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# NEW YORK CHILDREN'S LAWYER

*Published by the Appellate Divisions of the  
Supreme Court of the State of New York*

August 2013

Volume XXIX, Issue II

## Forensic Evaluator Proposals Attract Wide Range of Opinions\*

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With three competing proposals on who should have access to forensic evaluation reports in child custody cases, and under what terms, the Office of Court Administration asked to hear from the bench and the bar before promulgating rules.

It got an earful.

[Read the comments on the proposals.](#)

The forensic reports, which typically consist of psychologist interviews with the child and often with the parents or other caregivers, are frequently relied on by judges in making custody determinations. But questions abound over the appropriate use of those evaluations and their potential to determine the course of a child's life.

Should attorneys show the reports to their clients, or just discuss the contents? Do matrimonial litigants have a due process right to see not only all reports, but any notes or data used by the evaluator? If the reports are disclosed to the parties, will children and abused spouses be less forthcoming? How can the courts prevent dissemination or publication of the highly sensitive evaluations? Should children ever see the reports?

Attorneys have been debating those topics for a number of years, but the issue took center stage with a recent ruling from the Appellate Division, First Department, and three different proposals for a court rule.

The First Department ruling, [Sonbuchner v. Sonbuchner](#), 96 AD3d 566 (2012), involved a pro se litigant who was not allowed access to a forensic expert's report before the expert testified.

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The majority said Bronx Supreme Court Justice Robert Torres ([See Profile](#)) erred in denying the husband access to the report and concluded that "counsel and pro se litigants should be given access to the forensic report under the same conditions." But the court held the error harmless, over the objections of Justice David Saxe ([See Profile](#)), who said that without the report, the unrepresented husband "had no hope of successfully cross-examining the expert" ([NYLJ, June 27, 2012](#)).

Even before *Sonbuchner* was decided, the New York State Bar Association's Committee on Children and the Law was stumping for a court rule in which counsel for each party and for the child would be entitled to one copy of the forensic evaluation report, with orders to keep it confidential. Under the state bar proposal, judges would decide whether to provide copies to the parties themselves or just allow them to review the report at a secure location, such as an attorney's office or if the party was not represented, a courthouse.

Since *Sonbuchner*, the court system itself floated rival proposals, one advanced by the Matrimonial Practice Advisory Committee and the other by the Family Court Advisory and Rules Committee.

The Matrimonial Practice Advisory Committee would permit counsel to obtain a copy of the report after executing a signed non-disclosure statement. Parties would be able to read the report and take notes after executing a non-disclosure affidavit. In contrast, the Family Court Advisory and Rules Committee would allow courts to craft terms of access on a case-by-case basis.

In January, OCA sought comments without expressing a preference for any of the three proposals.

Approximately 30 individuals and organizations responded, expressing concerns ranging from privacy to due process to the best interests of the child to whether the evaluators have far too much sway over custody disputes. Judges and judicial associations, attorneys and bar groups, psychologists and advocates weighed-in on what is clearly a hot-button issue in matrimonial and family practice.

The responses, which the New York Law Journal obtained via a Freedom of Information Law request, reveal deep divisions with nuanced legal, psychological, sociological and practical implications, and no real consensus on the best way to go.

Several commentators favored the Matrimonial Practice Advisory proposal as the most balanced solution, but many said that plan is far from perfect and offered a number of caveats and suggestions. Several judges favored the plan of the Family Court Advisory and Rules Committee, whose proposal affords the most discretion to the judge.

The pre-*Sonbuchner* state bar solution seemed to generate little support, with respondents generally preferring one of the other two remedies on the table.

Interestingly, none of the three proposals address what is perhaps the most difficult issue—whether and under what circumstances a child should be shown or apprised of the contents of an evaluation. Regardless, many respondents stated an opinion on that thorny concern.

Lawyers for Children and the Children's Law Center would allow the attorney for the child to review the report with the client.

"The attorney for the child, like all other attorneys in the proceeding, must be permitted to review and/or discuss the report with his/her client." Karen Freedman, executive director of Lawyers for Children, a Manhattan-based group providing legal and social services to children at the center of custody, visitation and other disputes, said in a letter to OCA.

However, Freedman said neither the child, nor any party, should be given a copy, only the opportunity to review it in a confidential setting.

But most commentators who addressed the issue opposed disclosing the contents to a child.

"Providing children with access to the report would have a devastatingly chilling effect on our clients' willingness to provide critical information about the history of domestic abuse perpetrated against them by the other parent, often including sexual violence, for

fear of exposing children to it," said Dorchen Leidholdt, director of the Center for Battered Women's Legal Services at the Sanctuary for Families in Manhattan.

The New York County Lawyers' Association's Matrimonial Law Section told OCA that "allowing any child to review or read the forensic report would be detrimental to the child. Accordingly, if any rule is to be implemented regarding the child's access to the forensic materials, it should preclude the child from reading such materials."

Supreme Court Justice Sidney Strauss of Queens ([See Profile](#)) recalled an incident that he said illustrates the danger of apprising youth of the contents of an evaluator's report.

"Some years ago, when a teen-ager, the subject of a custody dispute, was able to learn of the statements made about him to the forensic evaluator, [he] became so upset that he committed suicide," said Strauss, who had a matrimonial practice for 35 years and, as a judge, has spent the past seven years in a dedicated matrimonial part.

### **'Total Transparency' Urged**

On the broader issue, matrimonial law expert Timothy Tippins and psychologist Jeffrey Wittmann of Albany called for "total transparency" and ensuring that attorneys have "unfettered access to the forensic report and to all underlying data" in the evaluating expert's file.

"While some make the argument that the child-related nature of the information contained in forensic reports calls for a level of protection against disclosure beyond that which is demanded in other courts of law, we would argue just the opposite," argued Tippins, a Law Journal columnist who has written extensively on the issue, and Wittmann. "It is precisely because custody and access issues have profound implications for a child's future that it is essential for the child's own attorney and their parents' attorneys be able to fully and easily explore the forensic report and its underlying data to insure that their lives will not be affected by an evaluative process that is substantially flawed with respect to its underlying data, method, or reasoning."

Family Court Judge Michael Nenno of Cattaraugus County ([See Profile](#)) agrees with Tippins that "nothing short of a full and unfettered access to both the report and complete file of the evaluator is sufficient to prepare a proper cross examination."

But attorney Elaine Miller of Great Neck would not allow attorneys to show the report to the litigants.

"Tippins and those who agree with him are looking at forensic reports as trial counsel," Miller wrote in an email to OCA. "I must always evaluate the situation as an attorney for the child who may have spilled some unsavory beans about the parents to the evaluator, and the consequence of the parent knowing of the revelation on the parent-child relationship."

The New York City Bar's official position is that parents should not be provided with a copy "given the harm that can be done" and that "would not be undone by any sanction." However, the group's Family Court and Family Law Committee would give pro se litigants a copy after making them sign a non-disclosure affidavit.

Robert Lonski, administrator of the Assigned Counsel Program of the Erie County Bar Association, found all three proposals flawed, with none sufficiently protecting due process rights.

"Access to custodial evaluation reports should not be subject to judicial approval on a case-by-case basis," Lonski said in a letter. "To do so would inevitably result in inconsistency among like-situated parties who are before different judges, and in any event would compromise the...ability to prepare adequately to cross examine the author of the report."

### **Case-by-Case Approach**

Several Family Court judges endorsed the case-by-case proposal of the Family Court Advisory and Rules Committee.

Family Court Judge Conrad Singer in Nassau County ([See Profile](#)), president of the Association of Judges of the Family Court of the State of New York, argues that the committee proposal is the only one that "fairly represents the rights and interests of all litigants, in all

cases and places the pro se litigants on parity with their opposing party."

"Not only do the two other proposals take away appropriate judicial discretion, they assume that a one-sided rule is fair for all litigants, in all courts, throughout this state," Singer said in a letter to OCA Counsel John McConnell.

Bronx Family Court Judge Carol Sherman ([See Profile](#)), president of the New York City Family Court Judges Association, said the Family Court advisory committee's proposal "allows judges to frame and order procedures that provide meaningful and complete access to the forensic evaluation report prior to trial, and, at the same time, to take into consideration the need for confidentiality to protect the children and parties."

Monroe County Family Court Judge Joan Kohout ([See Profile](#)) said "the court should have the flexibility to set reasonable rules regarding the reports, such as prohibiting disclosure of the report to others, especially the child."

On the other hand, the Lawyers Committee Against Domestic Violence, a coalition of attorneys in the New York City metropolitan area, found the Family Court advisory committee's proposal the "most problematic" of the three.

"Practitioners and litigants benefit from a consistent and predictable system that does not vary from one court to another and does not leave access to forensic reports in the sole discretion of each individual judge," the group said in a letter from co-chairs Barbara Kryszko of Sanctuary for Families and Kate Wurmfeld of New York Legal Assistance Group. "We believe that in the interest of due process, a uniform procedure for the dissemination of forensic evaluations should be adopted."

Nancy Erickson, a Brooklyn attorney who is on the state bar subcommittee of the Committee on Children and the Law, generally endorsed the organization's position. However, she expressed concern over the "enormous" power of a custody evaluator and the potential for incompetence and corruption.

"The New York State Education Department's Office of Professional Discipline does not accept complaints against psychologists who are appointed by the court to conduct custody evaluations," Erickson said.

"Therefore, there is no way to rid the judicial system of custody evaluators who are untrained, unprofessional or even corrupt."

Erickson said the evaluations of battered women are notoriously misleading and she expressed concern over the lack of standards.

"Custody evaluations, as currently practiced, are not limited by the court, they are in the unbridled discretion of the evaluator," Erickson wrote. "Any test can be given, without consideration of their reliability or validity...Any questions can be asked, regardless of their relevance or lack thereof...Any documents can be viewed (or not viewed, as the evaluator decides). Violations of the rules of evidence abound. Any 'collaterals' can be questioned, not under oath and not recorded, resulting in hearsay and even hearsay on hearsay."

David Bookstaver, a spokesman for the Office of Court Administration, said it is unclear when the Administrative Board of the Courts, which consists of the chief administrative judge and the four Appellate Division presiding justices, will formulate a rule.

"There is as wide range of opinion which will be helpful as the board considers this issue, which is exactly the reason we put difficult issues out for public comment," Bookstaver said.

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## NEWS BRIEFS

### SECOND DEPARTMENT NEWS

#### Continuing Legal Education Programs

Save the Date! The Fall Mandatory Seminar for the panel in Nassau County has been scheduled for October 23, 2013, to be held at Hofstra University Law School from 6 p.m. to 9 p.m. The Fall Mandatory Seminar for the panel in Suffolk County has been scheduled for October 16, 2013, to be held at the Suffolk County Supreme Court from 6 p.m. to 9 p.m. The Fall Mandatory Seminar for the panels in Westchester, Orange, Dutchess, Putnam and Rockland counties has been scheduled for October 18, 2013, to be held at the Westchester County Supreme Court from 9 a.m. to 4 p.m. Please note that scheduling of the Fall Mandatory Seminar for the panels in Kings, Queens, and Richmond Counties has not yet been finalized. Further details for the above mentioned seminars to follow by e-mail.

#### **Second, Eleventh & Thirteenth Judicial Districts (Kings, Queens, and Richmond Counties)**

On March 15, 2013, The Appellate Division, Second Judicial Department, the NYC Family Court and the Kings County Family Treatment Court, co-sponsored ***Family Treatment Court Training Workshop: Drug Abuse and Treatment From a Family Court Perspective***. This presentation was given by the Hon. Ann O'Shea, Kings County Family Court Judge; Naomi Weinstein, Director of the

Center for Rehabilitation and Recovery at The Coalition of Behavioral Health Agencies.

On April 23, 2013, the Appellate Division, Second Judicial Department, the Queens Family Court, the Queens County Bar Association, and the Queens County Family Court Disproportionate Minority Representation Committee co-sponsored ***Considering the Role of Race and Drug Policy in Child Protective Cases***. This presentation was given by Lynn Paltrow, J.D., Founder and Executive Director, National Advocates for Pregnant Women, and Emma Ketteringham, J.D., Managing Attorney, Family Defense Practice of Bronx Defenders.

On April 30, 2013, the Appellate Division, Second Judicial Department, the Office of Attorneys for Children, and the Kings County Judicial Committee on Women in the Courts, co-sponsored ***Technological Abuse: Practical Considerations and Evidentiary Issues***. This presentation was given by Ian Harris, Esq., Staff Attorney, Matrimonial & Family Law Unit, New York Legal Assistance Group.

On May 22, 2013, the Appellate Division, Second Judicial Department, the Queens County Family Court, the Queens County Bar Association, and the Queens County Family Court Disproportionate Minority Representation Committee co-sponsored ***Drug Use, Drug Effects, and the Role of Science and Experts in Child Protective Cases***. This presentation was given by Lynn Paltrow, J.D, Founder and

Executive Director, National Advocates for Pregnant Women and Carl H. Hart, Ph.D., Assistant Professor of Clinical Neuroscience in the Department of Psychiatry, Adjunct Faculty, Department of Psychology at Columbia University and Research Scientist, Division of Substance Abuse, NYS Psychiatric Institute.

On June 4, 2013, the Appellate Division, Second Judicial Department and the NYC Family Court Advisory Council Committee for Lesbian, Gay, Bisexual & Transgender Matters co-sponsored ***Representing Transgender & Gender Non-Conforming Youth in Family Court***. This presentation was given by Sol Davis, Staff Attorney, the Legal Aid Society's Juvenile Rights Practice and Virginia M. Goggins, Project Coordinator, LGBT Law Project at New York Legal Assistance Group.

On June 6, 2013, the Appellate Division, Second Judicial Department, the Queens County Family Court, the Queens County Bar Association and the Queens County Family Court Disproportionate Minority Representation Committee, co-sponsored ***Skills for Engagement of Fathers in Child Protective Proceedings***. This presentation was given by the Hon. Maria Arias, Family Court Judge, Chair of Queens County Family Court Disproportionate Minority Representation Committee; Ed Parker, Family Advocate, Center for Family Representation; and Scott Leach, CEO/Founder, Daddy's Toolbox.

## **Tenth Judicial District (Nassau County)**

On March 21, 2013, the Appellate Division, Second Judicial Department and the Nassau County Family Court Liaison Committee co-sponsored *Evidentiary Issues in Juvenile Delinquency Cases* as a part of their *Lunch and Learn Series*. This presentation was given by the Hon. Ellen R. Greenberg, Nassau County Family Court.

On April 18, 2012, the Appellate Division, Second Judicial Department and the Nassau County Family Court Liaison Committee co-sponsored *Criteria for Visitation and Reunification of Respondents in Article 10 Sex Abuse Cases with Their Child* as part of their *Lunch and Learn Series*. This presentation was given by Stephanie Hubblebank, Esq., Chief County Attorney of the Family Court Bureau and Michael Fitzgerald, Ph. D., Psychologist, Private Practice.

On May 16, 2013, the Appellate Division, Second Judicial Department, and the Nassau County Family Court Liaison Committee co-sponsored *Guardianship and Special Juvenile Immigration Status* as a part of their *Lunch and Learn Series*. This presentation was given by Hon. Julianne S. Eisman, Judge, Nassau County Family Court; Lisa Williams, Esq., Court Attorney, Nassau County Family Court; and Marianne Camilarie, Court Clerk, Nassau County Family Court.

On June 18, 2013, the Nassau County Probation Department, the Appellate Division, Second Judicial Department, and the Attorneys for

Children Program co-sponsored *An Overview of the New York State Office of Children and Family Services Detention Risk Assessment Instrument (DRAI)*.

This presentation was given by John D. Fowle, Director, Nassau County Probation Department, and the Hon. Ellen Greenberg, Nassau County Family Court.

On June 20, 2013, the Appellate Division, Second Judicial Department and the Nassau County Family Court Liaison Committee co-sponsored *On Estoppel*, as a part of their *Lunch and Learn Series*. This presentation was given by Jim Graham, Esq., Mangi and Graham, LLP.

*The handouts for the above seminars are available in the Office of Attorneys for Children. Please contact Nancy Guss Matles, LMSW, Support Services Coordinator, at [nmatles@courts.state.ny.us](mailto:nmatles@courts.state.ny.us).*

*The Appellate Division Second Department is certified by the New York State Legal Education Board as an accredited Provider of continuing legal education in the State of New York.*

## **THIRD DEPARTMENT NEWS**

### **Liaison Committees**

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts met last spring and will meet again in October. The committees were developed to provide a means of communication between panel members and the Office of Attorneys for Children. The Liaison Committees, whose members are nominated by Family

Court judges, meet twice annually and representatives are frequently in contact with the Office of Attorneys for Children on an interim basis. If you would like to know the name of your Liaison Committee Representative, it is listed in the Administrative Handbook or you may contact Betsy Ruslander by telephone or e-mail at [oac3d@nycourts.gov](mailto:oac3d@nycourts.gov). If you have any issues you would like brought to the attention of the Office of Attorneys for Children, please contact your county's Liaison Representative. Welcome to several new Liaison Representatives who have been recently appointed including Lisa Natoli (Chenango County) and Collette VanDerbeck (Ulster County) with many thanks to Kyphet Mavady (Chenango) and Anne LaGorga (Ulster) who served previously for many years.

### **In Memoriam**

The Office of Attorneys for Children is sad to report the loss of one of its great advocates this summer with the passing of Ian Arcus, Esq. on June 2, 2013. Ian was an Albany County panel member and that county's Liaison Representative for many years. Additionally, he was a long time member of the Office of Attorneys for Children Advisory Committee. Ian demonstrated his commitment to children and families on a daily basis and his skilled advocacy will be missed.

### **Training News**

The following training is currently planned for the Fall 2013:

**Children's Law Update '12-13**, will be held on Friday, September 20, 2013 at Traditions at the Glen in Johnson City, NY, and again on Friday, November 1, 2013 in Latham, NY

**Sullivan County** has a local training scheduled for October 18, 2013 in Monticello, NY;

**Introduction to Effective Representation of Children**, the two-day introductory course for panel applicants and new panel members, will be held on Friday and Saturday, December 6-7, 2013 at the Clarion Hotel (Century House) in Latham, NY.

**CLE News Alert** - We now have a series of 1-1 ½ hour online video presentations, called "KNOW THE LAW", designed to provide panel members with a basic working knowledge of specific legal issues relevant to Family Court practice. There are modules for a variety of proceeding types including custody/visitation, juvenile justice and child welfare. The series will be continually updated with additional modules to allow panel members to become familiar with a series of pertinent topics. If you would like to suggest a topic for inclusion in this series, please contact Jaya Connors, the Assistant Director of the Office of Attorneys for Children at (518) 471-4850 or by e-mail at JLCONNOR@courts.state.ny.us

#### **Website**

The Office of Attorneys for Children continues to update its web page located at [nycourts.gov/ad3/oac](http://nycourts.gov/ad3/oac). Attorneys

have access to a wide variety of resources, including E-voucher information, online CLE videos and materials, the New York State Bar Association Representation Standards, the latest edition (5-20-13) of the Administrative Handbook, forms, rules, frequently asked questions, seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The newest feature is a *News Alert* which will include recent program and practice developments of note.

#### **FOURTH DEPARTMENT NEWS**

##### **2012 Honorable Michael F. Dillon Awards**

Congratulations to the recipients of the 2012 Hon. Michael F. Dillon Awards. Each year two attorneys from each Judicial District in the Fourth Department are chosen to receive this award for their outstanding advocacy on behalf of children. The 2012 Awards were presented to the recipients by Presiding Justice Henry J. Scudder at a ceremony at the M. Dolores Denman Courthouse on June 18, 2013. The recipients are as follows:

##### **Fifth Judicial District**

A.J. Bosman, Oneida County  
Margaret Marris, Onondaga County

##### **Seventh Judicial District**

Mary Aramini, Monroe County  
John Lockhart, Livingston County

#### **Eighth Judicial District**

Nancy Dietzen, Chautauqua County  
Rebecca Baritot, Erie County

#### **SEMINARS**

You are not considered registered for a seminar until you have received a confirming e-mail from our office. If you do not receive a confirming e-mail within 3 business days from the date you registered, please call Jennifer Nealon at 585-530-3177.

#### **APPEALS PANEL**

You should have received a memo in June 2013 informing you that we are revamping the process for acceptance to the AFC Appeals Panel. If you are already on the AFC Appeals Panel, you will be not be affected by the changes, except that you are required to have attended the AFC Appeals Seminar in Canandaigua on March 26, 2013 or watch the videos of that seminar on the AFC website. If you did not attend the Appeals Seminar, you must send us your CLE affirmations after watching the Appeals Seminar videos, together with a signed affirmation on the AFC panel website by July 26, 2013 to remain on the Appeals Panel. If you attended the Appeals Seminar, you need only send us the signed affirmation.

AFC on the appeals panel are eligible to be substituted for trial AFC who do not wish to represent clients on appeal. If you are interested in being considered for the appeals panel, the application is at [www.nycourts.gov/AD4](http://www.nycourts.gov/AD4) under the link to Forms/AFC Forms. Please send it to Linda Kostin, AFC

Program, 50 East Avenue,  
Rochester, NY, 14604, appending  
examples of your appellate work.

**AFC NOT ON APPEALS  
PANEL**

**Please be advised that whether  
or not you are on the Appeals  
Panel, if your client appeals or is  
served with a notice of appeal and  
you do not request substitution,  
you are charged with knowledge  
of all information contained in  
the Appellate Training for  
Attorneys for Children seminar  
presented on 3/26/13. All  
segments of that seminar are  
available on the AFC website.**

**Fall Seminar Schedule**

**September 27, 2013**

Update  
Embassy Suites  
Syracuse, NY (full day- taped)

**October 3-4, 2013**

Fundamentals of Attorney for the  
Child Advocacy  
M. Dolores Denman Courthouse  
Rochester, NY

**October 21, 2013**

DV - Focus on Custody and  
Visitation and Teen Violence  
RIT Inn & Conference Center  
Rochester, NY (full day)

**October 29, 2013**

Update  
Holiday Inn  
Batavia, NY (full day - taped)

## **RECENT BOOKS AND ARTICLES**

Due to space constraints Books and Articles will not be listed in this Issue. If you would like to obtain this information, you may request Books and Articles by contacting Amy Klee at [aklee@nycourts.gov](mailto:aklee@nycourts.gov).

## FEDERAL COURTS

### **Prosecution's Use of Defendant's Silence During Police Interview as Evidence of Guilt Did Not Violate Fifth Amendment**

Defendant, who was not in custody and had not received Miranda warnings, voluntarily answered some of a police officer's questions about a murder, but fell silent when the officer asked whether ballistics testing would match his shotgun to shell casings found at the scene of the crime. At trial, prosecutors used defendant's failure to answer the question as evidence of guilt. Defendant was convicted, and both the state court of appeals and the court of criminal appeals affirmed. Defendant's claim was rejected that the prosecution's use of his silence violated the Fifth Amendment. The Supreme Court held, in a 5-4 decision, that there was no Fifth Amendment violation because defendant did not expressly invoke the privilege against self-incrimination in response to the officer's question. A defendant had an unqualified right to remain silent at trial, but defendant had no unqualified right during his interview with police. He was not subjected to the inherently compelling pressures of a pre-Miranda custodial interrogation, or subjected to threats to withdraw a governmental benefit, and thus was not deprived of a free choice to admit, deny, or refuse to answer.

*Salinas v Texas*, \_\_\_ US \_\_\_, 2013 WL 2922119 (June 17, 2013)

### **Award of Custody to Native American Birth Father Under ICWA Reversed in Adoption Proceeding**

For the duration of the pregnancy and for the first four months of the child's life, the biological father, who was a member of the Cherokee Nation, provided no financial assistance to the birth mother, his ex-fiancee, even though he had the ability to do so. He made no meaningful attempts to assume his parental responsibilities. Biological father signed papers stating that he accepted service and did not contest the adoption. However, the day after he signed the papers, he contacted an attorney and subsequently requested a stay of the adoption proceedings. The biological father never had custody of the child, who resided with the adoptive couple in South Carolina from shortly after

birth until the age of 27 months, when the South Carolina Family Court issued its ruling. The court concluded that the adoptive couple did not meet the heightened burden under the Indian Child Welfare Act of 1978 (ICWA) 25 U.S.C. Section 1912(f) of proving that the child would have suffered serious emotional or physical damage if the biological father had custody, and therefore denied the adoptive couple's petition for adoption and awarded custody to the biological father. The South Carolina Supreme Court affirmed. The Supreme Court reversed and remanded the case for further proceedings. Under the ICWA, a state court was prohibited from involuntarily terminating parental rights to an Indian child in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the child. A five-justice majority held that the phrase "continued custody" referred to custody that a parent already had, or at least had at some point in the past. The Court noted that, pursuant to Section 1912(d), any party that sought an involuntary termination of parental rights to an Indian child under state law was required to demonstrate that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts proved unsuccessful. The Court concluded that the statute did not apply where, as here, there was no breakup because the parent abandoned the child and never had legal or physical custody. With respect to the requirement under Section 1915(a) that in any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families, the Court concluded that the statute was inapplicable in cases where, as here, no alternative party formally sought to adopt the child.

*Adoptive Couple v Baby Girl*, \_\_\_ US \_\_\_, 2013 WL 3184627 (June 25, 2013)

### **Order of Repatriation Affirmed Where Father's Consent to Relocation Nullified**

The district court determined that, under the Hague Convention and the International Child Abduction Remedies Act, there was a wrongful detention in New York of the children by the mother, and that the children must be returned to Canada. The Second Circuit affirmed. Although the parties had a shared intent to move to New York and the mother did move to New York with the children, the father's plan was conditioned upon the parties and the children moving as an intact family, which did not happen because the mother filed for divorce. There was no basis for a finding that the father consented to the relocation since the failure of the condition nullified his consent. Therefore, the parties' last shared intent with respect to the children's residence was that they resided in Canada. The Court also agreed with the district court that the children did not become so acclimated to life in New York that returning them to Canada would be tantamount to removing them from the environment where their lives have developed.

*Hofmann v Sender*, 716 F3d 282 (2d Cir. 2013)

### **Denial of Father's Petition for Return of Child Pursuant to Hague Convention Affirmed**

The district court held that the Father did not establish that the child's habitual residence was Italy, and denied the petition for return of the child pursuant to the Hague Convention. The Second Circuit affirmed. There was a presumption that a child's habitual residence was consistent with the intention of those entitled to fix the child's residence at the time those intentions were mutually shared. This presumption could be overcome, however, if the evidence showed that a child was settled into (or, "acclimated" to) the new environment. This burden was more easily satisfied the longer a child lived in a given country. In the instant case, the father failed to show that the parents agreed to settle in Italy, and did not attempt to show that the child had acclimated there. The separation agreement signed by the parents in 2009 demonstrated their shared intent for the child to live primarily in New York. The child was then less than three years old, and had lived with the mother in New York for several months. The child did not become

habitually resident in Italy following his return to that country in the summer of 2009. Although the mother agreed to the child's return and attendance at an Italian nursery school, the District Court found credible the mother's testimony that her stay in Italy was temporary, and that she consistently intended to return to New York for the child to begin kindergarten. Although the child lived mostly in Italy from soon after his birth in 2006 until his removal in 2011 and regularly attended nursery school there, and the Court might conclude that the child was "acclimated" to living in Italy, the father did not preserve that argument.

*Guzzo v Cristofano*, \_\_\_ F3d \_\_\_, 2013 WL 2476835 (2d Cir., June 11, 2013)

### **Order of Repatriation Affirmed Where Mother Failed to Prove an Affirmative Defense**

The district court directed the return of the child to the father (an Iranian national) in Singapore, the child's country of habitual residence, because the removal of the child from Singapore to New York state by the mother (a Malaysian national) was wrongful under the Hague Convention. The Second Circuit affirmed. The mother failed to establish either of two affirmative defenses that she raised. She failed to prove, by clear and convincing evidence, that there was a grave risk that, if returned, the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. The mother also failed to establish that a return was not permitted by the fundamental principles of the United States relating to the protection of human rights and fundamental freedoms. There was no proof that the child would suffer unavoidable psychological harm if returned to Singapore. Evidence of spousal conflict alone, without a clear and convincing showing of grave risk of harm to the child, was not sufficient. Although the mother contended that the father, having been abusive to the mother, also was likely to turn on the child, there was no showing that the child faced a grave risk of harm from the father. Even assuming that the prospect of losing his mother posed a grave risk to the child's well-being, the mother did not show that the question of custody was likely to be decided by a Syariah Court upon repatriation, much less that such courts were predisposed to reach a certain outcome. Moreover, although divorce actions between individuals of the

Muslim faith were brought in Singapore's Syariah Court, any party could apply for leave to have custody decided by a secular court, and, when both parties consented, they did not need to apply for leave. The father agreed to pursue any custody proceedings, upon repatriation, in Singapore's civil courts. Even if this undertaking was unenforceable, the mother could still invoke it, as well as the Court's decision, in any application to transfer the custody determination from the Singapore Syariah Court. Further, the mother failed to establish that the father would abscond to Iran with the child, or that the father exposed the mother to being charged with apostasy in Malaysia, much less that she might face the death penalty. Finally, the presence of a Syariah Court in a foreign state whose accession to the Convention has been recognized by the United States was not a per se violation of all notions of due process. In the exercise of comity, the Court was required to place trust in the court of the home country to issue whatever orders may be necessary to safeguard children who came before it.

*Souratgar v Fair*, \_\_\_ F3d \_\_\_, 2013 WL 2631375 (2d Cir., June 13, 2013)

## COURT OF APPEALS

### **Evidence of Guilt Legally Sufficient Where Defendant's Spontaneous Statement That He Was "Just the Driver" Corroborated by Other Evidence**

Defendant drove a car while the co-defendant fired shots toward civilians, cars and homes from the front passenger window. Defendant then led police vehicles on a high speed chase through the city. When one police vehicle was within one car length, defendant swerved into the oncoming lane of traffic; the co-defendant, who now had a clearer shot at the officer, leaned out the front passenger window and fired two or three shots, but missed. The officer lost sight of defendant's car as it sped away, and, a few minutes later, the car was found abandoned. Both defendant and the co-defendant were apprehended attempting to flee on foot. Both men were convicted on an accomplice theory of reckless endangerment in the first degree for the earlier shootings and attempted murder in the first degree for the shots fired at the officer. The Appellate Division affirmed, as did the Court of Appeals. The Court concluded that the evidence was legally sufficient. Defendant's spontaneous statement that he was "just the driver" was corroborated by other evidence that the crimes occurred, including an officer's identification of defendant as the driver. The Court also rejected defendant's contention that defense counsel was ineffective. Given existing legal precedent, counsel was not faulted for neglecting to challenge the adequacy of the attempt evidence. Also, there could have been a strategic reason for counsel's failure to request that the court charge attempted assault as a lesser included offense of attempted murder. When a defendant with an arguably less active role was tried jointly with a co-defendant more directly involved, counsel may have adopted a "go for broke" strategy that forced the jury to choose between convicting both defendants of the same serious offense despite their different roles, which jurors may have viewed as inequitable, or convicting only the more active participant. Similarly, there could have been a strategic basis for counsel's decision not to seek severance, since the jury had the option of convicting the co-defendant while extending leniency to defendant on the rationale that he was merely the driver.

*People v McGee*, 20 NY3d 513 (2013)

### **Defendant in Criminal Case Entitled to Adverse Inference Charge Where State Destroyed Evidence Reasonably Likely to Be of Material Importance**

Defendant was charged with three assaults on three different deputy sheriffs. Defendant was acquitted on the first and third counts, but was convicted on the second. Counts one and two arose out of a single sequence of events at the Monroe County Jail; count three arose out of a separate incident at the jail two months later. A video camera was located in the cell block. The deputy involved in count one testified that he viewed the video images and was able to see a very small part of the incident. He testified that others were present when he looked at the images, but he could not remember who they were, or whether he looked at the images only once, or several times. The video images were destroyed before the trial. In an omnibus motion made before trial, defendant asked, among other things, to be told whether any electronic surveillance in any form was utilized in the case and the location of any such tapes. The People responded in general terms that they provided all of the discoverable material in their possession and that to the extent that there may be any video tapes, defendant would be permitted to view or inspect them. The parties did not appear to have focused specifically on video of the incident that gave rise to the first and second counts until the time of trial. The court agreed to give an adverse inference charge with respect to any video of the third count because defendant asked for preservation of that video before it was destroyed. The court denied the request pertaining to counts one and two. The Appellate Division affirmed defendant's conviction on count two. The Court of Appeals reversed and ordered a new trial. A permissive adverse inference charge should have been given where a defendant, using reasonable diligence, requested evidence reasonably likely to be material, and where that evidence was destroyed by agents of the state. Although the Appellate Division characterized defendant's assertion that the alleged videotape was exculpatory as merely speculative, it was state agents who, by destroying the video, created the need to speculate about its contents. An adverse inference

charge mitigated the harm done to defendant by the loss of the evidence, without terminating the prosecution. Further, the rule gave the state an incentive to avoid the destruction of evidence. In cases that arose out of events in jails or prisons that may foreseeably lead to criminal prosecution, the authorities in charge should have taken whatever steps were necessary to ensure that the video was not erased. In the instant case, the deputy recognized the potential importance of the video by choosing to view it himself. Defendant should have had the same opportunity.

*People v Handy*, 20 NY3d 663 (2013)

**“Circumstances Evincing a Depraved Indifference to Human Life” Did Not Mean Same Thing For Purposes of Social Services Law § 384-b (8) (a) (I) as Under Penal Law**

The Commissioner of the New York City Administration for Children’s Services filed related petitions under Article 10 of the Family Court Act against respondents Antoine N. and Ronnelle B. with respect to the four children who resided with them, including five-month old Jayquan N., the child of the respondents. Family Court determined that, among other things, Antoine and Ronnelle abused Jayquan in that, while in the care of Antoine and Ronnelle, the child sustained fractures of the clavicle and of the left 4-7 ribs\*\*\*and Antoine and Ronnelle did not offer any credible explanation for any of these injuries\*\*\*. While finding that Jayquan sustained serious physical injury, Family Court nonetheless dismissed the petition insofar as it alleged severe abuse against Antoine. The judge believed that, in view of *People v Suarez*, 6 NY3d 202 (2005), severe abuse under Social Services Law § 384-b (8) (a) (I) - which required a finding that Antoine acted under circumstances evincing a depraved indifference to human life - could almost never be established unless an eyewitness testified to the manner in which the harm was inflicted. Petitioner appealed from Family Court’s dismissal of the claim of severe abuse. The Appellate Division reversed, holding that Family Court was not constrained by *Suarez*, and found, based on clear and convincing evidence, that Antoine acted under circumstances evincing a depraved indifference to human life. The Appellate Division remanded to the lower court to determine if petitioner exercised diligent efforts to strengthen the parental

relationship, or whether such efforts were excused. Upon remand, Family Court determined that diligent efforts should be excused because such efforts would be detrimental to the best interests of the child. Antoine appealed and the Appellate Division affirmed. The Court of Appeals also affirmed and held that the phrase “circumstances evincing a depraved indifference to human life” did not mean the same thing for purposes of Social Services Law § 384-b (8) (a) (I) as it does under penal law. In addition, the Court of Appeals held that a showing of diligent efforts to encourage and strengthen the parental relationship is not a prerequisite to a finding of severe abuse under Family Court Act § 1051 (e) where the fact-finder determined that such efforts would be detrimental to the best interests of the child. For purposes of Social Services Law § 384-b (8) (a) (I), circumstances evincing a depraved indifference to human life referred to the risk intentionally or recklessly posed to the child by the parent’s abusive conduct. Antoine beat or struck a baby, an especially vulnerable victim, and the testimony of the doctor who examined the baby established that Antoine must have attacked the baby on at least two different occasions, separated by at least two weeks. Further, Antoine had to have been aware of the life-threatening risks he created when he applied brute force to Jayquan’s chest and shoulder. He knew that devastating injuries ensued when he brutalized his then four-month old namesake, Antoine, Jr., fourteen years prior to abusing Jayquan. The prior abuse reflected Antoine’s utter disregard for Jayquan’s life, health and well-being. Additionally, he neglected to summon medical aid for Jayquan for several hours, even though the baby would have experienced and displayed continuous pain and distress. Antoine offered unbelievable explanations for Jayquan’s injuries, and he did not testify at the fact-finding hearing. In light of Antoine’s abuse of Antoine, Jr., followed by his severe abuse of Jayquan some 14 years later, there was little prospect that Antoine’s chronic, long-standing violent behavior would improve anytime soon, if ever, and it was not in Jayquan’s best interests to languish in foster care in the meantime.

*Matter of Dashawn W.*, 21 NY3d 36 (2013)

**Rebuttable Presumption That Visitation With Incarcerated Parent Appropriate Not Contrary to *Tropea*; Presumption Rebuttable By Preponderance of Evidence**

Petitioner, an inmate in New York’s correctional system, sought visitation with the child after respondent mother refused to bring the child to the prison. The family court granted the petition and awarded petitioner periodic four-hour visits at the prison with the child, who was then three years old. The Appellate Division affirmed. While his appeal was pending, petitioner was moved to a different correctional facility, further from respondent’s home. The Appellate Division made no finding of fact in that regard, and ruled that any change in circumstance was more appropriately the subject of a modification petition. The Court of Appeals affirmed. The Court has held that, absent exceptional circumstances, appropriate provision for visitation or other access by a non-custodial parent followed almost as a matter of course. Subsequent Appellate Division decisions have frequently referred to this as a rebuttable presumption that, in initial custodial arrangements, a non-custodial parent will be granted visitation. Respondent’s contention was rejected that this presumption was contrary to the Court’s holding in *Tropea*, in which the Court stated that, where a custodial parent was seeking judicial approval of a relocation plan that would hinder visitation by the non-custodial parent, presumptions and threshold tests that artificially skewed the analysis in favor of one outcome or another must be rejected. In *Tropea*, the Court did not reject an initial presumption in favor of visitation, but rather a mechanical, tiered analysis that prevented or interfered with a simultaneous weighing and comparative analysis of all of the relevant facts and circumstances involved in deciding a relocation case. The Court did not mean that presumptions could never be relied upon, and also stated that each relocation request must be considered on its own merits\*\*\*and with predominant emphasis placed on what outcome was most likely to serve the best interests of the child. A rebuttable presumption that a non-custodial parent was granted visitation was an appropriate starting point in any initial determination. This rebuttable presumption applied when the parent seeking visitation was incarcerated. Visitation should be denied where it was demonstrated that, under all the circumstances, visitation was harmful to the child’s welfare, or that the

right to visitation was forfeited. The Appellate Division had frequently used the terms “substantial proof” and “substantial evidence” offered to rebut the presumption, which was intended to convey to lower courts and practitioners that visitation was denied only upon a demonstration via sworn testimony or documentary evidence. But the “substantial proof” language did not heighten the burden of the party who opposes visitation; the presumption may be rebutted through demonstration by a preponderance of the evidence. Here, there was support in the record for the finding that the travel was not harmful to the welfare of the child, and that petitioner made efforts to establish a meaningful relationship with the child. The Appellate Division also correctly ruled that the question of petitioner’s move from one prison to another should have been raised by means of a modification petition.

