
NEW YORK CHILDREN'S LAWYER

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

April 2015

Volume XXXI, Issue I

Email Spoliation and Service of Process by Social Media *

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Do not fancy that an email spoliation motion will be unsuccessful, and two recent, well-reasoned Manhattan Commercial Division decisions on the issue are *AJ Holdings Group v. IP Holdings*¹ and *L&L Painting v. Odyssey Contr.*² The lessons learned from these decisions are not new, but clients and counsel need to heed them. *First*, at least, an oral litigation hold must be implemented. *Second*, a litigation hold applies to personal emails, as well as to emails sent over, for instance, a company's AOL or Gmail account. *Third*, a client's information technology professional should be involved in effectuating the litigation hold which must apply to automatic email deletion features. *Fourth*, it is prudent to also involve counsel in discussions concerning implementing a litigation hold. *Fifth*, litigators should not count on a court finding "gross negligence" in the failure to implement a litigation hold and therefore rely on the concept that the relevance of destroyed emails will be presumed, but should be prepared to actually demonstrate to the court the relevance of such missing emails to specific issues in controversy.

It is inevitable that service of process over social media will be permitted under specific circumstances, and recent decisions in *Matter of Support Proceeding Noel B v. Anna Maria A*³ and in *Anonymous v. Anonymous Jane Does*⁴ authorized same. *Anonymous* also addressed the thorny issue of what relief, on default, an individual is entitled to in an anonymous Internet defamation lawsuit where the relief sought may constitute an improper prior restraint on speech.

Spoliation Sanctions Are Serious

In *AJ Holdings*,⁵ after holding a four-day evidentiary hearing, the motion court granted spoliation sanctions. The motion court reviewed each of the three factors set forth in *Zubulake v. UBS Warburg*,⁶ which states that the "party seeking an adverse inference instruction ... based on the spoliation of evidence must establish the following three elements: (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." Adopting from *Zubulake* the concept of "key players" who are "likely" to possess relevant information, the motion court found certain individuals fell into such category and therefore had an obligation to "preserve their email relevant to a potential lawsuit during the relevant time frame."

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The motion court found that such individuals permitted the destruction of relevant emails with a "culpable state of mind" by "taking no steps during the relevant time frame to implement a litigation hold or to collect or preserve their emails from automatic deletion by the servers, despite having received repeated warnings from counsel" and that there further had not been any preservation of emails from the AOL accounts maintained by plaintiff. Although a verbal litigation hold had been discussed, it had never been implemented. Plaintiff's IT manager had not been informed of the litigation until the day before his deposition and he had not kept records of the location of the computers used by the "key players" during relevant time period. A forensic examination revealed that plaintiff had no backups of emails and that the key custodians made no adjustment to their "routine" deletion of emails after litigation was anticipated or after their first meeting with counsel. Although the "key players" were sophisticated, frequent users of emails, they preserved "merely a fraction" of emails sent and received. In sum, the "key players" were found grossly negligent in failing to implement a litigation hold" and, as such, the relevance of the destroyed emails would be "presumed."

In weighing what sanction to impose, the motion court rejected striking the complaint, but ordered there to be an adverse inference both on summary judgment and at trial that plaintiff failed to preserve relevant emails, and that the missing emails would have favored defendants. In addition, the motion court ordered plaintiff to pay for the cost of defendants' forensic examination and reasonable attorney fees in twice moving for spoliation sanctions.

In *L&L Painting*,⁷ the court denied defendant's motion for sanctions for spoliation of evidence based on L&L's failure to preserve emails from the personal email accounts of certain employees that were used for business purposes relating to the subject project. The motion court found that there was no dispute that plaintiff had an obligation, at least upon the filing of this lawsuit, to preserve emails; that there was no litigation hold in place at such time; and plaintiff did "not explain what, if any, steps it otherwise took or was advised to take to preserve potentially relevant electronically stored documents." The emails, transmitted through personal email accounts not

connected to plaintiff's main office computer network, were deleted by an automatic delete feature. The motion court, however, rejected the notion that a failure to institute a "litigation hold" constitutes gross negligence per se, and noted that "the better approach is to consider [the failure to adopt good preservation practices] as one factor in the determination of whether discovery sanctions should issue."⁸ The motion court stated that "even a finding of gross negligence does not, in all cases, obviate the need to demonstrate the relevance of the evidence sought." The motion court concluded that while

[plaintiff] was negligent in failing to institute a litigation hold or otherwise act in a timely manner to preserve the emails in question, the facts do not support a finding of bad faith or gross negligence against [plaintiff]. Nor has [defendant] made an adequate showing of the relevance of the missing emails to its remaining counterclaims or how they would support its defenses; its reliance on the presumption of relevance is insufficient to establish a right to sanctions.

Service Over Social Media

In *Noel B*,⁹ in a support proceeding, the court authorized substituted service of process by transmitting a digital copy of the summons and petition to respondent's Facebook account, and then following up with a physical mailing to respondent's last known address. The court ordered such service where petitioner, under oath, described his efforts to try to locate his former wife, including that he telephoned and sent text messages to his emancipated daughter and his son concerning respondent's location, to which he received no response; conducted a Google search; and inquired of the occupant of respondent's last known address, who advised that he was unaware where respondent could be located.

Petitioner advised that he is "aware" that respondent "maintains an active social media account with Facebook" and that his "current spouse maintains her own Facebook account, and has posted photos that have been 'liked' by the [r]espondent as recently as July, 2014." The court then described what is "liking" on Facebook:

'Liking' on Facebook is a way for Facebook users to share information with each other. The 'like' button, which is represented by a thumbs-up icon, and the word "like" appear next to different types of Facebook content ... [a]ny Facebook user who 'likes' a specific Page or posted content remains in control of his or her 'like' at all times and is free to "unlike" the Page or content by clicking an "unlike" button provided by Facebook.¹⁰

Accordingly, the court ordered service of process over a known "active" Facebook account where service under traditional methods were "impracticable" and "despite the absence of a physical address," petitioner had a "means by which he can contact" the respondent and provide her with "notice" of the proceedings.

In *Anonymous*,¹¹ a defamation suit alleging that anonymous individuals posted a series of false and disparaging comments on the website www.dirtyphonebook.com, plaintiff moved for a default judgment. The motion court had previously permitted plaintiff to serve process upon defendants by publication on such website.

In ruling on the default motion, the court:

- denied plaintiff's request for a trial by jury on all issues contained in the complaint;
- denied, as an unconstitutional prior restraint on speech, plaintiff's request for injunctive relief prohibiting the restrained parties from any further acts of defamation or publishing of false statements, comments or information regarding plaintiff;
- granted plaintiff's request that the restrained parties take all action including, but not limited to, requesting www.dirtyphonebook.com, to remove all defamatory, disparaging, libelous, and false statements about plaintiff that defendants posted on the above-named website;
- denied, as an unconstitutional prior restraint on speech, the requested prohibition that the restrained parties be prevented from posting or publishing false and defamatory statements similar to those outlined in the complaint, regarding plaintiff on other websites;

- granted plaintiff's request for a declaratory judgment that defendants' comments posted on the website www.dirtyphonebook.com regarding plaintiff are false and defamatory;
- denied plaintiff's request for reimbursement of plaintiff's expenses incurred in retaining a private cyber investigative service to investigate the identity of defendants;
- denied plaintiff's demand for exemplary and punitive damages;
- denied plaintiff's demand for monetary damages for emotional distress; and
- denied plaintiff's demand to be awarded its attorney fees, court costs and other costs associated with bringing her action.

In granting plaintiff's default motion, the motion court stated that:

[u]nfortunately, this case is a prime example of the procedural limitations §230 of the Communications Decency Act ("CDA") places on a plaintiffs' legal right to litigate against online defamation. Generally, Internet service providers are not legally required to disclose the identities of its users given the compelling interest of the First Amendment and immunity granted under §230 of the CDA Furthermore, this statute preempts state law by providing that "no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

The motion court noted that, although the "CDA leaves victims with no hope of relief where the true tortfeasors cannot be identified or are judgment proof," the CDA "does not bar defamation suits against those who post libelous speech online."

