

**Office of Attorneys for Children
Appellate Division, Fourth Department**

2009 Case Digest

ADOPTION

Finding That Respondent Was Notice Father Reversed

Family Court determined that respondent was a notice father. The Appellate Division reversed and remitted. Respondent contended that the court erred in failing to afford him an opportunity to present evidence that he was not a notice father, but was a “consent father”, for which his consent to the adoption of his son was required. Even assuming, *arguendo*, that respondent was properly determined to be a notice father, he nevertheless had the right to notice of the proceeding and an opportunity to be heard concerning the child’s best interests. The record established that respondent appeared at each court date where he had notice, either in person or by counsel, thus manifesting his intent to exercise his rights. The record contained no indication that respondent was informed of the date on which the dispositional hearing on the termination of parental rights petition was to be conducted. Therefore, the failure to afford respondent an opportunity to be heard on the issue of his son’s best interests at that hearing in accordance with his right as a notice father, at which hearing he also would have been afforded the opportunity to submit evidence that he was a consent father, was a denial of his due process rights.

Matter of Jaleel F., 63 AD3d 1539 (4th Dept 2009)

Respondent’s Consent Not Required

Family Court adjudged that the consent of respondent father to the adoption of his child was not required. The Appellate Division affirmed. The father contended that he was denied effective assistance of counsel because his attorney did not challenge the constitutionality of section 111 (1) (d) of the Domestic Relations Law. The failure to advance a challenge that had no merit did not constitute ineffective assistance of counsel. Section 111 (1) (d) was amended to comply with *Caban v Mohammed* (441 US 380), which held that where a parent failed to come forward to participate in the rearing of his or her child, the Equal Protection Clause did not preclude a state from withholding from that parent the privilege of vetoing an adoption. The statute now provides that consent of the father of a child born out-of-wedlock and placed with adoptive parents more than six months after the birth of child is required, but only if the father maintained substantial and continuous or repeated contact with the child. Furthermore, because the father’s contact with the child was not as extensive as the mother’s contact with the child, the absence of a challenge by the father’s attorney to the constitutionality of the statute based on a claim of the denial of equal protection of the law as applied to the father, also did not deprive him of meaningful representation. The father’s attorney properly attempted to demonstrate that the father in fact maintained substantial contact with the child.

Matter of Kayla R., 67 AD3d 1420 (4th Dept 2009)

CHILD ABUSE AND NEGLECT

Findings of Abuse and Neglect Affirmed

Respondent, the live-in boyfriend of respondent mother, appealed from Family Court's order adjudicating the mother's daughter Riley to be an abused child and the mother's daughter Madison to be derivatively neglected. The Appellate Division affirmed. Respondent was correct with respect to the standard of review to be applied in determining whether a child was severely abused. Nevertheless, the court properly considered in the alternative whether petitioner established by a preponderance of the evidence that Riley was an abused child rather than a severely abused child.

Matter of Madison C., 59 AD3d 947 (4th Dept 2009)

Finding of Neglect Affirmed for Failure to Exercise a Minimum Degree of Care

Family Court found that respondent mother neglected the subject child. The Appellate Division affirmed. Petitioner established that the mother "coached," the child to allege that she was sexually abused by her grandfather and thus repeatedly subjected the child to unnecessary medical examination and extreme anxiety based upon those unfounded allegations of sexual abuse.

Matter of Morgan P., 60 AD3d 1362 (4th Dept 2009)

Finding of Neglect Reversed

Family Court found that respondent father neglected his daughter. The Appellate Division reversed. Although petitioner established that the father's behavior fell below a minimum standard of care and reasonableness with respect to that child, the court erred in determining that petitioner established by a preponderance of the evidence that respondent's behavior placed the child's physical, mental or emotional well-being in imminent danger of becoming impaired. The evidence presented at the hearing established that the child resided with suitable relatives while outside the home and continued to attend school, and there was no evidence that the father prevented the child's return to the home. Moreover, there was no evidence that the child was out of the home for a significant period of time.

Matter of Amoni P., 60 AD3d 1408 (4th Dept 2009), *lv denied* 12 NY3d 713

Dismissal of Petition Reversed and Case Remitted

Family Court dismissed the petition alleging that respondent father sexually abused his three children. The Appellate Division reversed and remitted. The out-of-court statements of the two oldest children describing incidents of sexual abuse by the father were sufficiently corroborated, and the record, viewed as a whole, supported the finding of abuse. The disclosures of sexual abuse by the older children were corroborated by

the testimony of petitioner's validation expert, as well as the testimony of the CPS caseworker. Contrary to the court's conclusion, the testimony at the hearing was credible and persuasive. The allegations of sexual abuse were further corroborated by the fact that the two oldest children had age-inappropriate knowledge of sexual matters, the cross-corroborating accounts of those children with respect to the details of the father's conduct and the setting for that conduct, and the behaviors exhibited by one of the children that were consistent with having been sexually abused. A preponderance of the evidence supported a finding of abuse with respect to the two oldest children and a derivative finding of neglect with respect to the youngest child.

Matter of Breanna R., 61 AD3d 1338 (4th Dept 2009)

Court Improperly Delegated Authority But Appeal Moot

Respondent mother appealed from an order of fact-finding and disposition that determined she abused her children and ordered, among other things, that visitation between the mother and three of her children "shall occur only if the [petitioner] deems it appropriate and as outlined in the companion Article 6 Custody Order." The respondent contended that the court improperly delegated to petitioner its authority to determine whether visitation was appropriate. Although the Appellate Division agreed with the merits of respondent's contention, because the order on appeal had expired, the appeal was moot.

Matter of Leah S., 61 AD3d 1402 (4th Dept 2009)

Order Adjudicating Child to be a Neglected Child, Affirmed

Family Court adjudicated respondent parents' daughter to be a neglected child. The Appellate Division affirmed. Petitioner presented evidence that established that the physical, mental or emotional condition of the child had been impaired or was in imminent danger of becoming impaired as a result of her parents' failure to exercise a minimum degree of care in providing her with adequate food and medical care. Further, petitioner established that the child failed to thrive because she was undernourished, and that her condition was of such a nature that would ordinarily not exist except by reason of the acts or omissions of the parents. The remaining contentions were either unpreserved or without merit.

Matter of Lorelei M., 67 AD3d 1383 (4th Dept 2009)

Determination of Derivative Neglect Proper

Family Court determined that respondent mother neglected her child based upon evidence that her other four children were determined to be neglected by her. The prior determinations of neglect were sufficiently proximate in time to the birth of the subject child to demonstrate that the conditions that led to the older children's removal continued to exist and that the mother suffered from such an impaired level of parental

judgment as to create a substantial risk of harm to any child in her care.

Matter of Amanda M.K., 67 AD3d 1384 (4th Dept 2009)

CHILD SUPPORT

Dismissal of Petition to Modify Child Support Reversed

Family Court dismissed for failure to state a cause of action father's petition, which sought to modify his child support order. The Appellate Division reversed and remitted the case. Petitioner established a prima facie case for relief by submitting evidentiary material that established that his daughter abandoned him. His submissions in support of the petition established that his repeated attempts at communication with his daughter had been refused and that she expressed a clear wish to have nothing to do with him. At the "hearing" the court did not permit petitioner to testify or otherwise present any other sworn testimony, and thus the hearing to which petitioner was entitled was inherently flawed.

Matter of Garcia v Barie, 59 AD3d 1090 (4th Dept 2009)

Suspension of Child Support Based on Abandonment Reversed

Family Court granted father's petition and suspended his child support obligation for his two children, ages 14 and 17. The court determined that the children refused to visit their father or to have any substantial contact with him, and that respondent mother was indifferent with respect to the visitation of the children with their father. The Appellate Division reversed. Here, only one of the two children was of employable age and thus the court erred as a matter of law in determining that the actions of the younger child constituted abandonment of her father. Further, with respect to the older child, the evidence failed to support the court's determination that she abandoned her father. The children, who reside in Florida, last visited their father in the summer of 2005. The father and children had an argument on the final night of the visit, and the children stayed with a family friend who transported them to the airport the next day. The father testified at the hearing on the petition that he left one or two messages for the children on the answering machine at their home and that he called or sent text messages to them on their individual cellular telephones. The father further testified that the children failed to return his calls or to respond to his text messages. Failure of the older child to contact her father indicated only that there was reluctance on her part to contact him and such reluctance does not constitute abandonment. Further, a few telephone calls cannot be construed as a serious attempt to maintain a relationship with a child. The court also erred in determining that the failure of the mother to encourage visitation warranted the suspension of the father's child support obligation.

Matter of Saunders v Aiello, 59 AD3d 1090 (4th Dept 2009)

Revocation of Suspended Jail Sentence Reversed

Petitioner mother commenced this proceeding alleging that respondent father violated a May 2007 order that required him to pay child support in the amount of \$28 per month. In addition, the prior order suspended a 6-month jail sentence that had been imposed

based on respondent's prior willful failure to pay support. Family Court revoked the suspension of respondent's jail sentence and remanded him to jail. The Appellate Division reversed and remitted for a hearing before another judge. The court had the discretion to revoke the suspension of the jail sentence, but erred in doing so without first affording respondent an opportunity to be heard and to present witnesses. Contrary to the contention of respondent county, respondent father did not waive his right to a hearing pursuant to Family Court Act § 433. Waiver of the right to be heard in a meaningful manner must be "unequivocal, voluntary, and intelligent," and the request for an adjournment by respondent father's attorney cannot be considered a waiver of respondent's right to a hearing.

