NEW YORK CHILDREN'S LAWYER

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REFRESHER: QUESTIONS & ANSWERS ON ETHICAL ISSUES FACING ATTORNEYS FOR CHILDREN

Prepared by the Offices of Attorneys for Children
State of New York, Supreme Court, Appellate Divisions

Q. What is the function of the attorney for children?

A. Attorneys for children are appointed for minors "who often require the assistance of counsel to **help protect their interests** and to **help them express their wishes** to the court" (Family Ct Act § 241 [emphasis added]). The dual role the statute places upon attorneys for children is addressed in section 7.2 of the Rules of the Chief Judge. That rule provides in relevant part:

(b) The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex-parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation.

(c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.

(d) In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position.

(1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.

(2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.

(3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of

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> imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

In *Matter of Krieger v Krieger,* the Appellate Division determined that Family Court improvidently exercised its discretion in failing to adjourn a hearing "to provide the attorney for the child a reasonable opportunity to present additional witnesses" (65 AD3d 1350; *see also Matter of Mark T. v Joyanna U.,* 64 AD3d 1092 [discussing Rule 7.2 in the context of an appeal]). Prior to the promulgation of Rule 7.2, the Appellate Division discussed the function of the attorney for the child in *Matter of Carballeira v Shumway* (273 AD2d 753, *lv denied* 95 NY2d 764 [Substituted judgment was proper because the child had just turned 11 years old at the time of the hearing, suffered from numerous emotional disorders, and his judgment was impaired by the degree of control the mother exercised over him]; *see Matter of James MM. v June OO.*, 294 AD2d 630; *see also Matter of Rosso v Gerouw-Rosso*, 79 AD3d 1726).

It is apparent from Rule 7.2 that the attorney for the child is an advocate for the child and not a guardian ad litem. CPLR 1202 (a) provides that the "court in which an action is triable may appoint a guardian ad litem at any stage in the action." A guardian ad litem is "charged with the responsibility of close investigation and exploration of the truth on the issues and perhaps even of recommending by way of report alternative resolutions for the court to consider" (*Braiman v Braiman*, 44 NY2d 584, 590). A guardian ad litem, who need not be an attorney, is appointed to protect the best interests of a person under a legal disability, not to advocate the child's position. The State of New York is not responsible for payment where a guardian ad litem is appointed (*see* CPLR 1204).

Q. How often should the attorney for the child meet with the client?

A. A child client is entitled to independent (*see Davis v Davis*, 269 AD2d 82) and effective representation (*see Matter of Colleen CC.,* 232 AD2d 787*).* In order to represent a child effectively, an attorney for the child should have regular contact to ascertain the child's wishes and concerns and to counsel the child concerning the proceeding (*see Matter of Christopher B. v Patricia B.*, 75 AD3d 871 [Family Court erred because its order was issued before the attorney for the child could interview his client, thus prohibiting the attorney from taking an active role in and effectively representing the interests of his client]; *Matter of Lamarcus E.,* 90 AD3d 1095 [The Appellate Division relieved the appellate attorney of her assignment, determining that the child client had been denied effective assistance of counsel. "Counsel's failure to consult with and advise the child to the extent of and in a manner consistent with the child's capacities (citation omitted) constitutes a failure to meet her essential responsibilities as the attorney for the child. Client contact, absent extraordinary circumstances, is a significant component to the meaningful representation of a child"]; *see also Matter of Dominique A.W.*, 17 AD3d 1038, *lv denied* 5 NY3d 706)

Q. Should the same attorney for the child be assigned when the child is involved in a subsequent proceeding?

A. Successive appointments are favored. Authority for this proposition is in Family Court Act § 249 (b), which provides: "In making an appointment of an attorney for the child pursuant to this section, the courts **shall,** to the extent practicable and appropriate, appoint the same attorney who has previously represented the child" (emphasis added); *see Matter of Kristi L.T. v Andrew R.V.*, 48 AD3d 1202, 1206, *lv denied* 10 NY3d 716 ["(T)he record establishes that the parties have had proceedings before at least three different judges. The same (attorney for the child) was appointed for the child in the first two matters but was not reappointed by Family Court in this matter because the mother objected to his appointment. The court recognized, however, that in appointing an attorney for the child 'the court shall, to the extent practicable and appropriate, appoint the same attorney for children who has previously represented the child (Family Ct Act § 249 [b]). The record establishes that the prior (attorney for the child) was available, and we conclude that he should have been reappointed]")

Q. Under what circumstances is it appropriate to replace an attorney for the child because of a conflict?

A. Where an attorney for the child jointly represents siblings and an actual conflict arises, the attorney for the child should be replaced because continued representation would violate the ethical rules of zealous representation and preservation of client confidences (*see Gary D.B. v Elizabeth C.B.*, 281 AD2d 969; *Matter of H. Children*, 160 Misc 2d 298; *see also Corigliano v Corigliano*, 297 AD2d 328). Disqualification is not necessary where the interests of the siblings are not adverse and an actual conflict is not demonstrated (*see Matter of Rosenberg v Rosenberg,* 261 AD2d 623; *Anonymous v Anonymous*, 251 AD2d 241; *Matter of Zirkind v Zirkind*, 218 AD2d 745).

Q. Under what circumstances may an attorney for the child divulge a client confidence or secret?

A. It is well settled that a child client's confidences and secrets are privileged communications (*see Matter of Angelina AA.*, 211 AD2d 951, *lv denied* 85 NY2d 808*; Matter of Bentley v Bentley*, 86 AD2d 926). Of course, in her role as counselor, in an appropriate case, the attorney for the child should always attempt to convince the client that consent to disclosure is the best course of action (*see generally Carballeira,* 273 AD2d at 757).

Before adoption of the Attorney Rules of Professional Conduct, under the New York Code of Professional Responsibility, disclosure in the event of a legal disability was not permitted. Thus, an attorney could not disclose communications of the client on an issue such as the sexual abuse of the client without the client's consent.

The Attorney Rules of Professional Conduct now permit disclosure in certain instances.

RULE 1.14

Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 [confidentiality of information]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Q. Under what circumstances may an attorney for a child be called as a witness in a proceeding involving her client?

A. An attorney for the child may not testify if the attorney-client privilege applies (*see Angelina AA.*, 222 AD2d 951[Family Court properly refused to allow attorney for the child to testify about veracity of statements Angelina made at in-camera hearing; she had an attorney-client relationship with attorney for the child and did not waive privilege]; *Matter of Renee B. v Michael B.,* 227 AD2d 315 [subpoenas demanding testimony of attorney for the child properly quashed based upon attorney-client privilege and work product]).

It is error for the court to direct the attorney for the child to testify as a witness (*see Cobb v Cobb*, 4 AD3d 747, *lv dismissed* 2 NY3d 759 ["(Attorney for the child's) testimony on behalf of petitioner in this case appears to be in direct contravention of the Code of Professional Responsibility"]; *see Matter of Morgan v Becker*, 245 AD2d 889 [Permitting attorney for the child to testify about observations during home visits was inappropriate, but harmless error]; *see also Matter of Herald v Herald*, 305 AD2d 1080 [Although mother sought disqualification of attorney for the child on the

ground that the attorney for the child might be called as a witness, she failed to meet her burden of showing that the testimony was necessary]).

In *Matter of Naomi C. v Russell A.* **(**48 AD3d 203, 204), the Appellate Division dismissed a petition to modify an order of custody, stating:

> "Although the court was warranted in dismissing the petition on its face, we point out that the questioning of the [attorney for the child] . . . by the court is something that should not be repeated. With the parties present, the court asked the [Attorney for the Child], on the record, to discuss the position of the 10-year-old child regarding how well the current custody arrangement was working. Although the court was correct to disallow the "cross-examination" of the [Attorney for the Child] by petitioner's counsel, the court should not consider the hearsay opinion of a child in determining the legal sufficiency of a pleading in the first place. Most importantly, **such colloquy makes the [Attorney for the Child] an unsworn witness, a position in which no attorney should be placed.** "The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to. . . becoming a witness in the litigation" (Rules of the Chief Judge [22 NYCRR] § 7.2 (b)]" (emphasis added).

Unless an exception applies, Rules of Professional Conduct rule 3.7 requires the attorney for the child to withdraw from the case if the attorney for the child is likely to be a witness on a significant issue of fact.

Q. Under what circumstances may an attorney for the child communicate with a party and when may a party's attorney speak with the attorney for the child's client?

A. During the course of representation of the child the attorney for the child shall not communicate with a party where the attorney for the child knows the party is represented by counsel, unless the attorney for the child has the prior consent of the party's counsel (*see* Rules of Professional Conduct rule 4.2).

Conversely, the attorney for the child should advise the parties' attorneys at the outset of the proceedings that the child should not be interviewed or examined by such attorneys without the prior consent of the attorney for the child (*see* Rules of Professional Conduct rule 4.2).

Q. What other situations require that the attorney for the child consent before the child may be interviewed?

A. In a custody case, the attorney for the child must consent before the child is interviewed by a mental health expert (*see Campolongo v Campolongo*, 2 AD3d 476 [Absence of attorney for the child at interview of child by psychiatrist who was retained by father on advice of father's attorney, without the attorney for the child's knowledge and consent, violated child's right to due process]; *Matter of Awan v Awan*, 75 AD3d 597 [In a custody proceeding, Family Court did not err in striking the testimony of an expert retained by the father, and in precluding further testimony by this expert. "The father's attorney violated the Rules of Professional Conduct rule 4.2 by allowing a physician, whom the attorney retained or caused the father to retain, to interview and examine the subject child regarding the pending dispute and to prepare a report without the knowledge or consent of the attorney for the child"]).

In a child protective proceeding, County Department of Social Services (DSS) caseworkers may interview the client of an attorney for children without the attorney for the children's consent (*see Matter of Cristella B.*, 77 AD3d 654 [Family Court properly denied a motion of the attorney for children to direct DSS to refrain from interviewing his clients concerning any issues beyond those related to safety, without 48 hours notice to him. The child who was the subject of a neglect proceeding had a constitutional and statutory right to legal representation, and Rule 4.2 of the Rules of Professional Conduct, which prohibits an attorney representing another party in litigation from communicating with or causing another to communicate with a child without prior consent of the attorney for the child, applies only to attorneys. DSS has constitutional and statutory obligations toward children in its custody, and has a mandate to maintain regular communications with children in foster care on a broad range of issues that go beyond their immediate

health and safety]; *Matter of Tiajianna M.*, 55 AD3d 1321).

Q. What is the attorney for the child's role in a stipulation regarding custody and/or visitation?

A. In *Matter of Figueroa v Lopez* **(**48 AD3d 906), the Appellate Division reversed Family Court's order, which was based upon a stipulation of the parties resolving a custody matter. The Appellate Division stated:

> "Here, **the [attorney for the child] stated that he did not consent to the stipulation.** When he attempted to explain his reason, Family Court responded that it did not care. Family Court also characterized the attorney for the child's position as ridiculous, without allowing an explanation for his position to be placed on the record. The attorney for the child reportedly had obtained information (including possible domestic violence by the father) which made him concerned about unsupervised visitation by the father. Moreover, while not all improper restrictions imposed on an attorney for the child will result in reversal if the record indicates sufficient facts to uphold the determination [citations omitted], this sparse record is inadequate" (emphasis added).

Q. Under what circumstances may the attorney for the child make a report to the court?

A. It is improper for the court to direct the attorney for the child to prepare and file an "attorney for the child report" – the attorney for the child is not an investigator but the attorney for the child – thus, the attorney for the child should not submit any pretrial report to the court (*see Cobb,* 4 AD3d 747; *see also Matter of Nicole Lee B.,* 256 AD2d 1103; *Matter of Brice v Mitchell*, 184 AD2d 1008 [It is error for the court to consider attorney for the child reports that contain hearsay]; *Matter of Rueckert v Reilly*, 282 AD2d 608 ["Contrary to the mother's contention, the [attorney for the child] did not provide the court with unsworn reports. Both parties recognize that the [attorney for the child] is the attorney for the child and could no more be required to report to a judge than the attorney for any party in a case"]). For discussion of a proper summation, see *Matter of VanDee v Bean* (66 AD3d 1253).

Q. Under what circumstances does representation continue after final disposition in a custody case?

A. "In its dual role as advocate for and guardian of the subject child [citations omitted] Lawyers for Children, Inc. clearly has an interest in the welfare of the child sufficient to give it standing to seek a change of custody" (*Matter of Renee B.,* 227 AD2d at 315).

Q. When is it proper for the attorney for the child to speak privately with the Judge about the case?

A. Section 7.2 of the Rules of the Chief Judge explicitly prohibits such ex parte communications. Moreover, the Advisory Committee on Judicial Ethics in opinion #95-29 has stated that a Judge "may not discuss with a[n attorney for the child] the position of the [attorney for the child] with regard to the interests of the child outside the presence of the parties, the parents or their attorneys, unless all parties consent."

Q. May the attorney for the child raise new facts on appeal?

A. Yes, an appellate court will take notice of new facts and allegations to the extent they indicate that the record before it is no longer sufficient for determining issues of fitness and right to custody of the child (*see Matter of Michael B.*, 80 NY2d 299).

New York
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Articles of Interest to Attorneys for Children, including legal analysis, news items and personal profiles, are solicited. We also welcome letters to the editor and suggestions for improvement of both this publication and the Attorneys for Children Program. Please address communications to Attorneys for Children Program, M. Dolores Denman Courthouse, 50 East Avenue, Suite 304, Rochester, New York 14604.

Address changes should be directed to the Department's Attorneys for Children Program office in which you reside.

NEWS BRIEFS

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

On January 19, 2012, the Appellate Division, Second Judicial Department, the Richmond County Family Court, the NYC Department of Health and Mental Hygiene, the NYS Office of Mental Health, and the NYC Legal Aid Society co-sponsored ***Intensive Mental Health Services for Juvenile Justice-Involved Youth***. This presentation was given by Nanette Schrandt, LCSW, Director of Juvenile Services, NYC Legal Aid Society - Juvenile Rights Practice, Daniel Greenbaum, Esq., Attorney-In-Charge, Richmond County Office, NYC Legal Aid Society - Juvenile Rights Practice, and Dr. Myla Harrison, Medical Director of the Bureau of Child, Youth and Families - Division of Mental Hygiene at the NYC Department of Health and Mental Hygiene. The handouts for this seminar may be obtained by contacting Nancy Guss Matles of the Office of Attorneys for Children at nmatles@courts.state.ny.us .

On January 25, 2012, The Appellate Division, Second Judicial Department, the Queens County Family Court Training Sub-Committee, and the Queens County Bar Association co-sponsored ***an Overview to Involving Youth in Courts: Maximizing Their Voice***. The speakers were Linda Baird, Program Coordinator of the Youth Justice Board; Jennifer Melnick, LCSW, Assistant Social Work Supervisor, Queens County Trial Office, NYC Legal Aid Society - Juvenile Rights Practice; Jessica Reichert, B.A., Criminal Justice; and Carolyn Silvers, Esq., Deputy Attorney-in-Charge, Queens County Trial Office, NYC Legal Aid Society - Juvenile Rights Practice. The handouts for this seminar may be obtained by contacting Nancy Guss Matles of the Office of Attorneys for Children at nmatles@courts.state.ny.us .

On February 2, 2012, The Appellate Division, Second Judicial Department, and the Kings County Judicial Committee on Women in the Courts co-sponsored ***Immigration Consequences of Family Court Findings***. This presentation was given by Joanne Macri, Esq., Director, Criminal Defense Immigration Project - New York State Defenders Association. The handouts for this seminar may be obtained by contacting Nancy Guss Matles of the Office of Attorneys for Children at nmatles@courts.state.ny.us .

On February 23, 2012, the Appellate Division, Second Judicial Department, and the Attorneys for Children Advisory Committee co-sponsored ***Family Law and Domestic Violence Interim Legislative Update.*** This seminar was held at the Law Guardian Program office. The speaker was Janet Fink, Esq., Deputy Counsel, New York State Unified Court System. The handouts for this seminar may be obtained by contacting Nancy Guss Matles of the Office of Attorneys for Children at nmatles@courts.state.ny.us .

On February 27, 2012, the Appellate Division, Second Judicial Department, and the Attorneys for Children Advisory Committee co-sponsored ***Uniform Rules for the Engagement of Counsel 22NYCRR Part 125***. This presentation was given by the Hon. Rachel Adams, Kings County Supreme Court, and the Hon. Paula Hepner, Kings County Family Court. This program is available for online viewing at http://www.nycourts.gov/courts/ad2/AttorneyforChildHome.shtml. For access to this website please contact gchickel@courts.state.ny.us . The handouts presented at this seminar are also available online. A sample *Affirmation of Actual Engagement Pursuant to Part 125* is available in our Administrative Handbook.

Beginning in June through the Summer of 2012, the Attorneys for Children Program of the Appellate Division, Second Judicial Department will sponsor the ***Fundamentals of Family Court/Family Law Advocacy***, a continuing legal education series comprised of twelve seminars. The following topics will be addressed (speakers to be announced): Child Protective Proceedings - Preliminary Proceedings Through Fact Finding, Juvenile Delinquency - Preliminary Proceedings Through Disposition, Juvenile Delinquency/PINS - Suppression, Motion and Trial Issues, Litigating Child Custody and Visitation Matters - an Overview, Custody and

Visitation from the Perspectives of Counsel for Adult Litigants and Attorneys for Children, the Role of the Attorney for the Child, Child Protective Proceedings - Disposition Through Permanency Hearings, Alternate Dispute Resolution, Child Support Proceedings, Child Psychological Development, Interviewing and the Custody Evaluation, Termination of Parental Rights/Adoption, and Appellate Practice. This program will be available for online viewing at the website indicated above.

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

THIRD DEPARTMENT NEWS

Statewide Financial System (SFS) and Vendor ID Numbers

As you know, the State of New York has now implemented a new Statewide Financial System (SFS) that requires anyone doing business with the State of New York, including attorneys for children, to have a Vendor ID Number. All vouchers must include that number and any vouchers submitted without the Vendor ID will not be accepted for payment**.**

E-voucher

As of January 1, 2012, all vouchers must be submitted on the E-voucher system. The mechanics of how to use the E-voucher system can be found in the *Office of Attorneys for Children E-voucher Manual,* and accompanying instructional video available on-line at www.nycourts.gov/ad3/oac.

New Panel Re-designation Application

The Appellate Division, Third Department Court Rules were recently amended, effective November 1, 2011, to require current panel members to submit to the Office of Attorneys for Children annually, a Panel Re-Designation Application in order to be eligible for re-designation on January 1st of each year. A copy of the amended rule, together with the Panel Re-designation Application was recently provided to all panel members. Included with the application is a waiver authorizing the Committee on Professional Standards for any Judicial Department to share information with the Office of Attorneys for Children.

The Panel Re-Designation Application was designed to reflect and document your desire to continue serving on the panel, your knowledge of and compliance with the Summary of Responsibilities of the Attorney for the Child and any significant information that our office should be aware of concerning your standing as a panel member. The initial panel designation application was similarly amended. Both applications can be found in the Administrative Handbook located on the Office of Attorneys for Children web page at www.nycourts.gov/ad3/oac and under the link to the Administrative Forms.

Advisory Committee

The departmental advisory committee provides oversight to the operation of the attorneys for children program and shall makes recommendations to the presiding justice with respect to promulgation of standards and administrative procedures for improvement of the quality of representation by attorneys for children in the department. Congratulations and best wishes to Carman Garufi, Esq. from Binghamton who has been a member of the Advisory Committee for a decade and is resigning to address his obligations as the new President of the Broome County Bar Association. We wish him the best of luck in that endeavor and extend our most sincere thanks for his many years of dedicated service. Sadly, we lost committee member Attorney Sandford Soffer who passed away this past winter. Sandy was a member of the Advisory Committee for the Third Department for a remarkable 30 years. We are deeply saddened by his passing and will greatly miss his insight and enthusiasm.

Liaison Committee Meetings

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts met in the Fall and will meet again this Spring, on Thursday, May 10, 2012, in conjunction with the Children's Law Update seminar to be held the next day. The committees were developed to provide a means of communication between panel members and the Office of Attorneys for Children. The Liaison Committees, whose members are nominated by Family Court judges, meet twice annually

and representatives are frequently in contact with the Office of Attorneys for Children on an interim basis. If you would like to know the name of your Liaison Committee representative, it is listed in the Administrative Handbook or you may contact Betsy Ruslander by telephone or e-mail at oac3d@nycourts.gov. If you have any issues you would like brought to the attention of the Office of Attorneys for Children, please contact your county's liaison representative. Again, as stated above, all the best and many thanks to Carman Garufi, Esq., Broome County liaison since 1995, who is resigning this spring.

Training News

The following continuing legal education programs are scheduled for Spring 2012. Registration information will go out by e-mail to all Third Department panel attorneys six to eight weeks prior to the training dates and is available on our web page at www.nycourts.gov/ad3/oac.

Legal Responses to Mental Health Issues in Child Welfare Cases will be held at the Holiday Inn on Wolf Road in Colonie on Friday, April 20, 2012 with the John T. Hamilton, Jr., Esq. Award for Excellence in the Representation of Children to be presented during the lunch hour;

Effective Representation of Children: Part II will be held at the Clarion Hotel (Century House) in Latham on Friday, April 27, 2012;

Children's Law Update '11-12 will be held at the Crowne Plaza Resort in Lake Placid on Friday, May 11, 2012;

Art. 10 Removals - Mock Trial will be held on Friday, May18, 2012 in Binghamton; and

Introduction to Effective Representation of Children, introductory training of new attorneys for children, will be held at the Clarion Hotel (Century House) in Latham on Friday and Saturday, June 1-2, 2012.

When available, program dates and agendas will be posted on the Office website, www.nycourts.gov/ad3/oac/cle, along with previously taped training programs that are available for online viewing. For any additional information regarding these programs, or general questions concerning the continuing legal education of attorneys for children, please contact Jaya Connors, Assistant Director of the Office of Attorneys for Children in the Third Department, at (518) 471-4850, or by e-mail at jlconnor@courts.state.ny.us

Website

The Office of Attorneys for Children continues to update its web page located at www.nycourts.gov/ad3/oac. Attorneys have access to a wide variety of resources, including E-voucher information, online CLE videos and materials, the New York State Bar Association Representation Standards, the latest edition of the Administrative Handbook, forms, rules, frequently asked questions, seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly.
The newest feature is a *News Alert* which will include recent program and practice developments of note.

FOURTH DEPARTMENT NEWS

Reminder – Video Training Option Now Available

You may now satisfy your AFC Program training requirement by watching at least 5.5 hours of CLE video segments on the Attorneys for Children Program link to the Appellate Division, Fourth Department website at **http://nycourts.gov/ad4.** You may choose the training segments in which you are most interested, but the segments you choose must add up to at least 5.5 hours. If you choose the video option, rather than attending a live seminar, you must correctly fill out an affirmation and evaluation for each segment and forward all forms together to Jennifer Nealon, AFC Program, 50 East Avenue, Rochester, NY 14604 or jnealon@courts.state.ny.us before your training requirement expires. You will receive all your CLE certificates within a few weeks. We are unable to process applications for AFC Program or NYS CLE for less that 5.5 hours credit. There are complete directions on the CLE page of the AFC website.

Tentative Fall Seminar Schedule

September 7, 2012
Update
Location TBA
Syracuse, NY

September 14, 2011
Update
Radisson Hotel Corning
Corning, NY
(Seminar will be cancelled if insufficient registration)

October 2, 2012
Domestic Violence Seminar
RIT Inn & Conference Center
Rochester, NY
Co-sponsored With OCA - max. cap. = 50

October 18-19, 2012
Fundamentals of Attorney for the Child Advocacy
M. Dolores Denman Courthouse
Rochester, NY

Congratulations to New Judges

5th Judicial District

Hon. James P. McClusky, Supreme Court Justice, Jefferson County

Hon. Erin Gall, Acting Supreme Court Justice, Oneida County

Hon. Patrick F. MacRae, Acting Supreme Court Justice, Oneida County

7th Judicial District

Hon. Thomas Moran, Supreme Court Justice, Monroe County

8th Judicial District

Hon. Kathleen Wojtaszek-Gariano, Family Court Judge, Niagara County

RECENT BOOKS AND ARTICLES

ADOPTION

Barbara L. Atwell, *Nature and Nurture: Revisiting the Infant Adoption Process,* 18 Wm. & Mary J. Women & L. 201 (2012)

Elizabeth Bartholet, *International Adoption: A Way Forward,* 55 N.Y.L. Sch. L. Rev. 687 (2011)

Richard Carlson, *Seeking the Better Interests of Children With a New International Law of Adoption,* 55 N.Y.L. Sch. L. Rev. 733 (2011)

Diane B. Kunz, *The Re-Invention of Adoption Law: A Reflection,* 55 N.Y.L. Sch. L. Rev. 853 (2011)

Jaci L. Wilkening, *Intercountry Adoption Act Ten Years Later: The Need for Post-Adoption Requirements,* 72 Ohio St. L. J. 1043 (2011)

ATTORNEY FOR THE CHILD

Marcia M. Bou mil et. al., *Legal and Ethical Issues Confronting Guardian Ad Litem Practice,* 13 J. L. & Fam. Stud. 43 (2011)

CHILD WELFARE

Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor,* 43 Colum. Hum. Rts. L. Rev. 1 (2011)

Katherine Unger Davis, *Racial Disparities in Childhood Obesity: Causes, Consequences, and Solutions,* 14 U. Pa. J. L. & Soc. Change 313 (2011)

Karen Syma Czapanskiy, *Disabled Kids and Their Moms: Caregivers and Horizontal Equity,* 19 Geo. J. On Poverty L. & Pol'y 43 (2012)

Jason Fuller, *Corporal Punishment and Child Development,* 44 Akron L. Rev. 5 (2011)

Matthew B. Seeley, *Unexplained Fractures in Infants and Child Abuse: The Case for Requiring Bone-Density Testing Before Convicting Caretakers,* 2011 B.Y.U. L. Rev. 2321 (2011)

CHILD SUPPORT

Michael J. Higdon, *Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support,* 46 Ga. L. Rev. 407 (2012)

Laura Raatjes, *High-Income Child Support Guidelines: Harmonizing the Need for Limits With the Best Interests of the Child,* 86 Chi.-Kent L. Rev. 317 (2011)

CHILDREN'S RIGHTS

Todd A. DeMitchell & Martha Parker-Magagna, *Student Victims or Student Criminals? The Bookends of Sexting in a Cyber World,* 10 Cardozo Pub. L. Pol'y & Ethics J. 1 (2011)

James G. Dwyer, *No Place for Children: Addressing Urban Blight and its Impact on Children Through Child Protection Law, Domestic Relations Law, and "Adult-Only" Residential Zoning,* 62 Ala. L. Rev. 887 (2011)

Eric M. Fish, *The Uniform Interstate Family Support Act (UIFSA) 2008: Enforcing International Obligations Through Cooperative Federalism,* 24 J. Am. Acad. Matrim. Law 33 (2011)

CONSTITUTIONAL LAW

Alaina Bergerstock, *Albany County's Cyber-Bullying Law: Is it Constitutional?,* 4 Alb. Gov't L. Rev. 852 (2011)

Antonio M. Haynes, *The Age of Consent: When is Sexting no Longer "Speech Integral to Criminal Conduct"?,* 97 Cornell L. Rev. 369 (2012)

John O. Hayward, *Anti-Cyber Bullying Statues: Threat to Student Free Speech,* 59 Clev. St. L. Rev. 85 (2011)

Kaitlin Jamiolkowski, *Life Imprisonment Without the Possibility of Parole is Cruel and Unusual Punishment and Barred by the Eighth Amendment for Juveniles who have Committed Nonhomicide Crimes:* Graham v. Florida, 49 Duq. L. Rev. 785 (2011)

Alysa B. Koloms, *Stripping Down the Reasonableness Standard: The Problems with Using* In Loco Parentis *to Define Students' Fourth Amendment Rights,* 39 Hofstra L. Rev. 169 (2011)

Ryan M. Rappa, *Getting Abused and Neglected Children Into Court: A Child's Right to Access Under the Petition Clause of the First Amendment,* 2011 U. Ill. L. Rev. 1419 (2011)

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NEW LEGISLATION

This summary was prepared by Gary Solomon, Esq., Director of Legal Support, Juvenile Rights Division, NYC

Cybercrime Youth Rescue Act - Chapter 535 of the Laws of 2011, "The Cybercrime Youth Rescue Act," adds a new Title Eleven to Article Six of the Social Services Law, entitled "Education Reform Program."