In conclusion, the motion court observed that

[w]hile it is not up to the Court to write the laws, which is a job for the Legislature, the Court can offer suggestions regarding online defamation. One suggestion is to adopt a rule

similar to "the right to be forgotten" in the European Union's May 13, 2014 case Google Spain SL, Google Inc. v. Agenda Espanola de Proteccion de Datos (AEPD), Mario Costeja Gonzalez (Case C-131/12).

The motion court noted that "the European Union Court held individuals have the right, under certain conditions, to ask search engines to remove links with personal information about them" and it would include "information that is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing." The motion court noted that the European Union Court "found that the interference with a person's right to data protection could not be justified merely by the economic interest of the search engine." Finally, the motion court noted that the "right to be forgotten" "offers greater protections" than the CDA as the "right to be forgotten," "under certain conditions, gives plaintiffs the opportunity to attain the redress they deserve."

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**Mark A. Berman, a partner at commercial litigation firm Ganfer & Shore, cochairs the social media committee of the Commercial and Federal Litigation Section of the New York State Bar Association.

Endnotes:

1. Index No. 600530/2009 (Sup. Ct. N.Y. Co. Sept.19, 2014) (Scarpulla, J.).
2. 2014 N.Y. Misc. LEXIS 4300; 2014 NY Slip Op. 32511(U) (Sup. Ct. N.Y. Co. Sept. 25, 2014) (Bransten, J.).
3. 2014 N.Y. Misc. LEXIS 4708 (Fam. Ct. Rich. Co. Sept. 12, 2014).
4. Index No. 151769/2013 (Sup. Ct. N.Y. Co. Dec. 3, 2014).
5. Index No. 600530/2009.
6. 200 F.R.D. 212, 220 (S.D.N.Y. 2003).
7. 2014 N.Y. Misc. LEXIS 4300; 2014 NY Slip Op

32511(U).

8. Id. at *33 (quoting *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012)).

9. 2014 N.Y. Misc. LEXIS 4708.

10. Id. at *3 (quoting *Mattocks v. Black Entertainment Television*, 2014 U.S. Dist. LEXIS 115829, 2014 WL 410594 (S.D. Fla. 2014)).

11. Index No. 151769/2013.

New York

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

NEWS BRIEFS

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

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

On February 25, 2015, the Appellate Division Second Judicial Department, and the Attorneys for Children Program co-sponsored ***D.B., et. al. v Richter and Related ACS Policies and Procedures***. The presenters were Betsy Kramer, Esq. of Lawyers for Children; and Courtney Camp, Esq., Travis Johnson, Esq., and Lena McMahon, Esq., of New York City Legal Aid Society - Juvenile Rights Practice. This seminar was held at the Kings County Family Court, and was repeated in the counties of Queens and Richmond.

On March 25, 2015, the Appellate Division Second Judicial Department, the Attorneys for Children Program, and the Kings County Family Court DMR/DMC Committee co-sponsored ***Children of Incarcerated Parents & Family Visiting***. The presenters were Allison Hollihan, LMHC, Program Manager, New York Initiative for Children of Incarcerated Parents, The Osborne Association; and Jayme Steadman, Program Director, Family Permanency Services/Family Visiting, Administration for Children's Services. This seminar was held at the Kings County Family Court.

***Notice to All Panels Regarding Mandatory Training Requirements:**

For any attorney who has not yet completed the mandatory Attorney for the Child Program training requirements, please be advised that the following seminars, together with accompanying handouts, are now available for viewing online at <http://www.nycourts.gov/courts/ad2/AttorneyforChildHome.shtml>. To obtain access please contact Gregory Chickel at gchickel@nycourts.gov.

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

October 20, 2014

Case Law and Legislative Update Practicing Family Law - the Rules of Professional Conduct

(2 hours, Professional Practice; 1 hour, Ethics)

Gary Solomon, Esq. - Legal Aid Society, NYC Juvenile Rights Practice
Mark F. Dewan, Esq.
Diana Maxfield Kears, Esq. - NYS Grievance Committee For The 2nd, 11th & 13th Judicial Districts

Ninth Judicial District (Westchester, Orange, Rockland, Dutchess, & Putnam Counties)

October 31, 2014

Child Welfare Caselaw Update Technological Abuse: Practical Considerations And Evidentiary Issues Creating Change For Children:

Addressing Commercial Sexual Exploitation Of Children

(3 hours, Professional Practice; 1 hour, Skills)

Margaret A. Burt, Esq., - Attorney At Law
Ian Harris, Esq., -New York Legal Assistance Group
Miriam Goodman, L.M.S.W. - Coordinator Of Trafficking Programs, Center For Court Innovation
Katie Crank, Esq., L.M.S.W., - Senior Manager, Domestic Violence Programs, Center For Court Innovation

Tenth Judicial District (Nassau County)

October 23, 2014

Case Law and Legislative Update Avoiding Role Conflicts in Forensic Evaluations Parental Alienation from the Legal and Clinical Perspectives

(2 hours, Professional Practice, 1 Hour, Ethics)

Gary Solomon, Esq., - Legal Aid Society, NYC Juvenile Rights Practice
Sherill R. Sigalow, Ph.D., - Psychologist, Private Practice
Susan L. Bender, Esq. - Bender, Rosenthal, Issacs & Richter, LLP
Bernice H. Schaul, Ph.D., - Psychologist, Private Practice
Harriet R. Weinberger, Esq., - Director, Office of Attorneys for Children, Appellate Division, Second Department.

Tenth Judicial District (Suffolk County)

November 24, 2014

***Child Welfare Law Update
How To File Neglect Petitions
Court Improvement Project
Creating Change For Children:
Addressing Commercial Sexual
Exploitation Of Children***

(2.5 hours, Professional Practice; .5 hours, Skills)

Margaret A. Burt, Esq., - Attorney at Law
John Belmonte, Esq., - Children’s Law Bureau
Hon. Theresa Whelan, - Judge, Suffolk County Family Court
Miriam Goodman, L.M.S.W. - Coordinator Of Trafficking Programs, Center For Court Innovation
Katie Crank, Esq., L.M.S.W., - Senior Manager, Domestic Violence Programs, Center For Court Innovation

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

Changes in the Compensation and Reimbursement Policies and Procedures

The most recent version of the Office of Attorneys for Children Administrative Handbook is available on the program's web page at nycourts.gov/ad3/OAC/AdministrativeHandbook and includes updated

billing policies. There have been significant changes, especially with respect to the Compensation and Reimbursement Policies and Procedures. The most notable change is that the Office of Attorneys for Children will not accept any voucher for payment and will not pay any voucher if it is submitted three years or more after the last valid date on the voucher. There are also significant changes regarding travel time and mileage. It is very important that you read this new version and familiarize yourself with the information contained therein. As you know, you will have to affirm that you have done so when you file for re-designation next year.

Liaison Committees

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts will be meeting on May 7, 2015 in conjunction with the Children's Law Update 2015 CLE program to be held the next day, Friday, May 8th, at the Crowne Plaza resort in Lake Placid. The committees 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. Our next meeting will be held on Thursday, May 7, 2015 in Lake Placid in conjunction with the Children’s Law Update CLE which will be held on Friday, May 8, 2015.

Welcome and congratulations to two new Liaison Representatives, Pamela Gee, Esq., in Chemung County and Isabelle Rawich, Esq., in Sullivan County. Many thanks to their predecessors, Mary Tarantelli, who was elected to Chemung County Family Court. Congratulations, Judge Tarantelli! And heartfelt thanks to Fran Clemente, Esq. for her 14 years of dedicated service as Sullivan County Liaison Representative.

Training News

Training dates are available on the web page at nycourts.gov/ad3/oac, link to CLE and Seminar Schedule. Please take note of the upcoming training dates:

Spring 2015

Introduction to Effective Representation of Children

Thursday, March 26 & Friday, March 27, 2015
Rochester, NY

Advocacy Beyond the Petition: Additional Factors to Consider When Representing JD Clients

Friday, April 24, 2015
Holiday Inn, Wolf Road, Albany

Children's Law Update 2015

Friday, May 8, 2015
Crowne Plaza Resort, Lake Placid

Fall 2015

Introduction to Effective Representation of Children

Thursday, September 10 & Friday, September 11, 2015
Latham, NY

Children's Law Update 2015

Friday, September 25, 2015
Binghamton, NY

Permanency Mock Hearing

Wednesday, October 14, 2015 (half-day)
Albany, NY

DV Conference in collaboration with Association of Family & Conciliation Courts (AFCC)
Friday, October 23, 2015
Albany, NY

Children's Law Update 2015

Friday, November 6, 2015
Latham, NY

Additional seminar dates and agendas will be posted on the program's web page when available.