*Matter of Granger v Misercola*, 21 NY3d 86 (2013)

## APPELLATE DIVISIONS

### ADOPTION

#### **Consent Not Invalidated by Technical Noncompliance with DRL Section 115-b (4) (a)**

Surrogate's Court denied the biological mother's application to dismiss the adoption petition of the prospective adoptive parents and granted the adoptive parents' motion for summary judgment dismissing the mother's petition seeking to set aside her extrajudicial consent to the private placement adoption of the subject child on technical grounds. The Appellate Division affirmed. Although the consent form was not in 18-point type, this technical noncompliance with Domestic Relations Law Section 115-b (4) (a) did not invalidate the consent, especially since the consent complied with all of the substantive requirements of section 115-b and there was no showing of injury or prejudice to the biological mother. Rather, the record showed that the biological mother consulted with an attorney prior to signing the consent, that the attorney read and reviewed the entirety of the consent, and that the mother understood that she could revoke the consent within 45 days of its execution. The birth mother's consent was not invalidated by either the prospective adoptive parents' failure to obtain judicial certification of their qualifications before taking custody of the child, in violation of Domestic Relations Law Section 115 (1) (b), or their failure to file an adoption petition within ten days of taking custody, in violation of section 115-c. Similarly, the prospective adoptive parents were not disqualified from adopting the child by their violation of the statutory provisions.

*Matter of Eliyahu*, 104 AD3d 488 (1st Dept 2013)

#### **Respondent's Consent to Adoption Not Required**

Family Court determined that the biological father's consent was not required before freeing the child for adoption and that, in the alternative, respondent abandoned the child. The Appellate Division affirmed. There was clear and convincing evidence that the father failed to satisfy the requirements of Domestic Relations Law section 111 (1) (d) that he maintain substantial and continuous or repeated contact with the child. The

record also demonstrated by clear and convincing evidence that the father abandoned the child because during the six-month period preceding the filing of the petition, he did not contact the agency or visit the child. The father's filing of two custody and/or visitation petitions were not within the applicable look-back period and were dismissed upon the father's default. The father's testimony that before the applicable look-back period, he had chance encounters with the child during which he would talk with the child and leave money, was insufficient to demonstrate consistent contact. A dispositional hearing was not required after the finding of abandonment.

*Matter of Thailique Nashean S.*, 105 AD3d 428 (1st Dept 2013)

#### **Post-adoption Contact Provisions Not Limited to Authorized Agencies**

Family Court determined it had no authority to incorporate a post-adoption contact provision into a private adoption order pursuant to DRL §112-b, as the statute limited its application to authorized agency adoptions. The Appellate Division reversed. DRL §112-b allows parties to an adoption to enter into a legally enforceable post-adoption agreement as long as such agreements are in writing, consented to by the parties and the attorney for the child, and the court determines it is in the child's best interest for such contact. While DRL §112-b is found under Title 2 of the adoption article labeled "Adoption from an Authorized Agency", that heading is not part of the statute itself and therefore does not extend or restrict the language contained in the statute. The statute itself states that it should not be construed to prohibit the parties "under this chapter" from entering into such agreements. Additionally, the adoption article includes Title 3, which refers to private placement adoptions. Since Family Court failed to hold an evidentiary hearing to determine whether post-adoption contact was in the best interests of the child, the matter was remitted for a hearing.

*Matter of Andie B.*, 102 AD3d 128 (3d Dept 2012)

### **Biological Father Not Consent Father**

Family Court determined that respondent biological father abandoned his children and dispensed with his right to consent to the adoption of the children. The Appellate Division affirmed. Although it was unclear whether the court made a finding pursuant to Domestic Relations Law §111 (1) (d), reversal was not required because the record supported the finding that respondent's consent was not required under the statute. Despite being awarded supervised visitation with the children in 2009, respondent did not exercise such visitation. At the time of the hearing, respondent had not visited the children in over three years and had not sent gifts since 2009. Further, respondent had not made child support payments since 2010, when his tax returns were garnished. Although there was conflicting testimony regarding alleged interference of petitioner mother and petitioner stepfather with respondent's relationship with the children, the court resolved the issue in favor of petitioners and that determination was entitled to great deference. Even assuming respondent demonstrated his right to consent, the record established abandonment because respondent had no contact with the children in the six months preceding the filing of the adoption petition. Because the majority of the testimony at the hearing concerned events that occurred outside the six-month time period preceding the filing of the adoption petition, the court did not prevent respondent from fully establishing the nature of his relationship with the children and the alleged efforts of petitioners to exclude him from the children's lives.

*Matter of Angelina K.* 105 AD3d 1310 (4th Dept 2013)

### **CHILD ABUSE AND NEGLECT**

#### **Abuse and Derivative Abuse Findings Vacated Where Mother Engaged in Argument with Father Following Child's Disclosure of Sexual Abuse, and Abuse Stopped**

Family Court entered an order of disposition upon a fact-finding determination that respondent parents abused and neglected the eldest child and derivatively abused and neglected the younger children. The Appellate Division modified on the law and facts and vacated the findings of abuse and derivative abuse against mother, and otherwise affirmed. The findings

of abuse and neglect against the father were supported by a preponderance of the evidence. The eldest child testified that while the father was drunk, he sexually abused her on three occasions when she was 13 years old, and this was corroborated by the testimony of a caseworker and a pediatric specialist. The eldest child was subjected to extensive cross-examination, and the court credited her testimony. The eldest child also testified that as punishment for continuing to see a boyfriend that her parents did not approve of, the father punched her in the stomach and had her siblings punch her in the eye, causing bruises. Such conduct constituted excessive corporal punishment and thus, neglect. Moreover, the findings of derivative abuse and neglect against the father as to the younger children were appropriate. However, the court erred in finding that the mother abused the eldest child and derivatively abused the younger children by allowing the eldest child to be sexually abused. The eldest child testified that she only informed the mother of the abuse when the mother interrupted the last abusive incident, after which the mother engaged in an argument with the father, who never again abused the child. However, the mother never reported the father's conduct, or have the father removed from the home, which placed all of the children in imminent risk of harm. Accordingly, the findings of neglect and derivative neglect as against the mother were supported because she did not act as a reasonably prudent parent to protect the children from this risk.

*Matter of Dayanara V.*, 101 AD3d 411 (1st Dept 2012)

#### **Sufficient Evidence of Neglect**

Family Court adjudged that respondent mother neglected the subject children. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence, including the caseworker's testimony that respondent permitted her husband to babysit for one of the children even though the husband had thrown lighter fluid on the respondent and had threatened to set her and the stepchildren on fire, had "poked" one of the stepchildren with a knife when the child tried to intervene in a fight between respondent and the husband, and used marijuana in the home.

*Matter of Michelle L.*, 101 AD3d 455 (1st Dept 2012)

### **Court Properly Exercised Discretion to Grant Supervised Visits During Pendency of Dispositional Hearing**

Family Court, after a fact-finding determination that respondent mother permanently neglected the subject child, directed that, during the pendency of the dispositional hearing, respondent and the child were to have two visits supervised by an independent forensic psychologist. The Appellate Division affirmed. The court's order was a provident exercise of discretion. There was ample basis for the court's determination that the circumstances had changed since the court's prior order suspending visitation, and that limited, supervised visitation was in the child's best interests. Indeed, at the time of the prior order, the child was unaware that she was a foster child and that respondent was her biological mother. Visits were suspended because respondent and the child had difficulty bonding, and the child became upset when respondent hinted that she was the child's biological mother. The child only recently learned the truth regarding her identity, and, as the court noted, benefitted from therapy and became strong enough to deal with the issue. Although the court determined that respondent permanently neglected the child, the court had not yet terminated respondent's parental rights. Further, there were never any allegations that respondent abused the child, and the court gave the forensic psychologist considerable discretion in supervising the visits, including the power to end the visits if appropriate. The court acted within its discretion in questioning the reliability and advisability of the outdated recommendations of the agency's experts, which did not take into consideration the child's improvements.

*Matter of Shannen Nicole O.*, 101 AD3d 461 (1st Dept 2012)

### **Neglect Finding Against Mother Supported by Multiple Physical and Mental Health Examinations of Child Based on Mother's Unfounded Suspicions of Sexual Abuse of Child by Father**

Family Court adjudged that, among other things, respondent mother neglected the child, and released the subject child to the custody of the mother with 12 months of supervision by petitioner. The Appellate Division affirmed. The record supported the court's

neglect finding in that the mother subjected the child to multiple, repeated, intrusive physical and mental health examinations based on her unfounded suspicions that the father had sexually abused the child. The record indicated that the mother's allegations were thoroughly investigated, and were contraindicated by the child's occasional statements that she lied about the abuse, that her mother told her to make the statements, and by the child's vague and fanciful description of events. A suspended judgment was not warranted where the mother persisted in making unfounded allegations, which were detrimental to the child and the child's relationship with the father.

*Matter of Lanelis V.*, 102 AD3d 441 (1st Dept 2013)

### **Prior Findings of Neglect with Respect to Respondent's Older Children Basis for Prima Facie Showing of Derivative Neglect**

Family Court determined that respondent mother derivatively neglected the subject child. The Appellate Division affirmed. Petitioner agency made a prima facie showing of derivative neglect as to the subject child based on prior findings of neglect against respondent with respect to her older children, including a finding of neglect just 10 days before the subject child's birth. The derivative finding of neglect was supported by a preponderance of the evidence. The prior findings of neglect were sufficiently close in time to the derivative proceeding to support the conclusion that respondent's parental judgment remained impaired. Further, respondent testified that she did not complete anger management services or a mental health evaluation, and that she had not been compliant with her mental health treatment for a year before the filing of the petition in the derivative proceeding.

*Matter or Nhyashanti A.*, 102 AD3d 470 (1st Dept 2013)

### **Remand of Children to Agency, Rather than Return to Respondent, in Children's Best Interests**

Following a hearing pursuant to Family Court Act Section 1027, Family Court granted petitioner agency's application to remand the subject children to the agency pending resolution of the neglect proceeding. The Appellate Division affirmed and continued the stay of

the Family Court order for 60 days from the entry of its order. The record supported the determination that the children's lives or health was at imminent risk of harm, given the strong evidence of educational neglect and the prior findings of educational and medical neglect. The court correctly found that reasonable efforts were made to prevent the children's removal from the home, including agency referrals to various services. Despite these efforts and prior neglect findings, the children's excessive lateness and absence from school continued. Notwithstanding the harm of removal, it was in the children's best interests to remand them to the agency, rather than return them to respondent mother. However, respondent or any other interested party was at liberty to move to vacate the Family Court's order. At oral argument, the agency indicated that it would not oppose such a motion, given respondent's compliance with the terms and conditions of the Appellate Division's order staying the Family Court order.

*Matter of Obed O.*, 102 AD3d 575 (1st Dept 2013)

#### **Finding of Neglect for Condoning Infliction of Corporal Punishment on Child by Another in Isolated Incident Reversed**

Family Court adjudged that respondent mother neglected her 12-year-old daughter. The Appellate Division reversed, vacated the finding of neglect and dismissed the petition. Respondent orally argued with her daughter because the child did not come directly home after school and convinced her younger sister to stay out as well. The 27-year-old brother of the child involved himself in the argument and hit the child, according to information given to a child protective specialist by the child. The child ran down a staircase and claimed that her brother ran after her and pushed her, causing her to fall and injure her knee. When her brother told her to get up, the child stated that she could not get up because her knee hurt. The brother then called upstairs and requested that respondent give him a belt. Respondent asked the child's younger sister to give a belt to the brother, which the brother then used to hit the child on her "hind leg." The brother then carried the child back upstairs, "accidentally" banging her knee against the bannister. While the child was injured sufficiently to warrant medical intervention, the injury occurred when she either fell running away from her brother, or when she was pushed by the brother, or

when her knee hit the bannister, and not as a result of the use of the belt furnished by respondent. Further, the brother was the one arrested by the police and charged with assault, not respondent. At most, the child's provocative behavior caused an overreaction on the part of her brother, condoned by her mother. There was no evidence that any emotional or significant physical injury occurred as a result of this isolated incident. In cases where a legal guardian was found negligent for condoning the infliction of corporal punishment on a child by another, there was a pattern of punishment, as opposed to an isolated incident.

*Matter of Pria J.L.*, 102 AD3d 576 (1st Dept 2013)

#### **One Finding of Neglect Against Grandmother Vacated, Another Affirmed**

Family Court determined that respondent grandmother neglected the subject child. The Appellate Division modified on the law and vacated the finding of neglect based upon the grandmother's alleged misuse of drugs, and otherwise affirmed. Although the evidence did not support the court's finding that the grandmother neglected the child by misusing drugs, a preponderance of the evidence supported the finding that the grandmother neglected the child by perpetrating an act of domestic violence against the mother in the child's presence. A police officer testified that he witnessed the grandmother engaging in a physical altercation with the child's mother while the mother was holding the child, which caused the child to cry.

*Matter of Cherish C.*, 102 AD3d 597 (1st Dept 2013)

#### **Petition Properly Dismissed; Testimony Regarding Mother's Squalid Living Conditions and Drug Use Outside Presence of the Child Insufficient to Establish Prima Facie Case**

Family Court dismissed the neglect petition against respondent mother. The Appellate Division affirmed. The neglect petition alleged that the child's physical, mental or emotional condition had been impaired, or was in imminent danger of becoming impaired, by the mother's misuse of drugs without attending a rehabilitation program, and by her failure to provide him with adequate food, clothing, shelter, proper supervision or guardianship. The caseworker, who was

the only witness at the fact-finding hearing, testified that she visited and found respondent alone and living in a squalid abandoned building on August 26, 2010. The respondent told the caseworker that the child had been living with his maternal aunt and grandmother since September 2009. Respondent stated that the child occasionally visited her at the abandoned building. She admitted to the caseworker that she used marijuana and crack cocaine and supported herself by panhandling and prostitution. Respondent stated, however, that she never used or was under the influence of drugs while around the child. The caseworker interviewed the child, who confirmed he was living with his grandmother and aunt, occasionally visited the respondent at the abandoned building, and that he never saw his mother with drugs or alcohol. When interviewed by the caseworker, the child's grandmother and aunt stated that he was doing well under their care and attending school. The record from respondent's health care provider indicated that respondent was depressed, suffered from lupus, used cocaine and was subject to mood swings. The petition was properly dismissed because the caseworker's testimony and the medical record in evidence were insufficient to support, by a preponderance of the evidence, a determination that respondent neglected the subject child. Although respondent's living conditions were unsuitable, the record presented no basis for a conclusion that the child's physical, mental or emotional condition has been impaired or was in imminent danger of becoming impaired as a result of his occasional exposure to the environment in which his mother lived. The record was similarly insufficient to establish a prima facie case of neglect because the caseworker's investigation disclosed that respondent neither used nor was under the influence of drugs in the child's presence.

*Matter of Jeffrey M.*, 102 AD3d 608 (1st Dept 2013)

### **Finding of Neglect Supported by Sufficient Evidence of Excessive Corporal Punishment**

Family Court, upon a fact-finding determination of neglect, placed the children Leah G. and Taqia T.G. in the custody of the Commissioner of Social Services until completion of the next permanency hearing. The Appellate Division affirmed the fact-finding determination and otherwise dismissed the appeal as moot due to the expiration of the dispositional order.

Family Court's fact-finding order determined that respondent mother neglected Leah, Taqia, and another of respondent's children, Tiara. The Appellate Division affirmed the neglect finding with respect to the child Taqia, and otherwise dismissed the appeal as superceded by the appeal from the order of disposition. The finding of neglect as to Leah was supported by a preponderance of the evidence that the mother inflicted excessive corporal punishment on Leah by beating her with a belt, and leaving a mark that was visible approximately one year later. Leah's out-of-court statements to the caseworker were corroborated by the caseworker's observation of the mark and the out-of-court statements of Tiara and Taqia. The findings of neglect as to Taqia and Tiara were also supported by a preponderance of the evidence. Those children told a caseworker that the mother inflicted a similar, although less severe, corporal punishment on them. The findings of neglect as to all three children also were supported by the evidence that the mother failed to pick Leah up from the police after she was arrested, behaved in an aggressive manner, and had been found guilty of neglect in prior proceedings.

*Matter of Tiara G.*, 102 AD3d 611 (1st Dept 2013)

### **Not Necessary to Pinpoint Time of Injury When the Abuse is Ongoing**

Family Court determined that respondents, parents and the nanny of the subject child, had abused the subject child and derivatively neglected the other children. The Appellate Division affirmed. The subject child suffered seven distinct fractures of her arms, legs and skull before reaching the age of five months. Family Court correctly rejected respondents' claim that a preponderance of the evidence standard required that the time of injury be pinpointed, since testimony from the pediatrician noted that the injuries suffered by the child would have resulted in "moderate malnutrition" lasting over a period of three months. Therefore, the abuse would have been ongoing and evident over a three-month time span, and all three respondents shared responsibility for the child's care during this time. As in the *Matter of Philip M.* (82 NY2d 238), when there are few and well-defined care-givers, a presumption of culpability extends to them all. Although the respondents denied culpability, none of them were able to establish that the child was not in his or her care

during the relevant time period.

*Matter of Matthew O.*, 103 AD3d 67 (1st Dept 2012)

**Finding Supported by a Preponderance of the Evidence**

Family Court adjudicated the children to be neglected by respondent father. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence, including testimony that respondent had left the 9- and 10-year-old children alone at night so that he could engage in a narcotics transaction, which resulted in his arrest. Further, during the five to six hours that respondent was in custody, he took no steps to ensure the children's safety. During this time, the children locked themselves out of their apartment and went to a stranger's apartment for help. Additionally, based on respondent's failure to testify, the court was permitted to draw the strongest negative inference against him.

*Matter of Rosemary V.*, 103 AD3d 484 (1st Dept 2013)

**No Basis to Disturb Court's Abuse Determination**

The Appellate Division found no reason to disturb Family Court's determination that respondent had abused the child for whom he was legally responsible. The finding of abuse was supported by a preponderance of the evidence. The subject child's out-of-court statements were sufficiently corroborated by both her sister's out-of-court statements to the caseworker, and her mother's testimony. The court's improper admission of largely irrelevant evidence relating to respondent's character, and improper denial of respondent's motion to obtain the subject child's school records, was harmless error.

*Matter of Sade B.*, 103 AD3d 519 (1st Dept 2013)

**Sufficient Evidence of Permanent Neglect Notwithstanding Respondent's Completion of Parenting Courses**

Family Court determined that respondent mother permanently neglected the subject children. The Appellate Division affirmed. The findings of neglect were supported by clear and convincing evidence.

Petitioner agency exercised diligent efforts to encourage and strengthen the parental relationship. Despite these efforts, respondent failed to plan for the children's future during the relevant time period. Indeed, the record showed that respondent failed to obtain suitable housing or complete a mental health examination, even though she was advised that her compliance with these services was required before the children could be returned to her care. Respondent did complete parenting courses. However, on several occasions during the relevant time period, she failed to call the agency or take the children to the hospital after they were injured despite the fact that the agency told her to do so because one of the children had a potentially fatal medical condition.

*Matter of Natasha Denise B.*, 104 AD3d 457 (1st Dept 2013)

**Neglect Finding Reversed Notwithstanding Delay in Obtaining Medical Attention for Child's Fractured Femur**

Family Court found that respondents neglected their five-month-old son. The Appellate Division reversed on the law and the facts, vacated the findings of neglect and dismissed the petition. Family Court correctly determined that petitioner established a prima facie case of neglect because a fractured femur was an injury that a five-month-old child would not ordinarily sustain except by reason of the acts or omissions of the parent or other person responsible for the child. Respondents rebutted the presumption of culpability with a credible and reasonable explanation of how the child sustained the injuries. While the father was disposing of a soiled diaper, the child, for the first time in his life, rolled over and fell off respondents' couch, which, according to medical experts, most likely caused him to incur a hairline fracture that later progressed to an oblique fracture. Further, the record did not support a finding of medical neglect notwithstanding the fact that the child sustained the injury on June 28, and did not receive medical attention until July 6. Although respondents' expert testified that even a hairline fracture would cause the child evident pain, respondents introduced into evidence a videotape that showed the child rolling over and moving his leg with no evident discomfort, which was received, without objection, as a fair and accurate representation of the

child on the morning of July 5. When the child repeatedly awoke in distress during the night of July 5, respondent mother called the pediatrician and was told, on July 6, to bring the child to the emergency room and respondents did so. Inconsistent statements in the medical records attributed to respondents did not tip the scales in petitioner's favor with respect to the neglect charges.

*Matter of Amir L.*, 104 AD3d 505 (1st Dept 2013)

### **Child's Testimony that Stepfather Kissed Her Using His Tongue Competent Evidence of Sexual Abuse**

Family Court found that respondent father sexually abused a child for whom he was legally responsible and derivatively abused his biological son. The Appellate Division affirmed. The child's testimony was competent evidence that respondent sexually abused her. The fact that she did not have a physical injury or that there was no corroboration of her testimony did not require a different result. Kissing his stepdaughter, while using his tongue, was legally sufficient evidence to establish sexual contact on the part of the stepfather within the meaning of Penal Law Section 130.00. Respondent failed to explain his conduct and rebut the evidence of his culpability. In addition, a preponderance of the evidence supported the conclusion that respondent derivatively abused his son because his stepdaughter testified that the child was present in the apartment and walked into the room while respondent was sexually abusing her.

*Matter of Jani Faith B.*, 104 AD3d 508 (1st Dept 2013)

### **Sufficient Evidence of Neglect**

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. Petitioner proved by a preponderance of the evidence that the mother neglected the child by reason of her untreated mental condition and failure to provide adequate supervision and guardianship, which placed the child at imminent risk of becoming impaired. The hospital records and caseworker's testimony indicated that the mother suffered from paranoid ideation and delusions. The caseworker also testified that the home was in deplorable condition, which the mother attributed to the lack of closet space, and that the child

had not seen a doctor or dentist in several years. In addition, the mother's testimony was unfocused. Petitioner was not obligated to prove that the child suffered past or present harm, since the evidence demonstrated that he was at risk of harm based on demonstrable conduct by the mother.

*Matter of Immanuel C.-S.*, 104 AD3d 615 (1st Dept 2013)

### **Respondent Mother Neglected Children by Leaving Them With 21-Year-Old Brother For Week Without Adequate Food, Clothing and Shelter**

Family Court found that respondent mother neglected her children. The Appellate Division affirmed. The court properly found that the children's physical, mental or emotional condition were in imminent risk of becoming impaired because the mother left the children, then ages 4 and 15, with their 21-year-old brother for a week without sufficient food, shelter or clothing. The court also properly found that the children were neglected based upon the mother's regular misuse of marijuana. The mother's entry into a drug treatment program after the relevant statutory period was unavailing.

*Matter of Elijah J.*, 105 AD3d 449 (1st Dept 2013)

### **Insufficient Evidence of Neglect - Petition Dismissed**

Family Court determined that respondent father neglected the subject child. The Appellate Division reversed. The findings of neglect, based upon two incidents, were not supported by a preponderance of the evidence. The statutory test for neglect is minimum degree of care – not maximum - and the failure to exercise that degree of care must be actual, not threatened. Here, the father's conduct during a sequence of events that resulted in the child being left alone overnight, while not ideal, did not fall below the statutory minimum degree of care. The other incident was an alleged domestic violence dispute between the parents, and it was unclear what the child witnessed. In any event, this single instance, while unfortunate, was not, standing alone, so egregious as to support a finding of neglect.

*Matter of Andy Z.*, 105 AD3d 511 (1st Dept 2013)

**Mother Neglected Child by Allowing Father Primary Decision-Making Authority Over Child Despite Father’s Untreated Mental Illness And Violence Toward Mother and Others**

Family Court found that respondent mother neglected the subject child and in a second order, upon respondent’s default, denied the mother’s petition for modification of the order of disposition. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. Despite evidence of the father’s untreated mental illness and aggressive and violent behavior towards the mother and others, the mother refused domestic violence services and would have allowed the father to have primary decision-making responsibility for the child’s care, placing the child in imminent danger of impairment. The court’s determination that the mother’s testimony that she denied telling anyone that she was frightened of the father was incredible, was given deference. The court properly granted the agency’s motion to amend the petition to conform to the proof. The mother had ample notice of the new allegations and an opportunity to respond. The appeal from the order of disposition was dismissed. No appeal lies from an order entered on default and there was no basis to vacate the default.

*Matter of Aaron C.*, 105 AD3d 548 (1st Dept 2013)

**Finding of Neglect Against Father for Excessive Corporal Punishment Affirmed**

Family Court adjudged that respondent neglected the subject child by use of excessive corporal punishment. The Appellate Division affirmed. Respondent’s frequent use of belts, cords and other objects, including an incident that left a scar on the child’s thumb, constituted excessive corporal punishment. The child’s testimony was sufficiently corroborated by the testimony of the agency’s caseworker and physical evidence, as well as respondent’s admission that she might have struck the child on the six or seven occasions that she attempted to discipline him with a belt.

*Matter of Joshua J P.*, 105 AD3d 552 (1st Dept 2013)

**Mother’s Failure to Address Substance Abuse Problem Supported Finding of Permanent Neglect**

The mother appealed from an order of fact-finding and disposition of the Family Court, which, after a fact-finding hearing, found that she permanently neglected the subject children and, after a dispositional hearing at which she failed to appear, terminated her parental rights and transferred guardianship and custody of the subject children to the Suffolk County Department of Social Services for the purpose of adoption. Since the mother did not appear at the dispositional hearing, those portions of the order which terminated the mother's parental rights and freed the subject children for adoption were entered upon her default and were not appealable. However, because the mother was present by telephone at the fact-finding hearing, she was permitted to appeal from those portions of the order which found that she permanently neglected the subject children. Upon reviewing the record, the Appellate Division found that the department of social services established that it made diligent efforts to assist the mother in securing substance abuse counseling and planning for her children's future by providing multiple referrals to substance abuse and mental health clinics and consistently attempting to maintain phone and letter correspondence with her both before and after her move to Arizona. Nonetheless, the mother failed to complete any substance abuse or mental health programs and failed to comply with a court-ordered hair follicle drug test. Accordingly, the Family Court properly found that the mother's failure to address her substance abuse problem supported the finding of permanent neglect. Orders affirmed.

*Matter of Carmine A.B.*, 101 AD3d 711 (2d Dept 2012)

**Family Court Properly Denied Mother’s Application for the Return of Her Child Pursuant to FCA § 1028**

The Family Court’s determination, made, after a hearing, pursuant to FCA § 1028 to (1) deny the mother’s application for the return of the subject child to her, and (2) extend the award of temporary custody to the father, was supported by the record. The evidence presented at the § 1028 hearing established that the mother interfered with the father's visitation with false allegations of abuse, and subjected the child

to unnecessary examinations by both a doctor and by the police in an effort to sustain her false allegations. There was no merit to the mother's contention that she was deprived of notice and an opportunity to be heard pursuant to FCA § 1027 when the subject child was removed from her custody and transferred to the temporary custody of the father by order of the Family Court. Due process is afforded to a parent by the procedure set forth in FCA § 1028 for the return of a child temporarily removed. Here, the Family Court fully afforded the mother that relief and, after a hearing pursuant to FCA § 1028, properly denied her application for the return of the child and properly extended the award of temporary custody to the father.

*Matter of Forrest S.-R.*, 101 AD3d 734 (2d Dept 2012)

### **Proof of Abuse of One Subject Child Was Sufficient to Establish Derivative Abuse of Four Other Subject Children**

In this case, the petitioner sustained its burden of proving by a preponderance of the evidence that the child, K.W., was an abused child, and the mother failed to rebut the petitioner's prima facie case of abuse with respect to that child (*see* FCA § 1046 [b] [I]). The proof of abuse of K.W. was sufficient to establish that the mother derivatively abused the four other subject children, who were either whole or half siblings of K.W. (*see* FCA § 1046 [a] [I]). Further, a preponderance of the evidence supported a finding that the mother neglected all the subject children (*see* FCA § 1012 [f] [i] [B]). The hearsay admitted into evidence at the fact-finding hearing, which consisted, inter alia, of caseworker progress notes and a child abuse evaluation redacted to contain only the statements of the subject children, was allowable pursuant to specific statutory provisions (*see* FCA § 1046 [a] [iv], [v], [vi]). That evidence, together with a negative inference drawn from the mother's failure to testify, was sufficient to support the Family Court's findings.

*Matter of Keijonte W.*, 101 AD3d 890 (2d Dept 2012)

### **Father Failed to Exercise Minimum Degree of Care to Ensure Mother Did Not Abuse Drugs During Pregnancy**

The Family Court's determination that the father

neglected the subject child was supported by a preponderance of the evidence (*see* FCA §§ 1012 [f] [i] [B]; 1046 [b] [i]). The evidence established, inter alia, that the father knew or should have known of the mother's drug use and failed to exercise a minimum degree of care to ensure that the mother did not abuse drugs during her pregnancy. The evidence further established that the father himself was a substance abuser. Accordingly, the Family Court properly determined that the father neglected the child.

*Matter of Keira C.*, 101 AD3d 993 (2d Dept 2012)

### **Child's Sworn In-court Testimony Sufficiently Corroborated Her Out-of-Court Description of Abuse**

The father appealed from a decision of the Family Court and an order of disposition of the same court, which, after fact-finding and dispositional hearings, and upon a finding that he had abused the child R.M., and had derivatively abused the other three subject children, directed that he not have contact with three of the children until their 18th birthdays, that he only have supervised visits with one of the subject children, and that he complete a sex offender program. Contrary to the father's contention, the Family Court's determination that he sexually abused the child R. M. was supported by a preponderance of the evidence (*see* FCA § 1012 [e] [iii]; PL § 130.55). The Family Court has considerable discretion in deciding whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports such a finding. Here, the child's sworn in-court testimony sufficiently corroborated her out-of-court description of the abuse.

*Matter of Josue M.*, 101 AD3d 1012 (2d Dept 2012)

### **Improper to Conduct Permanency Hearing in the Absence of Mother and Her Attorney**

The Appellate Division found that the Family court improperly conducted a permanency hearing in the absence of the mother and her attorney, as it deprived the mother of her fundamental right to counsel which also constituted a denial of due process. The court attorney referee proceeded with the hearing without making any inquiry as to whether the mother or

attorney were en route to the hearing or were actually somewhere in the building, and the mother's attorney moved to vacate the referee's determinations at the hearing on the same day, specifically asserting that he was in the building, had seen the assistant county attorney representing the petitioner in the matter, and was waiting for the case to be called, when the referee commenced the hearing. The orders were reversed, the motion to vacate was granted, and the matter was remitted to the Family Court for a new hearing before a different court attorney referee.

*Matter of Deshawn N.*, 101 AD3d 1013 (2d Dept 2012)

**Waiver of Right to Counsel Was Rendered Involuntary; Matter Remitted for New Fact-Finding**

In an order of fact-finding and disposition the Family Court, inter alia, found that the mother permanently neglected the subject child and was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child, terminated her parental rights, and transferred guardianship and custody of the subject child to the Administration for Children's Services for the purpose of adoption. The mother appealed from those portions of the order. In the same order, the Family Court, among other things, determined that the father's consent was not required for the subject child's adoption pursuant to DRL § 111(1)(d), and the father appealed from those stated portions of the order. Upon reviewing the record, the Appellate Division found that the Family court's failure to ensure that the mother's waiver of her right to counsel was made knowingly, intelligently, and voluntarily, when she sought to have her attorney relieved at a permanency hearing, rendered her waiver of her right to counsel involuntary, and warranted a remand for a new fact-finding hearing. Contrary to the father's contention, the Family Court properly determined that his consent to the subject child's adoption was not required under DRL § 111(1)(d), because he failed to maintain substantial and continuous or repeated contact with the subject child through the payment of support and either regular visitation or other communication with the child.

*Matter of Stephen D.A.*, 101 AD3d 1109 (2d Dept 2012)

**Mother's Motion to Terminate Placement of Her Child Was Properly Denied**

The Appellate Division found that the mother's motion which was pursuant to FCA § 1062, to terminate the placement of J.W., one of her children among others, who was in the custody of the Department of Social Services (DSS), was properly denied in light of the Family Court's prior finding, upon the mother's admission, that she had neglected J.W., and the mother's failure to demonstrate that termination of the placement of J.W. in the custody of DSS was in the child's best interests. Furthermore, contrary to the mother's contention, the initial failure by DSS to comply with the mandates of the Indian Child Welfare Act did not warrant the return of J. W. to her custody.

*Matter of Latisha C.*, 101 AD3d 1113 (2d Dept 2012)

**Error to Deny Petition to Continue Order of Disposition and Related Order of Protection Without a Hearing**

The petitioner, the Department of Social Services (DSS), filed a petition alleging that the father neglected the subject children, the appellants on this appeal, by regularly exploiting them in marital/custodial disputes and by engaging in harassing and aggressive behavior. After a hearing, the Family Court, in an order of disposition and a related order of protection, inter alia, adjudged that facts sufficient to sustain the petition had been established, released the children to the custody of the mother, placed the father under the supervision of DSS, and limited the father's contact with the children to supervised visitation. The order of disposition and related order of protection were subsequently extended. Thereafter, DSS filed a petition to further extend the period of supervision and order of protection, and, during the pendency of the proceedings, the matter was transferred to the Integrated Domestic Violence Part of the Supreme Court. The Supreme Court, inter alia, granted an application by the DSS to withdraw the pending petition and, in effect, denied, without a hearing, the children's motion pursuant to FCA § 1061 to modify and extend the order of disposition and the related order of protection of the Family Court. Under the circumstances presented here, the Supreme Court erred when it, in effect, denied the children's motion without conducting a hearing to determine whether they

demonstrated “good cause” to extend the prior orders of the Family Court and whether such extension was in their best interests. Accordingly, the order was reversed and the matter was remitted.

*Matter of Kevin M.H.*, 102 AD3d 690 (2d Dept 2013)

### **Family Court Properly Granted Mother’s Motion to Dismiss**

The Administration for Children's Services appealed from an order of the Family Court, which, after a fact-finding hearing, granted the mother's motion to dismiss the petitions. Upon reviewing the record, the Appellate Division found that under the circumstances of this case, the Family Court properly granted the mother's motion to dismiss the petitions. The petitioner failed to prove by a preponderance of the evidence that the mother's drug use caused impairment, or an imminent danger of impairment, to the physical, mental, or emotional condition of the subject children (*see* FCA §§ 1012[f] [i] [B]; 1046 [a]).

*Matter of Diamond J.*, 102 AD3d 784 (2d Dept 2013)

### **Mother’s Refusal to Comply with Medical Treatment Rendered Her Unable to Care for Her Newborn Child**

The Family Court properly determined that the Administration for Children's Services met its burden of proving that the mother neglected the child A.L. and derivatively neglected the child A.O.R., by refusing to cooperate with treatment during her hospitalization for her bipolar disorder (*see* FCA § 1012 [f] [i] [B]). The evidence presented established that after the mother gave birth to A. L., she was held in a psychiatric unit due to her psychotic symptoms, and refused to comply with treatment, including refusing to take the various antipsychotic drugs prescribed for her. Her failure to take the medications prescribed for her resulted in her exhibiting severe psychotic symptoms, which rendered her unable to care for her newborn child. Furthermore, because the mother's judgment demonstrated a fundamental defect in her understanding of the parental duties relating to the care of children, the court properly made a finding of derivative neglect as to the child A.O.R. (*see* FCA § 1046[a] [i]).

*Matter of Aamir L.*, 102 AD3d 786 (2d Dept 2013)

### **Record Did Not Support Finding of Neglect Based upon Mother’s Failure to Provide Acceptable Course of Treatment for Child**

The record revealed that the Family Court entered a finding of neglect based on the mother's failure “to cooperate with medical personnel to provide necessary medical care for the child's diagnosed mental illness.” Here, it was not established by a preponderance of the evidence that the mother failed to provide an acceptable course of treatment. There was no evidence that the mother's concerns regarding the medication recommended by the child's doctors, and her preference that the child be discharged to a private hospital, were anything but reasonable and appropriate. Moreover, the evidence did not establish that the child's physical, mental, or emotional condition was, or was in imminent danger of becoming, impaired as a result of the mother's failure to cooperate with medical treatment. The order of fact-finding and disposition was reversed, the petition was denied, and the proceeding was dismissed.

*Matter of Ariel P.*, 102 AD3d 795 (2d Dept 2013)

### **Child’s Out-of-Court Statements Sufficiently Corroborated**

Here, contrary to the mother's contention and the position of the attorney for the children, the Family Court's finding of neglect of the child was supported by a preponderance of the evidence (*see* FCA § 1012[f] [i] [B]). The child's out-of-court statements that his mother hit and scratched him were sufficiently corroborated by testimony from the child's caseworker and from two police officers, all of whom observed the child's injuries. Moreover, the nature of the subject child's injuries supported a finding of excessive corporal punishment. This evidence, together with the negative inference drawn from the mother's failure to testify, was sufficient to support the Family Court's finding.

*Matter of Joseph O'D.*, 102 AD3d 874 (2d Dept 2013)

### **Mother Presented Sufficient Satisfactory Evidence to Rebut Petitioner's Case**

Although the petitioner established a prima facie case of abuse, the Family Court erred in determining that the mother failed to come forward with sufficient satisfactory evidence to rebut the petitioner's case. The mother adduced evidence, through her expert, that the subdural hematoma and hemorrhage sustained by the subject child were not caused by another unexplained event, but rather were consistent with the same accidental trauma described by the mother. No other evidence was presented to support the allegation of abuse. The record reflected and it was undisputed, that the mother was a concerned parent who cared for her child. She was forthcoming and cooperative with the medical professionals attending her child as well as the petitioner's caseworkers. Witnesses testified that the mother was a loving and caring parent and she had no other history with child protective agencies. Thus, the petitioner failed to establish by a preponderance of the evidence that the mother abused the child. Order reversed.