New SSL § 458-L contains the following definitions:

"Eligible person" means an individual who is the subject of a pending petition in family court alleging he or she has committed an eligible offense or a person who has been charged, in criminal court, with an eligible offense as that term is defined in paragraph (b) of this subdivision.

"Eligible offense" means a crime or offense committed by an eligible person that involved cyberbullying or the sending or receipt of obscenity, as defined in subdivision one of section 235.00 of the penal law, or nudity, as defined in subdivision two of section 235.20 of the penal law, when the sender and the receiver thereof were both under the age of twenty at the time of such communication, but not more than five years apart in age.

"Program" means the education reform program developed pursuant to subdivision two of this section.

The office of children and family services, hereinafter the "office," shall develop and implement, in consultation with the division of criminal justice services and the state education department, an education reform program for eligible persons who have been required to complete such program pursuant to article three or seven of the family court act or section 60.37 of the penal law.

The program shall be available in every judicial district in the state; provided that if the office determines that there is not a sufficient number of eligible offenses in a judicial district to mandate the implementation of a program, provisions shall be made for the residents of such judicial district to participate in a program in another judicial district where a program exists if practicable with regard to travel and cost, or to complete the education course online.

The program shall involve up to eight hours of instruction and shall provide, at a minimum, information concerning: (a) the legal consequences of and potential penalties for sharing sexually suggestive materials, explicit materials or abusive materials, including sanctions imposed under applicable federal and state statutes; (b) the non-legal consequences of sharing sexually suggestive materials, explicit materials or abusive materials, including, but not limited to, the possible effect on relationships, loss of educational and employment opportunities, and the potential for being barred or removed from school programs and extracurricular activities; (c) how the unique characteristics of cyberspace and the internet, including the potential ability of an infinite audience to utilize the internet to search for and replicate materials, can produce long-term and unforeseen consequences for sharing sexually suggestive materials, explicit materials or abusive materials; and (d) the potential connection between bullying and cyber-bullying and juveniles sharing sexually suggestive materials, explicit materials or abusive materials.

Upon receipt of the court order, pursuant to the family court act or section 60.37 of the penal law, directing an eligible person to attend the program, the office, after consultation with the eligible Person and the attorney for such person, shall schedule the eligible person to attend the next available session of the program and shall send written notice of the scheduling, along with the date, time and location of the session or sessions, to the eligible person, the attorney for such person and the clerk of the referring court.

Within twenty days of the date upon which the eligible person completes the program, the office shall provide such person with a certification that he or she has successfully completed the program.

FEDERAL COURTS

GPS Tracking Of Vehicle Is Search Under The Fourth Amendment

The Supreme Court held that the Government's installation of a GPS tracking device on the undercarriage of a vehicle parked in a public parking garage, and use of the device to track the vehicle's movements over the next 28 days, was a physical trespass upon private property for the purpose of obtaining information, and thus constituted a search under the Fourth Amendment. Although the Government argued that no search occurred because defendant had no "reasonable expectation of privacy" in the undercarriage of the vehicle or the locations of the vehicle on public roads that are visible to all, those contentions did not need to be addressed because “at bottom” the defendant must be assured preservation of that degree of privacy against Government trespass that existed when the Fourth Amendment was adopted and here defendant was not so assured.

United States v Jones, ___US___, 132 S Ct 945 (2012)

Police Officers Entitled to Qualified Immunity

Police officers who were investigating a rumor that a student had written a letter threatening to shoot up the school also knew that the student had been absent from school for two days and was frequently subjected to bullying, which are factors common among perpetrators of school shootings. When the officers knocked on the door of the student’s house and announced several times that they were with the police department, no one responded. The officer reached the student’s mother on her cell phone and after he identified himself and inquired where she was located, she stated that she was inside the house. The officer inquired about the student’s location, and she stated that he was inside with her. When the officer told her that he and other officers were outside and wanted to speak with her, she hung up the phone. One or two minutes later, the mother and student walked out of the house. An officer advised the student that the officers were there to discuss the threats. The student, apparently aware of the rumor, responded, “I can’t believe you’re here for that.” An officer asked the mother to continue the discussion inside the house, but she refused, which the officer, a juvenile bureau sergeant, found "extremely unusual.” The officer also found it unusual that the mother never asked the officers why they were there. When the officer asked if there were any guns in the house, the mother immediately turned around and ran inside. The officer entered behind her, then the student entered, followed by another officer. Then two other officers, who had been out of earshot, entered the house on the assumption that the mother had given permission to enter. When the student’s father entered the room, he challenged the officer’s authority to be there. The officers remained inside the house for 5-10 minutes, but did not conduct any search. The officers ultimately concluded that the rumor was false. The Ninth Circuit affirmed the dismissal of the parent’s civil rights claims against the officers who entered the house on the assumption that the mother had consented, but found that the other officers were not entitled to qualified immunity because any belief that there was a risk of serious, imminent harm would have been objectively unreasonable. The Supreme Court reversed. Reasonable police officers could have come to the conclusion that the Fourth Amendment permitted them to enter the residence because there was an objectively reasonable basis for fearing that violence was imminent.

Ryburn v Huff , ___US___, 132 S Ct 987 (2012)

Caseworker Not Entitled to Summary Judgment on Ground of Qualified Immunity

This action sought damages for injuries allegedly caused by an order of Family Court that authorised entry into plaintiffs father and children’s apartment. The order was based upon a caseworker’s affidavit. The Second Circuit vacated in part the District Court's order granting summary judgment in favor of the City and the caseworker. Plaintiffs made a substantial preliminary showing that the caseworker knowingly or recklessly made false statements in his application for an order authorizing entry into the home. That showing rebutted the presumption of reasonableness that would otherwise, at the summary judgment stage, entitle the caseworker to qualified immunity. Therefore the

District Court erred in granting summary judgment on plaintiffs' Fourth Amendment unlawful-search claims. Further, although the Court's decision in *Tenenbaum* (193 F.3d 581) changed the focus of the legal analysis of plaintiff children's constitutional claims from substantive due process to illegal seizure, what mattered was whether an objectively reasonable caseworker would have known that removing a child from the home without parental consent would violate a constitutional right, not whether the caseworker would have known which constitutional provision would be violated.

Southerland v City of New York. 667 F3d 87 (2d Cir. 2012)

Infant Removal from Kinship Foster Home Not Denial of Due Process

In this motion for reconsideration, plaintiffs claimed that ACS and its contracted foster care agency removed the infant plaintiffs from the kinship foster home without due process of law and the Court misconstrued caselaw in granting defendants summary judgment. The Court denied the motion. The Court did not overlook *Rivera v. Marcus* (696 F.2d 1016), which was the case underlying the Court's holding that plaintiffs possessed a liberty interest entitled to the protections of procedural due process. However, not all important liberty interests are substantive due process rights. The other case plaintiffs relied upon was ambiguous. Thus, the Court did not make a clear error by refusing to infer an expansion of substantive due process rights from an ambiguous district court case and a controlling precedent that overwhelmingly, if not exclusively, was about procedural due process. Plaintiffs' other arguments were unpreserved or without merit.

Rivera v Mattingly, 2012 WL 88233, (SDNY 2012)

Preliminary Injunction Banning Prone Restraints at OCFS Facilities Denied

In this 1983 action, challenging the use of restraints and inadequate mental health care in OCFS non-secure and limited secure facilities, the Court, after two days of testimony, issued a 40-page ruling on plaintiffs' motion for a preliminary injunction. The preliminary injunction would have, among other things, banned the use of prone restraints. The Court denied the motion based upon defendant OCFS Commissioner Carrion's testimony about the extensive efforts she was making to reform the system. The Court, however, after hearing testimony by plaintiffs' witnesses, five OCFS residents, about ongoing, serious injuries they had suffered, noted that youth in OCFS facilities are still at risk of harm from excessive force and required Carrion to provide a schedule for reforms to the Court and give assurances that the resources necessary to accomplish the reforms had been made available. The Court also noted that if Carrion failed to make sufficient progress, the Court would revisit its determination.

G.B. v. Carrion, ___F Supp___, (SDNY 2012)

COURT OF APPEALS

Conviction Not Legally Insufficient Where Inconsistency in Testimony Arose From Different Witnesses

In *People v Ledwon* (153 N.Y. 10), the Court of Appeals held that a criminal conviction was not supported by legally sufficient evidence if the only evidence of guilt is a witness's inherently contradictory testimony about the defendant's culpability. In this case, the victim consistently told the jury that defendant was the person who robbed him, but his testimony conflicted with the testimony of other witnesses. In a 4-3 decision, the Court of Appeals majority determined that the limited rule of *Ledwon* did not apply because the inconsistency in testimony arose from the testimony of more than one witness. There were serious conflicts in the trial proof about the perpetrator's physical appearance, but the victim was unwavering during his testimony at trial that defendant was the person who attacked him and that the detective's conflicting recollection of the perpetrator's description was incorrect. The Court of Appeals has no authority to upset a conviction because of differences between the pretrial and trial statements of a witness even where the Court believed that "the jury got it wrong" -- such authority is vested exclusively in the intermediate appellate court, which has an obligation to review whether the weight of the evidence supported the verdict. A new trial was necessary, however, because of an unduly suggestive photo array procedure. The victim's son participated in the photo array as a translator. The hearing court had been troubled by the son's role but denied suppression because the son did not know defendant. However, at trial, it was revealed that the son had known defendant for a long time. The trial court erred when it denied defendant's motion to reopen the Wade hearing because the new evidence considerably strengthened defendant's suggestiveness claim viewed in conjunction with the facts that the detective had acted on neighborhood gossip about a possible perpetrator based upon information provided by the son; the detective was apparently concerned about the son's possible preexisting familiarity with defendant; the detective was or should have been aware of the substantial risk that the son was familiar with defendant, despite his assurance to the contrary; there was no apparent impediment to the detective utilizing a Spanish interpreter who did not have preexisting information about the possible perpetrator or a familial connection to the victim; and the detective could not be reasonably sure that the son would accurately translate the conversation. This suggestiveness is attributed not to the victim's son, but to the detective's decision to utilize him as the translator. Defendant could not have discovered, before the hearing court ruled, the true extent of the son's familiarity with defendant or the son's misrepresentations to the police. The dissent would have held that there was no objective, rational basis upon which the jury could have decided which version of events provided by the victim it should accept. Failure to dismiss under the circumstances of this case violated the spirit of the rule against singular reliance on a witness who presents a hopelessly contradictory account of the events giving rise to the conviction.

People v. Delamota, 18 NY3d 107 (2011)

School District Not Obligated to Provide Tuition-Free Education to Nonresident Children

The Greek Archdiocese Institute of St. Basil (St. Basil) is located in the Garrison Union Free School District (School District) and houses primarily Greek Orthodox children whose parents are unable to care for them. The children are placed at the initiative of parish priests throughout the Unites States, sometimes also by Family Court order. St. Basil does not always obtain guardianship or custody of the children. In 2002, St. Basil attempted to register 26 children in the School District on a tuition-free basis. At a residency hearing, the Hearing Officer determined that none of the children were residents of the School District and, therefore, they were not entitled to attend school on a tuition-free basis. The Commissioner of Education affirmed the Hearing Officer's determination, explaining that Article 81 of the Education Law did not apply because St. Basil was not a "child care institution" inasmuch as it was not licensed by OCFS. After St. Basil was issued a license to operate a residential child care institution, it commenced the instant action seeking, among other things, a judgment

that the School District was now required to pay for the education of the children who were not residents of the St. Basil. Supreme Court found that the School District was not responsible for the cost of educating the children living in St. Basil who are not residents of the School District as defined by Education Law § 3202. The Appellate Division affirmed. The Court of Appeals also affirmed. Although St. Basil received a license to be a "child care institution" under Article 81 of the Education Law, that article must be read in conjunction with Education Law § 3202, which provides that the school district of a child's residence is financially responsible for the cost of educating a child. Article 81 does not expressly supersede Education Law § 3202 because Article 81 does not adequately address who is responsible for paying the cost of a "free and appropriate" education. The issuance of a license to operate a child care institution does not change the residence of the children living there.

Board of Educ. of the Garrison Union Free School Dist. v Greek Archdiocese Inst. of St. Basil, 18 NY3d 355 (2012)

Insufficient Evidence of Serious Injury

The Court of Appeals modified defendant's conviction for assault in the first degree to assault in the third degree. There was legally insufficient evidence of serious physical injury. The assault involved numerous blows with a sharp instrument, but the injuries were described by the treating emergency room physician as superficial and no organ damage or injury to muscle tissue was radiologically evident. Three of the four wounds required only gauze dressing and although the 6-7 centimeter wound on the victim's inner forearm was sutured, the victim spent just one day in the hospital without follow-up medical care apart from the removal of his stitches. Further, although the victim complained of daily pain attributable to his healing scars, there was no basis for a finding that these sensations were indicative of or causally related to any protracted health impairment.

People v Stewart, 18 NY3d 831 (2011)

Indictment Dismissed On Speedy Trial Grounds

The Court of Appeals reversed the Appellate Division and dismissed the indictment against defendant on statutory speedy trial grounds. It was undisputed that the People were not ready within six months of commencement of the action, even after application of the statutory exemptions. Defendant did not waive his rights under CPL 30.30 by participating in plea negotiations for several months. Mere silence is not a waiver. Prosecutors would be well advised to obtain unambiguous written waivers in such situations.

People v Dickinson, 18 NY3d 835 (2011)

APPELLATE DIVISIONS

ADOPTION

Biological Father's Consent Not Required

In a proceeding pursuant to Social Services Law § 384-b to terminate parental rights, the Attorney for the Child appealed from an order of the Family Court that denied that branch of the amended petition which was for a determination that the consent of the biological father, was not required for the child's adoption pursuant to Domestic Relations Law §111 (1) (d). The Appellate Division found that the Family Court's determination that the biological father's consent was required was not supported by the record. The biological father failed to meet his burden of establishing that he maintained substantial and continuous or repeated contact with the child through the payment of support and either regular visitation or communication with the child. Order reversed.

Matter of Charle Chiedu E., 87 AD3d 1140 (2d Dept 2011)

Father's Incarceration Did Not Absolve Him of His Responsibility to Child; Consent to Adoption Not Required

The Family Court properly determined that the father's consent to the adoption of the subject children was not required (*see* DRL § 111 [1] [d]). The father failed to sustain his burden of establishing that he maintained substantial and continuous or repeated contact with the children through the payment of support and either regular visitation or other communication with the children. The father's incarceration did not absolve him of his responsibility to financially support and maintain regular communication with the children.

Matter of Martin V.L., 88 AD3d 714 (2d Dept 2011)

Foster Mother Did Not Have Standing to File Petition to Vacate Contact Agreements

In April 2009, the father executed judicial surrenders in which he agreed to relinquish guardianship and custody of his two biological children to the Department of Social Services (DSS) on the condition that the children would be adopted by their foster mother. As a further condition to the surrenders, pursuant to SSL § 383-c (2) (b), the foster mother, the father, DSS, and the Attorney for the Children entered into contact agreements entitling the father to monthly visits with the children, plus a visit on Father's Day, and continuing communication by phone, pictures, and cards. In February 2010, prior to adoption, the foster mother filed a petition to rescind the surrenders or, alternatively, in effect, to vacate the contact agreements that were conditions of the surrenders. After a hearing, the Family Court concluded that the foster mother had standing to file the petition, that the contact agreements should be vacated in the best interests of the children, and that, in effect, the surrenders should remain intact as so modified. The father appealed. Under SSL § 383-c, the statute that governs a surrender of a child in foster care, a foster parent who is designated an adoptive parent by a judicial surrender is not a party to the surrender and, therefore, cannot seek to vacate the surrender (see SSL § 383-c [1], [3], [6] [c]; [8], [9]). Accordingly, the foster mother did not have standing to file a petition seeking to vacate the contact agreements that were conditions of the surrenders, and the petition to vacate the contact agreements should have been dismissed. The order was reversed and the petition was dismissed.

Matter of Mia T., 88 AD3d 730 (2d Dept 2011)

CHILD ABUSE AND NEGLECT

Mother Neglected Her Children by Committing Acts of Domestic Violence

Family Court determined that respondent mother neglected her three children, released two of the children to the custody of their father, and ordered the mother to comply with the terms of an order of protection. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that the mother neglected the children by committing acts of domestic violence against the father in the children's presence. The out-of-court statements of one of the children were corroborated by the father's testimony, the responding police officer's testimony and the out-of-court statements of the mother's

daughters. The finding of educational neglect of one of the children also was supported by the evidence. The record showed that the child missed 64 out of 181 days of school and was late 38 out of 181 days. It was in the children's best interests to be released to the custody of their father. The mother failed to cooperate or address the issues leading to the children's removal, whereas the father had taken steps to cooperate with family services and to create a stable home for the children. During the pendency of the neglect proceeding the mother failed to move for a *Tropea* hearing to prevent the children from relocating with their father and therefore failed to preserve the issue for review. In any event, the evidence demonstrated that the relocation was in the children's best interests.

Matter of Aliyah B., 87 AD3d 943 (1st Dept 2011)

Award of Custody to Father Proper in Light of Mother's Mental Illness

Family Court, upon denial of mother's application to dismiss the neglect petition and determining that mother neglected the child, awarded custody of the child to the father. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's longstanding history of mental illness and her resistance to treatment. The totality of the circumstances established that the award of custody to the father was in the best interests of the child. The evidence at the hearing established that the mother was incapable of caring for the child and that the child was doing well in the father's care.

Matter of Naomi S., 87 AD3d 936 (1st Dept 2011)

Mother's Excessive Drinking Results in Presumption of Neglect

Family Court held ACS proved, by a preponderance of the evidence, that mother neglected her child due to excessive drinking. The evidence included testimony that mother, under the influence of alcohol, screamed and cursed at step-mother and tried to grab child; went to father and step-mother's house while under the influence of alcohol and demanded to see child; and at a family conference at the County's office, mother's speech was slurred and she was drooling and unable to participate in the conference. The child told father that during a visit with mother, mother was drinking alcohol from bottle mixed with fruit juice. The mother denied the allegations but did not testify. The Appellate Division affirmed, deferring to Family Court's credibility assessments and held mother's impaired judgment and loss of self control resulted in presumption of neglect, and therefore there was no need to show how mother's behavior impacted child's emotional, physical or mental well-being.

Matter of Nasiim W., 88 AD3d 452 (1st Dept 2011)

Neglect Based on Use of Excessive Corporal Punishment Affirmed

Family Court held that father neglected his step-son and derivatively neglected his biological son based on father's use of excessive corporal punishment against step-son. Evidence showed father ordered step-son to kneel on uncooked grains of rice in a push-up position for extended periods of time. The court determined that father's actions demonstrated a sufficiently faulty understanding of his parental duties and issued derivative neglect finding on behalf of biological son. The Appellate Division affirmed, stating that absence of actual injury did not preclude a finding of neglect. However, if there were any further allegations of abuse or neglect against father with regard to biological son, ACS should review such allegations on their own merits and not be "unduly influenced by the existing derivative neglect finding."

Matter of Joseph C., 88 AD3d 478 (1st Dept 2011)

Finding of Neglect Affirmed

Family Court held DSS showed, by a preponderance of the evidence, that father neglected child based on evidence that father threw fish bowl or glass vase at mother, causing it to shatter near child and had allowed child to be alone with mother although he knew mother was abusing heroin and crack cocaine. The Appellate Division affirmed.

Matter of Sabrina D., 88 AD3d 502 (1st Dept 2011)

Derivative Neglect Affirmed Based on Mother's Failure to Complete Drug Treatment Program

Family Court held mother derivatively neglected child due to her failure to complete court-ordered drug treatment programs. Family Court, properly exercised its discretion in admitting mother's testimony on cross-examination that she had used cocaine after the petition had been filed. Mother falsely testified on direct examination, prior to filing of the petition, that she had not used drugs after leaving drug treatment facility. Thus, mother's testimony on direct opened the door to such evidence. The Appellate Division affirmed and held that even if it was error to admit such evidence, it was harmless error because the derivative finding was based on mother's failure to follow through with drug treatment program.

Matter of Virginia C., 88 AD3d 514 (1st Dept 2011)

One Incident Sufficient to Support Neglect Finding

Mother pushed one-month-old child across room causing the child to slide from one room to another. Family Court held that incident was sufficient to support neglect finding given child's physical, mental or emotional health was impaired or was in danger of being impaired due to the mother's actions. Mother failure to appear at hearing resulted in court taking the strongest negative inference against her. The Appellate Division affirmed. Mother's due process rights were not violated because mother was given notice of hearing, was represented by counsel, failed to appear for prior court proceedings and gave court wrong contact information.

Matter of Taylor C., 89 AD3d 405 (1st Dept 2011)

No Meritorious Defense to Default Order

On mother's motion to vacate default neglect finding, her counsel submitted affirmation in support of mother's position. Family Court denied the motion. The Appellate Division affirmed. A party seeking to vacate an order must show reasonable excuse for default and a meritorious defense to the petition. Here, there was no need to consider whether mother had a reasonable excuse because she failed to set forth a meritorious defense. Mother had personality disorder, had committed acts of domestic violence against the father in presence of child, and had threatened to kill the child. The affirmation by counsel was insufficient because it contained conclusory assertions without any personal knowledge of facts.

Matter of Samuel V.S., 89 AD3d 566 (1st Dept 2011)

One Incident of Excessive Corporal Punishment Did Not Constitute Neglect

The Appellate Division held that evidence of one incident of excessive corporal punishment , together with a photograph depicting relatively mild physical injury did not constitute neglect and reversed Family Court's neglect finding.

Matter of Kennya S, 89 AD3d 570 (1st Dept2011)

Abuse/Neglect and Derivative Abuse/Neglect Findings Affirmed

Father was found to have abused and neglected his step-son and derivatively abused and neglected his two biological children based on step-son's out-of-court statements to expert witnesses that father placed the step-son's hand on stove burner because he had been playing with matches. The child sketched a picture of burner. The child was not taken to hospital for nearly 24 hours and was diagnosed with second degree burns, suffered epidermal loss on two digits of his left hand, and was given morphine, motrin and tylenol for pain. The Appellate Division affirmed.

Matter of Delilah E. H., 89 AD3d 575 (1st Dept 2011)

Failure to Complete Sex Offender Therapy Placed Children at Imminent Risk of Impairment

The Appellate Division held that Family Court's determination that father neglected his five children and derivatively neglected one child was supported by a preponderance of the evidence. Father, a level three sex offender who had committed past sex offenses against children, placed the children at imminent risk of impairment by failing to complete sex offender therapy recommended in a prior neglect proceeding, and by seeing the children without supervision.

Matter of Anastacia L., 90 AD3d 452 (1st Dept 2011)

Neglect Finding Reversed

Father accompanied mother and eight-month-old child to maternal grandmother's apartment, where he took child to bedroom and put child in playpen. As he tried to leave, mother began to fight with him. He tried to leave but grandmother blocked the exit and mother's uncle and his girlfriend came into the apartment. The uncle then told father he was "going to murder him now," pointed a gun at him and pulled the trigger. When the gun jammed, father and uncle began to fight. During the fight, uncle's girlfriend was in room holding the child. The father ran out the door and flagged a police car. The child was not physically hurt. Family Court determined that father showed poor judgment in accompanying mother and child to grandmother's home because father had suspicions there was drug dealing at that home and father had prior criminal history and therefore had "some familiarity with illegal narcotics activity." The Appellate Division reversed, holding that ACS presented no evidence that father knew or should have known that going to grandmother's home would result in a dangerous situation for himself, child's mother or child. The court based its finding on caseworker's testimony, which father disputed, that father had knowledge of uncle's presence in grandmother's apartment and uncle had threatened him previously. The court also mistakenly relied on notation in caseworker's notes, which court thought had been made by father but had actually been made by an emergency room doctor, that "uncle was a known drug dealer." That information was hearsay and not admissible, even though such information was in the caseworker's notes. Although such evidence may be considered a business record, in order to qualify as a business record, it must be first be ascertained whether the information given by the doctor came from someone who had a business duty to report such information. The court also improperly admitted both father and uncle's criminal history. The fact that the fight occurred between the uncle and father could not support neglect against father without showing it was the father who had the gun or had been the aggressor in the altercation.

Matter of Jaden C., 90 AD3d 485 (1st Dept 2011)

Court Properly Denied Mother's Application for Return of Child Pursuant to FCA § 1028(a)

Contrary to the mother's contention, the Family Court properly denied her application pursuant to FCA § 1028(a) to return the subject child to her custody. The evidence adduced at the hearing was sufficient to establish that returning the child, whose older siblings remain in foster care as a consequence of a prior adjudication of neglect against the mother, would present an imminent risk to the child's emotional, mental, and physical health. Moreover, the imminent risk of harm to the child's emotional, mental, and physical health would not have been alleviated by the issuance of a protective order against the child's father.

Matter of Madeline A., 87 AD3d 1132 (2d Dept 2011)

Mother's Refusal to Take Child Home from Hospital Constituted Neglect

Upon reviewing the record, the Appellate Division held that the Family Court properly found that the mother neglected the child. A preponderance of the evidence presented at the fact-finding hearing demonstrated that the mother of the subject child had taken her to a hospital for a mental health evaluation, but that when the child was discharged from the hospital, the mother refused to take her home. The petitioner offered services to the mother, including respite care, but she refused the services and also refused to visit or contact the child. The mother indicated that she was unwilling to take the child home and did not want to have anything to do with the child, and that adopting the child was the "biggest mistake" she ever made. Thus, by refusing to take the child back into her home, and by indicating her desire to have no contact with, or responsibility for, the child, the mother neglected her pursuant to FCA §1012(f)(i)(B).

Matter of Nyia L., 88 AD3d 882 (2d Dept 2011)

Improper to Deny Motion for Return of Child Pursuant to FCA § 1028 (a) Without a Hearing

Under the circumstances of this case, the Family Court improperly denied the mother's motion to return the subject children to her custody pursuant to Family Court Act § 1028 without holding a hearing (see FCA § 1028 [a]). Contrary to the determination of the Family

Court, the mother's prior waiver of her right to a hearing pursuant to FCA § 1028 (a), which occurred before she made the present motion to return the subject children to her custody, did not warrant the denial of her present motion without a hearing. FCA § 1028 expressly permits the making of an application under that statute at any time during the pendency of the proceedings, notwithstanding a prior waiver of the right to a hearing under that statute. The order was reversed and the matter was remitted for a new hearing and determination.

