court where trial judge had, without further elaboration, announced after closing arguments that he was awarding final custody to father. N.Y. App. Div.

relied on S.L. v. J.R. in reversal to ensure full evidentiary hearing where court failed to elaborate on the facts material to its decision.

II. AFFIRMED CASES DENYING HEARING

Tony R. v. Stephanie D., 45 N.Y.S.3d 463 (N.Y. App. Div. 2017)
Custody modification affirmed where "Family Court possessed ample information regarding the numerous factors it was required to consider in its analysis of the children's best interest. Thus, it had a sound and substantial basis upon which to determine that it was in the children's best interest to remain in the mother's custody, even without a full evidentiary hearing."

Ward v. Feulner, 32 N.Y.S.3d 665 (N.Y. App. Div. 2015)
Custody modification affirmed in the absence of a plenary hearing. The court noted "although the hearing was conducted in an informal manner, no party requested otherwise or objected at the hearing, and the combination of atypical factors present herein permit this matter to fall within the narrow exception to the general requirement of a plenary hearing in child custody proceedings." Note that this opinion is dated June 23, 2015 while *S.L. v. J.R.*'s opinion is dated June 9, 2016. It is unclear if that date is an error or the citation to *S.L. v. J.R.* was added later.

In re Stephanie M., 47 N.Y.S.3d 435 (N.Y. App. Div. 2017)
Grant of permanent custody to child's maternal aunt affirmed where all parties had agreed to that result. Father's later contention that a full evidentiary hearing was needed per S.L. v. J.R. was rejected given his consent to the limited process.

Theresa B. v. Clarence D.P., Jr., 50 N.Y.S.3d 522 (N.Y. App. Div. 2017)
Dismissal of guardianship petition affirmed in absence of hearing where the facts material to the best interest analysis were not in dispute.

Scott v. Powell, 45 N.Y.S.3d 557 (N.Y. App. Div. 2017)
Dismissal of custody modification affirmed in absence of a plenary hearing because the facts alleged by father were "insufficient to meet the threshold evidentiary showing of a change in circumstances."