Web page

The Office of Attorneys for Children web page located at nycourts.gov/ad3/oac includes a wide variety of resources, including E-voucher information, online CLE videos and materials, the New York

State Bar Association Representation Standards, the latest edition of the Administrative Handbook, forms, rules, frequently asked questions, seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The *News Alert* feature includes recent program and practice developments of note.

FOURTH DEPARTMENT NEWS

Late Spring Seminar Schedule

April 17, 2015

Update
Center for Tomorrow
Buffalo, NY

May 14, 2015

Update
Inn on the Lake
Canandaigua, NY

Tentative Fall Seminar Schedule

October 8, 2015

Update
Embassy Suites
Syracuse, NY

October 30, 2015

Topical: Trends in Custody/Visitation Issues
Clarion Hotel
Batavia, NY

Fundamentals of Attorney for the Child Advocacy Seminars

Please note that Fundamentals I and II are basic seminars designed for prospective attorneys for children.

September 10 - 11, 2015

Fundamentals of Attorney for the Child Advocacy
Latham, NY

Seminar Issue: Registration

You are not considered registered for a seminar until you have received a confirming e-mail from our office. If you do not receive a confirming e-mail within 3 business days from the date you registered, please call Jennifer Nealon at 585-530-3177. **No CLE Credit** - Any attorney who leaves a seminar early will not receive any CLE credit, no matter the reason. Signing out even a few minutes early is a violation of NYS CLE Board Regulations. There are no exceptions.

Ethics for Attorneys for Children

There is an updated [Ethics for Attorneys for Children](#) on the AFC Program website.

RECENT BOOKS AND ARTICLES

ADOPTION

Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 Fla. L. Rev. 295 (2015)

Joanna E. Jordan, *There's No Place Like Home: Overhauling Adoption Procedure to Protect Adoptive Children*, 18 J. Gender Race & Just. 237 (2015)

Destinee Roman, *Please Confirm Your Online Order: One Child Adopted From Overseas at No Cost*, 52 Hous. L. Rev. 1007 (2015)

ATTORNEY FOR THE CHILD

Katherine E. Schulte, *Restoring Balance to Abuse Cases: Expanding the One-Sided Approach to Teaching Domestic Violence Practice*, 28 Colum. J. Gender & L. 144 (2014)

CHILD WELFARE

David S. Koller & Miriam Eckenfels-Garcia, *Using Targeted Sanctions to End Violations Against Children in Armed Conflict*, 33 B. U. Int'l L. J. 1 (2015)

Jane Ellen Stevens, *Childhood Trauma: Root Causes of a Public Health Crisis*, 32-WTR Del. Law. 10 (2014-2015)

CHILDREN'S RIGHTS

Jeffrey A. Cohen et. al., *A Legal Review of Autism, a Syndrome Rapidly Gaining Wide Attention Within Our Society*, 77 Alb. L. Rev. 389 (2013-2014)

Kristine S. Knaplund, *Baby Without a Country: Determining Citizenship for Assisted Reproduction Children Born Overseas*, 91 Denv. U. L. Rev. 335 (2014)

Elizabeth Traylor, *Protecting the Rights of Children of Same-Sex Parents in Indiana by Adopting a Version of the Uniform Parentage Act*, 48 Ind. L. Rev. 695 (2015)

CONSTITUTIONAL LAW

Scott Stottlemire, *Strict Scrutiny for Undocumented Childhood Arrivals*, 18 J. Gender Race & Just. 289 (2014)

COURTS

Hon. Richard A. Dollinger, *Judicial Ethics: The Obligation to Report Tax Evasion in Support Cases*, 27 J. Am. Acad. Matrim. Law 1 (2014-2015)

Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 Ga. St. U. L. Rev. 343 (2015)

Leah A. Plunkett, *Contraceptive Sabotage*, 28 Colum. J. Gender & L. 97 (2014)

Paul M. Secunda, *Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students*, 2015 U. Ill. L. Rev. 175 (2015)

CUSTODY AND VISITATION

Patrick Parkinson & Judy Cashmore, *Reforming Relocation Law: An Evidence-Based Approach*, 53 Fam. Ct. Rev. 23 (2015)

Rollie Thompson, *Presumptions, Burdens, and Best Interests in Relocation Law*, 53 Fam. Ct. Rev. 40 (2015)

DIVORCE

Stephanie R. deLusé & Sanford L. Braver, *A Rigorous Quasi-Experimental Design to Evaluate the Casual Effect of a Mandatory Divorce Education Program*, 53 Fam. Ct. Rev. 66 (2015)

Melinda Taylor et. al., *The Resource Center for Separating and Divorcing Families: Interdisciplinary Perspectives on a Collaborative and Child-Focused Approach to Alternative Dispute Resolution*, 53 Fam. Ct. Rev. 7 (2015)

DOMESTIC VIOLENCE

Tamara L. Kuennen, *Love Matters*, 56 Ariz. L. Rev. 977 (2014)

Fernanda S. Rossi et. al., *Does Level of Intimate Partner Violence and Abuse Predict the Content of Family Mediation Agreements?* 53 Fam. Ct. Rev. 134 (2015)

Emily J. Stack, *United States v. Castleman: The Meaning of Domestic Violence*, 20 Roger Williams U. L. Rev. 128 (2015)

Mary Pat Treuthart, *“No Woman, No Cry” - Ending the War on Women Worldwide and the International Violence Against Women Act (I-VAWA)*, 33 B. U. Int’l L. J. 73 (2015)

Vivek Upadhyia, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 Emory L. J. 1163 (2014)

EDUCATION LAW

Brinkley Beecher Cook-Campbell, *“Schoolhouse Block”*: *Why the Arkansas Public School Choice Act Should be Improved but not Eliminated*, 67 Ark. L. Rev. 927 (2014)

Shelaswau Bushnell Crier, *Beyond Money: Public Urban Boarding Schools and the State’s Obligation to Make an Adequate Education Attainable*, 44 J. L. & Educ. 23 (2015)

William J. Glenn, *School Segregation in Jefferson County and Seattle: The Impact of the Parents Involved Ruling and District Actions*, 63 Clev. St. L. Rev. 297 (2015)

Natalie Gomez-Velez, *Can Universal Pre-K Overcome Extreme Race and Income Segregation to Reach New York’s Neediest Children? The Importance of Legal Infrastructure and the Limits of the Law*, 63 Clev. St. L. Rev. 319 (2015)

Randall K. Johnson, *Where Schools Close in Chicago*, 7 Alb. Gov’t L. Rev. 508 (2014)

Sonya Laddon Rahders, *Do as I Say, Not as I Do: Sexual Health Education and the Criminalization of Teen Sexuality in the United States*, 26 Hastings Women’s L. J. 147 (2015)

Emily Gold Waldman, *Show and Tell?: Students’ Personal Lives, Schools, and Parents*, 47 Conn. L. Rev. 699 (2015)

FAMILY LAW

Mohammad H. Fadel, *Religious Law, Family Law and Arbitration: Shari’a and Halakha in America*, 90 Chi.-Kent L. Rev. 163 (2015)

Tiffany N. Godwin, *Does Father Know Best? Arkansas’s Approach to the “Thwarted” Putative Father*, 67 Ark. L. Rev. 989 (2014)

Andrew Haile, *The Scandal of Refugee Family Reunification*, 56 B.C. L. Rev. 273 (2015)

Jonathan Heller, *The Chat Room Moderator: Creating a Duty for Parents to Control Their Cyberbully*, 53 Fam. Ct. Rev. 165 (2015)

Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 Ala. L. Rev. 507 (2015)

Shahabudeen K. Khan, *The Threat Lives On: How to Exclude Expectant Mothers From Prosecution for Mere Exposure of HIV to Their Fetuses and Infants*, 63 Clev. St. L. Rev. 429 (2015)

Daniel B. Pickar & Robert L. Kaufman, *Parenting Plans for Special Needs Children: Applying a Risk-Assessment Model*, 53 Fam. Ct. Rev. 113 (2015)

Sarah Swan, *Home Rules*, 64 Duke L. J. 823 (2015)

Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 Hastings Women’s L. J. 65 (2015)

Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 Cardozo L. Rev. 1027 (2015)

IMMIGRATION LAW

Emily C. Arnold, *Here Today, Gone Tomorrow: "Nullifying" Lawful Permanent Resident Status*, 56 Ariz. L. Rev. 527 (2014)

Sean Mussey, *Fixing Alabama's Public School Enrollment Requirements in H.B. 56: Eliminating Obstacles to an Education for Unauthorized Immigrant Children*, 2014 B.Y.U. Educ. & L. J. 233 (2014)

JUVENILE DELINQUENCY

Ashley Blake, *"I Don't Understand Anything": An Analysis of Why State v. Diaz was Misguided and May Lead to an Erosion of Miranda and It's Progeny's Protections for Juveniles in South Dakota*, 60 S. D. L. Rev. 144 (2015)

Brianna H. Boone, *Treating Adults Like Children: Re-Sentencing Adult Juvenile Lifers After Miller v. Alabama*, 99 Minn. L. Rev. 1159 (2015)

Yvette McGee Brown & Kimberly A. Jolson, *Chief Justice O'Connor's Juvenile Justice Jurisprudence: A Consistent Approach to Inconsistent Interests*, 48 Akron L. Rev. 57 (2015)

Lisa C. Castillo, *No Child Left Alone: Why Iowa Should Ban Juvenile Solitary Confinement*, 100 Iowa L. Rev. 1259 (2015)

Meredith Lamberti, *Children Are Different: Why Iowa Should Adopt a Categorical Ban on Life Without Parole Sentences for Juvenile Homicide Offenders*, 63 Drake L. Rev. 311 (2015)

Symposium, *Life in the Box: Youth in Solitary Confinement*, 20 Cardozo J. L. & Gender 662 (2014)

FEDERAL COURTS

Family Courts Properly Transferred Jurisdiction of Custody Proceedings to Onondaga Nation Pursuant to ICWA

Plaintiff mother was a Native American who left the Onondaga Nation reservation at age sixteen and, thereafter, had not been a part of the tribe. Plaintiff father was not a Native American. Plaintiffs were the parents of six children. Although the children were part-Native American, they were not part of the Onondaga Nation or any other recognized tribe. The family residence was not on Indian land. The children were removed from plaintiffs' custody by Oswego Social Services Department after one of the minor daughters alleged that plaintiffs sexually abused her. Four of the children were placed with plaintiff mother's aunt, and one child was placed with the husband of plaintiff mother's sister. Both the mother's aunt and the husband of the mother's sister were Onondaga Nation foster parents. Oswego Social Services Department commenced a child abuse and neglect proceeding in Oswego County Family Court. Plaintiffs also were arrested, criminally charged and jailed. The allegedly victimized daughter subsequently recanted her allegations of sexual abuse. The criminal charges were dismissed and the child abuse and neglect case was closed. The court issued an order terminating the placement of the children because the proceedings were transferred to the jurisdiction of the Onondaga Nation. Thereafter, Onondaga County Family Court granted the Nation's motion to dismiss a custody petition filed by the father, noting that the court lacked jurisdiction over the custody proceeding. Custody of the children was formally transferred to the foster parents through proceedings before the Onondaga Nation and pursuant to the Indian Child Welfare Act of 1978 (ICWA) 25 USC Section 1901 et seq. Although they did not delineate any specific causes of action in District Court, plaintiffs, proceeding pro se, appeared to have asserted a federal substantive due process claim pursuant to 42 USC Section 1983. Plaintiffs alleged that defendants wrongfully held custody of the children in violation of plaintiffs' state and federal constitutional rights, and in violation of New York State law. Plaintiffs disputed the applicability of ICWA; they alleged that there was no valid court order or other legal justification permitting the continued placement of the children

outside of their custody. Defendants filed motions to dismiss, which were granted. The court determined that, pursuant to ICWA, the Onondaga Nation had exclusive jurisdiction over the custody proceedings that formed the basis of plaintiffs' complaint. The Onondaga County and Oswego County Family Courts properly transferred jurisdiction of the custody proceedings to the Onondaga Nation pursuant to 25 USC Section 1911(b). Plaintiffs did not object to the transfer at that time, identify good cause to prevent the transfer, or appeal the state court orders thereafter. Further, review of the state court proceedings was barred by the Rooker-Feldman doctrine. Pursuant to this doctrine, federal district courts lacked jurisdiction over suits brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced, and inviting district court review and rejection of those judgments.

Pitre v Shenandoah, ___ F3d ___, 2015 WL 667540 (NDNY 2015)

COURT OF APPEALS

Appeal From Contested Family Court Order of Protection Based on Finding That Respondent Had Committed a Family Offense Not Mooted Solely By Expiration of Order

Respondent regularly stayed in an apartment with petitioner, his aunt. The aunt filed a petition charging respondent with various family offenses under Family Court Act article 8, alleging that respondent had assaulted and harassed her in the apartment. The court determined that respondent was guilty of a family offense, having concluded that respondent committed acts which constituted harassment in the second degree. The court entered a written two-year order of protection against respondent. Respondent appealed, but while the appeal was pending, the order of protection expired. The Appellate Division dismissed the appeal as moot, citing the expiration of the order. The Court of Appeals reversed. An appeal from a contested Family Court order of protection based on a finding that the respondent had committed a family offense was not mooted solely by the expiration of the order. In general, an appeal would be considered moot unless the rights of the parties would be directly affected by the determination of the appeal, and the interest of the parties was an immediate consequence of the judgment. Even where the resolution of an appeal did not immediately relieve a party from a currently ongoing court-ordered penalty or obligation to pay a judgment, the appeal was not moot if an appellate decision will eliminate readily ascertainable and legally significant enduring consequences. Although the order of protection did not declare respondent guilty of a family offense in so many words, the order noted that it was issued after a hearing and expressly barred respondent from victimizing petitioner by committing a variety of crimes nearly identical to those charged in the family offense petition. Thus, a court examining the order may readily discern that Family Court found respondent guilty of committing a family offense against petitioner. Armed with that information, the court in a future case may increase the severity of a criminal sentence or civil judgment against respondent. Moreover, in a future legal matter, an opposing party might be permitted to use the order of protection to impeach respondent's credibility. Furthermore, because the order of protection remained in a police database, albeit not in

an active file, respondent may face additional law enforcement scrutiny and an increased likelihood of arrest in certain encounters with the police. Beyond its legal consequences, the order of protection placed a severe stigma on respondent. Should the order come to the attention of respondent's business contacts, social acquaintances or other members of the public, those individuals would almost certainly view him as a domestic violence offender and cease their dealings with him. Potential employers might ask respondent whether an order of protection had ever been entered against him, and he may be ethically or legally bound to answer in the affirmative, significantly curtailing his chances of getting a job.

Matter of Veronica P. v Radcliff A., 24 NY3d 668 (2015)

Harassment Not Lesser Included Offense of Attempted Assault

Complainant was ascending the staircase to her home when defendant exited a neighbor's apartment, waited, then walked down the same staircase and forcefully "banged into" complainant with his shoulder. Defendant was charged with one count of attempted assault in the third degree, and one count of harassment in the second degree. During summation, counsel asserted that defendant was overcharged, and contended that the harassment count was a lesser included offense. The court convicted defendant on both charges. The Appellate Division affirmed. The Court of Appeals also affirmed. Under the Court's prior decisions, including *People v Moyer* (27 NY2d 252), harassment was not a lesser included offense of attempted assault. The counts of attempted assault and harassment did not share a common intent element. Even if in some cases the proof was sufficient to establish intent to injure and intent to annoy, harass or alarm, the fact that there was a potential subset of cases in which it was possible to be guilty of both offenses did not overcome the theoretical impossibility requirement that the elements align in all cases.

People v Repanti, 22 NY3d 1043 (2015)

APPELLATE DIVISIONS

CHILD ABUSE AND NEGLECT

Respondent Inflicted Excessive Corporal Punishment Upon Her Son

Family Court, upon a fact-finding order, found that respondent mother neglected the subject child Adam and derivatively neglected the other children. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. On one occasion, respondent slapped Adam in the face leaving marks and, nine days later, she beat him over the course of 10 hours, using a belt on his legs and attempting to pry his mouth open while trying to force him to eat. That the injuries sustained by Adam did not warrant medical attention did not preclude a finding of neglect based upon excessive corporal punishment. The court also found that respondent showed no remorse or insight into the impact of her conduct on her children. Petitioner demonstrated respondent's derivative neglect of the three other children. Her behavior demonstrated a level of parental judgment so impaired as to create a substantial risk of harm to any child in her care.