Matter of Prince Mc., 88 AD3d 885 (2d Dept 2011)

Court's Order Denying Petition for Removal Pursuant to FCA § 1027 Reversed

The record revealed that on the evening of March 29, 2011, the mother and father were involved in an altercation at the family shelter where they resided with the child, which prompted the petitioner, on the following day, to move, among other things, pursuant to Family Court Act § 1027 to temporarily remove the child from the custody of the mother and place the child in its custody pending the outcome of the proceeding. At a hearing conducted pursuant to FCA §1027 the Family Court declined to take judicial notice of the prior neglect adjudications against the mother. Also at the hearing, a shelter supervisor and the mother gave widely disparate accounts of the March 29 incident at the shelter regarding, among other things, the mother's conduct, whether the mother was physically aggressive and intoxicated while carrying the child, whether the child was appropriately clothed, and whether the mother brought appropriate provisions for the child when the mother abruptly left the shelter with the child that evening. At the conclusion of the hearing, the Family Court found credible the testimony of both the shelter supervisor and the mother, despite their starkly contrasting versions of the March 29th incident. In the order appealed from, the Family Court denied the petitioner's motion which was to temporarily remove the child from the custody of the mother and place the child in its custody pending the outcome of the proceeding. Based on the foregoing, the Appellate Division found that the Family Court erred when it declined to take judicial notice of the prior orders of neglect against the mother with respect to the child's four older siblings (see FCA §1046 [a] [I]). Further, in light of the four prior neglect adjudications against the mother, and the shelter supervisor's hearing testimony indicating that, during the March 29th incident at the shelter, the mother was physically aggressive and intoxicated while carrying the child, the petitioner met its burden of establishing, by a preponderance of the evidence, that the child's life or health would be at imminent risk unless she were removed from the custody and care of the mother during the pendency of this proceeding (see FCA § 1027 [a], [b], [d]). Moreover, the evidence adduced at the hearing demonstrated that, during the pendency of this proceeding, the imminent risk to the child's life or health could not be mitigated by reasonable efforts short of removal. The order was reversed and the petition was granted.

Matter of Serenity S., 89 AD3d 737 (2d Dept 2011)

Evidence Produced at Fact-Finding Sufficient to Support Finding of Neglect

The evidence produced at the fact-finding hearing established that the child's physical condition was impaired, or placed in imminent danger of becoming impaired, by the father's failure to assist the child in monitoring her diabetes and administering her insulin medication, after he had been repeatedly advised by medical professionals that the child needed supervision in these tasks to ensure her compliance with the prescribed medical regimen. Furthermore, the Family Court's finding of neglect was supported by the evidence, which demonstrated that the father permitted the child to miss 8 of 21 medical appointments for the management of her diabetes between July 2008 and March 2009, during which time she was caused to be hospitalized on three occasions because of elevated blood glucose levels. Contrary to the father's contention, he was not prejudiced by the Family Court's decision to incorporate into the fact-finding hearing the evidence adduced at a prior hearing, held pursuant to FCA § 1028 (hereinafter the 1028 hearing), such that reversal of the finding of neglect was warranted. Initially, the father was correct that the Family Court erred in incorporating the testimony from the FCA §1028 hearing into the fact-finding hearing, without first determining that the witnesses were unavailable. However, since the evidence produced at the fact-finding hearing was sufficient, standing alone, to support the Family Court's finding of neglect, the error was not prejudicial to the father and, therefore, did not

require reversal. Order affirmed.

Matter of Kinara C., 89 AD3d 839 (2d Dept 2011)

Mother Established That Child Was Solely in Care of Paramour When Child Was Injured

Upon reviewing the record, the Appellate Division found that the petitioner established a prima facie case of abuse by presenting evidence that the subject child, who was four months old at the time, suffered a greenstick fracture, that a child of that age and physical ability would not normally sustain such a fracture accidentally, and that the mother's explanation, that the child may have suffered the injury due to a fall from a bed days earlier, was inconsistent with the injury sustained. However, the mother rebutted the presumption of parental abuse with evidence, which was credited by the Family Court, that the child was solely in the care of her paramour at the time of the injury. Accordingly, the Appellate Division held that the Family Court properly dismissed the petition insofar as asserted against the mother.

Matter of Jaiden T.G., 89 AD3d 1021 (2d Dept 2011)

Child Left Alone with Mother While She Was Intoxicated

The father appealed from an order of fact-finding and disposition of the Family Court, which, after fact-finding and dispositional hearings, inter alia, found that he had neglected the subject child and directed him to comply with an order of protection of the same court. The Appellate Division found that the finding of neglect was supported by a preponderance of the evidence (*see* FCA § 1012 [f]). The evidence adduced at the hearing established that the father left the child alone with the child's mother while she was intoxicated. In fact, on one of those occasions, the father permitted the child's mother to push the child in a stroller at night while she was intoxicated, and in an area without any sidewalks. Further, the evidence showed that the father neglected the child by engaging in acts of domestic violence against the mother in the child's presence, thereby creating an imminent risk of impairing the child's physical, mental, or emotional condition. Orders affirmed.

Matter of Nicholas M., 89 AD3d 1087 (2d Dept 2011)

Mother Engaged in Acts of Domestic Violence Against the Father in Presence of Child

The mother appealed from of an order of fact-finding of the Family Court which, after a hearing, found that she had neglected the subject child, and from an order of disposition of the same court, which, inter alia, upon the order of fact-finding, and after a hearing, directed her to comply with the recommendation of the Administration for Children's Services that she complete domestic violence, parenting, individual counseling, anger management, and substance abuse programs. Upon reviewing the record, the Appellate Division found that a preponderance of the evidence established that the mother neglected the subject child by engaging in acts of domestic violence against the father in the child's presence that created an imminent danger of impairing the child's physical, mental, or emotional condition (see FCA § 1012 [f] [i] [B]). The evidence adduced at the fact-finding hearing established that the mother walked past the father's house with the child, who was then less than six months old, despite having an order of protection against the father. When the mother encountered the father on the street, the father removed the child from her stroller and carried her into his house. Instead of immediately contacting the police, the mother pursued the father into his home and engaged him in a struggle over the child. The mother engaged in a physical altercation with the father in the presence of the child, which she escalated by stabbing the father with a knife. At some point during the altercation, the child was left unattended outside a closed door about three feet away from the parties, which is when the stabbing occurred. Under the circumstances, the Family Court properly determined that, as a result of the mother's conduct, the child's physical, mental, or emotional condition was in imminent danger of becoming impaired. Orders affirmed.

Matter of Ariella S., 89 AD3d 1092 (2d Dept 2011)

Delegation of Best Interest Determination to Third Party Results in Reversal

Integrated Domestic Violence part of Supreme Court held father abused/neglected son and issued one year no-contact order of protection on behalf of child, conditioned father's right to visit upon showing he had made reasonable efforts to engage in programs, and

directed child's counselor to determine when it "would not be in child's best interest not to see father". Father's appeal was not dismissed even though his notice of appeal pre-dated court order. The Appellate Division deferred to court's credibility findings and held child was neglected, but held court had improperly delegated its authority to determine father's visitation rights to third party, and issue of visitation was remitted.

Matter of Steven M., 88 AD3d 1099 (3d Dept 2011)

Neglect Based on Drug/Alcohol Abuse and Domestic Violence

Family Court's finding that mother had neglected child was based upon sound and substantial evidence in the record. Mother had history of prescription drug abuse which had led to neglect findings on behalf of her two older children. Mother's admission to continued abuse of such drugs, mother's intoxicated condition at DSS's office and positive toxicology results from drug testing supported finding. Additionally, mother continued to reside with father who repeatedly engaged in acts of severe domestic
violence against her, and failed to acknowledge its severity or its effect on child. Appeal from court's dispositional order was dismissed as mother had consented to disposition and order had expired.

Matter of Madison PP., 88 AD3d 1102 (3d Dept 2011)

Father's Wilful Violation Results in Jail Time

Family Court adjudicated two-year-old to be neglected child, placed father under one year order of supervision which required, among other factors, that all visits between mother and child be supervised. Father violated provision, informed DSS of this, and court imposed 30 day suspended sentence. Thereafter, father left child in care of mother and her boyfriend because of medical emergency. Upon return from hospital, father decided he could not care for child, left child with mother and her boyfriend for the weekend. Later father informed DSS of his actions and DSS filed wilful violation petition against father and sought to remove suspended sentence. After hearing, court found father had violated order and sentenced him to jail. By the time appeal was heard, father had already served his time in jail, and therefore his challenge to severity of sentence was mooted. The Appellate Division found DSS had shown by clear and convincing evidence father had violated order because he had continued to leave child in care of mother even after his medical crisis had passed.

Matter of Jatie P., 88 AD3d 1178 (3d Dept 2011)

Sufficient Corroboration to Find Sexual Abuse

DSS filed abuse/neglect and derivative neglect petitions against parents of two children, boy and girl. Allegations against father, among other factors, included excessive drinking and threatening behavior towards family and an incident where intoxicated father molested daughter in her bedroom threatening her with harm if she told anyone. Daughter eventually escaped by climbing out her window, went to neighbors home, and police were informed. Criminal charges were filed against father. Allegations against mother were based on failure to protect as she had coerced child into recanting allegations against father. At fact-finding hearing, court held child's out of court statements regarding abuse were corroborated by her subsequent written statement to police, her conduct in fleeing home in the middle of the night, her statements to caseworker, her demeanor after the incident and father's written statement to police. Her later recantation was found not credible. Family Court held father had abused daughter and derivatively neglected son and mother had neglected daughter and derivatively neglected son. The Appellate Division affirmed.

Matter of Kimberly Z., 88 AD3d 1181 (3d Dept 2011)

Unsanitary and Unliveable Home Results in Neglect Determination

Mother was found to have neglected her seven children based on testimony of caseworkers, parent aide, teacher and police officer who offered testimony about mother's unsanitary and "unliveable" home which, among other factors, included animal and human feces throughout the living area, dirty diapers strewn about floor, dirty dishes left out attracting cockroaches and flies; children came to school so filthy they had to be bathed and provided clean clothes at school. Ten year old was still wearing diapers and seven year old often wet his bed. Although children wanted to live with mother, attorney for children advocated that they be removed from mother 's care. Five children were removed but the

older two remained at home. The Appellate Division affirmed court's decision finding it had sound and substantial basis in the record. However it held as attorney for children had not filed appeal regarding court's
disposition of the two oldest children who still remained at home with mother, issue concerning their placement was not properly before the Court.

Matter of Alyson J., 88 AD3d 1202 (3d Dept 2011)

Clear and Convincing Evidence of Severe Abuse

Father of infant and one year old was found to have severely abused infant child based on evidence of extensive injuries including acute skull fracture, severe brain damage, sub-dural bleeding, multiple rib fractures and fractured femur. Injuries inflicted upon child resulted in child suffering severe seizure disorder, impaired vision, spastic quadriparesis and delayed cognitive development which meant she would remain an "infant" for the rest of her life. Based on the abuse, court found father had derivatively abused other child. The Appellate Division affirmed order as it was supported by clear and convincing evidence and finding of derivative abuse was appropriate as abuse of infant was "so closely connected with the care of" his other child that older child would be equally at risk if left in father's care.

Matter of Kayden E., 88 AD3d 1205 (3d Dept 2011)

Appellate Attorney's Failure to Meet With Child Client Results in Ineffective Assistance of Counsel

Family Court determined after hearing that father had neglected child based on his decision to relocate to Connecticut to be with girlfriend, and leave son behind without making any plans for his care and well being. Father appealed. Child's appellate attorney took the same position as child's family court attorney, stating that while she had not personally met with client, she had spoken with client's family court attorney to ascertain child's position. The Appellate Division relieved the appellate attorney of her assignment and held it would appoint a new appellate attorney, finding that child had been denied effective assistance of counsel. The Court held that counsel's "failure to consult with and advise the child to the extent of and in a manner consistent with child's capacities constitutes a failure to meet her essential responsibilities as the attorney for the child." The Court stated "[c]lient contact, absent extraordinary circumstances, is a significant component to the meaningful representation of a child."

Matter of Lamarcus E., 90 AD3d 1095 (3d Dept 2011)

Violation of Few Provisions of ACD is Substantial Violation

Family Court ACD'd neglect petition against mother of three children directing, among other things, that mother "refrain from offensive conduct...and...domestic violence and arguing in the presence of the children." Thereafter DSS moved to restore petition against mother alleging mother's live in fiancé had come to mother's home drunk and sworn at her; fiancé was incarcerated as a result of this but mother told DSS she wanted fiancé to return home when he was released from jail and didn't care if children were taken away from her. Mother also admitted to yelling obscenities at caseworker in front of children, saying she didn't care what DSS did with children, and mother violated verbal order of protection which directed another individual to keep away from the children. Mother argued that while she had violated some of the provisions, she had complied with the rest. While court noted that mother had been compliant with other provisions, mother substantially failed to comply with terms of the ACD as "the violations that were established do show the continued existence.... of unpredictable, irrational and unstable behavior" as alleged in the neglect petition. Mother appealed. The Appellate Division affirmed.

Matter of James S., 90 AD3d 1099 (3d Dept 2011)

Sufficient Corroboration to Make Abuse/Neglect Finding

Supreme Court, integrated domestic violence part, held father of two boys and two girls had abused/neglected children. School employees testified younger daughter had told them father had hurt her and had sexual contact with her and her brother had told her father had hurt him by putting his "wiener into ...[brother's] butt." CPS worker and police officer testified older son had told them father had "put his pee pee in ..[his] butt after telling son to take off his clothes and bend over", and

demonstrated his actions. Older daughter also told caseworker her brother and sister had told her father had sexual contact with them and brother "picked at his butt". Maternal grandmother testified older son had told her father had him bend over the couch and father "put his penis inside of him". She further testified child was "openly masturbating...having nightmares...pick[ed] at his butt". Older son testified sexual abuse had occurred two or three times during one visit and demonstrated what father had told him to do. Respondent father did not testify which allowed the court to take the strongest inference against him. Father appealed. The Appellate Division affirmed, finding that son's out-of-court statements were sufficiently corroborated and held father's abuse of son supported derivative abuse/neglect findings on behalf of his other children as father "demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to any child".

Matter of Branden P., 90 AD3d 1186 (3d Dept 2011)

Visitation Between Mother and Children Not in Children's Best Interest

Father of two girls, who repeatedly sexually abused older child, consented to termination of his parental rights, and mother was found to have neglected children as she had been aware of the abuse but had failed to protect them. The children were placed in custody of DSS with permanency goal of return to mother but mother was denied visitation. A year later the same permanency goal continued with no visitation to mother. Mother appealed arguing DSS had failed to make reasonable efforts toward reunification by denying her visitation. The Appellate Division affirmed finding court's decision was based on children's best interest as there were "compelling reasons and substantial evidence that such visitation would be detrimental or harmful to child's welfare." Older child suffered from severe mental health issues resulting from abuse and mother failed to work with service providers to "understand the child's mental health... and behavioral needs in preparation for any possible visitation".

Matter of Telsa Z., 90 AD3d 1193 (3d Dept 2011)

New York is Home State Pursuant to UCCJEA

Family Court held that mother's husband had sexually abused mother's older son, held mother had neglected her children, two sons and one daughter, placed sons in care of DSS. Husband absconded and in his absence, court issued an arrest warrant, which was never executed, and held an inquest during which it found he had abused the older son and neglected both sons, and issued an order of protection against husband on older son's behalf until his 18th birthday. Two years later sons were returned to mother and services were provided to mother for two more years. Thereafter mother took children to Wisconsin and lived there for 18 months before returning to NY. A month or so after her return to NY, mother filed for custody of her younger son, alleging she had allowed child to visit husband who was in Mississippi, and husband had refused to return child. Mother alleged, among other things, that husband was a crack addict and husband's girlfriend had hit son with belt. On day mother filed her petition, DSS filed to temporarily remove children from mother's care pursuant to FCA §1022, on grounds that mother had sent younger son to husband who had sexually abused older son. After hearing, court found it had jurisdiction and removed children from mother's care, issued new warrant against husband. Younger son was returned to NY. DSS then filed neglect against mother and upon mother's consent to allegations, all children were removed and placed in care of DSS. Two years later DSS filed to terminate mother's parental rights and mother filed motion to vacate the earlier neglect determination on grounds court lacked jurisdiction. Family Court denied motion and mother appealed. The Appellate Division affirmed finding NY had jurisdiction as no court in any other state had jurisdiction, the parties had significant connection with NY and, and although Wisconsin had been the children's home state within the previous 6 months prior to the neglect proceedings, it did not have jurisdiction over the removal application as no "parent or person acting as parent was residing there". Among other facts, NY was the only jurisdiction with information about previous abuse, prior proceedings took place in same family court, NY had issued warrant against husband, DSS knew the family's history and the children were still in contact with their prior foster parents. Additionally when mother filed custody petition in NY, she wrote NY was her residence and mother and children made several statements indicating

they had moved back to live in NY permanently, and mother's claims regarding jurisdiction were raised after removal of her children. Mother's other argument that this case is similar to *Matter of Afton C.,*where father's sex offender designation did not *per se* make him a danger to his children was rejected as in this case basis for neglect finding against mother was her knowledge of husband's sexual abuse of her child.

Matter of Destiny EE., 90 AD3d 1437 (3d Dept 2011)

Parents Neglected Their Children

Family Court adjudicated respondents' children to be neglected. The Appellate Division affirmed. A preponderance of the evidence established that the mother neglected her children by attempting to drive a motor vehicle in an intoxicated condition with the children in the vehicle. The record supported the court's determination that the father deliberately failed to take anti-seizure medication so that he could consume alcohol and that he was aware that he was likely to become violent when he had a seizure and that he had two seizures on the day in question. The dissent would have reversed with respect to the father because he knew only that there was some unspecified possibility that he might have a seizure, might become violent, and that the children might be harmed if they were present. The dissent also would have reversed with respect to the mother because there was insufficient evidence that she was intoxicated or that her actions placed the children in imminent risk.

Matter of Damian G., 88 AD3d 1268 (4th Dept 2011)

Father Sexually Abused Child – Visitation Suspended

Family Court determined that respondent father sexually abused his child, granted petitioner mother sole custody of the child, and suspended visitation with respondent. The Appellate Division affirmed. The child's out-of-court statements were sufficiently corroborated by the testimony of the child's therapists, who both opined that the child's behavior following the alleged abuse was consistent with a child who had been sexually abused. Further, the child's out-of-court statements were corroborated by the unsworn testimony she gave on cross-examination at the fact-finding hearing. The court did not err in allowing the child's therapists to testify, even though they were not identified as potential witnesses in the abuse petition. The Family Court Act does not require petitioner to list all potential witnesses. The court did not err in suspending visitation. The court determined that respondent sexually abused the child and respondent refused to proceed with recommended sex offender treatment and mental health counseling. One of the child's therapists opined that visitation would be harmful to the child and the child did want to see the father or return to the father's home.

Matter of Lydia C., 89 AD3d 1434 (4th Dept 2011)

Neglect Finding Supported by Evidence of Prior Neglect of Mother's Other Children

Family Court adjudged that respondent mother neglected her children. The Appellate Division affirmed. The court did not err in conforming the pleadings to the proof. Respondent conceded that her objection to petitioner's motion was not based upon surprise and the record demonstrated that respondent suffered no demonstrable prejudice when the court conformed the pleadings to the proof and considered evidence that occurred after the filing of the neglect petition. Petitioner established that respondent neglected the children. Respondent's parental rights were terminated with respect to one of her older children on the ground of mental illness during the proceedings concerning the subject children. The record contained evidence that respondent continued to experience mental health problems associated with her schizophrenia and had been hospitalized twice for mental health issues after her parental rights with respect to the older children were terminated.

Matter of Ariel C.W.-H., 89 AD3d 1438 (4th Dept 2011)

Finding of Derivative Neglect Supported by Finding of Severe Neglect of Father's Other Child

Family Court adjudged that respondent father abused his children. The Appellate Division affirmed. The court did not err in finding that respondent derivatively abused his children based upon the finding that he severely abused one of his other children, resulting in the child's death. The finding was appropriate in view of the nature and severity of the abuse of the child who

died.

Matter of Alaysha M., 89 AD3d 1467 (4th Dept 2011)

Father's Older Daughter Severely Abused Child and Younger Daughter Derivatively Abused

Family Court determined that respondent severely abused his older daughter and that his younger daughter was derivatively abused. The Appellate Division affirmed. There was clear and convincing evidence that respondent committed felony sex offenses against his older daughter. The older daughter's out-of-court statements to a school counselor and a nurse practitioner were sufficiently corroborated by medical evidence of sexual intercourse and the testimony of petitioner's validator. Further, the court was entitled to draw the strongest possible inference against respondent based upon respondent's failure to testify.

Matter of Chelsey B., 89 AD3d 1499 (4th Dept 2011)

Mother Neglected Youngest Son and Derivatively Neglected Older Sons

Family Court determined that respondent mother neglected her youngest son and derivatively neglected her two older sons. The Appellate Division affirmed. Although respondent took her youngest son to the hospital when directed, the court's finding that she knew or should have known that the child was being abused by her live-in boyfriend and that she failed to take steps to avoid the risk of harm to the child when she continued to live with the boyfriend and allowed him to babysit, was supported by a preponderance of the evidence. Further, the court was entitled to draw a negative inference against respondent based upon her failure to testify.

Matter of Brian P., 89 AD3d 1530 (4th Dept 2011)

Finding of Neglect Supported by Father's Adult Stepdaughter's Testimony About Sexual Abuse

Family Court adjudged that respondent father neglected his children. The Appellate Division affirmed. The father's adult stepdaughter, who was the sole witness for petitioner, testified that respondent sexually abused her for a period of years beginning when she was 15. That testimony supported a finding of derivative neglect with respect to the subject children because the impaired level of parental judgment shown by respondent's behavior created a substantial risk to the subject children. The court could make a finding of derivative neglect even if the child who was sexually abused was not a subject of the neglect petition. The finding of neglect also was supported by the stepdaughter's testimony that respondent engaged in acts of domestic violence, occasionally in the presence of the children. The court properly admitted respondent's substance abuse treatment records because they were relevant to the issue of neglect.

Matter of Kennedie M., 89 AD3d 1544 (4th Dept 2011)

Neglect Adjudication Reversed

After respondent father pleaded guilty to a criminal charge of third degree assault based upon an incident where the father struck his oldest son in the face, the same judge granted petitioner summary judgment on its petition alleging that the father neglected his oldest son. The court also denied father's motion to dismiss the petition and his request for a fact finding hearing. The Appellate Division reversed. Petitioner failed to meet its burden of establishing that the acts underlying the criminal conviction constituted neglect as a matter of law and that the issues in the neglect proceeding were resolved by the father's guilty plea. Under the circumstances here, petitioner failed to establish that the father intended to hurt his son or that his conduct was a pattern of excessive corporal punishment. The case was remitted for further proceedings before a different judge.

Matter of Nicholas W., 90 AD3d 1614 (4th Dept 2011)

Neglect Adjudication Affirmed

Family Court adjudged that respondent mother neglected her children. The Appellate Division modified by vacating all references to respondent's alcohol abuse and related treatment in 2006. There was no mention of alcohol abuse and treatment in the court's decision and where there is a conflict between the order and the decision, the decision controls. Petitioner established by a preponderance of the evidence that the mental and physical condition of the children had been or was in imminent danger of becoming impaired as a result of respondent's failure to

maintain the family's residence free from unsanitary or unsafe conditions and respondent's longstanding failure to seek treatment for substance abuse. The evidence presented by petitioner, together with the adverse inference the court was allowed to draw based upon respondent's failure to testify, supported the court's findings about the imminency of the children's impairment and respondent's inability to exercise the degree of care required to provide proper supervision.

Matter of Alexis H., 90 AD3d 1679 (4th Dept 2011)

CHILD ABUSE REGISTER

Reliance on Hearsay Did Not Violate Due Process

OCFS , after a fair hearing, denied petitioner former foster parent's request to seal and mark unfounded a report to the Central Register of Child Abuse and Maltreatment. The Appellate Division affirmed. The determination that ACS proved by a preponderance of the evidence that petitioner maltreated two of her former foster children was supported by substantial evidence. The fact that ACS' case consisted entirely of hearsay, whereas petitioner testified, did not preclude a finding that the OCFS' determination was supported by substantial evidence. Because petitioner testified at the hearing that she had no interest in being a foster parent again and the foster children at issue had been adopted by another, petitioner failed to satisfy the "stigma plus" test. Even assuming petitioner had an interest of constitutional magnitude, the reliance on hearsay, even double hearsay, did not violate due process.

Parker v Carrion, 90 AD3d 512 (1st Dept 2011)

CHILD SUPPORT

Support Obligation Based Solely on Child's Needs

Support Magistrate based respondent non-custodial mother's $950 per month child support obligation for one child on the child's needs because the mother presented insufficient evidence regarding her gross income. The expenses mother listed were twice as much as her income and the Support Magistrate found her testimony to be incredible. The mother testified that she was a well known esthetician with celebrity clients and she had 22 years work experience. The Appellate Division affirmed

Matter of Salvatore D. v Shyou H., 88 AD3d 548 (1st Dept 2011)

Strained Relationship Between Parent and Child Does Not Constitute Constructive Abandonment

Family Court granted mother's objections to order of Support Magistrate terminating father's child support obligation based on child's constructive abandonment and reinstated father's support obligation. The Appellate Division affirmed. Although the relationship between father and child was strained, there was no showing that the child completely refused to have relationship with father.

Matter of Haleniuk v Persaud, 89 AD3d 601 (1st Dept 2011)

Family Court Erred in Calculating Child Support and in Failing to Award Maintenance

Supreme Court directed plaintiff husband to pay child support order of $6,887.50 per month for three children and awarded no maintenance to defendant mother. The Appellate Division remanded for clarification regarding how the court calculated the child support amount. Although trial courts have broad discretion in imputing income to a parent, here father was evasive about his income, failed to produce appropriate financial documentation, and the court gave no basis for how it arrived at the $300,000 cap for marital income. While court said it used the statutory 29% calculation for three children and determined father was responsible for 95% of the support, it was unclear how much of the marital income was attributable to mother. The court also erred in failing to award any maintenance. The father earned substantially more than the mother and the mother stopped working outside the home so that she could take care of the children, one of whom was ill.

Squitieri v Squitieri, 90 AD3d 500 (1st Dept 2011)

Premature for Court to Direct Father to Contribute Towards College Costs

Contrary to the father's contention, the Supreme Court providently exercised its discretion in directing the father to contribute towards the cost of parochial school tuition for the parties' youngest child. However, it was

premature for the Supreme Court to direct the father to contribute towards the college costs of the two youngest children, given that those two children were less than 16 and 13 years old, and no evidence was adduced concerning their academic ability, interest in attending college, or choice of college.

Felix v Felix, 87 AD3d 1106 (2d Dept 2011)

Father Failed to Establish Substantial Change in Circumstances; **Order Reversed**

The Support Magistrate improperly determined that the father established a substantial change in circumstances sufficient to modify a stipulation of settlement which was incorporated but not merged into a judgment of divorce, obligating him to maintain health insurance coverage for the parties' children under a plan in effect at that time or to pay for a comparable plan, so as to require him to pay only the sum of $390.88 per month for a health insurance plan for the children that was acquired by the mother. The documentary evidence in the record contradicted the father's testimony that the cost for him to obtain health insurance for the parties' children, comparable to what he was able to provide at the time the parties entered into their stipulation of settlement, increased after he lost his job and began working for a new employer. Even if the father's testimony was properly credited, the father failed to demonstrate that he was unable to provide support at the level agreed upon pursuant to the stipulation of settlement or that the health insurance the mother was able to acquire for the parties' children was comparable to the healthcare plan that was in effect at the time the parties entered into their stipulation of settlement. Accordingly, the Family Court should have granted the mother's objections to the Support Magistrate's order granting the father's cross petition to modify the stipulation of settlement. Order reversed.

Matter of Malbin v Martz, 88 AD3d 715 (2d Dept 2011)

Motion to Vacate Default Should Have Been Granted; **Order of Support Against Father Reversed**

An order of support was entered against the father on default when, after having arrived at the courthouse for a hearing on the child support petition at 9:00 a.m., and having been told to return at 2:00 p.m., he was minimally late for the afternoon hearing due to traffic. Significantly, the father's failure to appear was not willful or even indicative of a general attitude of neglect, but, rather, he understood his obligation to appear and made substantial efforts to do so. Under these circumstances, the father demonstrated a reasonable excuse for his default. Further, the father demonstrated a potentially meritorious defense through his evidence that he became unemployed one month before the hearing, and was earning a minimal salary at the time he moved to vacate the order of support made upon his default. Accordingly, "considering that public policy favors resolution of cases on the merits" the Family Court should have granted the father's objections to the order denying his motion to vacate his default. The order was reversed and the matter was remitted to the Family Court for a hearing and new determination as to child support.