Matter of Thompson v Thompson, 59 AD3d 1104 (4th Dept 2009)

Court Erred in Including Maintenance Award in Calculating Child Support

Supreme Court directed plaintiff mother to pay defendant father child support. The Appellate Division modified. The court properly determined that father was the custodial parent with respect to the issue of child support. Pursuant to the express terms of the parties' stipulation, father was the primary residential parent, and plaintiff mother made no showing that the stipulation was unenforceable. However, the court erred in including the amount of maintenance awarded to mother in determining her income for the purpose of calculating the amount of child support that she was required to pay father. Further, the court erred in failing to deduct the FICA tax payments from the salaries earned by both parties. Therefore, father's pro rata share of the child support obligation was 71% and mother's pro rata share of the child support obligation was 29% and mother must pay father \$111.54 per week for child support. The court did not abuse its discretion in awarding mother the sum of \$1,850 per month in maintenance for a five-year period or in denying her request for counsel fees.

Johnston v Johnston, 63 AD3d 1555 (4th Dept 2009)

Modification of Child Support Obligation Modified and Remitted

Supreme Court increased defendant father's child support obligation. The Appellate Division modified. The court erred in directing that the child support modification be retroactive to a date prior to the filing of the order to show cause. The court should have directed that the modification of child support be retroactive to October 4, 2006, the date on which plaintiff filed the order to show cause seeking that relief. The matter was remitted to the court to recalculate support arrears for the period from October 4, 2006 through November 2, 2007. The father's further contentions were without merit, and plaintiff mother's cross appeal was deemed abandoned and dismissed based upon her failure to perfect in a timely manner.

Hayek v Hayek, 63 AD3d 1598 (4th Dept 2009)

Order of Support Magistrate Affirmed

Family Court denied respondent father's objections to the order of the Support Magistrate. The Appellate Division affirmed. The court properly determined that father may not invoke the doctrine of equitable estoppel. The "doctrine of equitable estoppel is applicable in paternity proceedings where it is invoked to further the best interests of the child . . . , it generally is not available to a party seeking to disavow the allegation of parenthood for the purpose of avoiding child support (citations omitted)." Further, respondent was not denied the right to counsel and to effective assistance of counsel. The record established that at the initial appearance on the petition, the Support Magistrate advised father of his right to counsel and that he elected to proceed pro se. Although the Support Magistrate failed to advise father that he had a right to have counsel assigned if he was financially unable to retain counsel, father waived his right to appellate review of that omission by failing to raise it in his written objections to the order of the Support Magistrate.

Matter of Aikens v Nell, 63 AD3d 1662 (4th Dept 2009)

Court Did Not Have Authority to Modify Order of Support

DSS commenced proceeding on behalf of mother seeking to hold respondent father in violation of child support order. At the time of the initial support order, mother lived in New York with the child and father lived in Florida. In the violation petition DSS alleged upon information and belief that the mother resided in New York but had in fact moved with the child to Florida. The father admitted the allegations with respect to his violation of the support order. The Support magistrate determined arrears, continued the order of support and entered judgment in favor of mother and DSS. The support Magistrate directed that the "new York State Order shall terminate in 90 days, if Order is not registered in a state in which one of the parties resides." Family Court denied Dss's objections. The appellate Division modified by vacating the directive that the order shall terminate in 90 days. The court lost continuing, exclusive jurisdiction to modify the support order when both parties moved out of state. The New York court could enforce the order of support but could not modify it.

Matter of Chautauqua County Dept. of Social Servs. v Calhoun, 64 AD3d 1154 (4th Dept 2009)

Order of the Support Magistrate Affirmed

Family Court denied petitioner father's objections to the order of the Support Magistrate concluding that the father was owed \$1,050.41 as excess child support payments. The Appellate Division affirmed. Contrary to the father's contention, the court did not err in deciding that the first objection lacked specificity because it failed to identify any evidence that the Support Magistrate disregarded. The father's contention that the Support Magistrate disregarded prior orders was rejected. The Support Magistrate referred to the orders submitted by the father in support of his petition. Further, the fathers contentions that the Support Magistrate's findings were against the weight of evidence and that the father was entitled to recoup sums that the Support Magistrate

erroneously deemed to be arrears were not properly preserved for review.

Matter of White v Knapp, 66 AD3d 1358 (4th Dept 2009)

Respondent in Willful Violation of a Prior Support Order

Family Court found respondent father to be in willful violation of a prior order of child support and committed him to an intermittent term of incarceration of six months in jail. The Appellate Division affirmed. Petitioner mother presented evidence of a willful violation of the support order by establishing that the father failed to pay support as ordered. Respondent failed to meet his burden of establishing his inability to pay. He presented no evidence that he made any efforts to obtain employment. Respondent's contentions that the court was biased against him and that the sentence was excessive were rejected. The respondent's remaining contentions were without merit.

Matter of Todd v Johnson, 66 AD3d 1480 (4th Dept 2009)

Military Allowances Constitute Income For Purposes of Child Support

Family Court, among other things denied the objection of respondent father to the order of the Support Magistrate that military allowances for food and housing constituted income for the purposes of calculating a parent's child support obligation. The Appellate Division affirmed. The allowances fell within CSSA's broad definition of income. The fact that the allowances did not constitute income for federal income tax purposes is of no moment; the purposes underlying the federal tax code and child support statutes are different. The former is to calculate an individual's taxable income and the latter is to determine the amount a parent can afford to pay to support his or her child.

Matter of Massey v Evans, 68 AD3d 79 (4th Dept 2009)

Order Directing Respondent to Pay Uninsured Medical Expenses Affirmed as Modified

The Appellate Division modified Family Court's order directing respondent to pay his share of the uninsured medical expenses for the parties' child by vacating the amount awarded for uninsured medical expenses and providing that respondent pay his share of those expenses incurred on or after July 14, 2005. The court erred in ordering respondent to pay uninsured medical expenses incurred prior to July 14, 2005, the date the order directing him to pay his share of those expenses was entered. Respondent was entitled to a hearing to determine the reasonable cost of the uninsured medical expenses, but he was not entitled to a hearing on the issue whether the treatment itself was unnecessary.

Matter of Coan v Thompson, 68 AD3d 1655 (4th Dept 2009)

No Emancipation Based on Child's Move to Other Parent's Home

Respondent mother appealed from an order directing her to pay child support to the father. The Appellate Division affirmed. The court properly determined that the parties' daughter did not emancipate herself. The evidence in the record established that the daughter was a college student supported by her parents and that she relocated from the mother's residence to the father's residence with the father's permission. The mother eventually acquiesced regarding the move. A child's moving from one parent's home to the other parent's home does not constitute emancipation where, as here, the child is neither self-supporting nor independent of all parental control, i.e., the daughter did not become independent of her parents' control because the father expressly permitted her to move in with him and the mother acquiesced. A dissenting justice would have found "constructive emancipation" and reversed, on the ground that the record showed that the child moved out of the mother's home voluntarily, without the mother's permission, for the purpose of avoiding discipline and control.

Matter of Stabley v Caci-Stabley, 68 AD3d 1682 (4th Dept 2009)

CUSTODY AND VISITATION

Petition to Modify Prior Order and Violation Petition Properly Dismissed

Family Court dismissed father's two petitions, one seeking to modify a prior order and the other alleging that respondent mother violated the prior order. The Appellate Division affirmed. The prior order required the mother to mail to the father, who is incarcerated, a photograph of the parties' child every other month, along with a letter describing the photograph and any important events in the child's life that had occurred since the prior letter was sent. The petitions were filed 1 ½ months following the entry of that order. The father alleged in one petition that the mother had failed to mail the father a photograph of the child, and he sought modification of the prior order by instead requiring a third party to bring the child to visit him. The father alleged in the second petition that the mother violated the prior order because she failed to send him any pictures of the child or any correspondence concerning the child. With respect to the modification petition, the father failed to allege a sufficient change in circumstances requiring modification in the best interests of the child. Moreover, at the time the petitions were filed, there was no evidence of the mother's willful violation of the prior order.

Matter of Telfer v Pickard, 59 AD3d 954 (4th Dept 2009), *lv denied* 12 NY3d 832

Petition For Custody Properly Dismissed

Family Court dismissed the father's petition for custody of the child and continued temporary custody with the maternal grandmother. The Appellate Division affirmed. The record did not support the contention of petitioner that he did not consent to the referral of the matter to a Judicial Hearing Officer. Although petitioner did not personally sign the consent form, the record established that his attorney did do so and thus the requirements of CPLR 4317 were satisfied. The Appellate Division also rejected was the attorney for the child's contention that the court was required to determine whether extraordinary circumstances existed because the court granted the maternal grandmother only temporary custody. The court properly determined that it was in the best interests of the child to continue the temporary custody arrangement. At the time of the hearing, petitioner had not yet completed the terms and conditions relating to a prior finding of neglect, and he had not been involved with the child's mental health treatment or schooling the preceding year. Further, there was testimony presented at the hearing indicating that the father was likely to interfere with the child's relationship with the children's mother in the event that he was awarded custody.

Matter of Foster v Bartlett, 59 AD3d 976 (4th Dept 2009), *lv denied* 12 NY3d 710

Father Properly Granted Sole Custody

Family Court granted sole custody of the parties' children to respondent father. The Appellate Division affirmed. The court's determination following a hearing that the best

interests of the children would be served by an award of sole custody to the father was entitled to great deference. The record established that the determination was the product of careful weighing of the appropriate factors and that it had a sound and substantial basis in the record. The Appellate Division rejected the contention of petitioner mother and the attorney for the child that the court erred in reconsidering its order to sequester witnesses at the hearing and, upon reconsideration, determined that it would admit the testimony of the children's paternal grandmother, who was present during testimony of other witnesses. The decision whether to sequester witnesses was within the court's discretion in the first instance, and the court retained jurisdiction to reconsider its sequestration order during the course of the hearing.

