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Child Custody Factors: Relationship With Both Parents Gains in Importance*

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Deciding between parents in a contested child custody dispute is one of the most daunting challenges a court can face. The relevant statute directs simply that the court make its decision on the basis of "the best interests of the child."¹ The statute essentially stops at this level of abstraction. It provides no objective or operational definition of "best interests of the child," meaning that it remains an elusive concept, an aspiration really, rather than an operational standard.

Underscoring the subjectivity and complexity of the concept, judicial proclamations have made clear that the "only absolute in the law governing custody of children is that there are no absolutes"² and that the court must base its determination on the totality of the circumstances.³ As often stated by the Court of Appeals, the decisional law eschews absolutes in favor of elucidating "policies designed not to bind the courts but to guide them in determining what is in the best interests of the child."⁴ All of which leaves the litigation landscape immersed in a thick fog of subjectivity and it leaves the lawyers and judges who traverse it in constant search for points of clarity. A review of recent decisions reveals at least one such point.

An Elusive Aspiration

As noted, neither the statute nor the case law defines "best interests" in any operational sense. As one court forthrightly acknowledged, "At the bottom line, what is

in the child's best interest equals the fact finder's best guess."⁵ The concept is amorphous because it is inherently value-laden. There is no objective optimal outcome for the child. The only way the desired outcome can be divined in a given case is by reference to socio-moral value judgments made by the presiding judge.

For example, suspending reality and assuming the ability to perfectly predict outcomes, which of course is impossible, suppose one were to know that if custody is given to Parent A the child will enjoy a rich intellectual life, will excel in college and professional school, and go on to a lucrative and fulfilling professional life, honored frequently with achievement awards and other distinctions. The child will also, however, at a number of life's pressure points endure significantly elevated stress levels, with periodic physical manifestations that from time to time will require resort to anti-anxiety and anti-depression medications.

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On the other hand, if custody were given to Parent B, the child will grow up with little appreciation of education or intellectual pursuit, will squeak through high school, drop out of college, maintain spotty employment, and never really achieve anything in the material/professional world. The child will, though, never experience a moment of stress or anxiety and will cavort about happy as a pig in slop, chanting the Alfred E. Newman mantra "What, me worry?"

Which of these two outcomes is superior? This writer has put such a question to numerous audiences nationwide, consisting of both attorneys and mental health professionals. The responses are always mixed. Some see achievement as the higher value, while others opt for Alfred's relatively stress-free life. Neither is objectively right nor objectively wrong. Either answer can be embraced without fear that the choice will be contradicted by objective evidence or empirical research. This is so because socio-moral value judgments must be made as a precondition to answering that question. Therefore, it is not a question that can be answered by behavioral science research or mental health theories. The behavioral science field can be of immense assistance to the custody court in providing relevant information, but it cannot resolve the policy judgments that are committed squarely to judicial authority. Only the courts can do that.

Custody Factors

While neither behavioral science nor the law objectively and operationally defines the "best interests" concept, the courts have described a number of factors to be considered in deciding upon the proper custodial arrangement. While these provide some useful guidance, they hardly constitute a fixed template that can objectively be applied. This is because there is no methodical weighting system that prescribes the relative importance of each variable.

For example, one parenting function of value is the contribution that a parent makes to the intellectual development of the child. Another is the parental contribution toward the child's emotional development. Well, suppose Parent A is the best provider of intellectual stimulation and motivation for superior intellectual development, while Parent B better affords the child emotional solace in times of travail. Which, if

either, should count for more?

The behavioral science field does not answer that question and, given the ethical and practical limitations on psychological research design, probably never will be able to do so. While the law ascribes no formal weighting system that definitively answers the question, custody courts, as the duly designated arbiters of such values, must, in fact, do so, on a case-by-case basis.

In the absence of such a legally prescribed weighting system one is left to discern the relative importance of the various factors by examining the published decisions in search of trends and patterns in the case law. A review of recent decisions, in fact, does reveal that one factor in particular, namely, the willingness or unwillingness of a parent to actively encourage and support the child's relationship with the other parent, has risen to a preeminent position.

Relationship with Parents

The courts have embraced the concept that it is generally in the best interest of the child to have a healthy relationship with both parents following marital dissolution. Therefore, in determining custody disputes, the court may properly consider "the effect that an award of custody to one parent might have on the child's relationship with the other parent." ⁶

In sustaining an award of custody to the mother in *Bliss on Behalf of Ach v. Ach*, ⁷ the Court of Appeals noted:

In this child custody proceeding, the trial court found that, although both parents are fit to raise the child, the welfare of the child would best be served by placing primary custody in the petitioner mother. Very important in this connection was the court's determination that if the father were to receive primary custody, he would endeavor to fully integrate the child into his separate family, significantly downplaying the role of the child's natural mother, jeopardizing both the child's sense of identity and his relationship with his natural mother. A similar undesirable design on the part of the mother was not perceived. ⁸

It is neither rare nor surprising that divorcing parents frequently feel great hostility toward one another. The

courts, however, take a dim view of the litigant who allows such rancor to spill over and poison the natural love and affection that the child would ordinarily feel toward the other parent.⁹ Where one parent acts to diminish the relationship between the child and the other parent, this effectively subverts the child's interests and can lead to psychological or emotional problems in the child. Evidence of such behavior can cut strongly against the offending parent.¹⁰ Indeed, over time, the courts have enunciated this consideration in the strongest possible terms, declaring that interference with the child's relationship with the other parent is "so inconsistent with the best interests of the children as to, per se, raise a strong probability that the mother is unfit to act as custodial parent."¹¹

Over the past decade or so this factor has proven to be increasingly decisive. Numerous decisions just from the past year in the New York courts attest to its strength.

In *Diaz v. Diaz*,¹² the mother was awarded custody because "the father engaged in a course of conduct which intentionally interfered with the relationship between the children and the mother. Such action is so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as custodial parent." In *Jones v. Pagan*,¹³ the mother's interference with the father's relationship with the children resulted in custody going to the father, notwithstanding the fact that the father had a criminal history.

*Ashmore v. Ashmore*¹⁴ saw the court award custody to the mother, notwithstanding her history of mental disorder (obsessive-compulsive disorder and depression) and relegated the father to supervised visitation because his "actions demonstrated that he was unwilling to allow the children to have a relationship with the mother." In *Anthony MM. v. Jacquelyn NN.*,¹⁵ the mother lost custody because she "continued to insinuate that the father was sexually abusing the child, despite the fact that no evidence of the alleged abuse was ever found by medical professionals who examined the child."

Similarly, the court awarded custody to the father in *Aaron W. v. Shannon W.*¹⁶ upon the finding that he was more likely to promote the mother's relationship with the child than would the mother if she were the

custodial parent without reference to any history of actual interference. Indeed, it seems clear that the obligation to actively promote the relationship is an affirmative one, as evidenced by the court's decision in *Dobies v. Brefka*,¹⁷ wherein the court found it telling that the offending custodial parent was unable to cite any examples of disciplining the child when the child refused to go on visits with the non-custodial parent.

So important is this factor that it has to power to swamp substantial constellations of other factors that point in a different direction. A recent Third Department decision exemplifies this potency:

After a hearing, ...Supreme Court performed a detailed analysis of the relevant factors and found that the father and mother were both fit, loving parents, each demonstrating significant strengths and weaknesses. In particular, the court noted that the father had exhibited occasional poor judgment in such serious matters as maintaining unsecured guns in the home, and the mother had taken a more proactive role in raising the children, had acted as their primary caregiver before the parties' separation and was better aware of their needs. However, the court found that the mother's positive attributes were outweighed by her 'cumulative efforts' after the separation to interfere with the father's relationship with the children and prevent him from having a meaningful role in their lives and by her 'willingness...to deceive in order to achieve her goal of parenting the children without the [father's] involvement.'¹⁸

Behavioral Science Support

The legal preeminence accorded the willingness to foster factor is well supported by the behavioral science research. In a well-documented compilation of family law related research, Joan B. Kelly, Ph.D., one of the preeminent scholars in the field, has made clear that "children and adolescents in separated and divorced families are better adjusted when they have warm relationships with two actively involved and adequate parents...",¹⁹ adding that the research has shown that "for four decades, children have reported the loss of the nonresident parent, usually the father, as the most negative aspect of divorce."²⁰

Other scholars in the field have expressed accord, noting that "the evidence now available that children in divorced families benefit from rich relationships with both their residential and non-residential parents leaves little room for debate."²¹ Likewise, Jonathan W. Gould, Ph.D., and David A. Martindale, Ph.D., also have made clear that there "is an emerging consensus that the benefits of maintaining contact with both parents exceed any special need for relationships with the mother or the father."²²

Conclusion

Behavioral science has informed judicial decision-makers of the negative consequences to children when they are deprived of a post-divorce relationship with both parents. The task of prioritizing or weighting this factor relative to other pertinent variables, however, lies within the province of the courts, not the research community. In the case of the "willingness to foster" factor, the courts have done so in a manner that provides a striking point of clarity: The unwillingness to promote the relationship between the child and the other parent trumps the other factors, not only standing alone but also in combination with one another. Accordingly, irrespective of any litigant's feeling, belief, or deeply held conviction that the child would be better off without the other parent, acting on those feelings is likely the kiss of death in the custody arena.

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Endnotes:

1. Domestic Relations Law §240.
2. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765 (1982).
3. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982).
4. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982).
5. *Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. 406, 419, 381 A.2d 1154 (1977).

6. *Bliss on Behalf of Ach v. Ach*, 56 N.Y.2d 995, 439 N.E.2d 349 (1982).
7. *Bliss on Behalf of Ach v. Ach*, 56 N.Y.2d 995, 439 N.E.2d 349 (1982).
8. *Bliss on Behalf of Ach v. Ach*, 56 N.Y.2d 995, 439 N.E.2d 349 (1982).
9. *Eastman v. Drennen*, 122 A.D.2d 397, 398–399, 505 N.Y.S.2d 211 (3d Dept. ?1986).
10. *Walden v. Walden*, 112 A.D.2d 1035, 1037, 492 N.Y.S.2d 827 (2d Dept. 1985).
11. *Entwistle v. Entwistle*, 61 A.D.2d 380, 384–385, 402 N.Y.S.2d 213 (2d Dept. 1978).
12. *Diaz v. Diaz*, 97 A.D.3d 747, 948 N.Y.S.2d 413 (2d Dept. 2012).
13. *Jones v. Pagan*, 96 A.D.3d 1058, 947 N.Y.S.2d 580 (2d Dept. 2012).
14. *Ashmore v. Ashmore*, 92 A.D.3d 817, 939 N.Y.S.2d 504 (2d Dept. 2012).
15. *Anthony MM. v. Jacquelyn NN.*, 91 A.D.3d 1036, 937 N.Y.S.2d 360 (3d Dept. 2012).
16. *Aaron W. v. Shannon W.*, 96 A.D.3d 960, 946 N.Y.S.2d 648 (2d Dept. 2012); See also, *McNichol v. Kim*, 89 A.D.3d 735, 931 N.Y.S.2d 895 (2d Dept. 2011).
17. *Dobies v. Brefka*, 83 A.D.3d 1148, 921 N.Y.S.2d 349 (3d Dept. 2011).
18. *Jeannemarie O. v. Richard P.*, 94 A.D.3d 1346, 943 N.Y.S.2d 246 (3d Dept. 2012).
19. Kuehnle, K., Drozd, L., *Parenting Plan Evaluations: Applied Research for the Family Court*, Oxford (2012, p. 67).
20. Kuehnle, K., Drozd, L., *Parenting Plan Evaluations: Applied Research for the Family Court*, Oxford (2012, p. 66).
21. Fabricius, W.V., Braver, S.L., Diaz, P., Velez, C.E., "Custody and Parenting Time," in Lamb, M.E., *The Role of the Father in Child Development* (Wiley, 2010),?p. 217.
22. Gould, J.W., Martindale, D.A., *The Art and Science of Child Custody Evaluations*, Guilford 2007, p. 183

NEWS BRIEFS

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

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

On January 15, 2013, and January 16, 2013, the Appellate Division Second Judicial Department, the Attorneys for Children Program, the Kings County Family Court Committee, the New York State Unified Court System Child Welfare Court Improvement Project, and the Kings County Disproportionate Minority Representation Committee, co-sponsored a two part lunchtime seminar which was held at the Kings County Family Court. The Hon. Ilana Gruebel, Kings County Family Court, and Dr. Dalton Conley, Sociologist, presented the documentary film, *Race: the Power of Illusion*, which was followed by *Reflections on Race: the Power of an Illusion - Implications for Our Work in Family Court*, a moderated discussion. This program was also presented at the Richmond County Family Court on February 7, 2013, and February 8, 2013, with speakers Darius Charney, Senior Staff Attorney, Center for Constitutional Rights, and Dr. Dalton Conley, Sociologist.

On January 24, 2013, the Appellate Division, First and Second Judicial Departments, the Attorneys for Children Program in

the First and Second Judicial Departments, the New York City Family Court, the New York City Administration for Children's Services, the New York State Office of Children and Family Services, the New York State Unified Court System Child Welfare Court Improvement Project, and Casey Family Programs, presented a lunch time seminar at the Richmond County Family Court. The documentary film, *Unseen Tears*, was introduced by Michael Martin, Executive Director, Native American Community Services of Buffalo and Niagra Counties, followed by a panel discussion, *Native American Children in the New York City Child Welfare System: More than Meets the Eye*. The panelists included Ray Kimmelman, Director of Legal Compliance, ACS/FCLS, Marguerite Smith, Counsel, Shinnecock Indian Nation, and Shaylynn Raphaelito, American Indian Community House. This program was also presented on February 25, 2013, and February 26, 2013, at the Family Courts in Kings and Queens Counties.

Tenth Judicial District (Nassau County)

On January 17, 2013, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, and the Nassau County Family Court Liaison Committee, co-sponsored a Lunch and Learn seminar at the Nassau County Family Court. Robert Mangi, Esq, Attorney in Private

Practice, presented *Modifications of Custody Orders*.

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

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

THIRD DEPARTMENT NEWS

Liaison Committees

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts met last fall and will meet again in May in conjunction with the Lake Placid presentation of the Children's Law Update '12-13. 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. Welcome to several new Liaison Representatives who have been recently appointed including Ruth Supovitz (Albany), Christopher Pogson (Broome), Bethene Lindsdtedt-Simmons (Columbia), Virginia Morrow (Franklin), and Paula Michaud (St. Lawrence).

Training News

The following training is currently planned for the Spring 2013:

Children's Law Topical entitled "Expand the Possibilities: Proactive Lawyering in Child Abuse Cases" will be held at the Holiday Inn on Wolf Road in Colonie, NY on Friday, April, 19, 2013 and will focus on Child Welfare proceedings. During the luncheon portion of the program we will be presenting the John T. Hamilton, Jr., Esq. Award for Excellence in the Representation of Children to an outstanding panel member.

Children's Law Update '12-13, will be held on May 10, 2013 at the Crowne Plaza Resort in Lake Placid, NY.

Introduction to Effective Representation of Children, the two-day introductory course for panel applicants and new panel members, will be held on Friday and Saturday, June 7-8, 2013 at the Clarion Hotel (Century House) in Latham, NY.

CLE News Alert - We now have a series of 1-1 ½ hour online video presentations, called "KNOW THE

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

Website

The Office of Attorneys for Children continues to update its web page located at nycourts.gov/ad3/oac. 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 (1/13) of the Administrative Handbook, forms, rules, frequently asked questions, seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The newest feature is a *News Alert* which will include recent program and practice developments of note.

FOURTH DEPARTMENT NEWS

New Assistant Director

The new Assistant Director of the

Fourth Department AFC Program is Linda Kostin, Esq. Linda was an AFC and most recently was the coordinator of CLE for Volunteer Legal Services Project in Rochester.

Tentative Fall Seminar Schedule

September 17, 2013

Update
Location TBA
Rochester, NY

October 4, 2013

Update
Location TBA
Syracuse, NY

October 17-18, 2013

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

Tentative Spring 2014 seminars:

Lockport, NY and Utica, NY

Congratulations to New Judges

5th Judicial District

Hon. David King, Family and Surrogate Courts, Lewis County
Hon. Charles Merrill, Supreme Court, Lewis County (formerly Multi-Bench Judge, Lewis Co.)
Hon. Julie Cecile, Family Court, Onondaga County

7th Judicial District

Hon. Scott Odorisi, Supreme Court Justice, Monroe County

RECENT BOOKS AND ARTICLES

ATTORNEY FOR THE CHILD

John Lande & Forrest S. Mosten, *Family Lawyering: Past, Present and Future*, 51 Fam. Ct. Rev. 20 (2013)

The Safe Start Center, *Polyvictimization: Tips for Advocates Working with Children*, 32 No. 1 Child L. Prac. 12 (2013)

CHILD SUPPORT

Ryan Larson, *Modifying Modifications: The Future of Child Support is Electronic*, 51 Fam. Ct. Rev. 149 (2013)

CHILD WELFARE

Edward R. Anderson & Shannon M. Greene, *Beyond Divorce: Research on Children in Repartnered and Remarried Families*, 51 Fam. Ct. Rev. 119 (2013)

Sarah Collins, *Unreasonable Seizure: Government Removal of Children From Homes with Drugs but no Evidence of Neglect*, 20 Geo. Mason L. Rev. 631 (2013)

Vanessa M. Starke, *The Impact of Coy v. Iowa on State Protective Statutes for Child Abuse Victim Testimony in Criminal Trials: A Case Study-Missouri*, 49 No. 1 Crim. Law Bulletin ART 4 (2013)

CHILDREN'S RIGHTS

Tanya Mir, *Trick or Treat: Why Minors Engaged in Prostitution Should be Treated as Victims, not Criminals*, 51 Fam. Ct. Rev. 163 (2013)

CONSTITUTIONAL LAW

Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 Stan. J. Civ. Rts. & Civ. Liberties 79 (2013)

COURTS

Hon. Karen S. Adam & Stacey N. Brady, *Fifty Years of Judging in Family Law: The Cleavers Have Left the Building*, 51 Fam. Ct. Rev. 28 (2013)

Hon. Russell A. Comstock & Hon. David E. Day, *The Idaho Rules of Family Law Procedure: A Pilot Project in the Fourth Judicial District*, 56-JAN Advocate (Idaho) 40 (2013)

Sharon Press, *Family Court Services: A Reflection on 50 Years of Contributions*, 51 Fam. Ct. Rev. 48 (2013)

Peter Salem et. al., *Taking Stock of Parent Education in the Family Courts: Envisioning a Public Health Approach*, 51 Fam. Ct. Rev. 131 (2013)

Matthew J. Sullivan, *Parenting Coordination: Coming of Age?*, 51 Fam. Ct. Rev. 56 (2013)

CUSTODY AND VISITATION

Sean Michael Larson, *Watt's Love Got to do With it: Relocating the Best Interests of Wyoming's Children in Custodial Parent Relocation Law*, 13 Wyo. L. Rev. 95 (2013)

Philip M. Stahl & Lorraine Martin, *An Historical Look at Child Custody Evaluations and the Influence of AFCC*, 51 Fam. Ct. Rev. 42 (2013)

DOMESTIC VIOLENCE

Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 25 Hastings Women's L. J. 107 (2013)

Margaret B. Drew, *Collaboration and Coercion*, 24 Hastings Women's L. J. 79 (2013)

Janet R. Johnston & Nancy Ver Steegh, *Historical Trends in Family Court Response to Intimate Partner Violence: Perspectives of Critics and Proponents of Current Practices*, 51 Fam. Ct. Rev. 63 (2013)

Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 U. Pa. L. Rev. 363 (2013)

Julie Saffren, *Professional Responsibility in Civil Domestic Violence Matters*, 24 Hastings Women's L. J. 3 (2013)