Matter of Morales v Marma, 88 AD3d 722 (2d Dept 2011)

Plaintiff's Income Was Not Properly Calculated

In a child support proceeding, the awards of child support, maintenance, arrears, and an attorney's fee were based upon the Supreme Court's calculation of the parties' respective incomes. The defendant correctly contended that the Supreme Court made a mathematical error in calculating the plaintiff's income. The numbers reflecting the various components of the plaintiff's annual income, as set forth by the Supreme Court in its decision, add up to a total of $54,163, not $33,262, as erroneously stated by the Supreme Court. The matter was remitted for recalculation.

O'Brien v O'Brien, 88 AD3d 775 (2d Dept 2011)

Support Magistrate Improperly Precluded Mother from Providing Testimony Regarding Cross Petition for Upward Modification

The father did not establish that the parties' stipulation of settlement was not fair and equitable when entered into, and further failed to establish a showing of an unanticipated and unreasonable change in circumstances. Accordingly, the father was not entitled to a downward modification of his child support obligation as set forth in the parties' stipulation of

settlement, and the mother's objections regarding the downward modification should have been sustained. Additionally, since the support magistrate improperly precluded the mother from providing testimony regarding her cross petition for an upward modification of the father's child support obligation, her objections as to that issue should also have been sustained. Accordingly, the Appellate Division reinstated the mother's cross petition and remitted the matter to the Family Court for a hearing and new determination on the mother's cross petition for an upward modification of the father's child support obligation.

Matter of Weinschneider v Weinschneider, 88 AD3d 806 (2d Dept 2011)

Father Failed to Show a "Substantial" Change in Circumstances

Although the Family Court found that the father failed to show an ""unanticipated" and "unforeseen" change in circumstances warranting a downward modification of his child support obligation, because the father's obligation was not contained in a stipulation of settlement that had been incorporated but not merged into a judgment of divorce, the standard that should have been applied is "a substantial change in circumstances". Here, despite the father's testimony that the current economic downturn severely affected his earnings, and despite the fact that his income as a stock broker fluctuated yearly, depending on stock sales, he did not show a substantial change in average income since the entry of the divorce judgment which established his support obligation. Accordingly, on this record, the father failed to establish a substantial change in circumstances sufficient to entitle him to a downward modification of his support obligation. Moreover, he failed to show that his ability to provide support had changed during that time. Therefore, the Family Court properly denied the father's objections to the Support Magistrate's finding that the father was not entitled to a downward modification of his child support obligation.

Matter of Levine-Seidman v Seidman, 88 AD3d 883 (2d Dept 2011)

Stipulation of Settlement Did Not Comply with Requirements of CSSA

Contrary to the plaintiff's contention, the parties' so-ordered stipulation of settlement which was incorporated, but not merged, into the judgment of divorce, did not comply with the requirements of the Child Support Standards Act (CSSA) (see DRL § 240 [1-b] [h]). The stipulation did not recite that the parties were advised of the provisions of the CSSA, and that the basic child support obligation provided for therein would presumptively result in the correct amount of support to be awarded. Moreover, the parties' prorated shares of child care expenses and future reasonable unreimbursed health care expenses deviated from the CSSA guidelines, since they were not calculated based upon the parties' "gross (total) income as should have been or should be reported in the most recent federal income tax return" (see DRL § 240 [1-b] [b] [5] [i]; [c] [1]). Thus, the stipulation was required to contain the additional recitals setting forth, inter alia, the amount that the basic child support obligation would have been under the CSSA (see DRL § 240 [1-b] [h]). Since the so-ordered stipulation of settlement did not contain the specific recitals mandated by the CSSA, its provisions, insofar as they concern the plaintiff's basic child support payment and "add-ons" for child care and unreimbursed health care expenses, were not enforceable. Therefore, the Supreme Court should not have incorporated them into the judgment of divorce, and should not have directed the defendant to commence payment of her share of such "add-ons" pursuant to the stipulation, and to pay arrears related to them.

Bushlow v Bushow, 89 AD3d 663, 665 (2d Dept 2011)

Husband Directed to Pay 60% of Tuition Costs

Under the circumstances of the parties' divorce proceedings, a pendente lite order directing the husband to pay 60% of the minor child's tuition costs at a private school was warranted, where a prior court order had directed a 60%–40% split between the husband and wife of any such tuition costs, and, although the parties disputed whether they had agreed to send the child to the subject school, the record was clear that the child had previously attended that school (see DRL §

240(1–b)(c)(7).

Maybaum v. Maybaum, 89 AD3d 692 (2d Dept 2011)

Record Supported Calculation of Child Support Obligation

In this case, based on the evidence in the record, including the trial testimony, the defendant's financial records, and the tax returns of the parties and the defendant's businesses, the Supreme Court providently imputed income to the defendant and calculated the amount of child support by applying the statutory percentage of 17% to all of the defendant's income, which was $199,655, for child support purposes (see DRL § 240 [1-b] [b] [3] [i]; [c] [2], [3]; [f] [2]). The Supreme Court correctly required the defendant to obtain and maintain a life insurance policy in order to secure his maintenance and child support obligations (see DRL § 236 [B] [8] [a]). The defendant's testimony and the evidence adduced at the trial indicated that he " 'had the resources available to sufficiently provide for his family as established in the pendente lite award' " of maintenance and child support. Thus, the Supreme Court correctly denied the defendant's motion, made during trial, for a downward modification of his pendente lite child support and maintenance obligations.

Siskind v Siskind, 89 AD3d 832 (2d Dept 2011)

Downward Modification Not Warranted

The Family Court properly found that the father failed to meet his burden of demonstrating a substantial and unanticipated change in circumstances warranting a downward modification of his child support obligation. The father's child support obligation is not necessarily determined by his current financial condition but, rather, by his ability to provide support, as well as his assets and earning powers. Here, while the father presented evidence of an unanticipated loss of employment, there was also evidence that he is nonetheless possessed of sufficient means to provide support at the level ordered.

Matter of Kalarickal v Kalarickal, 89 AD3d 846 (2d Dept 2011)

Court Grants Mother's Petition for Upward Modification on Ground that Father Was No Longer a Full-time Student

The mother filed a petition for an upward modification of the father's child support obligation on the ground that the father was no longer a full-time student. At the ensuing hearing, the father testified that he earned $18.15 per hour, but only worked 15 hours per week. The Family Court imputed an income of $33,000 per year to the father by applying his hourly earnings rate to a 35-hour work week. An order was entered by the Family Court granting the mother's petition, and modifying the prior support order to direct that the father pay the sum of $25 per week in child support from August 31, 2010, until October 1, 2010, and that he pay the sum of $96 per week thereafter. The father appealed. Upon reviewing the record, the Appellate Division found that the Family Court properly imputed an income to the father based on his employment history, and properly granted the mother's petition for an upward modification of the father's child support obligation on the ground that there had been a substantial change in circumstances. Order affirmed.

Matter of LoCasto v Chiofolo, 89 AD3d 847 (2d Dept 2011)

Father Failed to Establish That His Son Was Constructively Emancipated

The mother appealed from an order of the Family Court that denied her objections to an order of the same court which granted the father's petition to vacate the child support provisions of the parties' stipulation of settlement, which was incorporated but not merged into the judgment of divorce entered September 1996, based on the constructive emancipation of the parties' child. The record amply demonstrated that the father's own behavior was the parallel and coequal cause of the deterioration in the relationship. Accordingly, the father failed to meet his burden of establishing that his son was constructively emancipated. Accordingly, the Family Court should not have granted the father's petition to vacate the child support provisions of the parties' stipulation of settlement, which was incorporated but not merged into the judgment of divorce.

Matter of Glen L.S. v Deborah A.S., 89 AD3d 856 (2d Dept 2011)

Father Properly Precluded from Offering Evidence of His Financial Ability to Pay Child Support

The father appealed from an order of the Family Court dated February 3, 2011, which, denied his objections to an order of the same court dated September 17 , 2010, which, granted the mother's petition for an upward modification of his child support obligation. The mother cross-appealed from the Order dated February 3, 2011, which, denied her objections to the order dated September 17, 2010, allocating to her only one half of the sum determined to be reasonable to meet the needs of the children. The record revealed that the father failed to file a sworn financial disclosure affidavit (see FCA § 424-a) and failed to comply with discovery demands. Under these circumstances, the Support Magistrate did not err in precluding the father from offering evidence as to his financial ability to pay child support (see FCA § 424-a [b]). Moreover, since there was insufficient evidence to determine the father's gross income, the Family Court properly denied his objections to the Support Magistrate's determination based upon the needs of the children. Furthermore, the Support Magistrate had sufficient evidence to determine the needs of the children. The record supported the Support Magistrate's assessment of the mother's credibility on the issue of the needs of the children. Contrary to the mother's contention, the Family Court properly denied her objections to the Support Magistrate's determination allocating to her one half of the sum determined to be reasonable to meet the needs of the children, given her means and earning capacity (see FCA § 413 [1] [a]).

Matter of Feng Lucy Luo v Yang, 89 AD3d 946 (2d Dept 2011)

When Directing That Orders Would Be Enforced by SCU, the Support Magistrate Erred in Setting a Payment Schedule for Retroactive Support

Here, the Support Magistrate's order of support dated July 13, 2010, and amended order of support dated November 24, 2010, directed that such orders would be enforced by the Support Collection Unit (SCU) pursuant to FCA § 440 (1). The Appellate Division agreed with the mother’s contention that the Support Magistrate erred in setting a payment schedule for retroactive support rather than establishing the amount of retroactive support owed and allowing the SCU to establish such a schedule pursuant to CPLR 5241 (b). Accordingly, the Family Court should have granted her objections to those portions of the orders that set a payment schedule for retroactive support. Contrary to the mother's contention, however, the Support Magistrate providently exercised her discretion in imputing income to the mother based on her earning capacity. Accordingly, the Family Court properly denied her objections to so much of the orders as imputed income to her based on her earning capacity.

Matter of Tosques v Ponyicky, 89 AD3d 1097 (2d Dept 2011)

Father’s Irrational Behavior is Not Basis For Vacating His Admission of Wilful Violation

Support Magistrate held respondent father had wilfully violated order of support, established arrears and recommended incarceration. At appearance before Family Court, father's erratic behavior resulted in court directing that he submit to psychiatric evaluation. On hearing date, father was not present and his counsel stated father was psychotic and incapable of participating in proceedings. Court issued warrant for father and when was father produced before court, he began to make "irrational arguments", admitted he had not made payments and stated that paying too much child support prevented him from working. Court found him in wilful violation and sentenced him to 90 days in jail. Appellate Division affirmed.

Matter of Clark v Clark, 88 AD3d 1095 (3d Dept 2011)

Daughter's Full Time Employment Not Automatic Emancipation

Parents of two children entered into separation agreement which was incorporated but not merged into judgment of divorce and stipulated to joint legal and physical custody, waived child support and agreed to be equally responsible for health insurance and uncovered medical expenses of children. Thereafter children elected to reside primarily with mother. Mother filed to modify order arguing change in circumstances as son lived with her more than 50 % of the time, and requested child support. After hearing, Support Magistrate found as mother had agreed to "right of first refusal" in earlier custody proceeding, she could not now use that as grounds to argue she had primary

custody. Additionally magistrate held as daughter had graduated and working full time, she was emancipated and mother was not entitled to support for her. Mother filed objections but Family Court deemed it untimely. The Appellate Division reversed finding mother's objection was timely. While the Court agreed that mother had failed to show change in circumstances with regard to son, the fact that daughter was working full time did not mean she was emancipated without first determining how much daughter earned or the degree to which mother supported her. Additionally, Support Magistrate failed to explain, in determining parental income, why he used projected income for mother but not father.

Matter of Drumm v Drumm, 88 AD3d 1110 (3d Dept 2011)

Support Magistrate Not Limited to $80,000 in Calculating Support Obligation

Father filed an earlier unsuccessful appeal, arguing Family Court incorrectly determined that Support Magistrate could consider combined parental income of over $80,000 to calculate his child support obligation. Father appealed again from Family Court's determination, arguing that his support obligation was incorrectly calculated as it took into account combined parental income of over $80,000. The Appellate Division affirmed finding that the court had statutory authority to take such amount into consideration in determining support and there were sufficient findings by Support Magistrate as to why father's support obligation was neither unjust or inappropriate. In a footnote the Court noted that although the income cap had been amended as of January 31, 2010 to $130,000, this proceeding was commenced prior to the amendment.

Matter of Marcklinger v Liebert, 88 AD3d 1114 (3d Dept 2011)

Child Not Required to Accept College Tuition Loans

Parents of three children agreed, by separation agreement which was incorporated but not merged into divorce decree, that if any child attended college, they would contribute on an equal basis to those expenses, which they defined as tuition, academic fees and books. Mother filed wilful violation petition against father when he refused to pay half the share of child's college expenses. Father argued child had refused college loans and as such he was only liable for half the expenses after loan amount was deducted. Family Court held pursuant to terms of separation agreement child was not obligated to accept college loans and held father had violated order. The Appellate Division affirmed, finding that when parties entered into agreement, it was not their intent to require the children to contribute to cost of higher education.

Matter of Frank v Frank, 88 AD3d 1123 (3d Dept 2011)

Child Support Based on Parent's Ability to Provide Support

Order of support in amount of $1,750 was issued in 2004 against father, on behalf of one child. Father's income was $207,890 and the support ordered was a downward deviation of the CSSA. In 2007 father filed to modify downward arguing he had lost his job. Finding that he had 2 million in investment assets and $100,000 in his checking account, court denied his petition. Thereafter court adjusted child support to $1,962 per month as a cost of living adjustment. In 2009 father once again filed to modify downward alleging he was still unsuccessfully seeking employment. Support Magistrate determined he had not established there had been change in circumstances. Family Court denied his objections. On appeal the Appellate Division affirmed noting that father was limiting his job search, still had over 2 million in investment assets, was receiving a pension, and interest and dividends from his assets. Additionally he had chosen not to collect from his social security, even though this would allow beneficiary payments to his child, as he wanted to wait until the payments were maximized. The Court stated that child support is not determined by parent's current financial situation but by his or her ability to provide support.

Matter of Flannigan v Smyth, 90 AD3d 1107 (3d Dept 2011)

Order Invalid As it Failed to Recite Presumptive Amount of Support Pursuant to CSSA

Father and mother entered into oral stipulation that father's support obligation on behalf of two children

would be $1,235. Thereafter father filed motion to vacate order as it had failed to comply with FCA section 413(1)(h). The Support Magistrate denied the motion and Family Court affirmed the denial. The Appellate Division reversed stating that although parties had agreed to amount of child support, neither the agreement or the order made reference to the presumptive amount of child support father would have had to pay pursuant to the CSSA. As this provision was a non-waivable requirement under FCA section 413 (1)(h), the order is invalid and unenforceable.

Matter of McKenna v McKenna, 90 AD3d 1110 (3d Dept 2011)

Appeal of Penalty Dismissed as Moot

Support Magistrate determined father had wilfully violated child support order and owed mother arrears in the amount of $12,000. Family Court confirmed finding and matter was adjourned to determine an appropriate penalty. Father did not appeal wilfulness finding. Family Court then determined 90 day jail time was appropriate penalty and father appealed from this order. By the time the appeal was heard, father had served jail time and as father had only appealed the penalty and not the wilfulness finding, Court dismissed appeal as moot.

Matter of Muller v Muller, 90 AD3d 1165 (3d Dept 2011)

Children Should Not Subsidize Parent's Financial Decision

Unemployed Father of three children was ordered to pay child support in the amount of $2,834 per month based on income imputed to him by Support Magistrate's in the amount of $125,000. Father then filed modification petition alleging he was unable to find work. The Support Magistrate dismissed his petition based on ground that he had failed to demonstrate a substantial change in circumstances. The Family Court denied his objections and father appealed. The Appellate Division affirmed finding that father's job search was too narrow, he was attempting to start his own business and stated he would "jump-on" a full-time job offer only if it paid a substantial salary. Court stated it would not require children to subsidize a parent's financial decision.

Matter of Berrada v Berrada, 90 AD3d 1192 (3d Dept 2011)

Father Given Adequate Notice of Basis for Violation Proceeding

Father was ordered to make bi-weekly child support payments of $184.00. Mother filed support violation petition and Support Magistrate found father had violated order, not wilfully, and ordered him to make an extra $100 bi-weekly payments towards arrears. Thereafter a wilful violation finding was made against father but court suspended his sentence. Mother filed another support violation petition seeking an order that father had wilfully violated previous support orders. Father was served with summons and petition. The summons contained the requisite warning that he could face up to six month in jail for contempt if found to have violated prior support orders, and petition stated mother was requesting wilfulness finding against father based on violations of prior support orders. Family Court repeatedly clarified for father's benefit, the basis for mother's petition. Court found wilful violation and sentenced father to 180 days in jail. Father appealed alleging it was unclear whether proceeding was for wilful violation of support or whether it was to determine if suspended sentenced should be revoked. Court held father received adequate notice of nature of proceeding and affirmed. Father's claim that jail time being unduly harsh and excessive was moot.

Matter of Santana v Gonzalez, 90 AD3d 1198 (3d Dept 2011)

Within Trial Court's Discretion to Determine Whether Application of CSSA Unjust or Inappropriate

Pursuant to terms of separation agreement, which was incorporated but not merged into judgment of divorce, father and mother agreed to share legal and physical custody of three children, and agreed that father's child support would deviate from the CSSA amount of $515 per week, specifically stating father's support obligation would be satisfied in full based on his waiver of his equity interest in the marital home, which was $108,500. Both parents agreed to contribute to children's college education. Few years later, oldest child began to live with father and father filed for child support on her behalf. Support Magistrate determined

that mother's obligation would be $290 per week but deviated from that amount and issued an order of support for $80 per month. Father objection to order was denied by Family Court and father appealed. The Appellate Division affirmed. The Court held that a determination of whether application of CSSA is unjust or inappropriate is within the discretion of the trial court and in this case, evidence showed \yt1 mother was paying two-thirds of child's car insurance and one-third of her college expenses, child was partially meeting her own expenses through part-time work, both parties were well off and mother was responsible for all expenses of other two children in her home. In a footnote the Court noted that had the CSSA been applied to father's support obligation, over a six year period his obligation would be $160,000.

Matter of Kelly v Kelly, 90 AD3d 1295 (3d Dept 2011)

Respondent Father Denied His Right to Counsel

Family Court confirmed the Support Magistrate's determination that respondent father willfully failed to obey an order of the court and sentenced him to six months in jail. The Appellate Division reversed. The court erred in allowing respondent to proceed pro se at the hearing. The court failed to make the requisite searching inquiry of respondent's awareness of the dangers and disadvantages of proceeding without counsel.

Matter of Commissioner of Genesee County Dept. of Social Servs. v Jones, 87 AD3d 1275 (4th Dept 2011)

Imputation of Income Proper Even Though Father Was Incarcerated

Family Court denied respondent father's objections to an order of child support imputing income to respondent based upon the minimum wage for a period of over three years and ordered arrears for that period in the amount of $1,870.68. The Appellate Division affirmed. Although it was undisputed that respondent was incarcerated for most of the relevant time period, to the extent that respondent's financial hardship was the result of his own wrongful conduct he was not entitled to a reduction in his child support obligation. Because respondent's income included imputed income, his income was not below the poverty income guidelines and he was not entitled to a reduction of arrears to $500. The Support Magistrate was not obliged to accept respondent's unsupported testimony that he had a medical condition that prevented him from working.

Matter of Niagara County Dept. of Social Servs. v Hueber, 89 AD3d 1433 (4th Dept 2011)

Imputation of Income Proper Even Though Father Was Incarcerated

Family Court denied respondent father's objections to an order of child support imputing income to respondent based upon the minimum wage for a period of about one year and ordered arrears for that period in the amount of $659.18. The Appellate Division affirmed. Although it was undisputed that respondent was incarcerated for most of the relevant time period, to the extent that respondent's financial hardship was the result of his own wrongful conduct he was not entitled to a reduction in his child support obligation. Because there was no evidence that the child's noncustodial mother had any income or was capable of earning income, there was no basis to apportion 50 % of the child support obligation to her. Petitioner was not required to produce the child's custodian on whose behalf the proceeding was commenced at the hearing on the petition. Further, if respondent wished to challenge the custodian's eligibility for welfare, he should have done so at the hearing where he had the opportunity to be heard.

Matter of Niagara County Dept. of Social Servs. v Hueber, 89 AD3d 1440 (4th Dept 2011)

Father Not Deprived of Right to Counsel Because Court Disqualified His Attorney

Supreme Court awarded maintenance, child support and attorney's fees to defendant mother. The Appellate Division affirmed. The court did not abuse its discretion in disqualifying plaintiff father's attorney based upon that part of rule 3.7 of the Rules of Professional Conduct, providing "[a] lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." The record established that it was likely that plaintiff's original trial attorney would be called to testify about transferring plaintiff's funds in apparent violation of the court's order. Although it appeared that plaintiff's attorney did not testify at the second trial, the

express language of rule 3.7 provides only that it is "likely" that the attorney would be called as a witness and here it was likely. The court was not required to make a searching inquiry about whether plaintiff understood the dangers and disadvantages of self-representation because there is no right to counsel in a divorce action.

Jozefik v Josefik, 89 AD3d 1489 (4th Dept 2011)

Court Erred in Dismissing Petition to Terminate Support Obligation Without Hearing

Family Court dismissed father's petition seeking to terminate his support obligation for the parties' son, which alleged that respondent mother had frustrated the father's visitation rights and that his son had abandoned him. The Appellate Division reversed. The Referee erred in dismissing the petition without conducting a hearing. The father established a prima facie case for termination of his support obligation by submitting evidentiary material establishing that his son abandoned him. His submissions established that his repeated attempts at communication with his son had been refused and his son had expressed a clear desire to have nothing to do with the father. Additionally, the petition alleged that the mother refused to allow the father to exercise his visitation rights and such deliberate frustration of visitation rights can warrant the suspension of future child support payments.

Matter of Coleman v Murphy, 89 AD3d 1500 (4th Dept 2011)

Father's Total Income Must Be Recalculated

Family Court denied the parties' objections to an order increasing respondent father's child support obligation. The court determined that respondent's 2008 adjusted gross income from his subchapter S corporation was $707,511, including $109,106 in capital gains, $5,238 in entertainment expenses, and $562,113 in imputed income based upon increased depreciation. The Appellate Division reversed and remitted the matter for recalculation of the father's income and child support obligation. Contrary to respondent's contention, he was self-employed within the meaning of the CSSA and the court properly included in his income the $109,1096 in capital gains. Because petitioner mother failed to establish that respondent's entertainment expenses were personal in nature, it was an abuse of discretion to include the entertainment expenses in the amount of $5,238 in respondent's income. Although respondent's income for child support purposes might ultimately include imputed depreciation income, the manner in which the court calculated the amount was incorrect under the Family Court Act because it was not calculated as depreciation "greater that depreciation calculated on a straight-line basis for the purpose of determining business income."

Matter of Grosso v Grosso, 90 AD3d 1672 (4th Dept 2011)

CRIMES

Conviction for Gang Assault in the Second Degree Reduced

Defendant was convicted of gang assault in the second degree. The Appellate Division reduced the conviction to gang assault in the third degree, concluding that evidence was legally insufficient to establish that either the broken nose or the three chipped teeth sustained by the victim constituted serious physical injury. Following reconstructive surgery, the indentation in the nose, while qualifying as "disfigurement," did not constitute "serious disfigurement," which is established only upon proof that a reasonable observer would find the person's altered appearance distressing or objectionable. Although the plastic material used to replace tooth enamel had to be replaced approximately every 10 years, and darkening of the affected teeth and improper healing of the nerves was "possible," the need for maintenance at relatively long intervals did not constitute serious disfigurement, or impairment of the victim's health or the functioning of his teeth. While a likelihood of adverse effects on appearance, functionality, or overall health may qualify as serious physical injury, the mere possibility of such consequences did not.

People v Rosado, 88 AD3d 454 (1st Dept 2011)

Court Erred in Setting Aside Defendant's Gang Assault Conviction

Supreme Court granted defendant's motion to set aside the verdict convicting defendant of gang assault in first and second degrees and dismissed the convictions. The

Appellate Division reversed. The motion court erred in setting aside defendant's gang assault conviction on the ground that the evidence of serious physical injury was insufficient where defendant moved for a trial order of dismissal, but did not challenge the sufficiency of the evidence that the victim sustained a serious physical injury. However, the court's ruling on the merits was correct. The fracture to the orbital socket of the victim's eye was surgically repaired and the victim suffered no lasting ill effects beyond an occasional twitching of his eye. Because of the procedural posture of the case, the Appellate Division could not affirm on the merits and had to await a post-sentencing appeal by defendant to determine whether to consider this claim under its interest of justice or weight of the evidence review powers.

People v Sudol, 89 AD3d 499 (1st Dept 2011)

Motion to Suppress Affirmed; **Statements Made Before Miranda Not Triggered by Police Questioning**

The Supreme Court properly denied that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials. The evidence presented at the suppression hearing supported the Supreme Court's determination that the defendant's spontaneous statements, made after a police officer arrested him but before *Miranda* warnings were administered, were not triggered by any police questioning or other conduct which reasonably could have been expected to elicit a statement from him.

People v Oliver, 87 AD3d 1035 (2d Dept 2011)

Motion to Suppress Granted; **Vehicle Stop Was Not Justified**

The defendant's motion to suppress physical evidence together with statements made by the defendant which resulted from a vehicle stop should have been granted. The record revealed that the Supreme Court credited the defense testimony to the effect that the taillights on the defendant's vehicle were operating properly at all relevant times. The Appellate Division found that the record supported this determination. Accordingly, the Supreme Court erred in further concluding that the arresting officer acted reasonably in stopping the vehicle based on the inoperability of the one its taillights. The officer could not have reasonably have been mistaken as to what she saw, and there was no reasonable basis for her belief that the defendant committed a traffic infraction. Judgment reversed.

People v Anokye, 88 AD3d 736 (2d Dept 2011)

Motion to Suppress Denied; Police Officers' Pursuit Was Justified

The defendant's motion to suppress physical evidence which resulted from the pursuit of the defendant by two police officers was properly denied. Notwithstanding the defendant's contention that the officers chased him even though they lacked a "reasonable suspicion that [he] was involved in a felony or misdemeanor" the testimony adduced at the suppression hearing reflected that the officers' pursuit of the defendant after he dropped what appeared to be a drug packet and fled their presence immediately thereafter was justified.

People v Preston, 88 AD3d 748 (2d Dept 2011)

Police Had Reasonable Suspicion to Pursue the Defendant

Here, the People appealed from an order of the Supreme Court which granted the defendant's motion which was to suppress physical evidence. Upon reviewing the record, the Appellate Division reversed the court's order. The defendant's actions of breaking away from a group and running from police officers with one hand pinned to his waist, only moments after the police heard gunshots in the area, were sufficient to give rise to a reasonable suspicion that he was engaged in criminal activity. Consequently, because the police had reasonable suspicion to pursue the defendant, the gun that the defendant discarded during the pursuit was not a product of improper or illegal police conduct. Accordingly, the Supreme Court should have denied that branch of the defendant's omnibus motion which was to suppress the handgun recovered by the police.

People v Buie, 89 AD3d 748 (2d Dept 2011)

CUSTODY AND VISITATION

No Appeal Lies From Order Based on Consent

Family Court's order allowed father to contact child by mail, letters and gifts and child was free to telephone father if she wished. The Appellate Division affirmed. The father's attorney consented to the order after meeting with the father and ascertaining his position. No appeal lies from an order based on consent. In any event, visitation with the father was not recommended by the expert and the child expressed fear of the father. Thus, the court had enough information to make a best interest determination without holding a hearing.