Matter of McLeod v McLeod, 59 AD3d 1011 (4th Dept 2009)

In Camera Interview Unnecessary to Determine the Children's Wishes

In a divorce action, Supreme Court granted the parties joint custody of their children and designated plaintiff mother as the primary residential custodian. The Appellate Division affirmed. The record supported the court's determination that the mother was better suited to nurture the children and to provide for their emotional support. The father's contention that the court should have conducted an in camera interview of the children was without merit. An in-camera interview was not warranted where, as here, the court had before it sufficient information to determine the wishes of the children.

Bielli v Bielli, 60 AD3d 1487 (4th Dept 2009), *lv dismissed*, 12 NY3d 896

Family Court Abused its Discretion in Refusal to Vacate the Default Order

Family Court denied petitioner mother's motion to vacate the default order in a custody matter. The Appellate Division reversed. Given the unintentional nature of the default, the reasonable nature of the excuse, and the judicial preference for resolving cases on their merits, the court abused its discretion in denying petitioner's motion to vacate the default order. Petitioner established a reasonable excuse for her failure to appear as well as a meritorious defense to respondent's petition for custody of the parties' daughter.

Matter of Danner-Nepage v Nepage, 60 AD3d 1495 (4th Dept 2009)

Order Denying Petitioner's Motion to Vacate Custody Order Reversed

Family Court denied petitioner father's motion to vacate a custody order modifying a prior order. The Appellate Division reversed and remitted the matter to Family Court for a new hearing before a different adjudicator. The Referee erred in denying father's motion to vacate the second custody order. In support of the motion, the father established that neither he nor his attorney consented to the terms of the order, which had been submitted by the attorney for the child, and the record provided no basis for concluding that the parties entered into an enforceable stipulation of settlement. The

Referee erred in terminating the hearing before the father completed the presentation of his case and the mother was afforded an opportunity to present evidence. Although a hearing is not required on a custody petition when the Referee has sufficient information to make a comprehensive assessment of the best interests of the child, that was not the case here.

Matter of Placidi v Sleiertin, 61 AD3d 1340 (4th Dept 2009)

Father's Petition to Modify Prior Order Properly Denied

Family Court denied father's petition to modify a prior order of custody and visitation, which sought unsupervised home visitation with the parties' child. The Appellate Division affirmed. Contrary to the contention of the father and the attorney for the child, the record supported the court's determination that the child's best interests would be served by the continuation of supervised visitation.

Matter of Burczynski v Rogers, 61 AD3d 1401 (4th Dept 2009)

Denial of Mother's Petition to Relocate Affirmed

Family Court dismissed respondent mother's petition, which sought permission for the parties' son to relocate with her to Texas. The Appellate Division affirmed. The court properly considered the relevant factors set forth in *Tropea* in dismissing the petition. Those factors included the mother's failure to establish that her life and the life of the child might be enhanced economically, emotionally, and educationally to any degree by the move, and the mother failed to establish that the child's relationship with petitioner father would be preserved despite the proposed relocation.

Matter of Seyler v Hasfurter, 61 AD3d 1437 (4th Dept 2009)

Modification of Visitation Reversed and Remitted

Respondent father appealed from an order that modified the visitation provisions of a prior order entered upon stipulation of the parties. The Appellate Division reversed and remitted. The court erred in permitting a "licensed mental health counselor," who examined the parties' child and was called as a witness by the mother, to offer an opinion that was based in part upon his interviews with collateral sources who did not testify at trial. The two exceptions to the general rule requiring that opinion evidence be based on facts in the record or on facts personally known to the witness are: "If the opinion was based upon out-of-court material of a kind accepted in the profession as reliable in forming a professional opinion or if it comes from a witness subject to full cross-examination on the trial (citation omitted)." Neither exception applied in this case. The expert testified that material portions of his opinion were based not only upon his interviews with the parties, but also on his interviews with collateral sources. The Appellate Division was unable to determine the extent to which the expert relied on those collateral source interviews in forming his opinion. Furthermore, the collateral

sources did not testify at trial, and there was no evidence establishing their reliability.

Matter of Murphy v Woods, 63 AD3d 1526 (4th Dept 2009)

Transfer of Primary Physical Custody Reversed and Remitted

Family Court transferred primary physical custody of the parties' child to petitioner father and respondent mother appealed. The Appellate Division reversed and remitted. The parties had joint custody of the child with primary physical custody with the mother since August 2000. It was undisputed that the mother moved six times between the years 2000 and 2007, and as a result the child had attended three schools over a period of five years. The court properly determined that a sufficient change of circumstances existed to warrant a review of the custody arrangement. Nevertheless, the court improvidently exercised its discretion in determining that the best interests of the child warranted a transfer of primary physical custody. The evidence presented at the hearing on the petition established that the mother moved with her three children to her parents' home because the trailer park in which she lived had been sold. The child's grandmother cared for the child and the mother's other children while the mother worked. The mother intended to live with the father of her other children and had been looking for housing that would permit the child to continue to attend the same school where the child was enrolled at the time of the hearing. Although the father testified that he filed the petition seeking a change of primary physical custody because the mother moved with the child to her parents' home, he did not identify any negative impact on the child as a result of the move. Although both parties were able to provide for the child's emotional and intellectual development, the evidence established that the child had a learning disability, that the mother had participated in the child's individualized education program, and that the father had not attended meetings with respect to that program. Further, despite the evidence that the child had a loving relationship with both parties, the father refused to allow the child to visit his home for several weeks because of her "attitude." While both parties were able to provide for the financial needs of the child and although both parents were fit to care for the child, the child had always lived with her mother. Finally, the order would have necessitated the separation of the child from her two half-sisters.

Matter of Perry Jr. v Korman, 63 AD3d 1564 (4th Dept 2009)

Modification of Custody Affirmed

Under a prior order, respondent father had sole custody of the parties' children, with visitation to petitioner mother. Father appealed from an order which modified the prior order by awarding the mother sole custody of the children, with visitation to the father. The Appellate Division affirmed. There was a sound and substantial basis in the record to support the Judicial Hearing Officer's (JHO) determination. The mother established that the father interfered with the mother's visitation with the children, that the children's grades declined while the children were in the father's care, that the father failed to seek proper and necessary medical and dental treatment for the children, and that he

had used a belt to “whip” the children on at least one occasion. That evidence, as well as the evidence that the children were thriving in the mother’s care and preferred to reside with the mother, supported the JHO’s determination. Father was not denied a fair hearing. His request that the JHO recuse herself did not constitute a withdrawal of his consent to have the matter handled by the JHO. Further, the record failed to establish that the JHO was biased against him. Although the JHO elicited substantial testimony from the father during the mother’s cross-examination of him, he did not object to the JHO’s questioning, and the questions only sought clarification.

Owens v Garner, 63 AD3d 1585, (4th Dept 2009)

Mother Failed to Establish a Change in Circumstances

Family Court granted respondent father’s motion and dismissed mother’s amended petition seeking to modify a prior order of custody and visitation and mother appealed. The Appellate Division affirmed. Mother’s contention that the court erred in determining that she failed to establish a change in circumstances sufficient to warrant modification of the prior order relied solely upon the father’s alleged interference with her telephone contact with the child. The mother did not raise any issues with respect to the remaining instances of changed circumstances alleged in the amended petition and thus was deemed to have abandoned those issues. The court did not abuse its discretion in refusing to conduct a *Lincoln* hearing.

Matter of Walters v Francisco, 63 AD3d 1610 (4th Dept 2009)

Mother Entitled to Sole Custody of the Children

Family Court awarded respondent mother sole custody of the parties’ two children and granted the mother permission for the children to relocate with her to Troy, New York. The petitioner father appealed. The Appellate Division affirmed. The court’s determination had a sound and substantial basis on the record. The mother was gainfully employed in Troy, New York and provided the children with a stable home environment, while the father had no gainful employment and it was unlikely that he could provide a stable environment. Further, the court did not err in granting the mother’s family offense petition. The record established that the father engaged in acts constituting the crimes of disorderly conduct and attempted assault, thus warranting the order of protection.

Harrington v Harrington, 63 AD3d 1618 (4th Dept 2009)

Permission to Relocate to California Reversed and Remitted

Family Court modified a prior order of joint custody by granting petitioner mother permission for the parties’ children to relocate with her to California. The Appellate Division reversed and remitted. The court erred in entering the order upon “default” based upon respondent father’s failure to appear in court. The record established that

the father was represented by counsel and “where a party fails to appear but is represented by counsel, the order is not one entered upon default of the aggrieved party and appeal is not precluded (citation omitted).” The court further erred in modifying the prior custody order without conducting an evidentiary hearing because it was unclear on the record whether the court had sufficient information to render an informed determination consistent with the children’s best interests.

Matter of Pollard v Pollard, 63 AD3d 1628 (4th Dept 2009)

Father Properly Granted Sole Custody of Parties’ Children

Family Court granted sole custody of the parties’ children to petitioner father and granted respondent mother unsupervised visitation. The Appellate Division affirmed. The mother failed to preserve for review her contention that the court erred in admitting hearsay evidence and, in any event, that contention was without merit. The father presented medical evidence corroborating the hearsay evidence with respect to an incident in December 2006, where his daughter was allegedly sexually abused by the mother’s former boyfriend, and he presented testimony that the mother’s boyfriend was “deceptive” when questioned by the police concerning the incident. Further, the court did not abuse its discretion in precluding mother from offering allegedly corroborating testimony concerning an incident in September 2007 where her daughter was allegedly sexually abused by the father’s girlfriend. The court properly limited the testimony of the mother’s neighbor with respect to that incident because, although the parties’ daughter purportedly repeated the accusations to the neighbor that she previously made to the mother, “the mere repetition of . . . accusation[s] by a child was not sufficient to corroborate his or her prior statement (citation omitted)”. With respect to the father’s contention, the court did not abuse its discretion in finding that unsupervised visitation with the mother was in the children’s best interests.