*Matter of Tyler S.*, 103 AD3d 731 (2d Dept 2013)

### **Father Engaged in Act of Violence Against Mother in Child's Presence**

The father appeal from an order of fact-finding and disposition of the Family Court, which, after fact-finding and dispositional hearings, inter alia, determined that he neglected the subject child. The Appellate Division found, contrary to the father's contention, that a preponderance of the evidence established that he neglected the subject child, inter alia, by engaging in an act of domestic violence against the mother in the child's presence that created an imminent danger of impairing the child's physical, mental, or emotional condition (*see* FCA § 1012[f] [i] [B]). Order affirmed.

*Matter of Michael G.C.*, 103 AD3d 890 (2d Dept 2013)

### **Subject Children's Motion to Dismiss Petitions Against Mother Denied**

The subject children appealed from an order of disposition of the Family Court, which, after a fact-

finding hearing, upon the denial of that branch of their motion which was to dismiss the petitions against the mother pursuant to FCA § 1051(c) on the ground that the aid of the court was not required, upon a finding that the mother had neglected the children, and upon the denial of that branch of their motion which was for a suspended judgment pursuant to FCA §1053, inter alia, released them to the custody of the mother and the father under the supervision of the Administration for Children's Services (hereinafter ACS). Contrary to the children's contention, the Family Court did not improvidently exercise its discretion in denying that branch of their motion which was to dismiss the petitions against the mother on the ground that the aid of the court was not required. Despite the mother's successful completion of parental skills training and anger management counseling, the court properly found that some type of supervision was appropriate, especially since the mother never admitted responsibility for her daughter's injuries. Similarly, the Family Court did not improvidently exercise its discretion in denying that branch of the children's motion which was for a suspended judgment at disposition. “ ‘The paramount concern in a dispositional hearing is the best interests of the child. The factors to be considered in making the determination include the parent or caretaker's capacity to properly supervise the child, based on current information and the potential threat of future abuse and neglect’ ”. Under the circumstances presented in this case, particularly, in view of the mother's failure to admit responsibility, the Appellate Division could find no basis to disturb the Family Court's determination that it would not be in the children's best interests to enter a suspended judgment. Order affirmed.

*Matter of Phillips N.*, 104 AD3d 690 (2d Dept 2013)

### **Order denying Mother and Grandmother's Motions to Dismiss Reversed**

The record revealed that the grandmother of the seven-month-old subject child left the child in the kitchen sink with the water running, asking the child's mother, who was in the living room about 10 feet away, to watch the child while she went into the next room to retrieve a birth certificate for her other daughter. Moments later, while the mother and grandmother were outside the kitchen, the temperature of the water spiked and the

child sustained burns to his body. A neglect petition was filed against the mother and the grandmother, and, following a fact-finding hearing, the Family Court sustained the petition against both of them, finding that the mother and the grandmother had neglected the child by leaving him unattended in the sink with the water running, causing him to sustain burns over his body when the water temperature spiked. The mother and the grandmother separately moved to dismiss the petition insofar as asserted against each of them pursuant to FCA § 1051(c) on the ground that the aid of the court was not required. The court denied those motions. The mother and the grandmother appealed. Contrary to the contentions of the mother and the grandmother, a preponderance of the evidence presented at the hearing supports the Family Court's finding that they neglected the subject child. Nevertheless, although facts sufficient to sustain the petition were established, a neglect petition may still be dismissed if "the court concludes that its aid is not required on the record before it" (*see* FCA § 1051[c]). Under the circumstances of this case, the Family Court should have granted the separate motions of the mother and the grandmother to dismiss the petition pursuant to FCA § 1051(c). Following the incident, the mother completed all the services required by the Administration for Children's Services (hereinafter ACS), including therapy sessions and parenting classes, and ACS did not request that the mother complete any additional services. The grandmother, although not required to do so, also attended parenting classes with the mother. In January 2010, 18 months before the fact-finding hearing concluded, the child, upon ACS's consent, was returned to the mother. In the interim, ACS, during home visits, documented that the mother and the grandmother had taken steps to ensure that the child was not left unsupervised, and that he was bathed appropriately. ACS noted in its progress notes that it had no safety concerns. The mother stated that the pipes in her apartment building have been replaced and, as a result, the water temperature no longer fluctuates. The foregoing demonstrates that the incident on which the petition was based was an isolated one, that the mother and the grandmother have been rehabilitated, and that the child is no longer at risk of being neglected. Accordingly, since the aid of the court was no longer required to protect the child, the petition insofar as asserted against the mother and the grandmother should have been dismissed (*see* FCA §

1051[c]). The fact-finding order was affirmed. The order denying the separate motions of the mother and grandmother to dismiss the petitions was reversed, and the petitions were granted.

*Matter of Kayden H.*, 104 AD3d 764 (2d Dept 2013)

### **Mother Made Repeated Unfounded Allegations of Abuse Against Father**

The mother appealed from an order of the Family Court, which, after a fact-finding hearing, found that she had neglected the subject child, and, an order of disposition of the same court, which, after a dispositional hearing, inter alia, directed her to obtain a mental health evaluation and follow the recommended treatment. The Appellate Division found that the Family Court's determination that the mother neglected the child was supported by a preponderance of the credible evidence (*see* FCA §§ 1012[f][i][B]; 1046[b][i]). The evidence offered at the hearing established that the mother made repeated unfounded allegations of abuse against the father, resulting in the child undergoing multiple medical examinations and being interviewed by police officers and caseworkers. On certain occasions, the mother also withheld visitation from the father. After the child was removed from the mother's care, she continued to relentlessly scrutinize the child for signs of abuse during her supervised visitations with the child. Contrary to the mother's contentions, her actions were not those of a reasonable and prudent parent. Further, the Appellate Division found that the order of disposition, which required the mother to undergo a mental health evaluation, was in the best interests of the child. Orders affirmed.

*Matter of Salvatore M.*, 104 AD3d 769 (2d Dept 2013)

### **Child's Out-of-court Statements Regarding Father's Sexual Abuse of Her Were Sufficiently Corroborated**

The determination by the Family Court that the father sexually abused his then six-year-old daughter, S., was supported by a preponderance of the evidence (*see* FCA § 1046[b]). S.'s out-of-court statements concerning the father's sexual abuse were sufficiently corroborated, inter alia, by the testimony of S's cousin and half-sister,

who testified regarding the father's sexual abuse of them in a similar manner many years earlier (*see* FCA § 1046[a][vi]). Further, the father's abuse of S. demonstrated a flawed understanding of his duties as a parent and impaired parental judgment sufficient to support the Family Court's finding of derivative abuse of the subject child L. Order affirmed.

*Matter of Leah R.*, 104 AD3d 774 (2d Dept 2013)

**Child's Out-of-court Statement That Father Sexually Abused Her Was Sufficiently Corroborated by Expert Testimony**

Contrary to the father's contention, the Family Court's determination that he sexually abused the subject child was supported by a preponderance of the evidence. The subject child's out-of-court statement that her father had committed acts of sexual abuse upon her was corroborated by the testimony of an expert in clinical and forensic psychology, with a specialization in child abuse, who evaluated the subject child, and concluded that she exhibited behavior indicative of sexual abuse (*see* FCA § 1046[b][i]). Order affirmed.

*Matter of Amber C.*, 104 AD3d 845 (2d Dept 2013)

**Petitioner Not Barred from Bringing and Maintaining Article 10 Proceeding Against Mother Based upon Report Deemed Unfounded and Sealed by the Office of Children and Family Services**

The mother appealed from an order of fact-finding and disposition of the Family Court, which, after fact-finding and dispositional hearings, *inter alia*, found that she neglected the child M. and derivatively neglected the child I. Under the facts of this case, including the negative inference which the Family Court was entitled to draw against the mother upon her failure to testify at the fact-finding hearing, a preponderance of the evidence supported the Family Court's finding of neglect against the mother. As to the child having attained the age of 18 during the proceeding, the Family Court had jurisdiction to adjudicate the neglect petition, as it was commenced prior to the child's 18th birthday. Further, the petitioner was not barred from commencing and maintaining the FCA Article 10 proceeding against the mother based on the same set of facts contained in a report deemed unfounded and

sealed by the New York State Office of Children and Family Services. Order affirmed.

*Matter of Mylasia P.*, 104 AD3d 856 (2d Dept 2013)

**Evidence Supported Denial of Mother's Application for Return of Children**

The mother failed to preserve her due process argument for appellate review since she did not make this argument before the Family Court. In any event, upon reviewing the record, the Appellate Division found that the mother's contention that she was deprived of her due process rights was without merit. The Family Court fully afforded the mother due process by following the procedure set forth in FCA § 1028 for the return of a child temporarily removed. As to the merits of this case, the Appellate Division could find no basis to disturb the Family Court's assessment that the testimony of an ACS case worker, a guidance counselor at the oldest child's school, and a Legal Aid Society caseworker was credible, and that the mother's testimony was not credible. Further, the evidence was sufficient to support the court's denial of the mother's application pursuant to FCA § 1028 based upon its finding that the children's emotional, mental, and physical health would be at imminent risk if the children were returned to their mother's custody because of the mother's continued use of excessive corporal punishment. Moreover, the record demonstrated that the safer course was not to return the children to the mother's custody pending a full fact-finding hearing. Order affirmed.

*Matter of Deonna E.*, 104 AD3d 943 (2d Dept 2013)

**Father Neglected Children by Virtue of His Drug Use**

Contrary to the father's contention, Family Court's determination that he neglected C. and E. by virtue of his drug use was supported by a preponderance of the evidence (*see* FCA § 1046[a][iii]; [b][I]). Moreover, the conduct which formed the basis for the finding of neglect as to C. and E. was sufficiently proximate in time to the birth of G., to support a finding of derivative neglect as to G. The orders were affirmed.

*Matter of Chanel T.*, 104 AD3d 953 (2d Dept 2013)

### **Failing to Provide Home for Child Results in Neglect**

Family Court dismissed Article 10 petitions against the mother and found that she had not neglected her son or derivatively neglected her daughter. The Appellate Division affirmed the court's determination regarding the daughter, but reversed with respect to the son. The mother, who had disciplinary problems with her son, told him to leave her home and live somewhere else and refused to make reasonable efforts to work with petitioner so that he could return home. During this time period, the mother was parenting her daughter adequately and was capable of providing a home for her son. The record established that due to the mother's abdication of her parental responsibility, her son was in imminent danger of being homeless. When petitioner urged the mother to make plans or exert parental effort for her son, she opted instead to surrender her parental rights. Under such circumstances, the mother did not act as a reasonable and prudent parent. Additionally, the fact that the mother had initially sought assistance for her son's disciplinary problems did not foreclose a finding of neglect against her because thereafter she refused to act reasonably or cooperate with petitioner.

*Matter of Clayton OO.*, 101 AD3d 1411 (3d Dept 2012)

### **Father Neglected Children Because He Knew or Should Have Known Mother was Intoxicated While Driving Children Home**

Family Court adjudged that the mother had neglected the children by operating a motor vehicle with the children in the car, while under the influence of alcohol. It further determined that the father, who had been a passenger in the car, had neglected the children by allowing the mother to drive under such circumstances. The father appealed and the Appellate Division affirmed. The parties and children had attended a wedding reception before the incident. Although the father alleged that during the seven hours they were at the wedding reception he had not seen the mother drink alcohol or smell any alcohol on her breath, or see anything in her demeanor to suggest she was intoxicated, this contradicted the testimony of the arresting police officer, who stated that there was a "strong odor" of alcohol emanating from the car. Additionally, the mother admitted to operating a motor

vehicle with a BAC of .10%.

*Matter of DarcyY.*, 103 AD3d 955 (3d Dept 2013)

### **Error to Grant Summary Judgment Motion**

Petitioner filed a neglect petition against respondent father on behalf of two children, one his biological child. The allegations stemmed from respondent's arrest in Massachusetts, when the children were in his care, and criminal charges filed against him. The charges included intent to distribute narcotics, assault and battery on a police officer, resisting arrest and disorderly conduct. Furthermore, the children had to be taken to a hospital for suspected malnutrition and ringworm, and one child tested positive for marijuana. Thereafter, petitioner filed a motion for summary judgment, including as evidence the Massachusetts police and hospital reports and affidavits from two caseworkers. Family Court granted the motion but declined to consider the police and hospital reports as it found them to be inadmissible. The court determined that the remaining, general allegations of neglect were supported by an adverse inference against respondent due to his failure to submit to a court ordered mental health evaluation. The court determined that if respondent had submitted to the evaluation he would have been found to suffer from a mental illness or other emotional problem which needed treatment, but because he had failed to do so, he would not receive treatment and this resulted in his inability to provide proper care for the children. Thereafter at the dispositional phase, the court awarded the mother custody of the children based on the Article 6 petition filed by her. The Appellate Division reversed. Family Court committed error when it improperly granted the summary judgment motion, and denied respondent his right to sufficient notice. The court incorrectly based its finding on respondent's alleged untreated mental illness, without requiring petitioner to amend its petition or give respondent an opportunity to answer. While such a circumstance can be overlooked if sufficient proof is presented to sustain petitioner's original petition without considering the new allegations, that was not the case here. Although the court correctly declined to review the police and medical reports as they were submitted in an inadmissible form, the affidavits of the caseworkers alone failed to constitute affirmative proof of neglect

sufficient to satisfy petitioner's burden of proof.

*Matter of Aiden XX.*, 104 AD3d 1094 (3d Dept 2013)

### **Neglect Finding Affirmed**

Family Court found that respondent had neglected his paramour's son and daughter, and also neglected his twin infants. The Appellate Division affirmed. The paramour's son suffered a spiral tibial shaft fracture with bony fragments, including a large butterfly fragment when he and his sister were in the care of respondent. The evidence showed that the son's injury was consistent with a high energy accident requiring significant force, and was not, as respondent suggested, a fall down a typical flight of stairs. Additionally, respondent failed to learn to care for his twin infants, who due to their premature birth suffered serious health problems and spent four months in the Neonatal Intensive Care Unit (NICU). Among other things, respondent failed to visit the NICU as directed by medical staff in order to receive training on caring for his children, he did not visit the twins often, did not stay long when he did visit and rarely participated in such tasks as feeding them. On two occasions when he did visit, he became so explosively angry in the hospital, the staff became frightened and intimidated and security personnel had to intervene. The twins' treating physician wrote a letter describing her "grave concerns" over these incidents and respondent's minimal contact with the infants. Respondent, who was disabled, unemployed, suffered from ADHD, anxiety issues and had problems staying awake during the day, felt there was nothing special about the twins' medical needs.

*Matter of Izayah J.* 104 AD3d 1107 (3d Dept 2013)

### **Consent Orders Not Appealable**

Mother and her boyfriend were charged with neglect. The allegations included, among other things, engaging in acts of domestic violence in front of the child. The boyfriend appeared in court, with counsel, and in full satisfaction of the petition against him, consented to a no-contact order of protection on behalf of the child until she reached the age of 18. The boyfriend's subsequent appeal of the order was dismissed since it was entered upon consent. The Appellate Division

noted the appropriate action would have been to make a motion to vacate the underlying order.

*Matter of Gabrielle S.*, 105 AD3d 1098 (3d Dept 2013)

### **Sufficient Evidence to Find Mother Had Neglected Children**

The record amply supported Family Court's determination that the mother had neglected her children. Although the mother claimed she was a victim of domestic violence and her husband had instigated the domestic violence incident, there was also evidence that the mother, among other things, was observed chasing her husband while wielding a baseball bat and had struck him with it. Additionally, the mother minimized the husband's conduct by attempting to have the criminal charges against him dropped, partially blamed the children for his conduct, violated a court order by allowing the husband back into her home while at least one child was in the home, and instructed the child to keep the husband's presence a secret. There was also evidence of educational neglect against the mother. One of her children, who had special needs, had extensive absences from school and was repeatedly tardy but the mother failed to cooperate with school officials.

*Matter of Anthony FF.*, 105 AD3d 1273 (3d Dept 2013)

### **Children's Statements Sufficiently Corroborated; Strongest Possible Negative Inference Drawn Against Father for Failure to Testify**

Family Court adjudged that respondent father neglected two of his children and derivatively neglected three others. The Appellate Division affirmed. The out-of-court statements of respondent's two children were sufficiently corroborated by their "cross statements," the photographic evidence of their injuries, and the caseworker's testimony. Moreover, the court properly drew the strongest possible negative inference against the father for his failure to testify at the fact-finding hearing. The court's finding of neglect was justified on the record, as was its finding of derivative neglect. The admission of evidence relating to an order of protection that father contended was not in effect was not material to the court's ultimate finding of neglect. Thus, any error in its admission was harmless.

*Matter of Brittany W.*, 103 AD3d 1217 (4th Dept 2013)

### **Mother's Appeal from Order Temporarily Removing Children Dismissed as Moot**

Family Court denied the application of respondent mother pursuant to Family Court Act § 1028 for the return of the subject children who were temporarily removed from her custody. The Appellate Division dismissed the mother's appeal as moot. A final order of disposition was entered while the appeal was pending, which found the children were neglected and placed them in petitioner's custody. The appeal was mooted for the further reason that the order of disposition expired during the pendency of the appeal, and the children were returned to the mother's custody. Contrary to mother's contention, the case did not fall within the exception to the mootness doctrine. Although there may be additional Family Court Act § 1028 hearings with respect to this family, the circumstances addressed in each application were fact-specific; the issue raised did not typically evade review; and the issue raised was not substantial or novel.

*Matter of Angel C.*, 103 AD3d 1246 (4th Dept 2013)

### **Mother Failed to Rebut Prima Facie Evidence of Educational Neglect**

Family Court adjudicated respondent mother's children to be neglected based on her failure to supply them with an adequate education. The Appellate Division affirmed. Petitioner met its burden of establishing educational neglect by a preponderance of the evidence. Proof that a minor child did not attend a public or parochial school in the district where the parent resided made out a prima facie case of educational neglect pursuant to § 3212 (2) (d) of the Education Law. Unrebutted evidence of excessive school absences was sufficient to establish educational neglect. Petitioner submitted the children's school records and the testimony of the caseworker, which established that each child had a significant, unexcused absentee rate that had a detrimental effect on each child's education. The mother failed to present evidence that the children attended school and received the required instruction in another place, or to establish a reasonable justification for the children's absences. Thus, the mother failed to rebut the prima facie evidence of educational neglect.

*Matter of Gabriella G.*, 104 AD3d 1136 (4th Dept 2013)

### **Sufficient Evidence of Sexual Abuse of Two Children and Derivative Neglect of Another Child**

Family Court determined that respondent father sexually abused two of his children and derivatively neglected another child. The Appellate Division affirmed. The findings of sexual abuse were supported by a preponderance of the evidence. Although the court erred in admitting in evidence the written report of a social worker who performed sexual abuse assessments because it contained prior consistent statements that bolstered her trial testimony, the error was harmless because it did not appear from the record that the court relied on the report in its decision.

*Matter of Arianna M.*, 105 AD3d 1401 (4th Dept 2013)

### **Neglect Adjudication Against Father Reversed**

Family Court adjudged that respondent father neglected his child. The Appellate Division reversed. The only evidence of domestic violence presented by petitioner consisted almost entirely of out-of-court statements made by the mother to a police officer and caseworkers. Those statements were not admissible against the father absent a showing that they came within an exception to the hearsay rule. Petitioner's theories for admissibility of the hearsay statements were not reviewed because they were not advanced at the fact-finding hearing. The nonhearsay evidence was insufficient to establish that the child's physical, mental or emotional condition was impaired or in danger of becoming impaired as a consequence of the father's conduct. Respondent was not denied effective assistance of counsel.

*Matter of Nicholas C.*, 105 AD3d 1402 (4th Dept 2013)

## **CHILD SUPPORT**

### **Upward Modification of Interim Child Support Affirmed**

Supreme Court, among other things, granted plaintiff mother's motion to increase interim child support from \$2,000 to \$3,000 per month, and denied defendant father's cross motion to suspend interim child support

payments and direct plaintiff to reimburse him for all child support payments related to a former nanny. The Appellate Division affirmed. There were no exigent circumstances warranting disturbance of the modified interim award. The court properly directed the parties to supplement their motion papers with updated financial statements. In any event, the court did not base the upward modification in interim child support on the parties' updated financial information; it based the modification on the substantial change in circumstances represented by the reduction in defendant's interim visitation schedule from two to three days per week to one two-hour supervised visit per week.

*Strauss v Saadatmand*, 101 AD3d 573 (1st Dept 2012)

#### **Motion to Vacate Order of Support, Entered Upon Default, and Judgment for Support Arrears Properly Denied**

Family Court denied respondent father's objection to an order of a Support Magistrate denying his motion to vacate an order of support, entered upon default, and a judgment for child support arrears in the amount of \$31,826.56. The Appellate Division affirmed. Respondent failed to demonstrate a reasonable excuse for his default. Before the date of the support hearing, respondent was present in court and advised that he needed to document his financial condition on the next court date or the support order would be based on the children's needs on a public assistance budget, pursuant to Family Court Act Section 413 (1) (k). Nonetheless, respondent failed to appear at the support hearing. Although he was incarcerated at the time of the hearing, he took no action to notify the court of his unavailability. Respondent also failed to present a meritorious defense, since he never established his income for the period before the date of the default order. The court correctly declined to cancel, reduce or otherwise modify the child support arrears that accrued before respondent's filing of an application for that relief. No grievous injustice resulted from this determination, because respondent's financial hardship was the result of his wrongful conduct that led to his incarceration.

*Matter of Commissioner of Social Servs. v Kastriot*, 101 AD3d 574 (1st Dept 2012)

#### **Court's Award of Child Support Proper**

Family Court partially granted the mother's objections to the Support Magistrate's order by increasing the award of child support from \$1842 per month to \$3,000 per month, directed that the child be removed from New York State's "Child Health Plus" health care plan and placed on the father's private health insurance plan, directed the father to pay 85% of the child's daycare and un-reimbursed medical expenses, ordered the father to name the child as a beneficiary in his life insurance policy for a specific amount, and also ordered the mother be named as trustee of the child's life insurance policy until the child turned 21 years of age. The Appellate Division affirmed. Based on the mother's imputed income of \$109,210.31, and the father's imputed income of \$616,000.09, the court properly determined that pursuant to FCA §413 [1], it would be "unjust or inappropriate" to apply the statutory percentage to all of the combined income in excess of \$130,000. The court's award of \$3,000 per month in child support was sufficient to satisfy the child's "actual needs" and afford him an "appropriate lifestyle". Family Court's refusal to award the mother child care expenses incurred during overseas travel with her mother and child, as well as its refusal to order the father to pay for prospective private school expenses for the then toddler child, was proper.

*Matter of Vulpone v Rose*, 103 AD3d 416 (1st Dept 2013)

#### **Motion to Vacate Untimely and Cannot Be Used as a Substitute for an Appeal**

Family Court denied respondent father's motion to vacate an order of child support. The father's motion was filed almost 4 ½ years after issuance of the support order. The Appellate Division affirmed. The father's motion was unreasonable given the delay in moving to vacate the order despite the fact that he was aware of all the relevant facts surrounding the case. Moreover, the father abandoned his appeal from the Family Court order by filing a motion to vacate the court order pursuant to CPLR § 5015, instead of filing an appeal. Such a motion cannot serve as a substitute for an appeal, or remedy an error of law that could have been addressed on a prior appeal.

*Matter of Angela P. v Floyd S.*, 103 AD3d 439 (1st Dept 2013)

### **Court Properly Denied Father's Motion to Vacate**

Family Court denied respondent father's motion to vacate an order of support, which dismissed with prejudice his petition to terminate child support, and found his objection untimely. While the Appellate Division affirmed the court's order, it determined respondent's objection was timely because the record did not establish that the underlying order, from which he was appealing, was served upon him with a notice of entry. However, the Appellate Division determined that the Support Magistrate had properly dismissed respondent's petition. Respondent failed to establish that the subject child had resided with the paternal grandmother and not the mother during the relevant period. Additionally, respondent's argument that his child support should have been retroactively reduced was not properly before the Court since it was raised for the first time on appeal.

*Matter of Reid v Moodie*, 103 AD3d 441 (1st Dept 2013)

### **Invalidity of Child Support Provision Invalidated Entire Settlement Agreement**

The Appellate Division reversed Supreme Court's order, which partially enforced a settlement agreement between the parties. The agreement contained a provision for child support. The parties had opted out of the basic child support obligation, but failed to include the necessary language pursuant to FCA § 413[1][h], which required any agreement which sought to opt out of the basic child support obligation, to include a provision stating that the parties had been advised of the provisions of the CSSA, the amount the basic child support obligation would have been and the reason(s) for the deviation. Although the invalidity of the support provision alone did not necessarily mean the entire agreement had to be invalidated, in this case, the provisions pertaining to child support constituted the main objective of the agreement or bargained-for consideration, which had induced one of the parties to agree to the remainder of the agreement. Thus, the entire settlement agreement was invalid.

*David v Cruz*, 103 AD3d 494 (1st Dept 2013)

### **Court's Order of Child Support Affirmed**

Family Court denied respondent father's objections to an order of child support, which directed he pay \$675.00 bi-weekly. The Appellate Division determined that the Support Magistrate had properly imputed income to the father, gave due deference to the Support Magistrate's credibility determinations, and affirmed. The father, who worked as an accountant for an entity where his brother was the director, failed to include as income \$110,000 in his bank account. The father alleged the amount was a loan from his brother but this was not reflected as a loan on his tax return. Additionally, the father failed to include as income, money in a bank account which he held jointly with a board member of the entity where his brother was director. Further, in assessing the veracity of the father's testimony regarding his limited income, the Support Magistrate properly took into consideration the father's M.B.A. degree, and correctly refused to take into consideration the father's support payments for two non-subject children given the evidence in the record that he lived at the same residence as these two children along with their mother.

*Matter of McElhaney v Okebiyi*, 103 AD3d 544 (1st Dept 2013)

### **Respondent's Failure to Present Credible Proof is Basis to Deny Her Objections**

Family Court denied respondent mother's objections to the Support Magistrate's order of support. The Appellate Division affirmed. Respondent failed, despite multiple opportunities, to present credible proof of her income. She testified she worked washing hair in a beauty salon when in fact she was the sole proprietor of the salon. She filed two financial affidavits within months of each other, with her expenditures significantly lower on the second one, and far in excess of her reported income. Under these circumstances, the Support Magistrate was not bound to determine her income solely from her tax returns and properly set support based on the children's needs.

*William P. v Yojacni P.*, 103 AD3d 552 (1st Dept 2013)

### **No Basis to Modify Child Support Arrears Order**

Family Court denied petitioner father's objection to a prior order, marking as withdrawn the father's petition to modify or vacate an order setting his child support arrears at \$714. The Appellate Division affirmed. There was no basis to modify the prior order. The father failed to submit evidence that his income was less than or equal to the poverty income guidelines. The cash withdrawals from the bank account he held jointly with the mother, which the father claimed showed that the mother received payments to care for the child, were well after the relevant time period of the arrears determination. Here, the application of the statutory prohibition against modification of the arrears determination would not result in a grievous injustice. The Support Magistrate adequately advised the father of his right to counsel and was not required to advise the father of the dangers of proceeding pro se.

*Matter of Randolph W. v Commissioner of Social Servs.*, 105 AD3d 414 (1st Dept 2013)

### **Father Failed to Rebut Evidence of His Willful Violation of Support Order**

Family Court affirmed the Support Magistrate's finding of respondent father's willfulness and sentenced respondent to incarceration for a period not to exceed four months with a purge amount of \$5000. The Appellate Division affirmed. Although respondent paid the purge amount and completed his sentence, the appeal was not academic because enduring consequences might flow from the finding that he violated the support order. However, the father failed to rebut the prima facie evidence of his willful violation.

*Matter of April G. v Duane M.*, 105 AD3d 491 (1st Dept 2013)

### **Court Properly Determined Child Support Award**

Family Court denied respondent father's objection to the Support Magistrate's imputation to him of income based on the value of his employer-provided apartment, and in another order, denied his objections to the parts of the Support Magistrate's order of support requiring him to pay \$476.49 per week in child support, applying the child support percentage to the parties' combined

income above \$130,000 and requiring him to pay a pro rata share of the child's kindergarten tuition. The Appellate Division affirmed. Although respondent contended that the child's needs were met by the statutory amount of the first \$130,000 of combined parental income, the record showed that the child's pre-school tuition and allocated housing cost alone, excluding food clothing and all other expenses, were almost equal to that amount. Respondent was not entitled to a credit for his "extraordinary expenses" in connection with his visitation with the child. The court properly imputed income to respondent based upon the fair market value of his employer-provided apartment. The record showed that respondent had a separate office in the same building, that he was not required to be on the premises after completing his 9 to 5 shift, that he used the apartment for his daily living activities, and that he was not restricted in any way in the use of the apartment. The record supported the Support Magistrate's finding that respondent consented to enrolling the child in a private pre-kindergarten program. He admitted that before enrolling the child in the school he and petitioner had looked at several other private schools. Respondent did not sign the enrollment contract, but he was aware that petitioner made a non-refundable deposit to reserve the child's place.

*Matter of Perel v Gonzalez*, 105 AD3d 552 (1st Dept 2013)

### **Father Failed to Rebut Evidence of His Willful Violation of Support Order**

Family Court denied respondent father's objection to an order of the Support Magistrate denying his petition for a downward modification of the support order and granting the mother's petition for an upward modification. The Appellate Division affirmed. Although respondent presented evidence that he was terminated from his job after taking an extended medical leave, he failed to establish that he used his best efforts thereafter to obtain employment commensurate with his qualifications and experience, sufficient to show that his loss of employment constituted changed circumstances. Petitioner established a decrease in her salary and that her rent, child care, and food expenses had increased, sufficient to show changed circumstances warranting an upward modification.

*Matter of Bianca J. v Dwayne A.*, 105 AD3d 574 (1st Dept 2013)

### **Support Magistrate's Reasoning for Excluding Medical Documentation Was Not Valid**

The father appealed from an order of the Family Court which denied his objection to an order of the same court which, after a hearing, determined that certain medical documents were inadmissible and, thereupon, dismissed his petition for a downward modification of his child support obligations. Upon reviewing the record, the Appellate Division found that contrary to the Support Magistrate's reasoning, since the original documents were destroyed by the Family Court through no fault of the father, and since the father subpoenaed the documents from the same physician, there was no basis to exclude the documents on the ground that the attached certification failed to clarify whether the newly subpoenaed documents were exact duplicates of those previously offered into evidence. The issue that was to be decided by the Support Magistrate was not whether the father could prove that the documents produced by his physician pursuant to the most recent subpoena were exactly the same documents which had initially been subpoenaed for the first hearing, but whether the documents then before the Family Court were admissible, in whole or in part. There may be other valid reasons for excluding or redacting portions of those newly subpoenaed medical documents, such as some of the documents being medical reports and not medical records, certain medical records pre-dating the accident referred to in the petition, or certain medical records post-dating the original hearing. With respect to those documents which are found to be medical records, if any portion of a record is deemed illegible, the medical record as a whole is not inadmissible. Rather, only those entries or notations within the record that are illegible should be deemed inadmissible. Accordingly, Appellate Division reversed the order, and remitted the matter for a new determination of the admissibility of the subject medical documents and, thereafter, a new determination of the petition.

*Fortunato v. Murray*, 101 AD3d 872 (2d Dept 2012)

### **Family Court Improperly Modified Canadian Order**

Under the Uniform Interstate Family Support Act (hereinafter the UIFSA), which New York has adopted as Article 5-B of the Family Court Act, a state may not modify an issuing state's order of child support unless the issuing state has lost continuing, exclusive jurisdiction, or the parties consent to a modification. The Appellate Division found that in this case, although the UIFSA did not expressly apply to the Canadian order, since Ontario is not a "state" within the meaning of that statute (*see* FCA § 580-101[19]), the equitable principles embodied therein, as well as traditional common-law principles of comity, require New York courts to enforce the terms of a child support order or judgment entered in the courts of a foreign nation, "absent some showing of fraud in the procurement of the judgment or that recognition of the judgment would do violence to some strong public policy of this State". Here, the record revealed that upon reargument, the Family Court, in effect, adhered to its prior determination denying the mother's objection to the determination of a support magistrate denying that branch of the petition which was for an award of interest at the rate of 6% per annum on unpaid child support arrears that had accrued over the period from April 13, 2010, to June 13, 2011, in the principal sum of \$16,642.15. In doing so, the Family Court, in effect, improperly modified the Canadian order, notwithstanding the facts that the courts of Ontario have not lost continuing, exclusive jurisdiction over the matter, the parties did not consent to the modification, and there was no showing that the Canadian order was procured by fraud or that recognition of that order would do violence to some strong public policy of New York. Since the mother's request for an award of interest at the rate of 6% per annum on these arrears should have been granted, the arrears in the amount of \$16,642.15 that were awarded by the Family Court must bear interest at a rate of 6% per annum, as directed in the Canadian order.

*Jasen v. Karassik*, 101 AD3d 874 (2d Dept 2012)

### **Child Support Not Properly Calculated**

Contrary to the plaintiff's contentions, the Supreme Court providently exercised its discretion in awarding the plaintiff 25% of the value of the defendant's interest in the plaintiff's company. Here, the 25% share "takes into account the plaintiff's minimal direct and indirect

involvement in the defendant's company, while not ignoring her contributions as the primary caretaker for the parties' children, which allowed the defendant to focus on his business". However, the Supreme Court failed to properly calculate child support pursuant to the Child Support Standards Act (*see* DRL § 240 [1-b]). The Court also improperly deducted the distributive award from the defendant's income, a deduction that is not recognized in the Child Support Standards Act (*see* DRL § 240 [1-b] [b] [5] [vii] [A]-[H]). Further, the record indicates that the Supreme Court improperly capped the defendant's income at \$125,000, which was below the statutory ceiling of \$130,000 that became effective on January 31, 2010 (*see* DRL § 240 [1-b] [c] [2]; SSL § 111-i [2] [b]). Accordingly, the matter was remitted for a recalculation of the defendant's child support obligation.

*Elias v Elias*, 101 AD3d 938 (2d Dept 2012)

#### **Evidence Relied upon by Mother Predated the Judgement of Divorce**

Here, the Support Magistrate properly found that the mother failed to meet her burden of establishing a substantial change in circumstances. Notably, the mother's allegations that the father was living a more lavish lifestyle than he disclosed in his financial disclosure affidavit was based on evidence which predated the judgment of divorce. Accordingly, the Family Court properly denied the objections to the order dismissing the petition for an upward modification of child support.

*Matter of Ngo v Quach*, 101 AD3d 1011 (2d Dept 2012)

#### **Upward Modification Warranted**

The substantial increase in the father's income, plus the mother's evidence of specific increased expenses, warranted an upward modification of the father's child support obligation. Here, the Support Magistrate properly calculated the father's child support obligation, using the income reported on his most recent tax return (*see* DRL § 240 [1-b] [b] [5]).

*Matter of Papenhausen v Sudbrink*, 101 AD3d 1020 (2d Dept 2012)

#### **Father Failed to Establish That Child Was Constructively Emancipated**

Contrary to the father's contention, he failed to meet his burden of establishing that his oldest child was constructively emancipated. The proof submitted by the father in support of his motion failed to demonstrate that he made sufficient attempts to maintain a relationship with the child, or that the child abandoned the relationship with him.

*Schulman v Schulman*, 101 AD3d 1098 (2d Dept 2012).  
Order affirmed.

#### **Judgment of Divorce Modified**

Here, given the defendant's earnings history from his private medical corporations, and his current employment as a medical doctor, the Supreme Court providently exercised its discretion in imputing an annual income to the defendant of \$135,000 for the purpose of calculating his child support obligation. However, the Supreme Court should have directed that his child support obligation be decreased by the amount of any college room and board expenses he incurs while the parties' child attends college. Further, the Supreme Court should have allowed the defendant to secure his child support obligations by maintaining a declining term policy of life insurance rather than requiring him to maintain the existing policy coverage of \$1,400,000. Judgment modified.

*Sotnik v Zavilyansky*, 101 AD3d 1102 (2d Dept 2012)

#### **Mother Not Deprived of Right to Counsel**

Contrary to the mother's contention, under the circumstances of this case, she was not deprived of her right to counsel (*see* FCA § 262 [a] [vi]). Moreover, the Support Magistrate providently exercised her discretion in denying the mother's request for an adjournment (*see* FCA § 435[a]). The mother was repeatedly informed that, if she did not appear with counsel, the hearing would continue without any additional adjournments. Order affirmed.

*Matter of Albert v Albert*, 101 AD3d 1112 (2d Dept 2012)

### **Father Not Entitled to Downward Modification**

Here, the record supports the Support Magistrate's determination that the father did not testify credibly regarding the reasons and circumstances surrounding his departure from his former employment. Further, contrary to the father's contention, he failed to adduce sufficient credible evidence to satisfy his burden of establishing that he lost his employment through no fault of his own and that he diligently sought re-employment commensurate with his earning capacity. Thus, the Family Court properly denied the father's objections to the Support Magistrate's finding that the father was not entitled to a downward modification of his child support obligation.

*Matter of DaVolio v DaVolio*, 101 AD3d 1120 (2d Dept 2012)

### **Record Supported Finding That Father Willfully Violated Child Support Provisions of Divorce**

The Family Court properly confirmed the Support Magistrate's finding that the father willfully violated the child support provisions of the parties' judgment of divorce. The mother's prima facie showing that the father owed approximately \$100,000 in child support arrears shifted the burden to the father to come forward with competent, credible evidence that his failure to pay child support in accordance with the terms stipulated to, and incorporated in, the parties' 2002 judgment of divorce was not willful. The father failed to satisfy that burden.