Matter of Reynaldo M. v Violet F., 88 AD3d 531 (1st Dept 2011)

Petition to Modify Requires Evidentiary Hearing

Mother filed petition to modify father's unsupervised visitation with parties' children, alleging father had become increasingly verbally, emotionally and physically abusive towards the children, and requested that father's visits be supervised. The father disputed the allegations. Family Court held a *Lincoln* hearing but determined it did not need to hold a fact-finding hearing to determine what was in children's best interest, and ordered supervised visits for father. The Appellate Division reversed, finding that the court was required to hold an evidentiary hearing to determine whether there had been a subsequent change in circumstances and whether it was in children's best interest to modify visitation.

Matter of Santiago v Halbal, 88 AD3d 616 (1st Dept 2011)

Father's Acts of Domestic Violence Results in Supervised Visitation

Family Court held father had committed repeated acts of domestic violence against mother and child, which included assault in the second and third degrees, harassment in the first and second degrees, menacing in second degree and disorderly conduct, and this evidence proved by a preponderance of the evidence that it was in child's best interest to modify father's visitation with child from unsupervised to supervised. The Appellate Division affirmed. The court's decision had a sound and substantial basis in the record.

Matter of Marrero v Johnson, 89 AD3d 596 (1st Dept 2011)

Prolonged Absence and Lack of Involvement in Child's Life Warranted Finding of Extraordinary Circumstances

Family Court awarded maternal aunt custody of child. The Appellate Division affirmed. The mother's contention that the court failed to conduct a full evidentiary hearing because she did not testify was without merit because mother's counsel rested after the aunt's case. In any event, any error was harmless because the mother had not lived with child since 1997 or 1998, had no contact at all with child during the years 2006 and 2007, and the child and aunt had a close and loving relationship. Thus, the mother's prolonged absence combined with her lack of involvement in the child's life warranted a finding of extraordinary circumstances.

Matter of Shemeek D.v Teresa B., 89 AD3d 608 (1st Dept 2011)

Mother's Minimum Contact with Child and Unstable Life Supports Finding of Extraordinary Circumstances

Family Court dismissed mother's custody petition against grandmother based upon mother's minimal contact with the child for several years and her inability to provide and "safeguard the child's mental and developmental needs." The Appellate Division affirmed. The court's finding of extraordinary circumstances and that it was in child's best interest to remain with grandmother had a sound and substantial basis in the record.

Matter of Natasha Latoya T-M.v Michael Devonne M., 90 AD3d 536 (1st Dept 2011)

Family Court Properly Awarded Residential Custody to the Mother

Upon reviewing the record, the Appellate Division affirmed the Family Court's award of joint legal custody to the mother and father, and residential

custody to the mother. The mother was available to care the subject child and was able to provide for the child's emotional and intellectual development, and had been the primary care giver since the child's birth.

Matter of Cardozo v Defreitas, 87 AD3d 1138 (2d Dept 2011)

Antagonism Between Parents Insufficient Basis for Modification of Custody Arrangement

The mother appealed from an order of the Family Court which granted the father's petition to modify a prior order of the same court so as to award him sole legal and physical custody of the subject child, with visitation to her. Here, the father's petition for a change in custody was based primarily on the fact that the subject child had come to live with him after the mother lost her job and home. However, the mother testified that by the time of the hearing, she had found employment and housing. The Family Court stated in its determination that it was "unfortunate" that the mother "had to move," leading the father to petition for custody, but it otherwise failed to mention any of the relevant factors in deciding to modify the existing custody arrangement so as to award the father sole legal and physical custody of the subject child. Instead, the Family Court's determination was based exclusively on the fact that there was acrimony between the parties. While joint custody may be inappropriate where there is antagonism between the parents and they have demonstrated an inability to cooperate on matters concerning the child. Any antagonism and inability to cooperate did not provide a basis for modifying the existing custody arrangement so as to award the father sole legal and physical custody. The Court further noted that, although their authority in custody matters is as broad as that of the Family Court so that they can make their own determination on custody, the record was not sufficiently complete for them to do so. The matter was heard in a single day, with the only testimony coming from the parents, each leveling allegations against the other and, yet, the Family Court made no findings of credibility. Consequently, given the scant record, the lack of credibility findings, and the fact that the child had been living with the father for nearly two years, the matter was remitted to the Family Court, for a new hearing and determination. The Appellate Division further directed that on remittal, the Family Court must appoint an independent forensic expert to examine and perform a full evaluation of the parents and the child, and hold an in camera hearing with the child in order to ascertain his wishes.

Matter of Parliman v Labriola, 87 AD3d 1144 (2d Dept 2011)

Power of Parent Coordinator Properly Limited

In a matrimonial action in which the parties were divorced by judgment the plaintiff former wife appealed from an order of the Supreme Court, which, inter alia, in effect, granted that branch of the defendant former husband's motion which was to appoint a parenting coordinator to assist the parties in implementing the terms of the existing child custody and visitation arrangement provided for in the parties' stipulation dated October 22, 2007. Contrary to the appellant's contention, the parent coordinator's power is properly limited to implementing the terms of the existing child custody and visitation arrangement provided for in the parties' stipulation, subject to the Supreme Court's oversight. Likewise, although the parenting coordinator is empowered to issue a written decision resolving a conflict where he is unable to broker an agreement between the parties, the Supreme Court's order also provides that the parties may seek to have the parenting coordinator's decision so-ordered by the Supreme Court and that they "retain their right to return to Court and seek a modification of their parenting plan at any time." Accordingly, the Supreme Court properly limited the role of the parenting coordinator and properly provided that his resolutions remain subject to court oversight.

Silbowitz v Silbowitz, 88 AD3d 687 (2d Dept 2011)

Mother's Allegations Re: Domestic Violence Were Not Supported by Preponderance of the Evidence

The Family Court's determination that the child's best interests would be served by awarding sole custody to the father had a sound and substantial basis in the record. Based on the parents' testimony and credibility, the Family Court found, inter alia, that the father was more willing than the mother to assure meaningful contact between the child and the other parent. Contrary to the mother's contention, the Family Court did not improperly fail to consider her allegations of domestic violence, as the Family Court, in effect,

resolved the parents' conflicting testimony in favor of the father and, accordingly, the mother's allegations were not supported by a preponderance of the credible evidence.

Matter of Gasby v Chung, 88 AD3d 709 (2d Dept 2011)

Family Court Erred in Refusing to Exercise Temporary Emergency Jurisdiction over Family Offense Petition

Contrary to the mother's contention, the Family Court properly granted that branch of the father's motion which was to dismiss her petition for custody of the parties' son for lack of subject matter jurisdiction. Here, the Family Court properly determined that New York was not the subject child's home state and, therefore, that New York did not have jurisdiction over this custody dispute (see Domestic Relations Law § 76). However, the Family Court erred in refusing to exercise temporary emergency jurisdiction over the family offense petition (see Domestic Relations Law §76-c) and in summarily dismissing the family offense petition upon its finding that the allegations contained in the mother's family offense petition were insufficient to sustain a family offense. The Family Court in this instance improperly determined that the mother failed to demonstrate that the father possessed the intent required to sustain any of the family offenses alleged in the petition, as it did so without the benefit of a hearing. Based on the foregoing, that branch of the father's motion which was to dismiss the family offense petition was denied and the matter was remitted to the Family Court for a fact-finding hearing and a determination of the family offense petition with respect to the allegations contained therein.

Matter of Jablonsky-Urso v Urso, 88 AD3d 711 (2d Dept 2011)

Although Family Court Lacked Exclusive, Continuing Jurisdiction, it Did Have Jurisdiction for an Initial Child Custody Determination Pursuant to DRL §76 (1)(a)

The Family Court correctly determined that it lacked exclusive, continuing jurisdiction pursuant to DRL § 76-a (1), since neither the subject child nor the father maintained a significant connection with New York, and substantial evidence regarding the child's present and future welfare was no longer available in this State (*see* DRL §76-a [1] [a]). However, the record revealed that New York was the child's "home state" within the six months immediately preceding the commencement of this proceeding, and the mother continued to reside in this State (*see* DRL §76 [1] [a]). Thus, the Family Court had jurisdiction to hear the mother's cross petition for modification pursuant to DRL § 76-a (2) since it would have had jurisdiction for an initial child custody determination" under DRL §76 (1) (a). Accordingly, the matter was remitted to the Family Court for further proceedings on the cross petition.

Matter of Knight v Morgan, 88 AD3d 713 (2d Dept 2011)

Family Court Improperly Conditioned Mother's Application for Resumption of Visitation upon Her Compliance with Treatment

Here, the Family Court's determination that it was in the child's best interests to suspend supervised visitation and prohibit all contact with the mother had a sound and substantial basis in the record. The mother, by her own admission, violated the express terms of the Family Court's previous order, which only permitted visitation supervised by designated individuals, by having unsupervised contact with the child at two separate little league baseball games. Moreover, the mother contributed to certain events at a recent therapeutic visit which adversely affected the child and undermined the progress of the therapeutic visitation, as demonstrated by testimony from the father, testimony from the mother, and a letter from a licensed clinical social worker who had been counseling the child. However, a court may not order that a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights, but may only direct a party to submit to counseling or treatment as a component of visitation. Here, the Family Court improperly conditioned the mother's application for resumption of visitation upon her compliance with treatment, including medication, recommended by a mental health professional. However, the Family Court properly directed the mother to submit to a mental health evaluation for use in any future determination of visitation. Accordingly, the order was modified by deleting the provision that conditioned the mother's application for resumption of visitation upon her compliance with treatment, including medication,

recommended by a mental health professional.

Matter of Smith v Dawn F.B., 88 AD3d 729 (2d Dept 2011)

Relocation to Georgia Permitted

The father appealed from an order of the Family Court which granted the mother's petition to modify a prior order of visitation of the same court, so as to allow her to relocate to Georgia with the subject child. The Family Court's determination had a sound and substantial basis in the record. The mother sought permission to relocate to Georgia with the subject child and her extended family. The mother noted that, with the exception of a brief period during which she lived with the father, she has always lived with her extended family and relied on their assistance. Without their support, the mother, a cosmetologist, would have to work two or three jobs and place the child in daycare. The move would allow the child to continue the relationships he had formed with his extended family since having moved in with them in March 2004. The father, who had not been fully exercising his visitation rights, was not intimately involved in the child's life, and was a five-hour car drive away from him, would have been able to maintain a meaningful relationship with the child through the post-relocation visitation schedule established by the Family Court. In addition, the position of the attorney for the child was that relocation was in the best interests of the child, which, since not contradicted by the record, was entitled to some weight. Accordingly, the mother's petition was properly granted.

Matter of Hamed v Hamed, 88 AD3d 791 (2d Dept 2011)

Family Court Conducted No Inquiry to Determine Whether Father Was Waiving Right to Counsel

At the commencement of a hearing to determine whether the father should have only supervised visitation with his daughter, the father's attorney asked to be relieved, and the father consented to her discharge. The father asked that new counsel be appointed, but the Family Court declined to do so, and the father represented himself. The father, as a respondent in a proceeding pursuant to Family Court Act article 6, had the right to be represented by counsel (see FCA §262). Here, the Family Court conducted no inquiry at all to determine whether the father was waiving the right to counsel. Requiring the father to try the matter without the benefit of counsel impermissibly placed the Family Court's interest in preventing delay above the interests of the parents and the child, and violated the father's right to be represented by counsel. The Appellate Division concluded that the deprivation of a party's fundamental right to counsel in a custody or visitation proceeding was a denial of due process which required reversal, regardless of the merits of the unrepresented party's position. The matter was remitted for a new hearing and determination.

Matter of Rosof v Mallory, 88 AD3d 802 (2d Dept 2011)

Record Insufficient to Determine Wether the Best Interests of the Child Warranted a Modification of Child's Custody from Nonparent to Birth Mother

In July of 2009 the Family Court concluded, after a hearing, that extraordinary circumstances existed sufficient to support awarding custody of the subject child to a nonparent. In September of 2009 the mother filed a petition to modify that determination based on a change in circumstances. At a hearing on the petition the Family Court limited the testimony to the facts occurring between the July 2009 date of the extraordinary circumstances determination and the mother's September 2009 petition, and then denied the petition, finding that the mother had not established a change in circumstances. On appeal, the Appellate Division found that the Family Court had properly limited the testimony at the hearing to the facts occurring between July 2009 and September 2009, and properly found that the mother had not established a change in circumstances between those dates. However, under the particular circumstances of this case the Appellate Division found that it could not ignore the additional time that had passed since the filing of the mother's modification petition, including the time that passed during the appellate process. It therefore remitted the matter to the Family Court to determine whether current circumstances supported the child's continued custody with the nonparent.

Matter of Fleischman v Hall, 88 AD3d 1000 (2d Dept 2011)

Family Court Had Sufficient Information to Award Custody Without a Hearing

The mother appealed from an order of the Family Court, dated July 19, 2010, which, without a hearing, awarded custody of the parties' children to the father. The record revealed that the Family Court entered a finding of child neglect against the mother upon the mother's admission, at a fact-finding hearing on September 18, 2008, to allegations that she tested positive for marijuana, obtained Xanax from a neighbor, and used both Xanax and marijuana on a regular basis. Additionally, the Family Court conducted a dispositional hearing which commenced on December 3, 2008, and concluded on April 6, 2010. The evidence adduced at the dispositional hearing supported the court's finding of the mother's continued drug use, and additional evidence demonstrated the mother's history of mental health issues, inappropriate conduct during visitation, and inappropriate conduct in making, or having her daughter make, false allegations against the father. Further, at the hearing, the caseworker for the Administration for Children's Services (ACS) recommended that the children be released to the custody of the father. Moreover, a psychologist, who conducted a mental health examination, opined that the mother was in need of additional services prior to reunification. In an order of disposition dated April 8, 2010, the Family Court, inter alia, released the subject children to the care of the father under the supervision of ACS for a period of six months. Subsequently, the Family Court awarded custody to the father pursuant to article 6 of the Family Court Act without conducting a hearing. Contrary to the mother's contentions, the Family Court possessed adequate relevant information to enable it to make an informed decision as to the best interests of the children without conducting a hearing, and the record supports a finding that it was in the children's best interests for custody to be awarded to the father. Order affirmed.

Matter of Luis O. v Jessica S., 89 AD3d 735 (2d Dept 2011)

Error to Dismiss Petitions Without a Hearing

The mother appealed from orders of the Family Court which, without a hearing, granted the motion of the attorney for the children to dismiss the mother's petition to modify the custody order, and dismissed the mother's petitions alleging that the father willfully violated certain provisions of the custody order and seeking to modify that order. The Appellate Division, held that the mother was entitled to a hearing on her petitions alleging that the father willfully violated provisions of the parties' custody order. In seeking to modify that order, the mother alleged that the father willfully violated the custody order by failing to consult her about a change in the dosage of their daughter's medication and by administering the changed dosage over the mother's objection. Additionally, in support of a modification of custody, the mother alleged, as a change in circumstances, that their daughter had been hospitalized in a psychiatric ward for suicidal ideation, and their son had been cutting himself and had not been attending therapy on a regular basis. Those allegations were not disputed by the father. The Appellate Division held that it was error for the Family Court to dismiss the petitions without conducting a hearing and setting forth the reasoning for those determinations.

Dana H. v. James Y., 89 AD3d 844 (2d Dept 2011)

Mother Awarded Sole Legal Custody; **Father Directed to Attend Anger Management Class**

The Appellate Division affirmed the Family Court's order which granted the mother's petition to modify the custody provisions of the parties' judgment of divorce, so as to award the mother sole legal custody of the parties' children, and directed the father to attend a certain anger management class. Contrary to the father's contention, the issue of legal custody was properly before the Family Court. In the mother's petition, by seeking "final say regarding any major decisions" involving the parties' children, she effectively sought sole legal custody. Here, a sound and substantial basis existed in the record for the Family Court's determination that the relationship between the parties had become so antagonistic that they were unable to cooperate on decisions regarding the children, and that it was in the best interests of the children for the mother to have sole legal custody of them. Further, a sound and substantial basis existed in the record for the Family Court's direction, as part of its order modifying the custody arrangement, that the father attend a certain anger management class, as it was in the children's best interests that he do so.

Conway v Conway, 89 AD3d 936 (2d Dept 2011)

Father Failed to Demonstrate a Sufficient Change in Circumstances

In this case, the Family Court improperly considered testimony regarding events alleged to have occurred prior to the parties' stipulation of settlement. The Appellate Division noted, however, that even if the testimony had been considered, the father did not demonstrate that there was a sufficient change in circumstances such that modification of the custody and visitation arrangement was in the best interests of the subject child. Accordingly, the Family Court erred in granting the father's petition to modify a prior order of custody and visitation so as to award the father sole legal and physical custody, and, thereupon, terminating his child support obligation on that basis.

Matter of DiCiacco v DiCiacco, 89 AD3d 937 (2d Dept 2011)

Mother Failed to Offer Any Proof That She Was Unable to Appear for Hearing

The mother appealed from an order of the Family Court, which, after a hearing, granted the father's petition to modify a custody order so as to award him sole custody of the parties' children. The record revealed that although the mother failed to appear in person at the hearing, her counsel appeared on her behalf and participated in the hearing. The record further indicated that the Family Court set the hearing date more than 60 days in advance and issued a trial and scheduling order setting a date certain. Given the mother's failure to offer any proof that she was unable to attend the hearing because she was in an inpatient drug treatment program, and particularly in light of her history of failing to provide such proof, the court providently exercised its discretion in denying her attorney's request for an adjournment. Moreover, the court offered the mother the opportunity to testify telephonically on the second day of the hearing if she provided proof that she was in an inpatient treatment program, but she failed to avail herself of the court's offer. Accordingly, the court providently exercised its discretion in holding the hearing in her absence. Order affirmed.

Matter of O'Leary v Frangomihalos, 89 AD3d 948 (2d Dept 2011)

Petition Properly Dismissed on Ground of Forum non Conveniens

The father appealed from an order of the Family Court which dismissed his petition for custody of the subject child on the ground of forum non conveniens. Here, the Family Court providently exercised its discretion in declining jurisdiction over the father's custody petition and determining that the courts in Morocco were a more appropriate forum (see DRL § 75-d [1]; § 76-f [1]). Although the child, who is now more than two years old, was born in New York, he has lived in Morocco since he was three months old, and very little information regarding him exists in New York. Moreover, the Moroccan courts have significant familiarity with the family and the pending issue as they have already determined the mother's divorce proceeding—which included custody, child support, maintenance, and visitation issues—and the father participated in those proceedings through a Moroccan attorney. Accordingly, the Family Court order properly, in effect, dismissed the father's petition for custody of the subject child on the ground of forum non conveniens.

Matter of Mzimaz v Barik, 89 AD3d 948 (2d Dept 2011)

Respondent Father Denied Meaningful Representation

DSS filed neglect petition against father of six children, two by girlfriend and four by wife. After fact-finding hearing, where only father, girlfriend and wife testified, court found neglect against father based on his commission of domestic violence against the mothers in presence of children, and use of illegal drugs in household with children present. Counsel for father filed notice of appeal. Thereafter, joint dispositional and contempt hearing for father's violation of earlier order of protection was held. Family Court found father had violated order of protection and issued open-ended stay away on behalf of girlfriend and children. Family Court also granted DSS's oral motion to relieve it of obligation to make diligent efforts to re-unite parent and child. Father's attorney did not file notice of appeal in these matters. The Appellate Division reversed, holding all proceedings and orders, from fact-finding onwards were invalid as father was denied meaningful representation of counsel, court had failed

to require DSS's motion regarding diligent efforts to be in writing nor did it make finding of fact to support its conclusion that DSS's witnesses were credible. In this case, father's counsel failed to make opening statement, failed to cross-examine DSS's witnesses on children's exposure to father's neglectful behavior, counsel's questions to wife and girlfriend regarding domestic violence were "tasteless and irrelevant, even prurient", made no motions at close of DSS's case, failed to submit proposed findings of fact and conclusions of law as directed by court, failed to object to court's decision that no diligent efforts needed to be made. Additionally, in response to father's request for new lawyer, counsel sent letter to father containing"a not-so-subtle threat" that if father were to get new lawyer he would not cooperate with that lawyer, and counsel "flaunted that he had achieved financial success...and did not need" father's case.

Matter of Jaikob O., 88 AD3d 1075 (3d Dept 2011)

Evidence Mother Smoked Not Sufficient Change in Circumstances Without Showing Mother Smoked in Presence of Asthmatic Child

Father and mother of one child consented to an order of joint legal custody with primary, physical custody to mother and visitation to father. Thereafter father moved to another county and upon parties consent, court modified order with regard to father's visitation rights with child. Two months later father filed to modify custody, and after fact-finding hearing, court continued joint legal custody but transferred primary physical custody to father with parenting time to mother three week-ends per month, with father responsible for transportation. Both parents appealed. The Appellate Division reversed holding that although mother and mother's babysitter smoked, child was asthmatic, and doctor testified asthmatic child should not be exposed to smoke, there was no evidence that mother and babysitter smoked in child's presence or if mother smoked prior to date of filing of father's modification petition.

Matter of Clark v Ingraham, 88 AD3d 1079 (3d Dept 2011)

Best Interests of Children to Limit Incarcerated Father's Visitation Rights

Mother was awarded custody of the parties two children while father, on probation from criminal conviction, was given limited right to visit children two hours each week. After three months of exercising visitation, father stopped seeing children for substantial period of time, and was then re-arrested for violating terms of probation. While incarcerated, father filed petition seeking access to children's medical and school records, and right to telephone and correspond with children. Mother objected arguing father was unstable, irresponsible, had never paid child support, and children had suffered emotionally when father had suddenly stopped visiting them. Family Court dismissed father's petition but allowed him to correspond with children four times per year. Father appealed. The Appellate Division affirmed finding court's decision to limit father's access was based on sound and substantial basis in the record and provided a good balance as father could try to establish a meaningful relationship with them through correspondence without causing children further emotional harm if he once again decided to remove himself from their lives.

Matter of Russell v Simmons, 88 AD3d 1080 (3d Dept 2011)

Prospective Release From Prison Does Not Establish Change in Circumstances

Father of one child was sentenced to 12-year prison sentence for rape and sodomy two years after child's birth. Twelve years later he was released and re-incarcerated due to parole violation. Thereafter both parents and maternal grandmother agreed to joint legal custody between mother and maternal grandmother with primary, physical custody to grandmother. Father was allowed to communicate with child. Shortly thereafter father filed to modify order seeking visitation with child. After fact-finding hearing, court dismissed father's petition finding no change in circumstances. Father appealed. The Appellate Division affirmed stating father had failed to establish relationship with child had developed as he had never had significant contact with child and his argument that he would be released from prison in 36 months did not constitute change in circumstances.

Matter of Bunger v Barry, 88 AD3d 1082 (3d Dept 2011)

Right to Full and Comprehensive Hearing on Issues

Parents of one child had joint legal custody with primary, physical custody to mother and visitation to father. Thereafter DSS filed neglect proceeding against mother and her boyfriend alleging boyfriend had been driving drunk with mother and child in car. Father filed to modify custody petition, seeking primary physical custody of child. At fact-finding hearing, father presented evidence that boyfriend had one- year no contact order of protection against him on behalf of child, then moved for summary judgment which court granted and awarded him custody of child. Mother appealed. The Appellate Division reversed and remitted matter, finding mother's due process right were violated as she was entitled to a full and comprehensive hearing on the issues. The Appellate Division found confusing Family Court's determination that it would be impossible to award custody to mother. Boyfriend had stated on cross-examination he would be willing to move out of mother's home while order of protection was in effect.

Matter of Jeffrey JJ. v Stephanie KK., 88 AD3d 1083 (3d Dept 2011)

Cannot Terminate Untreated Sex Offender's Parenting Time Without Determining Whether it's in Child's Best Interest

Father, a level 1 sex offender, and mother had two children with mother having primary physical custody and father limited visitation. Father petitioned for more parenting time and mother petitioned to have his visitation terminated. Court ordered probation investigation and psychological evaluation. Parents stipulated to discontinue father's petition and later mother's petition was also discontinued. Father filed petition seeking enforcement and modification of the original order of custody. Mother again cross-petitioned to terminate father's visitation and moved for summary judgment. Without a hearing, Family Court granted mother's petition, terminated father's visitation on grounds that he was an untreated sex offender, he had harassed mother and absented himself from children's lives. Father appealed. The Appellate Division reversed and remitted matter, finding an evidentiary hearing was necessary to determine whether it was in children's best interest to terminate father's visitation, whether or not father had ever been ordered to complete sex offender treatment, whether such treatment or visitation with father would harm children and whether or not mother was ever harassed by father.

Matter of Carl v McEver, 88 AD3d 1089 (3d Dept 2011)

Necessity of *Lincoln* Hearing Within Discretion of Family Court

Divorced father of three children seeking physical custody, unsuccessfully petitioned to modify custody order. Mother had physical custody except for brief period when father had custody of oldest child. Father alleged mother had given son alcohol and drank with him. During fact-finding hearing Family Court did not allow father to bring up issues already raised and reviewed in previous petition, did not grant *Lincoln* hearing because court noted during previous *Lincoln* hearing, child had been "very fragile and had a meltdown". Additionally, father's therapist, mother and attorney for children all stated child was upset and did not want to be involved in court proceedings. On appeal the Appellate Division affirmed court's decision, finding there was no abuse of discretion in limiting evidence at hearing or failing to hold a *Lincoln* hearing as it was within the discretion of the court.

Matter of DeRuzzio v Ruggles, 88 AD3d 1091 (3d Dept 2011)

Mother Provided More Stability, Consistency and Guidance

Parents of one child entered into consent order where parents shared joint legal custody, alternating physical custody on a weekly basis. Prior to child entering kindergarten, both parents filed modification petitions as they lived in different school districts. After hearing, Family Court granted custody to mother and ample visitation to father, finding that while both were loving parents, mother was able to offer more stability, consistency and guidance than father as she had steady job and home, child had own room, child had close relationship with grandparents, mother had enrolled child in pre-k and demonstrated willingness to facilitate

relationship between child and father. Father however had no steady employment, lived in his sister's home, discussed court matters with child making her upset and child did not attend pre-k when she was with him but stayed in the home all day with the adults. Father appealed and Appellate Division affirmed finding court's decision had sound and substantial basis in record.

Matter of Wilson v Hendrickson, 88 AD3d 1092 (3d Dept 2011)

Neither Hearing Nor Consent of Parties Necessary for Court to Make Custody Determination

Both mother and father of two children filed for custody. Prior to the filings, parties had initially lived in maternal grandmother's home but father had relocated to paternal grandmother's home. At initial appearance, the parents, maternal and paternal grandmothers and parties' attorneys appeared. Family Court assigned counsel for children and issued temporary joint custody order with primary physical custody to mother and visitation to father, which was extended at the next appearance at father's request. At final appearance, with all parties, attorneys and grandparents present, court issued final order basing it on the temporary order. Mother appealed arguing court should either have held hearing or formally placed a stipulation on the record with consent of parties. The Appellate Division affirmed stating court had sufficient information before it to render its decision as all parties attended court every time and court invited and received input from all. Additionally, mother never requested a hearing.

Matter of Cole v Cole, 88 AD3d 1104 (3d Dept 2011)

No Compelling Reason to Overcome Presumption Visitation in Best Interest of Child

Parents of one child divorced and stipulated to joint legal custody with primary physical custody to mother and visitation to father in Florida. Thereafter Judicial Hearing Officer granted mother 's petition and modified father's visitation, directing that it take place in New York. Later mother filed family offense and custody modification petitions against father requesting suspension of father's visitation rights based on his harassing behavior. Father cross-petitioned to have visitation with child in Florida. Family Court dismissed the modification petitions, found father had committed family offense and ordered visitation for father in New York with permission to father to petition court after certain date for visitation in Florida. Mother appealed. The Appellate Division affirmed. While father's behavior was disturbing, such as putting child in middle of conflict with mother, threatening child he would never see him again if child didn't visit him in Florida, making angry remarks to mother, not working with social worker to improve relationship with child, Court held it would be "drastic" to suspend all visitation. In a footnote, the Appellate Division noted that court should not have betrayed child's confidences from *Lincoln* hearing even though court's intent was to benefit child.