D. Kelly Weisberg, *Lindsay's Legacy: The Tragedy That Triggered Law Reform to Prevent Teen Dating Violence*, 24 Hastings Women's L. J. 27 (2013)

EDUCATION LAW

Esther Kim, *Smaller Steps Towards Progress in the Dominican Republic: Securing Equal Access to Education for Dominico-Haitian Children*, 31 B.U. Int'l L. J. 155 (2013)

Taylor Pospichel, *Are California's Homeless Children Being Left Behind?: Analyzing the Implementation of McKinney-Vento Education Rights in California*, 10 Hastings Race & Poverty L. J. 121 (2013)

Elizabeth Richardson, *Homeschooling Laws (or Lack Thereof) in New Jersey - - Are Children Slipping Through the Cracks?*, 42 J. L. & Educ. 173 (2013)

Whitney Stohr, *Coloring a Green Generation: The Law and Policy of Nationally-Mandated Environmental Education and Social Value Formation at the Primary and Secondary Academic Levels*, 42 J. L. & Educ. 1 (2013)

FAMILY LAW

J. Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 Fam. Ct. Rev. 104 (2013)

Lynne Marie Kohm & Rachel K. Toberty, *A Fifty-State Survey of the Cost of Family Fragmentation*, 25 Regent U. L. Rev. 25 (2012-2013)

Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 Geo. Mason L. Rev. 419 (2013)

Myrisha S. Lewis, *Sex and Statutory Uniformity: Harmonizing the Legal Treatment of Semen*, 7 Charleston L. Rev. 235 (2012-2013)

Asifa Quraishi-Landes, *Rumors of the Sharia Threat are Greatly Exaggerated: What American Judges Really Do With Islamic Family Law in Their Courtrooms*, 57 N.Y.L. Sch. L. Rev. 245 (2012/2013)

Lisa Shultz, *No Faith, No Credit, No Union*, 56 JAN Advocate (Idaho) 20 (2013)

Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 Seton Hall L. Rev. 1 (2013)

FOSTER CARE

Claire Chiamulera, *New Birth Assessment Helps Teen Parents in Illinois Foster Care*, 32 No. 1 Child L. Prac. 10 (2013)

The Legal Center for Foster Care Education, *Infants and Toddlers with Disabilities in the Child Welfare System: What Advocates Should Know About IDEA Part C*, 32 No. 1 Child L. Prac. 1 (2013)

IMMIGRATION LAW

Paul Easton, *School Attrition Through Enforcement: Title VI Disparate Impact and Verification of Student Immigration Status*, 54 B.C. L. Rev. 313 (2013)

Azadeh Shahshahani & Chaka Washington, *Shattered Dreams: An Analysis of the Georgia Board of Regents' Admissions Ban from a Constitutional and International Human Rights Perspective*, 10 Hastings Race & Poverty L. J. 1 (2013)

JUVENILE DELINQUENCY

Brian J. Fuller, *Criminal Law - - A Small Step Forward in Juvenile Sentencing, But is it Enough? The United States Supreme Court Ends Mandatory Juvenile Life Without Parole Sentences: Miller v. Alabama*, 132 S. Ct. 2455 (2012), 13 Wyo. L. Rev. 377 (2013)

Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of*

Prosecutors in Juvenile Justice Reform, 98 Cornell L.
Rev. 383 (2013)

Jonathan Levy, *The Case of the Missing Argument: The
Mysterious Disappearance of International Law From
Juvenile Sentencing in Miller v. Alabama*, 132 S. Ct.
2455 (2012), 36 Harv. J.L. & Pub. Pol'y 355 (2013)

FEDERAL COURTS

Error Was “Plain” Within the Meaning of Rule 52(b) if Error Was Plain at Time of Appellate Review

The District Court increased the length of petitioner’s sentence so he could participate in a prison drug rehabilitation program. Petitioner’s counsel did not object, but on appeal to the Fifth Circuit, petitioner claimed that the District Court plainly erred by increasing his sentence solely for rehabilitative purposes. While petitioner’s appeal was pending, the Supreme Court decided in *Tapia v. United States*, ___ US ___, 131 S Ct 2382, that it was error for a court to “impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise promote rehabilitation.” The Fifth Circuit decided that Federal Rule of Criminal Procedure 52(b) did not give it the authority to correct the trial court’s unreserved legal error where the law was unsettled at the time of trial, inasmuch as an error was plain only if it was clear under current law at the time of trial. A six-Justice Supreme Court majority reversed and remanded the case, holding that Rule 52(b) permitted a court of appeals to consider an unreserved legal error where there was “plain error that affect[ed] substantial rights,” if the error was plain at the time of appellate review, but was not plain at the time of trial. To hold to the contrary would bring about unjustifiably different treatment of similarly situated individuals. Although the Solicitor General pointed out that a contrary rule provided an added incentive to counsel to call the court’s attention to an issue at a time when the court could quickly take remedial action, this incentive had little, if any, practical importance. “If there is a lawyer who would deliberately forgo objection now because he perceives some slightly expanded chance to argue for ‘plain error’ later (emphasis in the original), we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom.”

Henderson v. United States, ___ US ___, 2013 WL 610203 (Feb. 20. 2013)

Return of a Child to Her Country of Habitual Residence Did Not Render Appeal Moot

The Eleventh Circuit dismissed as moot petitioner father’s appeal of a Hague Convention on the Civil Aspects of International Child Abduction/International Child Abduction Remedies Act return order. The court concluded that it was “powerless” to grant relief after petitioner’s daughter was returned to Scotland. The Supreme Court vacated and remanded the case, holding that the return of a child to a foreign country pursuant to a Convention return order did not render an appeal of that order moot. A case was moot only when it was impossible for a court to grant any effectual relief whatever to the prevailing party. The parties’ dispute was still very much alive where petitioner continued to contend that the daughter’s country of habitual residence was the United States and the respondent mother contended that the daughter’s home was in Scotland. Respondent’s argument that the case was moot because the District Court lacked authority to issue a re-return order confused mootness with the merits. Petitioner’s prospects of success were not pertinent to the mootness inquiry. Enforcement of an order seemed uncertain if respondent chose to defy it, but such uncertainty did not render the case moot. If cases such as the case at issue became moot upon the child’s return, courts would be more likely to grant stays as a matter of course to prevent the loss of any right to appeal. Such routine stays conflicted with the Convention’s mandate of prompt return of a child to his or her country of habitual residence. Further, if losing parents were effectively guaranteed stays, it seemed likely that more would appeal.

Chafin v. Chafin, ___ U.S. ___, 2013 WL 598436 (Feb. 19, 2013)

Student Stated Cause of Action Under Equal Protection Clause Based Upon Anti-Semitic Bullying

Plaintiff student (plaintiff), who attended high school in defendant School District, and his father, brought this action in District Court, alleging that the School District failed to protect plaintiff from anti-Semitic bullying by other students. The court granted defendant's motion to dismiss in part and denied it in part. The court rejected defendant's contention that plaintiffs' claim based upon the Equal Protection Clause was barred by the doctrine of primary jurisdiction. Because plaintiffs' Equal Protection claim involved the interpretation of a constitutional provision and not technical or policy considerations within the NYS Commissioner of Education's field of expertise, and the Commissioner would be unable to provide the injunctive relief, compensatory damages and punitive damages plaintiff sought, plaintiff was not required to appeal to the Commissioner. Moreover, plaintiffs' alleged facts, if true, stated an Equal Protection claim of deliberate indifference to religion-based harassment based on defendants' knowledge of the harassment of plaintiff and failure to either educate students about the harms of such religious discrimination or investigate and discipline the student bullies. However, there was no private right of action under the New York State Constitution where, as here, remedies were available under § 1983. New York Civil Rights Law § 40, which prohibited discrimination on the basis of race, creed, color, national origin, sex, marital status, sexual orientation or disability, covered religious discrimination in the term "creed." Therefore, discrimination based upon plaintiff's religion fell squarely within the protected categories provided by the NYCRL.

G.D.S. v. Northport-East Northport School Dist., ___F Supp3d___, 2012 WL 6734686 (SDNY 2012)

COURT OF APPEALS

Agency No Defense to Charge of Criminal Facilitation

An undercover officer approached defendant and asked him where he could find some “rock.” Defendant led the officer to a location where they encountered “JD Blue.” Defendant said the officer wanted “two fat ones” and handed JD Blue \$40 in pre-recorded buy money that the officer had given defendant earlier. JD Blue left briefly and upon his return he handed defendant two ziplock bags containing crack and defendant passed them to the officer. Defendant was subsequently arrested and indicted for, among other things, felony sale of a controlled substance and criminal facilitation in the fourth degree. Supreme Court found defendant not guilty of the felony sale count upon its determination that the People failed to disprove defendant’s agency defense beyond a reasonable doubt. Defendant was convicted of the misdemeanor facilitation charge. The Appellate Division affirmed. The Court of Appeals also affirmed. Agency may not be interposed as a defense to a charge of criminal facilitation. “Sale” or “sell” were not components of facilitation and, under Penal Law § 115.10 (3), the fact that defendant was not an accomplice to the sale or guilty of that crime did not provide a defense to facilitation. The underlying purpose of the agency doctrine was to reduce the exposure of a buyer’s agent from a mandatory indeterminate life sentence for sale to the more lenient punishments imposed for possession offenses, but here, defendant’s facilitation offense was a class A misdemeanor. Further, the agency defense is not a complete defense. It would be incongruous to allow a facilitator, who acted as the buyer’s conduit to the seller and actively participated in the transaction, to escape all criminal liability because that person never touched the drugs.

People v Watson, 20 NY3d 182 (2012)

Defendant Failed to Demonstrate That He Was Deprived of Effective Assistance of Counsel

Defendant was convicted of murder, attempted murder, assault and weapons offenses after a trial where witnesses testified that he shot two members of a rival gang, killing one and wounding another. The theory of

the defense at trial was that defendant did not shoot the gang members, rather the shooter was “Sims,” the leader of defendant’s gang, who according to witnesses was present at the shootings. Sims did not testify at defendant’s trial. On cross-examination of defendant, the prosecutor established that defendant and Sims were incarcerated in the same jail at the same time. Defendant acknowledged that he saw his lawyer meet with Sims at the jail, but denied that he had attended the meeting. In the People’s summation the prosecutor referred to the defense lawyer’s “secret little meeting” with Sims and suggested that its purpose was “to see if he would help save [defendant], say it wasn’t him, say it was somebody else ... get our boy and your friend off.” Defense counsel did not object to that part of the summation. Likewise, defendant’s appellate counsel did not raise any issue relating to that part of the summation on the direct appeal of defendant’s conviction. Defendant’s conviction was upheld on appeal, his CPL 440.10 motion was denied, as was his coram nobis proceeding in the Appellate Division. The Court of Appeals granted the writ of error coram nobis and affirmed, rejecting defendant’s contention that he was deprived of the effective assistance of appellate counsel because his attorney failed to argue that the conduct of the prosecutor at trial subjected defendant’s attorney to ethical conflicts. The jury’s knowledge that the attorney met with Sims did not make it either necessary or appropriate for the attorney to testify. Moreover, nothing in the record indicated that the attorney could have said anything about the meeting that would have helped defendant. Defendant’s contention that he was deprived of effective assistance of counsel based upon the prosecutor’s accusation that a defense attorney attempted to get Sims to tell a false story that would exculpate the defendant had more merit. Such accusation would not automatically require disqualification, but would create at least a potential for conflict because the attorney could be impelled to protect himself at his client’s expense. However, defendant’s appellate attorney could reasonably have concluded that no such accusation was made. The prosecutor did refer in closing arguments to the defense lawyer’s “little secret meeting” with Sims and suggested that its purpose was to see if Sims would help him save defendant. Although those statements in the summation warranted a rebuke from the judge, a

reasonable appellate attorney could have concluded that it did not involve a potential conflict that required the trial court to make an inquiry on the record. The dissent would have reversed.

People v Townsley, 20 NY3d 294 (2012)

Family Court's Findings Regarding Equitable Estoppel More Nearly Comported With The Weight of The Evidence

Family Court made findings that the eight-year-old child, who was the subject of the proceeding, knew respondent, with respondent's encouragement, as her father; that so far as the child was concerned there was a relationship with respondent; and that the child relied on respondent as her father sufficient that it would have been detrimental for the court to order DNA testing. The Appellate Division made different factual findings and reversed, concluding that the Commissioner of Social Services failed to prove by clear and convincing evidence that respondent should be estopped from denying paternity. The Court of Appeals reversed, concluding that the evidence more nearly comported with Family Court's findings and its determination that respondent should be equitably estopped from asserting nonpaternity. The dissent would have affirmed.

Matter of Commissioner of Social Servs. v Julio J., 20 NY3d 995 (2013)

APPELLATE DIVISIONS

CHILD ABUSE AND NEGLECT

Large Amounts of Marijuana in Children's Home Posed Imminent Danger

Family Court found that respondent neglected his live-in girlfriend's children. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. Police officers smelled a strong odor of marijuana emanating from respondent's apartment. A detective knocked on the door, respondent opened it, and the detective saw marijuana in plain view. After respondent's arrest, over 130 individual packets of marijuana were found during a search of the apartment. The court properly found that respondent's conduct posed an imminent danger to the children's physical, mental and emotional well-being. The fact that the children were not home when respondent was arrested did not warrant a different result.

Matter of Jared M., 99 AD3d 474 (1st Dept 2012)

Sufficient Evidence of Neglect; Petition Properly Amended to Conform to the Proof of Domestic Violence

Family Court determined that respondent father had neglected the subject child. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. The mother and medical experts testified that the child suffered an injury that would not ordinarily occur absent an act or omission of a caretaker, and respondent was the caretaker at the time of the injury. Respondent's demeanor and disruptive courtroom behavior was cited by the court, which refused to credit respondent's denial of the abuse. Further, the court properly amended the petition at the conclusion of the fact-finding hearing to conform to proof of domestic violence. Respondent had ample notice that domestic violence was at issue, and ample opportunity to cross-examine the mother regarding her claims. The mother testified that the respondent had swung the child in his arms during an argument with the mother, which constituted sufficient additional proof that the child's physical, mental or emotional condition was in

imminent danger.

Matter of Madison H., 99 AD3d 475 (1st Dept 2012)

Excessive Corporal Punishment Constituted Neglect

Family Court found that respondent mother neglected her daughter by using excessive corporal punishment. The Appellate Division affirmed. Respondent beat her daughter with a belt, leaving bruises and marks on the daughter's neck, arms and legs. Petitioner was not required to demonstrate that the child suffered a "significant injury." The child's out-of-court testimony to a caseworker was corroborated by the caseworker's observation of the child's injuries, photographs, and the child's medical records, which included signed diagrams of the sizes and locations of the child's injuries visible approximately three days after the incident.

Matter of Aniya C., 99 AD3d 478 (1st Dept 2012)

Failure to Provide Proper Supervision and Guardianship for Teenager Constituted Neglect

Family Court adjudged that respondent mother neglected the subject child by failing to provide her with proper supervision and guardianship. The Appellate Division affirmed as to the fact-finding, and dismissed the appeal as moot inasmuch as the subject child had attained her 18th birthday. A preponderance of the evidence supported the finding of neglect. The child frequently left respondent's home for days at a time. Respondent failed to provide alternative living arrangements, forcing the child to live on the streets for at least part of the time. Evidence showed that respondent also failed to seek recommended counseling or therapy for the child, whose behavior was uncontrollable. Respondent did not object to the court's entry of a dispositional order without a dispositional hearing; therefore, the issue was not preserved for review.

Matter of Kiera R., 99 AD3d 565 (1st Dept 2012)

Failure to Provide Adequate Shelter, by Itself, Was Sufficient to Support Finding of Neglect

Family Court based the finding of neglect on respondent mother's failure to obtain stable living conditions. The Appellate Division affirmed. The finding was supported by a preponderance of the evidence and was, by itself, sufficient to support the finding of neglect. Respondent was repeatedly advised that her son's progressively deteriorating mental condition was caused by her unstable living conditions. Respondent and her son lived in the New York City homeless shelter system for nearly five years, and respondent unreasonably refused suitable permanent housing options. Respondent's alcohol abuse and violent behavior toward her son and others was an independent basis for a finding of impairment, and a risk to the child's mental, emotional and physical well being. Additional imminent risk of emotional impairment was presented by respondent's abrupt termination of the child's weekly psychotherapy sessions.

Matter of Alexander L., 99 AD3d 599 (1st Dept 2012)

Petition Amended to Conform to the Proof Presented at the Fact-Finding Hearing

Family Court found that respondent mother had severely abused her son and derivatively severely abused her daughter. The Appellate Division affirmed. The record refuted the mother's contention that the court violated section 1051 (b) by not notifying her that it was amending the petition until the order under review was issued, thereby depriving her of the opportunity to answer the amended allegations. The court advised the parties that it was considering the petition "under a clear and convincing standard***and therefore, under the severe and repeated abuse statute" approximately two months before the mother commenced her case. Further, the mother did not request an adjournment to better prepare her defense or move to dismiss the petition.

Matter of Ne-Ashia R., 99 AD3d 616 (1st Dept 2012)

Abuse Determination Reversed as Respondent Not Legally Responsible

Family Court determined that respondent had neglected and sexually abused the children and repeatedly sexually abused one child. The Appellate Division reversed. The Appellate Division determined that respondent was not legally responsible for the care of the children as they were in the care of their adoptive parents at all times, including when the abuse took place. Further, there was no evidence that respondent acted as a functional equivalent of the children's parent at the relevant times.

Matter of Ceawanya W., 100 AD3d 406 (1st Dept 2012)

Mother Wilfully Violated Order of Disposition

Family Court revoked an order of supervision and placed the subject child in the care of DSS, based on the mother's wilful violation of the order of disposition. The Appellate Division affirmed. The evidence showed that the mother violated the terms of the order by allowing the child to see his father. The mother's argument that Family Court violated her rights to due process by denying her request to allow further testimony in support of her case, was also dismissed as the mother's counsel had offered no proof as to how the proposed testimony would have been relevant to the child's best interests.

Matter of Anthony M., 100 AD3d 441 (1st Dept 2012)

Family Court's Determination of Abuse and Neglect Supported by a Preponderance of the Evidence

Family Court determined that respondent sexually abused his daughter, derivatively abused the three other subject children and neglected all four children. The Appellate Division affirmed, giving great deference to the court's credibility determinations. The determination was supported by a preponderance of the evidence. The daughter's testimony was competent evidence of abuse even though it was absent of corroboration or evidence of physical injury. Respondent failed to rebut the evidence of his culpability and although the court did not specifically state so, it was entitled to draw a negative inference from his failure to testify. The finding of derivative abuse was based on the testimony of the daughter that one of her brothers had witnessed the abuse, and that

the other children were in the apartment when the abuse occurred. The Appellate Division also affirmed the court's finding of neglect against the respondent due to his abuse of cocaine. The respondent admitted to using cocaine a month before the hearing, stated he had been "high" when he had returned home, and that he was not in a treatment program. Additionally, the daughter testified respondent used cocaine when she was in the car with him. This evidence supported a presumption of neglect against the respondent pursuant to FCA §1046 (a)(iii), and obviated the need to establish the children's impairment.