Matter of Thomas M.F. v Lori A.A., 63 AD3d 1667 (4th Dept 2009)

Custody With Stepmother Not in Child’s Best Interests

Family Court denied respondents father’s and stepmother’s petitions seeking custody of father’s son with stepmother and granted a subsequent order terminating father’s parental rights with respect to his son. The father is incarcerated until at least 2013 and the child is in foster care. The Appellate Division affirmed. With respect to the custody petitions, even assuming, arguendo, that the stepmother was required to establish extraordinary circumstances, she did so, which shifted the focus to the best interests of the child. Giving the trial court’s determination of best interests the greatest respect, there was no basis to disturb the determination that custody with the stepmother was not in the child’s best interests. The court properly considered the father’s incarceration and the potential that he may relapse into a life of crime and substance abuse. With respect to the termination of father’s parental rights, once the court determined that custody with the stepmother was not a feasible plan, father was required to make other arrangements for his child’s long-term care and he failed to do so. Father received

meaningful representation.

Matter of Deborah E.C. v Shawn K., 63 AD3d 1724 (4th Dept 2009)

Case Remitted for Hearing on Issue of Extraordinary Circumstances

Family Court granted the motion of respondent maternal grandmother to dismiss mother's petition seeking to modify a prior order awarding custody of the mother's child to the grandmother. The Appellate Division reversed and remitted. The court erred in failing to determine whether extraordinary circumstances existed to warrant the child's continued custody with the grandmother and, if so, whether mother established a change in circumstances such that modification of custody was in the child's best interests. There was no indication in the record that the court previously made a determination of extraordinary circumstances divesting the mother of her superior right to custody. The record was insufficient for the Appellate Division to make its own determination whether extraordinary circumstances existed and, if so, whether the mother established a change in circumstances.

Matter of Howard v McLoughlin, 64 AD3d 1147 (4th Dept 2009)

Family Court Erred in Failing to Conduct Hearing

Petitioner mother sought change in custody based upon allegations of a volatile relationship between the parties 16-year-old son and respondent father. Based upon those allegations, Family Court ordered an investigation by Child Protective Services (CPS) but did not grant the motion of the attorney for the child to dismiss the petition prior to CPS's report and instead modified the prior order with respect to mother's visitation rights upon the oral request of the father. The Appellate Division reversed. The mother made a sufficient evidentiary showing of a change in circumstances to warrant a hearing. The case was remitted for a hearing on the petition.

Matter of Shaw v Cannata, 64 AD3d 1168 (4th Dept 2010)

Court Erred in Declining Jurisdiction

Petitioner mother and respondent father signed an agreement in 2005 pursuant to which they were to have joint legal custody of their child with primary physical custody to father, who was granted permission for the child to relocate with him to Florida. The agreement, which was incorporated into a New York order, provided that physical custody of the child would be transferred to mother upon her relocation to Florida. The mother did not relocate and the child remained with the father. In 2007, mother filed a petition seeking custody of the child. Family Court declined to exercise jurisdiction over the proceeding and dismissed the petition upon determining that, although it had exclusive continuing jurisdiction, New York was an inconvenient forum. The Appellate Division reversed and remitted. Before making the determination regarding inconvenient forum the court was required, pursuant to Domestic Relations Law § 76-f

(2), to allow the parties to submit information and to consider all relevant factors, including eight specified factors. The court failed to consider all the requisite statutory factors and therefore reversal was required.

Matter of Berg v Narolis, 64 AD3d 1188 (4th Dept 2009)

Order of Primary Physical Custody to Petitioner Affirmed

Family Court awarded petitioner father primary physical custody of the parties' child. The Appellate Division affirmed. The court's determination was the product of careful weighing of appropriate factors and had a sound and substantial basis in the record. Despite respondent mother's contention, the court did not rely too heavily on the child's race in determining the issue of custody. Further, the gaps in the hearing transcript resulting from inaudible portions of the audio tape recording were not so significant as to preclude meaningful review of the order.

Matter of Savage v Cota, 66 AD3d 1358 (4th Dept 2009)

Family Court Properly Dismissed Petitioner's Petition for Visitation

Family Court dismissed petitioner father's petition, which sought visitation with his son. The Appellate Division affirmed. Contrary to petitioner's contention, the court did not abuse its discretion. The court's determination with respect to the child's best interests was entitled to great deference and would not be disturbed where, as here, it was based on careful weighing of the appropriate factors, including the court's first-hand assessment of the character and credibility of the parties and their witnesses.

Matter of Armstrong v Robinson, 66 AD3d 1385 (4th Dept 2009)

Order of Custody Affirmed

The Appellate Division affirmed Family Court's order, which dismissed petitioner mother's petition for modification of a custody order entered upon the consent of the parties, i.e., the mother, her cousin and her cousin's husband. The court did not err in failing to conduct a hearing to determine whether a transfer of custody to her was in the best interests of the child. Although the petition alleged that the mother had obtained suitable housing and employment and that the 13-year-old child wished to reside with her, the mother advised the court at the time of the court appearance on the petition that she was not employed, and the attorney for the child advised the court that the child wished to remain with respondents. The mother failed to make a sufficient evidentiary showing to warrant a hearing. It was noted that the court was fully familiar with relevant background facts regarding the parties and the child from several past proceedings.

Matter of Chrysler v Fabian, 66 AD3d 1446 (4th Dept 2009)

Court Erred in Failing to Hold Hearing on Best Interest After Finding Extraordinary Circumstances

In appeal No. 1, Mother appealed from an order granting custody of her daughter to the child's aunt. In appeal No. 2, mother appealed from an order that dismissed as moot her petition to modify a prior order granting custody to the father. The Appellate Division modified. The orders did not lack the essential jurisdictional predicate of the mother's consent. The mother signed a stipulation permitting the Referee to hear and decide all issues in the proceedings at issue, as well as all future proceedings. The Referee did not err in refusing to allow mother to withdraw her valid consent. With respect to appeal No. 1, the aunt met her burden of establishing extraordinary circumstances in view of mother's history of mental health issues and mother's failure to address those issues, but the court erred in failing to hold a hearing on the child's best interests and the record was insufficient for the Appellate Division to make that determination. The Referee erred in dismissing as moot the mother's petition to modify the prior order granting custody of the child to the father. If it is determined on appeal that the aunt's petition for custody should be denied, the issues raised in mother petition in appeal No. 2 must be addressed.

Matter of Johnson v Streich-McConnell, 66 AD3d 1526 (4th Dept 2009)

Court's Assessment of Parties' Character and Credibility Entitled to Great Deference

Family Court granted the parties joint custody of their four children, with primary physical residence with the father and visitation to the mother. The Appellate Division affirmed. Following a lengthy hearing, the court determined that the father would provide greater stability to the children and that it would be in their best interests to reside together with him. The determination was based in large part upon the court's firsthand assessment of the character and credibility of the parties, and was entitled to great deference. The determination was supported by a sound and substantial basis in the record. The mother failed to preserve contentions with respect to tape recordings made by the father. The record established in any event that the recordings did not influence the court's determination, and thus any error with respect to the tape recordings was harmless.

Matter of Thayer v Thayer, 67 AD3d 1358 (4th Dept 2009)

Child's Mental Health Evaluation Supported Denial of Visitation With Father Who Engaged in Domestic Violence

Petitioner father appealed from an order denying his petition seeking visitation with the parties' daughter. The Appellate Division affirmed. The court properly based its determination on the mental health evaluation of the child, concluding that forced visitation with the father, who was incarcerated, would be harmful to the child's emotional and psychological well-being. During the course of the proceeding, the father was incarcerated based upon his conviction of assault in the first degree, arising from his having attacked and beaten the child's older sister. The record established the father

had engaged in a pattern of domestic violence in the presence of the child who was the subject of the appeal, that she suffered from posttraumatic stress disorder, and that she did not wish to visit with the father.

Matter of Jacobs v Chadwick, 67 AD3d 1373 (4th Dept 2009)

Modification of Custody Reversed

Family Court granted the cross petition of respondent mother seeking to modify the existing custody arrangement by awarding her sole physical custody of the parties' child. The Appellate Division reversed. The mother failed to establish a significant change in circumstances sufficient to warrant the court to determine whether a change in custody was in the child's best interests. The court erred in determining that the fact that petitioner father began to commute to an out-of-state college two days a week constituted a significant change of circumstances. The father testified that he continued to arrive home each night before dinner and that the commuting arrangement was temporary. Further, the fact that the mother had given birth to the child's half-sibling did not constitute a significant change in circumstances. Finally, even if mother established a significant change of circumstances, the Appellate Division would conclude, on the record before it, that a change in custody was not in the child's best interests.

Matter of Yadow v Bianco, 67 AD3d 1430 (4th Dept 2009)

Denial of Motion to Vacate Amended Order Entered on Default Reversed

Family Court denied petitioner father's motion to vacate an amended order entered upon his default. The Appellate Division reversed. The amended order granted respondent mother sole legal and physical custody of the parties' children and permanently terminated respondent's custodial and visitation rights. The determination of the father's motion was contained in a letter but no order was entered. However, the Referee filed the letter with the Family Court Clerk and that letter resolved the motion and advised the father that he had a right to appeal. The Appellate Division determined that the letter would be treated as an order. The Referee erred in denying the father's motion. The father lived in California and he asserted in an affidavit in support of his motion that he failed to appeal on the date scheduled for trial because he relied upon the representation of his attorney that the trial had been adjourned. The father's attorney was suspended from practice for misconduct, including misconduct in failing to appear at the trial of this matter, despite the referee's denial of his request for an adjournment. The father also asserted that the mother had denied him access to their children.

Matter of Louka v Shehatou, 67 AD3d 1476 (4th Dept 2009)

Return From Active Military Service Is 'Substantial Change in Circumstances'

Family Court granted respondent father's motion to dismiss the petition without conducting a hearing based on the court's determination that the mother failed to show a

change of circumstances. The Appellate Division reversed and reinstated the petition based on the recent enactment of Family Court Act § 651 (f). Section 651 (f) (3) provides that the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances. Here, the mother alleged that she had returned from active military duty and thus made a sufficient evidentiary showing of substantial change in circumstances.