Matter of Susan LL. v Victor LL., 88 AD3d 1116 (3d Dept 2011)

Grandmother Had Extraordinary Circumstances to Modify Custody

Child lived with maternal grandmother from birth to age four. When child was three mother was given legal custody provided she continued to live with grandmother. When child was five, court transferred custody to father as mother was found unfit due to mental health issues. A month later grandmother filed for custody. After fact-finding and *Lincoln* hearings, court found extraordinary circumstances based on fact that father had inappropriately touched child several times. Court held it was in child's best interest to live with grandmother as father had sexually abused her, child had lived with grandmother for four years, grandmother had stable home, stable employment whereas father had abruptly quit his job and employer suspected him of committing theft. Additionally, when child was in father's care her clothes were dirty, she was unclean and smelled of urine. Appellate Division gave due deference to court's credibility determinations and affirmed decision.

Matter of Daphne OO. v Frederick QQ., 88 AD3d 1167 (3d Dept 2011)

Mother's Alienating Behaviors Results in Custody to Father

Parents of two children divorced and entered into agreement, which was incorporated but not mergedinto

divorce decree, providing for joint legal and physical custody. Few years later, parties filed several article 6 and 8 petitions against each other. They eventually consented to daughter living with father and son living with mother. Two months later father filed for physical custody of son. After trial and having heard from both children, court continued joint legal custody, but granted father physical custody of son and visitation to mother. Mother appealed arguing court had failed to find a change in circumstances since entry of last custody agreement. The Appellate Division held while court did not specifically make such a finding it had authority to conduct independent review of record and the record amply supported modification determination. Mother had engaged in conduct aimed to harm father-son relationship. She had refused father mid-week visits with son, unnecessarily involved police in matter, sought to align son with her in dispute with father. Based on these behaviors, the Appellate Division held court had sound and substantial basis to modify order.

Matter of Barrington v Barrington, 88 AD3d 1171 (3d Dept 2011)

Severe Punishment of Children Results in Custody Modification

Parents were awarded joint legal custody of two children with primary physical custody to mother and visitation to father. Father filed petition seeking primary physical custody and mother cross petitioned seeking supervision of father's visitation. After hearing, court granted father's petition and dismissed mother's. Mother appealed. The Appellate Division held court had sound and substantial basis to grant father's petition. Mother punished children by putting liquid dish soap in their mouths, made child stand in corner for hours at time, refused to allow child to speak for several days if not a week imposing monetary penalty each time child said a word. Additionally mother neglected children's dental care, drove children in car without driver's license and caused children to be late for school. Giving due deference to court's credibility determinations, the Appellate Division held there was sound and substantial basis in record to modify custody.

Matter of Brown v Brown, 88 AD3d 1174 (3d Dept 2011)

Mother's Violation of Order a Factor in Determining Best Interest

Family Court granted parents joint legal custody of their three children with primary physical custody to mother and parenting time to father. A year or so later father filed show cause order requesting court to direct mother to keep children away from her boyfriend whom he alleged was a drug abuser. Court granted order. Thereafter both parties filed modification petitions. After hearing, court granted father sole legal and physical custody. Mother appealed. The Appellate Division affirmed finding that court had considered mother's violation of the order to show cause in addition to other factors in determining that it would be in children's best interest to modify order.

Matter of Stalker v Stalker, 88 AD3d 1177 (3d Dept 2011)

Propriety of Visitation Within Sound Discretion of Family Court

Incarcerated father petitioned for visitation with three year old child. After hearing, court granted father visitation twice per year at prison facility, which was nine hour round trip from where child and mother resided, and allowed father to send child one letter per month. Father appealed. The Appellate Division affirmed finding court had sound basis as it had considered child's age, nature of relationship with father, distance of prison and costs of transportation in issuing its decision.

Matter of Miller v Fedorka, 88 AD3d 1185 (3d Dept 2011)

Best Interest of Children to Award Sole Custody

Parents of two children had joint legal custody with primary physical custody to mother and parenting time to father. Mother successfully petitioned to modify joint custody to sole and father's parenting time was continued. Father appealed. Appellate Division affirmed order. Parties' relationship had significantly deteriorated, they were unable to communicate and cooperatively make parenting decisions, father was verbally abusive to mother which resulted in mother only communicating with him in writing, and father had changed his phone number without informing mother.

Father's parenting was also an issue as he failed to give child, who had behavioral and medical issues, his prescribed medication for two months until he was court ordered to do so, and under father's supervision one child took wrong medication. Father also allowed children to watch pornographic movies and made unfounded reports against mother to CPS. Based on these and other findings court had sufficient grounds to modify.

Matter of Spiewak v Ackerman, 88 AD3d 1191 (3d Dept 2011)

No Change in Circumstances to Modify

Divorced parents of one child stipulated to joint legal custody. Thereafter mother filed to modify seeking sole legal custody on grounds that two physicians had recommended tonsillectomy for child but father was opposing surgery. Mother sought court permission for surgery. Family Court did not hold hearing but modified joint custody order allowing mother sole decision making power with regard to surgery and all future medical treatment, subject to advanced notice to father of any non-emergency treatment involving general anaesthesia. Father appealed. By the time appeal was heard, tonsillectomy had been performed and issue was moot. However, Appellate Division reversed court's order regarding future medical treatment as there was no showing of change in circumstances to justify such modification.

Moore v Sloan, 88 AD3d 1193 (3d Dept 2011)

Mother's Interference With and Manipulation of Father-Child Relationship Results in Sole Custody to Father

Unmarried parents of one child separated. Mother had a daughter from prior relationship. Mother filed for sole custody and father cross-petitioned for joint legal and primary physical. Mother alleged child came back dirty from visits with father and father had inappropriately touched her daughter. Mother was given temporary custody and father was granted visitation. After hearing, Supreme Court, Integrated Part, awarded father sole custody and provided mother visitation. Court determined parties were unable to communicate effectively or cooperate to raise child and mother had interfered with father's visitation by denying him access to child when he was only five minutes late. Additionally, among other factors, mother had threatened father with CPS intervention, denied him access to well-baby visits with child's pediatrician although he was providing child's medical insurance, and mother had manipulated her child into alleging father had inappropriately touched her. Appellate Division affirmed.

Matter of Melissa WW. v Conley XX., 88 AD3d 1199 (3d Dept 2011)

Allegations of Parents' Sporadic Visits and Limited Communication With Children Sets Forth Sufficient Grounds for Extraordinary Circumstances Hearing

Parents of two children separated and custody was awarded to mother. Mother left children with maternal grandparents while she attempted to stabilize her life. Four months later, based on mother's consent and father's non appearance in court, Family Court awarded custody to grandparents. Later both parents filed for sole custody but court dismissed petitions based on lack of sufficient change in circumstances. The Appellate Division remanded and re-instated parents' petitions finding court had failed to make "threshold determination regarding existence of extraordinary circumstances" to warrant custody to non-parent. Grandparents then filed custody petition, or in the alternative, sought extensive visitation with children. They alleged children were still residing with them and parents only had sporadic contact and limited communication with children. Family Court dismissed petition without hearing finding that even if facts were proven, they did not establish extraordinary circumstances. The Appellate Division reversed and remitted case, finding that grandparents' petition should not have been
dismissed without holding an evidentiary hearing to determine facts "which, if established, could support a finding of extraordinary circumstances".

Matter of Wayman v Ramos, 88 AD3d 1237 (3d Dept 2011)

Appeal of Custody Order Rendered Moot

Father appealed order of custody giving mother sole custody and right to relocate with children to Georgia. However, by the time appeal was heard, parents

consented to physical custody of both children with father. Matter was rendered moot and dismissed.

Matter of Dickerson v Knox, 89 AD3d 1290 (3d Dept 2011)

Potentially Non-frivolous Issues Present To Pursue Appeal

Father filed to modify joint legal custody order alleging mother and child were living in squalid conditions. After hearing, court awarded father sole custody and provided limited visitation to mother. Mother appealed. Mother's appellate counsel asked to be relieved of representation as there were "no non-frivolous issues". Court disagreed and stated there was at least one potentially non-frivolous issue raised by the attorney for child, who questioned Family Court's propriety in awarding sole legal custody to father**.**

Matter of Michael GG. V Melissa HH., 89 AD3d 1291 (3d Dept 2011)

Court's Failure to Consider Corroborating Testimony Supporting Child's Sex Abuse Allegations Results in Reversal

Maternal grandmother and step-grandfather unsuccessfully attempted to gain custody of three children, two girls and one boy. Thereafter children's lawyer filed modification petition on behalf of children, seeking to them placed in custody of grandparents. While children were in temporary custody of grandparents, oldest girl pulled on her genitals and told grandparents her mother had told her to do it and "tell her how...it feels." Family Court ordered psychological evaluation of girls and psychologist opined oldest girl had been sexually abused by mother. Parents moved for evaluation by another psychologist, which court denied and court also declined to consider psychologist's testimony. Testimony from temporary custody hearing was stipulated into evidence and court held that attorney for child had failed to show existence of extraordinary circumstances, finding that oldest child's statements regarding abuse were uncorroborated. Grandparents and attorney for children appealed. The Appellate Division reversed and remitted matter finding that FCA Article 10 provision regarding abuse are applicable in Article 6 matters where child is alleging sexual abuse, and a "relatively low degree of corroboration is required"and in this case, the psychologists corroboration of the child's allegations would have provided the necessary corroboration. The Appellate Division held court's refusal to consider either the evaluation or the or psychologist's testimony has led to "pernicious" results as court was unable to consider the child's statements or assess her credibility.

Matter of Rawlich v Amanda K., 90 AD3d 1085 (3d Dept 2011)

Court Had Sound and Substantial Basis to Award Custody to Father

Parents of one child divorced and after trial Supreme Court awarded sole, legal custody to father with parenting time to mother. Mother appealed arguing that as she had appeared *pro se,* she had been denied effective assistance of counsel. The Appellate Division held there was no constitutional right to counsel in matrimonial proceedings and mother's decision not to have counsel was an informed and voluntary one and she did not qualify financially for assigned counsel. As to the merits of the case, the Court held that Supreme Court had sound and substantial basis in the record to find it was in child's best interest to award father sole custody. Parties had multiple altercations where police had to be called and were unable to communicate therefore joint custody was not appropriate. Court's finding that father had assumed most of the parenting responsibilities and mother's behavior called into question her parental judgment was supported by the record.

Hughes v Gallup-Hughes, 90 AD3d 1087 (3d Dept 2011)

Boyfriend's Prior Endangering Conviction Insufficient to Modify Custody Order

Parents of two children consented to order of joint legal custody with primary, physical custody to mother and parenting time to father. Two years later the court ordered a FCA §1034 child protective investigation due to allegations of domestic violence by father against mother, and allegations against mother that she allowed rapist boyfriend to be around children. Mother's boyfriend had been convicted of "endangering the welfare of a child" due to having sex with 15 year old

when he had been 22 years old. While DSS was conducting its investigation, boyfriend and mother attended all recommended services and were cooperative. Mental health evaluation, which was done eight months before the 1034 report and which was not included in the record before the Appellate Division, concluded boyfriend could live in mother's home, there was no evidence that his presence would put children at risk, and boyfriend was able to support mother with parenting responsibilities. Mother then filed family offense against father based upon an incident at her workplace and father filed to modify custody requesting boyfriend have no contact with children. Family Court dismissed the family offense petition but granted the modification ordering that boyfriend not be present around children. Mother appealed the custody modification. The Appellate Division reversed finding while there were sufficient grounds, namely the child protective involvement, to constitute sufficient change in circumstances, there was no evidence in the record to support the court's decision to modify. Family Court made no finding that boyfriend posed a danger to children and court's directive to mother that she could file to modify by submitting an evaluation by mental health professional was confusing as the year before, mental health evaluation had determined boyfriend posed no threat to children.

Matter of Christopher T.v Jessica U., 90 AD3d 1092 (3d Dept 2011)

Extraordinary Circumstances Exist to Deny Father Custody

Infant was born addicted to drugs and was released to mother's care after stay in hospital. Father was incarcerated during child's birth. Mother tested positive for drugs and child was placed in foster care, except for brief period of time when she lived with maternal grandmother. Father was released from prison and during a six month period, exercised limited visitation with child. Thereafter father was re-incarcerated due to violation of probation. After release father again exercised limited visitation with child. DSS filed to terminate mother's maternal rights due to repeated drug use. Father appeared in court and was represented by counsel. Father then filed for custody. After hearing, court dismissed father's petition finding extraordinary circumstances existed to divest father of custody. Father's commission of crimes was voluntary which resulted in limited time spent with his daughter, father made no effort, prior to mother's parental rights termination, to petition for custody of child while incarcerated, and failed to offer relatives as potential custodial resources for child. Father was also unfit as he admitted to poly-substance abuse, had attempted suicide, failed to address his mental health issues, failed to take responsibility for his actions, and failed to sever ties with mother with whom he had toxic relationship and who was a threat to his continued sobriety. The Appellate Division affirmed.

Matter of James NN. v Cortland County DSS, 90 AD3d 1096 (3d Dept 2011)

Children's Best Interest to Have Sole Custody Awarded to Mother

Family Court awarded sole custody of two children to mother after hearing. The court held that while both parents are fit and loving it was in the children's best interest to award custody to mother as she had been their primary caregiver, was able to provide proper guidance for them and more likely to foster a relationship between the children and the non-custodial parent. The evidence showed father was strict and controlling, self-centered and distant in his interactions with children and it was very likely that if awarded custody he would denigrate mother in front of the children, will act to alienate children from their mother and would act to cut out mother's family from the children's lives as he had attempted to do in the past. The Appellate Division affirmed.

Matter of Danielle TT. v Michael UU., 90 AD3d 1103 (3d Dept 2011)

Family Court Erred in Determining it Lacked Personal Jurisdiction

Father commenced custody proceedings seeking joint legal custody, alleging mother had relocated out of state with children. Mother appeared *pro se* by telephone in two court appearances but withheld her address stating she and children were fearful of father. Mother's counsel appeared on her behalf at third appearance and raised issue of court's lack of personal jurisdiction. Court set a trial date and ordered mother to appear or

matter would result in default. On day of trial, mother did not appear and court directed mother's counsel to make the jurisdiction argument again and this time court determined mother had not waived service by appearing and dismissed petition with prejudice. Father appealed. The Appellate Division reversed finding pursuant to §76(3) of the UCCJEA which states "physical presence of, or personal jurisdiction over, a party or child is not necessary...to make child custody determination", court erred in dismissing case. Additionally, "court's peremptory resurrection of the [personal jurisdiction] issue" when father believed that jurisdiction was no longer an issue and its failure to afford father to serve mother by alternate means was improper.

Matter of Malek v Kwiatkowski, 90 AD3d 1109 (3d Dept 2011)

Failure to Rebut Effective Service of Order Makes Appeal Untimely

Following custody modification hearing and issuance of order by court, attorney for the children mailed custody order to the parties, along with an affidavit of service. The affidavit of service created presumption that proper mailing was effected which appellant did not rebut. Appellant filed notice of appeal more than 35 days after order was mailed to her, and as such the Appellate Division held appeal was untimely pursuant to CPLR § 2103.

Matter of Kevin C. v Claudia C., 90 AD3d 1161 (3d Dept 2011)

Re-location Issue One Factor in Initial Custody Determination

Mother gave birth to child while husband/father was incarcerated. For 10 months following child's birth, mother drove 3-4 hours one way for total of 10 times, for father to have visits with child. Mother asked for divorce during this time, began dating and became pregnant with boyfriend's child. Mother and child, over father's objection, left NY to be with active duty Marine boyfriend in Virginia. Mother filed for sole custody in NY. Family Court considered issue of relocation along with other factors in determining what was in child's best interest. After the hearing, court awarded sole custody to mother. The Appellate Division affirmed court's "well-reasoned" decision, as it had considered father's relationship with child and his efforts to prepare for child's birth prior to his incarceration. Mother was a nurse who had been gainfully employed and father had provided no financial support. During visit with child at prison, father shook one month old child and made no effort to comfort crying child. While the Court condemned mother's decision to relocate without father's consent, it held decision was supported by sound and substantial basis in the record.

Matter of Sullivan v Sullivan, 90 AD3d 1172 (3d Dept 2011)

Court Erred in Increasing Father's Parenting Time Upon Finding Father Violated Order of Protection

Mother was awarded sole custody and father was given parenting time. Custody order incorporated terms of order of protection which directed father to, among other things, "refrain from assault, harassment, intimidation....or any criminal offense against mother." Mother filed violation petition alleging father had been verbally and physically confrontational with her during visitation exchange. After hearing, Supreme Court held father had wilfully violated custody order and modified father's parenting time which resulted in increased visitation to father. Mother appealed. The Appellate Division reversed finding whether or not court intended this result or whether it was trying to limit parents' contact with each other, the court erred in modifying visitation when the only petition before it was mother's violation petition, which did not request modification of parenting time.

Matter of Revet v Revet, 90 AD3d 1175 (3d Dept 2011)

Mother's Continued Interference With Father's Relationship With Child Results in More Parenting Time to Father

Married parents of one child separated prior to child's birth, and after a DNA test determining husband was the father, stipulated to joint custody order with physical custody to mother and visitation to father on alternate weekends. An order of support was also issued against father. After two months or so father left for New Jersey, and parties lost touch with each other. One year later a default custody order was issued with

sole custody to mother and parenting time to father as agreed upon by parties. Three years later father returned and mother and child left county. Two years after this father filed visitation petition, seeking to locate mother and child. Mother moved back to county but again left immediately. Father filed more petitions seeking custody modification and violation and sought to downwardly modify child support. Following hearing on these petitions, court awarded parties joint custody with child spending 4 days with father and 3 days with mother. Court also terminated father's support order, retroactive to date of filing support modification petition. Mother appealed. The Appellate Division affirmed finding court had sound and substantial basis in the record. While the Appellate Division held father's explanation for losing contact with child was inadequate, mother, among other factors, had continually hindered father's attempts to have contact with child. Additionally, mother had moved numerous times, lived in housing that was unsuitable for child, had fled abusive boyfriend to live in safe house with child, child feared boyfriend, and mother had, via letter, given custody of child and her half-sibling to boyfriend's daughter without father's consent. Father agreed to preventive services and while child had close relationship with half-sibling and "law expresses a preference for keeping siblings together, the rule is not absolute" and, the court reasoned, she would see her half-brother 3 days per week.

Matter of Luke v Luke, 90 AD3d 1179 (3d Dept 2011)

Violation of Order Not Wilful

Family Court issued order of custody of children to father with supervised visitation to mother at the "Family and Children's Society." That order was affirmed by this court. The order also provided that within 10 days of issuance of order, the children were to be enrolled in counseling with therapist. Two months later mother filed violation petition alleging father had failed to timely enroll children with therapist. Family Court held father had not wilfully violated order as he had tried, in good faith, to arrange for counseling at the Family and Children's Society but the agency had failed to respond. Therefore father had arranged for counseling with another agency. The Appellate Division affirmed.

Matter of Yishak v Ashera, 90 AD3d 1184 (3d Dept 2011)

Violation Petition Needs to Meet Particularity Requirements of CPLR 3013

Parents of two children agreed to sole custody to mother and visitation to father as agreed upon by the parties. The order also directed that the children be properly supervised and that neither parent smoke nor allow third parties to smoke in vehicle in which children are passengers. Two years later father filed violation petition alleging mother failed to properly supervise children and had permitted older child to be violent towards others and smoke. Family Court dismissed petition without hearing, finding petition lacked sufficient specificity, failed to provide mother with proper notice and failed to state how father's rights had been prejudiced. However the court ordered a child protective investigation. Father appealed. The Appellate Division affirmed stating that petition had failed to be "sufficiently particular" pursuant to requirements of CPLR 3013 and father had failed to show how mother's violation "defeated, impaired, impeded or prejudiced" his rights.

Matter of Miller v Miller, 90 AD3d 1185 (3d Dept 2011)

Relocation Not in Child's Best Interest

Parents stipulated to legal and physical custody of one child to mother and weekend parenting time to father. The order also provided that mother could move to "any county that is contiguous to Ulster County...". Six years after order was issued, mother filed to modify order as she wanted to re-locate with her current husband to Pennsylvania because it would mean employment for husband, who was currently unemployed, more income, better health care, good school district and supportive family members. At close of mother's case, court granted father's motion to dismiss on grounds that mother had failed to show relocation was in child's best interest. Mother appealed and the Appellate Division affirmed. While mother said child's new school district would be better, she did not provide evidence to show whether child's current school district was meeting her needs, mother wasn't sure in which community she would eventually live and there was no documentary evidence to support testimony concerning husband's employment in

Pennsylvania. Father was limited financially and the move would have detrimental impact on his ability to maintain contact with child.

Matter of Kirshy-Stallworth v Chapman, 90 AD3d 1189 (3d Dept 2011)

Award of Counsel Fees to Mother Modified

After extensive custody/visitation litigation between parties, Family Court awarded sole custody to mother, who moved for an award of counsel fees and other expenses. After a hearing on this issue, the court ordered father to pay 80% of the total fees requested by mother, and awarded $80,508 to mother. Father appealed. The Appellate Division modified the order in part finding that the court sufficiently considered all factors, including father's "obstreperous and litigious conduct" but held that only $70,760 of mother's counsel's fees were "documented reasonable fees" and 80% of this amount was $ 56,608.

Matter of Berrada v Berrada, 90 AD3d 1195 (3d Dept 2011)

Dismissal for Failure to Allege Change in Circumstances

Mother was granted sole custody of two children and incarcerated father was entitled, with certain restrictions, to communicate with children by mail and telephone. Mother was also ordered to provide father photocopies of children's report cards to father within 3 days of receiving them. Father filed modification and violation petitions. He sought visitation with children alleging that his move to a closer correctional facility along with his anticipated release supported a change in circumstances, and he alleged mother had failed to send children's report cards in a timely manner. Family Court dismissed his modification petition finding father's allegations failed to show a change in circumstances and after a hearing on the violations matter, dismissed his petition. The Appellate Division affirmed giving due deference to the court in making credibility assessments.

Matter of Januszka v Januszka, 90 AD3d 1253 (3d Dept 2011)

Mother Failed to Demonstrate by Preponderance of Evidence That Re-location Was in Child's Best Interest

Mother filed petition to modify joint legal custody order, which provided for physical custody to mother and extensive parenting time to father, seeking to relocate with child to North Carolina to be with boyfriend. Father cross-petitioned for, among other things, sole custody of child and filed a violation petition. After fact-finding and *Lincoln* hearings, court dismissed all petitions. Mother appealed. The Appellate Division affirmed, stating that relevant factors to consider in re-location cases include each parent's reasons for seeking or opposing the move, quality of relationship between child and parents, degree to which custodial parent's and child's life will be enhanced economically by move, feasibility of preserving relationship between non-custodial parent and child. In this case, mother testified she was moving to be with boyfriend and intended to move even if it resulted in transfer of custody to father. While mother said boyfriend lived in community with a good school system, she failed to show how it was an improvement over the child's current school system, or why it was in child's interest to be uprooted from his school. Additionally, the Court noted that re-location would result in a "substantial disruption of the weekly interaction between father and the child", and would take child away from his extended family in NY.

Matter of Williams v Williams, 90 AD3d 1343 (3d Dept 2011)

Children's Best Interest to Award Sole Custody to Mother

Parents of two children separated and each filed for sole custody of children. After 7 days of hearing, testimony from 13 witnesses including the parties, and *Lincoln* hearing, Family Court issued an order of sole custody to mother, equal parenting time with each parent, but mother's home was designated as primary residence. The court noted that while both parents were significantly involved in their children's lives, the father suffered from, among other things, alcohol dependancy issues for which he had not successfully completed treatment, dysfunctional personality dynamics, obsessive compulsive traits, lacked insight into his own problems and minimized them. As to the

mother, she had bi- polar disorder which resulted in mood fluctuations, irritability and hypomania. However mother recognized her mistakes and was willing to take responsibility for them to far greater degree than father. Father was obsessed with gathering information against mother and on one occasion videotaped mother struggling with daughter's temper tantrum instead of trying to help, had relatives record visitation exchanges and reported mother to CPS when child returned from mother's home with a minor scratch. The Appellate Division affirmed, finding there was sound and substantial basis in the record for the court's well reasoned decision.

Matter of Shearer v Spisak, 90 AD3d 1346 (3d Dept 2011)

Child's Wishes Support Expansion of Mother's Parenting Time, but Joint Custody Not Viable Given Parents' Inability to Communicate

Parents divorced and stipulated to sole custody of child to father and specific parenting time to mother. Five years after stipulated order, mother filed modification petition seeking sole custody. After hearing, court awarded parties joint legal custody with primary, physical residence to father and specific extended parenting time to mother, the specificity an effort to eliminate need for communication between the parents. Father appealed. The Appellate Division held that mother had shown there was change in circumstances based on father's refusal to comply with mother's court ordered parenting time as well as his alienating behaviors. As to whether modification of the order was warranted, the Court noted factors to consider included the existing arrangement between the parties, quality of home environments, the child's wishes, length of time present custody arrangement has been in place, each parent's past performance, relative competence and capacity to provide for and direct the child's development. While the Appellate Division supported the court's decision to expand mother's parenting time given the child's wishes, it slightly modified the time afforded, as it held mother's parenting time was too expansive as it interfered with child's school and after school activities and mother's work schedule. The Court further held as the parents were not able to communicate effectively, Family Court did not have sound basis to modify sole custody to joint legal custody. Additionally, the Appellate Division directed father to "actively communicate" with the mother about the child's activities and appointments.

Matter of Prefario v Gladhill, 90 AD3d 1351 (3d Dept 2011)

Mother Failed to Meet Burden to Show Re-location in Child's Best Interest

While both were in college and residing separately, mother and father had child. Father was present for child's birth and enjoyed significant parenting time with child for three years. Mother later married and had two children with husband. After father completed post-graduate work, he moved to live near child and custody order was issued giving parents joint legal and shared physical custody. Both parents were actively involved in child's life and child thrived under these circumstances. Mother's husband was offered a more stable yet lesser paying job in Pennsylvania. Mother filed to relocate. After fact-finding and *Lincoln* hearings, court held mother had established by preponderance of the evidence that re-location was in child's best interest. Mother and child moved to Pennsylvania. Father appealed and the Appellate Division, in a split opinion, reversed. While the Court agreed that the move would improve quality of life for mother, her husband and their children, the move would significantly impact quality and quantity of future relationship between father and child. The Appellate Division noted that court had pointed out that father was devoted to child, worked in her school district, coached her soccer team. While father might enjoy the same number of total hours with child were mother to relocate, he would still be deprived of regular and meaningful access to child, and it would be difficult for child to travel 10-11 hours by car every other weekend, as it would impact on her social and extra-curricular activities. Additionally, there was no evidence to show that the school district where child would be enrolled would be better than the child's current school, where she was in a gifted child program. The dissent argued that during the lengthy hearing, Family Court was able to assess the credibility of the witnesses, observe and listen to the child while conducting a *Lincoln* hearing, and its decision was well-reasoned, thoroughly discussing all re-location factors. The court's determination was supported by sound and substantial basis in the record and should be affirmed.

Matter of Scheffey-Hohle v Durfee, 90 AD3d 1423 (3d Dept 2011)

Alleged Facts Insufficient to Support Finding of Extraordinary Circumstances

DSS removed two children from mother, placed them in care of third party, the appellant in this matter, and filed neglect petition against mother. DSS then removed children from appellant as she had allowed children's grandfather to move back in with her although she had an order of protection against him. Appellant then filed for custody arguing children had lived with her for six weeks, that children were happy with her, they had been cared by her in the past when they had been temporarily removed from mother and one of the children was acting out due to removal from appellant's home. Family Court dismissed her petition without a hearing as if found she had failed to allege facts sufficient to support finding of extraordinary circumstances. The Appellate Division affirmed.