Matter of Christina G., 100 AD3d 454 (1st Dept 2012)

Preponderance of the Evidence Supports Neglect Determination Based on Excessive Corporal Punishment

Family Court determined that respondent neglected her 22-month-old child and derivatively neglected her younger child by inflicting excessive corporal punishment on the subject child. The Appellate Division affirmed. The findings, which were supported by a preponderance of the evidence, included hospital records and oral report transmittals, which documented the extensive bruising on the legs, buttocks, elbow and lumbar area of the 22-month-old, all of which were in various stages of healing. Respondent's sister testified that respondent told her, "These are my kids and I raise them the way I want. If they act up, I'm going to hit them". As respondent did not testify, Family Court was permitted to draw the strongest, negative inference against her and its credibility determinations were entitled to deference. Additionally, as infliction of excessive corporal punishment on a 22-month-old demonstrated such an impaired level of parental judgment, it was appropriately determined the younger child was derivatively neglected. Family Court was also well within its discretion to disbelieve respondent's explanation to the agency caseworker that the maternal grandmother had been the caregiver during the three days leading up to the most recent injuries. Even if respondent's explanation was true, respondent should have known about the neglect because the various healing stages of the child's injuries indicted neglect over a prolonged period, yet she failed to act as a reasonably prudent parent to protect her children.

Matter of Mia B., 100 AD3d 569 (1st Dept 2012)

Child Exposed to Domestic Violence

The mother appealed from an order of fact-finding and disposition of the Family Court, which, after a hearing, found that she neglected the subject child and placed the child with her under the supervision of the Suffolk County Department of Social Services and subject to certain terms and conditions. Here, the evidence adduced at a hearing established that the child was exposed to domestic violence. The mother testified that she and the father had a history of domestic violence and admitted that the child had witnessed at least one act of domestic violence when the father choked her and she bit the father. Further, a caseworker testified that the child had told her that he had witnessed his parents hitting each other on numerous occasions and that such fighting frightened him. Contrary to the mother's contention, the finding of neglect against her was supported by a preponderance of the evidence, as she failed to exercise the minimum degree of care to prevent the imminent danger of the emotional and mental impairment of the subject child (see FCA §§ 1012 [f] [I]; 1046 [a] [vi]). Order affirmed.

Matter of Anthony S., 98 AD3d 519 (2d Dept 2012)

Family Court Should Not Have Ordered Unsupervised Visitation Without the Benefit of a Full Fact-Finding Hearing

The petitioner appealed from an order of the Family Court, which, after a permanency hearing, directed that the mother should have at least one hour of unsupervised visitation with the subject child each day. By decision and order on motion of the Appellate Division, the order was stayed pending the hearing and determination of the appeal. The petitioner commenced this proceeding against the mother and father alleging, among other things, that the mother and father abused and neglected their daughter who was, at the time, less than three months old. According to the allegations in the petition, the child sustained multiple rib fractures and a left wrist fracture. The petition alleged that, due to the fractured ribs, the child sustained a punctured lung, had fluid in her lungs, and contracted pneumonia. The mother and father were allegedly the sole caretakers of the child. After a permanency hearing,

but before a full fact-finding hearing was conducted, the Family Court directed that the mother shall have at least one hour of unsupervised visitation with the child each day. In view of the serious allegations of physical abuse committed against the child, it was an improvident exercise of discretion for the Family Court, without the benefit of a full fact-finding hearing, to direct that the mother shall have at least one hour of unsupervised visitation with the child each day. The safer course, and the one which served the best interests of the child, was to continue with supervised visitation pending a full fact-finding hearing and final determination of the child abuse and neglect petition. The order was reversed and the matter was remitted to the Family Court.

Matter of Bree W., 98 AD3d 522 (2d Dept 2012)

Family Court Should Not Have Precluded Child's Grand Jury Testimony

In four related child protective proceedings, the appellant appealed from an order of fact-finding and disposition of the Family Court, which, after a fact-finding hearing, found that he abused the child N. L. and derivatively abused the children J. J., K. J., and G. P. The record revealed that the child N. L. did not testify at the fact-finding hearing, and the only evidence of his accounts of the occurrence at issue was hearsay admitted through other witnesses. In seeking to cast doubt on those accounts, the appellant sought admission of N. L.'s grand jury testimony from a companion criminal proceeding, which, he argued, was inconsistent with the hearsay accounts. Under the circumstances of this case, where the appellant had no other means of showing that N. L. had given arguably inconsistent accounts of the occurrence, the Family Court's preclusion of N. L.'s grand jury testimony was an improvident exercise of discretion (see FCA § 1046 [a] [vi]; CPL 190.25 [4]; see generally FCA §§ 331.2 [1] [b]; 331.4 [1] [a]). Accordingly, the matter was remitted to the Family Court for a new fact-finding hearing, and a new determination thereafter.

Matter of Jaiden J., 98 AD3d 667 (2d Dept 2012)

Neither Parent Could Provide Basic Care for Child

Contrary to the appellants' contentions, the Family

Court's finding of neglect as to the subject child was supported by a preponderance of the evidence with respect to each parent (see FCA §§ 1012[f][i][B]; 1046[b][i]). The nonhearsay evidence submitted at the fact-finding hearing established that neither parent was capable of providing basic care for the subject child, a newborn at the time this proceeding was commenced, and that they each had acknowledged as much to a caseworker at the hospital. Furthermore, the Family Court was entitled to draw a negative inference against the father based upon his failure to testify at the fact-finding hearing.

Matter of Renee R., 98 AD3d 1048 (2d Dept 2012)

Cross Motion for Summary Judgment During Fact-Finding Untimely

The Family Court properly denied the mother's motion to dismiss the petition. Viewing the evidence in the light most favorable to the Administration of Children's Services (ACS) and affording it the benefit of every inference which could be reasonably drawn from the evidence, ACS presented a prima facie case of neglect. However, the Supreme Court improperly granted ACS's cross motion for summary judgment on the petition under the facts and circumstances of this case. Although there is no express provision for summary judgment procedure in a Family Court Act Article 10 proceeding, the Act does provide that "the provisions of the civil practice law and rules shall apply to the extent that they are appropriate to the proceedings involved" (see FCA § 165 [a]). Here, however, ACS submitted an untimely cross motion for summary judgment in the midst of the fact-finding hearing after presenting its case and prior to the mother presenting a case or resting her case. Moreover, even if ACS's motion were to be deemed analogous to a motion for judgment during trial, such a motion should have been denied as premature, since such motions must be made "after the close of the evidence presented by an opposing party with respect to [the subject] cause of action or issue" (see CPLR 4401). Order affirmed.

Matter of Giovanni S., 98 AD3d 1054 (2d Dept 2012)

Modification Permitting Visitation Prior to Outcome of Fact-Finding Hearing Where There Were Allegations of Sexual Abuse; Order Reversed

The modification of an order of protection prior to the outcome of a full fact finding hearing, to allow the father visitation with the child under the mother's supervision, created a substantial risk of harm to the child. Allegations that the father sexually abused an unrelated teenage boy raised concern for the safety of the child because the father's alleged conduct demonstrated such an impaired level of parental judgment so as to create a substantial risk of harm for any child in his care. Further, the record raised a concern that the mother would not provide proper supervision because she did not believe the allegations of sexual abuse that had been made against the father. See FCA § 1011. The order was reversed and the prior order of protection was reinstated.

Matter of Chavah T., 99 AD3d 915 (2d Dept 2012)

Preponderance of the Evidence Supported Finding That Child Was Sexually Abused

The petitioner sustained its burden of proving by a preponderance of the evidence (see FCA § 1046 [b] [i]) that the child was abused. The medical evidence presented by the petitioner established that the child, then 4 ½ years old, contracted gonorrhea while under the care and supervision of the father and mother. Expert testimony at the hearing established that a vaginal culture, such as the one performed on the child, was the diagnostic “gold standard” and did not yield false positives. Moreover, during counseling sessions, the child described being touched on her private parts by a “ghost” and identified her father as the one who committed the abuse. According to hearing testimony and clinical notes, the child also became very anxious during one of her sessions, stating that her mother told her she would not be able to go home if she talked about who gave her the “boo-boo” and pointed to her vagina. Order affirmed.

Matter of Shade B., 99 AD3d 1001 (2d Dept 2012)

Evidence Established That Father Sexually Abused Child in Presence of Another Child

The petitioner established by a preponderance of the evidence that the father sexually abused his child in the presence of another one of his children who was the subject child's sibling (*see* FCA § 1046[b][i]), that the mother neglected the subject child by failing to take actions to protect her or to investigate whether the sibling's allegations of the sexual abuse were true, and by permitting that sibling to continue to reside with the subject child after she was informed that such abuse had taken place. The subject child's out-of-court statements were corroborated by her sworn in-court testimony, the out-of-court statements by the subject child's sibling who witnessed the abuse, and by expert testimony. The father's abuse of the subject child in the presence of his other child evinced a flawed understanding of his duties as a parent and impaired parental judgment sufficient to support the Family Court's finding that he derivatively abused one child and derivatively neglected his two other children. Furthermore, the finding that the mother derivatively neglected two of her children was supported by the evidence of her neglect of the subject child. That evidence established that the mother lacked an understanding of her parental responsibilities. The record further demonstrated that the Family Court did not err in excluding the father and the mother from the courtroom during the subject child's testimony. The Family Court properly balanced the respective interests of the parties and reasonably concluded that the subject child would suffer emotional trauma were she compelled to testify in their presence. Moreover, because the attorneys for the father and the mother were present during the subject child's testimony and cross-examined her on their behalf, the constitutional rights of the mother and the father were not violated by their exclusion from the courtroom. Order affirmed.

Matter of Kyanna T., 99 AD3d 1011 (2d Dept 2012)

Evidence Supports Family Court's Finding of Neglect, Abuse and Severe Abuse

The Appellate Division held that Family Court had properly determined that respondent had neglected, abused and severely abused his six biological children and one step-child, based on a finding that he had sexually abused his ex-wife's biological child. The subject child's testimony provided details as to how respondent forced her to have intercourse on at least

three different occasions, and her in-court testimony was consistent with what she had told her mother and the caseworker. Additionally, the subject child's pediatrician testified that the child's vaginal opening was much larger than it should have been for a child of her age, consistent with her report of chronic sexual abuse. Respondent's argument that he was not a person legally responsible for the child's care lacked merit as he visited the child every other weekend and she referred to him as "daddy". Respondent's own testimony confirmed that he occasionally supervised the subject child and was left alone with her and the other children at times including those when the sexual abuse was alleged to have occurred. Respondent's contention that Family Court erred in denying his CPLR § 4404(b) motion to set aside the fact-finding order and order a new trial, or to reopen the proof to present new testimony, was unpersuasive as the motion was made six months after the fact-finding order had been issued, no reasonable excuse was offered for the delay and the testimony of the witnesses he wished to present was known to him at the time of the fact-finding hearing and thus was not new evidence. His final contention that he was denied effective assistance of counsel was also without merit as his counsel effectively cross-examined witnesses, elicited testimony favorable to respondent's position, lodged appropriate objections and made cogent arguments for dismissal of the petition. Respondent's remaining contentions were also found to be without merit.

Matter of Ramsey H., 99 AD3d 1040 (3d Dept 2012)

Sound and Substantial Basis in the Record to Revoke Order of Supervision

The Appellate Division held Family Court had sound and substantial basis in the record to revoke the mother's order of supervision and place her two children in foster care. The mother had violated the terms of the order of supervision, which had been issued upon a consent order of neglect, by continuing her relationship with her abusive boyfriend despite being aware that it was having an adverse effect upon her children. She had also failed to meet certain treatment goals in connection with her mental health counseling. The mother claimed that Family Court had erred in admitting into evidence the contents of a "hotline" report which alleged that the children had

been abused while in foster care. The Appellate Division held that pursuant to SSL §422, the admission of this report was not erroneous as Family Court had not used the report to make a determination of an issue before the court, but to determine whether the mother had filed the report knowing that the allegations were false and therefore, had engaged in conduct that was not in the children's best interests. Finally, respondent claimed that the attorney for the children did not provide them with meaningful assistance of counsel. But the Court found that the attorney for the children did provide meaningful representation by visiting with the children numerous times to discuss the issues and repeatedly expressing the wishes of the children to Family Court.

Matter of Gloria DD., 99 AD3d 1044 (3d Dept 2012)

Reasonable Efforts Made to Eliminate the Need for Continued Placement

The Appellate Division affirmed Supreme Court's order continuing placement of two children in the home of their maternal grandmother. The children were temporarily removed from the parents' home after both parties admitted to the neglect based on the father's history of sexual offenses committed against minors and failure to follow through with recommended services. Following a combined permanency-dispositional hearing, the court continued placement with the grandmother. The Appellate Division held that DSS exercised reasonable efforts to reunite the parents with the children. Specifically, DSS demonstrated that it made reasonable efforts intended to eliminate the need for continued placement of the children that were tailored to respondent's individual situation, including review of the father's sex offender risk assessment recommendations with him, explaining to him the importance of his compliance with random weekly drug testing, which was required as part of his probation, explaining the terms of the existing court order to facilitate his compliance with such orders, referring him to sex offender and substance abuse treatment programs as well as mental health counseling, and facilitating and supervising visitation with his children, providing medicaid, emergency housing assistance and other similar services.

Matter of Cloey S., 99 AD3d 1080 (3d Dept 2012)

Family Court Properly Granted Summary Judgment of Neglect Based on Criminal Convictions

The Appellate Division held that Family Court properly granted DSS's application for summary judgment against Respondent, and adjudicated him to have neglected three children, one to whom he was the biological father and uncle to the other two. This was based on a domestic violence incident which occurred at the home of respondent's child's mother, while all three children were in the home. Based on this incident and after a jury trial, respondent was criminally convicted of criminal possession of a weapon in the second degree, two counts of criminal possession of a weapon in the third degree and criminal contempt in the second degree. In support of its motion for summary judgment, DSS submissions included its neglect petition, which contained allegations that arose out of the same domestic violence incident as the criminal matter, supporting affidavits, the underlying incident report, supporting deposition given by the mother, the resulting order of protection as well as the indictment, sentence and commitment order. Such proof, the Appellate Division held, established the required identity of issue and factual nexus between the criminal conviction and the allegations in the neglect petition, and respondent had a full opportunity to litigate this matter in his criminal trial. Respondent's assertion that Family Court erred in allowing him to proceed pro se was equally found lacking in merit as his waiver of his right to counsel was knowing, intelligent and voluntary.

Matter of Tavianna CC., 99 AD3d 1132 (3d Dept 2012)

No Right to Appeal From Neglect Order Issued Upon Consent

Respondent was charged with neglect due to his alleged abuse of drugs. At the fact-finding hearing, respondent's attorney, a conflict defender, advised the court and parties that he had represented a potential witness listed on petitioner's list. The court determined there was no conflict. The hearing continued and before the potential witness was called to testify the matter settled as respondent consented to the neglect finding. On appeal, the Appellate Division dismissed respondent's argument that she was deprived of effective assistance of counsel, as respondent had no

right to an appeal from a consent order. However, the Court held were it to consider the claim, it would be found to be without merit.

Matter of Trenton G., 100 AD3d 1124 (3d Dept 2012)

Derivative Neglect Supported by a Sound and Substantial Basis in the Record

Family Court determined that respondent father had sexually abused one child and derivatively neglected his other three children. The father appealed the determination of derivative neglect with respect to two of his children and the prohibition of any contact with them. The Appellate Division affirmed finding that Family Court had sound and substantial basis in the record. The evidence showed that the abused child, who was 4, had disclosed the sexual abuse to her grandmother and later used dolls to show a counselor and her grandmother what respondent had done to her. When confronted with this evidence, the father stated that he was going to "blow his head off" and he wrote out and signed a statement purporting to be his will. DSS's expert, a child psychologist specializing in sexual abuse who had evaluated the child, had testified that the subject child had not been coached and concluded that the child's account was consistent with known sexual abuse victims. The child's mother had testified that the child's vaginal and rectal areas were red after she came back from a visit with respondent and the child had displayed disturbing behaviors after spending an overnight with respondent. The Court held that the father's conduct against the one child evidenced fundamental flaws in his understanding of parenting so profound as to place any child in his care at substantial risk of harm. Respondent's argument regarding contact with his children was deemed moot as the order of protection had expired.

Matter of Joanne II., 100 AD3d 1204 (3d Dept 2012)

Respondent's Challenge to Due Process Violations Unpreserved

Family Court took a recess during cross-examination of respondent on the third day of a FCA Article 10 fact-finding hearing. Thereafter no further testimony was presented but the court allowed respondent to expand his proof and submit higher quality photographs for

those already in evidence, and the parties submitted closing statements. Thereafter, the court determined that respondent had abused his older child and derivatively neglected the younger, and after a dispositional hearing, orders were issued placing the respondent under supervision. Respondent appealed arguing he had been deprived of due process as his hearing had been improperly terminated. The Appellate Division held that as respondent had not challenged the alleged improper conclusion of the hearing or otherwise moved to reopen the evidence before Family Court, his claim was unpreserved. Additionally, the Court held that, as respondent was not prevented from calling any witnesses or presenting additional evidence at the hearing, he was "giv[en] the full measure of any due process owed."

Matter of Gary MM., 100 AD3d 1206 (3d Dept 2012)

Court Erred in Finding Neglect Without Conducting Hearing

Family Court found that respondent father neglected his child and awarded custody of respondent father's child to Mr. and Mrs. Raymond M. The Appellate Division reversed. The court erred in entering the fact-finding order on respondent's alleged default. Although the father did not appear at the scheduled court appearance, respondent's attorney advised the court that he was authorized to proceed in the father's absence and the father's attorney objected to the entry of a default order. The court also erred in making a finding of neglect without first conducting a fact-finding hearing.

Matter of Kairis v Kairis, 98 AD3d 1281 (4th Dept 2012)

Court Erred in Granting Petitioner's Motion For Summary Judgment

Family Court granted the motion of petitioner agency for summary judgment with respect to respondent's neglect of her child. The Appellate Division reversed. Because petitioner attached only a petition and a psychological assessment from a termination of parental rights proceeding involving one of respondent's other children, without any evidence establishing the outcome of that proceeding, the court erred in granting petitioner summary judgment.

Although the court indicated its familiarity with the prior proceedings involving the mother's other children, the record did not contain necessary information about those proceedings.

Matter of Terrence G., 98 AD3d 1294 (4th Dept 2012)

Respondent's Drug Use Was Prima Facie Evidence of Neglect

Family Court adjudged that respondent mother neglected her child. The Appellate Division affirmed. Pursuant to Family Court Act § 1046 (a) proof of a parent's repeated and chronic misuse of drugs or alcohol, which substantially impairs the parent's judgment while the child is entrusted to the parent's care, constitutes prima facie evidence of neglect. Petitioner met its burden of proof by establishing that the mother used the drug Suboxone on numerous occasions; that she purchased the drug on the street whenever she could; and that she was prostituting herself to obtain money to purchase the drug. The mother failed to rebut the presumption. The mother's contention that Suboxone was not a drug within the meaning of the statute was not preserved for review. The court did not err in admitting an intake report filed with OCFS because the person making the report was a mandated reporter.

Matter of Samaj B., 98 AD3d 1312 (4th Dept 2012)

Preponderance of The Evidence Supports Court's Findings of Sexual Abuse

Family Court adjudged that respondent sexually abused a five-year-old child for whom he was a parent substitute and derivatively neglected his two-year-old child. The Appellate Division affirmed. The out-of-court statements of the child who was allegedly sexually abused were sufficiently corroborated by the testimony of an evaluating psychologist who opined that the child's statements made to the psychologist and to a caseworker during a videotaped interview were credible. Further, the court properly drew a strong inference against respondent for failing to testify.

Matter of Raygen D., 100 AD3d 1413 (4th Dept 2012)

CHILD SUPPORT

Finding of Contempt Supported by Respondent's Wilful Violation

Family Court determined that respondent had wilfully violated his child support order and committed him to jail for four months or until he paid \$2,370 to SCU. The Appellate Division affirmed, finding that respondent's acknowledgment that he owed child support arrears constituted prima facie evidence of a wilful violation, which he failed to rebut with competent, credible evidence of inability to pay. The Court rejected respondent's contention that his arrears should have been fixed at \$500 pursuant to FCA §413 (1)(g), as he had failed to provide any documentation regarding his income. Additionally, respondent had never made an application to reduce or annul his support arrears, and as his arrears totaled \$14,600, it was not unreasonable for Family Court to require that he pay \$2,370 to purge his contempt.