Matter of Hughes v Davis, 68 AD3d 1674 (4th Dept 2009)

Modification of Custody Affirmed

Family Court modified a prior order by granting sole legal custody of the parties' son to petitioner father. The Appellate Division affirmed. The court did not err in relying upon evidence that respondent mother's paramour sexually abused the son's step-sisters in determining that the father made the requisite showing of a significant change in circumstances. The mother could not assert the defense of collateral estoppel with respect to the evidence of sexual abuse because although she belatedly objected to the introduction of that evidence, she did not object based on the defense of collateral estoppel or raise that defense in her answer or move to dismiss the petition on that ground. Therefore, she waived her right to assert that defense. The father established a sufficient change in circumstances to warrant inquiry into whether modification of the existing custody arrangement was in the son's best interests. In addition to the evidence of sexual abuse, the record established that the mother continued to reside with her paramour thereafter, that she planned to exercise her visitation with her son in a basement with no furniture and that the son was placed in an environment where he was exposed to pornography and excessive alcohol and drug consumption. The court did not err in permitting the amendment of the pleadings to conform to the evidence presented at the hearing because the mother's attorney consented to the amendment. Finally, even assuming the child was aggrieved when the court denied the mother's request that the court recuse itself, the attorney for the child did not take a cross appeal from the order and therefore cannot seek affirmative relief with respect to the denial of the mother's request.

Matter of Simonds v Kirkland, 67 AD3d 1481 (4th Dept 2009)

Court Properly Granted Permission to Relocate to Alabama

Family Court granted the mother's petition for permission to relocate with the parties' child to Alabama. The Appellate Division affirmed, rejecting respondent's contention that the court should have directed petitioner to be examined by a psychiatrist or psychologist. Although petitioner admitted that she had been diagnosed with bipolar disorder, the record established that she consistently maintained a drug treatment regimen for nearly 20 years and was under the care of a family physician. Respondent failed to submit any evidence that the petitioner's mental health condition was poorly maintained. Petitioner met her burden of establishing that the proposed relocation would be in the best interests of the child. Petitioner had been the primary care taker of the child since his birth, and respondent had not consistently exercised the visitation to which he was entitled under the prior order.

Matter of Linn v Wilson, 68 AD3d 1767 (4th Dept 2009)

Some Evidence of Interference Did Not Outweigh Other Evidence

Petitioner mother appealed from an order dismissing her petition seeking custody of her child. The Appellate Division affirmed. Although there was some evidence in the record that respondent father actively interfered with the mother's relationship with the child, other factors supported the court's determination. The record also did not support the mother's contention that she did not receive effective assistance of counsel: there was extensive cross-examination of the parties, and the court had issued decisions with respect to previous petitions by both parties and thus was familiar with the circumstances of the case.

Matter of Smith v Natali, 68 AD3d 1768 (4th Dept 2009)

Evidence Sufficient to Support Finding of Extraordinary Circumstances

Family Court awarded custody of respondent mother's child to the paternal grandmother. The Appellate Division affirmed. The evidence was sufficient to support the finding of extraordinary circumstances, including evidence of the mother's chronic mental illness, unstable living situation, and a failure on her part to address the special needs of the child.

Matter of Brault v Smugorzewski, 68 AD3d 1819 (4th Dept 2009)

FAMILY OFFENSE

Court Could Credit Wife's Testimony Over Husband's

The Appellate Division affirmed an order determining that respondent husband committed the family offenses of disorderly conduct and criminal mischief against petitioner wife. The wife established by a preponderance of the evidence that the husband engaged in acts constituting those crimes. The court's assessment of the credibility of the witnesses was entitled to great weight, and the court was entitled to credit the testimony of the wife over that of the husband.

Matter of Scroger v Scroger, 68 AD3d 1777 (4th Dept 2009), *lv denied* 14 NY3d 705

JUVENILE DELINQUENCY

Court Did Not Err in Requesting Agency to File a Violation Petition

The Appellate Division affirmed Family Court's order, which revoked respondent's existing probation based upon the finding that he violated the conditions of probation and placed him on a new two-year period of probation. Respondent contended that the court erred in directing the presentment agency to file a violation petition. The record did not support that contention. The petition, which was verified and subscribed by the presentment agency in accordance with Family Court Act § 360.2, merely recited that it was being filed at the request of the court, and it did not recite that the court directed the presentment agency to file the petition. Respondent did not present evidence that it was the court alone that prompted the filing of the petition. Further, the record established by a preponderance of the evidence that respondent violated the conditions of his probation. Also, the court did not lack the authority to remand respondent to detention after completion of the fact finding hearing, pending a continuance of the violation proceeding. Based upon the severity of the offense committed by respondent, as well as his willful violation of his existing conditions of probation, the court did not abuse its discretion in imposing a new two-year period of probation.

Matter of Joshua M., 59 AD3d 1073 (4th Dept 2009), *lv denied* 12 NY3d 712

JD Adjudication Reversed: Arrest Was Unauthorized

Family Court found that respondent committed an act that, if committed by an adult, constituted the crime of resisting arrest. The Appellate Division reversed. The petition was facially insufficient. An essential element of resisting arrest is that the arrest is authorized. The petition and supporting depositions filed with the petition alleged that respondent resisted arrest while being placed under arrest for "fighting," i.e., disorderly conduct. Disorderly conduct is a violation, and a warrantless arrest of a juvenile is authorized only in cases where an adult could be arrested for a crime. A crime is defined in Penal Law § 10.00 (6) as a misdemeanor or a felony, not a violation. Further, because there was no evidence in the petition or supporting depositions that the police officers who attempted to arrest the 12-year-old respondent believed or had reason to believe that she was at least 16 years old, the petition and supporting depositions failed to allege that the arrest was "authorized."

Matter of Iyona G., 60 AD3d 1403 (4th Dept 2009)

Restrictive Placement With OCFS Affirmed

Family Court adjudged respondent to be a juvenile delinquent based upon the finding that he committed an act that, if committed by an adult, would constitute the crime of murder in the second degree, and after a dispositional hearing the court determined that respondent required restrictive placement and placed him with OCFS for a period of five years. The Appellate Division affirmed. The court rejected respondent's

contention that the court erred by failing to order a less restrictive placement. The court properly considered the background of the 14-year-old respondent; his need for intensive psychotherapy, supervision and educational services; the particularly brutal and violent nature of the murder; the need for the protection of the community in light of the unexpected nature of respondent's actions; and the willing participation of respondent in the murder of the 18-year-old victim, whom he did not know. Further, the court did not abuse its discretion in directing that respondent initially be confined in a secure facility for a period of 18 months.

Matter of Dwayne J. R. Jr., 60 AD3d 1467 (4th Dept 2009)

Respondent's Admission Defective

Family Court adjudicated respondent to be a juvenile delinquent based upon his commission of an act that, if committed by an adult, would constitute the crime of endangering the welfare of a child, and placed him on probation for two years. The Appellate Division reversed. Respondent's admission to the underlying act was defective based on the court's failure to comply with Family Court Act § 321.3 (1) by conducting an adequate allocution of his mother. Although that issue was not preserved for review, preservation was not required because the statute's requirements were mandatory and nonwaivable. The dispositional order was reversed and the fact-finding order vacated, but because the period of respondent's placement had not expired, the petition was not dismissed.

Matter of Tyler D., 64 AD3d 1243 (4th Dept 2009)

JD Adjudication Reversed in Interest of Justice

Family Court adjudged respondent to be a juvenile delinquent based on findings that he committed acts which, if committed by an adult, constituted the crimes of arson in the third degree and burglary in the third degree. Although respondent failed to preserve his contention for review, the Appellate Division reviewed it in the interest of justice and concluded that the evidence was legally insufficient to support the court's findings. The court's findings were based on the uncorroborated testimony of accomplices. No independent corroborative evidence was offered at the fact-finding hearing, and the evidence introduced by the presentment agency had no real tendency to connect respondent with the commission of the crimes.

Matter of Howard M., 66 AD3d 1374 (4th Dept 2009)

Evidence Legally Insufficient to Support Reckless Endangerment Finding

Family Court adjudged respondent to be a juvenile delinquent based on findings that he committed acts which, if committed by an adult, constituted the crimes of reckless endangerment in the second degree, attempted assault in the third degree, harassment

in the first degree and menacing in the second degree. The Appellate Division modified. The evidence was legally insufficient to establish that respondent created a substantial risk of serious physical injury to another person and thus the evidence was legally insufficient with respect to the charge of reckless endangerment. The evidence was legally sufficient with respect to the remaining crimes of attempted assault, harassment, and menacing.

Matter of Dominick L., 66 AD3d 1490 (4th Dept 2009)

JD Adjudication Affirmed, Evidence Was Legally Sufficient

Family Court adjudicated respondent to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, constituted the crimes of assault in the second degree and assault in the third degree. The Appellate Division affirmed. The evidence was legally sufficient to establish that the police officer involved sustained a physical injury within the meaning of Penal Law § 10.00.

Matter of Asa A., 67 AD3d 1372 (4th Dept 2009)

ORDER OF PROTECTION

Order of Protection Effective for up to Two Years Without Aggravating Circumstances

Family Court, in a proceeding pursuant to Family Court article 8, granted petitioner an order of protection, effective through January 3, 2010. The Appellate Division affirmed. Family Court Act §842, as amended in 2003, allowed an order of protection to be effective for up to two years without a finding of aggravating circumstances.