Matter of Adam Christopher S., 120 AD3d 419 (1st Dept 2014)

Finding of Failure to Supervise and Educational Neglect Affirmed

Family Court, upon a fact-finding determination that respondent mother neglected the subject child, placed the child with petitioner until the next permanency hearing and directed respondent to comply with conditions. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that respondent mother neglected the special needs child by failing to properly supervise him and failing to attend numerous medical appointments. A preponderance of the evidence also supported the court's finding of neglect based upon the child's excessive absences from school. Between September 2011 and February 2012, the child missed 52 days of school. There was no basis to disturb the court's rejection of respondent's explanation that she missed medical appointments because of inclement weather and lateness, resulting in the child being able to obtain a

prescription for a protective helmet that was required for him to attend school.

Matter of Jaquan F., 120 AD3d 1113 (1st Dept 2014)

Respondent Neglected Children by Allowing Violent and Addicted Mother to Return to Home

Family Court, after a fact-finding hearing, found that respondent father neglected the subject children. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. The record showed that respondent repeatedly allowed the mother to return to the family home despite his awareness of her history of domestic violence. Also, respondent allowed the mother to return to the home in violation of an existing order of protection. The children's out-of-court statements about the mother's history of violence against respondent were cross-corroborated by each other's statements, by their statements to the caseworker, and by respondent's own statements.

Matter of Jasmine A., 120 AD3d 1125 (1st Dept 2014)

Respondent's Acts of Domestic Violence Supported Neglect Finding

Family Court determined that respondent father derivatively neglected the subject child. The Appellate Division affirmed. The finding of derivative neglect was supported by a preponderance of the evidence. Although respondent completed batterers' services pursuant to a prior order issued after a finding that he neglected the subject child's older sister by committing an act of domestic violence against the mother in the presence of that child, the record supported the findings that respondent committed additional acts of domestic violence thereafter, including an incident that resulted in respondent pleading guilty to a charge of menacing. Thus, the record supported the finding that respondent suffered from an impaired level of parental judgment sufficient to create a substantial risk of harm to any child in his care. Neither res judicata nor collateral estoppel precluded litigation of derivative neglect. Although a prior petition against respondent alleging derivative neglect of the child was dismissed, that petition was filed prior to the incidents and the guilty plea at issue here.

Matter of Autumn P., 121 AD3d 454 (1st Dept 2014)

No Meritorious Defense to Default

Family Court denied respondent mother/grandmother's motion to vacate an order of fact-finding entered upon her default, which determined that she neglected the subject children. The Appellate Division affirmed. Respondent failed to set forth a meritorious defense to the neglect petition. Petitioner demonstrated by a preponderance of the evidence that the children's physical, mental and emotional condition was in imminent danger of becoming impaired as a result of respondent's long-standing untreated mental illness. The record showed that respondent resisted treatment, despite attempting suicide a month before the neglect petition was filed and that she continued to have suicidal thoughts until her involuntary hospitalization. There was evidence that respondent repeatedly left her young grandson in the house without adequate supervision, and was unable or unwilling to provide appropriate guardianship for her teenage daughter. The contention that respondent was actively planning for the children's safety before she was admitted to the hospital was insufficient because it rested solely upon her attorney's affirmation.

Matter of Delybe C., 121 AD3d 467 (1st Dept 2014)

Respondent Abused Child by Ignoring Sexual Abuse

Family Court determined that respondent mother abused the subject child. The Appellate Division affirmed. The finding of abuse was supported by a preponderance of the evidence. The evidence established that the child informed respondent of the sexual abuse by the child's brother and that the child made statements to several people that, on one occasion, respondent walked in on them as her brother was forcing her to engage in sexual activity with him. The court properly found the child's out-of-court statements were corroborated by the brother's guilty plea to criminal sexual act in the third degree, as well as the detail, consistency and specificity of the child's statements.

Matter of Milagros C., 121 AD3d 481 (1st Dept 2014)

Respondent's Single Act of Excessive Corporal Punishment Supported Neglect Finding

Family Court found that respondent father neglected the subject child by inflicting excessive corporal punishment upon him and committing an act of domestic violence upon the child's mother in the child's presence. The Appellate Division affirmed. The determination that respondent inflicted excessive corporal punishment upon the child was supported by a preponderance of the evidence. The child's out-of-court statements made during an interview with an investigator with an advocacy center and an ACS caseworker were corroborated by the photographs depicting his injuries and by the testimony of the mother. Regardless whether there was a valid reason for disciplining the child, the resulting bruising was not appropriate in form or degree. That the child's injuries resulted from a single incident did not render the finding of neglect insufficient, given the photographs and respondent's admission that he struck the child with a wooden spoon at least 20 times. Respondent's failure to acknowledge the severity of the child's bruising demonstrated that his parental judgment was strongly impaired and exposed the child to a substantial risk of harm. The finding that respondent neglected the child by committing an act of domestic violence against the mother while in the child's presence was supported by a preponderance of the evidence. The child's out-of-court statements to a caseworker that respondent pushed the mother into a bathtub and choked her was corroborated by the mother's testimony. Further, the child's statement that he was frightened by the altercation demonstrated that he was in imminent risk of emotional and physical impairment.

Matter of Krystopher D'A., 121 AD3d 484 (1st Dept 2014)

Deplorable Living Conditions Put Child at Imminent Risk of Impairment

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that the then three-year-old child's health was in imminent risk of impairment as a result of being exposed to unsanitary and deplorable living conditions, including the odor of dead vermin, the presence of dog feces on the floor, bedbugs in the bed and sofa, and

otherwise filthy conditions in the apartment where the child was staying with respondent. Because respondent did not move to dismiss the petition, the issue whether it should have been dismissed was not preserved. In any event, the court's continued aid was required. Although respondent contended that she obtained suitable housing after moving out of the apartment, she refused to provide the address of her new home and, therefore, the new home could not be assessed.

Matter of Josee Louise L. H., 121 AD3d 492 (1st Dept 2014)

Child Neglected by Reason of Mother's Mental Illness

Family Court determined that respondent mother neglected her child. The Appellate Division affirmed. The finding of neglect by reason of respondent's untreated mental illness and failure to provide adequate supervision and guardianship was supported by a preponderance of the evidence. The hospital records and the expert witnesses' testimony indicated that respondent suffered from, among other things, psychosis, bipolar disorder, and paranoia, as evidenced by her beliefs that she is a famous actress and someone was hacking into her computer. Respondent testified to multiple hospitalizations for mental illness and repeated relapses due to her noncompliance with treatment and medication.

Matter of Jacob L., 121 AD3d 502 (1st Dept 2014)

Respondent Inflicted Excessive Corporal Punishment Upon Her Children

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent neglected her three children by inflicting excessive corporal punishment upon them. The children's independent, out-of-court statements to the caseworker, describing how respondent grabbed them by their clothing, causing the clothing to rip, throwing them on the bed, scratching them, punching them, and biting the oldest child on her back, cross-corroborated each other's statements. The children's statements were further corroborated by the caseworker's observations of a cut on the oldest child's lip and a bite mark on her back, as well as scratches on the middle child's hand, an old belt mark

on the youngest child's leg, and photographs of the child's bruises.

Matter of Genesis F., 121 AD3d 526 (1st Dept 2014)

Respondent Sexually Abused His Daughter

Family Court determined that respondent father abused and neglected his daughter and derivatively abused and neglected his son. The Appellate Division affirmed. The finding of abuse was supported by a preponderance of the evidence. Medical evidence and testimony established that the six-year-old child suffered from genital herpes and that in a young child that was highly indicative of sexual abuse. This evidence, coupled with evidence that respondent was the child's primary caretaker established, prima facie, that respondent abused the child. That evidence also corroborated the child's out-of-court statements that respondent sexually abused her. The child's initial disclosure to her pediatrician that respondent abused her was not the product of an unduly suggestive interview. Further, the reliability of the disclosure was reinforced by evidence that when a social worker used the word "snuggle" in connection with the child's stuffed animals, the child had a strong negative reaction and said that respondent used that word during the abuse. Respondent failed to rebut petitioner's case with any credible explanation for his daughter's condition. The court properly rejected respondent's expert witnesses' theory of non-sexual transmission of the herpes via a washcloth, since even the expert admitted that he had never seen such a case. The court's finding of neglect was also supported by a preponderance of the evidence. After being turned away by several doctors for lack of health insurance, respondent failed to take his daughter to the emergency room, notwithstanding that she has been complaining of burning and itching and had visible lesions. Based on all the evidence, the finding of derivative neglect was supported by a preponderance of the evidence.