Matter of Ana B. v Hector N., 100 AD3d 476 (1st Dept 2012)

Father Properly Found to Be in Arrears for Child's Unreimbursed Medical Expenses

The Support Magistrate properly found that the father was in arrears for the sum of \$1,365.13 for his pro rata share of unreimbursed medical expenses of the parties' two sons. The mother's testimony at the fact-finding hearing and her submissions of medical expense receipts satisfied her initial burden of presenting prima facie evidence of the father's nonpayment of this amount. The father proffered no proof of having reimbursed the mother for any of the medical expenses for which she sought reimbursement.

Matter of Rutuelo v Rutuelo, 98 AD3d 518 (2d Dept 2012)

Younger Sibling Moving into Father's Home Did Not Warrant Modification of Child Support Obligation

The plaintiff failed to demonstrate that the stipulation should be modified to adjust the parties' respective child support obligations so as to require the defendant

to pay the plaintiff child support for the younger son, who recently moved into the plaintiffs residence, in accordance with the Child Support Standards Act. The plaintiff did not claim that the younger son's change of residence was "an unanticipated and unreasonable change in circumstances," and failed to show that the younger son's needs were not being met. Accordingly, the Supreme Court properly denied that branch of the plaintiff's motion which was, in effect, to modify the child support provisions of the stipulation. However, the Appellate Division agreed with the plaintiff that the Supreme Court erred in granting that branch of the defendant's cross motion which was to direct the entry of a money judgment in her favor in the sum of \$6,660.45. Although the defendant essentially alleged that the plaintiff owed her \$212.50 for his share of the cost of an SAT tutor, the defendant failed to sufficiently document that expense. In addition, although the defendant alleged that the plaintiff owed her \$1,466.95 for his share of the cost of "[s]ports fees, equipment and related expenses," the defendant failed to, inter alia, establish that the plaintiff was obligated to pay for those expenses. Accordingly, the Supreme Court improperly directed the award to the defendant of those two sums.

Schneider v Schneider, 98 AD3d 732 (2d Dept 2012)

Record Supported Support Magistrate's Finding That Father Did Not Owe Child Care Expenses

The Support Magistrate's finding that the father did not owe child care expenses pursuant to the prior support order dated April 10, 2007, which provided that the father was to pay one-third of the babysitting costs if he could not "babysit," was supported by the record. Additionally, the Support Magistrate providently exercised her discretion in disallowing the testimony of the mother's attorney's husband and denying admission into evidence of unauthenticated documents printed from the internet. As to the mother's mother's contention that the Support Magistrate was biased against her, there was no such indication in the record.

Matter of Suyunov v Tarashchansky, 98 AD3d 744 (2d Dept 2012)

Imputation of Higher Income Warranted

The record supported the Supreme Court's determination that the plaintiff's testimony lacked credibility and that an imputation of income higher than that claimed was warranted. The court properly determined that the plaintiff has access to, and receives, financial support from his family. Considering these factors and all of the evidence presented, the court providently exercised its discretion in imputing income to the plaintiff in the sum of \$75,000 per year. Further, contrary to the plaintiff's contention, the Supreme Court did not err in failing to deduct from his income claimed child support for the plaintiff's child of a former marriage, where there was no evidence establishing that the plaintiff actually paid child support to the custodial parent of that child.

Baumgardner v. Baumgardner, 98 AD3d 929 (2d Dept 2012)

Parent Not Obligated to Pay 100% of Children's Unreimbursed Medical Expenses

Supreme Court erred in directing defendant to pay 100% of the past due and future unreimbursed medical expenses of the children. The obligation for unreimbursed medical expenses should have been prorated in the same proportion as each parent's income was to the combined parental income (see DRL § 240 [1-b] [c] [5] [v]). Order modified and the matter was remitted for a calculation of the parties' respective pro rata obligations with regard to these expenses.

Goldberg v Goldberg, 98 AD3d 944 (2d Dept 2012)

Parent Required to Pay His Pro Rata Share of Children's Private School Tuition

Under the circumstances of this case, where the parties' children had been attending private school during the parties' marriage, despite the defendant's purported objection to them doing so, the Supreme Court providently exercised its discretion in directing the defendant to pay his pro rata share of the children's private school tuition. As to the defendant's contention that he should not have been directed to pay a pro rata share of the children's nanny expenses, the Appellate Division was not inclined to disturb the Supreme

Court's direction. The plaintiff, who was the custodial parent, worked full time, and had been incurring those child care expenses both during the marriage and after commencement of the action.

Iarocci v Iarocci, 98 A.D.3d 999 (2d Dept 2012)

Additional Income Generated by Father's Business

When determining the child support award, the Support Magistrate should have imputed an additional \$31,448.30 to the father's income. The Support Magistrate failed to include a \$10,611 payment made to the father by his company for services rendered as its vice president. Evidence at the hearing supported the conclusion that this was not a one-time payment, but would be a recurring one, particularly since the father's business was growing. Since the incorporation of the company, the father increased his hours, charged a higher hourly rate, and added sheet-rocking as a component of his business. The Support Magistrate should have imputed \$8,736 to the father as income, based on the earnings generated for the company through sheet-rocking. The father's testimony that he received as a salary only 30% of the amount he bills on behalf of the company was not credible, since the company operated out of the father's home, and its only employees were the father, his wife, and his father-in-law. See FCA § 413(1)(b)(5).

Huddleston v. Rufrano, 98 AD3d 1046 (2d Dept 2012)

Stipulation of Settlement Ambiguous

Contrary to the determination of Family Court, the stipulation of settlement was ambiguous with regard to the father's obligation to, in effect, reimburse the parties' oldest son for the father's share of the expense of student loans. In the absence of a clear and unambiguous provision to the contrary in the stipulation of settlement concerning the matter, "[i]n determining the parents' respective obligations towards the cost of college, a court should not take into account any college loans for which the student is responsible". Thus, the loans should not have been deducted before the court calculated the father's share of the son's college costs.

Korosh v Korosh, 99 AD3d 909 (2d Dept 2012)

Father Failed to File Proof of Service

The father appealed from an order of the Family Court which denied his objections to an order of the same court, which, after a hearing, *inter alia*, granted his petition for downward modification of his child support obligation only to the extent of reducing his obligation to the sum of \$865 biweekly. Upon reviewing the record, the Appellate Division found that the issues raised by the father on this appeal were not reviewable. The Family Court properly denied the father's objections on the ground that he failed to file proof of service of a copy of the objections on the mother. See FCA § 439 (e).

Matter of DiFede v DiFede, 99 AD3d 1003 (2d Dept 2012)

Sufficient Basis to Find Father Wilfully Violated Support Order

When the father failed to make child support payments, as agreed, the mother filed a violation petition and Family Court found a willful violation. The Appellate Division deferred to Family Court's credibility assessments and held there was sufficient basis for the court's decision. The evidence showed that the father was able to earn more income than was reported on his most recent tax stub and that he had failed to establish his inability to pay. The father contended that he only earned \$14,000 a year as a seasonal self-employed painter, contrary to what he had stated in the parties' separation agreement, which was that he expected to earn \$34,000. However, the mother presented evidence that the father had accepted unreported cash payments, worked regularly year round, and after the separation agreement had been executed he had begun to take extended trips to his native country of Hungary during the winter. The father's testimony was discredited and there was no basis to disturb the finding of willfulness.

Matter of Richards-Szabo v Szabo, 99 AD3d 1069 (3d Dept 2012)

Downward Modification of Child Support Upheld

Family Court downwardly modified the father's support obligation based on the emancipation of the parties' eldest child and the father's reduced earnings but did

not modify his maintenance obligation and implicitly affirmed the Support Magistrate's determination that each parent shall be responsible for 33% of each child's net college expenses. Family Court reserved decision on the mother's wilful violation petition against the father, pending an updated report from the CSU. Without waiting for the court's decision, the father appealed. The Appellate Division affirmed, finding that the father had failed to show extreme hardship in order for his maintenance to be reduced and his assertion that the court's order had failed to take into consideration his reduced earnings in determining his responsibility for the children's college expenses was found not credible. The Court held although the father earnings had been reduced from \$98,314.00 to \$63,000, his income still exceeded the mother's, which was \$23,544.64, and therefore he was in no position to claim injustice. The father's remaining claims concerning his educational obligations to his children were similarly dismissed.

Matter of Cranston v Horton, 99 AD3d 1090 (3d Dept 2012)

Reasonable College Expenses Includes Off-Campus Flight Training

The parties' separation agreement, which was incorporated but not merged into their judgment of divorce, provided that the parents would each contribute toward reasonable college expenses of their children in accordance with their relative means and abilities at the time of attendance. Thereafter, there were enforcement petitions filed by the mother. In June 2010, Family Court, among other things, determined that based on a change in the father's income, the mother's proportional share of the subject child's college expenses for the period on or after July 1, 2009, would be 52% and the father's share would be 48%. Family Court, in setting forth credits to which each parent would be entitled for various college expenses from fall '08 to fall '09, also determined that the child's off-campus flight training, which was paid through a credit card given by the father to the child, constituted reasonable college expenses. The mother appealed arguing that Family Court should not have included off-campus flights as a reasonable college expense, that the court should not have deducted the father's child support obligation from his income in

determining his proportional share of the child's college expenses, and that she should be entitled to an award of counsel fees incurred for the enforcement action and this appeal. The Appellate Division held that while the father had been unduly lax in monitoring the child's flight expenses, the record as a whole showed that both parents were supportive of the child's career in aviation, and according due deference to the court's findings, there was no abuse of discretion in determining that the flights constituted a reasonable college expense. However, the Appellate Division held there was insufficient evidence in the record to review the court's determination of the parties' obligations towards the child's college expenses and remitted the matter to Family Court. Finally, the Appellate Division denied the mother's request for counsel fees as the parties' had agreed that such fees could only be awarded for breach or default of the agreement and such was not the case in this instance.

Matter of Costa-Daley v Daley, 100 AD3d 1198 (3d Dept 2012)

Father Required to Pay Child Support - Child Not Emancipated

Family Court denied petitioner father's objections to the Support Magistrate's order that determined that the parties' child was not emancipated and continued the father's child support obligation until the child turned 21 years of age. The Appellate Division affirmed. Although the parties' child worked on a full-time basis and filed individual income tax returns, the fact that respondent mother continued to pay for the child's gas, food, and cell phone demonstrated that the child was not economically independent and self-supporting.

Matter of Cedeno v Knowlton, 98 AD3d 1257 (4th Dept 2012)

Because Father Received SSI Income Court Could Not Suspend Hunting and Fishing Licenses

Family Court denied respondent father's objections to an order issued by the Support Magistrate. The Appellate Division modified by vacating that part of the order suspending respondent's hunting and fishing licenses. Petitioner's introduction of a calculation of respondent's arrears was prima facie evidence of a

willful violation of the support order. In response, respondent failed to introduce some credible evidence of his inability to make the required payments. The evidence that respondent was receiving Social Security disability benefits, by itself, did not preclude the court from finding that he was capable of working. Respondent's contention that the court should have capped his child support arrears at \$500 was not preserved for review. His contention that the court should not have suspended his hunting and fishing licenses also was not preserved for review but was reviewed in the interests of justice. Family Court Act § 458-c (a) allows the court to suspend recreational licenses of respondents in arrears but does not apply to respondents who receive supplemental security income. It was undisputed that respondent received supplemental security income.

Matter of Commissioner of Social Servs. v Turner, 99 AD3d 1244 (4th Dept 2012)

No Evidence that Father Made Reasonable Efforts to Obtain Employment

Family Court denied respondent father's written objections to the Support Magistrate's order granting mother's petition for child support arrears and denied father's cross petition for a downward modification. The Appellate Division affirmed. Where a parent fails to pay support as ordered, the burden shifts to that parent to show some competent, credible evidence of an inability to make the required payments. Here, respondent failed to submit some competent, credible medical evidence of his inability to make the required support payments. He also failed to establish that his claimed disability continued at the time of the hearing. Respondent's cross petition was properly denied. Respondent failed to make a good faith effort to seek other employment or show that he was unable to perform other work.

Matter of Commissioner of Cattaraugus County Dept. of Social Servs. v Jordan, 100 AD3d 1466 (4th Dept 2012)

No Evidence Father Made Reasonable Efforts to Obtain Employment

Family Court denied respondent father's written

objections to the Support Magistrate's order finding that respondent willfully violated a child support order and denied his petition seeking modification of that order. The Appellate Division affirmed. Respondent's failure to pay support as ordered constituted prima facie evidence of a willful violation and thus the burden shifted to him to show some competent, credible evidence of inability to make the required payments. Respondent did not meet his burden. Although he testified that he had been a carpenter for 16 years, he did not testify that he made efforts to obtain carpentry work after he ceased operating his construction company. He also failed to demonstrate a substantial change in circumstances justifying a downward modification because he presented no evidence that he diligently sought re-employment commensurate with his former employment.

Matter of Greene v Hanson, 100 AD3d 1558 (4th Dept 2012)

CRIMES

No Reasonable Basis for Search of Defendant's Car

Here there was no probable cause for the officer to search the defendant's vehicle. Although the officer testified that he detected the odor of marijuana emanating from the defendant's person after he exited his vehicle, the officer also stated that he neither smelled any such odor coming from inside the vehicle nor saw any smoke at any time. Moreover, the officer saw only what "appeared to be marijuana" in the defendant's mouth, and neither he nor his partner discovered any marijuana on the ground outside the vehicle despite a 10-15 minute search therefor. Nor did they retrieve any marijuana from the defendant's mouth. In fact, the officers never even sought to recover the alleged green substance which was observed in the defendant's mouth. Furthermore, the officer admitted that he searched the car despite the fact that, at that time, he had not discovered any "evidence for the marijuana." Such circumstances did not provide a reasonable basis for the search of the defendant's car.

People v Smith, 98 AD3d 590 (2d Dept 2012)

Police Lacked Reasonable Suspicion; Frisk Not Justified

Here, the police reasonably suspected that the defendant was attempting to steal the bicycle, but there was no evidence that the defendant posed a threat to the officers. The police suspected him of committing a nonviolent crime, he had immediately complied with their order to put down the screwdriver, he did not reach toward his pockets and the police did not believe that the bulge in his pocket was a gun or a knife. That a hard ball may be improvised as a weapon did not by itself justify a frisk. Moreover, that the police believed that the defendant may have intended to flee did not justify a frisk. Consequently, the police did not reasonably suspect that the defendant was armed or posed a threat to their safety. Because the police lacked the factual predicate necessary to frisk the defendant, the evidence seized as a result of that frisk should have been suppressed, and the indictment dismissed. Judgment reversed, plea vacated, and motion to suppress granted.

People v Shuler III, 98 AD3d 695 (2d Dept 2012)

Photographic Array Id Was Not Unduly Suggestive

The defendant's contention that the photographic array identification procedure was unduly suggestive was without merit. The record showed that the witness selected the defendant's photograph from an array containing pictures of six individuals with similar characteristics, and none of the defendant's physical features depicted therein was so unusual as to single him out for identification. Upon reviewing the record, the Appellate Division was satisfied that the verdict of guilt was not against the weight of the evidence.

People v Burroughs, 98 AD3d 583 (2d Dept 2012)

CUSTODY AND VISITATION

Sole Custody to Father Affirmed; Mother's Visitation Modified

Family Court awarded sole physical and legal custody to respondent father with visitation to petitioner mother. The Appellate Division modified, on the facts, to provide visitation to petitioner mother on Mother's Day, the child's birthday, and the Thanksgiving holiday on even numbered years. The remaining provisions were affirmed. The record supported the Referee's

determination that the child's best interest would be served by awarding custody to respondent. The child resided with respondent since 2000, when the child was paroled to respondent after a finding of neglect against petitioner. Respondent provided a healthy, stable environment for the child. By contrast, petitioner suffered from emotional, physical and financial issues, which prevented her from placing the child's needs before her own. Joint decision making was not in the child's best interests due to the acrimonious relationship between the parties.

Matter of Frances M. v Jorge M., 99 AD3d 407 (1st Dept 2012)

Father's Petition to Modify Custody and Visitation Dismissed; Father's Visitation Suspended

Family Court dismissed father's petition to modify custody and visitation and suspended petitioner's visitation rights. The Appellate Division affirmed. The court properly declined to conduct a full evidentiary hearing. Petitioner failed to make any showing that modification of custody and visitation was warranted on the grounds alleged in the petition. Petitioner admitted that he failed to visit the children for at least five months. There was no indication that joint custody was in the children's best interests, given the acrimonious relationship between the parties. Further, the court properly suspended petitioner's visitation. Petitioner disregarded the court's direct order to reveal where he took the children during weekend visitation. Under these exceptional circumstances, petitioner forfeited his right to visitation.

Matter of Samuel A. v Aidarina S., 99 AD3d 420 (1st Dept 2012)

Grandmother Fails to Establish Extraordinary Circumstances

Family Court dismissed the custody petition brought by petitioner paternal grandmother. The Appellate Division affirmed. Petitioner failed to establish extraordinary circumstances. Her concerns pertained to matters that occurred when the child was living with her maternal grandmother under the supervision of Administration for Children Services (ACS). No concerns were raised about the care the child received

after she was discharged to her mother. ACS investigated the allegations raised in the petition and determined that they were unfounded. Further, the court did not err by sustaining a hearsay objection to petitioner's testimony regarding uncorroborated out-of-court statements made by the child.

Matter of Khaliah T., 99 AD3d 537 (1st Dept 2012)

Failure to Advise Parent of Right to Counsel was Reversible Error; Court's Failure to Conduct an Evidentiary Hearing was also Reversible Error

Family Court granted father's petition to modify a prior custody and visitation order and awarded him sole legal and physical custody of the parties' minor child, with visitation to respondent mother. The Appellate Division reversed on the law, vacated the order, and remanded the matter for an evidentiary hearing. Pending the hearing, the child was to be returned to the mother's custody, with visitation to the father, pursuant to the prior order. The court committed reversible error when it failed to advise the mother of her right to counsel. Further, the court committed additional reversible error by failing to conduct an evidentiary hearing prior to modifying the existing custody and visitation order. Upon remand, the court should consider the father's petition in light of any subsequent change in circumstances, including his planned relocation to Wisconsin.

Matter of Mora v. Alatraste, 99 AD3d 540 (1st Dept 2012)

Order to Return Children to Country of Habitual Residence Affirmed

Supreme Court granted plaintiff father's motion for an order directing defendant mother to present the parties' two minor children and turn them over to the plaintiff for their return to Italy, pursuant to article 3 of the Hague Convention on the Civil Aspects of International Child Abduction (1343 UNTS 89, TIAS No. 11670 [1980]) and the International Child Abduction Remedies Act (42 USC §§ 11601-11611). The Appellate Division affirmed. Plaintiff, an Italian citizen, filed a petition seeking the return of the children to Italy, their country of habitual residence where they had lived all their lives, after defendant, a

US citizen, relocated with the children to New York without the plaintiff's knowledge or consent. The petitioner met his burden of establishing, by a preponderance of the evidence, that the children had been wrongfully removed. Defendant failed to establish by clear and convincing evidence that a grave risk of harm to the children would result if the children were returned to Italy. Contrary to defendant's assertions of domestic violence, the evidence established that the parties' relationship was amicable prior to the defendant's departure with the children.