Matter of Giardina v Campbell, 60 AD3d 1367 (4th Dept 2009)

PATERNITY

Order to Submit to a Genetic Marker Test Reversed and Remitted

Family Court directed respondent to submit to a genetic marker test. The Appellate Division reversed and remitted. The court erred in denying respondent's objection to a genetic marker test without a hearing. It was undisputed that, at the time of the child's birth petitioner mother was married to another man. Respondent also asserted that from the time of the child's birth until almost eight years later, when the petition was filed, petitioner and the child lived with another man with whom the child had a parent-child relationship. Although the court ordered the test based on its belief that the child had a right to know the identity of his biological father, the court's belief was insufficient to overcome the benefits accruing to the child by preserving his legitimacy. Because there was insufficient evidence before the court to determine the child's best interests, the court should have conducted a hearing. Further, respondent was correct in his contention that the court should have appointed an attorney for the child before conducting the hearing.

Matter of Tracy C.O. v. Douglas A.F., 66 AD3d 1390 (4th Dept 2009)

PERSON IN NEED OF SUPERVISION

Respondent Properly Adjudged Person in Need of Supervision

Family Court adjudged respondent to be a person in need of supervision based upon her admitted truancy and placed her in the custody of DSS for a period of 12 months at a residential facility. The Appellate Division affirmed. The record supported the court's determination that petitioner's reasonable efforts aimed at preventing or eliminating the need for placement away from respondent's home were ineffectual and her best interests would be served by placement at a residential facility.

Matter of Jessica C., 63 AD3d 1618 (4th Dept 2009)

TERMINATION OF PARENTAL RIGHTS

Mother's Parental Rights Terminated Upon a Finding of Permanent Neglect

Family Court terminated respondent mother's parental rights with respect to the subject children upon a finding of permanent neglect. The Appellate Division affirmed. The court did not err in refusing to enter a suspended judgment with respect to her daughter Tammy because the record clearly established that the mother had no meaningful relationship with that child and that the child expressed a clear preference not to be reunited with her mother.

Matter of Anthony E., 59 AD3d 929 (4th Dept 2009), *lv denied* 12 NY3d 710

Mother's Parental Rights Properly Terminated

Family Court adjudged respondent mother's three children to be permanently neglected and terminated her parental rights. Petitioner DSS presented evidence that established that it provided services and other assistance aimed at ameliorating or resolving the problems preventing the children's return to the mother's care. DSS was not charged with guaranteeing that the mother succeed in overcoming her problems. Although the mother participated in some of the services offered by DSS, she failed to address successfully the problems that led to the removal of the children and continued to prevent their safe return. Respondent failed to preserve for review her contention that the court erred in admitting evidence at the fact finding hearing with respect to events preceding the removal of the children and predating the instant petition by more than one year. That evidence was relevant and instructive for the limited purpose of ascertaining the conditions that led to the removal of the children in the first instance. Respondent's attorney's failure to object to the admission of that evidence did not constitute ineffective assistance of counsel. Respondent failed to preserve for review her contention that the attorney for the children should have apprised the court of the children's wishes at the dispositional hearing. The record established that the attorney for the children had previously apprised the court of the children's wishes at the fact finding hearing, and the failure to do so again at the dispositional hearing did not prevent the court from considering the children's best interests.

Matter of Brittany K., 59 AD3d 952 (4th Dept 2009), *lv denied* 12 NY3d 709

Father Admitted Permanent Neglect

Upon a finding of permanent neglect, Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The father admitted that he permanently neglected the children and the evidence at the dispositional hearing supported the court's determination that the best interests of the children would be served by terminating his parental rights and freeing the children for adoption. The contentions of the father and the attorney for the children concerning events that occurred subsequent to the dispositional hearing were not properly before the court.

Matter of Maria F., 59 AD3d 952 (4th Dept 2009)

Evidence Supported Termination By Reason of Mental Illness

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. The court's determination that the mother was presently and for the foreseeable future unable by reason of mental illness to provide proper and adequate care for the children was supported by clear and convincing evidence. The court was entitled to credit the testimony of a psychologist that, based on the mental illness of the mother, any child in her care would be placed at significant risk of neglect for the foreseeable future. That testimony was based upon the results of standardized testing, interviews with the mother and petitioner's caseworkers, the psychologist's observation of the mother's interaction with the children, and a review of records relevant to both the mother and the children.

Matter of Shahida M., 59 AD3d 976 (4th Dept 2009), *lv denied* 12 NY3d 708

No Obligation to Exercise "Diligent Efforts"

Respondent father's parental rights were terminated on the ground of permanent neglect but he retained visitation rights. Father appealed and the Appellate Division affirmed. Father contended that petitioner DSS failed to establish by clear and convincing evidence that it exercised diligent efforts to encourage and strengthen the parent-child relationship. Petitioner was relieved of that obligation based on father's failure on more than one occasion while incarcerated to cooperate with an authorized agency in its efforts to assist him in preparing a plan for the future of the child. Even where an incarcerated parent makes an effort to develop a feasible plan for the future of his or her child, a finding of permanent neglect is appropriate where, as here, no alternative to foster care for the duration of the parent's incarceration was provided.

Matter of Samantha K., 59 AD3d 1012 (4th Dept 2009)

Parental Rights Properly Terminated: "Some Cooperation and "Limited Progress" Insufficient

Family Court adjudicated respondent mother's four children to be permanently neglected and terminated her parental rights. The Appellate Division affirmed. Petitioner DSS established that it exercised the requisite diligent efforts to strengthen the parent-child relationship by providing assistance necessary for the mother to overcome the particular conditions that separated her from her children. Although the mother did cooperate with DSS to some degree and made limited progress in other areas, she nevertheless failed to address and overcome the primary problem that led to the children's removal in the first instance. Even assuming, *arguendo*, that the mother preserved for the court's review her contention that the dispositional hearing was deficient, the Appellate Division rejected that contention. The court's procedure in conducting the hearing was proper. The failure of the mother's attorney to present any

evidence at the dispositional hearing, without more, did not constitute ineffective assistance of counsel. At the fact finding hearing, the mother's attorney thoroughly cross-examined petitioner's witnesses and presented witnesses on the mother's behalf, and the mother failed to establish that the failure to present evidence at the dispositional hearing caused her to suffer actual prejudice.

Matter of Grabiell V., 59 AD3d 1132 (4th Dept 2009), *lv denied* 12 NY3d 711

Denial of Reopening Finding by Default Reversed

Respondent father appealed from Family Court's order denying his motion "to Reopen a Finding by Default Terminating Parental Rights" with respect to his daughter based upon the findings that he abandoned and permanently neglected her. The Appellate Division reversed. The court violated the father's fundamental right to due process by failing to conduct either a fact-finding hearing or inquest before making its findings of abandonment and permanent neglect, regardless of the father's default status on the scheduled hearing date. Although a fact-finding hearing was scheduled, no hearing was conducted when the father did not appear. Petitioner offered no evidence at the scheduled fact-finding hearing to support its petition, and the record was devoid of any evidence that the father was guilty of fault to support the determination of the court, or that petitioner engaged in the requisite diligent efforts to strengthen the relationship between respondent and his daughter. The respondent's contentions that he was prejudiced by his attorney's alleged ineffective assistance and that the attorney for the child was ineffective were unsupported by the record.

Matter of Sarah A., 60 AD3d 1293 (4th Dept 2009)

Father's Failure to Communicate With Petitioner Not Excused by Fact That He Was Prohibited From Communicating With Children Under 18

Family Court terminated respondent father's parental rights with respect to his son on the ground of abandonment. The Appellate Division affirmed. The father's parole officer testified at the hearing on the petition that, although the father was prohibited from contacting any child under the age of 18, he was not prohibited from contacting petitioner DSS. His failure to communicate with petitioner was not excused by the fact that he was participating in a sex offender treatment program or by the fact that the conditions of his release on parole prohibited him from having any contact with children under the age of 18. Two caseworkers for petitioner testified that the father failed to communicate with petitioner concerning the status of the child and any plans for the child's future, and he failed to request information concerning the child from the caseworkers. Further, he failed to file a petition for custody or visitation with the child. The Appellate Division noted that at the hearing respondent admitted he never contacted the child's caseworker during the relevant period. The father failed to preserve for review his contention that the testimony of the petitioner's two caseworkers constituted inadmissible hearsay.

Matter of Lucas B., 60 AD3d 1352 (4th Dept 2009)

Father's Parental Right Terminated On Ground of Abandonment

Family Court terminated respondent father's parental rights on the ground of abandonment. The Appellate Division affirmed. The record established that the father visited the child only once during the relevant time period, failed to pay child support despite his ability to do so, and had contact with petitioner only at court appearances. The court was entitled to discredit the testimony of the father that he attempted to contact petitioner by telephone. Although the record established that the father was denied the opportunity to visit with the child on one occasion when he accompanied the child's mother to one of her supervised visits, the record further established that neither the agency supervising the mother's visitation nor the caseworker for petitioner were aware that the father was the child's parent, and the caseworker subsequently advised the agency conducting the visitation of that fact.

Matter of Isis S., 60 AD3d 1385 (4th Dept 2009)

Order Terminating Respondent's Parental Rights Reversed

Upon a finding of abandonment, Family Court terminated respondent father's parental rights with respect to his daughter. The Appellate Division reversed. Petitioner DSS failed to meet its burden of establishing by clear and convincing evidence that father failed to visit his daughter or communicate with her or petitioner. The petition was filed on September 19, 2007, but petitioner presented evidence concerning the failure of the father to maintain contact with his daughter beginning on March 26, 2007, which was less than six months prior to the filing of the petition.

