When Can Sex Offender Visitation be in a Child's Best Interests?

By Vesselin Mitev

Last month's column dealt with "trigger words," oft-defined as shorthand for a conclusion wrapped in a trigger word, such as "best interests of the children," "non-monied spouse," and say, "sex offender," words that like jellyfish floating towards the surface, carry sharp tendrils of meaning by dint of their very utterance: meaning which each of us ascribes, according to our particular biases and prejudices.

The intersection of two such trigger words — visitation of a child by a convicted sex offender — presents a special problem for the court, which is deemed to be *parens patriae* for minors under the age of 18.

It is well-settled that visitation with one's natural child is a fundamentally protected interest (although interestingly, not in the Second Circuit, if you are the non-custodial parent), and that there is a heavy presumption that visitation with the non-custodial parent is in the best interests of the child.

The Court of Appeals has held that even those incarcerated are entitled to visitation, (see *Granger v. Misercola*, 21 NY3d 86 (2013)) and that a person's "incarceration . . . alone, does not make a visitation order inappropriate" and therefore the heavy presumption is not rebutted.

In *Granger*, the court resolved inconsistent language across the Appellate Divisions as to the standard that was required to rebut the presumption was preponderance of the evidence (and not substantial evidence as had previously been loosely used in the appellate courts).

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In *Joshua C. v. Yolanda C.*, 140 AD3d 1213 (3rd Dept. 2016), the court denied the incarcerated sex-offender father's application to have in-person visitation with his then 9-year-old daughter. In that case, the father had pleaded guilty to sexually abusing three children around the age of seven, including his niece, his stepdaughter and their friend (but not his own daughter).

In denying visitation, the court made no mention of the admittedly heinous nature of the father's crimes but instead, focused on the trial testimony that the child had been in therapy for the past two years and that upon having telephone conversations with the father returned mean and temperamental. That, coupled with the father's admission that he had not been to sex offender therapy or received sex offender treatment, supported the Family Court's decision to deny visitation as not in the child's best interests.

In *Cardwell v. Mighells*, 122 AD3d 1293 (4th Dept. 2014), the father, convicted of rape in the third-degree for having sex with the then-underage respondent mother (and conceiving the child which he now sought to visit) was denied visitation with permission to re-apply upon completing a sex offender risk assessment by a neutral provider. Again, in that case, the father admitted that he had failed to complete sex offender treatment; and, critically, failed to accept fault for raping the mother of his child.

In that case the court cited to a 2001 1st Department decision that held in dicta that generally the Family Court has the power to order one to undergo a sex offender evaluation and subsequent treatment for said affliction, although in the absence of any judicial finding of sexual abuse, one cannot be compelled to attend such treatment, *In re Selena L.*, 289 AD2d 35 (1st Dept. 2001).

What happens then, when the subject petitioner is, for example, a convicted Level 1 (lowest possible level) sex offender, who has duly complied with all the terms and conditions of his probation, including sex offender treatment, is contrite, apologetic and admits and acknowledges his fault and simply seeks visitation with a child that he was not accused of assaulting in any fashion?

The answer, albeit perhaps begrudgingly for respondents, AFCs and the court, is that visitation is indeed in the best interests of the child in such or similar circumstances. An intriguing twist on why is that in cases where the parent was arrested and then incarcerated, especially where the child was young, there was no opportunity for the parent to attempt to apologize, or explain, or in any way give closure to their child for their behavior. Likewise, while the parent has been deprived of contact with the child, conversely, the child has been deprived of contact by the parent.

Such an outcome is especially congruent with the purposes of the N.Y. Correction Law (168 *et seq.*), which governs the supervision of sex offenders according to a three-tiered level system (Level III is the highest, Level I is the lowest). The monitoring requirements of the law have been upheld as permissible *civil* supervision serving the best interests of the community at large. While that is debatable, it is arguable that a petitioner who is also monitored under the Cor. Law would necessarily have an additional level of supervision upon him/her thereby making it somewhat easier for the trier of fact to award visitation with their child.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.