Matter of Eames v Holding, 90 AD3d 1444 (3d Dept 2011)

Court Properly Granted Sole Custody to Mother

Family Court granted petitioner mother sole custody of the parties' children and denied the cross-petition of father for sole custody. The Appellate Division affirmed. Contrary to the attorney for children's contention, the court properly granted mother sole custody of the children. The court's determination, based on its assessment of the character and credibility of the parties, was entitled to great weight and would not be disturbed where, as here, the determination was the result of a careful weighing of appropriate factors and had a sound and substantial basis in the record.

Matter of Canfield v Canfield, 87 AD3d 1272 (4th Dept 2011)

Biological Parents Not Entitled to Post-Adoption Visitation Despite Contract

Family Court denied petitions of biological parents to enforce a visitation provision in the post-adoption contract agreement with respect to their biological children who had been adopted by respondents. Pursuant to Domestic Relations Law § 112-b (4) a court should not enforce an order incorporating a post-adoption contract agreement unless such enforcement was in the child's best interests. Here there was a sound and substantial basis for the court's determination that visitation was not in the children's best interests. Moreover, petitioners were expressly warned before they signed the judicial surrenders that the post-adoption contract agreement was subject to modification. The court properly granted respondent's cross petition seeking an order requiring the biological father to stay away and refrain from contact with respondents and the children. Because this proceeding was in the nature of a visitation proceeding, the court had the authority to issue an order of protection setting forth reasonable conditions. Because the court did not state an expiration date for the order, the Appellate Division modified by directing that the stay away provision was in effect until the youngest child turned eighteen.

Matter of Kristian J.P. v Jeannette I.C., 87 AD3d 1337 (4th Dept 2011)

Court Properly Granted Sole Custody to Father

Family Court granted sole custody of the parties' child to petitioner father with visitation to respondent mother. The Appellate Division affirmed. The father met his burden to show changed circumstances. The petition was prompted by an incident where the mother left the six-year-old child alone in a casino hotel for three hours while the mother gambled. A hotel patron found the child crying in a hallway and the police were called. As a result, the mother was arrested, the child missed her first day of first grade, and CPS issued an indicated report for inadequate guardianship and lack of supervision. After the casino incident the mother and child stayed overnight at the home of a man unknown to the child. The man and the mother went out for drinks, leaving the child in the care of the man's daughters. Additionally, the father, stepmother, and a social worker testified that the child had poor hygiene when in the care of the mother and during the time the mother had sole custody, the child's teeth decayed to the point where the child required 11 extractions and the placement of stainless steel crowns. The award of sole custody to the father was in the child's best interests because the father was better able to meet the child's financial, emotional and educational needs.

Matter of Grybosky v Riordan, 87 AD3d 1339 (4th Dept 2011)

Petition Alleging Violation of an Order of Visitation Properly Dismissed

Family Court dismissed the father's petition alleging that respondent mother violated a prior order of visitation with respect to the parties' son. The Appellate Division affirmed. A hearing on the petition was not required even where a factual dispute exists if the allegations in the petition are insufficient to support a finding of contempt. Here, the father failed to indicate how the mother allegedly violated the order**,** and as the court noted, the order was ambiguous.

Matter of Fewell v Koons, 87 AD3d 1405 (4th Dept 2011)

Grant of Primary Physical Custody of Children to Father Reversed

Family Court granted petitioner father primary physical custody of the parties' children. The Appellate Division reversed. Even assuming, arguendo, that the father showed a change in circumstances, it was in the children's best interests for primary physical custody to remain with the mother because the record established that the mother had been the children's primary caregiver throughout their lives and the children had a close relationship with the half-sibling residing in the mother's home.

Matter of Walker v Cameron, 88 AD3d 1307 (4th Dept 2011)

Prior Joint Custody Arrangement Unworkable

Family Court granted sole custody of the parties' child to the mother with visitation to the father and supervised contact with the stepfather. The Appellate Division affirmed. The mother met her burden of establishing a change in circumstances. Under the prior consent order, the parties shared residential custody of the child and that arrangement was no longer feasible because it caused confusion upon the child's attainment of school age. Further, the parties' relationship had deteriorated and their inability to co-parent rendered the existing joint custody arrangement unworkable. The father failed to preserve for review his contention that the court erred in precluding testimony concerning the "Abel test" administered to the stepfather or in failing to hold a *Frye* hearing with respect to the admissibility of testimony concerning that test.

Matter of York v Zullich., 89 AD3d 1447 (4th Dept 2011)

Court Properly Dismissed Violation Petition

Family Court denied the mother's petition for sole custody of the parties' children and granted the father's petition for sole custody. The Appellate Division affirmed. The court properly dismissed mother's violation petition because she failed to establish that the father willfully violated a clear mandate of the prior order or that his conduct defeated, impaired, impeded or prejudiced any right or remedy to which she was entitled. The court properly considered, as one of the factors in its determination, the support the father's parents gave to the children, which contributed to the children's stability and emotional comfort. The mother failed to preserve for review her contentions that the court improperly interjected itself into the hearing by questioning her about matters not addressed on direct or cross-examination and that the court erred in admitting into evidence the custody evaluation on the ground that it contained hearsay.

Matter of Oravec v Oravec, 89 AD3d 1475 (4th Dept 2011)

Sole Custody to Father With Supervised Visitation to Mother Affirmed

Family Court awarded sole custody of the parties' daughter to petitioner father, with supervised visitation to respondent mother. The Appellate Division affirmed. The court did not err in transferring temporary custody of the parties' daughter to the father before the custody hearing because the father demonstrated the requisite exigent circumstances. In any event, reversal would not have been required because the court subsequently conducted the requisite evidentiary hearing and the record of the hearing fully supported the court's determination following the hearing. Further, the court properly denied the mother's motion to reopen and reschedule a "mediation conference" that was held by the court after the custody hearing. The record of the custody hearing established that the court's decision

concerning visitation to the mother was based entirely on evidence presented at the custody hearing, where the mother appeared with counsel and participated.

Matter of Ward v Ward, 89 AD3d 1518 (4th Dept 2011)

Return From Deployment Overseas Constituted Changed Circumstances

Family Court granted respondent mother primary physical custody of the child. The Appellate Division affirmed. Although petitioner father's return from overseas deployment with the United States Army constituted a change in circumstances warranting review of the existing custody arrangement, the court, after holding an evidentiary hearing and conducted an in camera hearing with the parties' children, made a custody determination that was supported by a sound and substantial basis.

Matter of Messimore v Messimore, 89 AD3d 1544 (4th Dept 2011)

Not Necessary to Strictly Adhere to Relocation Factors Where Initial Custody Determination

Family Court granted petitioner mother sole custody of the parties' infant son. The Appellate Division affirmed. The father's contention was without merit that the Referee erred in failing to consider the *Tropea* factors before awarding custody to the mother, who had moved from Syracuse to North Carolina shortly after she commenced this proceeding. Because this was an initial custody determination, it was not necessary to strictly apply the factors to be considered in a potential relocation as enunciated in *Tropea*. Although the court failed to make an explicit finding that the award of custody to the mother was in the child's best interests, the record enabled the Appellate Division to do so and it concluded that custody to the mother was in the child's best interests. There was no dispute that as of the hearing date the father had never seen the child and that he did not avail himself of opportunities to visit the child during the pendency of the proceeding. The father failed to appear for a scheduled home visit with the attorney for the child, who sought to arrange visits between father and child.

Matter of Moore v Kazacos, 89 AD3d 1546 (4th Dept 2011)

Not Necessary to Strictly Adhere to Relocation Factors Where Initial Custody Determination

Family Court granted petitioner mother sole custody of the parties' infant son. The Appellate Division affirmed. The father's contention was without merit that the Referee erred in failing to consider the *Tropea* factors before awarding custody to the mother, who had moved from Syracuse to North Carolina shortly after she commenced this proceeding. Because this was an initial custody determination, it was not necessary to strictly apply the factors to be considered in a potential relocation as enunciated in *Tropea*. Although the court failed to make an explicit finding that the award of custody to the mother was in the child's best interests, the record enabled the Appellate Division to do so and it concluded that custody to the mother was in the child's best interests. There was no dispute that as of the hearing date the father had never seen the child and that he did not avail himself of opportunities to visit the child during the pendency of the proceeding. Also, the father failed to appear for a scheduled home visit with the attorney for the child.

Matter of Moore v Kazacos, 89 AD3d 1546 (4th Dept 2011)

Matter Remitted on Issue Whether Visitation Properly Denied

Family Court dismissed father's petition seeking visitation with the parties' child. The Appellate Division reversed. The court abused its discretion in denying the father visitation with the child because there was no evidence to support the conclusion that visitation with the father was detrimental to the child.

Matter of Diedrich v Vandermallie, 90 AD3d 1511 (4th Dept 2011)

Court Failed to Address Issue Whether Extraordinary Circumstances Existed

Family Court granted physical custody of the subject child to petitioner maternal grandmother and joint custody to father and maternal grandmother. The Appellate Division reversed. The court erred in failing to determine whether extraordinary circumstances existed before determining that it was in the child's best interests to grant physical custody of the subject child

to petitioner maternal grandmother and joint custody to father and maternal grandmother. Because the record was insufficient to enable the Appellate Division to make that determination, the case was remitted to the court to determine whether extraordinary circumstances existed, after affording the parties the opportunity to submit additional evidence.

Matter of Vazquez v Valez, 90 AD3d 1559 (4th Dept 2011)

Father Awarded Increased Visitation

Family Court granted father's petition seeking increased visitation with the parties' child. The Appellate Division affirmed. The court did not preclude respondent mother's testimony concerning the father's alleged attempted suicide on the ground that it was too remote. Rather, the court allowed the testimony over the father's objection, but advised the mother that the testimony was not relevant to the best interests of the child in the absence of evidence concerning the father's recent mental health. The court also allowed the mother to testify that the father struck her in 2001, although the court noted it was more interested in the five or six years prior to the hearing. The court did not abuse its discretion in limiting testimony about verbal altercations between the parties because the court was well aware of the parties' acrimonious relationship. There was no evidence in the record to indicate that the court should have ordered, sua sponte, a psychological or social evaluation of the father.

Matter of Canfield v McRee, 90 AD3d 1653 (4th Dept 2011)

Court Not Required to Abide by Child's Wishes

Family Court modified the parties' prior custody agreement by awarding petitioner father sole custody of the child. The attorney for the child appealed. The Appellate Division affirmed. The attorney for the child conceded that there was a showing of changed circumstances. The totality of the circumstances supported the award of custody to the father in light of the ample evidence of the mother's interference with the father's visitation, including after she was warned several times by the court that visitation must occur according to a strict schedule promulgated by the court. Additionally, the child's treating psychologist and the court appointed psychologist testified that a change in custody would be warranted if the parties could not abide by the visitation schedule. The child's wishes were not determinative, particularly where, as here, following the child's wishes would be tantamount to severing the child's relationship with her father.

Matter of Marino v Marino, 90 AD3d 1694 (4th Dept 2011)

DISCOVERY

Information Sought in Interrogatories Was Reasonable and Necessary

Defendant husband and non-party respondents opposed plaintiff wife's motion to direct nonparties to answer interrogatories. Defendant and the non-parties contended that the information sought was not relevant to the matrimonial action because defendant's sole involvement in the limited partnerships that were the subject of the interrogatories was as custodian for the interests held by the parties' children. Supreme Court compelled non-party respondents to answer the interrogatories, concluding that the information sought was limited in scope and that child support would be directly affected by any tax liability of the children or assets held by them. The Appellate Division affirmed. The information sought in the interrogatories was reasonable and necessary in plaintiff's prosecution of the matrimonial action.

D'Angelo v D'Angelo, 89 AD3d 1427 (4th Dept 2011)

FAMILY OFFENSE

Father's Disorderly Conduct at Children's School Not a Family Offense

Mother filed family offense against father alleging he had committed family offenses against her and their two children. Allegations were based upon father's conduct in going to children's school and in a "loud and boisterous voice" demanding to see his children despite being informed by school officials, who mistakenly believed children had order of protection against him, not to come. Family Court held while father's conduct may constitute disorderly conduct, such conduct was not against mother or children but the school and thus court had no jurisdiction to entertain such petition.

The Appellate Division affirmed.

Matter of Janet GG. v Robert GG., 88 AD3d 1204 (3d Dept 2011)

Mother Failed to Establish Father Committed Family Offense

Family Court dismissed mother's family offense petition. The Appellate Division affirmed. The court did not err in taking sworn testimony from the mother before issuing a temporary order of protection. The court properly dismissed the family offense petition because the mother failed to meet her burden of establishing by a fair preponderance of the evidence that the father committed the family offense of harassment in the second degree. The court was entitled to credit the testimony of the father over that of the mother.

Matter of Helles v Helles, 87 AD3d 1273 (4th Dept 2011)

Respondent Committed a Family Offense

Family Court continued the prior visitation schedule with respect to the parties' children, determined that respondent committed a family offense against petitioner, and ordered respondent to stay away from petitioner. The Appellate Division affirmed. There was a sound ands substantial basis for the court's determination to continue the prior visitation schedule. The record supported the court's determination that petitioner established by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree. Respondent verbally abused and threatened petitioner throughout a single day and left numerous threatening messages on petitioner's cellular phone that were played in court. The prior experience of petitioner with respect to respondent's assaultive behavior made the threats credible. Although obscenities alone would not constitute criminal conduct, the verbal acts made in the context described by petitioner were not constitutionally protected.

Matter of Beck v Butler, 87 AD3d 1410 (4th Dept 2011)

Evidence Insufficient to Establish Family Offense

Family Court determined that respondent husband committed the family offence of stalking in the fourth degree and ordered respondent to stay away from petitioner. The Appellate Division reversed. The evidence was insufficient to establish that respondent acted with "no legitimate purpose" within the meaning of the stalking statute. Letters and cards sent by respondent to petitioner were sent with the legitimate purpose of attempting to reconcile with petitioner, a purpose that was not unreasonable based upon the parties' lengthy marriage and history of separation and reconciliation. There was nothing on the face of the cards or letters that was improper or threatening. Petitioner's remote allegations of physical violence did not establish a cognizable pattern of behavior on respondent's part so as to render his behavior devoid of a legitimate purpose.

Matter of Ovsanik v Ovsanik, 89 AD3d 1451 (4th Dept 2011)

JUVENILE DELINQUENCY

Court's Failure to Draw Missing Witness Inference Did Not Prejudice Respondent

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted the crimes of attempted assault in the second and third degrees, criminal possession of a weapon in the fourth degree, and menacing in the second and third degrees, and placed him on probation for a period of 12 months. The Appellate Division affirmed. The evidence supported inferences that respondent, either personally or as an accessory, committed each of the offenses at issue. Although there was evidence relating to two victims, the attempted assault and menacing counts were not duplicitous. Regardless whether the court should have drawn a missing witness inference, respondent was not prejudiced because the court noted that even if it had drawn such inference, its finding would have been the same.

Matter of Stephon L., 87 AD3d 887 (1st Dept 2011)

Probation Least Restrictive Alternative

Respondent was adjudicated a juvenile delinquent upon

her admission that she committed acts that, if committed by an adult, would have constituted the crimes of assault in the third degree, and placed her on probation for a period of 12 months. The Appellate Division affirmed. Given the seriousness of the underlying assault, the court properly denied respondent's request for an adjournment in contemplation of dismissal. The record did not support respondent's contention that, in evaluating the seriousness of the offense, the court gave undue weight to the allegations in the petition. The evidence as a whole established that respondent needed the duration and level of supervision that probation would provide.

Matter of Lena I., 87 AD3d 936 (1st Dept 2011)

Restitution By Respondent Upheld

Family Court ordered respondent to pay restitution in the amount of $500. The Appellate Division affirmed. There was a sworn statement by the victim that respondent's acts had rendered her cell phone incapable of normal operation and that she had paid approximately $500 for the phone, and, when respondent moved to modify the restitution order, the presentment agency responded with documentary proof of replacement cost.

Matter of Dwayne F., 88 AD3D 481 (1st Dept 2011)

Adjournment in Contemplation of Dismissal Not Warranted

Family Court denied respondent's request for an adjournment in contemplation of dismissal, adjudicated her a juvenile delinquent, and imposed a conditional discharge. The Appellate Division affirmed. The seriousness of the underlying assault - the incident took place in a school, involved a weapon, and resulted in significant injuries to a fellow student, requiring 6 staples and 12 stitches - outweighed positive factors in respondent's background.

Matter of Kaina M., 89 AD3d 430 (1st Dept 2011)

Family Court Improvidently Exercised Jurisdiction in Adjudicating Respondent a JD

Respondent was adjudicated a JD upon his admission that he committed an act that, if committed by an adult, would constitute the crime of possession of an imitation firearm, and imposed a 12 month term of probation. Respondent was carrying a toy revolver, but there was no evidence of unlawful or threatened use. The Appellant Division reversed. The court improvidently exercised its jurisdiction in adjudicating respondent a JD because this was not the least restrictive alternative. Respondent did not have a "negative history." He had been living in an unstable home during the time when the incident occurred and was now in a stable foster home where he posed no problem. The Court directed that respondent be placed on a supervised order of adjournment in contemplation of dismissal.

Matter of Jonnevin B., 89 AD3d 464 (1st Dept 2011)

Adjudication of JD Affirmed

Family Court adjudicated respondent a JD upon her admission that she committed an act that, if committed by an adult, would constitute the crime of robbery in the second degree and placed her on probation with ACS for period of 18 months. Respondent had prior JD history, her pattern of unlawful behavior was escalating, she had behavior problems, she was inadequately supervised at home, and she was doing poorly in academics. The Appellate Division affirmed.

Matter of Aaliyah H., 89 AD3d 557 (1st Dept 2011)

Family Court Properly Exercised Discretion in Refusing to Adjudicate Respondent as PINS

The Appellate Division held that Family Court properly exercised its discretion in refusing to adjudicate respondent as a PINS and instead adjudicated him as a JD. Respondent underlying offense was a serious sex offense against a younger child. The Appellate Division affirmed. Placing respondent on probation for 18 months was the least restrictive disposition, meeting both respondent's needs and protecting the community.

Matter of Steven O., 89 AD3d 573 (1st Dept 2011)

Finding of Sexual Abuse in the Third Degree by 13-Year-Old Reversed

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted

the crime of sexual abuse in the third degree. The Appellate Division reversed. The finding of sexual abuse in the third degree was based upon an incident where the then 13-year-old respondent made rude sexual comments and gave the then 13-year-old complainant a quick slap on her buttocks in a classroom in which other students and their teacher were present. This was legally insufficient to establish beyond a reasonable doubt that respondent acted for the purpose of gratifying sexual desire. The finding also was against the weight of the evidence.

Matter of Jabari I., 90 AD3d 490 (1st Dept 2011)

Appellant's Allocution Was Proper

The appellant's contention that his allocution was defective was unpreserved for appellate review, as he did not move to withdraw his admission on that ground. Nevertheless, the Appellate Division found that the allocution was proper, since the appellant voluntarily waived his right to a fact-finding hearing, and was made aware of the possible specific dispositional orders prior to stating that he committed the act to which he was admitting. The appellant's claim that the evidence was legally insufficient also was unpreserved for appellate review. In any event, the Court found that the appellant's admission was legally sufficient to establish that he committed an act which, if committed by an adult, would have constituted the crime of criminal possession of stolen property in the fifth degree. Order of disposition affirmed.

Matter of David H., 88 AD3d 710 (2d Dept 2011)

Officers Had Articulable Reason For Initial Encounter With Respondent

Family Court adjudicated respondent to be a juvenile delinquent based upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a controlled substance in the third degree. The Appellate Division affirmed. The court properly refused to suppress the tangible evidence seized from respondent by police officers. Respondent's actions in meeting with two other individuals in a chronic open air drug sale location and immediately running upon seeing police officers, provided the officers with an articulable reason for their initial encounter with respondent. Immediately after the initial encounter, the officers observed a surveillance video that showed respondent in the store shoving a plastic sandwich bag down the rear of his pants. When the officers asked respondent what he shoved down his pants respondent said he did not know what they were talking about. Based upon the totality of the circumstances, the officers had probable cause to search respondent, resulting in the seizure of the bags of crack cocaine and money in his possession. The retrieval of a plastic bag protruding from respondent's buttocks was a strip search, not a body cavity search, and did not require a warrant.

Matter of Demitrus B., 89 AD3d 1421 (4th Dept 2011)

PERMANENCY HEARINGS

Permanency Goal Modified

After a permanency hearing, Family Court ordered that the permanency goal for the subject child was placement for adoption. The Appellate Division modified by changing the permanency goal to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parents. The court's determination regarding the child's permanency goal lacked a sound and substantial basis in the record. Petitioner met its burden of establishing by a preponderance of the evidence that its recommendation to modify the permanency goal from adoption to APPLA was in the child's best interests. At the time of the permanency hearing the child was 14 years old and the uncontroverted evidence was that despite petitioner's diligent efforts to counsel the child regarding adoption, the child refused to consent to adoption and wished to remain with his foster parents. Petitioner submitted evidence that the child's placement with his foster parents allowed the child to have continued contact with his older brother, with whom he was very close and that he resided in a home in which he was safe and happy. Also, under an APPLA the child would have access to family and friends who lived in the same area as the foster parents. The child expressly wished to remain with the foster parents and the foster parents were willing to be a permanency resource for the child. They unequivocally stated their willingness to serve as an ongoing resource for the child.

Matter of Jose T., 87 AD3d 1335 (4th Dept 2011)

Permanency Goal Modified

Family Court ordered that the permanency goal for the subject children was placement for adoption. The Appellate Division modified by changing the permanency goal of one of the children, Lavar, to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parent. The court's determination regarding Lavar's permanency goal lacked a sound and substantial basis in the record. The attorney for the children requested an APPLA at the hearing and petitioner supported that placement on appeal. Lavar, who was 16 years old at the hearing, testified that he did not want to be adopted, that he been pressured into considering adoption, and that he would refuse to consent to adoption. Lavar had resided with his foster parent for over one year and the foster parent testified that he was willing to be a permanency resource for him. The contention of the attorney for the children that the permanency goal for the other child, Lavalle, should be an APPLA was rejected because it was raised for the first time on appeal.

Matter of Lavalle W., 88 AD3d 1300 (4th Dept 2011)

Permanency Goal Modified

After a permanency hearing, Family Court ordered that the permanency goal for the subject child was placement for adoption. The Appellate Division modified by changing the permanency goal to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parent. Although the appeal was moot because a superseding permanency order had been entered, the exception to the mootness doctrine applied because the issue was likely to recur, typically evaded review, and raised a significant question not previously determined. The court's determination regarding the child's permanency goal lacked a sound and substantial basis in the record. Petitioner met its burden of establishing by a preponderance of the evidence that its recommendation to modify the permanency goal from adoption to APPLA was in the child's best interests. At the time of the permanency hearing the child was 16 years old and the uncontroverted evidence was that despite petitioner's diligent efforts to counsel the child regarding adoption, the child refused to consent to adoption and wished to remain with her foster parent. Petitioner submitted evidence that the child had previously been adopted by another foster parent who had surrendered her parental rights to the child and that the child suffered from ongoing emotional stress from that adoption and she would be further mentally traumatized by being forced into another adoption. The child expressly wished to remain with the foster parent and the foster parent was willing to be a permanency resource for the child. Petitioner's failure to call the caseworker and indirect service coordinator who had worked with the child at the permanency hearing was not a rational basis for rejecting APPLA where the referee had sufficient information to determine the child's best interests.

Matter of Latanya H., 89 AD3d 1528 (4th Dept 2011)

PINS

Court's Attempt to Impose a 10 Month Adjournment in Contemplation of Dismissal Results in Reversal

On June 23, 2009, the appellant, an alleged person in need of supervision, admitted to truancy, and the Family Court, on the appellant's consent, entered an order adjourning the matter in contemplation of dismissal until December 23, 2009. The Family Court directed, in the same order, that the matter be restored to the calendar prior to the six-month expiration date on December 23, 2009, and then adjourned in contemplation of dismissal for an additional four-month period with supervision. FCA § 749(a) states in part "An adjournment in contemplation of dismissal is an adjournment of the proceeding, for a period not to exceed six months with a view to ultimate dismissal of the petition in furtherance of justice . . . Upon application of the petitioner, or upon the court's own motion, made at any time during the duration of the order, the court may restore the matter to the calendar. If the proceeding is not so restored, the petition is at the expiration of the order, deemed to have been dismissed by the court in furtherance of justice". The Appellate Division noted that as a general rule, points which were not raised at trial may not be considered for the first time on appeal. However, a narrow exception to this rule exists where a court issues an unauthorized or unlawful sentence. Thus, although the the appellant did not object to the order dated June 23, 2009, he was permitted to argue for the first time on appeal the

propriety of that order, as well as an order dated March 15, 2010, restoring the matter to the calendar, as the argument involved the legality of those orders and the Family Court exceeding its statutory authority. In the order dated June 23, 2009, the Family Court clearly determined that the appellant required a period of supervision longer than six months. Thus, the entry of an adjournment in contemplation of dismissal (hereinafter ACD) was not a viable option. Moreover, while the six-month ACD period expired on December 23, 2009, the first and only application to restore the matter to the calendar was made on March 12, 2010, nearly three months after the expiration of the adjournment period, and the matter was restored to the calendar three days later in the order dated March 15, 2010. Therefore, as the case was not restored to the calendar within the requisite six-month time period, any subsequent action by the Family Court, including the issuance of the order of fact-finding and disposition, was a nullity. Accordingly, the Family Court should have deemed the petition to have been dismissed in furtherance of justice. See FCA § 749(a). Order reversed.

Matter of Ramon H.-T., 87 AD3d 1141 (2d Dept 2011)

TERMINATION OF PARENTAL RIGHTS

Respondent's Motion to Vacate TPR Orders Properly Denied

Family Court denied respondent mother's motion to vacate orders of disposition entered upon default and terminated her parental rights to her children on the ground of abandonment. The Appellate Division affirmed. Respondent's moving papers failed to demonstrate a reasonable excuse for her absence from the hearing and a meritorious defense to the abandonment allegation. Respondent failed to substantiate her defense that she was unable to visit the children because she was in a drug treatment program and her grandmother refused to let her see the children. The post-termination change in the children's foster care situation did not warrant remittal for a new dispositional hearing. Nothing indicated that respondent had completed any of the drug, psychotherapy and vocational programs and neither respondent or the children's attorney rebutted the agency's contention that respondent had not been in contact with the children for years. That the children were now in a non-kinship foster home did not alone warrant the conclusion that returning them to respondent was in their best interests.

Matter of Alexander John B., 87 AD3 927 (1st Dept 2011)

Mother Permanently Neglected Her Child

Family Court, upon a finding of permanent neglect, terminated respondent mother's parental rights. The Appellate Division affirmed. Although the agency formulated a service plan, arranging for regular visitation with the child and referred respondent to parenting skills classes, housing assistance, and a GED program, respondent failed to maintain regular contact with the child and failed to obtain adequate housing and a stable source of income. It was in the best interests of the child to be freed for adoption by her foster mother, in whose home she had lived and thrived for most of her life.

Matter of Dynasia C., 87 AD3d 929 (1st Dept 2011)

Incarceration No Excuse for Failure to Maintain Contact With Child

Family Court determined father abandoned child based on his failure to contact child, DSS or the court during the relevant six-month period prior to the filing of the TPR petition. The Appellate Division affirmed. Father's incarceration was not an excuse for his failure to maintain contact with child and DSS did not have to make diligent efforts to strengthen parent-child relationship. It was in child's best interest to terminate father's parental rights because he would not be released from prison until the child was an adult, the child was thriving in her foster home, and the foster parent intended to adopt her.

Matter of Chartasia Delores H., 88 AD3d 460 (1st Dept 2011)

Motion to Vacate Default TPR Order Denied

Mother failed to appear at fact-finding and disposition hearings for permanent neglect. Family Court terminated mother's rights and freed child for adoption. Mother then filed motion to vacate default order, which court denied. The Appellate Division affirmed. The

mother failed to present any reasonable excuse for her failure to appear at hearings, she failed to submit an affidavit supporting her reason for default, she had a pattern of missing court appearances, and she failed to present any evidence to refute the agency's showing that she permanently neglected child and that it was in child's best interest to have mother's rights terminated.