Squicciarini v. Oreiro, 99 AD3d 605 (1st Dept 2012)

No Change in Circumstances to Warrant Modification of Visitation

Supreme Court determined that there had not been a change in circumstances sufficient to modify an order of visitation. The Appellate Division affirmed. The father, who was incarcerated, sought to modify visitation to require the children to come to see him at the correctional facility where he was incarcerated. The father failed to allege a change in circumstances to warrant such a modification or that such modification was in the children's best interests. The father's contention that he had been deprived of his right to due process of the law because his participation in the hearing was via telephone was without merit in view of the fact that the father did not ask to be produced for the hearing.

Keisha Gabriel S. v Alphonso S., 100 AD3d 449 (1st Dept 2012)

Relocation in Child's Best Interest

Family Court determined that relocation would be in the child's best interests. The Appellate Division affirmed. The court's determination had a sound and substantial basis in the record. Although the child had a loving relationship with both parents, the mother had been the child's primary caregiver and had been responsible for his daily routine. Further, the mother's move to Virginia would improve the quality of the child's life, the mother and her current husband were committed to fostering a relationship between the child and his father, and although the relocation would have an impact on the father's ability to spend time with the

child, the liberal visitation schedule would allow for a continued, meaningful relationship between them.

Matter of Carmen G. v Rogelio D., 100 AD3d 568 (1st Dept 2012)

Sound and Substantial Basis in the Record to Modify Custody

Family Court determined that a change of circumstances occurred warranting a modification of the prior custody order, and that it was in the children's best interests to award sole legal and physical custody to the father and supervised visitation to the mother. The Appellate Division affirmed. There was a sound and substantial basis in the record to support the court's determination. There had been a neglect finding against the mother based on her failure to protect the children from the excessive corporal punishment inflicted upon them by her former boyfriend. Despite the neglect finding, the mother continued to state that the children lied, and although she completed a parenting skills program and participated in therapy, her relationship with her children was not improved and she was without empathy for them. By contrast, the children were happy with the father and making progress under his care.

Matter of Gabriel J., 100 AD3d 572 (1st Dept 2012)

Modification of Prior Order Was in the Best Interests of the Children; Order Reversed

The father appealed from an order of the Family Court, which, after a hearing, dismissed his petition to modify a prior order of custody and visitation, entered on the parties' consent, by specifying a set visitation schedule. At the hearing the father testified that the mother was preventing him from having visitation with the children by conditioning visitation on various demands; she claimed that she did not know his current wife and was afraid that he would not return the children from California to New York. The father also testified that he and the mother did not communicate absent exigent circumstances. In view of this evidence establishing that the existing visitation arrangement, which was dependent on the cooperation of both parents, had become unworkable, the Family Court's determination that the father had failed to make a prima facie showing

of changed circumstances warranting modification of the prior visitation order was not supported by the record. Further, under the circumstances of this case, including the fact that the parents had previously agreed that the father should enjoy liberal visitation, and the father's testimony that the children identified him as Daddy and told him that they loved him during numerous telephone conversations, the Appellate Division held that modification of the prior order to specify a set visitation schedule was in the best interests of the children.

Ross v. Morrison, 98 AD3d 515 (2d Dept 2012)

Relocation with Mother Was in the Child's Best Interest

The Family Court's determination to condition an award of sole custody to the mother, modifying a prior stipulation transferring primary custody to the father in the parties' supplemental judgment of divorce, on the mother residing in the county to ensure that the child could stay in his current school district and to deny the mother's petition for leave to relocate with the child, lacked a sound and substantial basis. The record showed that the mother had been the primary caregiver throughout the child's life while the father had limited involvement in the child's day-to-day care. Even when the child lived only with the father, the primary care fell to the father's relatives. The Family Court failed to give enough weight to the mother's allegations of domestic violence which occurred often in the child's presence. The mother testified that she could not afford to live in the school district as required by the court order. She expressed a willingness to provide liberal visitation to the father and to drive the child to visit with the father. The mother's move was motivated by a desire to escape domestic violence, to reside closer to her extended family who could provide financial and emotional support, and to secure affordable housing. Under the totality of the circumstances, the record established that the child's best interests would be served by permitting the mother to relocate with the child. The order was reversed and the matter was remitted to establish a new visitation schedule.

Matter of Eddington v McCabe, 98 AD3d 613 (2d Dept 2012)

Modification to Award Sole and Residential Custody to Father Warranted

A sufficient change in circumstances existed to warrant the modification of a child custody arrangement to award the father sole legal and residential custody of the child. The record revealed that the parents' relationship with each other was strained when they entered into a stipulation providing for joint custody, with the mother having residential custody and the father having extensive visitation rights. The parents' relationship subsequently deteriorated so that they could not communicate and cooperate with one another concerning the child. Further, the mother's animosity towards the father and her attempts to undermine the child's relationship with him were harmful to the child, and the father was more likely to foster a meaningful relationship between the child and her mother. Order affirmed.

O'Loughlin v. Sweetland, 98 AD3d 983 (2d Dept 2012)

New York Was Appropriate Forum, Even Though Not Child's Home State

The defendant moved, in effect, to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) arguing that South Carolina had subject matter jurisdiction of the issue of custody of the parties child. The plaintiff made an untimely cross motion to restrain the defendant from removing the child from Suffolk County until final disposition of the action. In an order dated December 22, 2010, the Supreme Court denied the defendant's motion and, sua sponte, restrained her from removing the parties' child from Suffolk County until final disposition of the action. It then denied the plaintiff's cross motion as academic, and noted that if it had not denied the cross motion as academic it would have denied it as untimely. Contrary to the defendant's contention, New York had subject matter jurisdiction of the issue of custody of the parties' child. The South Carolina Family Court, where the mother had commenced a custody proceeding in mid-October 2010, found that, under South Carolina's version of the UCCJEA, which, in pertinent part, is identical to the one enacted in New York (see DRL Article 5-A), South Carolina was the child's home state. However, since the New York Supreme Court had already determined that it had jurisdiction over the

issue of custody of the parties' child in the divorce action commenced by the father, the South Carolina Family Court determined that New York was the appropriate forum, and stayed the custody proceeding before it pending a determination of the New York action. Accordingly, the Supreme Court correctly denied that branch of the defendant's motion which was, in effect, pursuant to CPLR 3211(a)(7) to dismiss the complaint on the ground that it failed to state a cause of action. As to the defendant's contention that the Supreme Court erred in, sua sponte, restraining her from removing the parties' child from Suffolk County until final determination of the action, the Appellate Division granted the defendant leave to appeal from that portion of the court's order dated December 22, 2010 (*see* CPLR 5701[c]). When the plaintiff cross-moved to restrain the defendant from removing the child from Suffolk County until final disposition of the action, the defendant objected to the cross motion as untimely, and did not submit any substantive opposition thereto. In the order dated December 22, 2010, the Supreme Court, sua sponte, restrained the defendant from removing the parties' child from Suffolk County until final disposition of the action, then denied the plaintiff's untimely cross motion for that same relief as academic. The Appellate Division found that under these circumstances, the Supreme Court's order prejudiced the defendant, who had no fair notice of the plaintiff's cross motion and was deprived of a sufficient opportunity to address the issues raised. The order was modified without prejudice to the plaintiff making a motion for such relief.

Dalcollo v. Dalcollo, 99 AD3d 656 (2d Dept 2012)

Relocation to Texas with Mother Was in the Best Interests of the Children

Contrary to the defendant's contention, the Supreme Court's determination, that the plaintiff's proposed relocation to Texas with the parties' children was in the best interests of the children, was supported by a sound and substantial basis in the record. The plaintiff demonstrated that she could not meet the family's living expenses in New York and that the defendant did not make regular child support payments. She also demonstrated that, if she were permitted to relocate, she would receive, from her parents, financial assistance and assistance with child care, as well as the

opportunity for her and the children to live with them rent-free. Order affirmed.

Tsui v Tsui, 99 AD3d 793 (2d Dept 2012)

Attorney for the Child Not Provided a Reasonable Opportunity to Present Evidence

Accepting the father's evidence as true and affording him the benefit of every favorable inference, the Appellate Division, upon reviewing the record, found that the father presented sufficient prima facie evidence of a change of circumstances which might warrant modification of custody in the best interests of the child. Therefore, the Family Court erred in granting the mother's application, made at the close of the father's case, to dismiss the father's petition for modification. The Family Court also erred in dismissing, at the close of the father's case, the father's petition alleging that the mother had violated the court's prior order of custody and visitation, where the evidence sufficiently established, prima facie, that the mother had violated a condition of the prior order which prohibited the child from being in the presence of a certain individual. Moreover, the Family Court erred in dismissing the father's petitions without providing the attorney for the child a reasonable opportunity to present evidence. The Appellate Division further noted that while forensic evaluations may not be needed in all custody determinations, under the circumstances presented, and in light of allegations concerning the mother's parental fitness and mental health, the Family Court should have ordered forensic evaluations in this case.

Matter of James R.O. v Cond-Arnold, 99 AD3d 801 (2d Dept 2012)

Hearing Abruptly Concluded Without Allowing Mother to Present Her Case; Order Reversed

The mother appealed from an order of the Family Court, which, after a hearing and upon the recommendation of a Court Attorney Referee, granted the father's petition to modify an existing order of custody and visitation so as to award him sole custody and awarded her only supervised visitation. Upon reviewing the record, the Appellate Division found that the mother's due process rights were violated when the hearing was concluded without her being permitted to

present any evidence, call the father or any other witnesses, or properly answer the allegations asserted against her. The Appellate Division noted that while the mother's disruptive behavior cannot be condoned or excused, her conduct was not the sole cause of the abrupt termination of the hearing. The record revealed that the father, who had already obtained temporary orders in his favor, sought, through his attorney, to prolong the hearing, inflame the situation, and interfere with the mother's right to be heard by engaging in an extended direct examination filled with irrelevant details and unsubstantiated accusations, primarily focused on incidents and behaviors that long preceded the prior order of custody and visitation. Under these circumstances, the Court Attorney Referee, by repeatedly refusing to appropriately limit the father's inquiry and by abruptly concluding the hearing without allowing the mother to present her case, failed to ensure that the mother was afforded a full and fair opportunity to be heard. Accordingly, the order was reversed and remitted for a full hearing on the merits before a different Court Attorney Referee. Further, the Family Court was directed to conduct a hearing for the purpose of fashioning a temporary order of custody and visitation.

Thomson v. Battle, 99 AD3d 804 (2d Dept 2012)

Award of Sole Custody to Father Was in the Best Interests of the Child

The Family Court's determination to award sole custody of the parties' youngest child to the father had a sound and substantial basis in the record. The evidence at the hearing, which was held in January 2011, established that the child, who was 12 1/2 years old at the time of the hearing and had been in the father's care since April 2009, when the mother sent him to live with the father, was happy and well-adjusted, was performing satisfactorily in school, and had a close relationship with his father, his sister, and his extended family with whom he lived. In addition, the father was able to provide a more stable environment for the child, was best able to provide for the child financially, and adequately provided for the child's emotional and intellectual development. Order affirmed.

Matter of Blakeney v Blakeney, 99 AD3d 898 (2d Dept 2012)

Mother Failed to Demonstrate a Change of Circumstances

The parties, who never married or resided together, are the parents of one child born on September 27, 2000. On June 22, 2005, the parties consented to an order of joint custody, with residential custody to the father during school months and to the mother during non-school months. The mother had relocated from New York to Florida at the time that order was entered. In August 2006, the mother filed a petition to modify the order dated June 22, 2005. After a hearing, the Family Court denied that petition. In September 2009, the mother again filed a petition to modify the order dated June 22, 2005, alleging, inter alia, as a change of circumstances, that she should have custody of the child during school months because his academic performance had deteriorated while in the father's custody, and that she was better able to address the child's special education needs. In an order dated October 11, 2011, the Family Court denied the mother's petition, after a hearing. The mother appealed from that order. Upon reviewing the record, the Appellate Division found that the Family Court's determination that the mother failed to satisfy her burden of demonstrating a change of circumstances warranting a change of custody in the child's best interests was supported by a sound and substantial basis. Order affirmed.

Matter of Kimberly A.H. v Perez, 99 AD3d 903 (2d Dept 2012)

Error to Deny Petition Without Full Evidentiary Hearing

The father petitioned for visitation with the subject children, born on December 17, 2002, and March 6, 2006. The father alleged that the children resided with the mother in Bay Shore. The father was incarcerated at a correctional facility. At an appearance in the Family Court on July 25, 2011, the mother's attorney moved to dismiss the petition. The Family Court, in effect, denied the mother's motion and held what it referred to as a hearing on the merits, at which the attorneys for the father, the mother, and the children advanced their clients' respective positions. No witnesses were called. On the next day, the Family Court rendered its decision on the record, denying the

petition, and issued the order appealed from, denying the father's petition. The father appealed. Under the circumstances of this case, including the lack of sufficient information before the Family Court to permit a comprehensive, independent review of the children's best interests, the Family Court erred in denying the father's petition without a full evidentiary hearing. Accordingly, the Appellate Division reversed the court's order and remitted the matter for a full evidentiary hearing to determine the best interests of the children and a new determination of the father's petition for visitation.

Matter of Burgess v Burgess, 99 AD3d 797 (2d Dept 2012)

Parents Properly Denied Overnight Visitation with Child; Full Evidentiary Hearing Not Necessary

The mother and the father separately appealed, from an order of the Family Court, which, after a hearing, denied their requests for overnight visitation. Contrary to the contention of the mother and the father, the Family Court properly considered the totality of the circumstances, and its determination was supported by a sound and substantial basis in the record. Since his birth, the child had been in the care and custody of the maternal grandfather who was the child's legal guardian. Although, as a general rule, determinations regarding custody and related matters should be made after a full evidentiary hearing, here, the mother and the father consented to the Family Court conducting only a "mini-trial," thus waiving their right to a full evidentiary hearing. Nevertheless, the Appellate Division noted that a full evidentiary hearing was not necessary in this case, since the Family Court possessed sufficient information to render an informed decision consistent with the best interests of the children based on its extensive history with the parties. Order affirmed.

Matter of James M. v Kevin M., 99 AD3d 911 (2d Dept 2012)

Family Court Erred in Determining It Did Not Have Jurisdiction

Family Court issued an order of sole custody of the son to the father, did not address custody regarding the daughter, and set visitation between the parents and the

children. The daughter subsequently relocated with the mother to Virginia. Several years later, the father filed in New York for custody of his daughter alleging abuse and neglect by the mother and her boyfriend. Family Court determined that because its prior order had only addressed custody of the son and not the daughter, it did not have continuing jurisdiction over the daughter, and it further held that New York was the least convenient forum. The Appellate Division reversed holding that Family Court did have continuing jurisdiction over the daughter since the prior order addressed visitation with respect to the daughter, it constituted a prior "[c]hild custody determination" over which Family Court maintained continuing jurisdiction (Domestic Relations Law § 75-a [3]). Additionally, the Appellate Division held that a court's jurisdiction continues until it is determined that neither the child nor the child and one parent have a significant connection with this state, and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships. In this case, the father and son had lived in this state, the daughter visited her father and brother in New York several times each year, and in the prior court proceeding, the daughter had been appointed an attorney and Family Court had made determinations about her best interests. Even though the alleged incidents occurred in Virginia, substantial evidence was available in this state since the witnesses to the incidents lived in New York, and since Family Court had presided over the most recent custody proceeding involving these children, it possessed pertinent information regarding the parties' past circumstances. Additionally, evidence in Virginia relating to the daughter's best interests could be submitted by way of, among other things, depositions, or testimony by telephone, audiovisual means or other electronic means under DRL §75-j.

Matter of Belcher v Lawrence, 98 AD3d 197 (3d Dept 2012)

Litany of Complaints Insufficient to Prove a Change in Circumstances

The Appellate Division affirmed Family Court's decision dismissing the father's custody modification petition on the grounds that there was no showing of a

change in circumstances. The father's evidence consisted of a list of complaints about the existing custody order of sole custody to the mother. The evidence further showed that the parties had made no improvements in their ability to communicate with each other and thus there was no basis for modification of the order.

Matter of Scott LL. v Rachel MM., 98 AD3d 1197 (3d Dept 2012)

No Substantial Change in Circumstances

The Appellate Division held that Family Court properly concluded that the father had failed to show a substantial change in circumstances sufficient to modify a prior order of joint legal custody with primary custody to the mother and visitation to the father. Although the father's petition alleged that he had acquired a certification as a medical assistant, had taken steps to address his substance abuse issues and improve his relationship with his children, the evidence showed that the father remained unemployed and remained delinquent in his child support obligation. However, modification of the father's visitation schedule was appropriate based upon the express agreement of all parties.

Matter of Clarkson v Clarkson, 98 AD3d 1208 (3d Dept 2012)

No Change in Circumstances to Modify Order Directing Mother to Provide All Transportation

Family Court's amended order of custody/visitation, which continued the provision that the mother provide all transportation for her visitation with the child, failed to include all of the mother's parenting time with the child and omitted her time with the child on summer vacation, school breaks and some major holidays. On appeal the mother challenged both the court's requirement that she provide all transportation and the omission of her parenting time schedule. As to the transportation issue, the Appellate Division held that the issue was not properly before them as the mother never appealed from that order. In fact, she had stated in court that she was able to transport the child. As to the omission of mother's parenting time schedule, the Appellate Division agreed that it was not addressed

in the order and that it was unclear from the record and remitted to Family Court for further proceedings.

Matter of Keator v Crippen, 99 AD3d 1047 (3d Dept 2012)

Wrongfully Withholding a Child Cannot Result in New York Acquiring Home State Jurisdiction

The unmarried parents separated prior to the child's birth. When the child was four-months-old, the mother relocated to the state of Washington. Three years later, the child came to reside temporarily with the father. After the child had been in New York for three weeks, the father filed for custody which was granted upon default and was later vacated. The mother filed paternity and guardianship actions in Washington and the father again filed for custody of the child in New York. Following an ex parte telephone conversation with the judge presiding over the mother's case in Washington, the Family Court judge presiding over the initial appearance, issued an order finding New York had gained jurisdiction over the child and granted temporary custody to the father, which was later reversed by the judge who presided over the fact-finding hearing. On appeal, the Appellate Division held that while a Family Court judge's overruling of a previous determination concerning subject matter jurisdiction violated the doctrine of the law of the case, the Appellate Division was not bound by such doctrine and in the interest of achieving substantial justice, affirmed the court's order. The Appellate Division held that New York cannot establish home state pursuant to DRL § 75-a[7], where the child's presence in this state is a result of being wrongfully removed or withheld from his home state. The child was supposed to have been returned by the father to the mother after approximately one month. To allow otherwise would contravene one of the stated purposes of the UCCJEA, which is to deter the unilateral movement of children from one jurisdiction to another. Additionally, even though an earlier agreement had been reached by the initial Family Court judge and the judge in Washington that New York was the more appropriate forum, no record of that communication between the courts was in the record.

Matter of Joy v Kutzuk, 99 AD3d 1049 (3d Dept 2012)

Order Modifying Custody Order Reversed and Remitted

Both parents filed petitions to modify a prior order of sole custody to the mother. The father sought custody and the mother requested supervised visitation. Family Court directed both parents to submit to substance abuse evaluations. While the mother did so after ten months, the father failed to submit to the evaluation altogether. Both the mother and the children's lawyer moved to dismiss the father's petition without prejudice. Citing among other things the fact that the petitions had been pending for more than one year, the court awarded joint legal custody with primary custody to the mother and visitation to the father. The Appellate Division reversed and held that Family Court had improperly modified the prior order without determining whether there had been a change in circumstances and whether such modification was in the children's best interests.

Matter of Stevens v Gibson, 99 AD3d 1052 (3d Dept 2012)

Error to Dismiss Aunt's Custody Modification Petition Without Determining Extraordinary Circumstances

For almost ten years, the child was in various custodial situations including with the mother, father and maternal aunt. In this proceeding, the aunt filed for sole custody and Family Court dismissed the petition on the ground that she had failed to establish a change in circumstances.