Matter of Elegant R.C., 60 AD3d 1386 (4th Dept 2009)

Post-Termination Visitation Not in Child's Best Interest

The Appellate Division affirmed Family Court's determination that post-termination contact between respondent mother and her child was not in the child's best interests. The Appellate Division previously modified and remitted the matter to the court for a determination whether such contact was in the best interests of the child. Upon remittal, the court determined that post-termination contact with the mother would interfere with the pending adoption of one of the children and was not in his best interests, but granted the mother "reasonable" post-termination visitation with the other child. The mother's contention that the trial court refused to grant her post-termination contact with the one child based on the unsworn statements of the caseworkers for petitioner made during a "postdisposition review" from which the mother was excluded was without merit. The record established that the court's determination that post-termination visitation with the mother was not in the best interests of the child was properly based on evidence presented at the dispositional hearing, at which the mother was afforded the opportunity to present evidence in support of post-termination visitation with the

child and to controvert the evidence against her. Indeed, the mother cross-examined each of petitioner's witnesses with respect to whether her contact with the child would interfere with the adoption process. The mother was not aggrieved by that part of the order granting her visitation with the other child. The mother's contention concerning visitation between the children was raised for the first time on appeal and was not properly preserved for review.

Matter of Kahlil S., 60 AD3d 1450 (4th Dept 2009), *lv dismissed* 12 NY3d 898

Father's Parental Rights Properly Terminated

Family Court found that the subject children were permanently neglected and terminated respondent father's parental rights. The Appellate Division affirmed. The court rejected respondent's contention that petitioner failed to make the requisite diligent efforts to reunite him with his children. Petitioner established that it made arrangements for supervised visitation between respondent and the subject children; suggested three different parenting programs; offered to enlist the services of an individual who spoke respondent's native language to assist during visitation; encouraged respondent to apply for public assistance in order to obtain sufficient income to support the children; and encouraged respondent to help his son to comply with the order of protection that prohibited that son's contact with the children at issue. Further, the court properly determined that respondent failed to plan for the future of the children. The record established that respondent believed that he had not done anything to warrant the removal of the children and that he did not know why the children were removed. Respondent ultimately blamed the removal of the children on his eldest daughter, who alleged that she had been sexually abused by the father's son who was the subject of the order of protection.

Matter of Lilian I., 60 AD3d 1491 (4th Dept 2009)

Termination of Parental Rights on Ground of Mental Retardation Modified

Family Court terminated respondent father's parental rights on the ground of mental retardation. The Appellate Division modified and remitted for further proceedings. Petitioner established by clear and convincing evidence that the father was presently and for the foreseeable future unable, by reason of mental retardation, to provide proper and adequate care for his child, who had developmental disabilities. Petitioner presented the testimony of a psychologist and a psychiatrist, who each testified that the father was mildly mentally retarded and that his mental retardation rendered him incapable of providing proper and adequate care for his child. However, the court erred in failing to determine whether post-termination contact with the father was in the best interests of the child. After the court issued its written decision, both the court and the attorney for the child expressed their belief that post-termination contact might be appropriate. The court urged the parties to come to an agreement but the parties were unable to do so. The court then ordered that the father's parental right were terminated without determining whether post-termination contact was in the child's best interests.

The court erred in conditioning post-termination contact on the parties' ability to reach an agreement. Instead, the court should have determined whether such contact was in the child's best interests.

Matter of Josh M., 61 AD3d 1366 (4th Dept 2009)

Termination of Parental Rights Reversed

Family Court found that respondent mother permanently neglected her child and terminated her parental rights. The Appellate Division reversed and remitted. Mother's failure to appear at the fact-finding hearing on the issue of permanent neglect did not automatically constitute a default, in view of the fact that the mother's attorney appeared on her behalf and requested an adjournment.

Matter of Isaiah H., 61 AD3d 1372 (4th Dept 2009)

Father's Parental Rights Properly Terminated

Family Court terminated respondent father's parental rights with respect to his daughter on the ground of permanent neglect. The Appellate Division affirmed. Despite diligent efforts to encourage and strengthen the relationship between father and his daughter, the father failed during the statutory period to maintain contact or plan for her future although physically and financially able to do so.

Matter of Meredith S.F., 61 AD3d 1430 (4th Dept 2009)

The Court Properly Refused to Extend Suspended Judgment

Respondent mother appealed from Family Court's order that revoked a suspended judgment and terminated her parental rights with respect to four of her children. The Appellate Division affirmed. The court did not err in refusing to extend the suspended judgment. The suspended judgment, having already been extended six months, was properly revoked where the mother admittedly failed to comply with its terms. In addition, the mother failed to demonstrate that "exceptional circumstances" required extension of the suspended judgment.

Matter of Demario J., 61 AD3d 1437 (4th Dept 2009)

Appeal From Suspended Judgment Dismissed

Family Court terminated respondent mother's parental rights with respect to her daughter Tiffany K. and issued a suspended judgment with respect to her son Giovanni K., who were found to be neglected children. The Appellate Division affirmed with respect to Tiffany K. but took judicial notice of a superseding order terminating mother's parental rights with respect to Giovanni and dismissed that part of the appeal. Further, although the mother also purported to challenge the termination of her parental rights

with respect to a second son, the Appellate Division had dismissed that appeal insofar as it concerned him by prior order based upon the fact that he had attained the age of 18.

Matter of Giovanni K., 62 AD3d 1242 (4th Dept 2009)

Termination of Mother's Parental Rights Reversed

Family Court terminated respondent mother's parental rights with respect to her five children based upon a finding of permanent neglect. The Appellate Division reversed and remitted. The court abused its discretion in entering the order upon the mother's default after granting the motion of the mother's attorney to withdraw as counsel without notice to the mother. "Because the purported withdrawal of counsel in this case was ineffective, the order entered by Family Court was improperly entered as a default order and appeal therefrom was not precluded (citation omitted)."

Matter of Davontae D., 62 AD3d 1251 (4th Dept 2009), *lv dismissed* 12 NY3d 906

Issues on Appeal Deemed Abandoned

Family Court terminated respondent mother's parental rights with respect to her son and daughter. The Appellate Division affirmed. Although the mother filed notices of appeal with respect to the orders at issue in appeal Nos. 1 and 2 terminating her parental right, she failed to address any issues concerning those orders in her brief on appeal and thus any such issues were deemed abandoned. Because the mother's son attained the age of 18 years during the pendency of the appeal, the part of the appeal of the order denying her request for post-termination visitation with her son was moot.

Matter of Ronnie P., 63 AD3d 1527 (4th Dept 2009)

Family Court Erred in Granting Motion of Mother's Attorney to Withdraw Without Notice to Mother

Respondent mother appealed from Family Court's default order, which terminated her parental rights upon a finding that she permanently neglected her children. Family Court abused its discretion in granting the motion of the mother's attorney to withdraw as counsel for the mother without notice to mother. Therefore, the Appellate Division reversed and remitted for reassignment of counsel and a new hearing on the petition.

Matter of La'Derrick W., 63 AD3d 1538 (4th Dept 2009)

Suspended Judgment Not in Child's Best Interests

The Appellate Division affirmed Family Court's order that terminated respondent father's parental rights to his child. Father contended that the court should have issued

a suspended judgment; however, petitioner established that the child had no meaningful bond with the father, that the father could not provide structure for his child who had special needs, that he failed to attend a court-ordered domestic violence program, and that he continued to use crack-cocaine. The father's contention that the court did not have an adequate opportunity to consider the wishes of the child because the court did not conduct an in camera interview with the child and that the attorney for the child did not meet with her to ascertain her wishes is not preserved, and in any event is without merit. In view of the child's young age and the evidence before the court, an in camera interview with the child would not have assisted the court in any meaningful way. In addition, the attorney for the child indicated that staff from his office had met with the child and determined that the child had no interest in additional contact with the father.

Matter on Tonjaleah H., 63 AD3d 1611 (4th Dept 2009)

Petitions Erroneously seeking Termination on Ground of Neglect Not Jurisdictionally Defective

Family Court terminated respondent father's parental rights with respect to his children on the ground of abandonment. The Appellate Division affirmed. The fact that the petitions were denominated as petitions seeking termination of father's parental rights on the ground of neglect did not render them jurisdictionally defective because the factual paragraphs in both petitions alleged that father abandoned the children. Petitioner established by clear and convincing evidence that he had abandoned the children. Petitioner presented evidence that established that the father had almost no contact with the children in the five years preceding the filing of the petitions and that he had failed to keep petitioner apprised of his location.

Matter of Dennis K.A., 63 AD3d 1638 (4th Dept 2009)

Termination of Parental Rights in Best Interests of Children

Respondent father appealed from an order that revoked a suspended judgment and terminated his parental rights with respect to two of his children. The Appellate Division affirmed. The court properly determined that he violated several of the terms of the suspended judgment and that termination was in the children's best interest. Further, the father did not ask the court to consider post-termination contact with the children in question or to conduct a hearing on that issue, and in any event, he failed to establish that such contact would be in the best interests of the children.

Matter of Christopher J., 63 AD3d 1662 (4th Dept 2009)

Termination of Parental Rights Reversed

Family Court terminated respondent father's parental rights with respect to his daughter on the ground of permanent neglect. The Appellate Division reversed. The court

violated father's due process rights by refusing to permit him to present evidence during the fact-finding phase of the proceeding after the father failed to make a timely appearance on the fourth day of the hearing. There was no showing that father waived his right to be heard. Father appeared on the first three days of the hearing and communicated his intent to testify. On the fourth day of the hearing, the father's attorney notified the court that the father believed the hearing started at 10:00 AM, rather than 9:00 AM and that he was en route to the hearing. Additionally, father's first witness was available to testify. Under those circumstances, respondent's due process rights were violated when the court closed the fact-finding hearing and precluded the father from presenting evidence. In any event, petitioner failed to establish that father permanently neglected his daughter. Petitioner failed to tailor its efforts to the needs of this father and daughter. Even assuming, arguendo, that petitioner met its burden with respect to diligent efforts, petitioner failed to meet its additional burden of establishing that father failed to maintain contact or plan for his daughter's future. Despite substantial geographic, personal, and employment related obstacles, father made significant efforts to maintain contact with his daughter and plan for her future.