Matter of Brittany Annette M., 88 AD3d 466 (1st Dept 2011)

Revocation of Suspended Sentence Affirmed

Family Court revoked suspended judgment entered on finding of abandonment and terminated mother's rights. The Appellate Division affirmed. The terms of the suspended sentence directed mother to submit to random drug testing, remain free of illegal substances, maintain regular and consistent contact with child, obtain and maintain source of income, and find suitable housing for herself and child, but mother had been re-arrested and convicted of criminal sale of controlled substance and had failed to maintain contact with child. Additionally, it was in the child's best interest to terminate mother's parental rights because mother had been re-incarcerated, child had quality relationship with kinship foster mother who was trained to handle child's special needs, and the foster mother wanted to adopt child.

Matter of Aliyah Careema D., 88 AD3d 529 (1st Dept 2011)

Mother's Failure to Complete Service Plan Requirements Results in Permanent Neglect

Family Court held finding of permanent neglect against mother was supported by clear and convincing evidence. Mother was ordered to complete mandated programs in order to regain custody of child who had been in foster care for four years. Mother failed to complete service plan requirements inasmuch as she failed to complete mental health treatment and never enrolled in drug treatment program. It was in child's best interest for mother's rights to be terminated because the child was in caring environment with paternal grandmother who wished to adopt her. The Appellate Division affirmed.

Matter of Sukwa Sincere G., 88 AD3d 592 (1st Dept 2011)

Finding of Permanent Neglect and TPR Affirmed

Family Court held mother permanently neglected her children. The Appellate Division affirmed. ACS made diligent efforts to encourage and strengthen the relationship between parent and children by referring mother to parenting skills training, mental health therapy, assisted her with finding housing and getting her GED, and scheduled regular visits between mother and children. Mother failed to complete therapy or enroll in GED program and refused housing placement which would have led to return of one of her children. It was in children's best interest to terminate mother's rights because children had been living in foster care for over seven years, had a close relationship with their foster mother, and were thriving.

Matter of Nakai H., 89 AD3d 434 (1st Dept 2011)

Finding of Permanent Neglect and TPR Supported by Evidence

Family Court found father permanently neglected child and terminated his parental rights. The Appellate Division affirmed. Diligent efforts by ACS to encourage and strengthen the parent-child relationship included referring father to anger management program, domestic violence and parenting skills classes, and providing regularly scheduled visits with child. Father, however, failed to visit child consistently, failed to engage in required services during statutorily required time period, and gained little insight from the therapy in which he did engage. It was in child's best interest for father's rights to be terminated. The child was thriving in foster home where she lived with sister, and foster parent was meeting child's special needs. The great-aunt's petition for custody was dismissed because children had little if any relationship with great-aunt whom they had seen infrequently. The father failed to preserve his claim that suspended judgment was warranted and it was unlikely that he would have been successful.

Matter of Juliana Victoria S., 89 AD3d 490 (1st Dept 2011)

Mother's Failure to Plan for Children's Future Supports Permanent Neglect

Mother was found to have permanently neglected children. The Appellate Division affirmed.
ACS made diligent efforts to encourage and strengthen relationship by offering regular visits with children, inviting mother to service plan meetings, and referring her to parenting and drug treatment programs. Evidence showed mother failed to plan for children's future or attempted to deal with issues that had resulted in children's removal. It was in children's best interest to be adopted by foster parent with whom they had lived for over 10 years, the children wanted to be adopted, and foster mother agreed to facilitate visits between children and their siblings.

Matter of Arnel Ashley B., 89 AD3d 504 (1st Dept 2011)

Mother's Mental Retardation Results in Termination of Her Parental Rights

Family Court terminated mother's parental rights based on her mental retardation. The Appellate Division affirmed. The court-appointed psychiatrist testified that despite the fact that mother had completed several parenting classes, she was not able to understand or cope with her child's special needs. There was no evidence presented whether post-terminations visits between mother and child would be in the child's best interest.

Matter of Shae Tylasia I.M., 89 AD3d 527 (1st Dept 2011)

Children Permanently Neglected Children Despite Mother's Completion of Services

Family Court held that although mother had completed all the recommended services, her inability to separate from the children's father, who had alcohol and anger management issues, supported a finding of permanent neglect. The court further determined that because the children had been living with the foster mother for over three and one- half years, the foster mother had provided the children with a stable and nurturing environment, and she wanted to adopt them, it was in children's best interest for mother's parental rights to be terminated. The Appellate Division affirmed.

Matter of Kie Asia T., 89 AD3d 528 (1st Dept 2011)

Failure to Maintain Regular Contact and Plan for Children's Future Results in Permanent Neglect

Family Court determined that mother permanently neglected children based on her inability to maintain contact with them and plan for their future. The Appellate Division affirmed. Despite two agencies' diligent efforts to provide appropriate services to reunite mother and children, including scheduling visits for her and the children, mother only showed up one-half the time and was late the rest of the time. It was in children's best interest to terminate mother's rights. The children had been living in a stable and nurturing foster home and the foster parent wanted to adopt them.

Matter of Jamal N., 89 AD3d 537 (1st Dept 2011)

Termination of Parental Rights Due to Mental Illness and Mental Retardation

The Appellate Division affirmed Family Court's decision to terminate mother's parental rights due to mental illness and father's rights due to mental retardation. Clear and convincing evidence was provided from the testimony of court-appointed psychologist who stated that mother's reluctance to take medication rendered her incapable of caring for child presently and in the foreseeable future and father's mental retardation made him unable to provide adequate care for child at present and in the foreseeable future.

Matter of Timothy Reynaldo, 89 AD3d 542 (1st Dept 2011)

Child's Best Interest to Terminate Mother's Parental Rights

The Appellate Division affirmed Family Court's determination that mother permanently neglected her child. The evidence supported the court's finding that it was in the child's best interest for mother's rights to be terminated because the child, who had special needs, was in a loving and stable foster home, the foster mother had cared for child since he was six months old, and the foster mother was willing to continue visitation between child and his siblings.

Matter of Achilles S., 89 AD3d 635 (1st Dept 2011)

Mental Illness and Permanent Neglect Findings Result in Termination of Parental Rights

Family Court found by clear and convincing evidence that mother was unable to care for child due to her mental illness and terminated her parental rights. Testimony from a court-appointed psychologist who examined the mother provided evidence that mother suffered from mental illness, schizophrenia, paranoid type, and despite medication she was acutely symptomatic and thus impaired from caring for child at present and in foreseeable future. The agency also established by clear and convincing evidence that the father permanently neglected the child. Diligent efforts to reunite father and child included, among other things, regular visits with child, referral to drug treatment and domestic violence programs, and referral for mental health evaluations. However, the father only visited child sporadically, during times he was not incarcerated, and refused to undergo mental health evaluation. It was in child's best interest for parents' rights to be terminated. The child had resided with foster mother almost her entire life, the foster mother tended to her special needs, the child was thriving in the foster home, and foster mother wanted to adopt her. The Appellate Division affirmed.

Matter of Sharon Crystal F., 89 AD3d 639 (1st Dept 2011)

Termination of Father's Rights Affirmed

The Appellate Division affirmed Family Court's determination that father permanently neglected child and terminated his parental rights. Father failed to appear at hearing and father's attorney excused himself after the court denied his request for adjournment based on father's absence. Father failed to present any excuse for his default.

Matter of Anaya Michelle L., 90 AD3d 432 (1st Dept 2011)

Failure to Have Contact for Two Years Before TPR Filing Results in Abandonment Finding

Family Court terminated mother's parental rights based on mother's abandonment of children. Mother failed to have any contact with children for two years before TPR petition was filed. Grandmother's petition for custody was denied because children had "not expressed a desire to see the mother's side of the family, and the grandmother has no preemptive statutory or constitutional right to custody."

Matter of Keyevon Justice P., 90 AD3d 477 (1st Dept 2011)

Mother's Denial of Responsibility Justifies Permanent Neglect Finding

Family Court's finding of permanent neglect and termination of parental rights was supported by clear and convincing evidence. ACS made diligent efforts to reunite parent and child, including providing mother with individual counseling to deal with her emotional instability, which caused developmentally delayed child "to exhibit emotional distress." Mother failed to complete her service plan, denied responsibility for her actions that resulted in removal of child, and failed to gain any insight into how to parent her special needs child. It was in child's best interest to have mother's rights terminated inasmuch as child was thriving in foster home and foster parent wished to adopt her.

Matter of Emily Rosio G., 90 AD3d 511 (1st Dept 2011)

Motion to Vacate Default Order of TPR Denied

Mother filed motion to vacate the default fact-finding and dispositional orders, which established she had permanently neglected her child and terminated her parental rights. Mother's allegation that her job as a home health aide prevented her from being present in court was not supported by detailed information or documentation. Mother also failed to inform her counsel of her non-appearance and she failed to controvert the evidence that she had not completed all the required programs, obtained a suitable residence for child or obtained a source of income to support child. The Appellate Division affirmed. Mother's contention that her almost one year delay in filing motion to vacate was due to hospitalization was unpreserved for Court's review.

Matter of Christopher James A., 90 AD3d 515 (1st Dept 2011)

Permanent Neglect Finding Affirmed

Family Court held that mother permanently neglected her children and terminated her parental rights. The Appellate Division affirmed. ACS presented clear and convincing evidence that in the four years since the older child and the two years since the younger child had been removed, ACS made diligent efforts to reunite mother with children, including issuing referrals to obtain suitable housing, and requiring her to submit to drug testing and attend drug programs. Mother also had been advised of the importance of complying with the service plan. Despite mother's completion of anger management and parenting skills programs and her consistency in visiting children, she never obtained suitable housing, continued to fail to attend or complete seven drug treatment programs to which she was referred, and she failed five drug tests. It was in children's best interest for mother's rights to be terminated because the children had a close relationship with foster parent who wished to adopt them.

*Matter of Kamilah Aminah Abdulla K.,*90 AD3d 525 (1st Dept 2011)

Mother's Non-Compliance With Services Justifies TPR

Mother's rights were terminated based upon a finding of permanent neglect. The Appellate Division affirmed. It was in child's best interest not to suspend judgment because mother failed to complete drug treatment program, failed to visit the child for two months, and was incarcerated for parole violation. The child was thriving in the pre-adoptive foster home.

Matter of Kharyn O., 90 AD3d 541 (1st Dept 2011)

Motion to Vacate Default Judgment Denied as No Reasonable Excuse or Meritorious Defense Provided

Mother's motion to vacate default order terminating her parental rights was denied. Mother failed to provide a reasonable excuse or demonstrate a meritorious defense. Mother alleged she had no money for transportation, yet she failed to inform her attorney or the court of her plight. Additionally, mother made appointment with service provider on the same day as the hearing. Mother also failed to show that in the four years since the children had been placed she had completed drug treatment program or mental health evaluation. The Appellate Division affirmed.

Matter of Isaac Howard M., 90 AD3d 559 (1st Dept 2011)

Court Order Denying Petition to Terminate Parental Rights Reversed

The Appellate Division reversed an order of the Family Court which denied a petition to terminate the mother's parental rights on the ground of abandonment. Upon reviewing the record, the Court found that the petitioner established by clear and convincing evidence that the mother abandoned the subject child by failing to visit, or maintain contact with the child or the petitioner, for a six-month period preceding the filing of the petition to terminate her parental rights. See SSL § 384(b). Contrary to the Family Court's conclusion, the fact that the mother maintained communication with the petitioner regarding her other children, with whom she continued to visit, did not negate the petitioner's showing that the mother intended to forgo her parental rights and obligations with respect to the subject child, about whom she did not substantially communicate with the agency. Further, the mother failed to show that the petitioner prevented or discouraged her from communicating with the child or the agency. The matter was remitted to the Family Court for disposition.

Matter of Amaru M., 87 AD3d 1069 (2d Dept 2011)

Court's Order Dismissing Petitions to Terminate Parental Rights Affirmed

In related proceedings pursuant to SSL § 384-b to terminate parental rights on the ground of permanent neglect, the petitioner appealed from an order of the Family Court which dismissed the petitions, with prejudice. The Appellate Division affirmed the court's order. The record revealed that the petitioner brought these proceedings to terminate parental rights based upon the parents' individual consent to findings of neglect against them (see FCA § 1051). The findings of neglect stemmed from the conclusion that the subject children had been "exposed to some form of sexual activity" by relatives of the parents. The Appellate Division found that the petitioner did not demonstrate, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the parental

relationship. In this regard, the Court noted that the Family Court correctly found that the petitioner's goal of having the parents each acknowledge their responsibility for the abuse of the children prior to reunification was unreasonable, given that both parents denied any direct involvement or participation in, or any knowledge of, the specifics of the alleged abuse. Moreover, that goal was never clearly communicated to the parents, and no therapy specifically addressed to that issue was ever provided by the petitioner. Additionally, the petitioner failed to exercise due diligence to adequately address the underlying allegations of sexual abuse, failed to exert sufficient diligent efforts with respect to arranging appropriate contact and visitation between the parents and children, and improperly kept the children in the care of foster parents who undermined efforts towards reunification. The evidence was also insufficient to show that, during the relevant period of time, the parents did not maintain contact with the children or that they failed to plan for their children's future. The parents visited the children whenever allowed to do so, and substantially complied with all terms set forth by the petitioner. The parents also maintained contact with the caseworkers, attended individual therapy and family therapy when it was made available, and maintained adequate housing. Accordingly, given the lack of clear and convincing evidence, the petitions were properly dismissed with prejudice.

Matter of Christopher John B., 87 AD3d 1133 (2d Dept 2011)

Father Continued to Use Illegal Drugs Following Removal of Child from His Custody

Contrary to the father's contention, the evidence adduced at the fact-finding hearing established by the requisite clear and convincing standard of proof that he permanently neglected his child by continuing to abuse illegal drugs following the removal of the subject child from his custody. Notwithstanding the persistent efforts of the Department of Social Services to help reunite the family, the father refused to cooperate with all rehabilitation programs, failed to secure financial stability, and tested positive for illegal drugs on one occasion. By his actions, the father failed to plan for his child's return. Here, the Family Court properly concluded that it was in the child's best interests to terminate the father's parental rights and free him for adoption by the foster parents. A suspended judgment was not appropriate in light of the father's lack of insight into his problems and his failure to address the primary issues which led to the child's removal in the first instance.

Matter of Peter C., Jr., 88 AD3d 702 (2d Dept 2011)

Mother Failed to Plan for Child's Return Despite Agency's Diligent Efforts

The Family Court properly determined that there was clear and convincing evidence that the mother permanently neglected the subject child by failing, for a year following the child's entrance into foster care, to plan for his return. The record established that the petitioner made diligent efforts to help the mother comply with her service plan, which required the mother, inter alia, to complete a parenting skills class for special needs children, to complete individual and family therapy, and to maintain regular visits with the child. Moreover, the Family Court properly determined that termination of the mother's parental rights was in the child's best interest.

Matter of Todd Andre'D, Jr., 88 AD3d 876 (2d Dept 2011)

Evidence of Mother's Failure to Attend Therapy and Take Prescribed Medication Supported Finding of Permanent Neglect

Contrary to the mother's contention, the Family Court properly found that she permanently neglected the subject children. The petitioner agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship (see Social Services Law § 384-b [7]). These efforts included facilitating visitation, referring the mother for individual and family therapy, providing her with financial assistance to buy food and furniture and pay her rent arrears, and repeatedly advising her of the need to comply with the service plan by attending therapy, taking her prescribed medication, keeping her rent current, and obtaining employment. Despite these efforts, the mother failed to plan for the children's future by failing to attend visitation and therapy regularly, recognize and address the problems that led to the children's placement in foster care, take her medication consistently, or obtain steady employment

and stable housing. Further, the petitioner also established by clear and convincing evidence that the mother is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the children (*see* Social Services Law § 384-b [4] [c]). A licensed psychologist who interviewed the mother and reviewed her medical records testified that she suffered from a mood disorder, post-traumatic stress disorder, and a personality disorder. The psychologist also testified that the mother's insight into her mental illness was poor, and that her prognosis for remedying her mental illness to the point where she would be able to parent a child was also poor. The psychologist additionally opined that the children would be at risk of neglect if placed in the mother's care based on her long-standing pattern of functioning and behavior. Accordingly, the Family Court properly terminated the mother's parental rights on the grounds of both mental illness and permanent neglect.

Matter of Dileina M.F., 88 AD3d 998 (2d Dept 2011)

Evidence of Mother's Illegal Drug History and Her Failure to Plan for Child's Future Supported Finding of Neglect

The record revealed that the child was removed from the mother's care in June 2006 because of the mother's history of drug use. It was undisputed that in September 2006, the mother left, without having completed drug rehabilitation programs at the Family Treatment Court and the Family and Children's Association that she had been attending, and she relapsed into drug use. Ultimately, she was arrested for selling drugs. By failing to complete the rehabilitative services to which she had been referred by the DSS, the mother failed to plan for the child during the period from September 2006 to February 2007. The evidence supported the Family Court's finding that the mother's plan of obtaining an apartment and finding a job as a chef was, at the time of the finding of neglect, made on May 8, 2009, not "realistic and viable." Based on that finding, and the mother's failure, while incarcerated, to "provide any realistic and feasible alternative to having [the child] remain in foster care until [her earliest] release from prison", clear and convincing evidence supported the Family Court's determination that the mother permanently neglected the child by failing to adequately plan for his future. Orders affirmed.

Matter of Jamel Raheem B., 89 AD3d 933 (2d Dept 2011)

Mother's Failure to Gain Insight Into Parenting Problems and Plan for Future Results in TPR

Family Court held ACS had proven by clear and convincing evidence that mother had permanently neglected child. ACS made diligent efforts to encourage and strengthen relationship between mother and children including providing counseling, parenting skills and anger management courses, scheduling regular supervised visits between mother and children, and although mother had completed some of the programs, she had failed to gain insight into her parenting problems and had failed to progress or plan for the future. The court also found it was in children's best interest to terminate mother's parental rights because the children had bonded with foster mother with whom they had lived with for many years, were thriving under her care, and she intended to adopt them. The Appellate Division affirmed.

Matter of Janell J., 88 Ad3d 512 (3d Dept 2011)

Motion to Vacate Default TPR Order Denied

Family Court denied mother's motion to vacate order terminating her parental rights based on permanent neglect. Mother had no reasonable excuse for default, no affidavit or public documentation to support her reason for delay, and she had no competent evidence to offer showing she had taken necessary steps to remove obstacles to her regaining custody of children. The Appellate Division affirmed.

Matter of Chelsea Antoinette A., 88 AD3d 627 (3d Dept 2011)

Failure to Take Assertive Steps Results in Abandonment

Respondent father and mother had child out of wedlock. Child was placed in foster care immediately after birth. Two years later mother's rights were terminated. Thereafter, DSS filed paternity proceeding against respondent, who after DNA test was confirmed as father. DSS then commenced abandonment proceeding against father. After hearing, court determined child was abandoned and terminated

respondent's rights. Father appealed. The Appellate Division affirmed. Father had been aware of mother's pregnancy, knew from speaking with mother he might be father but failed to take any assertive steps to determine paternity ,"including registering as putative father, requesting DNA testing, visiting child or paying support". And even after the paternity determination, father failed to take any steps to contact child or ask about her welfare.

Matter of Beverly EE., 88 AD3d 1086 (3d Dept 2011)

No Statutory Obligation to Insure Respondent had Counsel During Relevant Six Month Period

Respondent father was incarcerated when child was born. Child was removed from mother's care by DSS and later placed with paternal grandfather. After release from prison, father assigned his parental rights to grandfather. DSS filed abandonment proceeding against father alleging no significant contact between father and child for six months preceding filing of petition. After hearing, court dismissed petition finding respondent had no legal representation during six month period prior to filing of petition. DSS appealed. The Appellate Division reversed holding DSS has no statutory obligation to insure respondent had benefit of counsel during relevant six month period, only obligation is to show by clear and convincing evidence

that respondent had no significant contact and was not prevented or discouraged from doing so. In a footnote, the Court noted that respondent had legal representation throughout court matter.

Matter of Lily LL., 88 AD3d 1121 (3d Dept 2011)

No contact for Eleven Months Results in Abandonment

DSS filed petition to terminate father's parental rights based on abandonment. Mother's rights had already been terminated and father had not seen child eleven months prior to filing of petition. Thereafter DSS moved for summary judgment to have child adjudicated abandoned by father. Family Court terminated father's rights after reviewing affidavits from foster parent and caseworker verifying father had no contact with child for 11 months, and although caseworker was under no duty to make diligent efforts to encourage relationship between father and child, she did attempt, unsuccessfully, to encourage and strengthen their relationship. Child had a close relationship with pre-adoptive foster parents. The Appellate Division affirmed finding no reason to disturb court's decision.

Matter of Braidyn NN., 88 AD3d 1218 (3d Dept 2011)

Clear and Convincing Evidence of Permanent Neglect

Family Court found father of one child to have permanently neglected child and terminated his parental rights. DSS met its burden, by clear and convincing evidence, that it had made diligent efforts to strengthen and encourage relationship between father and child by arranging weekly visits between father and child, continuing to bring the child to him even when father moved out of the county. DSS gave father bus tokens to facilitate his attendance at parenting programs and counseling center. DSS tried to facilitate substance abuse treatment for him, spoke to various providers with whom he had enrolled to discuss how best to coordinate all the programs and help father meet his goals. Despite its efforts father missed nine appointments and failed to notify DSS for 4 of those missed appointments. DSS also established that father had failed to plan for child's future, as he had failed to take steps to provide an adequate, stable home and parental care for the child within the necessary period of period of time. Additionally, father refused to stop seeing his girlfriend who had drug addiction problem despite being advised of dangers of relapse and said he would "take his chances". The Appellate Division affirmed rejecting father's argument that court abused its discretion in not offering him a suspended sentence, as the overriding concern in these proceedings is the child's best interest and in this case, child's mother's rights had already been terminated, child had a been in same foster home for over four years and her foster parent intended to adopt her.

Matter of Angelina BB., 90 AD3d 1196 (3d Dept 2011)

Abandonment Finding Affirmed

Father was incarcerated when child was born and he remained incarcerated for two years thereafter. Child was in care of father's sister and sister's husband as

mother's rights had been terminated. After release, father was re-arrested due to parole violation. DSS commenced abandonment proceeding against father alleging that during relevant six month period, father had three one-hour supervised visits, father sent one letter to DSS, one birthday card to child and one voice mail message. There was conflicting testimony as to how many letters father had sent, whether or not the letters concerned child but no letters were produced into evidence. Father's attempts to say he tried to phone his sister were held to be "at the least disingenuous" by court as father knew sister would not accept collect calls and he had failed to establish a prepaid phone plan. The Appellate Division affirmed noting that father had not made any attempt during the relevant period to request DSS for visits with child or made any effort to communicate
with child, did not seek to find out how child was progressing or ask after his well being or otherwise demonstrate "a meaningful effort to assume his parental obligations."

Matter of Ryan Q., 90 AD3d 1263 (3d Dept 2011)

Petitioner Properly Relieved of Reasonable Efforts Requirement

Family Court terminated respondent's parental rights with respect to her son on the ground of permanent neglect. The Appellate Division affirmed. The court properly granted petitioner's motion to be relieved of the requirement that it make reasonable efforts to reunite the mother and son. Petitioner established by clear and convincing evidence that the mother's parental rights had been terminated with respect to the son's half sibling and that she repeatedly failed to cooperate with programs to address her alcohol, drug use and mental health issues. The mother failed to establish that requiring reasonable efforts would be in the child's best interests and would likely result in reunification.

Matter of Jacob E., 87 AD3d 1317 (4th Dept 2011)

Social Services Law Did Not Implicate Family Court's Subject Matter Jurisdiction

Family Court terminated respondent mother's parental rights with respect to her son upon a finding of permanent neglect and freed the child for adoption. The Appellate Division affirmed. The mother was not denied effective assistance of counsel because the attorney counseled the parent to admit the allegations in the petition and there was no demonstration that mother's attorney's alleged failure to request a suspended judgment or post-termination contact resulted in actual prejudice. Instead, the evidence established that a suspended judgment or post-termination contact was not in the child's best interests. Mother's contention was without merit that the court lacked jurisdiction over the proceeding because it failed to comply with Social Services Law § 384-b (3) (c-1), which applied where one Family Court judge presides over a prior permanency hearing and a termination of parental rights petition involving the same child is assigned to a different Family Court judge. That statute did not implicate subject matter jurisdiction, but rather concerned venue, which where, as here, if not raised is waived. Further, the statute contained a preference for the same judge to hear the most recent proceeding, not a mandate.

Matter of Sean W., 87 AD3d 1318 (4th Dept 2011)

Mother's Unexplained Failure to Appear Constituted a Default

Family Court denied respondent mother's motion to vacate a prior order revoking a suspended judgment and terminating her parental rights with respect to her five children. The Appellate Division affirmed. The mother failed to appear at the hearing on the revocation of the suspended judgment and although her attorney was at the hearing he did not participate. The unexplained failure to appear at the hearing constituted a default and the Appellate Division therefore dismissed that appeal. In terms of the appeal from the order denying mother's motion to vacate the default, the court properly exercised its discretion in denying the motion. The mother's incarceration at the time of the hearing was not a reasonable excuse for her default because she failed to provide a credible explanation for her failure to advise her attorney, the court, or petitioner of her unavailability and she failed to demonstrate a meritorious defense.

Matter of Lastanzea L., 87 AD3d 1356 (4th Dept 2011)

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Remittal For Hearing on Post-Termination Contact

Family Court revoked a suspended judgment and terminated respondent's parental rights to his child. The Appellate Division modified by granting respondent's request for a hearing to determine whether he should be afforded post-termination contact with the instant child. The father failed to demonstrate exceptional circumstances to warrant an extension of the suspended judgment. However, the court should have granted respondent's request for a hearing to determine whether post-termination contact between th respondent and the child was in the child's best interests.

Matter of Lestariyah A., 89 AD3d 1420 (4th Dept 2011)

Termination of Parental Rights Warranted on The Ground of Mental Illness

Family Court terminated respondent's parental rights on the ground of mental illness. The Appellate Division affirmed. The testimony and reports of petitioner's experts, as well as the testimony of a caseworker who supervised the mother's visitation with the child, established that the mother was suffering from a mental illness that was manifested by a disorder or disturbance in behavior, thinking or judgment to such an extent that if the child were in the custody of respondent the child would be in danger of becoming a neglected child.

Matter of Royfik B., 89 AD3d 1423 (4th Dept 2011)

TPR on Ground of Mental Illness Affirmed

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. There was clear and convincing evidence that mother was then and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for her children. Although the psychiatrist who testified on behalf of the mother recommended that the mother be given one last chance, once he learned of various misstatements made by the mother, his recommendation changed. Contrary to mother's contention the psychiatrist's ultimate recommendation was not equivocal. The court was entitled to draw an adverse inference from mother's failure to testify.

Matter of Darius B., 90 AD3d 1510 (4th Dept 2011)

Family Services Progress Notes Properly Admitted

Family Court terminated father's parental rights with respect to his child and transferred custody and guardianship of the child to petitioner. The Appellate Division affirmed. The contention of the father that the court erred by admitting into evidence his records from a drug treatment facility was unpreserved and without merit. The court properly admitted in evidence the family service progress notes relating to the father. Petitioner properly laid a foundation for the admission in evidence of those notes through the testimony of its caseworker.

Matter of Shirley A.S., 90 AD3d 1655 (4th Dept 2011)

WITNESSES

Appellate Division Affirms That Five-Year-Old Be Permitted to Testify

Family Court permitted the five-year-old victim to give sworn testimony. The Appellate Division affirmed. The victim's voir dire responses established that he sufficiently understood the difference between truth and falsity, that lying was wrong, and that lying could bring adverse consequences.

Matter of Dandre H., 89 AD3d 553 (1st Dept 2011)

NOTES