

POINT II

THE EXISTING ORDER OF VISITATION IMPROPERLY DELEGATES TO THE MOTHER COMPLETE DISCRETION TO SCHEDULE OR DENY THE FATHER'S VISITATION

The existing visitation order, entered January 1, 2015, improperly provides for the father's visitation only at the mother's "sole discretion." (A 1). This Court has made clear that a parent's visitation cannot be delegated to the discretion of a parent, a child, or even a therapist. *Matter of William BB v Susan DD*, 31 AD3d 907 [3d Dept 2006]; *Matter of Millett v Millett*, 270 AD2d 520, 522 [3d Dept 2000]. The court below erred in dismissing the father's petition to modify, and in failing to modify the order so as to ensure reasonable visitation by the father. This Court should reverse and remand.

In *William BB*, the parents shared joint legal and physical custody of their children until temporary sole legal and physical custody was granted to the father due to the mother's alcohol abuse. 31 AD3d 907. When the mother subsequently was arrested for driving while intoxicated, the court ordered primary physical custody to the father with parenting time to the mother "at times and places as agreed under such circumstances and conditions as the father determines are necessary to protect the safety and general welfare of the children." *Id.* This Court found that the Family Court improperly delegated its responsibility to structure a visitation schedule, noting that, unless visitation is "inimical to a child's welfare,"

a court is “required to structure a schedule which results in frequent and regular access by the noncustodial parent.” *Id.*

This Court further emphasized that a “court’s authority in this respect can no more be delegated to one of the parties than it can be to a child.” *Id.*, citing *Millett*, 270 AD2d at 522 [holding in pertinent part that visitation order was supported by record, but that arrangement of visitation and contact by children’s therapist was error in that it inappropriately delegated to therapist the court’s authority to determine best interests of the children, in structuring visitation]. *Accord*, *Matter of Jordan v Jordan*, 288 AD2d 709, 710 [3d Dept 2001][finding that in absence of proof that visitation would result in significant emotional harm to children, Family Court should not have directed visitation based on children’s desires]; *Gadomski v Gadomski*, 256 AD2d 675, 677 [3d Dept 1998][stating that a court cannot delegate to a mental health professional the authority to decide visitation in the best interests of the children].

In the case at bar, not only does the existing custody and visitation order improperly delegate to the mother “sole” and unfettered discretion to decide visitation in the best interests of the children, (A 1), but the father argued below that the mother abused her discretion to the detriment of the children in unreasonably denying visitation unless she had need for childcare, and not based on “the children’s best interests.” (Amended Petition ¶ 1(b) ; A 111). The father

petitioned to modify the existing order of visitation in part because the mother was limiting his visitation in an “arbitrary and capricious” manner and had prohibited all telephone contact with the children. (Amended Petition ¶ 1(b)).

Moreover, the attorney for the children, during the initial appearance below, stated that the judge should set a visitation schedule for the father. (A 3). Indeed, the rule that a court, and not a parent, structure reasonable visitation in the best interests of the children exists to prevent exactly the type of unreasonable deprivation of visitation as in the case at bar. *See Millett*, 270 AD2d at 522. The court below therefore erred in dismissing the petition and failing to modify the existing order that improperly delegates to the mother “sole discretion” and responsibility to structure the father’s visitation schedule with the children. *See William BB*, 31 AD3d 907. This Court should reverse and remand for the Family Court to issue a proper visitation order.