*Marra v. Hernandez*, 102 AD3d 699 (2d Dept 2013)

### **Family Court Properly Declined to Allocate Total Amount of Child Support Arrears Set Forth in Pendente Lite Order**

In a child support proceeding pursuant to the Uniform Interstate Family Support Act (Family Ct Act art 5-B), the petitioner appealed from an order of the Family Court, which denied her objection to an order of the same court, which failed to award child support arrears. The petitioner argued that the Family Court erred in failing to award child support arrears which were allegedly due and owing pursuant to a pendente lite order of the Supreme Court. The Appellate Division

disagreed. Where, as in this case, a court fails to allocate specific amounts for maintenance and child support, the proper action is for the matter to be redetermined by the court that issued the order. Thus, the Family Court properly declined to allocate the total amount set forth in the pendente lite order or to award arrears at that time, as the pendente lite order was not issued by it. Order affirmed.

*Fixman v Fixman*, 102 AD3d 783 (2d Dept 2013)

### **Downward Modification Not Warranted**

The plaintiff appealed from an order of the Supreme Court which granted the defendant's motion for a downward modification of his child support obligation. The record revealed that the defendant sought modification of a child support obligation contained in a stipulation of settlement. To obtain such relief, the defendant was required to demonstrate "a substantial and unanticipated change in circumstances since the entry of the judgment of divorce". Here, the record demonstrated that the defendant's financial difficulties were the result of his intentional criminal conduct and subsequent incarceration. Moreover, although the defendant averred that he was forced to shut down his businesses in 2007 due to a federal criminal investigation, and at some point began cooperating with the federal government, he did not aver that the federal authorities prevented him from obtaining any other form of employment or from earning income prior to his incarceration in 2011. Nonetheless, the defendant did not offer any evidence of efforts he made during those years to earn money. Indeed, the evidence showed that during that time the defendant simply continued to deplete a child support reserve held in escrow without replenishing it, even though he was required by the terms of the parties' stipulation to replenish the account. Accordingly, under the circumstances of this case, the defendant failed to show a substantial and unanticipated change of circumstances warranting a reduction of his child support obligation. The defendant's motion should, therefore, have been denied.

*Anderson v Anderson*, 102 AD3d 822 (2d Dept 2013)

### **Child Support Award Should Have Been Based upon Total Combined Parental Income**

The defendant argued, inter alia, that the Supreme Court should have calculated the plaintiff's child support obligation based upon the combined parental income in excess of \$130,000. Upon reviewing the record, the Appellate Division found that in view of the standard of living enjoyed by the children during the marriage, and the earnings and assets of the parties, it was appropriate for the child support award to be based upon the total combined parental income. The Court could find no basis to limit the child support award to the statutory cap of the first \$130,000 of combined parental income. Accordingly, the judgment was modified.

*Heymann v Heymann*, 102 AD3d 832 (2d Dept 2013)

### **Mother's Express Waiver Was Valid and Enforceable**

The parties were divorced in 2004 and the mother was awarded residential custody of their three children. The father was directed to pay biweekly child support to the mother in the sum of \$522. In September 2008, the parties' child H. began living with the father. The parties' two other children, at various times from 2008 until the date of the petition, also lived with the father. In November 2010, the father petitioned for a termination of the child support order on the ground that the children, in fact, resided with him. The parties thereafter agreed that the child support payments from the father to the mother should cease on the ground that the father had residential custody of the children. Accordingly, the Family Court terminated the child support order. The mother subsequently filed a petition to recover child support arrears in the sum of \$15,314. After a hearing, the Support Magistrate granted the petition and fixed the father's child support arrears in the sum of \$15,314 for the parties' three children. The father objected on the ground that the mother had waived prospective child support payments after the children began living with him. The Supreme Court denied the father's objections. Here, the record demonstrated, and the mother did not dispute, that H., one of the parties' three children, lived with the father beginning in September 2008. The father presented a letter dated September 28, 2008, which was signed by the mother, in which the parties agreed that the mother would not seek child support for H. and that the father, in turn, would not seek child support from the mother.

Contrary to the Support Magistrate's contention, the mother's express waiver of her future child support payments for H. was valid and enforceable. However, the evidence adduced at the hearing did not warrant the conclusion that the mother waived her future child support payments as to the parties' other two children. Thus, the order was modified, and the matter was remitted for a recalculation of the amount of the father's child support arrears.

*Matter of Tafuro v Tafuro*, 102 AD3d 877 (2d Dept 2013)

### **In Calculating Child Support Court Erred When it Deducted FICA Taxes from Plaintiff's Income**

In calculating the plaintiff's share of child support under the Child Support Standards Act (CSSA) DRL § 240[1-b]), the Supreme Court first deducted a certain amount from her income for Federal Insurance Contributions Act (*see* 26 USC subtit C, ch 21; hereinafter FICA) taxes. However, in this case, the plaintiff's sole source of income was the spousal maintenance to be paid to her by the defendant. Since FICA taxes should be deducted only from income upon which FICA taxes are "actually paid" prior to applying the provisions of DRL § 240(1-b) (c) (DRL § 240 [1-b] [b] [5] [vii] [H]), and since FICA taxes are not paid from amounts received for maintenance, the Supreme Court's calculations were erroneous. Judgment modified.

*Kaufman v. Kaufman*, 102 AD3d 925 (2d Dept 2013)

### **Child Not Restricted to Attendance of a State University School**

The record revealed that the parties' judgment of divorce provided, in relevant part, that "pursuant to the stipulation dated July 1, 1996, both the Plaintiff and the Defendant agree to contribute not more than 50% of the cost of a SUNY tuition fees and miscellaneous expenses that would ensue if the child were to attend a State University School. This is not to restrict the child to attendance of a State University school, but is meant only to put a cap on the respective parties' obligation to contribute to the cost of that child's college education." The parties' son enrolled in a private university in August of 2010. The cost to attend the subject university was approximately \$46,394 for the

2010–2011 school year, and \$49,463 for the 2011–2012 school year. The child was awarded a scholarship and grants. To cover the balance of tuition, the child secured several loans, and the mother made additional payments. In May 2011, the mother commenced a proceeding alleging a violation of the support provisions of the judgment of divorce, and seeking a direction that the father, inter alia, pay his share of the child's college expenses. The Family Court, after a hearing, found that the father's share of college expenses from August 2010 through December 2011 was \$2,615. The mother appealed. The Appellate Division found that under the circumstances of this case, the father's share of college expenses for the child should have been based on the total cost of tuition, room and board, college fees, and books and miscellaneous expenses as estimated by the university attended by the child, less only the sum of all nonrepayable scholarships, grants, and work-study payments or credits. Based on the evidence submitted at the hearing, the father was obligated to pay the principal sum of \$15,187, which represented his pro rata tuition obligation accrued from August 2010 through December 2011. Order modified.

*Rashidi v Rashidi*, 102 AD3d 972 (2d Dept 2013)

**Change of Circumstances Need Not Be Substantial as Modification Sought Was Not Based on Agreement Between the Parties**

The record revealed that the Support Magistrate concluded that mother failed to establish grounds for an upward modification of the father's child support obligation because she did not demonstrate that her income plus the current child support award were not sufficient to meet the child's needs. However, where a party is seeking to modify a prior court order of child support, which is not based on an agreement between the parties, the movant need only demonstrate a substantial change in circumstances, defined as a change of circumstances “sufficient to warrant a modification”. Here, the significant increase in the father's income over the last decade, and the increase in the child's expenses since the original order of support was entered, warranted a new determination of child support pursuant to the Child Support Standards Act (see FCA § 413). Order reversed.

*Matter of Braun v Abenanti*, 103 AD3d (2d Dept 2013)

**Parties Intended for Health Insurance Premiums to Be Included in Father's Obligation to Pay 50% of Uncovered Health Care Expenses**

The mother filed a petition seeking to direct the father to pay a share of the health insurance premiums attributable to the child. The Support Magistrate denied the petition, and the mother filed an objection. The Family Court denied the mother's objection, and the mother appealed. The Appellate Division noted that health insurance premiums are not the equivalent of “unreimbursed health care expenses” pursuant to FCA § 413(1)(c)(former [5]), which was in effect when the parties entered into the separation agreement. However, the Appellate Division found that the circumstances of this case indicated that the parties intended that health insurance premiums were to be included in the father's obligation to pay 50% of “uncovered health care expenses”. The father acknowledged that he interpreted the agreement as requiring him to pay 50% of health insurance premiums, and made those payments until 2010. Accordingly, the order was reversed, the mother’s objection was granted, and the matter was remitted.

*Matter of Kreiswirth v Shapiro*, 103 AD3d 725 (2d Dept 2013)

**Father Not Entitled to Credit for Overpayment**

The father appealed from an order of the Family Court, which, denied his objections to an order of the same court dismissing his petition to modify his child support obligation. The Appellate Division found that in view of the circumstances of this case and the strong public policy against restitution or recoupment of support overpayments, the Family Court did not improvidently exercise its discretion in rejecting the father's contention that he was entitled to a credit for overpayments of child support. Order affirmed.

*Matter of Krowl v Nightingale*, 103 AD3d 726 (2d Dept 2013)

**Father Not Entitled to Downward Modification**

The father appealed from an order of the Family Court

which denied his objections to an order of the same court, which, after a hearing, dismissed his petition for a downward modification of his child support obligation. Here, the record supported the Support Magistrate's determination that the father failed to establish a sufficient change in circumstances. Specifically, the father failed to submit competent medical evidence of his alleged disability and he did not show that he had diligently sought re-employment commensurate with his qualifications and experience. Order affirmed.

*Matter of Monroe v Jordan-Monroe*, 103 AD3d 803 (2d Dept 2013)

### **Reluctance to See a Parent Does Not Constitute Abandonment**

Here, the Support Magistrate did not improvidently exercise her discretion in declining to rely on the father's account of his finances in determining that he failed to establish a substantial change of circumstances warranting a downward modification. Thus, the Family Court properly denied the father's objections to the Support Magistrate's order dismissing his petition for a downward modification of his child support obligation. Furthermore, the Family Court properly denied that branch of the father's subsequent petition which was to terminate his child support obligation on the ground of constructive emancipation. Although there was evidence that the children failed to return the father's telephone calls for several weeks before he filed his termination petition, such an occurrence shows no more than the children's reluctance to contact him. Reluctance to see a parent is not abandonment. Moreover, there was ample support for the court's determination that the father made no serious effort to maintain his relationship with the children during the relevant time period. Orders affirmed.

*Matter of Gansky v Gansky*, 103 AD3d 894 (2d Dept 2013)

### **Non-Custodial Parent Was Required to Pay Basic Child Support for Parties' Two Children Even Though Custodial Parent Had Been Able to Maintain Children's Lifestyle for Two Years Without Any Financial Contributions from Non-custodial Parent**

The record revealed that the the petitioner, David S.P. (hereinafter David), and the respondent, Thomas P.R. (hereinafter Thomas), are the parents of two children. David has sole custody of the children pursuant to an agreement between the parties. In 2006, David resumed his work as a public school teacher, and Thomas voluntarily made support payments, most recently in the sum of \$1,234 per week. In May 2008, Thomas stopped making voluntary support payments. David petitioned for child support in 2010. A pendente lite order dated November 1, 2010, awarded David temporary child support in the sum of \$1,000 per week. At a subsequent hearing, the Support Magistrate found that combined parental income was \$468,259.36, 82% of which was attributable to Thomas. In an order dated December 23, 2011, the Support Magistrate declined to award any child support above a combined parental income of \$130,000, determining that, upon consideration of the factors specified in FCA § 413(1)(f), Thomas's pro rata share of the basic child support obligation above that amount would be "unjust and/or inappropriate," inter alia, because David (the custodial parent) failed to submit evidence of the children's standard of living prior to the parties' separation, and David had been supporting the children for two years without help. David appealed an order of the Family Court, dated March 18, 2012, which denied his objections to the December 23, 2011 order, which, after a hearing, granted his petition to the extent of directing Thomas to pay basic child support for the parties' two children in the sum of only \$512.50 per week and directed that Thomas be credited for overpayments made pursuant to a temporary support order dated November 11, 2010. The record revealed that the children enjoyed a comfortable lifestyle, participated in music lessons and attended summer camp. On the question of the amount of support necessary to maintain that lifestyle, Thomas' most recent voluntary payments, which were made in 2008, were over \$1,200 per week, and while since then, David received a substantial raise in salary, that raise did not compensate for Thomas's termination of support payments. The Appellant Division noted that although David was able to maintain the children's lifestyle for two years without any financial contributions from Thomas, he should not have been expected to do so indefinitely, without Thomas having contributed his equitable share. Here, the Appellate Division found that the children's needs would be met, and their

lifestyle maintained, with an award based upon applying the child support percentage to the first \$260,000 of combined parental income, which yields an award of \$1,025 per week. Accordingly, David's objections were granted, the petition was granted to the extent of directing Thomas to pay basic child support in the sum of \$1,025 per week, and the matter was remitted to the Family Court for a determination of any arrears.

*Parsick v. Rubio*, 103 AD3d 898 (2d Dept 2013)

**Mother Waived Her Right to Demand Additional Child Support Arrears Based upon the CPI Formula; Father Properly Directed to Pay Arrears for Certain College Expenses**

The parties are the parents of twin boys. Following commencement of a divorce action, the parties executed a stipulation of settlement (hereinafter the Stipulation), which was subsequently incorporated, but not merged, into a judgment of divorce. The Stipulation provided that the father's monthly child support obligation shall be adjusted as of January 1 of each calendar year and shall be either 25% of the father's gross income or the sum of \$5,000 per month, adjusted by Consumer Price Index for the Greater New York area, "whichever is greater." In July 2008, the mother moved (hereinafter the July motion), inter alia, to direct the father to pay "additional child support" arrears for the years 2004, 2005, and 2007, in effect, to direct the father to pay arrears for college expenses for the 2004/05, 2005/06, and 2006/07 school years, and to direct the father to pay his pro rata share of one child's college expenses for the 2008/09 school year. In her supporting affidavit, the mother contended that the Stipulation obligated the defendant to pay "basic child support in the sum of \$5,000 monthly based upon his income of \$240,000" and that the defendant was obligated to pay as "additional child support," 25% of his income over \$240,000. Using the 25% formula, the mother requested that the father be directed to pay \$7,368 in additional child support for the year 2004, \$4,943 in additional child support for the year 2005, and an amount to be determined by the court in additional child support for the year 2007. The mother stated that the father "appears to owe no additional child support for 2006 as his income, as reflected on his income tax return, did not exceed \$240,000." In his

opposition papers, the father admitted that based on the 25% formula, he owed the mother additional child support for the years 2004, 2005, and 2007 in the sums of \$7,368, \$4,943 and \$768, respectively, and the father tendered a check to the mother dated September 12, 2008, in the sum of \$13,079. In October 2008, the mother made a second motion (hereinafter the October motion), inter alia, in effect, to direct the father to pay child support arrears for the years 2003 through 2008. In the October motion, the mother calculated the father's child support obligation as \$5,000 per month, adjusted by Consumer Price Index for the Greater New York area, instead of 25% of the father's income. After a hearing on both motions, the Supreme Court, inter alia, granted those branches of the July motion which were, in effect, to direct the father to pay arrears for college expenses for the 2004/05, 2005/06, and 2006/07 school years, denied that branch of the July motion which was to direct the father to pay his pro rata share of one child's college expenses for the 2008/09 school year, granted those branches of the October motion which were to direct the father to pay child support arrears for the years 2003, 2006, and 2008, and, in effect, denied those branches of the October motion which were, in effect, to direct the father to pay child support arrears for the years 2004, 2005, and 2007. The Appellate Division found that the Supreme Court properly denied those branches of the October motion which were to direct the father to pay child support arrears for the years 2004, 2005, and 2007, and, moreover, should have also denied those branches of the October motion which were to direct the father to pay child support arrears for the years 2003 and 2006. It was clear from the explicit language of the July motion that the mother was seeking additional child support arrears for the years 2004, 2005, and 2007 using the 25% formula, and that she was not seeking additional child support arrears for the years 2003 or 2006 because the father had not earned income over \$240,000 for those years. Accordingly, when the father paid the mother \$13,079 by check, the entire amount originally sought by the mother as accrued additional child support arrears for the years 2003 through 2007, and the mother accepted and cashed the check, as she testified that she did, the mother waived her right to demand additional child support arrears based upon the Consumer Price Index formula. The Appellate Division further found, however, that the Supreme Court properly determined that the mother was entitled to

child support arrears based on the CPI formula for 2008, since she had not requested, or received, additional child support for 2008 at the time of the October motion. Based on the clear and unambiguous language of the Stipulation's "Modification and Waiver" provision, the mother's past waiver of her right to adjustments based on the Consumer Price Index formula could not be construed as a waiver of the same for the future, and there was no other basis in the record to conclude that the mother waived her right to adjustments based on the Consumer Price Index formula with regard to 2008. The Supreme Court also properly granted those branches of the July motion which were, in effect, to direct the father to pay arrears for college expenses for the 2004/05, 2005/06, and 2006/07 school years. The Stipulation required the parties to pay educational expenses on a pro rata basis, "in proportion to their respective incomes at the time such expenses [are] incurred." The father contends that the parties orally modified the Stipulation to split the college expenses 50/50 instead of on a pro rata basis. Here, while the father testified that the parties orally agreed to split the college expenses 50/50, instead of on a pro rata basis, the mother testified that she only agreed to pay 50% of the college expenses up front, with the understanding that the parties would "settle up" later. There was no basis in the record to set aside the hearing court's determination to credit the mother's testimony on this matter. Also, the Supreme Court properly denied that branch of the July motion which was to direct the father to pay his pro rata share of one child's college expenses for the 2008/09 school year. The Stipulation only required the parties to pay college expenses of "unemancipated" children, and provided that the children would be deemed to have become emancipated upon attaining the age of 21, except that emancipation would be delayed "if, and so long as, the child continuously pursues a college and post graduate education on a full-time basis." Since it was undisputed that this child did not attend college during the Fall semester of 2007, she became emancipated as of her 21st birthday in 2007. Orders affirmed as modified.

*Hannigan v Hannigan*, 104 AD3d 732 (2d Dept 2013)

### **Respondent Failed to Show Inability to Pay**

Family Court found that respondent father had wilfully violated a prior child support order and committed him

to a 60-day jail term, but suspended the sentence on condition that he pay at least \$130 per month towards arrears. The Appellate Division affirmed. The uncontroverted testimony of the child support investigator established that respondent had not complied with the prior support order. Although respondent testified that he was prohibited from working due to medical issues, and had a physician testify on his behalf that he was unable to work because of neck discomfort and inability to perform repetitive motions without fatiguing, the physician also admitted she had based her opinion on respondent's complaints alone and without any objective testing. Additionally, respondent did not provide any medical records to support his contention.

*Matter of St. Lawrence County Support Collection Unit v Laneuville*, 101 Ad3d 1199 (3d Dept 2012)

### **Respondent's Waiver of Counsel Was Not Made Knowingly and Intelligently**

Family Court determined respondent father was in willful violation of a prior order of child support and committed him to jail for a suspended period of six months. The Appellate Division reversed, determining that the Support Magistrate had erred in allowing the respondent to represent himself. The respondent's waiver of counsel in this matter was not made knowingly, intelligently and voluntarily. At the initial appearance and before his hearing, respondent repeatedly stated that he had applied for a public defender from Fulton County but had received no response. When the Schenectady County public defender appeared on his behalf, respondent indicated he had a pending appeal against this office on the grounds of ineffective assistance of counsel. All parties agreed that there was a conflict stemming from this situation. Based on this circumstance, there was nothing to bar the Support Magistrate from appointing substitute counsel for respondent. However, the court failed to do so and therefore respondent proceeded pro se. Additionally, the Support Magistrate should have inquired whether respondent understood the disadvantages of proceeding without counsel. The court should have known that respondent's self-representation was likely to be ineffective since the court had commented that respondent's arguments made "no sense whatsoever".

*Matter of Clark v Clark*, 101 AD3d 1394

### **Clear and Convincing Evidence to Find Willful Violation**

Family Court determined that respondent father had willfully violated a prior child support order and committed him to jail for six months. The Appellate Division affirmed. Respondent's admission that he had failed to pay child support for several years established a direct case of willful violation. His testimony that he was unable to work due to injuries sustained in a car crash was not credible as he did not present any medical proof. Respondent conceded that his claim for disability benefits had been denied three times, and he failed to demonstrate that he had made a good faith effort to find employment. According due deference to the court's credibility determinations, there was clear and convincing evidence to support the finding.

*Matter of Boyle v Boyle*, 101 Ad3d 1412 (3d Dept 2012)

### **Family Court Applied Incorrect Legal Standard**

Parents of one child executed an "opting-out" agreement which provided that a prior order of support issued by Family Court would be "incorporated but not merged" into a future judgment of divorce. Thereafter, the mother sought an upward modification of the father's child support obligation and also requested that the father pay for one-half of the child's private school expenses. The Support Magistrate granted the mother's application and Family Court affirmed the order. The Appellate Division affirmed the court's decision regarding the college expenses, but reversed the upward modification order. Family Court applied the wrong legal standard in concluding that the mother only needed to show a substantial change in circumstances in order to modify the order. The correct standard would have been to show that the agreement was unfair or inequitable when entered into, or that an unanticipated and unreasonable change of circumstances had occurred resulting in an increased need, or that the needs of the child were not being met. The mother failed to establish either ground. Her allegation that the father's income had increased and the costs of providing for a maturing child had increased was neither unanticipated nor an unreasonable change

in circumstances. Additionally, the mother's income had also substantially increased. However, with regard to the child's private school tuition, as the opting-out agreement was silent on this issue, Family Court properly ordered the father to pay one-half of the child's educational expenses. The father had been consulted on this issue and had not opposed his son's private school education. The father himself had attended private school as had his step-son and daughter from a previous marriage, and the father had the financial resources to contribute without impairing his ability to support himself.

*Matter of Overbaugh v Schettini*, 103 AD3d 972 (3d Dept 2013)

### **Father Failed to Establish Reasonable Efforts to Obtain Employment**

Family Court confirmed the determination of the Support Magistrate that respondent father willfully violated a child support order and directed that he be incarcerated for four months. The Appellate Division dismissed the appeal insofar as it concerned incarceration and otherwise affirmed. Respondent's failure to pay support as ordered constituted prima facie evidence of a willful violation and thus the burden shifted to him to show some competent, credible evidence of inability to make the required payments. Respondent failed to meet his burden inasmuch as he did not present evidence establishing that he made reasonable efforts to obtain employment so he could meet his support obligation. His contention about incarceration was moot because the commitment portion of the order had expired by its own terms

*Matter of Cattaraugus County Dept. of Social Servs. v Gore*, 101 AD3d 1739 (4th Dept 2012)

### **After Father's Business Deteriorated Failed to Pursue Employment Options**

Family Court found that respondent father willfully violated a child support order and sentenced him to six months of weekends in jail. The Appellate Division affirmed. Respondent's failure to pay support as ordered constituted prima facie evidence of a willful violation and thus the burden shifted to him to show some competent, credible evidence of inability to make

the required payments. After respondent's business deteriorated, he did not actively pursue other employment options. Further, respondent did not sell his assets to enable him to make his support obligations.

*Matter of Bushnell v Bushnell*, 101 AD3d 1741 (4th Dept 2012)

### **Father Did Not Make Reasonable Efforts to Obtain Employment**

Family Court confirmed the finding of the Support Magistrate's order that respondent father willfully violated a child support order. The Appellate Division affirmed. Respondent's failure to pay support as ordered constituted prima facie evidence of a willful violation and thus the burden shifted to him to show some competent, credible evidence of inability to make the required payments. The Support Magistrate, who was in the best position to evaluate credibility, determined that the father was not credible and did not make reasonable efforts to obtain employment. Further, the court properly granted the relief sought in the violation petition because the father failed to submit a financial disclosure statement. The court properly denied father's petition for a downward modification of child support and did not err in denying the petition without receiving a financial disclosure statement. The burden was on the father to demonstrate a substantial change in circumstances warranting a downward modification. Any error in relying on documents not in evidence was harmless because the Support Magistrate's credibility determination was supported by admissible evidence.

*Matter of Kasprowicz v Osgood*, 101 AD3d 1760 (4th Dept 2012)

### **Father Denied Right to Counsel**

Family Court determined that respondent father was in willful violation of a child support order and sentenced him to six months incarceration. The Appellate Division reversed. Respondent was denied his right to counsel at the hearing before the Support Magistrate to determine whether he was in willful violation of the support order. The record established that respondent advised the

Support Magistrate that he had spoken to a person at the Public Defender's Office and expected an attorney at the hearing. The Support Magistrate reminded respondent that he had stated at the initial appearance that he would be representing himself. When the Support Magistrate asked him whether he was prepared to go forward with the hearing, respondent answered "Well, I guess I am." Where, as here, the court failed to conduct a searching inquiry, reversal was required.

*Matter of Storelli v Storelli*, 101 AD3d 1787 (4th Dept 2012)

### **Father Who Failed to Appear at Hearing Was Not Denied Right to Rebut Mother's Prima Facie Showing of a Willful Violation**

Family Court entered an amended order that, among other things, confirmed the Support Magistrate's determination that respondent father had willfully violated an order of child support. The Appellate Division modified the amended order on the law by vacating Special Conditions 17, 18 and 19 and as modified, affirmed the amended order. The Support Magistrate's amended order determining that there was a willful violation was issued after the father failed to appear for the hearing on the violation petition. The father's contention that he was denied his right to a hearing was not properly before the Appellate Division. The proper procedure for challenging the Support Magistrate's amended order entered upon the father's default was by way of a motion to vacate the amended order pursuant to CPLR 5015 (a). Nonetheless, on the merits, the father was statutorily presumed to have sufficient means to support his child, and evidence of the failure to pay support as ordered constituted prima facie evidence of a willful violation. Once the mother made a prima facie showing of a willful violation, the burden shifted to the father to rebut that showing. Having failed to appear, the father could not now argue that he was denied his right to rebut the mother's prima facie showing. The father's contention that he was denied due process of law was rejected. Inasmuch as Special Conditions 17, 18 and 19 were not reasonably related to the underlying issue of child support arrears, those conditions were vacated.

*Matter of Ball v Marshall*, 103 AD3d 1270 (4th Dept 2013)

### **CPLR 5019 (a) Cannot be Applied to Amend Judgment of Divorce to Change Maintenance and Child Support Arrears**

Supreme Court granted plaintiff husband's motion to amend the parties' judgment of divorce to correct an error in the calculation of the child support and maintenance arrears due to defendant wife, and applied CPLR 5019 (a) to amend the judgment by changing the amount of the husband's arrears. The Appellate Division found that the court erred in granting husband's motion and applying CPLR 5019 (a) to amend the judgment. The court's power to amend orders or judgments under that statute was limited to correcting orders or judgments that contained a mistake, defect, or irregularity not affecting a substantial right of a party, or [that were] inconsistent with the decision upon which [they were] based. The mistakes contemplated for correction pursuant to CPLR 5019 (a) were merely ministerial, not those that involved new exercises of discretion or a further turn of the fact-finding wheel. A court had no power to reduce or increase the amount of a judgment when there was no clerical error. Unlike cases relied upon by the husband, this case did not involve an inconsistency between the judgment and an underlying decision or stipulation of the parties. Rather, the husband sought to correct a mistake of fact, i.e., the court's allegedly erroneous calculation of a credit for maintenance and child support payments made by the husband pursuant to a temporary order, and the court's failure to credit the husband for the wife's equitable share of medical insurance premiums.

*Meenan v Meenan*, 103 AD3d 1277 (4th Dept 2013)

### **Father Directed to Obtain Life Insurance Policy to Secure His Obligation for Child Support and His Pro Rata Share of Children's Private School Tuition**

Supreme Court entered a judgment of divorce that, among other things, directed defendant father to pay to plaintiff mother the amount of \$30,160 per year in child support and to pay his pro rata share of 80% of the children's private school tuition. The Appellate Division modified and directed defendant to obtain a life insurance policy with plaintiff as the beneficiary in the amount of \$500,000 and to maintain the policy until the youngest child reached the age of majority.

Supreme Court did not abuse its discretion when it refused to award child support on the parties' combined income in excess of \$130,000. The court properly considered the factors set forth in Domestic Relations Law § 240 (1-b) (f), including that the divorce did not result in a change in the children's standard of living. Plaintiff's contention that the court erred in its calculation of the parties' pro rata shares was raised for the first time in her reply brief and thus was not properly before the Appellate Division. However, the court erred in failing to direct defendant to obtain a life insurance policy to secure his obligation for child support and his pro rata share of the children's private school tuition.

*Scully v Scully*, 104 AD3d 1137 (4th Dept 2013)

### **Family Court Erred in Revoking Respondent's Suspended Jail Sentence for Willful Violation of Child Support Order**

Family Court confirmed an order of the Support Magistrate that found the father to be in willful violation of an earlier order that required the father to pay child support in the amount of \$155 per week. The court sentenced the father to four months in jail. The Appellate Division reversed and remitted the matter. The Support Magistrate issued an order "on consent" setting forth that the father admitted that he willfully violated a child support order and found him in willful violation of the order. The Support Magistrate imposed a sentence of four months in jail, but suspended the sentence on the condition that the father did not miss two consecutive support payments. Based upon the father's alleged failure to pay support as ordered, at a subsequent court appearance, the court dispensed with a hearing and took an oral admission of nonpayment from the father's attorney. Although the court had the discretion to revoke the suspension of the jail sentence, the court erred in doing so when it did not first afford the father an opportunity to be heard and to present witnesses on the issue whether good cause existed to revoke the suspension of the sentence. No specific form of a hearing was required, but at a minimum the hearing must have consisted of an adducement of proof coupled with an opportunity to rebut it.

*Matter of Davis v Bond*, 104 AD3d 1227 (4th Dept 2013)

### **Court's Errors Required Remittal For Recalculations**

Supreme Court's judgment in this divorce action dissolved the marriage, awarded the mother maintenance and child support and distributed the marital property. The Appellate Division modified and remitted for a number of recalculations. The court did not err in imputing annual income of \$20,000 to the mother for the purpose of calculating child support and maintenance given her education, qualifications, employment history, past income, and earning potential. The court erred, however, in failing to distribute certain assets to the mother. An investment account, the father's 403-b account, and the father's in-service death benefit were marital property or at least partly marital property, subject to equitable distribution. The court also erred in failing to award the mother any portion of the father's enhanced earnings from his master's degree because the mother made at least a modest contribution towards the degree. It was not possible to ascertain from the record the merit of the mother's contentions regarding the amount of \$250 per week in child support and whether the court deducted maintenance from the father's income before calculating his child support obligation. Finally, the case was remitted for resolution of the mother's contention that the father owed her money pursuant to an order requiring him to pay for groceries during the pendency of this action and the father's contention that he satisfied that obligation.

*Lauzonis v Lauzonis*, 105 AD3d 1351 (4th Dept 2013)

### **CUSTODY AND VISITATION**

#### **Application for Visitation Denied; Written Communication Ordered Where Lack of Visitation Was Result of Father's Inaction Not Mother's Interference**

Family Court, after a fact-finding hearing, denied petitioner father's application for visitation with the parties' minor child, except to the extent of allowing limited written communication via mail. The Appellate Division affirmed. There was a sound and substantial evidentiary basis for the court's determination that it was not in the child's best interest to award petitioner

visitation. The evidence established that petitioner's lack of visitation over a period of many years was the result of his own inaction and not due to the mother's interference. Moreover, the record supported the court's determination that visitation would have a negative impact on the child's emotional well-being. Under the circumstances, the court properly provided for limited written communication with the child, which the child may read at her discretion.

*Matter of Craig S. v Donna S.*, 101 AD3d 505 (1st Dept 2012)

#### **Order Granting Father Custody in Child's Best Interests**

Family Court granted the father's petition for a final order of custody and awarded respondent mother visitation. The Appellate Division affirmed. The court considered all of the relevant factors and properly concluded that, although the evidence demonstrated that both parents had a strong love for the child and either would have been an adequate custodian, allowing the child to remain with the father served the child's best interests. The father was better able to provide a stable environment for the child, since he lived in the same apartment for many years, and had been the child's primary caretaker, with whom she resided, for almost three years after her return from foster care. In contrast, the mother moved into her boyfriend's apartment in an effort to avoid homelessness, and the boyfriend had an extensive criminal history and indicated that the mother's residence in his apartment was temporary, until she got on her feet. The record indicated that the father would maintain, promote and foster the relationship between the mother and the child. The Referee did not err in failing to conduct an in camera interview, since the attorney for the child stipulated that the child's preference was to live with the mother.

*Matter of David C. v Laniece J.*, 102 AD3d 542 (1st Dept 2013)

#### **Recommendation of Court Appointed Forensic Psychologist Reasonably Rejected Where Expert Did Not Sufficiently Weigh Impact of Domestic Violence**

Family Court awarded petitioner mother sole legal and physical custody, subject to respondent father's right of visitation. The Appellate Division affirmed. The record supported the court's determination that the totality of the circumstances warranted awarding custody of the children to petitioner. In determining the best interests of the children, the court considered the appropriate factors, including that petitioner had always been the primary care giver and made sure that the children received the educational and medical attention they required. Moreover, petitioner was more likely than respondent to foster a relationship between the children and the other parent, and there was a history of domestic violence at the hands of the respondent. Further, the court reasonably rejected the recommendation of its appointed forensic psychologist. The court fairly found, among other things, that the expert did not sufficiently weigh the impact of domestic violence on petitioner's emotional and psychic state, perhaps causing her depression and the other difficulties she faced. The court fairly concluded that the expert disproportionately blamed petitioner for problems in the parties' relationship while ignoring her explanations, and relied too heavily on the reports of the paternal grandparents, who had themselves made false reports of abuse and neglect against petitioner.

*Matter of Xiomara M. v Robert M.*, 102 AD3d 581 (1st Dept 2013)

#### **No Basis to Disturb the Court's Credibility Determinations**

Family Court granted the mother a five-year order of protection and modified a prior custody and visitation order by awarding her sole legal custody and visitation to the father. The Appellate Division affirmed. Family Court possessed sufficient information in the combined family offense/custody modification hearing to render an informed decision based on the court's extensive history with the parties. Upon weighing the appropriate factors, the court correctly determined it was in the child's best interests to grant the mother sole custody, and there was no basis to disturb the court's credibility determinations.

*Matter of Fayona C. v Christopher T.*, 103 AD3d 424 (1st Dept 2013)

#### **Ample Support for Court's Determination of No Extraordinary Circumstances**

Family Court dismissed the grandmother's custody petition, finding she did not establish the requisite extraordinary circumstances to seek custody. The Appellate Division affirmed. Family Court's order was amply supported by the evidence. The record showed that the foster mother had provided a positive environment for the subject child, had tended to his special needs and had expressed a desire to adopt him. The grandmother had not seen the child for five years, the child had been in foster care for five years and had no desire to have contact with the grandmother.

*Matter of Michael M.* 103 AD3d 471 (1st Dept 2013)

#### **No Presumption that it's in Child's Best Interests for Custody to be Awarded to Relative**

Family Court determined it was in the best interests of the children to deny petitioner great-grandmother's custody petition, and transferred custody and guardianship of the subject children to the agency for the purposes of adoption. The Appellate Division affirmed. Family Court properly found there is no presumption that it's in a child's best interest for custody to be awarded to a relative. The record showed that the children, who were each placed in a different foster home, were thriving in foster care. Both sets of foster parents had provided for the needs of the child placed in their home, and had expressed their love for and their wish to adopt the child. Although the court-appointed expert expressed some concerns about one of the foster parents, there was no doubt the foster parent loved the child and wanted to adopt him. Additionally, the expert noted that the great-grandmother had minimized the children's problems, specifically, the special needs of one child and language and developmental delays of the other.

*Matter of Sandra N. v Administration for Children's Servs.*, 103 AD3d 591 (1st Dept 2013)

#### **New York is the More Appropriate Forum**

Supreme Court properly weighed all factors in determining that New York, and not North Carolina, was the home state of the parties' children, and the

more appropriate forum pursuant to the UCCJEA. Among other things, the court found both children had lived in New York all their lives including the six consecutive months prior to the filing of the custody petitions, the father was financially better off than the mother, the mother still lived in New York and the majority of witnesses and documents were located in New York, including evidence of the parents' allegations of misconduct against each other. Additionally, the father seemed to acknowledge that New York was the more appropriate forum to look into allegations of abuse and neglect of his daughter, because he had reported these allegations to New York's City ACS. Supreme Court also gave proper weight to the mother's allegations that the father had taken the children to North Carolina without her consent, which if true, would have obligated the North Carolina court to decline jurisdiction pursuant to DRL §76-g.

*Gottlieb v Gottlieb*, 103 AD3d 593 (1st Dept 2013)

#### **Sound and Substantial Basis in the Record for the Court's Credibility Determinations**

Family Court, after a hearing, modified an order of joint custody and awarded sole custody of the children to the father, with visitation to the mother. The Appellate Division affirmed. The father alleged the change in circumstances was due to the mother's failure to meet the children's basic hygiene and medical needs, and concerns over the children's school commute. There was sound and substantial basis in the record for Family Court's credibility determinations. The mother's testimony that she was not aware that one of the children had "rampant cavities" was contradicted not only by the father, but by the children, the social worker and the children's dentist. The mother did nothing about the child's dental needs until the court ordered her to do so. Additionally, while the mother claimed the children never traveled to school unaccompanied by an adult, the children themselves told the social worker otherwise. Even though the father was unemployed, he was able to provide a stable home for the children and had seen to their medical and educational needs. Further, both attorneys for children supported the court's determination.

*Matter of Errol S. v Shelidah D.*, 103 AD3d 597 (1st

Dept 2013)

#### **Mother's Application to Modify Custody Denied**

Family Court denied the petitioner mother's application to modify a prior custody order. The Appellate Division affirmed. No basis existed to disturb the court's determination that it was in the subject children's best interests to remain in the custody of their father. The children were happy and well cared for by their father, who provided for their medical care and special needs. The mother's contention of alleged judicial bias was not preserved for review, and the Appellate Division declined to review it in the interest of justice. Nonetheless, the record failed to support the mother's allegation of bias.