Matter of Patricia C., 63 AD3d 1710 (4th Dept 2009)

Motion to Vacate Order Entered Upon Default Properly Denied

Respondent mother appealed from an order revoking a suspended judgment and terminating her parental rights with respect to her child and an order denying her motion to vacate the order entered upon her default. The Appellate Division affirmed. Mother failed to appear at the hearing on the petition seeking revocation of the suspended judgment and, although her attorney was present, he did not participate. Family Court properly determined that mother's unexplained failure to appear constituted a default and the Appellate Division therefore dismissed that appeal. With respect to the order denying mother's motion to vacate the order entered on her default, the court did not abuse its discretion in denying that motion because the mother failed to establish a meritorious defense and a reasonable excuse for her failure to appear.

Matter of Tiara B., 64 AD3d 181 (4th Dept 2009)

Court Properly Revoked Suspended Judgment

Family court revoked respondent mother's suspended judgment and terminated her parental rights with respect to two of her children. The Appellate Division affirmed. Petitioner established that mother violated various terms and conditions of the suspended judgment. Although each violation, viewed separately, may have been trivial, viewed together they demonstrated a lack of commitment and inability to make significant progress in developing a meaningful parental relationship with the child.

Matter of Dennis A., 64 AD3d 1191 (4th Dept 2009)

Parental Rights Properly Terminated on Grounds of Mental Retardation

Family Court terminated the parental rights of respondent parents, the mother and respective fathers of the two children at issue. The Appellate Division affirmed. Petitioner established by clear and convincing evidence, including the testimony of a psychologist, that the mother was presently and for the foreseeable future unable, by reason of mental retardation, to provide proper and adequate care for her child, and that each father, for the same reason, was unable to provide the requisite care for his child. Respondent father Anthony J. G.'s contention that the psychologist's testimony lacked proper foundation because it was based on evaluations conducted prior to the filing of the petition against him was without merit. In view of the life-long nature of Anthony J. G.'s disabilities, the court properly admitted testimony of the psychologist concerning an evaluation conducted prior to the filing of the petition. The court ordered further psychological evaluations of all three respondents at their request, and the testimony of the psychologist who performed those evaluations substantiated the testimony of Anthony A.G.'s psychologist. Finally, respondents waived their contention that the petitions were improperly filed before the children had been in the care of an authorized agency for the period of one year because they failed to raise that contention in the trial court.

Matter of Brayanna G., 66 AD3d 1375 (4th Dept 2009)

Termination of Parental Rights Modified and Remitted

Family Court terminated respondent mother's parental rights with respect to her children on the ground of permanent neglect. The Appellate Division modified and remitted. The mother's contention, raised for the first time on appeal, that the court erred in accepting her consent to the finding of permanent neglect without conducting a further inquiry into her capacity to consent was not preserved for review. In any event, the contention lacked merit. The court did not abuse its discretion in declining to conduct an in camera interview of the two children. However, the court erred in determining that it lacked the authority to permit post-termination visitation and therefore the case was remitted for a determination whether such visitation was in the children's best interests.

Matter of Seth M., 66 AD3d 1448 (4th Dept 2009)

Family Court Properly Terminated Respondent's Parental Rights

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The court did not abuse its discretion in refusing to issue a suspended judgment. Petitioner established that over the course of more than a year and six months, respondent made little to no effort to visit the child and that during visitation he made minimal efforts to interact with the child. Further, respondent failed to complete a court-ordered substance abuse treatment program or to attend court-ordered domestic violence counseling.

Matter of Emmeran M., 66 AD3d 1490 (4th Dept 2009)

Revocation of Suspended Judgment Reversed Based Upon New Facts

Family Court revoked an extended suspended judgment entered upon a finding of permanent neglect and terminated respondent mother's parental rights. Respondent's contention that the court failed to consider the tolling provisions of Family Court Act § 633 (e) was raised for the first time on appeal and therefore was not properly before the Appellate Division. In any event, the expiration date of the suspended judgment was of no moment because respondent was alleged to have violated the terms and conditions of the suspended judgment. Petitioner met its burden with respect to the extended suspended judgment by presenting evidence that respondent failed to obtain suitable housing, failed to attend two out of three appointments with the child's psychologists, failed to provide required documentation concerning her employment and mental health treatment in a timely manner, and failed to demonstrate the parenting skills necessary to understand the child's unique educational standards. Nevertheless, in view of new facts and allegations that the Appellate Division could properly consider, including that the child was no longer in the preadoptive home and did not want to be adopted, it was not clear that termination of the child's rights was in the child's best interests. Therefore, the matter was remitted to the court for a new dispositional hearing.

Matter of Shad S. Jr., 67 AD3d 1359 (4th Dept 2009)

Dismissal of Petition Seeking Termination of Parental Rights Affirmed

Family Court dismissed the agency's petition, which sought to terminate the parental rights of respondent father. The attorney for the child appealed, contending that the court erred in finding that petitioner failed to establish that it made the requisite diligent efforts to encourage and strengthen the father's parental relationship with the child. The Appellate Division affirmed. The father was incarcerated and the father's parents were initially rejected as a resource and therefore the permanency planning goal was to return the child to the mother. The father was in agreement with that goal, and petitioner's efforts consequently were directed toward reuniting the child with the mother. With respect to the father, petitioner merely implemented visitation between the father and child, and provided the father with permanency hearing reports setting forth the mother's progress. The attorney for the child's contention that petitioner was not required to use diligent efforts with respect to the father because the father failed to cooperate with petitioner's efforts to assist him in planning for the child's future was rejected. Although the father initially agreed with the permanency planning goal to return the child to the mother, it thereafter became apparent that the goal was no longer feasible. At that time, the father presented his parents as a custodial option, and petitioner then found the father's parents to be appropriate as a custodial resource for the child.

Matter of Roberto C. Jr., 67 AD3d 1384 (4th Dept 2009)

Non-Respondent Father Served With Notice of Underlying Neglect Proceeding

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The record demonstrated that the court's "Order of Fact-Finding and Disposition and Permanency Hearing (Neglect)" indicated that respondent was served with a copy of the neglect petition with respect to the child as a "non-respondent parent," but respondent did not appear. Respondent was subsequently served with the termination petition and appeared in response. Respondent did not, however, move to vacate the prior order in the underlying neglect proceeding. In any event, respondent's conclusory assertions that he was not notified of the neglect proceeding was insufficient to raise an issue of fact requiring a traverse hearing. Finally, the court's assignment of counsel for respondent when he appeared in response to the petition to terminate his parental rights was neither "late" nor "constitutionally inadequate" because respondent had not previously appeared.

Matter of Steven G., 67 AD3d 1429 (4th Dept 2009)

Dismissal of Petition Reversed: Child Freed for Adoption by Appellate Division

The Appellate Division agreed with appellant attorney for the child that Family Court erred in dismissing the petition seeking revocation of a suspended judgment and termination of respondent's parental rights. Respondent waived the contention that Family Court did not acquire personal jurisdiction over him, because he raised the contention for the first time in a post-hearing memorandum and had already participated in the proceedings. On the merits, DSS established that the father violated the conditions of the suspended judgment. The father did not contact the psychologist with whom he was directed to meet for three months and failed to secure appropriate housing; he could not recall what type of special educational services or treatment the child received, and he did not know the nature of the disability for which the child was receiving treatment. Because the record was sufficient to determine the child's best interests, the Appellate Division did so, terminating parental rights and freeing the child for adoption. The evidence established that attempts to reunite the child with the father resulted in psychological trauma to the child; and a court-appointed special advocate who observed the child failed to see any signs of affection between the father and the child, and strongly opposed reunification. Two justices dissented.

Matter of Richelis S., 68 AD3d 1643 (4th Dept 2009)

Evidence of 'Diligent Efforts' Not Required

Family Court properly terminated respondent father's parental rights on the ground of permanent neglect. By virtue of respondent's admission of permanent neglect, petitioner DSS was not required to establish that it made diligent efforts to reunite the father with his son. Further, once permanent neglect is established, an order of disposition must be made solely on the basis of the child's best interests, with no presumption that the child's best interests will be promoted by any particular disposition. Thus, contrary to the father's contention, a blood relative did not take precedence over a prospective adoptive parent selected by the authorized agency. Finally, the father failed to preserve for review the contention that the court erred in failing to issue a suspended judgment because he failed

to request that the court issue such a judgment.

Matter of Nestor H.O., 68 AD3d 1733 (4th Dept 2009)

Court Failed to Conduct Searching Inquiry

Respondent father appealed from an order finding that he permanently neglected his son and terminating his parental rights. The Appellate Division reversed. When the father appeared with his assigned counsel on the scheduled date of the fact-finding hearing, the father's counsel advised the court that the father no longer wanted him to proceed as his attorney. The court responded, "(t)hen I hope he went to law school when he was locked up in jail because you have a trial today . . .", cut the father off when he had spoken only five words, and refused to adjourn the hearing. The court then granted the motion of the father's attorney to withdraw as counsel, whereupon the court stated that the father could "retain himself then." The court conducted the fact-finding hearing, and the father did not cross-examine the single witness presented by petitioner, nor did he call any witnesses. Family Court deprived respondent of his fundamental right to counsel. In order to ensure that the waiver of the right to counsel is valid, the court must conduct a searching inquiry of the party, and there must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel. Here, the court failed to conduct a searching inquiry.

Matter of Deon M., 68 AD3d 1740 (4th Dept 2009)

Termination of Parental Rights Was in Child's Best Interests

The Appellate Division affirmed Family Court's order that revoked a suspended judgment and terminated respondent mother's parental rights with respect to her son. Contrary to the mother's contention, petitioner established by a preponderance of the evidence that the mother violated the terms and conditions of the suspended judgment. Although the mother participated in the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return. The mother's remaining contentions were unreserved and without merit.

Matter of Giovanni K., 68 AD3d 1766 (4th Dept 2009)