Matter of I-Conscious R., 121 AD3d 566 (1st Dept 2014)

Father Neglected Child by Allowing Unsupervised Visitation With Child's Mother

Family Court determined that respondent father neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that

respondent exposed his son to actual harm, by allowing him unsupervised contact with the mother, despite being aware of her long-term chronic and acute drug use, as well as other issues resulting in orders of protection. Although respondent denied the contact, the court credited the testimony of the mother, who admitted to the unsupervised visits. The mother's testimony also was supported by the testimony of the caseworker who stated that she viewed a video on the mother's cell phone showing the child playing in a park with the mother's voice audible in the background.

Matter of Troy B., 121 AD3d 570 (1st Dept 2014)

Child Neglected by Reason of Mother's Mental Illness

Family Court determined that respondent mother neglected her child and granted temporary custody of the child to the father. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that the child's physical, mental and emotional condition was at imminent risk of becoming impaired as a result of the mother's mental illness and failure to maintain regular treatment and take prescribed medication. The mother suffered from, among other things, bipolar disorder and anxiety and depression. Before she relocated from Boston, the mother alternated between several shelters, where she had physical altercations with staff and residents, in the presence of the child. On one occasion, the mother threatened to kill the child if the agency took her away and she reportedly heard voices telling her to kill someone.

Matter of Karma C., 122 AD3d 415 (1st Dept 2014)

Respondent Inflicted Excessive Corporal Punishment Upon His Son

Family Court, upon a fact-finding order, found that respondent father neglected the subject child by inflicting excessive corporal punishment and failing to make adequate plans for her care. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence, which showed that the father refused to allow the then 17-year-old child to return home after her living situation became untenable, indicating that he wished to relinquish care of the child, and refusing to participate in services to reunite the family. The father inflicted excessive corporal

punishment during an altercation in 2012 and there had been prior incidents of such punishment before that time. The aid of the court was necessary because the child was residing with her baby in a mother/child program where they had been placed after the child entered foster care. The child's permanency goal was an alternative planned permanent living arrangement and, therefore, she continued to require the agency's assistance to help her learn to live on her own and care for her baby,

Matter of Adam Christopher S., 122 AD3d 419 (1st Dept 2014)

Respondent Sexually Abused One Child and Inflicted Excessive Corporal Punishment on Two Children

Family Court determined that respondent Jose (respondent) abused Silvette, inflicted excessive corporal punishment on Silvette and Yaniel, and derivatively neglected three other children. The Appellate Division affirmed. The findings of abuse and neglect were supported by a preponderance of the evidence. At the hearing, the children's grandmother and a caseworker testified that then five-year-old Silvette consistently reported that respondent touched her private parts and kissed her inappropriately. The child's out-of-court statements were sufficiently corroborated by the testimony of her uncle, who witnessed an incident where respondent inappropriately placed the child's head in his crotch area. The consistency of Silvette's statements enhanced their credibility. The finding of excessive corporal punishment was supported by testimony that Silvette reported that respondent punched her in the head and struck four-year-old Yaniel with a hanger, leaving a red line on his arm. These statements by the siblings provided cross-corroboration of excessive use of force by respondent, and the statements were further corroborated by the grandmother's testimony that she saw Silvette crying and rubbing her head after the incident and that she saw the mark on Yaniel's arm. The findings of derivative neglect as to the other children were appropriate because respondent's behavior evinced such an impaired level of judgment as to create a substantial risk of harm to the other children. The findings of neglect against the mother were supported by a preponderance of the evidence. The record showed that the mother knew of respondent's treatment of the children, but dismissed the allegations of sexual and physical abuse, and continued to

show loyalty to respondent, without concern for the children.

Matter of David R., 123 AD3d 483 (1st Dept 2014)

Children Found Neglected by Father's Domestic Violence

Family Court found that respondent father neglected the subject children. The Appellate Division affirmed. The finding of abuse was supported by a preponderance of the evidence. The record showed that the children's out-of-court statements regarding respondent's use of violence against their mother in the children's presence, were corroborated by each other's statements, and by the caseworker's testimony and a police officer's statements about the injuries observed on the mother. A single incident where a parent's judgment was strongly impaired and the child was exposed to a risk of substantial harm can support a finding of neglect. In any event, here, the court properly discredited respondent's testimony that he did not have a history of domestic violence against the mother, given that he pleaded guilty to threatening to use physical force against the mother and that there was an order of protection in effect at the time of the incident. The police observation that the children were crying was sufficient to demonstrate that their well-being had been, or was in danger of becoming impaired by the altercation.

Matter of Madison M., 123 AD3d 616 (1st Dept 2014)

Father Was Collaterally Estopped from Relitigating Issue of Whether He Derivatively Abused His Children

In September 2003, the parents' three-month-old son died while in the father's care. The coroner determined that the baby's death was a homicide and that the baby had died of asphyxiation by smothering. The father was charged with manslaughter in the second degree, criminally negligent homicide, and endangering the welfare of a minor, and pleaded guilty to the latter charge. The Administration for Children's Services (hereinafter ACS) filed derivative abuse petitions against the father relating to the parents' two older children, Q. and P. On June 27, 2005, the Family Court, after a fact-finding hearing, found that the father had derivatively abused Q. and P. The parents thereafter had additional children (hereinafter collectively the younger children), and ACS filed additional derivative

abuse petitions against the father as each child was born. In addition, in December 2005, ACS filed three petitions against the mother alleging that she had derivatively abused the two older children, and the first of the younger children, A. by failing to enforce protective orders against the father. The children were removed from the mother's care by ACS and placed in foster care. ACS named the mother as a respondent in its subsequent petitions relating to the two youngest children, H. and B. based upon the same allegations, and each of these children was removed from the home as an infant. ACS subsequently moved, inter alia, for summary judgment against the father on its petitions relating to the children A. and B., and, in an order dated November 24, 2008, the Family Court granted the motion. On March 18, 2011, after a fact-finding hearing, the court issued an order finding that the mother had derivatively abused the children Q., P., B., and A. by allowing the father access to these children in violation of an order of protection. ACS then moved for summary judgment against the father and the mother on its petition relating to H. and, in an order dated February 8, 2012, the court granted that motion. On May 1, 2012, the Family Court commenced a dispositional hearing relating to all of the children and both parents. The parents were present on that date, but on the adjourned date of January 29, 2013, neither parent appeared, and the court entered its order of disposition on their failure to appear at the continued dispositional hearing. The parents separately appealed from the order of disposition. As the order appealed from was made upon the parents' default, review by the Appellate Division was limited to the fact-finding and summary judgment determinations of the Family Court. The Appellate Division found that the Family Court properly determined that the father had derivatively abused the two older children, Q. and P. The evidence before the court established not only that the father pleaded guilty to endangering the welfare of a child in connection with the death of the parents' son in 2003, but also that he had pleaded guilty to assault in the second degree for attempting in 1993 to strangle a three-month-old child from a prior relationship. The record showed no indication that the father lacked a full and fair opportunity to challenge either of his convictions. Contrary to the father's contention, the Family Court properly permitted the agency to move for summary judgment as to the petitions relating to the younger children. Although the Family Court Act does not specifically provide for summary judgment, it does state 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]). Thus, in an appropriate case, the Family Court may enter a finding of neglect or abuse on a motion for summary judgment in lieu of holding a fact-finding hearing, upon the petitioner's prima facie showing of neglect or abuse as a matter of law and the respondent's failure to raise a triable issue of fact in opposition to the motion. Here, because a fact-finding hearing had been held as to the two older children, and because the petitions relating to the younger children were all based upon events which occurred prior to their births, no purpose would have been served by holding 4 separate fact-finding hearings as to the younger children. The father also argued that, as to the younger children, the death of the parents' son was too remote in time to support a finding of derivative abuse. However, the Family Court correctly determined that, given the seriousness of the father's conduct—smothering his son and attempting to strangle another child 10 years earlier—the risk to the children remained despite the years which had passed. Moreover, in response to ACS's motions for summary judgment, the father did not submit any evidence suggesting that he had overcome whatever psychological flaws led him to commit such violent acts against his children or otherwise establishing that he no longer posed a danger to his children. Accordingly, with respect to the father, the Family Court properly granted ACS's motions for summary judgment on its petitions relating to the younger children. In her separate appeal, the mother argued that the Family Court erred in basing its findings against her upon statements made by the two older children when they were between four and six years old. Here, the record supported the Family Court's determination that the older children's statements corroborated one another. Accordingly, the record supported the court's determination that the mother derivatively abused the two older children and the first of the younger children by allowing the father access to them in violation of a protective order. Similarly, the record also supported the court's determination that the other younger children were derivatively abused. Throughout the various proceedings in this case, the mother steadfastly refused even to entertain the possibility that the father played any part in their son's death, notwithstanding her knowledge of ample evidence to the contrary. The mother's inability or unwillingness to recognize the risk posed by the father demonstrated a fundamental defect in her understanding of parental