*Matter of Maureen H. v Samuel G.*, 104 AD3d 470 (1st Dept 2013)

#### **Custody of Child with Grandmother in Child's Best Interests**

Family Court granted custody of the subject child to petitioner paternal grandmother. The Appellate Division affirmed. Respondent mother's contention was rejected that the court did not have jurisdiction over the proceeding because New York was not the child's home state. The child's absence from New York, brought about by respondent's desire to prevent the father or petitioner from obtaining custody, was a temporary absence which did not interrupt the six-month pre-petition residency period required by the UCCJEA. The evidence established extraordinary circumstances that justified the award of custody to petitioner. Respondent had an extensive history of abuse and neglect of her nine older children, which resulted in the death of one child who was left unattended in a bathtub, and the termination of her parental rights as to all the others. Respondent also had an extensive history of drug abuse, addiction and criminal activity, as well as mental illness for which she refused treatment and medication. Moreover, respondent's living situation continued to be unstable and she failed to plan for the child's return. The evidence supported the court's determination that the child's best interests were served by awarding custody to petitioner. Petitioner supported the child, gave structure to his life, and provided a stable and loving

home where he thrived. Indeed, the forensic evaluator concluded that removing the child from his grandmother's care would have disastrous consequences.

*Matter of Ruth L. v Clemese Theresa J.*, 104 AD3d 554 (1st Dept 2013)

### **Court Properly Determined Child's Best Interests Served by Awarding Mother Temporary Decision-Making with Respect to Child's Education**

Supreme Court awarded defendant mother temporary decision-making with respect to the parties' son's education. The Appellate Division affirmed. It was in the child's best interests to award defendant mother temporary decision-making with respect to the parties' son's education. Although the parties agreed to equal input with respect to all major decisions, including education, the agreement did not provide for a situation such as the one presented, where they could not agree where the child should attend school. Thus, there was a change in circumstances requiring modification of the agreement. The father was afforded a fair hearing, was allowed to cross-examine defendant, testify on his own behalf and argue his case. The court was not barred from deciding the issue by the doctrine of res judicata. No prior request for temporary educational decision-making had been made and, in any event, in custody and matrimonial matters, changed circumstances warranted reconsideration of prior orders as did the best interests of the child.

*Sequeira v Sequeira*, 105 AD3d 504 (1st Dept 2013)

### **Father's Motion to Vacate His Default Granted**

Upon reviewing the record, the Appellate Division found that under the particular circumstances presented in this case, and in light of the policy favoring resolutions on the merits in child custody proceedings, the Family Court improvidently exercised its discretion in denying the father's motion to vacate his default in appearing for a scheduled court date. The orders were reversed and vacated, and the matter was remitted to the Family Court for further proceedings.

*Matter of Cummings v Rosoff*, 101 AD3d 713 (2d Dept 2012)

### **Order Granting Father Sole Legal and Residential Custody Reversed**

The mother appealed from an order of the Family Court, which, in effect, granted the father's petition and awarded him, among other things, sole legal and residential custody of the parties' children. The father resided in the State of Virginia. The Appellate Division found that the Family Court's determination lacked a sound and substantial basis in the record. In particular, the Family Court failed to accord sufficient weight to the children's need for stability and to the impact of uprooting them, not only from the residence of their mother, but also from the place where they have lived since the parties separated in 2007. The court also failed to give sufficient weight to the undisputed evidence regarding the strained relationship between the father and one of the children (who was then 15 years old), and to that child's clearly expressed preference to remain in New York with the mother. Since the father failed to establish that circumstances had so changed since the initial custody determination that a modification in the existing custody arrangement was necessary to ensure the continued best interests of the children, his petition should have been denied.

*Matter of Sidorowicz v Sidorowicz*, 101 AD3d 737 (2d Dept 2012)

### **Award of Sole Custody to Mother in Child's Best Interests**

Under the circumstances of this case, the Supreme Court's determinations that joint legal custody was no longer feasible, to award sole custody to the mother, and to modify the father's visitation were all supported by evidence of changes in circumstances warranting those determinations in the child's best interest. Further, contrary to the father's contention, the Supreme Court providently exercised its discretion in determining that he was incompetent to testify at the hearing based upon the testimony of his treating physician.

*Matter of Baribault v Sauvola*, 101 AD3d 865 (2d Dept 2012)

### **Record Did Not Demonstrate That Mother Waived Her Right to Counsel**

The mother appealed from an order of the Family Court, which, in effect, denied her petition to modify a prior order of custody of the same court so as to award her sole custody of the subject child, and dismissed the proceeding. Here, the record did not demonstrate that the mother waived her right to counsel (*see* FCA § 262[a]). Accordingly, since the Family Court did not ensure that the mother knowingly, intelligently, and voluntarily waived her right to counsel, the Appellate Division reversed the order, reinstated the petition, and remitted the matter further proceedings, and a new determination thereafter.

*Matter of Mutone v Loos*, 101 AD3d 883 (2d Dept 2012)

### **Family Court Properly Granted Father's Motion to Dismiss Mother's Petition to Modify Out-of-state Custody Order**

The Appellate Division found that the Family Court properly granted the father's motion to dismiss the mother's petition to modify an out-of-state custody order. The record revealed that the State of Delaware had asserted home-state jurisdiction over the custody proceeding commenced there by the father (*see* DRL § 75-a[7]). The Family Court could not exercise jurisdiction over a custody proceeding involving the parties' children, since the pending Delaware proceeding had not been terminated or stayed by the Delaware courts (*see* DRL § 76-e[1]). Moreover, the Delaware courts had not relinquished jurisdiction over the matter by determining that they no longer had continuing, exclusive jurisdiction, or that New York would have been a more convenient forum (*see* DRL § 76-b[1]). Therefore, the Family Court could not modify the subject Delaware custody order, which had been registered in the State of New York (*see* DRL § 77-e[2]). Further, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified at article 5-A of the Domestic Relations Law, when a child is present in New York, a New York court may exercise temporary emergency jurisdiction to protect a child, sibling, or parent (*see* DRL § 76-c [1]). Here, however, the mother's allegations in her family offense petition failed to sufficiently allege conduct by the father that would constitute a family offense (*see* FCA §§ 812, 822). Therefore, the Family Court properly granted the father's motion to dismiss the

mother's family offense petition.

*Matter of Ozdemir v Riley*, 101 AD3d 884 (2d Dept 2012)

### **Father's Domestic Violence Against Mother Not Properly Considered**

Upon reviewing the record, the Appellate Division found that the Family Court's award of custody to the father lacked a sound and substantial basis in the record. In particular, the court gave inexplicably little weight to its own findings regarding the father's domestic violence against the mother and his startling lack of judgment on several occasions with respect to the parties' child. Additionally, it gave undue weight to the mother's temporary housing situation. Under the circumstances presented here, the court should have denied the father's petition for sole custody of the child, and granted the mother's petition for sole custody of the child. The order was reversed and the matter was remitted to the Family Court to determine a visitation schedule for the father.

*Matter of Supangkat v Torres*, 101 AD3d 889 (2d Dept 2012)

### **Family Court Should Have Conducted an in Camera Inspection of Mother's Medical Records**

The mother appealed, by permission, from an order of the Family Court which granted the father's motion to compel disclosure of her psychiatric records from November 2007 to the present. The Appellate Division granted the mother's motion to stay enforcement of the Family Court's order pending the hearing and determination of the appeal. Upon reviewing the record, the Appellate Division concluded that under the circumstances of this case, before determining the father's motion to compel disclosure of the mother's psychiatric records from November 2007, the Family Court should have conducted an in camera inspection of the subject records to determine the portions thereof, if any, that were material and relevant on the issue of the mother's fitness as a parent. The order was reversed, and the matter was remitted for an in camera inspection of the mother's psychiatric records from November 2007 to the present, and thereafter a new determination of the father's motion.

*Matter of Worysz v Ratel*, 101 AD3d 893 (2d Dept 2012)

### **Mother Failed to Establish That Relocation Was in Children's Best Interests**

Upon weighing the appropriate factors, the Family Court properly determined that the mother did not meet her burden of proof by a preponderance of the evidence that a move to the State of Georgia was in her children's best interests. The mother failed to establish that the relocation to Georgia was economically necessary, that the children's lives would be enhanced socially and educationally, that the move would not have a negative impact on the quality of the children's future contact with the father, or that it was feasible to preserve the relationship between the father and the children through suitable visitation arrangements. Accordingly, the Family Court's determination did not lack a sound and substantial basis in the record. Order affirmed.

*Matter of Karen H. v Maurice G.*, 101 AD3d 1005 (2d Dept 2012)

### **Term of Imprisonment for Contempt Found to Be Excessive; Order Modified**

In a custody and visitation proceeding, the mother appealed from an order of commitment of the Family Court, which, after a hearing, in effect, adjudged her to be in contempt of court and committed her to the custody of a county correctional facility for a term of imprisonment of six months. By decision and order on motion, the Appellate Division stayed enforcement of the order of commitment, pending hearing and determination of the appeal. Contrary to the mother's contention, the Family Court properly, in effect, adjudicated her in contempt for willfully failing to obey the visitation provision of a prior order. The Appellate Division found, however, that under the circumstances of this case, the punishment imposed was excessive. Accordingly, the order was modified by reducing the term of imprisonment to thirty days.

*Cunha v. Urias*, 101 AD3d 996 (2d Dept 2012)

### **Petitioner Grandmother Established a Prima Facie Case of Standing**

The petitioner, the maternal grandmother, appealed

from an order of the Family Court, which, in effect, dismissed her petition for visitation based upon her failure to establish a prima facie case as to standing. Upon reviewing the record, the Appellate Division found, contrary to the parents' contention, that the petitioner established a prima facie case of standing to seek visitation with the subject child. Through her testimony, the petitioner established, prima facie, the existence of a sufficient relationship with the child to warrant the intervention of equity. Further, the petitioner demonstrated, prima facie, that the parents' objection to contact between the child and the petitioner was based solely on animosity between the parties. The Court noted that although "animosity coupled with family dysfunction may provide a basis for denying visitation rights," the "existence of animosity between the parties alone" cannot provide such a basis. The order was reversed and the matter was remitted.

*Gray v. Varone*, 101 AD3d 1122 (2d Dept 2012)

### **Full-time Employment of the Children's Therapist by the Father Constituted Significant Change of Circumstance**

In a matrimonial action in which the parties were divorced by judgment, the plaintiff appealed from an order of the Supreme Court, which, without a hearing, denied that branch of her motion which was to modify the joint custody provisions of the parties' judgment of divorce so as to award her sole custody of the parties' children. The Appellate Division found that the mother made the necessary showing entitling her to a hearing. The mother's affidavit contained specific allegations concerning the father's repeated violations of the custody provisions of the agreement since its inception. Moreover, the full-time employment of the children's therapist, the person designated in the agreement as a neutral third-party "arbitrator" of custodial disputes, by the father, constituted a significant change of circumstance which could undermine the integrity of the agreement's custodial provisions. Upon determining that the mother was entitled to a hearing on her motion, the Appellate Division further held that given the particular facts of this case, the interests of the children should have been independently represented. The matter was remitted to the Supreme Court, for the appointment of an attorney to represent

the interests of the children, and thereafter for a hearing and a new determination.

*Anonymous 2011-1 v Anonymous 2011-2*, 102 AD3d 640 (2d Dept 2013)

### **Family Court’s Failure to Conduct a “Searching Inquiry” Rendered Father’s Waiver of Right to Counsel Invalid**

The father appealed from an order of the Family Court, which, after a hearing, granted the mother’s petition for sole custody of the subject child with certain visitation to him. The record revealed that at the first hearing, which lasted only 11 minutes, the Family Court advised the parties of their right to counsel, which both parties waived. However, given the confusion in the father’s response to the question of whether he would proceed without an attorney, the Family Court failed to determine that his waiver was knowingly, intelligently, and voluntarily made. Moreover, at the second hearing, which lasted only eight minutes and culminated in a final order of custody and visitation, the Family Court failed to even elicit an answer from the father as to whether he was waiving his right to counsel. Thus, the Family Court failed to conduct a “searching inquiry” of the father in order to be reasonably certain that he understood the dangers and disadvantages of giving up the fundamental right to counsel. Accordingly, the order was reversed and the matter was remitted.

*Matter of Belmonte v Batista*, 102 AD3d 682 (2d Dept 2013)

### **Record Supported Family Court’s Determination to Award Sole Custody of Child to Mother**

The Family Court’s determination to award sole custody of the child to the mother had a sound and substantial basis in the record. The evidence at the hearing established, inter alia, that the child, who was eight years old at the time of the hearing and who had been in the mother’s care since he was born, was happy and well-adjusted, and was close to his brother and sister, who also lived with the mother. In addition, the evidence showed that the mother was best able to provide for the child, and was adequately providing for the child’s emotional and intellectual development. Order affirmed.

*Matter of Maraj v Gordon*, 102 AD3d 698 (2d Dept 2013)

### **Defendant Failed to Make a Showing of a Sufficient Change in Circumstances**

The defendant appealed, as limited by her brief, from so much of an order of the Supreme Court, which, denied without a hearing, those branches of her motion which were to modify the parties’ stipulation of settlement, which was incorporated but not merged into the judgment of divorce, so as to prohibit the plaintiff from relocating to Florida with the children, and to remove the attorney for the children. The record revealed that the parties entered into a so-ordered stipulation on November 30, 2011, wherein they agreed that the plaintiff would have sole legal and physical custody of the children and would be permitted to relocate with them to Florida in June 2012, at the end of the school year. In April 2012, the defendant moved, inter alia, to modify the stipulation so as to prohibit the plaintiff from relocating to Florida with the children. The Appellate Division found that the defendant failed to make a showing of a sufficient change in circumstances since the date on which she entered into the stipulation of settlement, so as to warrant a modification of the agreement to ensure the best interests of the children. Therefore, that branch of the defendant’s motion which was to modify the stipulation so as to prohibit the plaintiff from relocating to Florida with the children was properly denied, without a hearing. That branch of the defendant’s motion which was to remove the attorney for the children also was properly denied.

*McMahan v McMahan*, 102 AD3d 841 (2d Dept 2013)

### **Judicial Hearing Officer’s Finding Supported by the Record**

The record revealed that after a complete evidentiary hearing, the Judicial Hearing Officer found that an award of sole custody to the mother was in the best interests of the child. The Appellate Division found that this finding was supported by a sound and substantial basis in the record. Moreover, the Appellate Division found that the father’s contentions that the Judicial Hearing Officer was biased against him and deprived him of a fair hearing were without merit.

*Matter of Stewart v Moseley*, 102 AD3d 973 (2d Dept 2013)

**Substantial Evidence in the Record Demonstrated That Visitation with Incarcerated Father Was Not in the Child's Best Interests**

The record revealed, that an incident involving both the mother and the child resulted in the father's conviction of kidnapping in the second degree, assault in the third degree, and endangering the welfare of a child, and that he was sentenced to 17 years imprisonment on the conviction of kidnapping in the second degree. The father has had no relationship with the child since December 2002, and has not attempted to contact the child for many years. The mother and child currently live in Florida, and the child is thriving. The father filed a petition seeking to modify a custody order to afford him visitation with the child in the correctional facility where the father was incarcerated. The Family Court vacated the prior custody order, and in effect, denied the father's petition. The father appealed. The Appellate Division found that substantial evidence in the record which demonstrated that visitation with the father would have been detrimental to the welfare of the child, and that visitation with the father would not have been in the child's best interests. Accordingly, the Family Court properly vacated so much of the order which provided for visitation between the father and the child and, in effect, denied the father's petition.

*Rambali v. Rambali*, 102 AD3d 797 (2d Dept 2013)

**Mother's Objections to Visitation with Grandparents Were Well Founded**

The mother appealed from an order of the Family Court, which, after a hearing, granted the grandparents' petition for visitation with the subject children and set a schedule for visitation. Here, the Family Court providently exercised its discretion in determining that the grandparents had standing to petition for visitation. Nonetheless, its determination to grant the petition was an improvident exercise of discretion, because the record established that visitation with the grandparents was not in the best interests of the subject children. The record established that the mother's objections to visitation were well founded. The grandparents engaged in conduct that showed that visitation was not in the

best interests of the children. Accordingly, the order was reversed, and the petition was denied.

*Matter of Quinn v Heffler*, 102 AD3d 876 (2d Dept 2013)

**Joint Custody Was in the Best Interests of the Children**

Although it was evident that there was antagonism between the parties, it was also apparent that both parties generally behaved appropriately with their children, that they could make parenting decisions together, and that the children were attached to both parents. Under these circumstances, there was a sound and substantial basis in the record for the Supreme Court's finding that the best interests of the children would be served by awarding the parties joint custody. Similarly, the record supported the determination that primary physical custody should be with the mother and that she should have final decision-making authority. The court, however, should have directed the mother to consult with the father regarding any issues involving the children's health, medical care, education, religion, and general welfare prior to exercising her final decision-making authority. Order modified.

*Prohaszka v Prohaszka*, 103 Ad3d 617 (2d Dept 2013)

**Record Supported Award of Sole Legal and Physical Custody of Child to Mother**

The father argued, inter alia, that the Family Court erred in granting that branch of the mother's petition which was to modify a prior order of custody and visitation to the extent that it granted her sole legal custody of the parties' remaining minor child, and suspended his visitation rights. Upon a review of the record, the Appellate Division found that in view of the totality of the circumstances, including the wishes of the subject child, which were expressed when the child was 14 years old, the Family Court's award of sole legal and physical custody of the subject child to the mother, and suspension of the father's visitation rights, had a sound and substantial basis in the record. Order affirmed.

*Matter of Luo v Yang*, 103 AD3d 636 (2d Dept 2013)

**Mother Continually Interfered with the Visitation Time Between the Father and Child And, as a Result, Disrupted Their Relationship**

The Appellate Division found that the Family Court did not err in granting the father's petition to modify the order of custody so as to award him sole custody of the subject child. Modification of an existing custody arrangement is permissible only upon a showing that there has been a change in circumstances such that a modification is necessary to ensure the continued best interests and welfare of the child. Interference with the relationship between a child and the noncustodial parent is an act so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as custodial parent. Thus, a change of custody is appropriate if the custodial parent's conduct deliberately frustrates, denies, or interferes with the noncustodial parent's visitation rights. Here, the evidence supported the court's determination that the mother continually interfered with the visitation time between the father and the child and, as a result, disrupted their relationship. Order affirmed.

*Matter of Tori v Tori*, 103 AD3d 654 (2d Dept 2013)

**Mother's Petition Properly Dismissed for Lack of Jurisdiction**

The mother appealed from a decision of the Family Court, and an order of the same court, which, upon the decision, granted the father's motion to dismiss the mother's petition for lack of subject matter jurisdiction, and denied her cross motion for temporary custody of the subject child and to set a visitation schedule. The record showed that the child did not live in New York for at least six consecutive months immediately before the commencement of the child custody proceeding (*see* DRL § 75-a[7]). The child had spent the previous school year living with the father in the State of Texas. Therefore, the Family Court properly granted the father's motion to dismiss the mother's custody petition for lack of jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, and properly denied the mother's cross motion for temporary custody of the subject child and to set a visitation schedule.

*Agueda v. Rodriguez*, 103 AD3d 716 (2d Dept 2013)

**Hearing Not Necessary on Motion of the Attorney for the Children to Temporarily Suspend Mother's Visitation**

In five related child protective proceedings, the mother appealed from an order of the Family Court, which, without a hearing, granted the motion of the attorney for the children to suspend her visitation with the subject children to the extent of temporarily suspending her visitation with the children pending a hearing. The mother argued that the Family Court erred in temporarily suspending her visitation with the children without a hearing. Generally, modifications to visitation should only be made after a hearing to determine the best interests of the child. A hearing is not necessary, however, "where the court possesses adequate relevant information to enable it to make an informed and provident determination as to the child's best interest". Here, the Family Court was fully familiar with the relevant facts regarding the mother and the children from past proceedings. In addition, it was the position of the attorney for the children that visitation should be suspended. Under these circumstances, the Family Court possessed sufficient information to render, without a hearing, an informed determination regarding visitation consistent with the best interests of the children. Order affirmed.

*Matter of Chaim N.*, 103 AD3d 728 (2d Dept 2013)

**Hearing Not Necessary on Mother's Motion for Permission to Relocate; Relocation with Mother Was in the Children's Best Interests**

The parties to this matrimonial action entered into a stipulation of settlement whereby they agreed to joint legal and residential custody of their five children, and which prohibited either party from relocating outside of Westchester County without "the advance consent of the other, which shall not be unreasonably withheld, or the Order of a court of competent jurisdiction." Thereafter, the defendant sought to relocate to a residence in Greenwich, Connecticut. When the plaintiff refused to consent to the move, the defendant sought permission from the court to relocate. The Supreme Court denied the defendant's motion without a hearing. The defendant appealed. Contrary to the

Supreme Court's determination, the defendant did not violate the stipulation of settlement. Although the defendant signed a lease to rent a residence in Greenwich prior to obtaining the plaintiff's consent or a court order, she sought a court order prior to relocating to that residence. The Supreme Court improperly determined that relocation would not be in the children's best interest. In that respect, the defendant averred that the residence in Greenwich was 7.5 miles from the former marital residence, and 9.9 miles from the residence at which the plaintiff planned to reside during his custodial periods with the children. The residence in Greenwich was also close to the private school the children attend. Moreover, the defendant averred that she had searched for suitable housing in Westchester County, but was unable to find any housing that she could afford. The plaintiff did not dispute any of these averments, did not claim that the relocation would have any impact whatsoever on his custodial time with the children, and did not offer any reason at all why the relocation would be contrary to the children's best interest. The Appellate Division found that under these circumstances, the Supreme Court possessed adequate relevant information to enable it to make an informed and provident determination with respect to the best interests of the children, and, instead of denying that branch of the defendant's motion which was for permission to relocate without a hearing, should have granted that branch of the motion, without a hearing. Accordingly, the order was reversed, and the defendant's motion for permission to relocate was granted.

*Piccinini v Piccinini*, 103 AD3d 868 (2d Dept 2013)

#### **Mother's Interference with Father's Visitation Constituted a Change in Circumstances Sufficient to Warrant a Change in Custody**

The mother appealed from an order of the Family Court, which, after a hearing, granted the father's petition to modify a prior order of the same court, awarding sole custody of the parties' child to the mother, subject to parenting time by the father, so as to award custody of the parties' child to the father, and the mother only parenting time. To modify an existing custody arrangement, there must be a showing of a change in circumstances such that modification is required to protect the best interests of the child. The

best interests of the child are determined by a review of the totality of the circumstances. One factor to be considered is the willingness of the custodial parent to assure meaningful contact between the child and the other parent. Accordingly, interference by the custodial parent with the non-custodial parent's right to visitation may constitute a change in circumstances sufficient to warrant a change in custody. Here, the Family Court's determination that there had been a change of circumstances sufficient to warrant a change of custody based on the mother's interference with the father's visitation rights was supported by a sound and substantial basis in the record. Order affirmed.

*Matter of Griffin v Nikiea Moore-James*, 104 AD3d 685 (2d Dept 2013)

#### **Father Not Entitled to Assigned Counsel**

The father's contention that the Family Court erred in failing to appoint counsel to represent him in a child custody proceeding was without merit. The father did not fall within any of the enumerated classes of persons entitled to the assignment of counsel under the provisions of FCA § 262(a), and, under the circumstances of this case, he was not entitled to assigned counsel under the United States Constitution or the New York Constitution (*see* FCA § 262 [b]). In addition, he failed to fully and timely make the disclosure necessary to support his claim of indigency. Further, the Family Court properly denied, without a hearing, the father's petitions to hold the mother in contempt for her alleged violations of certain provisions of the court's prior orders. The father failed to allege that the mother significantly defeated, impaired, impeded, or prejudiced his rights. Moreover, a hearing is not required, even where a factual dispute exists, where, as here, the allegations set forth in the petitions, even if accepted as true, are insufficient to support a finding of contempt. Orders affirmed.

*Matter of Perez v Richmond*, 104 AD3d 692 (2d Dept 2013)

#### **Mother's Petition for Custody Granted Without a Hearing; Father Deprived of Statutory Right to Counsel**

A review of the record indicated that contrary to the

statement in the order appealed from to the effect that a hearing had been held, the mother's petition for custody was granted without a hearing. In addition, the Family Court did not conduct an examination of the parties or obtain a forensic report from an expert. Although the Family Court did ask the attorney for the child for an argument on behalf of her two-year-old client, the attorney for the child stated that a social worker from her office would be sent to visit the child, but this had not yet been done when the order was issued. Under these circumstances, "it cannot be concluded that the court possessed sufficient information to render an informed determination consistent with the child's best interests". Since there was no hearing, the court also failed to make "specific findings of fact with respect to the issue of custody," as it was required to do. The order was reversed, and remitted for an evidentiary hearing not only for the reasons stated above, but for the additional reason that the father effectively was deprived of his statutory right to counsel (*see* FCA § 262[a][v]). The record showed that at the start of the proceeding, the Family Court acknowledged that, prior thereto, the father's attorney had requested an adjournment "to at least consider whether she want[ed] to continue representing [the father]." Nonetheless, the court proceeded to determine the custody issue without a hearing. Moreover, the court neither advised the father of his right to an attorney, nor advised him of his right to an adjournment to obtain new counsel, notwithstanding a statement to the contrary contained in the order appealed from. An attorney from the office of the father's counsel was apparently present when the court rendered its determination, but she did not appear to be representing the father. While "adjournments are within the discretion of the trial court" the "range of that discretion is narrowed . . . where a fundamental right such as the right to counsel is involved". Under the circumstances presented here, "[i]nstead of directing the matter to go forward, the Family Court should have exercised its discretion to grant an adjournment".

*Matter of Savoca v Bellofatto*, 104 AD3d 695 (2d Dept 2013)

**Relocation to California with Mother Was in the Child's Best Interests; Attorney for the Child's Motion to Strike Granted**

The mother appealed from an order of the Family Court, which, after a hearing, denied her petition to modify a prior order of the same court, entered upon a stipulation of the parties, awarding her sole custody of the child, so as to approve her relocation with the child to California. In this case, the mother established that the subject child's best interests would be served by approving her relocation from New York to California. Accordingly, the order was reversed, the mother's petition was granted, and the matter was remitted to the Family Court for further proceedings to establish an appropriate liberal visitation schedule for the father. As to the motion by the attorney for the child to strike stated portions of the respondent's brief on the ground that it referred to matter de hors the record, that motion was granted, and those portions of the respondent's brief that were the subject of the motion were not considered in the determination of the appeal.

*Matter of Wofford v Marquardt*, 104 AD3d 698 (2d Dept 2013)

**Record Amply Supported Court's Determination to Dismiss Custody Petition**

The father appealed from an order of the Family Court, which, after fact-finding and dispositional hearings, dismissed his petition for custody of the subject children. Here, the evidence at the fact-finding hearing established, inter alia, that the father sexually abused the subject child S. and had previously sexually abused his adult daughter and his niece. Moreover, the record demonstrated that, at the time of the dispositional hearing, the children had been residing with the mother for approximately 11 months, and that S., who was then seven years old, was performing well in school and did not have any behavioral issues. Order affirmed.

*Matter of Miguel R. v Maria N.*, 104 AD3d 771 (2d Dept 2013)

**Father's Contention That Family Court Should Have Sua Sponte Modified Prior Order So as to Award Him Sole Custody of Child Was Without Merit**

In his petition, the father sought, inter alia, to modify a prior order so as to award him unsupervised visitation with the subject child, but he did not request custody of

the child. The father's contention on appeal that the Family Court should have sua sponte modified the prior order so as to award him sole custody of the child was without merit. The father did not request such relief during the hearing and at no point did the Family Court indicate that a change in custody was an issue.

Accordingly, it would have been improper for the Family Court to have modified the provision of the prior order regarding custody. Additionally, upon reviewing the record, the Appellate Division found that the Family Court properly denied that branch of the petition which was to modify a prior order of visitation, so as to award the father unsupervised visitation. In this case, given the totality of the circumstances, unsupervised visitation was not in the child's best interests.

*Matter of Grant v Terry*, 104 AD3d 854 (2d Dept 2013)

### **Unsupervised Visitation with Father Not in Child's Best Interests**

Contrary to the father's contentions, the Supreme Court providently exercised its discretion in directing, inter alia, that his visitation with the child be supervised upon his release from incarceration. Given the totality of the circumstances, including the age of the child, the father's criminal background, and his history of domestic violence, the court properly determined that unsupervised visitation with the father at the present time would not be in the child's best interests.

*Matter of Colter v Baker*, 104 AD3d 850 (2d Dept 2013)

### **Court May Not Order Parent to Undergo Counseling or Treatment as a Condition of Future Visitation**

In a custody proceeding, the father appealed from an order of the Family Court, which, upon directing that the father could not file further petitions until he satisfied certain conditions, without a hearing, dismissed the petition with prejudice. Here, the Family Court did not possess adequate relevant information to determine that supervised visitation with the father, as provided for in the parties' judgment of divorce, was not in the subject child's best interests. Accordingly, the court erred in dismissing the father's petition to

enforce the supervised visitation provisions of the judgment of divorce without an evidentiary hearing. Moreover, "a court may not order that a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights, but may only direct a party to submit to counseling or treatment as a component of visitation". Thus, it was also improper for the Family Court to determine that the father could not file further petitions concerning his visitation rights until he completed, inter alia, therapeutic counseling, anger management classes, and parenting skill classes. Accordingly, the matter was remitted to the Family Court for an evidentiary hearing and a new determination of the father's petition.

*Matter of Lew v Lew*, 104 AD3d 946 (2d Dept 2013)

### **Father's Appeal Frivolous**

Unmarried parents of two children entered into a stipulation of joint legal custody in 2007, with primary physical to the mother and parenting time to the father. A few years thereafter, Family Court issued a temporary order suspending the father's visits as the children were experiencing problems at school resulting from, in part, the father's visitation. Following a psychological evaluation of the children, therapy was directed for the parents and children. The father's participation in therapy was minimal, but later in court, the parties entered into a consent order where the father agreed that he would undergo a complete mental health evaluation and engage in therapeutic counseling before visitation could be resumed. The father failed to follow through with the evaluation, and instead filed a petition seeking to enforce the previous 2007 visitation order. After a hearing, the court dismissed the petition with prejudice. The father re-filed to enforce the 2007 order, which was again dismissed with prejudice. On appeal, the Appellate Division affirmed determining there were no non-frivolous issues.

*Matter of Mariani v Morgan*, 101 AD3d 1179 (3d Dept 2012)

### **No Change in Custody Although Significant Changes Had Occurred Since Issuance of Prior Order**

Family Court treated the parties' cross-petitions for

custody as a modification matter based on a prior temporary order of custody issued by Supreme Court, which gave custody of the children to the father. The Supreme Court's temporary order had arisen from the father's divorce action, which had later been dismissed. After a hearing, Family Court determined that custody should continue with the father. The Appellate Division affirmed. Supreme Court's custody order resulted from a plenary hearing and reflected a considered and experienced judgment concerning all factors involved, therefore the case was properly evaluated by Family Court as a modification matter. The record established that while there had been significant and troubling changes since the temporary order had been issued, it was not in the children's best interests to change custody. The changes included, among other things, the father's decision to move out of the marital home and reside with his girlfriend who lived in a different school district, the move took the children 45 minutes further away from their mother, the older child had been diagnosed as morbidly obese and needed counseling to deal with his problems. Although the father had been slow to respond to his older child's physical and emotional needs, as of the time of the hearing, he was addressing them. The children had resided with the father since the parties' separation and the stability of an uninterrupted custody arrangement was an important factor. Despite the father's shortcomings, there was no evidence that the children would do better with the mother.

*Matter of Roefs v Roefs*, 101 AD3d 1185 (3d Dept 2012)

### **Error to Dismiss Order to Show Cause and Petition Seeking Modification**

Unmarried parents of two children entered into a consent order of custody with primary, physical custody to the father and weekend parenting time to the mother. Thereafter, following a PINS proceeding initiated by the father against the son, who had mental health issues, the child was placed in the custody of DSS, and an order of protection was issued against the mother directing that her parenting time with him be supervised. The mother, through an order to show cause and custody modification petition, sought physical custody of both her children. Family Court

dismissed her application sua sponte, determining the order of protection issued against her to be dispositive. The Appellate Division reversed. Initially, the Appellate Division noted that while an appeal from a denial of an order to show cause and its underlying petition is not appealable as of right, it could be reviewed pursuant to CPLR §5704(a). Upon examination, the Appellate Division concluded that the court erred in summarily dismissing the mother's petition as it contained factual allegations of a change in circumstances since the issuance of the prior order of custody. The mother's allegations included the filing of the PINS petition by the father, the father's verbal and physical abuse of the children, the father's drug use in front of the children, his denial of parenting time to the mother and break down in communication between the parties. Additionally, the record failed to include the underlying basis upon which the order of protection had been issued against the mother, therefore, the propriety of the court's dismissal based on this factor was not reviewable.

*Matter of Bridget PP.v Richard QQ.*, 101 AD3d 1186 (3d Dept 2012)

### **Court Erred in Modifying Custody**

Parents stipulated to joint legal custody with primary, physical custody to the father and visitation to the mother. The parents further agreed since the mother did not drive or own a car, she would make a good faith effort to contribute to the costs associated with visitation transportation. Thereafter, the mother filed a violation petition alleging the father had failed to comply with the order's visitation provisions, and both parties filed to modify. After a hearing, Family Court dismissed the mother's violation petition, modified the prior custody order by changing the visitation location, and directed all transportation costs associated with visitation to be borne by the mother. The Appellate Division affirmed dismissal of the violation petition but reversed the court's modification of the previous order. The evidence supported dismissal of the mother's violation petition. The mother had failed to contribute towards visitation transportation costs, the father was unable to provide transportation without financial assistance from the mother, and the mother showed a general lack of interest in the child's life. However, Family Court

erred in modifying the prior order as the court had specifically advised the parties at the commencement of the proceeding that it would be limiting the hearing to the violation petition. The mother did not have notice that the terms of her visitation would be an issue, the court did not have sufficient information to determine the mother's ability to contribute to transportation costs, and there was insufficient evidence to determine whether modification would be in the child's best interests.

*Matter of Constantine v Hopkins*, 101 AD3d 1190 (3d Dept 2012)

### **Sound and Substantial Basis in the Record to Limit Mother's Visits**

Parents stipulated to joint legal custody of their one child, with primary physical custody to the father and visitation to the mother. Thereafter, the father filed a modification petition seeking to limit the mother's visits. Family Court granted the father's petition and limited the mother parenting time to two hours of supervised visits each Sunday and such other times as the parents could agree. The Appellate Division affirmed finding there was a sufficient change of circumstances to modify visitation as it was in the child's best interests. The child suffered from attention deficit hyperactivity disorder and oppositional defiant disorder which caused him to lose self-control and become violent and destructive. The mother was unable to handle the child during such episodes, and on one occasion, her current spouse used excessive force in subduing the child resulting in minor injuries to the child. The mother had not taken any steps to learn how to handle the child when he lost control, opting instead to cut short her visitation with the child and relying on the father to bring the child under control. Based on the evidence contained in the record, there was sound and substantial basis to modify.

*Matter of Burrell v Burrell*, 101 AD3d 1193 (3d Dept 2012)

### **Court Properly Dismissed Father's Applications to Modify Prior Order**

Parents consented to an order of physical custody to the mother and visitation to the father. Prior to the

issuance of the order, the father re-located to Vermont, and five months after issuance of the order, the father sought to modify the order and also sought to enforce the parties' verbal visitation agreement. After a hearing, Family Court dismissed both petitions. The Appellate Division affirmed. The father's move predated the current custody order and therefore could not be used as a basis for alleging a change in circumstances. Additionally, as the father was only entitled to visitation as agreed upon by the parties, his contention that the mother violated the custody order by declining some of his visitation requests, lacked merit.

*Matter of Bowers v Bowers*, 101 AD3d 1200 (3d Dept 2012)

### **No Subject Matter Jurisdiction**

Family Court dismissed the father's custody petition on the grounds that it did not have subject matter jurisdiction. The Appellate Division affirmed. The child had lived with her mother in Puerto Rico until she was 10-months-old, at which time the father transported the mother, the child and mother's child from another relationship, to New York. The parties and children resided in New York for four months, and following a domestic dispute, the mother and children left the father's home, stayed temporarily in a shelter for 3 weeks and then returned to Puerto Rico. While the father admitted the child had not resided in New York for 6 months, he contended that as the mother's removal of the child had been wrongful, Family Court should have also taken into consideration the period of time the mother and child had been in Puerto Rico since leaving New York towards the time period necessary to establish New York as the child's home state. The Appellate Division dismissed his argument since this issue was raised for the first time on appeal, and thus was not preserved for review.

*Matter of Boivin v Gonzalez*, 101 AD3d 1208 (3d Dept 2012)

### **Relocation in Children's Best Interests**

Divorced parents entered into a stipulation awarding the mother sole legal custody of their three children, with supervised visitation to the father. Thereafter, the mother petitioned for permission to relocate to Arizona.

Supreme Court granted her application finding that the mother had met the burden of establishing, by a preponderance of the evidence, that relocation was in the children's best interests. The Appellate Division affirmed. Based upon the record as a whole, giving due deference to Supreme Court's credibility determinations and due consideration to the father maintaining meaningful contact with the children, the court's decision had a sound basis in the record. The evidence showed that although the mother's primary motive for relocation was her fiancé, the children, who all had special needs, would benefit from the economic stability and security such a move would bring. The father currently had supervised visitation with the children due to his failure to comply with a previous court order directing him to complete both a domestic violence and anger management program. At the time of the hearing the mother was receiving public assistance and received help from friends and relatives to make ends meet. The fiancé was gainfully employed as a mechanic for a well-established civilian contractor and had the financial resources to support the mother and children, all of whom would also be covered under his health insurance once he and the mother married. Although the children's educational opportunities mirrored those available in New York and the move would distance the children from their father, grandparents and relatives, the mother and fiancé also had extended family in this state and indicated they would return to New York to facilitate the father's visits with the children. The mother and fiancé also agreed to allow the father to visit the children in Arizona and have telephone and/or online contact with them.