The Appellate Division agreed with the aunt and the attorney for the child that Family Court erred in dismissing the petition without making a determination of whether extraordinary circumstances existed to warrant placement of the child with a nonparent. The court must find that the nonparent has met this burden before considering the child's best interests and this burden is not satisfied solely by the existence of prior consent orders in the nonparent's favor. In the absence of a prior judicial determination of extraordinary circumstances, Family Court was required to consider this issue before proceeding. The record here is not adequately developed to permit such an independent review to determine whether extraordinary circumstances exist. Family Court improperly limited or precluded the aunt and the attorney for the child

from providing proof on the issue of extraordinary circumstances. The Appellate Division further held that while the court's decision not to hold a *Lincoln* hearing was not error, as such a hearing is not mandatory, the court's in camera interview with the child did not constitute a *Lincoln* hearing because it was conducted long before the fact-finding hearing and the purpose of a *Lincoln* hearing is to corroborate information acquired during the fact-finding hearing.

Matter of Rush v Roscoe, 99 AD3d 1053 (3d Dept 2012)

Sound and Substantial Basis To Make Initial Custody Determination

The Appellate Division held that Family Court had sound and substantial basis in the record to award joint legal custody of child to the parties with primary physical custody to the father and parenting time to the mother. Although the in camera interview with the child was held before the fact-finding hearing, both occurred on the same day and it served to corroborate the evidence presented at the fact-finding hearing. As this was a initial custody determination, the court took into account those factors necessary to determine what was in the child's best interest. Here, the father offered uncontradicted testimony that he had spent all of his visitation time with the child, taking him to the playground, the library, the YMCA and other activities. The father was also involved in the child's medical care, took the child to counseling and communicated with the counselors and the child's school about his needs. The evidence also showed that when the child was at the father's home he did not want to return to the mother's home due to the stress caused by her home environment. The father was willing to move to a new home to keep the child in the same school district. The mother's testimony focused on the alleged family offense she had filed against the father and otherwise offered no evidence to support her custody petition.

Matter of Roberta GG. v Leon HH., 99 AD3d 1057 (3d Dept 2012)

Grandmother Lacks Standing to Seek Visitation

The Appellate Division held that Family Court did not abuse its discretion by granting the attorney for the

child's and the mother's motion to dismiss the grandmother's visitation petition for lack of standing. The evidence showed that although the grandmother sent the child birthday and holiday cards and presented evidence that she maintained a good relationship with the other children in her family, this only established that she had love and affection for the child and not a "sufficient existing relationship" required by the statute [DRL§72(1)]. Additionally, it was the orders of protection that were in place against the grandmother, which were due to her own conduct, that thwarted her ability to form a relationship with the child and not the conduct of the child's mother.

Matter of Roberts v LaCross, 99 AD3d 1065 (3d Dept 2012)

Dismissal of Custody and Family Offense Petitions Affirmed

The Appellate Division affirmed Family Court's decision dismissing the father's petitions to modify visitation provisions contained in the prior custody order and his application for an order of protection based on allegations that the mother had hit the subject child with a belt. After a fact-finding hearing, Family Court held that there was no change in circumstances to modify visitation and the allegations of improper discipline by the mother were unfounded. The prior custody order had been issued just a few months prior to the father's petition to modify and there was no evidence that the mother had interfered with the father's visitation with the child. Additionally, the mother's unwillingness to provide more visitation to the father than was agreed upon in the prior order was insufficient to establish a change in circumstances.

Matter of Kashif II. v Lataya KK., 99 AD3d 1075 (3d Dept 2012)

Frequent Change in Residence Sufficient to Find Sufficient Change in Circumstances

The Appellate Division held that Family Court's order modifying custody from the mother to the father due to the mother's frequent changes of residence, did not lack a sound and substantial basis in the record. Here, the child had been in the mother's custody for 8 years. The mother's decision to change residences twice in two

months, which in turn required the child, who had behavioral and emotional problems, to change schools with each move, demonstrated that the mother lacked insight and concern for the child's problems and was a sufficient change in circumstances to warrant a modification of the order. Although the mother explained that she was trying to find suitable housing for the child in order to avoid a change in schools and that the child was progressing positively while in her care, the record made it clear that the child, who was struggling academically, needed consistency, and the moves had made him lose ground academically. Even though the mother had been the child's primary caregiver, upon due consideration of all relevant factors, it was in the child's best interest to modify custody.

Matter of Hamilton v Anderson, 99 AD3d 1077 (3d Dept 2012)

Custody Modification Reversed as Father had Fundamental Right to Counsel

Parents shared joint legal custody of their child with primary, physical custody to the mother. Thereafter, the mother filed to modify custody, seeking an order allowing her to obtain a passport for the child after the father refused to sign the form consenting to the issuance of the passport. At the court appearance, Family Court advised the father of his right to counsel but refused to adjourn the proceeding after the father expressed confusion and requested an attorney. Family Court granted the petition without affording the father the assistance of counsel. On appeal, the Appellate Division reversed finding that the deprivation of a party's fundamental right to counsel was a denial of due process notwithstanding the merits of the unrepresented party's position.

Matter of Dolson v Mitts, 99 AD3d 1079 (3d Dept 2012)

Incarcerated Father Entitled to Modification of Visitation

The Appellate Division held that an incarcerated father had shown a change in circumstances resulting in the need for modification of the previous custody order,

which provided custody to the mother and entitled the father to visitation as agreed upon between the parties. During the father's initial confinement in jail, the mother had brought the child for weekly visits. However, after the parties had ended their romantic relationship and the father had been moved to another facility, which was a significant distance from the mother's home, the visits had stopped altogether. The father sought specific scheduled visits with the child and telephone contact at the mother's expense. Family Court continued the previous order of custody but modified the order to allow the father to have reasonable telephone contact with the child at no cost to the mother, allowed the father to send letters to the child and directed the mother to send a photograph of the child each month to the father. The court also directed the father to engage in domestic violence counseling before he had any unsupervised visits with the child after his release. The father appealed. The Appellate Division affirmed that part of the order regarding father's access to the child, holding that visitation did not always have to be contact visitation as both parents were limited financially, and the great distance the child would have to travel to see the father was not in the child's best interest. However, the Appellate Division reversed Family Court's imposition of domestic violence counseling noting that while the court may direct a parent to submit to treatment or counseling as a component of visitation, it could not impose such a requirement as a condition of the father's future access to the child.

Matter of Ruple v Harkenreader, 99 AD3d 1085 (3d Dept 2012)

Ample Basis in the Record to Determine that Circumstances Had Changed and it Was in Children's Best Interests to Modify Custody

Family Court issued an order modifying custody of two children from the mother to the father. While Family Court did not specifically state that circumstances had changed, the Appellate Division held that based on the court's extensive factual findings and giving great deference to the court's credibility determinations, the findings were fully supported by the record that there was ample basis for the modification. The evidence showed that the mother, who had been inebriated, and her paramour, had become involved in a public dispute

where the police had to intervene and the mother had been cited for disorderly conduct. The mother had continued to drink and two hours later when the police along with a caseworker went to check on the children, the mother had been incoherent, refused to let them in the home and had struck at them, resulting in the mother being charged with harassment and detained for a mental health evaluation. The caseworker learned that the mother drank heavily around the children, and had recently driven drunk with the children in the car. The oldest son reported that he had taken refuge with a neighbor during the mother's most recent drinking binge and when he returned home, she had tackled and injured him. This evidence, when coupled with a lack of proof that the mother had addressed her alcohol problem, and taking into consideration the stable home environment provided by the father, supported the determination that it was in the children's best interest for custody to be modified.

Matter of Fish v Fish, 100 AD3d 1049 (3d Dept 2012)

Incarcerated Father Established Change in Circumstances

Mother was awarded sole custody with parenting time to the father as the parties could agree. The mother brought the child to see the father several times at the correctional facility where he was incarcerated but thereafter stopped altogether when the father was transferred to a facility that was five hours from the mother's home. The father continued to send the child cards, letters and money on occasion. The father filed modification and violation petitions seeking visits with the child and alleged that the mother had failed to provide him with the agreed upon current photographs of the child pursuant to the prior order. After a hearing the court modified the order and granted the father visits once every four months at his place of incarceration with the father responsible for all associated travel, lodging and food expenses. The mother appealed and the Appellate Division affirmed determining that the father had proven a change in circumstances reflecting a genuine need for modification as three visits per year with the father is in the child's best interests.

Matter of Telfer v Pickard, 100 AD3d 1050 (3d Dept 2012)

Lack of Factual Allegations Sufficient to Support Violation of Visitation Petition

Parents entered into a consent order which directed the mother to send pictures to the father updating him on the child's growth and development. Both parties were directed to advise each other of change of addresses and the father was given the right to send the child letters and cards so long as it was not signed as "Dad". The father filed a violation of visitation petition alleging that the mother had interfered with his 14th Amendment rights. Family Court dismissed his petition for failure to state a cause of action. The Appellate Division affirmed, holding that the father had failed to set forth factual allegations tending to support his contention that the mother had violated the order in any way.

Matter of Panzer v Wood, 100 AD3d 1119 (3d Dept 2012)

Inadequate Proof to Support Family Court's Custody Determination

Both parents filed for initial custody of the subject child who had lived with the mother but at the time of the hearing was living with the father. Family Court held an in camera interview with the child and thereafter, a hearing was held where both parties were represented by counsel but only the mother appeared and testified. Family Court dismissed the father's petition but after the hearing on the mother's petition, the court issued an award of joint legal custody with primary, physical custody to the father. The mother appealed and the Appellate Division reversed. The evidence showed that although both parents had significant flaws in their past parenting, there was inadequate proof to support the determination that the father should have custody. There was virtually no proof regarding the father's home environment and it was unclear what involvement he had with the child after the parties' separation. There was no proof regarding the girlfriend who lived with him, the father had made no effort to appear at the hearing and there was proof that he was not fostering a relationship between the mother and child. Among other factors, while the mother had exercised poor judgment in living with a drug addict, the evidence indicated she had found work and appropriate housing for herself and the

child; she had been primary caregiver for much of the child's life, had been involved in the child's educational activities, had ensured the child received proper medical care and had been cooperative in arranging visits between the father and child. Additionally, the mother had agreed she would wait until Christmas or summer break before taking custody of the child so as to not disrupt his schooling, and she had agreed to place the child's interests before her own.

Matter of King v Barnes, 100 AD3d 1209 (3d Dept 2012)

Sound and Substantial Basis in the Record to Modify Custody

The mother filed to modify the joint custody provisions of the parties' separation agreement which was incorporated into their judgment of divorce, seeking sole legal custody of the parties' three children. After a trial and Lincoln hearing, Family Court awarded the mother sole legal custody of the eldest child and the father sole legal custody of the younger two children along with a revised visitation schedule. The mother appealed. The Appellate Division held that Family Court had a sound and substantial basis in the record to modify as the deterioration of the parties' relationship and their inability to communicate had constituted a change in circumstances. In determining the appropriate custodial agreement that would be in the children's best interests, Family Court had taken into consideration such factors including, the importance of maintaining stability in the children's lives, quality of the respective home environments, the length of time the present custody arrangement has been in place, each parent's past performance, relative fitness and ability to provide for and guide the children's intellectual and emotional development. In this case, the mother had caused the breakdown in the parties' communication due to her hostile behavior towards the father, and had used the children as pawns to score points in what she perceived was a contest between them. The mother had contacted the state police and incorrectly reported the father was intoxicated while driving one of the children in the car. She had also reported him to CPS four times, resulting in investigations that were deemed unfounded. In contrast, the father demonstrated a willingness to foster a relationship between the mother

and children.

Matter of Mahoney v Regan, 100 AD3d 1237 (3d Dept 2012)

Relocation is in Child's Best Interest

By stipulation, the father had sole custody and the mother had supervised visitation. When the father sought to relocate with the child, the mother filed for joint custody and unsupervised visitation. Family Court awarded the mother joint legal custody and allowed her to have unsupervised visits with the child. Both parties appealed. The father wished to relocate as he was concerned about his job stability due to multiple lay offs by his employer who had restructured the company and the father's position title. The father had investigated local jobs within his area of expertise but found that they would require him to either spend 25% of his time traveling or take a reduced salary. He sought the move after he was offered a job with a salary of \$90,000, which was approximately 10% increase over his current salary, and his new position offered bonus incentives. In addition, the father testified he would live initially with his family, who would provide free child care, further reducing his expenses. The father, who had been the sole custodial parent for the child and had been responsible for the child's daycare and financial support, also provided evidence of future educational opportunities for the child in Illinois. Although the distance would result in reduced visitation for the mother, evidence showed that she struggled with a generalized anxiety disorder and alcohol abuse which had led to the requirement that her visits be supervised by the maternal grandparents, and detracted from the quality of her relationship with the child. The mother and maternal grandmother had a stormy relationship and the mother had also lied under oath regarding the continuation of her romantic relationship with an individual who was not permitted to have contact with the child. Given the totality of the circumstances, the Appellate Division affirmed, holding that it was in the child's best interest for the custodial father to relocate with the child to Illinois.

Matter of Weber v Weber, 100 AD3d 1244 (3d Dept 2012)

Extraordinary Circumstances Based on Mother's Unfitness

The Appellate Division held that Family Court had a sound and substantial basis in the record to modify a prior order of sole custody with the mother, to joint legal custody to the father and grandmother. Pursuant to the terms of the prior custody order, the mother and father were directed to keep each other apprised of their current address and phone numbers, and were precluded from being intoxicated within 24 hours prior to or during any custodial period with the child. The mother violated the order by relocating to North Carolina without informing the father of the child's whereabouts; and, while being intoxicated, became involved in a drunken brawl with her sister and the child was injured when she attempted to intervene. The father filed violation and modification petitions, seeking joint legal custody of the child with the grandmother. While the mother admitted she was an alcoholic and admitted to having a nervous breakdown following the altercation, she continued to minimize her mental health issues and behavior and placed the blame for the altercation upon her sister. When the child was temporarily placed with the grandmother, the mother limited her phone contact with the child, made no effort to inquire about the child's schooling and offered no plan for the child's future. The mother indicated if she could not have custody of the child, she would waive her visitation due to travel expenses. Family Court found extraordinary circumstances based on the mother's irresponsibility and failure to plan for the child's future, which rose to the level of persistent neglect, and based on the totality of the circumstances, held it would be in the child's best interest to award joint legal custody to the father and grandmother, with primary, physical custody to the grandmother as she had been the main source of stability for the child. The court further issued a 30-day suspended sentence against the mother for her violation of the court order.

Matter of Rodriguez v Delacruz-Swan, 100 AD3d 1286 (3d Dept 2012)

Respondent's Appeal Dismissed as Untimely

The Appellate Division held that respondent was untimely in filing his notice of appeal and dismissed his case. In this matter, Family Court granted custody to

the petitioner at a time when the respondent was incarcerated. The order of custody was entered on July 15, 2011 and the court clerk mailed the order to the respondent on the same day. The respondent's notice of appeal was not filed until September 2, 2011. The Appellate Division held that pursuant to FCA §1113, the appeal should have been filed no later than 35 days from the mailing of the order by the clerk and therefore, dismissed his appeal.

Matter of Catherine C. v Billy D., 100 AD3d 1292 (3d Dept 2012)

Sound and Substantial Basis in the Record to Suspend Contact with Father

According due deference to Family Court's credibility assessments, the Appellate Division held that there was sound and substantial basis in the record for the court's determination that contact with the father would be detrimental to the child's well-being and relocation with the mother to a distant locale for an indefinite period was in the child's best interest. In this case, parents shared joint legal custody with primary, physical custody to the mother and parenting time to the father. Thereafter, the mother filed to modify alleging that the father had sexually abused the child and DSS commenced an Article 10 proceeding against the father on the same grounds. The parties stipulated to the custody matter which was commenced first, and DSS agreed to withdraw if the mother received custody and otherwise reserved its rights. After the fact-finding hearing, the court awarded the mother sole custody and granted her request to relocate with the child to Panama. The mother testified about the numerous statements the child had made to her describing acts of sexual abuse by the father. Family Court held the child's out-of-court statements regarding the abuse admissible pursuant to FCA Article 10, and a relatively low degree of corroboration was sufficient to support the reliability of the child's statements. Such corroboration included the mother's description of the dramatic changes in the child's behavior, such as panic attacks, cutting herself and inability to sleep. The court also found highly credible the expert testimony given by the therapist who saw the child weekly for two years. The expert testified that the child showed symptoms typical of children who had been sexually abused, such as anxiety, guilt, self-harming behaviors,

suicidal thoughts and knowledge of sex beyond what would normally be expected for her age. The therapist testified the child was ambivalent about her father, in that she loved him and missed him and at the same time strongly feared he would come after her again, and such mixed emotions were common in children who were abused by a relative or close acquaintance. Although the father denied all allegations, at the time of his testimony, the father was serving a three-year sentence for committing domestic violence against his girlfriend and he admitted to previous convictions for domestic abuse and drug possession.

Matter of Lori DD. v Shawn EE., 100 AD3d 1305 (3d Dept 2012)

Court Erred in Making Neglect Finding Without Hearing

Family Court denied mother's petition to relocate with the parties' child to Alabama. The Appellate Division modified by vacating the provision that if mother relocates to Alabama it was in the child's best interests that the father be the primary custodial parent. The court properly considered the *Tropea* factors in denying mother's relocation petition. Her primary reason for relocating was that she had obtained a job in Alabama that paid her \$40,000, but by the conclusion of the hearing she no longer had that job. Further, the mother made no attempts to obtain employment in New York State after she voluntarily closed her day care center. The court erred in ordering that if mother relocated, custody of the child would be transferred to father because it impermissibly altered the parties' custodial arrangement automatically upon a future event without taking into account the child's best interests at that time.

Matter of Bradley M.M., 98 AD3d 1257 (4th Dept 2012)

Court Erred in Granting Father Sole Legal and Primary Physical Custody of Child

Family Court awarded petitioner father sole legal custody of his daughter. The Appellate Division modified by granting respondent mother primary physical custody, joint legal custody to petitioner and

respondent and unsupervised visitation to petitioner. Although the father made a sufficient evidentiary showing of a change in circumstances to warrant an inquiry into whether the existing custody arrangement should be modified, it was in the child's best interests for the mother to retain primary physical custody. Throughout the child's life the mother was the child's primary caregiver and there was nothing in the record to support the conclusion that the mother was unfit or less fit than the father. Evidence at the hearing was presented that the child and mother often argued and that the child wanted to live with the father, but there was also evidence that the child relied on the mother, not the father, when she was sick. Further, the father's visitation had previously been supervised as a result of his substance abuse. Although the father submitted evidence that he had been sober and sought help for his substance abuse, the record did not support the drastic change to sole custody, although it did support granting father unsupervised visitation.

Matter of Kairis v Kairis, 98 AD3d 1281 (4th Dept 2012)

In Child's Best Interests to Change School District

Family Court granted the parties' motions to reargue with respect to a prior order of custody and on reargument dismissed mother's petition for sole custody of the child and granted that part of father's petition seeking a determination that the child attend Pittsford schools. The Appellate Division affirmed. The mother failed to establish a change in circumstances. Although she testified that the father was responsible for a complete breakdown in communication, she stipulated to the admission into evidence of the report of the court-appointed psychologist, who opined that the child was doing well under the existing custody arrangement and that the issues between the parties was not insurmountable. Although the court appeared to place significant weight on NYS Department of education data on the merits of Pittsford school, there was also evidence from the parties and an expert witness that provided a sound and substantial basis for the court's determination that the child's best interests would be served by attending Pittsford schools.