duties relating to the care of children, and supported a finding of derivative abuse as to the younger children.

Matter of Harmony M.E., 121 AD3d 677 (2d Dept 2014)

Family Court Properly Rejected Child's Recantations of Allegations of Sexual Abuse

Contrary to the respondent's contention, the Family Court's determination that he sexually abused the child M.H. was supported by a preponderance of the evidence (see FCA §§ 1012 [e] [I]; 1046 [b] [i]). The evidence adduced at the fact-finding hearing established that in 2011, the then 10-year-old M.H. made consistent, detailed, and explicit out-of-court statements to a child protective agency caseworker, a detective, and her mother, describing incidents of sexual abuse by the respondent when she was nine years old. These out-of-court allegations were corroborated by, among other evidence, the proof that the respondent previously sexually abused another of his children several years earlier (see FCA § 1046 [a] [i], [vi]). Thus, the Family Court did not err in rejecting the recantations, especially in light of the evidence suggesting that M.H. recanted in order to keep peace in the family. The evidence of the respondent's abuse of M.H. supported the Family Court's finding of, in effect, derivative abuse of the other subject children. The respondent's abuse of M.H. established a fundamental defect in respondent's understanding of his parental duties relating to the care of children and demonstrated that his impulse control was so defective that it created a substantial risk of harm to any child in his care.

Matter of Melody H., 121 AD3d 686 (2d Dept 2014)

Child's Out-of-Court Statements That Mother Struck Him Were Sufficiently Corroborated

Contrary to the Family Court's determination, the petitioner met its burden of establishing neglect with respect to the five subject children by a preponderance of the evidence (see FCA §§ 1012 [f]; 1046). The evidence adduced at the fact-finding hearing demonstrated that the parents regularly used marijuana. This evidence of the parents' repeated misuse of drugs without regular participation in a rehabilitative program established a prima facie case of neglect pursuant to FCA § 1046 (a) (iii) and, therefore, neither actual impairment of the

children's physical, mental, or emotional condition, nor specific risk of impairment, needed to be established. Further, the petitioner established by a preponderance of the evidence that the mother neglected the subject child D. by inflicting excessive corporal punishment on him. D.'s out-of-court statements that the mother struck him in the face and hit him with a belt were sufficiently corroborated by the caseworker's observation of the child's injuries and the statements by the child's sibling to the caseworker that he saw the mother hit D. A preponderance of the evidence also established that the father neglected D. in that the father knew or should have known that the mother was inflicting excessive corporal punishment on D., yet failed to take any steps to protect the child. Moreover, in light of the parents' failure to exercise a minimum degree of care in providing D. with proper supervision or guardianship, the petitioner also proved by a preponderance of the evidence that the parents derivatively neglected the other subject children.

Matter of Ishaq B., 121 AD3d 889 (2d Dept 2014)

Father Engaged in Acts of Domestic Violence Against Mother in Children's Presence

The petitioner proved by a preponderance of the evidence that the father had neglected the subject children by engaging in acts of domestic violence against the mother in the children's presence which impaired, or created an imminent danger of impairing, their physical, emotional, or mental conditions. The Family Court found that the mother's testimony regarding the incidents of domestic violence in the home was credible. The children's out-of-court statements regarding the neglect cross-corroborated one another. The children's statements were also corroborated by the mother's testimony. The evidence adduced at the fact-finding hearing, together with the negative inference drawn from the father's failure to testify, was sufficient to support the Family Court's finding. Finally, the father's contention that he was deprived of the effective assistance of counsel was without merit. The record showed that the father was afforded meaningful representation, thereby satisfying the constitutional standard.

Matter of Dean J.K., 121 AD3d 896 (2d Dept 2014)

Home Maintained in a Deplorable and Unsanitary Condition; Children Not Provided with an Adequate Education

Contrary to the mother's contention, the Family Court's determination that she neglected the subject children was supported by a preponderance of the evidence. The evidence adduced at the fact-finding hearing established that the mother maintained the children's home in a deplorable and unsanitary condition. The evidence also established that the mother neglected the subject children by failing to provide them with an adequate education (*see* FCA § 1012 [f] [i] [A]). The petitioner established educational neglect by a preponderance of the evidence (*see* FCA § 1046 [b] [I]). The petitioner submitted un rebutted evidence of excessive school absences, and the mother failed to offer a reasonable justification for the absences. Moreover, despite her claims that the children were being home-schooled, she acknowledged that she had not been given permission by the New York City Department of Education to home school them, and failed to submit any evidence indicating that the schooling she allegedly provided was, in any manner, in accordance with the requirements of the New York City Department of Education.

Matter of Joyitha M., 121 AD3d 900 (2d Dept 2014)

Father's Actions Created an Imminent Danger of Impairing the Children's Mental or Emotional Condition

Contrary to the father's contention, a preponderance of the evidence established that he neglected the subject children. The credible evidence presented at the fact-finding hearing established that the father committed an act of domestic violence in the children's presence, engaged in a pattern of verbal abuse and intimidation of the mother in the children's presence, and, on one occasion, gave one of the children a marijuana cigarette and directed him to give it to the principal of his school and falsely state that it belonged to the mother's boyfriend. The evidence further established that this course of conduct by the father impaired or created an imminent danger of impairing the children's mental or emotional condition. Accordingly, the Family Court properly found that the father neglected the subject children.

Matter of Robert K.S., 121 AD3d 908 (2d Dept 2014)

Child's Out-of-Court Statements Were Sufficiently Corroborated

Contrary to the father's contention, a preponderance of the credible evidence established that he neglected the subject child by, in the child's presence, hitting the mother on the head with an object, causing her to bleed and require nine stitches. The father's act of domestic violence against the mother in the child's presence impaired, or created an imminent danger of impairing, the child's physical, mental, or emotional condition. The child's out-of-court statements were corroborated by, among other things, the caseworker's testimony and the medical records.

Matter of Mohammed J., 121 AD3d 994 (2d Dept 2014)

Record Supported Finding of Sexual Abuse

The Family Court's finding that the father abused the subject child E. and derivatively neglected the other subject children was supported by a preponderance of the evidence (*see* FCA § 1046 [b]). The psychiatrist and child sexual abuse expert who treated E. during her hospitalization testified that E. displayed behaviors consistent with sexual abuse. Thus, E.'s out-of-court statements were sufficiently corroborated to support the finding of sexual abuse. The father's acts demonstrated a fundamental defect in his understanding of his parental duties relating to the care of children and, thus, the findings of derivative neglect as to the other subject children were warranted (*see* FCA § 1046 [a] [I]). Moreover, given the father's lack of insight into his actions and their effects on the children, the recommendations of the children's therapists and the agencies, and the reluctance of the children to visit with the father, the Family Court's determination, that supervised visitation at the discretion of the petitioner was in the children's best interests had a sound and substantial basis in the record.