*Matter of Shirley v Shirley*, 101 AD3d 1391 (3d Dept 2012)

### **Court Properly Suspended Father's Visits and Granted Mother an Order of Protection**

Family Court modified a previous custody order by suspending the father's parenting time, ordered him to engage in counseling and submit to a substance abuse evaluation. The court also issued a one-year order of protection on the mother's behalf, determining that the father had committed aggravated harassment in the second degree by sending the her 10 "disturbing" text messages over the course of a day, repeatedly stating he was still in love with her and wanted to be a family

again, which caused the mother to fear for her safety. The Appellate Division affirmed. With reference to the custody matter, the parents did not dispute that a sufficient change of circumstances had occurred since the prior order had been issued. The only issue was whether curtailment of the father's visits was in the child's best interests. There was sound and substantial basis in the record to modify visitation. The father rarely saw the child, tended to "disappear" from the child's life and it was the mother who made the effort to encourage a relationship between them. After spending time with the father, the child used swear words and exhibited aggressive behavior. At least on one occasion, the father agreed to see the child only if the mother had sex with him. The father's alcohol and drug use placed the child at risk of harm. The father's home smelled of marijuana and he confirmed he had recently tested positive for cannabis. The father drove or attempted to drive, with the child in the car, under the influence of alcohol; and he allowed the child to ride in the front seat without wearing a seat belt. The father also described an incident where he lost his child at a Wal-Mart store for nearly 45 minutes as "funny". Additionally, when the father was asked if he had been convicted of raping a 90-year-old, he invoked the Fifth amendment, allowing the court to draw an adverse inference against him.

*Matter of Robert AA. v Colleen BB.*, 101 AD3d 1396 (3d Dept 2012)

### **Summary Judgment Inappropriate as Questions of Fact Existed Regarding Parents' Deficits**

Grandmother and step-grandfather sought sole custody of their grandchild alleging that the mother had abandoned the child, and that both parents were unable to care for the child. Family Court awarded the grandparents' temporary custody of the child. Prior to the hearing, all parties were deposed. Thereafter, Family Court granted the mother's summary judgment motion to dismiss the grandmother's custody petition. The Appellate Division reversed. When viewed in the light most favorable to the grandmother as the non-moving party, numerous questions of fact existed as to whether the parents' deficits rose to the level of abdication of parental responsibilities. While the mother's motion, which was supported by her attorney's affirmation, was arguably sufficient, the grandmother's

response included evidence highlighting the parents' unstable living conditions, their lack of income, the father's incarceration, the mother's questionable mental health, the involvement of CPS, the parents' unwillingness and/or inability to attend to the child's physical needs and the fact that the grandmother had been primarily responsible for the child's care and support for a significant portion of the child's life.

*Matter of Daniels v Lushia*, 101 AD3d 1405 (3d Dept 2012)

### **Abuse of Discretion To Deny Father's Motion to Vacate Default Judgment**

Unmarried parents of one child entered into an agreement providing for joint legal custody with primary, physical custody to the mother and unsupervised parenting time to the father. The father was also ordered to complete all recommended substance abuse treatments and attend a parenting skills class. Thereafter, the mother filed a violation petition due to the father's failure to provide verification of participation in the required programs. Family Court adjourned the first appearance for the father to obtain counsel. When neither the father nor his attorney appeared at the adjourned date, the court granted the mother's oral application for a default judgment and modified the father's parenting time with the child, requiring it to be supervised. Later that same day, the father appeared at court and submitted a letter, which was treated as a motion to vacate, alleging that he had missed the court appearance due to car trouble. At the hearing on the motion to vacate, father's attorney moved to amend the father's application to include evidence allegedly verifying the father's participation in the required programs. Family Court denied both the attorney's motion to amend, and the father's motion to vacate. The Appellate Division reversed. Family Court abused its discretion by denying the father's motion to vacate. The father had been present at court just hours after his scheduled appearance, he had offered a reasonable excuse for his failure to appear on time and he had moved to vacate the court's order. The documents he sought to introduce made a prima facie showing that he was engaged in the mandated services. There was no prejudice to the mother as she was on notice that he intended to oppose her violation petition and most importantly, the court failed to make any

findings regarding the child's best interest when it changed the custody arrangement.

*Matter of Menditto v Collier*, 101 AD3d 1409 (3d Dept 2012)

### **Error to Dismiss Modification Petition Since Allegations Made Sufficient Evidentiary Showing of Change in Circumstances**

Parents of one child entered into a stipulation of joint legal custody. Thereafter, the mother moved to modify and Family Court granted the father's motion to dismiss with prejudice. The Appellate Division reversed. An evidentiary hearing is necessary where the petition contains factual allegations sufficient to warrant modification based on the child's best interests. The mother's allegations included, among other things, that the father had impeded her access to the child's daycare providers, he used profanity in the child's presence, he engaged in conduct designed to alienate the child from her, and he exhibited paranoid, hostile and volatile behavior. The mother's allegations were supported by a letter from the pediatrician which stated that the practice would no longer provide pediatric care for the child due to the father's hostile behavior during a recent visit. Although the mother's allegations were similar to those raised before the entry of the prior custody order, she claimed an escalation of the underlying issues. The fact that the prior order arose out of a stipulation also weighed in favor of a full hearing.

*Matter of Schnock v Sexton*, 101 AD3d 1437 (3d Dept 2012)

### **Child's Best Interests to Modify Custody**

Unmarried mother appealed Family Court's order modifying custody and transferring physical custody of the child to the father. The Appellate Division affirmed. Circumstances had changed since issuance of the prior custody order and it was in the child's best interests to live with the father. Pursuant to the terms of the prior order, the father had weekend visits with the child, who had been 4-weeks-old when the parties separated. By the time the child was 15-months-old, she was primarily living with her father, who lived with his parents, and only periodically visited her mother. Thereafter the father and the paternal grandparents

became the child's primary care-givers. The mother, who lived with her boyfriend, acquiesced to the child's living arrangement. The mother changed residences many times and created instability and visitation-related transportation issues. After the father filed to modify, the mother restricted his parenting time to the provisions of the prior order. The child, who was 3-years-old at the time of trial, exhibited negative and troubling behaviors after spending time with the mother. These behaviors included her use of inappropriate language, sexual gestures, violent acts against her dolls and regression in toilet training. While the evidence reflected that both parents loved the child, the father was able to provide a stable home life, he was gainfully employed, actively engaged in the day-to-day care of the child, provided the child with necessities, had a family support network to help him, and made efforts to address the child's behavioral issues. On the other hand, the mother and her boyfriend were unemployed, the mother did not have a support system and seemed unaware of the child's behavioral issues.

*Matter of Smith v Barney*, 101 AD3d 1499 (3d Dept 2012)

### **Child's Best Interest to Award Mother Primary Physical Custody**

Family Court properly awarded joint legal custody with primary, physical custody to the mother. Although the mother admitted to occasionally smoking marijuana and did not have custody of a child from a previous relationship, she was the primary caretaker of the subject child and she shared a home with her boyfriend who was employed and financially assisting the mother. The mother had a support system which included her friend and the boyfriend's mother, who was a nurse. These individuals helped the mother care for the child. On the other hand, the father had a criminal history, he sold illegal drugs, was violent towards others, and there was evidence he used illegal substances regularly. The mother also claimed the father had threatened her, and her claims were to some extent verified by the father.

*Matter of Gordon v Richards*, 103 AD3d 929 (3d Dept 2013)

### **Mother's Use of the Internet to Demean 10 -Year-**

### **Old Child Supported Sole Custody to Father and Order of Protection Against Mother**

Family Court modified a prior order of joint legal custody and awarded the father sole, legal custody of the children. The Appellate Division affirmed. There was no dispute that there was a sufficient change in circumstances since the entry of the last order as the parties' relationship had deteriorated to such an extent that modification was warranted. It was in the children's best interest for the father to have sole custody due to the inappropriate behavior by the mother, and its effects on the parties' oldest child, who had mental health issues for which he was receiving counseling. The mother refused to participate in counseling with the child and refused to agree with the therapist's recommendation that the child needed consistency in both households. The mother testified that she frequently called the father to take the child away because she could not deal with his behavior. The mother also admitted to swearing and yelling at the child as well as using physical means to deal with him. Additionally she used Facebook to demean the child, who was 10-years-old at that time and called him an "asshole". She testified without remorse she did so because that is what "he is" and thought it was important for her Facebook friends to know. On the other hand, the father dealt more appropriately with the oldest child, participated in counseling with him, made sure he took his medication and maintained a stable environment for the children. The oldest child's school work had improved since physical custody was transferred to the father. The court had sufficient basis to issue an order of protection against the mother based on her use of the internet to demean and disparage the oldest child, and her lack of remorse or insight into the appropriateness of such behavior.

*Matter of Melody M. v Robert M.*, 103 AD3d 932 (3d Dept 2013)

### **Sound and Substantial Basis in the Record**

Family Court dismissed the mother's family offense petition against the father and awarded the parties joint legal custody of the children, with primary physical custody to the father. The Appellate Division affirmed determining that the court had a sound and substantial basis in the record. The mother failed to show, by a

preponderance of the evidence, that the father had committed harassment in the second degree. Her testimony that the father had yelled and screamed at her during exchange of the children was too generalized and insufficient to prove that the father intended to harass or alarm her, or that he engaged in conduct which alarmed or seriously annoyed her or that his actions served no legitimate purpose. Additionally, while each parent would foster a relationship between the children and the other parent, the mother did denigrate the father by telling the children she left the parties' home due to the father's verbal abuse and that he would not let her return. The mother placed her own interests above that of the children by moving into an apartment in a different school district without a realistic plan of how she would get the children to school. The mother's work schedule changed each week and she had limited financial resources. On the other hand, the father offered the children more stability as he continued to live in the same property where they had lived for most of their lives and the children could continue to attend the same school. Giving due deference to the court's credibility determinations, it was in the children's best interests for custody to be awarded to the father.

*Matter of Christina MM. v George MM.*, 103 AD3d 935 (3d Dept 2013)

### **No Change in Circumstances to Modify Custody**

Family Court denied the father's petition to modify physical custody and issued an order of protection against him on the mother's behalf. The Appellate Division affirmed. The father failed to show there had been a change in circumstances since the entry of the last order. The children were doing well in school, were actively involved in extracurricular activities, had a stable home life with the mother and maintained a good relationship with both parents. Family Court's slight modification of the father's telephone access times with the children, and its change of the visitation exchange location, while not requested by either party, was not error. These issues were the basis of the underlying problems that prompted the parties' petitions. While there was conflicting evidence regarding the mother's allegation that the father had committed a family offense against her, according due deference to Family Court's credibility determinations, the court's award of

an order of protection was supported by a fair preponderance of the evidence that the father had committed harassment in the second degree.

*Matter of John O. v Michelle O.*, 103 AD3d 939 (3d Dept 2013)

### **Father's Sexual Abuse of Child From Previous Marriage Determined "Situational"**

Mother, upon learning that the father had sexually abused his daughter from a previous marriage, obtained an order preventing any contact between the subject child and the father. An order was later issued allowing the father twice-weekly supervised visits with the child. He was also directed to complete a sex abuse risk assessment and treatment. Thereafter, the mother filed a petition to relocate with the child to California. During the pendency of the proceeding, Supreme Court issued a temporary order allowing re-location. Just before the court rendered its decision, the mother filed a motion to stay the relocation proceeding on the ground that the child had recently disclosed the father had abused her. Supreme Court decided it would not be in the child's best interest to relocate, converted the mother's motion into a petition to modify the father's visitation access, and ordered the child to see a psychologist. The Appellate Division affirmed determining that the court's decision had a sound and substantial basis in the record. The mother's boyfriend was the impetus behind the mother's relocation petition, and although the mother's salary would increase by \$12,000, and she would be offered an opportunity for promotion, unlike the job she had left in New York, the costs of the child's education and living expenses in California would absorb the salary. The mother was financially dependant on her boyfriend for a large portion of her living expenses and was unable to show how she could support the child if her relationship with her boyfriend ended. Although the mother claimed the change in climate would help improve her child's eczema and sinus issues, she was unable to provide any evidence to support this claim, and there was no evidence the school in California was better than the school the child attended in New York. The child had extended family in New York, including her maternal grandparents. Although the father's visits with the child were supervised, he always acted appropriately and the child was affectionate towards the

father. The forensic evaluator testified that the move would compromise the father-child relationship. She also stated that the father was a "situational pedophile", who felt remorse and shame about his past misconduct, and opined that he posed a low risk to re-offend. Further, there was no evidence to suggest that he had ever abused the subject child.

*Matter of Scott VV. v Joy VV.*, 103 AD3d 945 (3d Dept 2013)

**New York is Inconvenient Forum to Hear Case Involving Older Child but Insufficient Information to Determine Whether it is Inconvenient Forum for Younger Child**

Family Court awarded the mother physical custody of two children and allowed her to relocate to Pennsylvania. Thereafter, a "dependancy proceeding" was commenced in Pennsylvania based on allegations that the older child had sexually abused the younger child, and the older child was removed from the mother's custody and placed in foster care in Pennsylvania. Family Court modified the previous order, provided the father specific visitation rights with the younger child, and retained jurisdiction of the case although the mother and children continued to reside in Pennsylvania. One month later, the father filed a violation of visitation petition with respect to the younger child, and a custody modification petition requesting physical custody of the older child. Family Court, on its own motion, dismissed both petitions finding New York was an inconvenient forum pursuant to §76-f of the DRL. The Appellate Division affirmed the court's determination with regard to the older child, but reversed Family Court's decision concerning the younger child finding it was not supported by a sound and substantial basis in the record. The Appellate Division noted that before a court can declare a forum inconvenient, it must consider eight factors, which the Court enumerated in a footnote. With regard to the older child, allegations of sexual abuse against him were made in Pennsylvania, court proceedings regarding this matter were ongoing in Pennsylvania and both parties had appeared with counsel at those proceedings. Further, the older child was in foster care in Pennsylvania and was being monitored by that state's child protective agency. Although the parties had agreed that jurisdiction would continue in New York

for a period of time, the mother and children had been residing in Pennsylvania for almost a year. However, with regard to the younger child, very little connected him to the proceedings going on in Pennsylvania and the younger child's attorney expressed concern that his client's best interests were not being addressed in Pennsylvania. The record did not contain sufficient information to determine which court was more familiar with the issues surrounding the younger child and there was not enough information to determine whether Family Court should have communicated with Pennsylvania before rendering a decision regarding the younger child. At the very least, the court should have stayed the petition until a proceeding concerning this child was commenced in Pennsylvania.

*Matter of Frank MM. v Lorain NN.*, 103 AD3d 951 (3d Dept 2013)

**Child's Close, Loving Relationship With Father is Basis For Denying Mother's Relocation Petition**

Family Court determined relocation was not in the child's best interest. The Appellate Division affirmed. The mother, who had remarried and was pregnant with her husband's child, sought to relocate to Kentucky so that she could raise the subject child in her new family unit. The husband was a successful construction manager in Kentucky and also owned two side businesses. The mother intended to work for one of his businesses part-time, from home. The husband had an annual salary of \$120,000 and a "wonderful and supportive extended family nearby", some of whom had formed a close bond with the child. The husband testified he would promote and facilitate the child's visits with her father and the mother proposed the father could have extensive periods during the summer, school breaks and holidays with the child. This in effect would result in the father having approximately the same number of total hours per year as he always had. However, since the father and his family had a close relationship with the child, the move would deprive him of a regular and meaningful relationship. Currently the father enjoyed significant parenting time with the child in which she was with him 6 out of 14 days. The father lived with his parents on a farm, was gainfully employed and was actively engaged in caring for the child's needs. He consistently paid child support, his share of daycare expenses, health insurance

and uncovered medical expenses. While the child had a close relationship with her mother, and had newly formed positive relationships with the husband's family, the considerable distance from her father and his family would have a detrimental impact on her relationship with her "devoted, loving, caring and capable father". Additionally, the mother failed to establish that the child's life would be enhanced emotionally or educationally by the move.

*Rose v Buck*, 103 AD3d 957 (3d Dept 2013)

### **Custody Order Reversed Due to Family Court's Failure to Provide Father His Right to Procedural Due Process**

Mother and Aunt had joint legal custody of two children with the aunt having primary, physical custody. The father, who was incarcerated, was prohibited from having physical, verbal or written contact with the children. Thereafter, the mother moved to modify seeking joint legal custody with the aunt, with primary physical custody to the mother. Following a hearing, at which the father was not present or represented, Family Court issued an order "upon consent of the parties", and granted the mother full legal and physical custody. The aunt was provided visitation with the children, and the no contact provision against the father was continued. The Appellate Division reversed. The father was denied his right to procedural due process. As a parent, he was entitled to a full and fair opportunity to be heard. Here, the undisputed facts showed the father was not present at the hearing or represented by counsel, and there was no evidence in the record to show that the father was put on notice of the proceedings or given an opportunity to appear.

*Matter of Whiteford v Jones*, 104 AD3d 995 (3d Dept 2013)

### **Not in Child's Best Interests to Modify Custody**

Family Court dismissed the father's custody modification petition. The Appellate Division affirmed. Although the mother's unstable living situation was sufficient to show a change in circumstances, it was not in the child's best interest to modify custody. The record reflected that both parents

were similarly situated regarding the quality and stability of their home lives. Both parents relied on friends and family for housing. However, the evidence showed that the police were called to the father's residence due to an altercation between the father and his brother, during a time when the child was present in the father's home. Further, the father admitted he had been in a fight with the mother's brother, which resulted in an order of protection against the father. Although the father presented testimony that the child was unclean when leaving the mother's care and the mother had ignored a rash on the child's buttocks, the evidence also showed that the mother had sought treatment for the rash. According deference to Family Court's credibility determinations, the record supported its determination that it was not in the child's best interests to change custody.

*Matter of Hayward v Campbell*, 104 AD3d 1000 (3d Dept 2013)

### **Father's Excessive Corporal Punishment and Drug Use Supports Award of Sole Custody to Mother**

Unmarried parents of three children separated and entered into an agreement whereby the father had custody of the oldest boy and the mother had custody of the younger twins. Thereafter the father filed for custody of all three children and the mother cross-petitioned for the same. After a hearing, Family Court awarded the mother sole legal and physical custody. The Appellate Division affirmed. The oldest child revealed to the mother, without any prompting, that the father had beaten him with a paddle and this statement was evidenced by welts and bruising on his body. The bruises were subsequently observed by two CPS caseworkers, one of whom noted that the bruises were consistent with being hit by a paddle, which gave rise to an indicated report against the father. Although the father's explanation contradicted the son's statements, the court found his testimony to be less than credible. The father had been the recipient of a previous indicated report for inadequate guardianship involving physical discipline of the oldest son and testimony revealed he had engaged in excessive physical discipline of the other children as well. Family Court ordered both parents to undergo drug testing as both had admitted past drug use. While the mother tested negative, the father failed to comply with drug testing.

He admitted to using hallucinogenic drugs on several occasions, and was indicated by CPS for smoking marihuana in front of one of the children.

*Matter of Joseph G. v Winifred G.*, 104 AD3d 1067 (3d Dept 2013)

### **Children's Best Interests for Fathers to Have Sole Custody**

Family Court awarded the mother of three children, two by one father and the youngest by another, custody of her two older children. At this time the mother was residing in Tennessee. Thereafter, the mother filed custody violation and modification petitions with respect to the older two children, and their father filed to modify as well. The father of the youngest child then filed for custody of his child. By this time, the mother was residing in New York but both fathers were residing in Tennessee. After a fact-finding and a Lincoln hearing, Family Court awarded sole custody of all children to their respective fathers. The Appellate Division affirmed. The change of circumstances was established by, among other things, the mother's drug abuse, her unilateral relocation with the children to New York some time earlier, and her subsequent arrest and incarceration. It was in the best interests of the children to live with their fathers. The father of the two older children owned his residence, he and his live-in paramour had steady jobs, neither had a criminal record or any child protective history. Further, the older two children had lived in Tennessee for most of their lives, had positive relationships with their father's paramour and their paternal grandmother, and since being returned to the father, both were doing well academically and socially in their Tennessee school. Although the father of the youngest child had a status as a convicted sex offender and lacked a well-established parental relationship with his child, the sex offender status had been due to a charge of statutory rape which had occurred over 10 years ago. He had no prior or subsequent criminal history of crimes or sexual misconduct, he was willing to undergo sex offender treatment if necessary and his lack of contact with the youngest child was due in part, to the mother's actions in terminating visits between them. He had still managed to maintain contact with the child by means of occasional contacts at a relative's home, without the mother's knowledge. He was married, he and his wife

had taken care of the child after the mother's incarceration, he had a stable lifestyle, a steady job and his wife, who also worked full time, was honorably discharged from the military and had no criminal conviction. On the other hand, the mother was unemployed and her lifestyle was so unstable that her older two children attended three different school districts during the six months they were residing with her in New York. She interfered with their relationship with their father by relocating, she and her fiancé had an indicated child protective report for inadequate guardianship, there was testimony that they bought and sold drugs in Tennessee while the children were living with them, and the children had been exposed to drug abuse and domestic violence. The mother and her fiancé had left Tennessee while open criminal matters were pending against them, and as a result of this, the mother was arrested by bounty hunters in front of the children. While there was some testimony that the youngest child attended school regularly and was usually clean and well-rested while she was residing with the mother, there was also testimony that the child feared the mother's fiancé because "he hurt mommy", and she demonstrated to relatives how the mother and her fiancé rolled up dollar bills to snort white powder into their noses, and the child stated she was told by the mother not to tell caseworkers about this.

*Matter of Bush v Bush*, 104 AD3d 1069 (3d Dept 2013)

### **Mother's Interference with Father-Child Relationship Results in Sole Custody to Father**

Unmarried parents of two children agreed to a consent order of joint legal custody with primary, physical custody to the mother. Thereafter, both parties filed various violation and modification petitions during different times in the proceeding, and after a hearing, Family Court awarded sole custody to the father and visitation to the mother. The Appellate Division affirmed. There was no error by Family Court in relying on the forensic expert's opinion although it was based in part on information the expert obtained from DSS caseworkers, who were not subject to cross-examination. The expert testified, without contradiction, that the information obtained from collateral sources is commonly relied upon within her profession when conducting forensic psychological

evaluations within the context of a custody proceeding, and her opinion was primarily based on information she obtained from extensive interviews with the mother, father and children, with the collateral source information serving only as a link in the chain of data. The evidence showed that the mother undermined and vilified the father to the children and interfered with their relationship with him. Among other things, she trained the children to ignore their father and sabotaged one of her children's participation in baseball in order to discourage the child's relationship with his father through this sport. The children were happy to play in the "bouncy tent" at their father's home but after speaking with the mother on the telephone, the younger child refused to go in the tent stating that if he did "mommy said....[his] heart could stop". Additionally, one of the children was overheard saying his father was a "bad person" because he moved out of the family home. The mother encouraged the children to rip up notes they received from their father; she had the children help hang "stop domestic violence" signs on her home and when the father asked them if they knew what domestic violence was, they replied it was what the father had done to the mother in the past.

*Matter of Greene v Robarge*, 104 AD3d 1073 (3d Dept 2013)

### **Sibling Visitation Issue Remitted for Lincoln Hearing**

Family Court granted an order of sibling visitation to the brother, but due to the brother's troubled background, limited his visitation with his sister to daylight hours, one weekend per month. The brother appealed arguing that the court should have held a Lincoln hearing to ascertain the sister's wishes. Although the attorney representing the sister in Family Court had argued that such a hearing was not necessary since he could convey her wishes, the appellate attorney arguing for the sister stated that the trial attorney had not accurately or adequately conveyed the child's wishes to the court. The Appellate Division determined that although a Lincoln hearing, while preferable, was not mandatory, in this unusual situation it was error for the court to deny the request and remitted the matter for a Lincoln hearing.

*Matter of Jessica B. v Robert B.*, 104 AD3d 1077 (3d Dept 2013)

### **No Extraordinary Circumstance Shown, But**

### **Grandmother Entitled to More Visitation**

Family Court determined that the grandmother did not show extraordinary circumstances sufficient to deprive the mother of custody. The Appellate Division affirmed. The court's decision had a sound and substantial basis in the record. Although the child had resided with her father at the grandmother's home pursuant to the prior order of custody which granted the father primary, physical custody, it was the father and not the paternal grandmother who served as the child's primary custodian. Throughout the time the child resided with her father, the mother consistently exercised visitation with the child and immediately after the father's death, the mother petitioned for custody. Even though the mother had lived in a number of residences with unsuitable companions and had admitted to using drugs and alcohol in the past, there were no child protective proceedings against her and she had matured and taken positive steps to address and resolve prior shortcomings. However, Family Court should have awarded the grandmother more visitation than one 28-hour overnight visit per month. Among other reasons, the grandmother had been a continuing presence in the child's life during the 2 ½ years the child lived with her, she had provided care when the father was unable to do so, brought her to school every day and attended the majority of the child's school and other activities. The mother was not opposed to the court awarding the grandmother visitation and recognized it was in the child's best interest. Additionally, the child's attorney advocated for more visitation with the grandmother based on her longstanding presence in the child's life, and the strong bond which existed between them.

*Matter of Burton v Barrett*, 104 AD3d 1084 (3d Dept 2013)

### **Parents' Acrimonious Relationship With Grandmother Insufficient to Deny Her Visitation**

Family Court awarded the paternal grandmother monthly visits with her grandchild. The Appellate Division affirmed. Family Court correctly ascertained that equity required intervention in this matter. The grandmother had standing to pursue visitation. She had purchased a crib and dresser for the child, she was present during the child's birth, prepared dinner for the family when the child came home from the hospital, visited the child at least 10 times during the first month of the child's life and attended the child's first doctor's

appointment. Although the mother contended that after some time the grandmother lost interest in the child, she also admitted she told the grandmother to stay away because she needed more time alone with the child. After the parents cut off the grandmother's visits with the child altogether, the father admitted the grandmother contacted him on at least 4 occasions asking to see the child. There was sound and substantial basis in the record to determine it was in the child's best interests for the grandmother to have visitation. Although the relationship between the parents and the grandmother was acrimonious, this alone was insufficient to deny her visitation.

*Matter of Laudadio v Laudadio*, 104 AD3d 1091 (3d Dept 2013)

### **Parties' Acrimonious Relationship Makes Joint Custody Unworkable**

Supreme Court granted the parents of two children a divorce and continued the prior joint custody order, with primary physical custody of the two children to the mother and a slightly reduced mid-week visitation access to the father. The mother appealed. The Appellate Division determined that joint custody was not workable given the significant change of circumstances that had occurred since entry of the prior order. The parents' relationship had deteriorated to a point where they were unable to speak to each other, and testimony from the court appointed psychologist described the children as being "in emotional turmoil" as a result of their parents' acrimonious relationship. Additionally, both children had attention deficit disorder, the daughter had depression and a skin pigmentation condition, and the son had juvenile diabetes. While neither parent was without fault, it was in the children's best interest to award sole custody to the mother. She was able to offer more stability, was better able to deal with the children's health issues and was willing to foster a relationship between the children and their father. Elimination of mid-week visits with the father was in the children's best interests as it would offer them a more predictable environment. The father admitted that mid-week visits were causing difficult behavioral issues with the children, and both the psychologist and the children's lawyer advocated for removal of these visits.

*Nolan v Nolan*, 104 AD3d 1102 (3d Dept 2013)

### **Family Court Erred in Determining that**

### **Grandmother Had Standing to Pursue Visitation**

Family Court erred in awarding the grandmother visitation with her grandchildren. As a threshold matter, the court failed to consider whether she had an existing relationship with the grandchildren, or where such a relationship has been frustrated by the parents, whether sufficient effort had been made by her to establish such a relationship, resulting in a situation where "equity would see fit to intervene", and thus confer standing upon her. Family Court's statement in its oral ruling that the grandmother appears to have a relationship with the children, without describing the nature or extent of such relationship, and its failure to address the objections made by a fit parent, does not establish equitable circumstances to justify standing.

*Matter of Hill v Juhase*, 105 AD3d 1278 (3d Dept 2013)

### **Mother Failed to Establish Change in Circumstances**

Family Court denied mother's petition to modify a prior custody order that granted physical custody of the parties' children to respondent father and visitation to mother. The Appellate Division affirmed. The mother failed to establish a change in circumstances sufficient to warrant a modification of custody. The only parenting problems that arose in the two months between the issuance of the prior order and the filing of the instant petition had been resolved before the hearing on the instant petition.

*Matter of Hoffmeier v Byrnes*, 101 AD3d 1666 (4th Dept 2012)

### **Court's Best Interests Determination Supported by Record**

Family Court granted father's petition to modify the custody provisions of a stipulated order and awarded the father primary physical custody of the parties' child and visitation to the mother. The Appellate Division affirmed. The court's best interests determination was supported by a sound and substantial basis in the record. Although the court noted concern about the mother's unstable work schedule that did not give the mother a Hobson's choice between livelihood and parenthood. Rather, the court paid particular attention to the child's wishes and the realities of each parent's home environment. The mother failed to preserve for

review the contention that the AFC should have substituted judgment because she made no motion to remove the AFC. In any event, the contention lacked merit. Neither exception in 22 NYCRR 7.2 (d) (3) was implicated here.

*Matter of Swinson v Dobson*, 101 AD3d 1686 (4th Dept 2012)

### **Court Attorney Referee Had Jurisdiction to Hear and Determine Matter**

Family Court awarded petitioners sole legal and physical custody of the subject child. Respondent father appealed. The Appellate Division affirmed for reasons stated by the court, adding only that the Court Attorney Referee had jurisdiction to hear and determine the matter. The father signed the requisite consent and, although he signed it before he was informed of his right to counsel, he and his attorney willingly participated in the subsequent proceedings without objection.

*Matter of Phelps v Hunter*, 101 AD3d 1689 (4th Dept 2012)

### **Court Properly Denied Mother Permission to Relocate**

Family Court denied mother's petition seeking permission to relocate with the parties' child to Georgia. The Appellate Division affirmed. The mother failed to establish that her child's lives would be enhanced economically, emotionally or educationally. Although she testified that she was offered a position as a hair stylist at a salon in Atlanta, there was little evidence adduced concerning the salary and other incidentals of employment. Additionally, the child had meaningful and regular access with respondent father, as well as with the child's maternal and paternal families. The evidence also supported the determination that the child's relationship with the father and other relatives in the Buffalo area would be adversely affected by the relocation.

*Matter of Williams v Epps*, 101 AD3d 1695 (4th Dept 2012)

### **Parties' Difficulty in Communicating Not Change in Circumstances**

Family Court dismissed mother's petition to modify a

prior custody and visitation order entered upon the parties' stipulation. The Appellate Division affirmed. The mother failed to establish a change in circumstances sufficient to warrant a modification of custody. The parties' communication problems did not constitute a change in circumstances. Although the record reflected that the parties experienced some difficulty in communicating with each other, there did not appear to be a change in the parties' communication issues since the prior order was entered. Further, the record reflected that the communication problems had not meaningfully interfered with the child's emotional and intellectual development, health or success in school. The father's alleged failure to spend time with the child did not establish changed circumstances.

*Matter of Avola v Horning*, 101 AD3d 1740 (4th Dept 2012)

### **Father's Transfer to Another Prison Not Change in Circumstances**

Family Court dismissed incarcerated father's petition to modify a prior consent order that allowed him to correspond with his child only by mail. The Appellate Division affirmed. The father failed to establish a change in circumstances since the time of the consent order sufficient to warrant a modification of custody. The fact that the father had been transferred to another correctional facility that was closer to the child's home was not a change in circumstances sufficient to warrant the relief sought.

*Matter of Ragin v Dorsey*, 101 AD3d 1758 (4th Dept 2012)

### **Court Erred in Failing to Advise Party of Her Right to Assigned Counsel**

Family Court granted mother's petition to modify an order on consent that had awarded grandmother, mother, and father joint legal custody of the subject child and primary physical custody to grandmother. The mother's petition sought visitation with the child in the mother's home. The Appellate Division reversed. The court committed reversible error when it failed to advise the grandmother of her right to assigned counsel. Contrary to the contention of the AFC, the Appellate Division, Fourth Department had not squarely addressed the issue whether respondents in visitation proceedings are entitled to assigned counsel under the Family Court Act. In doing so in this case, the Court

concluded that respondent was entitled to assigned counsel. Although the word “visitation” did not appear in Family Court Act § 262, a proceeding to modify a prior order of visitation was a proceeding under the Family Court Act article 6, part 3 and therefore, was within the purview of the assigned counsel statute.

*Matter of Wright v Walker* 103 AD3d 1087 (4th Dept 2013)

### **Award of Sole Custody to Mother Had Sound and Substantial Basis**

Supreme Court awarded sole custody and primary physical residence of the parties’ child to plaintiff mother. The Appellate Division affirmed. The Referee’s findings that the father’s application for equal time with or sole custody of the child was economically motivated and that the mother was more fit because the father was preoccupied with child support, placed his needs above the child’s needs, and was not as stable as the mother were supported by a sound and substantial basis in the record. The Referee did not abuse his discretion in ordering the father to pay 40 % of the child’s private school tuition.

*Belec v Belec*, 103 AD3d 1089 (4th Dept 2013)

### **Mother Established Changed Circumstances**

Family Court modified a prior joint custody order entered upon the parties’ consent by awarding primary physical custody of the parties’ children to petitioner mother and granting her all decision-making authority with respect to the children’s health, education and welfare. The Appellate Division affirmed. Even assuming, for purposes of argument, that a showing of changed circumstances had to be made notwithstanding language in the prior order that such showing need not be made, the mother established changed circumstances. The record established that the father interfered with the children’s telephone conversations with the mother. Also, the parties’ relationship had become so strained and acrimonious that communication between them was impossible.

*Matter of Murphy v Wells*, 103 AD3d 1092 (4th Dept 2013)

### **Father Who Did Not Seek Modification Not Aggrieved by Order**

Family Court directed the parties to participate in and cooperate in therapeutic supervised visitation for petitioner mother. The Appellate Division dismissed respondent father’s appeal. In her petition, mother had sought enforcement of a 2009 visitation order, and the court determined that father was not in willful violation of the order and continued supervised visitation. On appeal, father and AFC contended that the court erred in continuing supervised visitation. Because the father never requested a modification of the 2009 order he was not aggrieved by the court’s disposition.

*Matter of Mosher v Mosher*, 103 AD3d 1095 (4th Dept 2013)

### **Order Reversed: Relocation in Child’s Best Interests**

Family Court denied mother’s petition to relocate with the parties’ child to the New York City area. The Appellate Division reversed. The court’s determination lacked a sound and substantial basis. The mother established that the relocation would benefit the child economically and emotionally because the relocation would increase the mother’s earning potential and would enable her to spend more time with the child. The mother agreed to maintain a visitation schedule that would foster the child’s relationship with the father, to transport the child to and from Syracuse, and to pay transportation costs. The AFC was not ineffective. The AFC actively participated in the hearing and there is no requirement that she submit a position in her written closing argument. Also, there was no indication that the AFC would have succeeded in obtaining a *Lincoln* hearing even if she had requested one because the child was five at the time of the hearing.

*Matter of Venus v Brennan*, 103 AD3d 1115 (4th Dept 2013)

### **When Substitution of Judgment Warranted, AFC Not Obligated to State the Basis of Position**

Family Court awarded respondent father sole custody of the parties’ child. The Appellate Division affirmed. The mother contended that the AFC improperly advocated a position that was contrary to the child’s express wishes because the AFC failed to state the basis for advocating that contrary position. Because she did not move to remove the AFC, the issue was not preserved for appeal. In any event, the mother’s

contention lacked merit. There were only two circumstances in which an AFC would be authorized to substitute his or her own judgment for that of the child: where the AFC was convinced either that the child lacked the capacity for knowing, voluntary and considered judgment, or that following the child's wishes was likely to result in a substantial risk of imminent, serious harm to the child. Where the AFC was convinced that one of those two circumstances was implicated, the obligation of the AFC was to inform the court of the child's wishes, if the child requested that the AFC do so. The AFC did so in this case. Moreover, the record supported a finding that the child lacked the capacity for knowing, voluntary and considered judgment.

*Matter of Mason v Mason*, 103 AD3d 1207 (4th Dept 2013)

### **Primary Physical Placement Transferred to Father After Mother Violated Court Orders**

Family Court transferred primary physical placement of the parties' child to petitioner father. The Appellate Division affirmed. Pursuant to a consent order entered in August 2011, the mother was awarded primary physical placement of the child. The father was awarded liberal visitation that included, in odd-numbered years, "Christmas/Winter Break\*\*\*or\*\*\* at least two weeks at Christmas time." The mother, who had relocated to Virginia, was responsible for all transportation to and from visitation with the father in New York. It was undisputed that the mother did not transport the child for Christmas 2011 visitation. The father established by clear and convincing evidence that a lawful court order clearly expressing an unequivocal mandate was in effect, that the mother had actual knowledge of its terms, and that the violation\*\*\*defeated, impaired, impeded, or prejudiced the rights of the father. The fact that the court did not specifically address any other factors related to the child's best interests before transferring primary physical placement of the child did not warrant reversal. The record was sufficient for the Appellate Division to make a best interests determination. The mother's repeated violations of court orders and her interference with the father's visitation rendered her unfit to act as a custodial parent.

*Matter of Howell v Lovell*, 103 AD3d 1229 (4th Dept 2013)

### **Order Appealable; Refusal to Grant Downward Modification of Child Support and Award of Attorney's Fees Affirmed**

Supreme Court modified defendant's visitation schedule, among other things. The Appellate Division modified by vacating the first ordering paragraph. The mother sought, among other things, a modification of the parties' access arrangement set forth in their settlement agreement, which was incorporated into their judgment of divorce, an upward modification of defendant father's child support obligation, and attorney's fees. The mother's contention that certain issues raised by the father with respect to the modification of the access schedule were not reviewable on appeal because they were the subject of a consent order was rejected. Although an order incorporated into the final order stated at the end that it was a "stipulation," it stated at the beginning that it was an order entered after the court heard testimony and\*\*\*considered\*\*\*evidence in the matter, in the best interests of the children. Additionally, another order incorporated into the final order that amended access provisions stated that the modification was proposed by the attorney for the child. No agreement or stipulation was placed on the record during the action, and the court issued a written decision, which supported the notion that the determination was made on the merits. The court erred in modifying certain access provisions where the mother failed to establish a subsequent change in circumstances. Although raised for the first time on appeal and thus not properly under review, nonetheless, the court did not err in using the father's 2010 tax return to calculate his child support obligation nor did it abuse its discretion in not granting a downward departure from the Child Support Standards Act. The record did not indicate that the parties provided the court with more recent financial documents. The recalculation provisions of the settlement agreement were triggered by the father's failure to continue to provide health insurance for the children. Further, the court did not abuse its discretion in awarding attorney's fees to plaintiff. The court properly reviewed the financial circumstances of both parties together with all the other circumstances of the case, including the relative merits of the parties' positions. The father's failure to provide the children with health insurance for over a year in part necessitated the action and further justified the court's award.