Matter of Crudele v Wells, 99 AD3d 1227 (4th Dept 2012)

Error to Dismiss Incarcerated Father's Petition for Visitation with Child

Family Court dismissed incarcerated father's petition for visitation with his child. The Appellate Division reversed. Petitioner was incarcerated for rape. In dismissing the petition, the court failed to give due consideration to the presumption in favor of visitation, notwithstanding the father's incarceration. Respondent mother presented no evidence to overcome the presumption that visitation would be in the child's best interests, and the record was insufficient for the Appellate Division to make that determination. The matter was remitted for a hearing where the court must consider the full range of factors pertinent to the visitation determination.

Matter of Fewell v Ratzel, 99 AD3d 1237 (4th Dept 2012)

Enforcement of Prior Custody Order in Child's Best Interests

Family Court granted father's petition to enforce a prior order of custody and visitation entered upon stipulation of the parties in 2008 and dismissed the mother's petitions for modification of custody and visitation and for enforcement of an order of visitation. The Appellate Division affirmed. The court properly limited proof to incidents that occurred after the 2008 order was entered. Further, although there is an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, the mother failed to offer any evidence to corroborate the child's out-of-court statements and, therefore, the court's preclusion of those statements was proper. The court also properly determined that enforcement of the 2008 order was in the child's best interests. Finally, the court properly dismissed the mother's enforcement 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.

Matter of Hall v Hawthorne, 99 AD3d 1237 (4th Dept 2012)

Court Properly Found Father in Contempt of Court

Family Court found respondent father in contempt of court based upon his willful violation of a prior order directing the return of the parties' son to the custody of petitioner mother. The Appellate Division affirmed. The father was aware of the terms of the prior order and he put in motion the events that resulted in the child being removed from the mother's home and placed in the father's home. The court did not err in conducting a confidential interview with the parties' daughter and there was no indication that the court relied on that interview in reaching its decision.

Matter of Marvin v Kilmer, 99 AD3d 1255 (4th Dept 2012)

Mother Failed to Prove Father Abused Child

Family Court dismissed mother's petition, which sought modification of a prior custody order that granted her primary physical custody and the father visitation, based upon allegations that the father sexually abused the child. The mother and the attorney for the child appealed. The Appellate Division affirmed. Although several witnesses testified that the then four-year-old child reported to them that the father touched her "poo" and "pee," when a police officer interviewed the child outside the presence of the mother the child said that the touching occurred when the father wiped her after she used the toilet. Further, allegations of sexual abuse against the father had been investigated by DSS and were determined to be unfounded. The contention that the court should have drawn an adverse inference against the father based upon his failure to deny the allegations of sexual abuse at the hearing was rejected. Although the father testified at the hearing, he was not questioned by anyone about the sexual abuse allegations.

Matter of Danner v Nepage, 100 AD3d 1405 (4th Dept 2012)

Sole Legal Custody to Mother Reversed

Family Court awarded sole legal custody to respondent mother. The Appellate Division reversed and reinstated the father's petition seeking modification of visitation with the parties' children. Respondent spoke Swahili

and an interpreter appeared on his behalf. Although petitioner responded "no" when asked if he and respondent had been married, he previously stated unequivocally that he and respondent had been married in Africa in a cultural ceremony. The court interrupted petitioner's explanation of a cultural ceremony and petitioner did not complete his response. Respondent testified that the parties were never married. The court's determination that petitioner lacked standing was not supported by a sound and substantial basis in view of petitioner's contradictory testimony through an interpreter. Further, petitioner provided prior sworn petitions where respondent asserted that petitioner was the father of the child and that the parties were married in Africa. Thus, judicial estoppel applied because respondent secured an order in her favor by adopting a position and then sought to assume a contrary position in this action because her interests had changed.

Matter of Mukuralinda v Kingombe, 100 AD3d 1431 (4th Dept 2012)

Grant of Grandparent Visitation Lacked Sound and Substantial Basis

Family Court awarded petitioner grandfather visitation of one weekend per month with his daughter's child. The Appellate Division modified and remitted for further proceedings. The record did not support respondent's contention that the attorney for the child failed to make a recommendation in accordance with the grandchild's wishes. The grandfather had standing to seek visitation. The court properly concluded that the grandfather demonstrated a longstanding and loving relationship with the grandchild. However, the court's determination that it was in the best interests of the child to have overnight, weekend visitation with the grandfather lacked a sound and substantial basis in the record. The mother and grandfather testified to serious wrongdoing by the grandfather, including illegal drug use and sales and vehicular assault upon respondent's boyfriend. Because the court failed to make findings about the credibility of those allegations, the Appellate Division had no basis to determine how they would impact the determination whether visitation was in the child's best interests.

Matter of Hilgenberg v Hertel, 100 AD3d 1432 (4th Dept 2012)

Referee Without Jurisdiction to Dismiss Petition

Family Court dismissed father's petition seeking visitation with his son. The Appellate Division reversed and reinstated the petition. Because respondent mother did not sign the stipulation referring the matter to the referee to hear and determine the matter, the referee was without jurisdiction to dismiss the petition.

Matter of Gunn v Quinn, 100 AD3d 1506 (4th Dept 2012)

Mother's Willful Failure to Obey Visitation Order Results in Civil Contempt And 60 Days in Jail

Family Court adjudged that respondent mother willfully failed to obey a visitation order that granted visitation of the mother's children to the mother's teenage son and the mother's parents. The Appellate Division affirmed. The contention that the statute allowing grandparents to commence a special proceeding seeking visitation with grandparents is unconstitutional as applied to this case because the subject children's family is intact was unpreserved. In any event, the mother initially consented to an order providing for grandparent visitation and acknowledged in open court that it was in the children's best interests to visit their grandparents, with whom the children previously resided. By consenting to the visitation order any challenge to the statute was waived.

Matter of Guck v Prinzing, 100 AD3d 1507 (4th Dept 2012)

Award of Sole Custody to Father Affirmed

Family Court granted father's request for a temporary change in the residence of the children with the mother in New York to the father in Virginia and determined, after a hearing, that it was in the children's best interests that the father have sole custody and that they reside with him in Virginia. The Appellate Division affirmed. Even assuming, for purposes of argument, that the court erred in granting the father's request for a temporary change in custody, the error was harmless because the court subsequently conducted the requisite hearing. The mother failed to preserve for review her contention that the father failed to establish a change in circumstances. In any event, the mother in her petition

alleged that there had been a change in circumstances. There was a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award sole custody to the father.

Matter of Tisdale v Anderson, 100 AD3d 1517 (4th Dept 2012)

Father Established Changed Circumstances

Family Court awarded petitioner father primary physical custody of the parties' child. The Appellate Division affirmed. The father established that the mother left the child without adult supervision on several occasions late at night while she ran errands and that the child indicated to both her parents that she had been sexually touched by her half brother. Although the statements were uncorroborated, the mother admitted that after she heard the statements she enrolled the half brother in counseling. The mother's conduct in leaving the child without adult supervision, coupled with the statements about sexual touching by the half brother, constituted the necessary change in circumstances. The court properly considered the totality of the circumstances in determining it was in the child's best interests for the father to have primary physical custody.

Matter of Burrell v Burrell, 100 AD3d 1545 (4th Dept 2012)

Court Properly Denied Petition to Suspend Visitation

After a hearing, Family Court denied the mother's petition seeking suspension of visitation between respondent father and the parties' child. The attorney for the child appealed. The Appellate Division affirmed. Visitation with the noncustodial parent is presumed to be in the child's best interests and the denial of such visitation is justified only for a compelling reason. Here, although the relationship between father and child was strained, there was nothing in the record establishing that visitation was detrimental to the child. The record supported the court's determination that resuming visitation offered the only hope of restoring the father-daughter relationship and suggested that the child's opposition to

visitation was the result, at least in part, of parental alienation by the mother. Although the attorney for the child was correct that the court erred in disclosing the child's statement at the *Lincoln* hearing, the error did not justify disturbing an otherwise valid determination.

Matter of Carter v Work, 100 AD3d 1557 (4th Dept 2012)

FAMILY OFFENSE

Evidence Insufficient to Establish Harassment via Text Messages

The Family Court, after a hearing, made a finding on the record that the appellant had committed the offense of aggravated harassment. However, the order stated that she had committed the offense of harassment in the second degree. Where there is a conflict between an order or judgment and the court's decision upon which it was based, the decision controls. The petitioner did not establish by a fair preponderance of the evidence that the appellant's acts of sending several text messages to the parties' eldest son constituted aggravated harassment in the second degree (see FCA § 812 [1]; PL § 240.30). The evidence also was not sufficient to establish by a fair preponderance of the evidence that her acts constituted harassment in the second degree (see FCA § 812 [1]; PL § 240.26 [3]). Order reversed.

Matter of Testa v Strickland, 99 AD3d 917 (2d Dept 2012)

No Good Cause To Warrant Setting Aside Order of Protection

Family Court issued a two-year behavioral order of protection against respondent in favor of petitioner, upon consent by petitioner and respondent's counsel, who advised the court that respondent had consented to the contemplated order. Respondent, who had appeared by telephone in the past, failed to do so at this appearance. Thereafter, respondent unsuccessfully moved to vacate the order arguing that counsel had misunderstood his position and that Family Court had no authority to issue the order. Respondent appealed and the Appellate Division held as this was an appeal from a consent order, he bore the burden of establishing

fraud, collusion, mistake, accident or some similar ground. However, all respondent asserted was that there had been mis-communication between himself and counsel, and he failed to explain his non-appearance at the scheduled court proceeding. Based on these circumstances, the Court held he had failed to show good cause to set aside the issuance of the order.

Matter of Nori-Alyce Y. v Mark Y., 100 AD3d 1116 (3d Dept 2012)

Evidence Insufficient to Establish Family Offense

Family Court ordered respondent, the fiancé of petitioner's estranged husband, 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 Brazie v Zenisek, 99 AD3d 1258 (4th Dept 2012)

Respondent Committed Family Offenses

Family Court granted a protective order to petitioner upon a finding that respondent committed the family offenses of harassment in the second degree and menacing in the third degree. The Appellate Division affirmed. The court's assessment of credibility was entitled to great weight and the court was entitled to credit the testimony of petitioner over that of respondent. Although the order of protection had expired, the appeal was not moot because respondent challenged only the finding that he committed two family offenses.

Matter of Petrie v Petrie, 100 AD3d 1423 (4th Dept 2012)

JUVENILE DELINQUENCY

Challenges to Respondent's Admission Were Insufficient to Warrant Reversal

Family Court adjudged respondent to be a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree and placed him on probation for 12 months. The Appellate Division affirmed. Respondent's admission was knowingly, intelligently and voluntarily made and did not become final until the court fully advised respondent and his mother of the rights respondent would be waiving. Challenges to respondent's admission allocution raised matters of form, rather than substance, and did not warrant reversal. Further, the court sufficiently explained the right to remain silent.

Matter of Sean B., 99 AD3d 433 (1st Dept 2012)

Finding of Juvenile Delinquency Reversed, Court Directed to Order an ACD

Family Court adjudicated respondent to be a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree and menacing in the third degree, and placed him on probation for nine months. The Appellate Division reversed, as an exercise of discretion in the interest of justice, vacated the delinquency finding and dispositional order, and remanded the matter to Family Court with the direction to order an adjournment in contemplation of dismissal. Adjudicating respondent a juvenile delinquent and imposing probation was an improvident exercise of the court's discretion. It was not "the least restrictive available alternative." An ACD would serve respondent's needs and the needs of the community. Respondent was 11 years old at the time of the incident, which was his only conflict with the law. The circumstances of the assault were not particularly egregious, and respondent's unsatisfactory school record had greatly improved by the time of the disposition.

Matter of Besjon B., 99 AD3d 526 (1st Dept 2012)

Family Court Lacked Statutory Authority To Remand Juvenile To ACS Custody

Family Court, sua sponte, remanded respondent to the custody of ACS and modified an earlier disposition of probation. The Appellate Division reversed. The court lacked authority to initiate what was effectively a violation of probation proceeding by invoking FCA §355.1 (1), and, in any event, there was no statutory authority to detain a juvenile under this section of law. Additionally, in the absence of an expressed statutory provision, the detention of a juvenile may not be implied.

Matter of Kareem W., 100 AD3d 565 (1st Dept 2012)

PATERNITY

Record Supported Dismissal of Petition to Set Aside Acknowledgment of Paternity

Contrary to the petitioner's contention, the best interests of the child supported the Family Court's determination to invoke the doctrine of equitable estoppel in granting the mother's motion to dismiss his petition to set aside an acknowledgment of paternity dated December 22, 2000, directing a paternity test, and discontinuing his payment of child support. The record showed that since August 2006, upon the petitioner's consent, he was paying support for the child. The petitioner sought and was granted visitation with the child, and the child understood the petitioner to be his father. Accordingly, the Family Court properly granted the mother's motion to dismiss the petition to set aside the acknowledgment of paternity, direct a paternity test, and discontinue the payment of child support.

Matter of Merritt v Allen, 99 AD3d 1006 (2d Dept 2012)

PERSON IN NEED OF SUPERVISION

PINS Adjudication Reversed

Family Court adjudged that respondent was a person in need of supervision. The Appellate Division reversed. Although the dispositional part of the order had expired, the appeal was not academic because of the possibility of collateral legal consequences resulting

from the adjudication. The court erred in denying respondent's motion to dismiss the petition. In a report attached to the petition, the Probation Department stated in a conclusory fashion that diversion services for respondent and his family were provided before the petition was filed. Thus, the petition failed to show that the Probation Department, pursuant to family Court Act § 735 (a), exerted diligent attempts to avoid the necessity of filing a petition. Failure to comply with the statutory requirements constituted a nonwaivable jurisdictional defect.

Matter of Joseph C.E., 99 AD3d 1245 (4th Dept 2012)

TERMINATION OF PARENTAL RIGHTS

Motion Properly Denied to Vacate Order Entered Upon Default

Family Court denied respondent mother's motion to vacate an order terminating her parental rights upon her default. The Appellate Division affirmed. Respondent failed to demonstrate a reasonable excuse for her default and a meritorious defense to the petition. Respondent failed to explain why she could not notify her counsel, the court, or the agency about her alleged inability to attend the hearing due to an alleged delay at her methadone clinic. Further, respondent failed to demonstrate that the agency did not make diligent efforts to help her with her drug problem, or that she had completed treatment programs and maintained sobriety during the statutorily relevant period. Respondent also failed to show that she was ready to care for the child at the time of the dispositional hearing.

Matter of Diamond Lee P., 99 AD3d 451 (1st Dept 2012)

Mother Was Not Denied Meaningful Representation; Parental Rights Properly Terminated

Family Court terminated respondent mother's parental rights upon fact-findings of permanent neglect. The Appellate Division affirmed with respect to the fact-findings and dismissed the other appeals as moot inasmuch as the children had been adopted by their

respective foster parents. Denying the mother's request for an adjournment to review the case record was a provident exercise of the court's discretion. The mother's counsel received the case record well in advance of the fact-finding hearing and was familiar with it from prior proceedings. The mother did not identify any progress notes that were improperly admitted or prejudicial. Therefore, any error was harmless. The mother failed to demonstrate that she was deprived of meaningful representation and suffered actual prejudice as a result of the alleged deficiencies of her counsel. Further, the court's findings were supported by clear and convincing evidence. Petitioner agency made diligent efforts to encourage and strengthen the parent-child relationship by scheduling visitation and referring the mother to various programs, among other things. The mother failed to comply with mental health services and failed to address issues that interfered with her ability to care for the children. The court's reliance on past findings of neglect was proper, and a negative inference could be drawn from the mother's failure to testify.

Matter of Alexis C., 99 AD3d 542 (1st Dept 2012)

Court Properly Denied Motion to Vacate Orders of Fact-Finding and Disposition

Family Court denied respondent father's motion to vacate orders of fact-finding and disposition entered upon respondent's default, which terminated his parental rights on the ground of permanent neglect. The Appellate Division affirmed. The court's exercise of discretion was proper where respondent's moving papers failed to demonstrate a reasonable excuse for his absence from the court proceedings and a meritorious defense to the permanent neglect allegations. His assertion that he was confused as to the date of the hearing was not a reasonable excuse as he was present in court when the date was set and took no steps to clear up any alleged confusion. Respondent's generalized conclusory statements failed to establish a meritorious defense to the allegations of permanent neglect.

Matter of Giovanni Maurice D., 99 AD3d 631 (1st Dept 2012)

Revoking Suspended Sentence and Terminating Respondent's Rights Supported by Preponderance of the Evidence

Family Court determined that respondent violated the terms of her suspended sentence and terminated her parental rights. The Appellate Division affirmed. While respondent admitted to the violation, she argued that the court erred in making its determination without allowing the children to testify. Respondent waived her right to this argument because her counsel had not subpoenaed the children after receiving the court's permission to do so. In any event, the argument lacked merit because the children's lawyer informed Family Court that her clients, who were both receiving therapy for special needs, would find it too stressful to come to court, and there was no requirement that the children testify.

Matter of Laquanda Lasheia Myesha D., 100 AD3d 403 (1st Dept 2012)

No Right of Appeal Lies From Default Hearings

Family Court determined that the mother permanently neglected her children and terminated her parental rights. The Appellate Division affirmed. There was no right of appeal from the court's orders, because they were made on the mother's default at the hearings. While the mother appeared and testified on the first day of the fact-finding hearing, she failed to appear on the second day to complete her testimony, and therefore, her testimony was properly stricken. She was not present at the dispositional hearing and her motion to vacate her default hearing was dismissed due to her failure to appear in court on the return date of her motion. The Appellate Division held that even if it were to review the court's orders, the agency proved, by clear and convincing evidence, that it made diligent efforts to strengthen and encourage the parental relationship, but the mother permanently neglected her children by failing to comply with recommended services, and her relationship with her children deteriorated to the point where they no longer wished to see her. Because the mother failed to address the issues that led to the children's placement and because the children were well-cared for in the foster home where the foster parent wished to adopt them, termination of parental rights was in the children's best interests.

Matter of Lizette Patricia M., 100 AD3d 408 (1st Dept 2012)

Termination of Parental Rights Based on Parent's Mental Retardation was in Children's Best Interests

Family Court terminated the father's parental rights upon a finding of mental retardation. The Appellate Division affirmed. The court-appointed psychiatrist provided clear and convincing evidence that the children were in danger of being neglected due to their father's mental retardation, that the father would be unable to care for the children now or in the foreseeable future, and that additional parental training would not enhance his parenting and other skills. A dispositional hearing was not necessary to find that termination of the father's rights was in the children's best interests.

Matter of Kasey D., 100 AD3d 417 (1st Dept 2012)

Clear and Convincing Evidence that Parents Failed to Plan for the Children's Future

Family Court terminated the parents' parental rights with respect to their children. The Appellate Division affirmed. ACS proved by clear and convincing evidence that the parents permanently neglected the children and that it was in the children's best interests to terminate the father's rights. The Court held that the parents' argument that ACS failed to adequately address their language limitations was not preserved, but in any event, the argument was unavailing because the mother testified in English, communicated with her children in English, and did not raise any objections to the provision of services in English. The father testified that he understood English, he received clarification from service providers when necessary, and Family Court ordered an interpreter for the father. The evidence showed that the parents failed to plan for their children's future and that they were unable to comprehend the nature and significance of their children's severe psychiatric and developmental disorders. Because the dispositional order terminating the father's rights was entered upon the father's default, he could not appeal from it. However, if the Appellate Division were it to review that part of the order, it would find that, based on the facts that the children had been living with their foster family for over seven years, the foster parents had been trained to address the

children's needs and wished to adopt them, whereas at the time of the dispositional hearing, the father had missed several visits with them, it was in the children's best interests for the father's rights to be terminated.

Matter of Fatoumata D., 100 AD3d 464 (1st Dept 2012)

Clear and Convincing Evidence of Permanent Neglect

Family Court terminated mother's parental rights with respect to her child. The Appellate Division affirmed. ACS established by clear and convincing evidence that the mother permanently neglected her child and that it was in the child's best interests to terminate the mother's parental rights. ACS made diligent efforts to strengthen and encourage the parent-child relationship by, among other things, scheduling visitation with the child, referring the mother for mental health services, and referring her to suitable housing. Despite these efforts, the mother failed to appear at many scheduled visits, behaved inappropriately when she did attend, did not bond with the child, and failed to seek and regularly attend mental health services. The mother also failed to cooperate with ACS's attempts to find her suitable housing. Because the dispositional order was entered on the mother's default, she had no right of appeal, but, in any event, ACS presented, by a preponderance of the evidence, that the child was thriving in his pre-adoptive foster home where he had lived almost all his life and that his special behavioral and emotional needs were being met.

Matter or Ernie Luis T., 100 AD3d 475 (1st Dept 2012)

Termination of Parental Rights in Child's Best Interest

Family Court determined that the father permanently neglected his children and terminated his parental right with regard to one of his children. The Appellate Division affirmed. The record demonstrated, by clear and convincing evidence, that ACS made diligent efforts to reunite the father with the children. Among other things, ACS met with the father on a regular basis, provided him with transportation money, referred him to parenting class, a drug treatment program, a stress management class and vocational training.

Despite these efforts, the evidence showed that the father failed to plan for the children's future. A preponderance of the evidence supported termination of the father's rights with regard to one of his children because it was in the child's best interests. The child was living in the same foster home since he was placed in ACS's care, his special needs were being met by his foster parents, the father testified that the child was in an "excellent home" and he wanted him to stay there if "anything fail[s]."

Matter of Omea S., 100 AD3d 495 (1st Dept 2012)

TPR Reversed Based on Efforts of Dedicated and Reformed Parent

Family Court terminated mother's parental rights and remanded the matter for the issuance of a suspended sentence on condition that the mother maintain sobriety, continue with her medical treatment, obtain permanent housing and a school to suit the child's special needs. The Appellate Division reversed. The evidence showed that the mother had fulfilled all aspects of her required service plan, including completion of a drug treatment program, a parenting skills course, mental health evaluation, and consistently attended after-care programs. During the five months prior to the hearing, the mother had not missed any of her bi-weekly visits with the child, though it was a four hour round-trip commute spanning three states. The quality of the visits with her child improved and although the child, who was now three, had been in foster care for a year-and-a-half, the child reciprocated the mother's efforts to engage and called her "mommy". The mother was approaching one year of sobriety, she had an extensive support system which helped her find consistent work, provided her with long-term transitional housing and was assisting her to obtain permanent housing. The Court held that given the child's young age, the mother's recommencement of visitation, the child's relatively short time in foster care, the efforts of a dedicated and reformed mother, and the Legislature's express desire to return children to their natural parents whenever possible, the mother should have been granted a suspended sentence.

Matter of Trinity J., 100 AD3d 504 (1st Dept 2012)

Violation of Suspended Sentence Results in TRP

Family Court determined that the mother violated the terms of her suspended judgment and terminated her parental rights. The Appellate Division affirmed. The court's determinations were supported by a preponderance of the evidence. The mother admitted that she failed to attend all visits with the subject children and all doctor's appointments, failed to obtain adequate housing and a steady income, and failed to understand each child's medical needs. Additionally, it was in the children's best interest to terminate the mother's rights because the children had been in the same foster home for at least three years, the foster parents provided for their needs and wished to adopt them.

Matter of Isiah Steven A., 100 AD3d 559 (1st Dept 2012)

Father Failed to Plan for Future of Children Despite Agency's Diligent Efforts

Contrary to the father's contention, the Family Court properly determined that the petitioner established, by clear and convincing evidence, that it exercised diligent efforts to encourage and strengthen the parental relationship by, among other things, attempting to help him find adequate housing and referring him to parenting classes and therapy. Despite those efforts, the father failed to plan for the future of the children by failing to complete the necessary programs and failing to take steps to acquire appropriate housing. Accordingly, the Family Court properly found that the father permanently neglected the children. Order affirmed.

Matter of W.J., 99 AD3d 711 (2d Dept 2012)

Both Parents Unable to Provide Care Due to Mental Illness

Contrary to the parents' contentions, the Family Court properly found that there was clear and convincing evidence that each of them is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child (*see* SSL § 384-b [4] [c]). A licensed psychologist, who interviewed the mother and reviewed

her medical records, concluded that the mother suffers from "schizoaffective disorder, bipolar type," and opined that due to the nature of her illness, the serious and enduring deficits in her ability to parent, and her lack of insight about her illness, the mother is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child. The psychologist also interviewed the father and determined that he suffers from "personality disorder, NOS with schizoid and paranoid features," which "manifests as a marked and persistent social detachment and a pattern of distrust and suspiciousness." The psychologist opined that the father has "little or no insight into his personality disorder or the limitations that it might create for him as a parent," and noted that despite repeated recommendations that he participate in psychotherapy, he had "apparently entirely failed to do so." The psychologist concluded that the father is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child. This evidence supported the findings of the Family Court.

Matter of B. Mc., 99 AD3d 713 (2d Dept 2012)

Mother's Partial Compliance with Service Plan Deemed Insufficient

The petitioner agency established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the relationship between the mother and the subject child by meeting with the mother to review her service plan, discussing the importance of compliance, providing referrals to the mother for therapy, anger management classes, parenting skills classes, and housing, discussing the importance of the mother's obtaining suitable income, and scheduling visitation between the mother and the subject child. The mother's partial compliance with the service plan was insufficient to preclude a finding of permanent neglect.

Matter of Justin I.B., 99 AD3d 897 (2d Dept 2012)

Although Mother Made Progress in Complying with Court Mandates, She Lacked Insight into Reasons Why Children Were Removed from Her Care

The mother appealed from an order of fact-finding and disposition of the Family Court, which, after fact-finding and dispositional hearings, determined that she permanently neglected her children, terminated her parental rights, and transferred the custody and guardianship of the children to the Department of Social Services for the purpose of adoption. After entry of the order appealed from, one of the two subject children died from an aggressive form of brain cancer. The Appellate Division noted that the adjudication of permanent neglect with respect to that child constituted a permanent and significant stigma which might have indirectly affected the mother's status in any future proceedings. Accordingly, the appeal from the portion of the order was deemed to be not academic. The record showed that the mother conceded that DSS established by clear and convincing evidence that it exercised diligent efforts to encourage and strengthen the parental relationship by, inter alia, facilitating the mother's regular visitation with the children, counseling her when needed, and referring the mother to various programs where she could obtain housing, counseling, and training to live independently. Contrary to the mother's contention, the Family Court's determination that she permanently neglected the children by failing to plan for their future for a period of one year after they were removed from her care was supported by clear and convincing evidence. Although the evidence showed that the mother made progress by complying with various mandates of the court and developing coping skills, the mother continued to lack insight into the reasons why the children were removed from her care, which prevented her from correcting such problems and reflected her failure to plan for the children's future. Order affirmed.

In re Dariana K.C., 99 AD3d 899 (2d Dept 2012)

Mother Failed to Plan for Children's Future Despite Agency's Diligent Efforts

The mother and father separately appealed from two orders of fact-finding and disposition (one as to each child). Upon reviewing the record, the Appellate Division found that the petitioner established by clear and convincing evidence that the father abandoned the subject children by failing to visit or communicate with them or the petitioning agency during the six-month period immediately prior to the date on which the

petition was filed (see SSL § 384-b [4] [b]; [5] [a]). Contrary to the father's contention, the Family Court providently exercised its discretion in terminating his parental rights without first conducting a separate dispositional hearing. Further, the Family Court properly declined to consider his application for post-termination visitation. The petitioner established by clear and convincing evidence that it made diligent efforts to assist the mother in maintaining contact with the children and planning for the children's future. These efforts included referrals of the mother to anger management classes, parenting skills classes, and therapy, the monitoring of her progress in those programs, and the scheduling of regular visits between her and the children. Despite these efforts, the mother failed to plan for the children's future. Orders affirmed.

Matter of Mekhi Kahalil G., 99 AD3d 1003 (2d Dept 2012)

Parental Rights Not Restored as No Nonfrivolous Issues Presented

In this case, the petitioner's rights had been terminated with respect to her three children. The petitioner sought to restore her parental rights but Family Court dismissed her petition as the youngest child had been adopted and the other two children were not "[14] years of age or older" as required by FCA § 635(d). The Appellate Division granted petitioner's counsel's request to be relieved of her assignment on the ground that there were no nonfrivolous issues on appeal.

Matter of Shelia CC. v Commissioner of Social Servs. of Schenectady County, 98 AD3d 1200 (3d Dept 2012)

Clear and Convincing Evidence to Support Termination of Parental Rights Based on Mental Illness

Parents of two children admitted to neglect and the children were removed from their care. Thereafter, their parental rights were terminated upon the ground of mental illness. At the hearing, a clinical psychologist testified that both parents were and would continue to be unable to provide proper and adequate care for the children by reasons of their mental illness. The mother suffered from bipolar II disorder, an anxiety disorder not otherwise specified and a borderline personality

disorder. Her behaviors affected her parental judgment, insight and consistency, caused her to be impulsive and place her own needs ahead of her children's needs, inhibited her ability to acknowledge her own behaviors, and lead the psychologist to conclude that she was at high risk of engaging in behaviors that would place her children at risk and it was unlikely that she would stop making poor choices anytime soon. The father suffered from an anxiety disorder not otherwise specified and an antisocial personality disorder with narcissistic features. Although the father's anxiety disorder was fairly mild, his personality disorder significantly interfered with his ability to be an effective parent. Additionally, the father's lack of meaningful participation in treatment as well as his consistent resistance to change, and opposition to constructive recommendations did not bode well for future change. The Appellate Division affirmed Supreme Court's finding that there was clear and convincing evidence to support the court's decision.

Matter of Adrianahmarie SS., 99 AD3d 1072 (3d Dept 2012)

DSS Made Diligent Efforts To Encourage and Strengthen Parental Relationship

The Appellate Division determined that Family Court's finding of permanent neglect against the father was supported by clear and convincing evidence. DSS's diligent efforts to encourage and strengthen the parental relationship included, among other things, holding multiple service plan reviews, explaining the steps the father needed to take to obtain custody, referring him to parenting and anger management classes, assisting him in applying for public assistance, and arranging weekly visitation with the children. The caseworker also kept in touch with his probation officer. Although the caseworker did not actively assist him in complying with his mental health treatment or talk to his mental health providers, such a condition was part of his probation and she left this matter to his probation officer and advised the father to see his physician. While the father argued that DSS should have done more to assist him as he sometimes did not take his medication due to lack of insurance, the record did not support his argument. He never advised DSS that he needed financial assistance for medication. The father failed to plan for the children or maintain contact with

them by missing visits for months at a time, which he alleged was due to depression or lack of transportation. He absconded from probation for 11 months and did not see the children, he was arrested twice for domestic violence while on probation, he failed to enroll in anger management or batterer's intervention program telling one witness he did not see the need for it. He moved a lot and was homeless at one point during the relevant period. The Appellate Division held that the record supported the courts' decision that it was in the children's best interests to terminate the father's parental rights as they had been in foster care for over three years and their foster parents wished to adopt them.

Matter of Damian L., 100 AD3d 1193 (3d Dept 2012)

Although Judicial Surrender Executed, Challenge to Permanent Neglect is an Exception to Mootness

Mother stipulated that she had permanently neglected her children and consented to a one-year suspended judgment, which was later revoked. The mother moved to withdraw her admission of permanent neglect but Family Court denied her motion. Mother appealed but in the meantime, she executed judicial surrenders of her parental rights. The attorney for the child argued that the mother's appeal was moot but the Appellate Division held that where a parent is challenging a determination that implicates permanent neglect, such a determination creates a stigma which may affect the parent in future proceedings and therefore, it is an exception to mootness. However, the Court found no merit to the mother's argument that DSS had misled her by filing to revoke the suspended judgment soon after it was issued because the evidence showed that the mother had almost immediately failed to comply with the conditions in the judgment. Furthermore, there was no competent evidence that the mother did not willingly and knowingly stipulate to neglect.

Matter of Bailey W., 100 AD3d 1203 (3d Dept 2012)

Although Mother Maintained Contact With Child and Completed Services, She Did Not Meaningfully Benefit

Family Court determined the mother had permanently neglected her child and terminated her parental rights.

The mother's rights with regard to her two other children had already been terminated. The mother only appealed from Family Court's determination that she had failed to plan for the child's future. The Appellate Division affirmed and held that while DSS had shown by clear and convincing evidence that it had made diligent efforts to strengthen and encourage the parent-child relationship, the mother failed to make meaningful changes to address the specific issues that led to the child's removal. In this case, although the mother maintained contact with the child and participated in various services provided, the record showed that she did not meaningfully benefit from them. The mother continued to be involved in abusive and volatile relationships despite completing two domestic violence education programs; she maintained friendships with the abusive men; and during a trial placement of the child with her, the mother was found in the presence of one of these men along with her child, which was in violation of the order of protection.

Matter of Jayden J., 100 AD3d 1207 (3d Dept 2012)

No Violation of Religious Matching Requirement

The Appellate Division affirmed an order of Family Court terminating the mother's parental rights based on permanent neglect, and held that the court did not violate religious matching requirements by placing the child with a non-Jewish foster family. The Appellate Division found that DSS had made diligent efforts to foster the parent-child relationship, but the mother, who had a substance abuse problem, failed to adhere to the visitation schedule which would have allowed her to have access to her child, refused to participate in substance abuse counseling or comply with the court's dispositional orders. The mother failed to plan for her child's future by failing to take meaningful steps to address her addiction. Her participation in the court proceedings was at best, sporadic, and when she did attend court, she often could not participate because she appeared to be under the influence of drugs. The mother argued that Family Court had ignored New York's constitutional and statutory requirements that children be placed with foster parents who share the parent's religious beliefs, by freeing her child for adoption by a non-Jewish family. The Appellate Division held her request was belatedly made, as by this time, the mother had already executed a judicial

surrender and the child had been living in the foster home for almost 18 months. Additionally, during this period of time, the mother's only request had been for the child to live with his paternal grandmother, who was an unsuitable caregiver and not Jewish. As the child had developed a strong emotional attachment to his foster parents and was thriving in their care, the Court agreed it was in his best interests to be freed for adoption by his foster parents.

Matter of James WW., 100 AD3d 1276 (3d Dept 2012)

Family Court Erred in Terminating Mother's Rights and Finding Permanent Neglect Against Incarcerated Father

Family Court held that the mother of two children, who each had different fathers, had permanently neglected the children and terminated her parental rights. While the Appellate Division agreed with the court that there was legally sufficient evidence to find that the mother had permanently neglected her children, it disagreed with that court's determination that terminating the mother's parental rights was in the children's best interests and reversed this portion of the order. The mother had faithfully complied with the visitation schedule and throughout the proceeding sought to maintain contact with the children. She acted appropriately with the children during visits and contact with her had a beneficial impact on them. Each child had a strong, emotional attachment with the mother and expressed a desire to live with her. The mother had obtained suitable housing, and indicated a willingness to participate in the programs and mental health counseling required by DSS. The attorney for the children noted the children had not fared well in foster care and the foster parents were not seeking to adopt them. Therefore, the Appellate Division held that a suspended sentence with appropriate conditions should be entered by Family Court in this case. As to the fathers, the Appellate Division affirmed termination of one father's rights based on abandonment, but found that DSS had not made diligent efforts to foster the parent-child relationship with regard to the other father and reversed the court's determination of permanent neglect. The caseworker admitted to receiving a letter from the father, who was incarcerated, stating it would be better for his child to live with a family member rather than foster care. However, when the father's

brother filed for custody of the child, the caseworker failed to investigate the possibility of having the child reside with him. Further, the father requested visitation and stated he would be pursuing custody upon his release from prison but the caseworker did not arrange any contact between him and the child, nor did the caseworker meet with the father. The Appellate Division held that while the father's incarceration posed significant problems for DSS in promoting a constructive relationship between him and the child, this circumstance did not relieve it of its statutory obligation.

Matter of Arianna I., 100 AD3d 1281 (3d Dept 2012)

Diligent Efforts to Encourage and Strengthen Incarcerated Parent's Relationship With His Children

Family Court terminated incarcerated father's parental rights with respect to his two children on the ground of permanent neglect. The Appellate Division affirmed and held that DSS had met its burden of establishing by clear and convincing evidence that it had made diligent efforts to encourage and strengthen the father's relationship with the children. The caseworker had provided him with permanency reports and information about his rights and responsibilities, facilitated written correspondence between him and the children, sent him photographs and detailed letters describing their placements. The caseworker contacted the relatives the father suggested might be good placement resources, explored the relatives' willingness to care for the children, encouraged them to visit and communicate with the children, offered transportation assistance, sought the father's help when the relatives did not contact or visit the children and asked for additional suggestions when the relatives proved unsuitable. Respondent's argument that DSS should have acted quicker so that he could have suggested other resources was rejected as the only alternative the father proposed was his homeless girlfriend, who had no relationship with the children. The father's claim that DSS should have provided him with visitation was also rejected as the Court held that it would not have been in the children's best interests due to their young age, the distance they would have to travel to the correctional facility, and their emotional and behavioral difficulties in adjusting to foster care. In a footnote, the Court

noted that DSS was working towards reunifying the children with their mother, a goal that would not have been furthered by placing the children with distant relatives.

Matter of Charles K., 100 AD3d 1308 (3d Dept 2012)

Father Failed to Address Issues Leading to Children's Removal

Family Court terminated respondent father's parental rights with respect to his three children. The Appellate Division affirmed. Although the father completed parenting classes, one anger management class and substance abuse and mental health evaluations, he failed to attend a second anger management program following his arrest in connection with a domestic violence incident where he allegedly assaulted the mother and damaged the interior of her home. Respondent also failed to cooperate with petitioner's employees when they attempted to gain access to his home, the condition of which was the basis of the removal of the oldest child, and he refused to verify his income. Thus, the father did not adequately address the issues that caused the removal of the children. Because during the five years where the children were in foster care prior to the entry of the order of disposition, the father had only supervised visitation with the children, two of whom had never been in the parents' care and one of whom had been in the parents' care for only 10 months, it was in the children's best interests to terminate the father's parental rights.

Matter of Tiosha J., 98 AD3d 1283 (4th Dept 2012)

Mother Not Denied Effective Assistance of Counsel

Family Court suspended respondent mother's parental rights. The Appellate Division affirmed. The mother was not denied effective assistance of counsel at the fact-finding stage of the proceeding. The mother failed to show that any of her attorney's shortcomings resulted in actual prejudice. Although the mother's attorney should have objected to the use of leading questions, any error did not affect the outcome and thus was harmless. Also, while the mother's attorney would have had grounds to object to some of the statements made during petitioner's direct case, the mother failed to show that her attorney's failure to do so was not a

strategic decision. Finally, the mother's attorney did not admit on summation that the child was neglected.

Matter of Alisa E., 98 AD3d 1296 (4th Dept 2012)

Father Abandoned His Child

Family Court terminated respondent father's parental rights on the ground of abandonment. The Appellate Division affirmed. It was undisputed that the father had no contact with the child during the statutory six-month period. In fact, the father admitted that he had no contact with the child since he left the residence of the child's mother and moved to Ohio in 2008.

Respondent's contention that his failure to contact the child was justified because the child's caseworker failed to return numerous telephone calls he allegedly made seeking information was rejected because petitioner was not required to make diligent efforts to prevail on the abandonment petition. Further, the father's telephone calls to petitioner's office did not rise to the level of effort required to defeat the claim of abandonment.

Matter of Angela N.S., 100 AD3d 1381 (4th Dept 2012)

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