*Griffin v Griffin*, 104 AD3d 1270 (4th Dept 2013)

### **Res Judicata Did Not Bar Consideration of Mother's Prior Changes in Residence**

Family Court modified a prior custody order and awarded petitioner father primary physical custody of the parties' teenage child. The Appellate Division affirmed. Respondent mother contended that the court erred in considering her pre-2007 changes in residence in determining that there had been a change in circumstances because those changes were considered in a prior custody hearing after which the petition was dismissed. The mother's pre-2007 changes in residence were not barred by res judicata. The court properly considered the mother's pre-2007 changes in residence as background information in determining the significance of her post-2007 changes in residence.

*Matter of Nelson v Morales*, 104 AD3d 1299 (4th Dept 2013)

### **Jurisdiction Properly Retained; Mother's Violation of Divorce Judgment Among Factors Considered in Granting Sole Custody to Father**

Family Court modified the parties' joint custody arrangement and granted petitioner father sole custody of the parties' youngest child. The Appellate Division affirmed. Notwithstanding the fact that respondent mother had primary physical residence of the parties' children in California for approximately five years, the court had exclusive, continuing jurisdiction to determine custody pursuant to Domestic Relations Law § 76-a. It was undisputed that the initial custody determination was rendered in New York. Ample evidence existed of a significant connection by the child with New York. The father's extensive parenting time took place in New York, the child's extended family lived in New York, and her medical and dental providers were located there. The mother's argument that New York was an inconvenient forum was rejected. There was substantial evidence in this state from which the custody determination was made, the New York courts were more familiar with the parties and the child, and the court permitted the mother to appear electronically for all proceedings except the fact-finding hearing. The court properly determined that the father established the requisite change in circumstances to warrant inquiry into whether the best interests of the child were served by a custody modification. Moreover, the record supported the court's determination that it was in the child's best interests to award sole custody to the father. Among

the factors considered were the express wishes of the 13-year-old child to live with her father. Her wishes were entitled to substantial weight. Further, the weight of the evidence supported the court's finding that the mother willfully violated that part of the parties' divorce judgment that pertained to travel expenses for visitation. The court had discretion to consider that violation as part of its best interests analysis.

*Matter of Mercado v Frye*, 104 AD3d 1340 (4th Dept 2013)

### **Sole Custody to Father Properly Denied**

Family Court denied father's petition for sole custody of his son. The Appellate Division affirmed. Although the father's contention that the court erred in characterizing him as a "notice," rather than "consent" father, was not properly before the Appellate Division, it noted that, in any event, the father failed to establish that he had a substantial relationship with the child such that his consent to an adoption of the child would be required. The father's contention that respondent failed to use its best efforts to promote the father's relationship with the child pursuant to Article 10 of the Family Court Act was not properly before the Appellate Division because those sections of the Family Court Act were applicable only when a child was initially removed from a parent's custody. The court properly denied the father's custody petition.

*Matter of Bowie v Erie County Children's Servs.*, 105 AD3d 1312 (4th Dept 2013)

### **Father Established Changed Circumstances**

Family Court modified the parties' judgment of divorce, which incorporated the terms of their oral stipulation providing joint legal custody of the children, primary physical custody to the mother and unsupervised visitation to the father, by directing that the mother maintain primary physical custody of the parties' 15-year-old daughter and that the father have primary physical custody of the parties' 13-year old-daughter. The Appellate Division affirmed. The father met his burden of establishing a change in circumstances. The mother's testimony at the hearing established that her relationship with her 13-year-old daughter was strained due to the mother's inability to communicate with the daughter. It was in the 13-year-old daughter's best interests to reside with the father because of the stress caused by the mother's

interactions with her, but it was in the older child's best interests to reside with the mother because that child had learned to cope with her mother's personality. Although the separation of siblings was unfortunate, the children attended the same school and pursuant to the visitation schedule, the children would spend time together at each party's house during the week and every weekend.

*Matter of O'Connell v O'Connell*, 105 AD3d 1367 (4th Dept 2013)

### **Order Reversed: Petition For Visitation With Father in Prison Reinstated**

Family Court dismissed father's petition seeking visitation with the parties' then nine-year-old child. The Appellate Division reversed and reinstated the petition. The petitioner was an inmate at a New York State prison serving a 15-year sentence. He never had sought custody or visitation with the child. During the pendency of this proceeding, the mother agreed to transport the child to prison to visit the father. Thereafter, the mother and AFC informed the court that after the visit the child did not wish to have further contact with the father. The AFC also stated that the child's school counselor told him that contact between the father and child was not "preferable." The record was insufficient to determine whether visitation with the father would be detrimental to the child's welfare. Further, neither the mother nor the AFC presented any evidence rebutting the presumption that it was in the child's best interest to have visitation with the noncustodial parent and the fact that the parent was incarcerated did not, by itself, render visitation inappropriate. Moreover, no sworn testimony or other evidence was presented and the court did not conduct an in camera interview with the child.

*Matter of Brown v Divelbliss*, 105 AD3d 1369 (4th Dept 2013)

### **Court Erred in Summarily Dismissing Petition Based on Incarcerated Father's Failure to Appear**

Family Court dismissed the father's petition alleging that respondent violated a prior order because he failed to appear by video or telephone for proceedings held on an adjourned date. The Appellate Division reversed and reinstated the petition. Although the court was entitled to dismiss the petition with prejudice for failure to prosecute based upon exceptional circumstances or an

unreasonable neglect to prosecute, here neither ground was established. The record did not establish the basis for petitioner's failure to appear by telephone or video but, rather, the court stated on the record that staff had attempted to call the correctional facility and "didn't get through."

*Matter of Thomas v Smith*, 105 AD3d 1398 (4th Dept 2013)

### **Grant of Sole Custody to Father Affirmed**

Family Court granted petitioner father sole custody of the parties' child. The Appellate Division affirmed. The court's determination that sole custody to the father was in the child's best interests was supported by a sound and substantial basis in the record. There was evidence that the mother sought to interfere with the relationship between the father and child by pressuring the child into making groundless allegations of sexual abuse against the father and by repeating those groundless accusations. The court did not err in relying heavily on the investigative report and opinion testimony of a licensed clinical psychologist. The psychologist met with the parties individually, visited their homes when the child was present, administered psychological tests to the parties and the child, and consulted with caseworkers. Although the opinion of a court-ordered psychologist was only one factor to be considered in a custody proceeding, there was additional evidence in the record supporting the court's determination. The mother's contention that the court erred in failing to hold a *Lincoln* hearing was not preserved for review. In any event, given the child's young age, there was no abuse of discretion in the court's failure to conduct a *Lincoln* hearing.

*Matter of Olufsen v Plummer*, 105 AD3d 1418 (4th Dept 2013)

### **Validity of Service of Summons With Notice by Email to Defendant in Iran Affirmed**

Supreme Court granted plaintiff father a divorce and sole custody of the parties' child. The Appellate Division affirmed. On appeal, defendant mother, who lived in Iran, contended that the court erred in ordering service of the summons with notice by email. Plaintiff made a sufficient showing that service upon defendant pursuant to CPLR 3018 (1), (2), or (4) was impracticable. Plaintiff submitted evidence that defendant left the US with the parties' child and

declared her intention to remain in Iran with her family. Iran and the US do not have diplomatic relations and Iran is not a signatory to the Hague Convention on Service Abroad. Once the impracticability standard was satisfied due process required that the method of service be reasonably calculated, under all the circumstances, to apprise defendant of the action. Here, the court initially ordered service by (1) personal service upon defendant's parents, (2) mail service upon defendant at her parent's address in Iran; and (3) service upon defendant by plaintiff's attorneys in accordance with Iranian law. When plaintiff was unable to effect personal service upon defendant's parents, the court relieved him of that obligation and allowed service via email at each email address that plaintiff knew defendant had. Although service of process by email is not directly authorized by the CPLR of the Hague Convention, it is not prohibited by state or federal law or the Hague Convention. Here, service by email was sufficient to satisfy due process. For several months before the application for alternative service, the parties had been communicating by email at the two email addresses used for service. Although defendant claimed she did not receive the emails, she acknowledged receipt of a subsequent email from plaintiff's attorney sent to the same email addresses.

*Safadjou v Mohammadi*, 105 AD3d 1423 (4th Dept 2013)

### **Visitation Properly Suspended But Conditions on Resumption of Visits Improper**

Family Court suspended respondent mother's visitation with her three children who were in the custody of petitioner, the children's maternal grandfather. The Appellate Division modified. The court's determination to suspend visitation with the children had a sound and substantial basis in the record. In determining that visitation with the mother would be detrimental to the youngest child, the court properly considered the deleterious effects of such visitation on the two older children. The court erred, however, in directing the mother to engage in mental health counseling as a condition of visitation and in delegating its authority to the children's counselor to determine when resumption of visitation was appropriate.

*Matter of Roskwitalski v Fleming*, 105 AD3d 1432 (4th Dept 2013)

## **DISCOVERY**

### **Discovery of Documents Concerning Intervenor Foster Parents Granted**

Family Court granted petitioner paternal grandfather's application for discovery of documents concerning the intervenor foster parents. The grandfather's counsel was permitted to inspect a redacted version of the records in the courtroom prior to the dispositional/custody hearing and to discuss the records with the grandfather for the purposes of the hearing. The Appellate Division affirmed. The court properly determined that information concerning the foster parents' fitness to adopt the subject child was relevant to the combined proceeding to terminate the father's parental rights and to free the child for adoption, and the grandfather's petition for custody of the child. The court properly reviewed the records and redacted the portions that were not relevant to the issues.

*Matter of Joseph P.S. v New York City Admin. for Children's Servs.*, 104 AD3d 484 (1st Dept 2013)

## **FAMILY OFFENSE**

### **Aggravating Circumstances Found; Grant of Motion for Summary Judgment, Five-Year Order of Protection and Stay-Away Order in Favor of Petitioner and Child Affirmed**

Family Court granted petitioner mother's motion for summary judgment, finding that respondent father committed acts that constituted aggravated harassment in the second degree, and awarded petitioner a five-year order of protection that directed respondent to, among other things, stay away from and cease communication with petitioner and the parties' child. The Appellate Division affirmed. Respondent's conviction on four counts of aggravated harassment in the second degree regarding petitioner served as conclusive proof of the underlying facts, since he had a full and fair opportunity to contest the issues raised in the criminal proceeding. The family offense petition was established by a fair preponderance of the evidence. The court properly found aggravating circumstances, based on respondent's conduct in sending harassing letters to petitioner from prison in repeated violation of the prior order of protection, his criminal conviction of four counts of aggravated harassment with regard to petitioner, and his aggressive threatening conduct in court, which the court observed and determined constituted an immediate and ongoing threat to petitioner. Although respondent's threats were directed

at petitioner, they impacted upon the child, and thus the court properly issued a five-year order of protection in favor of both the mother and the child. A full stay-away order was also appropriate, since the father had no relationship with the then six-year-old child due to his incarceration from the time the child was four months old.

*Matter of Angela C. v Harris K.*, 102 AD3d 588 (1st Dept 2013)

### **Appeal from Order of Protection Moot**

Family Court issued an order of protection directing respondent father to stay away from the mother's home and refrain from contacting her. Respondent appealed, but as the order had expired, the Appellate Division dismissed the case as moot. The Appellate Division noted that if it were to reach the merits, it would find that Family Court had authority within the context of the underlying neglect petition to issue the order of protection pursuant to FCA § 1056, based on allegations of domestic violence committed in the child's presence, and it would also determine that respondent's objections to the order were un-preserved.

*Matter of Cheyenne J.*, 103 AD3d 467 (1st Dept 2013)

### **Dismissal of Petition Reversed**

Family Court dismissed the mother's petition without prejudice. The Appellate Division reversed, reinstated the petition and remitted the matter for further proceedings. There was no basis for the dismissal of the petition due to "remote" allegations inasmuch as some of the respondent paternal grandmother's offending conduct set forth in the petition occurred only 12 days before the petition was filed. There was likewise no basis for the dismissal of the petition as a "delay tactic" on the eve of trial because the court could have proceeded with the hearing scheduled for custody and visitation and considered the family offense petition at a later date. Respondent's challenge to the appealability of an order dismissing a petition "without prejudice" lacked merit.

*Matter of Wiley v Greer*, 103 AD3d 1218 (4th Dept 2013)

### **Respondent Committed Family Offense of Disorderly Conduct; Audio Recording of Incident Properly Admitted in Evidence**

Family Court issued an order of protection in connection with its determination that respondent husband committed acts that constituted the family offense of disorderly conduct against petitioner wife. The Appellate Division affirmed. Petitioner met her burden of establishing by a preponderance of the evidence that respondent committed the family offense of disorderly conduct. Although respondent's conduct did not take place in public, section 812 (1) specifically stated that disorderly conduct included disorderly conduct not in a public place. In addition, disorderly conduct may be committed when a person recklessly created a risk of annoyance or alarm through violent or threatening behavior. Thus, the respondent's contention that the statute required more than a risk was rejected. The Acting Family Court Judge did not abuse her discretion in refusing to recuse herself where respondent's claim of bias was not supported by the record. There was no evidence that any alleged bias had resulted in an opinion on the merits of the case on some basis other than what the Judge learned from her participation in the case. The court did not err in admitting in evidence an audio recording of the incident made by the parties' son. The eavesdropping statutes were implicated only when the recording was made by a person not present thereat. The parties' son, who made the recording from his bedroom, was present for the purposes of the statutes.

*Matter of McLaughlin v McLaughlin*, 104 AD3d 1315 (4th Dept 2013)

## **JUVENILE DELINQUENCY**

### **Court Properly Exercised Discretion in Adjudicating Respondent a Juvenile Delinquent and Imposing Probation**

Family Court adjudicated respondent a juvenile delinquent based on a finding that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the fourth degree, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation a period of 12 months. The Appellate Division affirmed. The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. Family Court providently exercised its discretion in adjudicating respondent a juvenile delinquent and imposing probation, in view of the seriousness of the offense, respondent's chronic

truancy, his prior gang affiliation and drug use, his mother's inadequate supervision and his failure to accept responsibility for his actions. The adjudication was based on a finding that respondent, while wearing a ski mask and carrying a knife, was part of a group of four who surrounded another teenager.

*Matter of Mike D.*, 102 AD3d 418 (1st Dept 2013)

### **Imposition of Period of Probation Proper Exercise of Court's Discretion**

Family Court adjudicated respondent a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed her on probation for a period of 12 months. The Appellate Division affirmed. The court properly exercised its discretion by imposing a period of probation rather than granting respondent's request for an adjournment in contemplation of dismissal. Probation was the least restrictive dispositional alternative consistent with respondent's needs and the community's need for protection. Respondent committed an unprovoked, violent attack on a fellow student, and was in need of anger management counseling. The record supported the conclusion that she needed supervision for a longer period than the maximum period available under an ACD.

*Matter of Mia R.*, 102 AD3d 627 (1st Dept 2013)

### **Family Court Erred in Initiating Motion to Modify Prior Order of Disposition and Revoke Probation**

Family Court adjudicated respondent to be a juvenile delinquent, placed him on probation for 18 months and ordered him to perform 50 hours of community service. Thereafter, respondent was arrested for allegedly punching someone in the face. At the pre-petition hearing, the police officer who was not the arresting officer but the only one to testify at the hearing, admitted that she had no personal knowledge of the events upon which the arrest was based. After the hearing, the court did not grant a pre-petition detention, but rather initiated, on its own motion, proceedings pursuant to FCA §355.1, to modify the prior order of disposition and revoke respondent's probation based upon a change in circumstances. The court then placed respondent in detention pending the resolution of the motion. On appeal, the Appellate Division held it was error for the court to use FCA §355.1 as an alternative

means to initiate proceedings to revoke probation, and detain respondent pending resolution of such motion. The Court noted that the legislature had enacted statutes to deal with probation violations, specifically FCA §§ 360.1, 360.2 and 360.3. FCA §360.2(1) authorizes the probation department, not the court, to file violation of probation petitions. FCA §§ 360.2 and 360.3 set forth specific procedural requirements, including the filing of the verified petition detailing the condition(s) of the order violated, a description of the time, place and manner in which the violation occurred, and non-hearsay allegations in support of the petition. Additionally, pursuant to these sections, unless respondent enters an admission, he or she is entitled to a prompt hearing at which only competent evidence may be admitted. Under FCA §355.1 however, respondent is only entitled to resolve any material questions of fact. In this case, Family Court erred in making its motion based solely on hearsay. Additionally, the court failed to specify which condition of the prior dispositional order respondent had violated, and it gave no description of the place and manner in which the violation occurred. Furthermore, the court circumvented the legislature's delegation to the probation department of the responsibility to determine whether to prosecute an act as a violation of probation. Pursuant to the rules of statutory construction, where the legislature enacts a specific provision directed at a particular class, but there is also a more general provision in the same statute which might encompass that class, the specific provision applies. Finally, the Appellate Division determined that even if Family Court had authority to initiate a FCA §355.1 motion, the remand order was not authorized.

*Matter of Rayshawn P.*, 103 AD3d 31 (1st Dept 2012)

### **One Parent's Presence Sufficient During Police Questioning of Child**

Family Court denied respondent's motion to suppress his statement, determining that the police had made a good faith attempt to comply with FCA §305.2(3), and did not willfully or negligently disregard any of its requirements when they permitted respondent's mother, but not his step-father, to be present during questioning of respondent. The Appellate Division affirmed. FCA §305.2(3) requires police officers to immediately notify the parent or person legally responsible for the child's care, or if such legally responsible person is unavailable the person with whom the child resides, when they take

a child into custody. They must also be advised of the child's *Miranda* rights prior to questioning. Since FCA §305.2 (3) is satisfied when one parent is notified, the mother's presence was sufficient. Additionally, there was no support for respondent's claim that pursuant to FCA §305.2, he should have been taken directly to Family Court instead of being questioned.

Interrogation is not limited to exigent circumstances and the record failed to support respondent's claim that he was too tired to be questioned.

*Matter of Trayvon J.*, 103 AD3d 413 (1st Dept 2013)

### **Placement With OCFS Proper Exercise of Court's Discretion**

Family Court adjudicated respondent a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of robbery in the second degree, and placed him with the Office of Child and Family Services for a period of 18 months. The Appellate Division affirmed. The placement was a proper exercise of the court's discretion and constituted the least restrictive dispositional alternative consistent with respondent's needs and the community's need for protection. The disposition was justified by the seriousness of respondent's offense in the instant case, as well as his prior and subsequent offenses. In addition, respondent was noncompliant with treatment and his academic performance, attendance and behavior at school were very poor.

*Matter of Julio J.*, 104 AD3d 404 (1st Dept 2013)

### **Respondent's Conduct Was Consistent with Pins Behavior, Not with Juvenile Delinquency**

The record revealed that on February 28, 2012, the Family Court remanded the respondent, who was previously adjudicated a person in need of supervision (hereinafter PINS), to a nonsecure detention facility, but she absconded that same day. On March 10, 2012, several probation officers executed a warrant at the respondent's home. The respondent allegedly resisted the officers' attempts to return her to the detention facility. Subsequently, the petitioner filed a juvenile delinquency petition against the respondent based on her conduct at the time of the execution of the warrant on March 10, 2012. The petition charged the respondent with, among other things, resisting arrest and obstructing governmental administration. The

respondent was remanded to secure detention in connection with the juvenile delinquency petition. Following a fact-finding hearing, the respondent was found to have committed acts which, if committed by an adult, would have constituted the aforementioned crimes. The court issued an order of disposition entered May 18, 2012, adjudging the respondent to be a juvenile delinquent and imposing a conditional discharge until April 13, 2013. Upon reviewing the record, the Appellate Division found that under the particular circumstances of this case, the respondent's conduct was consistent with PINS behavior, not with juvenile delinquency. Accordingly, the order of disposition was reversed, the fact-finding order was vacated, the juvenile delinquency petition was dismissed, and the matter was remitted to the Family Court, for further proceedings pursuant to FCA § 375.1.

*Matter of Gabriela A.*, 103 AD3d 888 (2d Dept 2013)

### **Respondent Was Entitled to Credit for All Predisposition Detention**

On October 12, 2010, following her admission to having committed acts which, if committed by an adult, would have constituted the crime of attempted assault in the third degree, the Family Court placed M. on probation for a period of up to 12 months in accordance with FCA § 353.2. One day before M.'s probation was scheduled to expire, on October 11, 2011, the Department of Probation filed a petition alleging that she had violated the conditions of her probation. On January 9, 2012, the Department of Probation filed a supplemental petition alleging further violations of probation. M. eventually admitted to violating certain conditions of probation, and in an order of disposition dated May 1, 2012, the Family Court vacated the October 12, 2010, order and placed her in the custody of the Commissioner of Social Services for a period of up to 12 months, with credit for 41 days for time spent in detention from March 20, 2012, to May 1, 2012, pending disposition. Over M.'s objection, the Family Court declined to credit her with the 51 days she had spent in detention from May 26, 2010, to July 15, 2010, holding that the statute did not mandate credit for time spent in detention "on the original juvenile delinquency petition." On appeal, M. argues that the court erred in determining that she was not entitled to credit for time spent in detention in 2010. The petitioner argued that M. was not entitled to credit for the 51 days she spent in detention in 2010 because the subject disposition related to the violation of probation proceeding, and

not the original juvenile delinquency proceeding, which resulted in a “final disposition of probation.” The Appellate Division rejected this argument. Here, upon finding that M. had violated conditions of probation, the Family Court vacated the prior order and entered an order of disposition. Thus, contrary to the presentment agency's contention, no prior disposition existed in this juvenile delinquency proceeding. Moreover, the 12-month period of placement was imposed for Miranda's acts underlying the initial finding of juvenile delinquency, not for any acts constituting violations of the conditions of her probation (*see* FCA § 353.3[5]). The presentment agency also argued that M. already received credit for her 2010 detention time in the order dated October 12, 2010. The period of probation, however, was not credited with or diminished by the 51 days she had spent in detention (*compare* PL§ 65.15[1]). Under the plain language of FCA § 353.3(5), the respondent was entitled to have the initial period of placement credited with and diminished by the amount of time spent in detention prior to the commencement of the placement. The Appellate Division noted that nothing in the statutory language suggested a legislative intent to limit such credit to time proximate to the disposition ordering placement (*compare* PL § 70.30 [3]). Accordingly, the Appellate Division held that as the Family Court had made no specific finding that such credit would not have served the interests of the juvenile or the community, M. was entitled to credit for all predisposition detention as a result of the charge that culminated in the period of placement.

*Matter of Miranda C.*, 103 AD3d 891 (2d Dept 2013)

#### **Petitioner Failed to Establish Reasonableness of Identification Procedure**

Here, the evidence presented by the petitioner contained inconsistencies as to, *inter alia*, the number of individuals present in a group of persons from which the complainant identified the alleged perpetrator, whether the complainant viewed one or two groups of individuals, and whether the police prompted the complainant to make an identification. There was also conflicting testimony as to whether two of the individuals identified by the complainant were apprehended only after a further pursuit and further identification procedure, the specifics of which were not elicited. Under these circumstances, the Family Court did not err in finding that the petitioner failed to meet its initial burden of establishing the reasonableness of the identification procedure and the

lack of any suggestiveness of that procedure. Accordingly, the Family Court properly granted the motion of the respondent A., and those branches of the separate omnibus motions of the other three respondents, which were to suppress identification testimony, and, thereafter, properly dismissed the petitions as based on legally insufficient evidence.

*Matter of Andrew S.*, 104 AD3d 693 (2d Dept 2013)

#### **Respondent's Consent to Change of Placement Agency Did Not Render Arguments on Appeal as Academic**

Contrary to the petitioner's contentions, this appeal was not rendered academic by the respondent's consent to a modification of the order of fact-finding and disposition, upon the petitioner's motion, to change the agency with which the respondent was placed from the Department of Social Services (hereinafter DSS) to the New York Office of Child and Family Services. The respondent consented only to the change of placement agency, not to placement itself. Thus, her arguments regarding the appropriateness of her placement remained viable. The respondent challenged the propriety of the Family Court's determination to place her with the DSS for a period of up to 12 months, which was contrary to the recommendation of her probation officer that she be continued on probation in the community. Upon reviewing the record, the Appellate Division found that the Family Court providently exercised its discretion in placing the respondent in the custody of the DSS for a period of up to 12 months, and in remanding the respondent to a nonsecure detention facility. Under the circumstances of this case, the disposition was the least restrictive alternative consistent with the best interests of the respondent and the needs of the community in light of, *inter alia*, the seriousness of the offense, the respondent's poor school attendance, and her repeated violations of the terms and conditions of probation (*see* FCA § 352.2[2][a]).

*Matter of Jalen G.*, 104 AD3d 853 (2d Dept 2013)

#### **Order of Disposition Directing Respondent to Undergo Sex Offender-specific Therapy Affirmed**

The respondent was not aggrieved by the part of the order of disposition which placed him on probation for a period of two years under stated terms and conditions, including those which directed him to undergo sex

offender-specific therapy, since he waived his right to a dispositional hearing and consented to the disposition. As to the respondent's challenge to the legal sufficiency of the evidence, upon review, the Appellate Division, found that it was legally sufficient to establish, beyond a reasonable doubt, that the respondent committed acts, which, if committed by an adult, would have constituted the crime of sexual abuse in the first degree (see PL § 130.65[1]). Further, the Appellate Division was satisfied that the Family Court's fact-finding determinations were not against the weight of the evidence (see FCA § 342.2[2]). Order of disposition affirmed.

*Matter of Cristian C.*, 104 AD3d 941 (2d Dept 2013)

**Respondent's Attorney's Failure to Object to Admission of Forensic Mental Health Evaluation Did Not Constitute Ineffective Assistance of Counsel**

The failure of the respondent's counsel to object to the admission of the forensic mental health evaluation insofar as it relied on the results of the Abel Assessment for Sexual Interest (hereinafter the Abel Assessment) did not constitute ineffective assistance of counsel. The forensic mental health evaluator relied on the Abel Assessment only with respect to his finding that it provided evidence that the respondent had been "deceitful and dishonest in his responses." The evaluator determined that this finding was corroborated by the respondent's Social Desirability Score, the reliability of which the respondent did not contest before the Family Court and did not contest on appeal. Since the finding of the forensic evaluator based upon the Abel Assessment was corroborated, counsel was not ineffective for failing to challenge the admissibility of the results of the Abel Assessment, irrespective of the merits of this particular assessment tool. Contrary to the respondent's contention, the forensic mental health evaluation was properly admitted into evidence and considered by the Family Court for the purpose of making its dispositional order.

*Matter of George R.*, 104 AD3d 949 (2d Dept 2013)

**Restitution Award Reduced Where Theft of Item Was Not Alleged in the Petition**

Family Court ordered respondent to pay restitution in the amount of \$740. The Appellate Division modified, reduced the amount of restitution to \$730 and, as modified, affirmed. With one minor exception, the

court's restitution award was supported by a preponderance of the material and relevant evidence. The evidence was sufficient to support the court's determination of the fair and reasonable cost to replace the property or repair the damage caused by respondent. However, the theft of a \$10 bottle of vodka was not alleged in the petition and, as such, was not properly part of the restitution award.

*Matter of Joshua R.S.*, 103 AD3d 1228 (4th Dept 2013)

**Finding Supported by Sufficient Evidence on Issues of Identification and Serious Physical Injury**

Family Court adjudicated respondent to be a juvenile delinquent upon his admission that he committed an act that if committed by an adult would constitute the crime of criminal sale of a controlled substance in the fifth degree. The Appellate Division affirmed. The court's finding that respondent committed an act that if committed by an adult would constitute the crime of gang assault in the second degree, as an accomplice, was supported by legally sufficient evidence on the issues of identification and serious physical injury. The victim testified that he was attacked initially by an individual other than respondent, and other people joined in the attack. With respect to the issue of identification, an eyewitness testified that respondent was one of the individuals who encircled the victim and engaged in the attack on him. With respect to the issue of serious physical injury, the victim testified that his vision was impaired as a result of the attack, and the court admitted in evidence the victim's certified hospital record, which indicated that the victim sustained a collapsed lung and fractures of the ribs and left orbital.

*Matter of Justin G.*, 104 AD3d 1329 (4th Dept 2013)

**Petition Was Jurisdictionally Defective**

Family Court adjudicated respondent to be a juvenile delinquent upon his admission that he committed an act that if committed by an adult would constitute the crime of criminal sale of a controlled substance in the fifth degree. The Appellate Division reversed and dismissed the petition. A juvenile delinquency petition is legally sufficient on its face when "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged" (FCA § 311.2 [3]). A conclusory statement that a substance seized from a defendant was

a particular type of controlled substance did not meet the reasonable cause requirement. Rather, petitioner was required to provide factual allegations that established a reliable basis for inferring the presence of a controlled substance. Here, the petition alleged that respondent knowingly and unlawfully sold a controlled substance, i.e., Adderall and the conclusory statements of respondent's classmate and an officer that the substance was Adderall. Those statement were not supported by evidentiary facts showing the basis for the conclusion that the substance was actually Adderall.

*Matter of Brandon A.*, 105 AD3d 1365 (4th Dept 2013)

## **PATERNITY**

### **Court Properly Denied Motion to Dismiss Paternity Proceeding on Ground of Equitable Estoppel**

Family Court denied respondent mother's motion to dismiss the paternity proceeding on the ground of equitable estoppel, and ordered DNA paternity testing of petitioner, respondent, the child and respondent's husband. The Appellate Division affirmed. The court properly determined that the child's best interests warranted denial of respondent's motion. The record showed that respondent had at all times recognized petitioner as the biological father of the child and supported and allowed the child to develop a relationship with petitioner. However, a few years after the child's birth, respondent terminated the child's access to petitioner due to concerns about petitioner's lifestyle that she had ignored until that point. The court providently exercised its discretion in denying respondent's application for an adjournment to obtain her husband's testimony. Indeed, it was a stipulated fact that respondent and her husband were married at the time of the child's birth, and the husband's good relationship with the child, about which he purportedly would have testified, did not change the equities in the case.

*Matter of Alexis T. v Vanessa C.-L.*, 101 AD3d 436 (1st Dept 2012)

### **Court Properly Denied Motion to Vacate Order Entered on Default Dismissing Paternity Petition Where Petitioner Failed to Show a Meritorious Claim of Paternity, and Equitable Estoppel Precluded Petitioner from Pursuing Paternity Claim**

Family Court denied petitioner's motion to vacate an order dismissing his paternity petition on default. The Appellate Division affirmed. While petitioner demonstrated a reasonable excuse for his default in appearing, he failed to show a meritorious claim of paternity. Although the court improperly relied on a purported DNA test that was not in the record, its determination was otherwise supported by the record. Petitioner testified that, although he knew of the child's birth within a year after she was born, he did not believe he was the father because of the mother's lifestyle. This testimony tended to undermine petitioner's claim, which he was required to prove by clear and convincing evidence. Where there is proof in the record that a man other than the putative father has had intercourse with the child's mother during the critical time period, the evidence is insufficient as a matter of law. The record also supported the application of the doctrine of equitable estoppel to preclude petitioner from pursuing his paternity claim. Petitioner waited almost four years after the child's birth before commencing the paternity proceeding, during which time he failed to communicate with the child or provide any financial support. The child, who was removed from her mother's care at the age of five months, lived with Jason A. and his extended family. An order of filiation was issued in 2007 declaring the child's father was Jason A. It was not in the child's best interests to interfere with her relationship with the only father she has ever known.

*Matter of Cecil R. v Rachel A.*, 102 AD3d 545 (1st Dept 2013)

### **Order of Filiation Entered Upon Respondent's Default Affirmed**

Family Court denied respondent's objection to a decision of the Support Magistrate, which, upon respondent's default, and following an inquest, entered an order of filiation finding that respondent was the father of the subject child, and a child support order. The Appellate Division affirmed. The record supported the court's finding that the presumption of legitimacy was overcome based on the mother's testimony that she was divorced from her former husband three years before the child's birth, and that she was in an exclusive sexual relationship with respondent during the relevant period before the child's birth. The court's determination that this testimony was credible was entitled to great weight and was supported by the record. Respondent was precluded from appealing the

equitable estoppel finding against him because he defaulted after having failed to appear on the prior court date and after being warned that the court would proceed with or without him on the adjourn date. Even if the matter was considered on the merits, the evidence supported the finding that it was in the child's best interests to deny respondent's request for a DNA test. The child believed that respondent was her father, she called him "Daddy," he sent her gifts, cards and letters, introduced her to others as his daughter, visited her and she visited his family. No evidence was presented that another man was the child's father.

*Matter of Bristene B.*, 102 AD3d 562 (1st Dept 2013)

### **Respondent Equitably Estopped From Challenging Paternity**

On the grounds of equitable estoppel, Family Court properly denied respondent's motion to vacate his acknowledgment of paternity and order a genetic marker test. The record showed that after the child's birth, respondent held himself out as the child's father to his family and co-workers, permitted the child to call him "daddy", provided the mother with child support, and placed the child on his medical insurance until such time when he believed that he was not the biological father. The child recognized respondent as his father and continued to have a relationship with respondent's family even after respondent stopped seeing him.

*Matter of Andre Asim M. v Madeline N.*, 103 AD3d 500 (1st Dept 2013)

## **ORDER OF PROTECTION**

### **Petition For Modification of Stay-Away Order of Protection Reinstated**

Petitioner father sought modification or vacatur of a stay-away order of protection against him. Family Court dismissed the petition. The Appellate Division reversed and reinstated the petition. Upon the father's default, the court terminated the father's parental rights with respect to two of his children and issued the order of protection that is the subject of this appeal. The order of protection required the father to stay away from the children until the youngest reached the age of 18. Ten years later he filed the instant petition claiming "changed circumstances." The court dismissed the petition on the ground that the father lacked standing because the presumption of regularity applied to the

termination proceeding, including the order of protection, and the father failed to meet his burden of establishing that he was not served with notice of the petition seeking the order of protection or the order itself. Here, the father had standing because he did not seek access to his children, but rather he sought to modify or vacate the order of protection and the order terminating his parental rights was separate and distinct from the order of protection. The court improperly dismissed the petition because DSS had the burden to show that it properly served the father so as to obtain jurisdiction over him with respect to the order of protection and DSS failed to submit a process server's affidavit of service and the record was otherwise devoid of evidence that the father was served with the petition giving rise to the order of protection or the order of protection itself.

*Matter of Anna B.*, 105 AD3d 1399 (4th Dept 2013)

## **TERMINATION OF PARENTAL RIGHTS**

### **Respondent's Parental Rights Properly Terminated on Ground of Permanent Neglect**

Family Court terminated respondent mother's parental rights upon a fact-finding determination that she permanently neglected the child. The Appellate Division affirmed. The court providently exercised its discretion in denying respondent's request for an adjournment, given the fact that she had more than three months to communicate with her counsel and prepare for the fact-finding hearing. The finding of neglect was supported by clear and convincing evidence. The agency exercised diligent efforts to reunite respondent and the child by preparing a service plan, scheduling visits between respondent and the child, referring respondent to parenting skills classes, and conducting meetings and case conferences with respondent. Despite the agency's diligent efforts, respondent failed to visit the child on a regular and consistent basis, complete a parenting skills program, and permit the agency to obtain information concerning her medication. A preponderance of the evidence supported the finding that it was in the child's best interests to terminate respondent's parental rights and free him for adoption, where, inter alia, the foster parents were able to care for his special needs.

*Matter of Jeovonni G.*, 101 AD3d 449 (1st Dept 2012)

### **Parental Rights Properly Terminated on Ground of**

## **Abandonment**

Family Court terminated respondent mother's parental rights following a fact-finding determination that she abandoned the child. The Appellate Division affirmed. Clear and convincing evidence established that the respondent failed to visit or communicate with the child or the agency for the six-month period immediately preceding the filing of the petition, which gave rise to a presumption of abandonment. The lone contact between respondent and the child during the relevant time period was initiated by the foster mother to obtain respondent's permission to take the child on a vacation. The court's rejection of respondent's uncorroborated testimony that she once visited the child, called the foster mother several times concerning the child, and once sent a friend to deliver clothing and money, was entitled to deference. Moreover, even assuming that respondent was truthful in her claims, such efforts constituted only sporadic minimal contacts that were insufficient to preclude a finding of abandonment. A preponderance of the evidence established that it was in the child's best interests to terminate respondent's parental rights so that he could be freed for adoption by his foster mother, the only parent he had ever known.

*Matter of Jasiaia Lew R.*, 101 AD3d 568 (1st Dept 2012)

## **Respondent's Parental Rights Properly Terminated; Consistent Visitation Did Not Preclude Finding of Permanent Neglect**

Family Court terminated respondent mother's parental rights upon a fact-finding determination that she permanently neglected the subject children. The Appellate Division affirmed. Petitioner met its burden of establishing, by clear and convincing evidence, that the children were permanently neglected. Respondent failed to plan for the future of her children despite the diligent efforts of the agency to strengthen and encourage her relationship with her children by, among other things, scheduling visitation, providing respondent with referrals for appropriate services, and assisting respondent in obtaining suitable housing. Respondent failed to remain drug and alcohol free or to secure appropriate housing or employment, and she interacted poorly with the children during visitation. Consistent visitation did not preclude a finding of permanent neglect where, as here, there was a failure to plan for the children's future. Respondent's contention was rejected that she was deprived of a fair trial

because the court asked questions that were speculative and/or lacked a foundation, such as how one of her older children felt when respondent refused to allow her to be adopted and whether she was concerned with the children's wishes regarding adoption. Respondent's perception of and response to the children's wishes and needs was material and relevant to the issue whether it was in the children's best interests that they be freed for adoption. A preponderance of the evidence established that it was in the children's best interests to terminate respondent's parent rights. For three-and-a-half years, the children had resided in a stable and nurturing environment with their foster mother, who was willing and able to adopt them.

*Matter of Jeremiah Emmanuel R.*, 101 AD3d 571 (1st Dept 2012)

## **Termination of Parental Rights on Ground of Permanent Neglect Affirmed**

Family Court terminated respondent mother's parental rights following a fact-finding determination that she permanently neglected the subject children. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that despite the agency's diligent efforts, respondent failed to plan for the children's future. Although respondent was required to complete a drug treatment program and the agency provided referrals and sought to follow up, respondent failed to complete a program. A preponderance of the evidence supported the determination that the children's best interests were served by terminating respondent's parental rights and freeing the children for adoption. Respondent still had not completed a drug treatment program at the time of disposition. Meanwhile, the children had lived in the same preadoptive foster home with their other siblings for over four years. The foster parents, who wished to adopt the children, tended to their special needs, and the children were thriving in their care.

*Matter of Tyjaia Simone-Kiesha Mc.*, 101 AD3d 635 (1st Dept 2012)

## **Parental Rights Properly Terminated on Ground of Mental Illness**

Family Court terminated respondent mother's parental rights upon a fact-finding determination that she suffered from a mental illness. The Appellate Division

affirmed. Clear and convincing evidence supported the determination that respondent, by reason of mental illness, was presently and for the foreseeable future unable to provide proper and adequate care for her child. The court-appointed expert testified that respondent suffered from schizophrenia, non-differentiated type with paranoid features, and that this condition, which was manifested during the expert's interview with respondent, prevented her from adequately caring for the child presently and for the foreseeable future. The expert also testified that respondent refused treatment and was noncompliant with medication. Respondent did not present any evidence to rebut the expert's testimony.

*Matter of Marlyn J'ace A.*, 101 AD3d 646 (1st Dept 2012)

### **Termination of Parental Rights on Mental Illness Ground Affirmed**

Family Court terminated respondent mother's parental rights following a fact-finding determination that she suffered from a mental illness. The Appellate Division affirmed. The uncontroverted medical evidence provided clear and convincing evidence that respondent was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for her daughter. Petitioner submitted un rebutted expert testimony that respondent suffered from a chronic major depressive disorder that prevented her from understanding how her behavior was harmful to her daughter, as well as the testifying psychiatrist's report, which was prepared after a two-hour interview of respondent and a review of her records. In addition, petitioner submitted a report from a psychologist who also interviewed respondent, reviewed her medical records and conducted psychological testing, which concluded that she suffered from depressive disorder and personality disorder and posed an ongoing risk to the subject child.

*Matter of Rosie Shameka S.R.*, 102 AD3d 480 (1st Dept 2013)

### **Respondent's Parental Rights Properly Terminated on Ground of Permanent Neglect**

Family Court terminated respondent mother's parental rights upon a fact-finding determination that she permanently neglected the subject children. The Appellate Division affirmed. Clear and convincing

evidence supported the determination that the mother permanently neglected the children, despite the agency's diligent efforts. The record reflected that the mother's visits were sporadic, that she sometimes behaved inappropriately at visits, and that she failed to complete individual therapy, which was part of the service plan. The record also supported the court's dispositional determination. The mother moved out-of-state, knowing that her already spotty visitation record would decline further, and failed to maintain phone contact with the children. The mother never requested a suspended judgment, which was not warranted in any event since the mother failed to demonstrate sufficient progress to justify delaying the children's ability to achieve stability in their lives.

*Matter of Tashameeka Valerie P.*, 102 AD3d 614 (1st Dept 2013)

### **Termination in Child's Best Interest**

Upon a fact-finding of abandonment against respondent mother, Family Court terminated her parental rights to the subject child for the purpose of adoption. The Appellate Division affirmed. The agency established by clear and convincing evidence that respondent abandoned her child by failing to contact the child or the agency during the relevant six-month period prior to the filing of the petition although she was able to do so, and she was not discouraged from doing so by the agency. Termination was in the best interests of the child rather than a suspended sentence because there was no evidence that respondent had a realistic and feasible plan to provide an adequate and stable home for the child.

*Matter of Jordan Anthony H.*, 103 AD3d 465 (1st Dept 2013)

### **Petitioner Failed to Meet its Burden of Proving Mother's Mental Illness Prevented Her From Providing Proper and Adequate Care**

Family Court terminated respondent mother's parental rights to the subject child upon a finding of mental illness for the purpose of adoption. The Appellate Division reversed. Although the evidence showed that the mother may have used some poor judgment in the past, petitioner did not meet its burden of proving by clear and convincing evidence that respondent was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate

care of the child. Although petitioner's expert testified the mother was non-compliant with mental health treatment, this testimony was contradicted by petitioner's own records which showed that the mother was fully compliant with her mental health treatment. She had undergone the necessary therapy and she had been evaluated and found not to be in need of any further counseling or psychotropic medications. Additionally, the evidence showed the mother had attempted to find an appropriate school placement for her son, she had participated in parenting classes and had done research on her son's ADHD diagnosis.

*Matter of Nicholas B.*, 103 AD3d 480 (1st Dept 2013)

### **Mother's Mental Illness Prevented Her from Providing Proper and Adequate Care**

Family Court terminated respondent mother's parental rights to the subject children upon a finding of mental illness for the purpose of adoption. The Appellate Division affirmed. There was clear and convincing evidence to support the determination that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for her children. The psychologist testified that the mother suffered from schizophrenia and her prognosis was very poor. She had periods of non-compliance with her medications and exhibited symptoms regularly, whether or not she was compliant with treatment.

*Matter of Justin Javonte R.*, 103 AD3d 524 (1st Dept 2013)

### **No Requirement that Family Court Conduct an In Camera Hearing**

Upon a fact-finding of permanent neglect against respondent mother, Family Court terminated her parental rights to the subject child for the purpose of adoption. The Appellate Division affirmed. Despite diligent efforts by the agency to strengthen and encourage the parental relationship, which included referring respondent for mental health evaluation, attempting to assist her in finding a suitable home and scheduling visits with the child, respondent failed to plan for the child's future. She did not avail herself of the services offered and failed to visit the child consistently. Termination was in the best interests of the child in order to facilitate adoption. Respondent's request for a remand based on the court's failure to hold

an in camera hearing was dismissed as unpersuasive since there was no such requirement for the court to do so. Additionally, even though there was evidence that the child was somewhat ambivalent about adoption, he understood that adoption offered stability and this factor was important to the child.

*Matter of Georges P.*, 103 AD3d 570 (1st Dept 2013)

### **Termination on Ground of Permanent Neglect Affirmed**

Upon a fact-finding of permanent neglect, Family Court terminated respondent mother's rights to three of her five children for purposes of adoption, and granted a suspended judgment with respect to the other two. The Appellate Division affirmed the order of termination of the three children. Since the one-year suspended sentence order had expired, the appeal from this portion of the order was dismissed as moot. Family Court properly determined that petitioner had made diligent efforts to strengthen and encourage the parent-child relationship between respondent and the three children by, among other things, scheduling and facilitating visitation with the children and referring respondent to various parenting programs and mental health services. Despite these efforts, respondent's visitation with the children remained consistently poor. During supervised visits with the children, respondent was unable to control their behavior and erupted into violence. She failed to engage or bond with her children and at least on one occasion after an extended, unsupervised, overnight visit with respondent, one of the children returned with visible bruises and welts. Termination was in the best interests of the three children in order to facilitate adoption by their foster parents, who were able to provide them with loving homes and meet their special needs.

*Matter of Ashley R.*, 103 AD3d 573 (1st Dept 2013)

### **Termination of Parental Rights on Ground of Permanent Neglect Affirmed**

Family Court terminated respondent mother's parental rights following a fact-finding determination that the mother permanently neglected the subject child. The Appellate Division affirmed. The court properly found that the agency exercised diligent efforts to strengthen the relationship between the mother and the child based on the testimony of the caseworker and the progress note entries. The mother admitted that she was late to

half of the visits and missed the other half of the visits with the child. The caseworker testified that she and the mother discussed the mother's noncompliance with the service plan on numerous occasions, but any improvement was short-lived. The agency was not charged with a guarantee that the parent succeed in overcoming her problems.

*Matter of Jabar H.*, 104 AD3d 440 (1st Dept 2013)

### **Denial of Motion to Vacate Order of Disposition Entered Upon Default Affirmed**

Family Court denied respondent mother's motion to vacate an order of disposition entered upon her default which, upon a finding of permanent neglect, terminated her parental rights to the subject child. The Appellate Division affirmed. Respondent failed to establish a reasonable excuse for her default and a meritorious defense to the allegations asserted in the petition. Her claim was unsubstantiated that she was late for the hearing because she and a companion were stopped by police for improperly traveling in the three person High Occupancy Vehicle lane, and she did not provide any explanation for her failure to contact the court or her counsel and advise them that she would be late. The fact that respondent previously defaulted further supported the court's decision not to credit her alleged excuse. Moreover, respondent failed to establish a meritorious defense to the allegation of permanent neglect. Despite respondent's claims to the contrary, the agency exercised diligent efforts to reunite her with her child. The evidence established that, despite these efforts, respondent failed to consistently visit with the child, interacted poorly with the child when she did visit, and failed to complete necessary mental health services or plan for the child's future. A suspended judgment was not warranted. By the time of the dispositional hearing the child was six years old and had lived virtually his entire life with his kinship foster family, and the kinship foster family was meeting all of his special needs.

*Matter of Ilyas Zaire A.-R.*, 104 AD3d 512 (1st Dept 2013)

### **Termination of Parental Rights on Ground of Mental Illness Affirmed**

Family Court terminated respondent mother's parental rights following a fact-finding determination that she suffered from a mental illness. The Appellate Division

affirmed. The uncontroverted medical evidence provided clear and convincing evidence that respondent was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child. The court-appointed expert testified that respondent suffered from schizoaffective disorder, bipolar type, and personality disorder NOS (not otherwise specified) with borderline narcissistic and antisocial features. Respondent's testimony confirmed that she lacked insight into the nature and extent of her mental illness. A dispositional hearing was not necessary to find that termination of respondent's parental rights was in the best interests of the child.

*Matter of Thaddeus Jacob C.*, 104 AD3d 558 (1st Dept 2013)

### **Termination of Parental Rights on Mental Illness Ground Affirmed**

Family Court terminated respondent father's parental rights upon fact-findings of mental illness and permanent neglected. The Appellate Division affirmed. The finding that respondent suffered from a mental illness was supported by clear and convincing evidence. The uncontroverted expert testimony demonstrated that respondent suffered from anti-social personality disorder which affected his ability to parent and placed the children in danger of being neglected if they were returned to his care. In addition, the finding of permanent neglect was supported by clear and convincing evidence. Petitioner engaged in diligent efforts to encourage and strengthen respondent's relationship with his children, who have special needs, by twice referring him to a parenting skills program where he received approximately two years of training and by scheduling regular visitation. Nonetheless, respondent continued to deny responsibility for the conditions necessitating the children's removal from the home, failed to complete or benefit from the parenting skills program, and failed to demonstrate that he had adequate parenting skills to address the children's significant special needs.

*Matter of Adam Mike M.*, 104 AD3d 572 (1st Dept 2013)

### **Termination of Parental Rights on Ground of Permanent Neglect Affirmed**

Family Court terminated respondent mother's parental rights following a fact-finding determination that she

permanently neglected the subject children. The Appellate Division affirmed. The court properly determined that the agency exercised diligent efforts to reunite the mother with the children, but that the mother failed to address her mental health and other issues that led to the children's placement. The social worker testified that the mother received numerous referrals for mental health services, but elected to receive treatment from a social worker, which did not address her problems. The evidence demonstrated numerous instances where the mother screamed, cursed and threatened agency staff and the children, and that she was not successful in controlling her temper or the children. It was in the best interests of the children to terminate the mother's parental rights and a suspended judgment was not warranted.

*Matter of Brandon H.*, 105 AD3d 409 (1st Dept 2013)

### **Respondent's Parental Rights Properly Terminated on Ground of Permanent Neglect**

Family Court terminated respondent mother's parental rights upon a fact-finding determination that she permanently neglected the subject children. The Appellate Division affirmed. Clear and convincing evidence supported the determination that the mother permanently neglected the children and that despite the agency's diligent efforts by, among other things, scheduling visitation and providing the mother with referrals for services, the mother failed to attend individual therapy, complete a second domestic violence program, obtain suitable housing and maintain a stable income. The court properly deemed the mother in default, given that her counsel did not state that she wished to proceed in the mother's absence or that she was authorized to do so.

*Matter of Jaquan Tieran B.*, 105 AD3d 498 (1st Dept 2013)

### **Denial of Motion to Vacate Order of Disposition Entered Upon Default Affirmed**

Family Court denied respondent mother's motion to vacate orders of disposition entered upon her default which, upon a finding of permanent neglect, terminated her parental rights to the subject children. The Appellate Division affirmed. Respondent failed to establish a reasonable excuse for her default and a meritorious defense to the allegations asserted in the petition. Her sole submission was an affirmation by her

counsel, who did not have personal knowledge of the facts. Counsel stated that respondent did not have the money to pay for transportation costs to the hearing, but she did not explain why respondent failed to notify her attorney or the court that she was unable to appear. Counsel's statement that respondent would have testified that she lacked medical insurance and financial resources to plan for the children was insufficient to establish a meritorious defense. Respondent failed to show that petitioner made no effort to help her with her drug addiction or that she remained drug-free, cooperated with drug testing or regularly attended therapy. Respondent's attorney's refusal to participate in the hearing did not deprive respondent of effective assistance of counsel; rather, it preserved respondent's opportunity to seek to open the default.

*Matter of Lenea'jah F.*, 105 AD3d 514 (1st Dept 2013)

### **Father Failed to Gain Insight into Problems Which Prevented the Return of Children**

Contrary to the father's contentions, the Family Court properly found that he permanently neglected his three children. The petitioner established by clear and convincing evidence that it made diligent efforts to assist the father in planning for the children's future by, among other things, repeatedly referring the father to individual counseling and anger management programs, advising him of the need to attend and complete the programs, and assisting him with housing. Notwithstanding the petitioner's efforts, the father failed to plan for the future of the children (*see* SSL § 384-b [7] [c]). Although the father completed some of the service programs offered to him, he failed to gain insight into the problems that were preventing the children's return to his care. The testimony and evidence showed that the father was uncooperative, hostile, and unaware of how his actions affected his relationship with the children. Moreover, he never acknowledged his responsibility for the removal of the children from his care and for their reluctance to have contact with him. Nor did the father obtain adequate housing for the children. Under these circumstances, the Family Court correctly found that, despite the petitioner's diligent efforts, the father failed to adequately plan for the children's future, and, therefore, they were permanently neglected. Furthermore, under the circumstances of this case, the Family Court properly determined that it was in the best interest of the child S. for the court to terminate the father's parental rights with respect to her. The father's appeal

from the two orders of fact-finding and disposition which terminated the father's parental rights as to his other two children were dismissed as academic since those children had reached the age of 18.

*Matter of Shamika K.L.N.*, 101 AD3d 729 (2d Dept 2012)

**Mother Failed to Establish Reasonable Excuse for Default**

Here, the mother appealed from an order of the Family Court, which, denied her motion to vacate an order of fact-finding and disposition of the same court, which, upon her default in appearing at the fact-finding and dispositional hearings, terminated her parental rights and transferred guardianship and custody of the child to the Commissioner of Social Services of the City of New York and the petitioner SCO Family of Services, for the purpose of adoption. Upon reviewing the record, the Appellate Division found that the mother established neither a reasonable excuse for the default nor a potentially meritorious defense to the relief sought in the petition. Accordingly, the Family Court properly denied the mother's motion to vacate the order of fact-finding and disposition entered on her default in appearing at the fact-finding and dispositional hearings. Order affirmed.

*Matter of Martique S.C.*, 101 AD3d 1116 (2d Dept 2012)

**Petitioners Not Required to Prove Diligent Efforts Where Mother Previously Admitted to Permanent Neglect**

Here, the Family Court properly found, by a preponderance of the evidence, that the mother failed to comply with at least one of the conditions of the suspended judgment during the one-year term. Contrary to the mother's contention, the petitioners were not required to prove that they had exercised diligent efforts to reunify the mother and child since the mother had previously admitted that she permanently neglected the subject child. Moreover, the evidence adduced at the dispositional hearing supported the Family Court's determination that it was in the best interests of the child to terminate the mother's parental rights and free the child for adoption (*see* FCA § 631). Order affirmed.

*Matter of Chanteau M.R.W.*, 101 AD3d 1129 (2d Dept

2012)

**Father Refused to Accept Agency's Assistance and Did Not Acquire Appropriate Housing**

Contrary to the father's contention, the Family Court properly found that the petitioner agency exercised diligent efforts to strengthen his relationship with his child by, inter alia, facilitating visitation, developing a service plan, advising him that he needed to secure adequate housing, and offering housing referrals. However, the father refused to accept the agency's assistance and did not acquire appropriate housing. An agency that has exercised diligent efforts but is faced with an uncooperative parent is deemed to have fulfilled its statutory obligations. Thus, under these circumstances, the Family Court correctly found that, despite diligent efforts by the agency, the father failed to adequately plan for his child's future and, therefore, permanently neglected the child. Additionally, the Family Court properly determined that the best interests of the child would be served by terminating the father's parental rights and freeing the child for adoption by his foster parent, with whom he had been living for over three years, which was substantially all of his life. Order affirmed.

*Matter of Kevin L.*, 102 AD3d 695 (2d Dept 2013)

**Mother and Father Failed to Plan for Child's Future**

Here, the Family Court properly found that the mother and the father permanently neglected the subject child. The petitioner established by clear and convincing evidence that it made diligent efforts to assist the mother and the father in planning for the child's future by, among other things, repeatedly referring them to domestic violence counseling and therapy, and advising them that they must attend and complete the court-ordered programs, and that despite these efforts, the mother and the father failed to plan for the child's future.

*Matter of Luis A.M.C.*, 102 AD3d 780 (2d Dept 2013)

**Father Refused to Attend and Complete Sexual Abuse Counseling Program**

Contrary to the father's contention, the petitioner established by clear and convincing evidence that it made diligent efforts to strengthen the relationship

between the father and the children, but that the father's refusal to attend and complete a sexual abuse counseling program was a failure to plan for the future of the children, such that they were permanently neglected by him. Moreover, the Family Court properly determined that it would be in the best interest of the children to be freed for adoption by the foster parents with whom they have lived since 2005.

*Matter of Michael W.*, 102 AD3d 802 (2d Dept 2013)

### **Agency Not Required to Prove Diligent Efforts**

The mother's argument that the Family Court's finding of permanent neglect, made upon her admission, was not based on legally sufficient evidence was unpreserved for appellate review. The record showed that she failed to move before the Family Court to vacate her admission of permanent neglect. Nevertheless, upon review, the Appellate Division found her claim to be without merit. Contrary to the mother's contention, the Family Court did not err in finding that she permanently neglected the subject child even though the petitioning agency did not prove that it made diligent efforts to strengthen the parental relationship. The agency was not required to present such evidence because the mother admitted that she permanently neglected the child by failing to maintain suitable housing. Furthermore, under the circumstances of this case, the Family Court properly determined that it was in the best interests of the child to terminate the mother's parental rights.

*Matter of Megan L.G.H.*, 102 AD3d 869 (2d Dept 2013)

### **Suspended Judgment Not Appropriate**

The Family Court properly determined that the best interests of the subject child would be served by terminating the mother's parental rights and freeing the child for adoption by his foster parents. Contrary to the mother's contention, a suspended judgment was not appropriate in light of her lack of insight into her problems and her failure to address the primary issues which led to the child's removal in the first instance.

*Matter of Jaylen S.*, 102 AD3d 877 (2d Dept 2013)

### **Evidence Did Not Establish That Mother Failed to Comply with Terms and Conditions of Suspended Judgment**

The mother appealed from an order of fact-finding and disposition of the Family Court, which, upon an order of the same court, made after a hearing, finding that the mother violated the terms and conditions of a suspended judgment contained in a prior order of fact-finding and disposition of the same court, and revoking the suspended judgment, terminated her parental rights, and committed the guardianship and custody of the children to the petitioner for the purpose of adoption. Upon reviewing the record, the Appellate Division found that the evidence at the violation hearing did not establish by a preponderance of the evidence that the mother failed to comply with the terms and conditions of the suspended judgment. Among other things, the evidence demonstrated that the mother had continued in her therapy and was attending a "challenging children" parent training program. Further, the Department of Social Services (DSS) did not sufficiently specify what was expected of the mother with respect to attendance at certain physical and speech therapy appointments for the two younger children to support the Family Court's finding that her limited attendance at these appointments violated the terms or conditions of the suspended judgment. The Family Court was properly concerned about an incident in the courthouse during which the mother became very agitated when she believed that her parental rights would be terminated. The record demonstrated, however, that, contrary to the testimony of the caseworker, the mother had complied with his recommendation that she address the episode in her therapy. Finally, the terms and conditions did not specify by when the mother was to have enrolled in or completed the classes pertaining to the special needs of the younger children. Given DSS's failure to prove that the mother had violated the terms and conditions of the suspended judgment, the court erred in revoking that suspended judgment. Nevertheless, noting that more than 15 months had passed since the Family Court revoked the now-expired suspended judgment, the Appellate Division remitted the matter to the Family Court for a new dispositional hearing to ascertain whether, in light of the mother's present circumstances and those of the children, a suspended judgment would be in the best interests of the children, and a new disposition thereafter. The Appellate Division concluded that a suspended judgment should not be entered if the best interests of the children would require a termination of parental rights.

*In re Jalil U.*, 103 AD3d 658 (2d Dept 2013)

### **Mother Unable to Provide Proper and Adequate**

### **Care by Reason of Mental Illness**

The mother appealed from an order of fact-finding and disposition of the Family Court, which, after a fact-finding hearing, terminated her parental rights, and transferred custody and guardianship of the subject child to the Commissioner of Social Services of the City of New York for the purpose of adoption. Contrary to the mother's contention, the Family Court properly found that there was clear and convincing evidence that she is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child (*see* SSL § 384-b[4][c]). The court-appointed psychologist, who interviewed the mother and reviewed her medical records, testified that the mother suffers from schizoaffective disorder with bipolar features. The psychologist opined that if the child were returned to the mother, he would be at risk of being neglected in the present and in the foreseeable future due to the nature of the mother's illness, the mother's lack of insight about her illness, and the mother's inability to act in accordance with her child's needs due to her illness. Further, the Family Court properly declined to award the mother post-termination visitation with the child. Order affirmed.

*Matter of Tyler M.J.*, 104 AD3d 768 (2d Dept 2013)

### **Father's Belated Attempts to Comply with Agency's Service Plan Were Insufficient to Warrant Imposition of Suspended Judgment**

The petitioner agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the subject child (*see* SSL § 384-b[7]). These efforts included setting up meetings with the father to review the child's service plan, discussing the importance of compliance, providing referrals to the father for substance abuse counseling and parenting classes, discussing the importance of the father's obtaining suitable income and housing, and scheduling visitation between the father and the child. Despite these efforts, the father failed to plan for the future of the child. Further, the Family Court correctly determined that it would be in the child's best interests not to enter a suspended judgment, but instead to terminate the father's parental rights and free the child for adoption by her foster parents, with whom she had bonded and with whom she had lived for more than half of her life (*see* SSL§ 384-b[7][a]). Under the

circumstances of this case, the father's belated attempts to comply with the agency's service plan were insufficient to warrant imposition of a suspended judgment (*see* FCA §§ 631[b]; 633). Order affirmed.

*Matter of Jewels E.R.*, 104 AD3d 773 (2d Dept 2013)

### **Failure to Plan for Children's Future Supports TPR**

Family Court, upon finding permanent neglect, terminated the parents' rights. The Appellate Division affirmed. Clear and convincing evidence supported the court's finding that despite diligent efforts, respondent father failed to plan for the return of his children by failing to complete the sex offender and alcohol treatment programs. The father had unresolved anger management issues and an uncooperative attitude that interfered with his ability to comply with the service plan. Respondent mother failed to plan for return of the children by continuing to reside with an untreated sex offender, who had a prior criminal conviction for sexually abusing his daughter and an indicated CPS report for sexually abusing his son. As both respondents failed to testify at the fact-finding hearing, the court was permitted to draw the strongest inferences against them. Although respondent mother alleged that Family Court failed to take into consideration the deficits of the foster parents during the dispositional hearing, the purpose of the dispositional inquiry is not to determine whether children are in the best possible foster placement but whether termination of parental rights is in their best interests. In this case a suspended sentence would not have been appropriate as the mother was unable to manage the children and she continued to reside with her sex offender paramour. The foster parents, who wished to adopt the children, had an "affectionate" relationship with them and the children were progressing in their foster home.

*Matter of Michael JJ.*, 101 AD3d 1288 (3d Dept 2012)

### **Mother's Continued Contact With Child Does Not Bar Permanent Neglect Finding**

Family Court terminated the mother's parental rights to her child upon a fact-finding determination of permanent neglect. The Appellate Division affirmed. Petitioner proved by clear and convincing evidence that respondent mother failed to substantially plan for her child's future. While the mother maintained contact with the child throughout the child's placement with petitioner, her parenting skills did not meaningfully

improve, her employment was intermittent, her living arrangements remained unstable, and she consistently failed to accept any responsibility for the removal of her child. Giving due deference to the court's credibility determinations, the finding was supported by a sound and substantial basis in the record. It was in the child's best interest to be adopted by her foster parents as the mother's situation remained unimproved. The foster parents, with whom the child had resided with since birth, continued to provide a stable, nurturing home for her and facilitated her relationship with her brother and grandmother.

*Matter of Alysheionna HH.*, 101 AD3d 1413 (3d Dept 2012)

### **Motion to Exclude Report by Attorney For Child Untimely**

Family Court determined that respondent mother had permanently neglected her four children and issued a suspended sentence. Thereafter, petitioner moved to revoke the suspended judgment, and after a hearing, the court granted the motion and terminated the mother's parental rights. The mother's only argument was that the court improperly relied upon a report submitted by the attorney for the children that contained facts not in the record. The Appellate Division determined the objection was untimely. The mother had not objected to the report when it had been distributed to everyone in Family Court, and therefore the appeal was not preserved for review. In any event, although such reports should not be submitted, in this case the error was harmless as the court made no reference whatsoever to any of the factual assertions contained in the report, but merely noted the stated position of the attorney for the children. In a footnote, the Appellate Division noted that the report had been requested because the attorney for the children had not expected to be present in court but thereafter had in fact appeared.

*Matter of Colin R.*, 101 AD3d 1430 (3d Dept 2012)

### **Sound and Substantial Basis in the Record to Revoke Suspended Sentence and Terminate Mother's Parental Rights.**

Family Court revoked respondent mother's suspended judgment and terminated her parental rights. The Appellate Division affirmed. There was sound and substantial basis in the record to support the court's

determination. Petitioner presented evidence that the mother violated numerous conditions of the suspended judgement including the requirement that she cooperate with the caseworkers, sign releases for information, abide by the terms of her probation, inform her caseworker and probation officer if she left the area, continue to take psychotropic medications as prescribed, accept techniques of effective discipline offered by a parent educator, avoid yelling at the child on the telephone, avoid the use of street drugs and lead a law-abiding life. It was in the child's best interest to terminate the mother's rights because despite petitioner's provision of numerous services, the mother was unable to comply with the conditions or behave as an appropriate parent. The child was making significant progress in foster care and his foster parents intended to adopt him.

*Matter of Marquise JJ.*, 103 AD3d 937 (3d Dept 2013)

### **Termination of Father's Rights Affirmed**

Family Court terminated respondent father's parental rights upon a finding of permanent neglect. The Appellate Division affirmed. Despite the fact that the father had been incarcerated for much of the children's lives, petitioner made diligent efforts to encourage and strengthen the parental relationship both when the father was incarcerated and during the brief periods when he was living in the community. While the father maintained regular contact with the children, he failed to develop a realistic plan for the children's future, relapsed into drug use and continued to engage in criminal activity. It was in the children's best interests to terminate the father's rights. They were thriving in their kinship foster home and their paternal aunt intended to adopt them.

*Matter of Johanna M.*, 103 AD3d 949 (3d Dept 2013)

### **Scope of Neglect Petitions Pursuant to FCA §1039-b Extends to Non-Respondent Parent**

Family Court properly granted Petitioner's motion to be relieved of its obligation to make further reasonable efforts to return the child to his father's care. Although the neglect petition had only been filed against the mother, nothing in FCA §1039-b limited petitioner's scope to the respondent named in the underlying petition. The statute's intent is to promote the health and safety of children by expediting permanency planning. The father, who was placed on notice of the

neglect proceeding against the mother and the ensuing permanency hearings, did not dispute the fact that he was advised of his right to pursue custody, and that a termination of parental rights could be brought against him even though he was not a named party. Furthermore, petitioner did make efforts to facilitate visits between the father and the child, and offered services to enable placement of the child with his father. However, such efforts proved to be unsuccessful, and additionally, the father's rights to his other two children, the subject child's half-siblings, had already been terminated. The father's argument that FCA §1039-b )(6) unconstitutionally distinguishes between individuals whose parental rights are involuntarily terminated as opposed to those individuals who surrender these rights, was found unpersuasive.

*Matter of Jayden QQ.*, 105 AD3d 1274 (3d Dept 2013)

### **TPR Reversed – Record Unclear Whether Termination in Child’s Best Interests**

Family Court terminated respondent mother’s parental rights and transferred guardianship and custody of the three children to petitioner agency. The Appellate Division reversed with respect to the child named Gena. The mother’s appeals from the permanency orders were dismissed. Because her parental rights had been terminated, the mother lacked standing to participate in the permanency hearing. The mother’s contention that the court improperly determined that the mother failed to plan for the children, although able to so, was without merit. The record established that the mother’s only viable plan for the children was that they remain in foster care until she was released from incarceration. However, the record was unclear whether termination of mother’s parental rights with respect to Gena was in Gena’s best interests. The AFC informed the Court that Gena’s clear and consistent wish was to be reunited with her mother. Gena was one month short of her 14<sup>th</sup> birthday when the order on appeal was issued and her consent to adoption would have been required if she had been 15 years old. Also, according to the AFC, Gena, who was now over 15 years old, still refused to be adopted. Thus, the record was unclear whether termination of the mother’s parental rights was in Gena’s best interests. The matter was remitted for a new dispositional hearing on that issue.

*Matter of Gena S.*, 101 AD3d 1593 (4th Dept 2012)

### **Suspended Judgment Properly Denied**

Family Court terminated respondents parent’s parental rights with respect to her two children. The Appellate Division affirmed. The court did not abuse its discretion in refusing to enter a suspended judgment. Although respondents had made progress in improving the deplorable conditions and other problems existing in the family home, the progress was not sufficient to warrant prolongation of the children’s unsettled familial status. Freeing the children for adoption by their foster parents was plainly in their best interests.

*Matter of Andie M.*, 101 AD3d 1638 (4th Dept 2012)

### **No Meaningful Plan For Child’s Future**

Family Court terminated respondent mother’s parental rights. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that the mother permanently neglected her child. It was undisputed that the child was removed from the mother’s care two days after her birth and was never returned to the mother’s care. The agency established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the mother’s relationship with the child. The mother failed to establish that she had a meaningful plan for the child’s future, including that she had addressed the problems that caused the child’s removal. Although the mother attended some of the parenting classes to which she was referred, she inconsistently applied the knowledge and benefits of the class and argued with service providers and professionals.

*Matter of Serenity G.*, 101 AD3d 1639 (4th Dept 2012)

### **Mother’s Parental Rights Properly Terminated on Ground of Mental Illness**

Family Court terminated respondent mother’s parental rights with respect to her older child and entered a finding of derivative neglect with respect to her younger child based upon mental illness. The Appellate Division affirmed. The mother’s contention that petitioner failed to lay a proper foundation for the testimony of its expert witnesses was unpreserved and lacked merit inasmuch as an adequate foundation was laid for the testimony. Petitioner established by clear and convincing evidence that respondent was presently and for the foreseeable future unable to provide proper and adequate care for the older child by reason of mental illness. The court did not err in allowing a psychologist to testify based on an evaluation he

conducted years earlier in connection with one of mother's other children. The psychologist's testimony was detailed and supported his opinion that mother's condition would not be likely to improve over time and it was substantiated by a second expert who had interviewed the mother in connection with the instant petitions. The court did not err in finding derivative neglect with respect to the younger child. The evidence supported the finding that the mother's untreated and ongoing mental illness resulted in an inability to care for the younger child.

*Matter of Kaylene S.*, 101 AD3d 1648 (4th Dept 2012)

### **Father Failed to Address Sexual Abuse Problem**

Family Court terminated respondent father's parental rights with respect to his children on the ground of permanent neglect. The Appellate Division affirmed. Respondent's contention that the court failed to make the requisite finding that petitioner exercised diligent efforts was belied by the record and his contention that petitioner failed to make diligent efforts lacked merit. There was copious evidence that petitioner exercised diligent efforts but that the father refused to acknowledge and treat the underlying sexual abuse problem that led to the children's placement in foster care.

*Matter of Emerald L.C.*, 101 AD3d 1679 (4th Dept 2012)

### **Hailey ZZ. Applied Retroactively**

Family Court terminated respondent mother's parental rights with respect to her children and granted respondent posttermination visitation with the children. The Appellate Division modified by vacating that part of the order that granted posttermination visitation. The court did not abuse its discretion in refusing to enter a suspended judgment. Because *Matter of Haily ZZ* (19 NY3d 422) should be applied retroactively, the court erred in granting posttermination visitation.

*Matter of Elsa R.*, 101 AD3d 1688 (4th Dept 2012)

### **Suspended Judgment Not Warranted**

Family Court terminated respondent mother's parental rights. The Appellate Division dismissed the appeal with respect to respondent's oldest child who had attained the age of 18 and otherwise affirmed.

Petitioner met its burden of establishing, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the mother's relationship with the younger children and the mother failed to establish that she had a meaningful plan for the children's future, including that she had addressed the problems that caused removal of the children. A suspended judgment would not serve the best interests of the younger children. The mother's progress was not sufficient to warrant further prolongation of the children's unsettled familial status.

*Matter of Joanna P.*, 101 AD3d 1751 (4th Dept 2012)

### **Suspended Judgment Properly Revoked But New Circumstances Merit Hearing**

Family Court revoked a suspended judgment and terminated respondent mother's parental rights with respect to her child. The Appellate Division reversed. The court properly revoked the suspended judgment because the mother failed to comply with numerous conditions of the suspended judgment. The mother's contention that petitioner was required to submit medical or psychological evidence establishing that termination was in the child's best interests was unpreserved and without merit. However, petitioner and respondent alleged new circumstances that warranted a new dispositional hearing. The new circumstances alleged included that the adoptive placement was disrupted and the child had been living in a group home, that no other adoptive placement had been found, that the child no longer wishes to be adopted, that the child reestablished contact with his maternal grandmother, and that the grandmother intended to pursue custody.

*Matter of Malik S.*, 101 AD3d 1776 (4th Dept 2012)

### **Father Not Denied Effective Assistance of Counsel**

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The court rejected father's contention that his attorney's failure to seek a stay of the court's proceeding based upon the pendency of the father's appeal from the judgment convicting him of murdering the mother constituted ineffective assistance. An order terminating parental rights on the ground that a parent was convicted of murdering the other parent may be affirmed notwithstanding an appeal of the conviction. Further, during the dispositional phase of the proceeding, the

father's attorney stated that the father did not oppose the TPR. Therefore, the allegation that counsel's failure to seek a stay was an error - rather than a strategic decision made by counsel - was speculative.

*Matter of Daltun A. B.*, 103 AD3d 1181 (4th Dept 2013)

### **Respondent's Parental Rights Properly Terminated on Ground of Mental Illness**

Family Court terminated respondent father's parental rights on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of demonstrating by clear and convincing evidence that the father was then and for the foreseeable future unable, by reason of mental illness\*\*\*, to provide proper and adequate care for the child. The unequivocal testimony of petitioner's expert witness, a psychologist, and other witnesses established that the father was so disturbed in his behavior, feeling, thinking and judgment that, if his son was returned to his custody, his son would be in danger of becoming a neglected child. Moreover, although the father participated in several treatment programs, he was unable to overcome his significant limitations.

*Matter of Christopher B.*, 104 AD3d 1188 (4th Dept. 2013)

### **TPR Affirmed; Derivative Neglect Properly Determined**

Family Court terminated respondent mother's parent rights and ordered that the child be freed for adoption. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and child. Furthermore, the court properly determined that the child was a neglected child based upon the derivative evidence that three of the mother's other children were determined to be neglected children, including the evidence that the mother failed to address the mental health issues that led to those neglect determinations and the placement of those children in a foster home. The court properly denied the mother's request for a suspended judgment. A suspended judgment, as provided for in § 633 of the Family Court Act, was a brief grace period designed to prepare the parent to be reunited with the child. The court's assessment that the mother was not likely to change her behavior was entitled to great deference.

*Matter of Lillianna G.*, 104 AD3d 1224 (4th Dept. 2013)

### **Despite Mother's Partial Participation in Services, TPR Affirmed Where Mother Had No Realistic Plan to Care for Child and Was Unlikely to Change Behavior**

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. The court did not abuse its discretion in determining that a suspended judgment was not in the child's best interests. Although the mother participated in some of the services offered by petitioner, she failed to address successfully the problems that led to the removal of the child and continued to prevent his safe return. The mother also did not have a viable plan for the child while she was incarcerated. Therefore, the record supported the court's refusal to grant a suspended judgment inasmuch as the mother had no realistic feasible plan to care for the child and she was not likely to change her behavior. The Appellate Division rejected the mother's contention that she was denied effective assistance of counsel, inter alia, on the grounds that her attorney allegedly failed to call the child's maternal grandmother as a witness during the dispositional hearing. The mother did not meet her burden of demonstrating that the alleged failure resulted in actual prejudice. There was no support in the record for the mother's contention that the child's maternal grandmother was willing or able to care for the child while the mother was incarcerated.

*Matter of Dahmani M.*, 104 AD3d 1245 (4th Dept 2013)

### **Parental Rights Properly Terminated on Ground of Permanent Neglect**

Family Court terminated respondent father's parental rights with respect to his child on the ground of permanent neglect. The court considered the appropriate factors, including the special circumstances of an incarcerated parent, in determining that the child was neglected. The father failed to demonstrate any commitment to the responsibilities of parenthood and demonstrated a fundamental defect in his understanding of proper parenting responsibilities. Petitioner was not required to guarantee that respondent succeed in overcoming his predicaments but, rather, he must have assumed a measure of initiative and responsibility.

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