Matter of Victoria P., 121 AD3d 1006 (2d Dept 2014)

Family Court's Error in Admitting Certain Evidence Did Not Require Reversal

The father correctly argued that the Family Court erred in admitting into evidence a Child Protective Services intake report of the Office of Child and Family Services with the identity of the reporter having been redacted (*see* FCA §§ 1038, 1046 [a] [v]). However, since the Family Court did not rely upon the report in its fact-finding determination, its erroneous admission into evidence was not prejudicial to the father and, therefore, did not require a reversal.

Matter of Jackson F., 121 AD3d 1114 (2d Dept 2014)

Record Did Not Support Finding of Neglect Based on Use of Excessive Corporal Punishment

The Family Court's finding that the mother neglected the subject child by using excessive corporal punishment was not supported by a preponderance of the credible evidence. The Family Court relied heavily upon a report of an emergency medical technician, which stated that the subject child had bruises and swelling on the day after the mother allegedly used excessive corporal punishment upon her. However, the emergency medical technician did not testify at the fact-finding hearing, and a caseworker who was present at the police station where the subject child was examined by the emergency medical technician testified otherwise, stating that she did not observe any bruises or swelling on the subject child. The Family Court also relied heavily on the statements of the subject child's four-year-old brother, which, contrary to the Family Court's conclusion, were not sufficient to establish a pattern of excessive corporal punishment against the subject child. Nor was it established, by a preponderance of the evidence, that the subject child tried to commit suicide by swallowing cough medicine.

Matter of Reina R., 122 AD3d 746 (2d Dept 2014)

Evidence of Mother's Untreated Mental Illness Supported Finding of Neglect

The Family Court properly determined that the petitioner proved, by a preponderance of the evidence, that the mother neglected the subject child by reason of her untreated mental illness, which rendered her unable to provide adequate supervision and guardianship, thus placing the child's physical, mental, and emotional

condition in imminent danger of becoming impaired (*see* FCA § 1012 [f] [i] [B]). At the fact-finding hearing, a psychiatrist who had diagnosed the mother with a psychosis disorder and had involuntarily hospitalized her overnight testified that, if returned to the mother, the child would be at risk of being neglected because of the mother's untreated mental illness. The psychiatrist testified that the mother refused to provide contact information for anyone who could care for the child during her hospitalization, and had no plan for the child during her hospitalization. She further testified that the mother told her that the then nine-year-old child actually took care of the mother. Additionally, a hospital social worker testified that, due to the mother's behavior, he had been unable to develop a discharge plan for the mother that ensured that she could safely care for the child.

Matter of Yu F., 122 AD3d 761 (2d Dept 2014)

Child's Injuries Were Inconsistent with Explanation That the Child Was Accidentally Dropped by Older Sibling

Contrary to the mother's contention, the Family Court properly found that she abused the subject child. The petitioner established a prima facie case of abuse by presenting evidence demonstrating that the subject child sustained injuries that were inconsistent with the mother's explanation that the subject child's older sibling had accidentally dropped the subject child, who was then less than one month old (*see* FCA § 1012 [e] [i], [ii]). Moreover, contrary to the mother's contention, the Family Court's assessment of the conflicting expert testimony, which was entitled to deference, was supported by the record.

Matter of Stephen Daniel A., 122 AD3d 834 (2d Dept 2014)

Respondent's Testimony Denying History of Violence Against Mother Was Not Credible

The finding of neglect was supported by a preponderance of the evidence (*see* FCA § 1012 [f] [i] [B]). The record showed that the children's out-of-court statements with regard to the respondent's use of violence against their mother in the children's presence, were corroborated by each other's statements, and by the caseworker's testimony and a police officer's statement as to the

injuries observed on the mother. The respondent's argument that, since the alleged domestic violence was an isolated incident, the finding of neglect was not based on legally sufficient evidence, was unavailing. A single incident, where the parent's judgment is strongly impaired and the child is exposed to a risk of substantial harm, can sustain a finding of neglect. Nevertheless, the court properly discredited respondent's testimony that he did not have a history of violence against the mother, given that he admitted to pleading guilty to threatening to use physical force against the mother, and also acknowledged that there was an order of protection in effect at the time of the subject incident. Contrary to respondent's contention, the police observations that the children were crying was sufficient to demonstrate by a preponderance of the evidence that their emotional well-being had been, or was in danger of becoming, impaired by the altercation they witnessed.

Matter of Madison M., 123 AD3d 616 (2d Dept 2014)

Family Court Erred in Directing Disclosure of Assessment Records Absent Notice to Mother

The county's Department of Social Services (hereinafter the DSS) commenced child protective proceedings against the mother and the father of the subject children, alleging that they neglected the children. The attorney for the children moved, inter alia, to compel DSS, in the event that the subject family was receiving services under the family assessment and services track (hereinafter FAST), to provide to the court, for inspection, any reports or records created by FAST (*see* SSL § 427-a). The Family Court granted that branch of the motion. DSS appealed. Upon reviewing the record, the Appellate Division found that the Family Court erred in directing DSS to provide it with the subject reports and records. SSL § 427-a permits such reports or records to be made available to a court, but only, among other things, "after notice and an opportunity for the subject of the report and all parties to the present proceeding to be heard" (*see* SSL § 427-a [5] [d] [vi]). Here, the mother was not provided with notice and an opportunity to be heard because the motion of the attorney for the child was never served upon the mother's attorney (*see* CPLR 2103 [b]).

Matter of Rafael M., 123 AD3d 719 (2d Dept 2014)

There Was No Evidence That the Children Witnessed Act of Domestic Violence

The father appealed from an order of the Family Court, which, after a fact-finding hearing, found that the father neglected the children. Here, the attorney for the children, who initiated the proceedings at the direction of the Family Court (*see* FCA § 1032), failed to establish by a preponderance of the evidence that the children's physical, mental, or emotional condition had been impaired or was in imminent danger of becoming impaired as a result of an incident of domestic violence. The mother testified that the father shoved her out of the couple's second floor bedroom as she was videotaping him angrily search for his missing eyeglasses, and that she fell to the ground outside the bedroom near the stairs. Even crediting this testimony, there was no evidence that the children, who were on the first floor of the house, witnessed this incident, and that their emotional condition was impaired or placed in imminent danger of impairment by it. The attorney for the children also failed to establish that the physical, mental, or emotional condition of the older child, who was then four years old, was impaired or placed in imminent danger of impairment when the father was returning the child to the mother. The evidence established that the father put a diaper on the child instead of taking her to a restroom, and allowed her to soil herself, while he was parked near the marital residence waiting for a supervised drop-off of the child. The father's undesirable parenting behavior during this incident was not a sufficient basis to support a finding of neglect. Accordingly, the order of fact-finding was reversed, on the facts, the petition was denied, and the proceedings were dismissed.

Matter of Kiana M.-M., 123 AD3d 720 (2d Dept 2014)

Father Failed to Complete Drug Treatment and Domestic Violence Counseling Programs

Here, the petitioner established, *prima facie*, that the subject child, A.P., was derivatively neglected by the father. The petitioner demonstrated, *inter alia*, that the father failed to complete drug treatment and domestic violence counseling programs, as required by the orders of disposition issued in connection with prior neglect findings against him, and that the conduct that formed the basis of the most recent neglect finding was sufficiently proximate in time to this derivative neglect proceeding

such that it could reasonably be concluded that the condition still existed. In opposition, the father failed to raise a triable issue of fact and failed to present any evidence to establish that the condition leading to the prior neglect findings no longer existed.

Matter of Alicia P., 123 AD3d 1135 (2d Dept 2014)

Determination of Sexual Abuse of One Child Supported Finding of Derivative Abuse of Other Children

The Family Court's determination that the respondent sexually abused the child A.S. supported the court's finding that he derivatively abused 3 other children. Such conduct established a fundamental defect in his understanding of his parental duties relating to the care of children, and demonstrated that his impulse control was so defective that it created a substantial risk of harm to any child in his care.

Matter of Ebony S., 123 AD3d 1136 (2d Dept 2014)

Neglect Finding Can Be Established Through Single Incident

Family Court adjudged that respondent mother had neglected her three children. The Appellate Division affirmed. To establish neglect, the agency had to show by a preponderance of the evidence that the children's physical or emotional condition was harmed by the parent's failure to exercise a minimum degree of care. The agency did not need to show actual injury but only an imminent threat that such injury could result, and this could be established through a single incident. The record showed the agency caseworker had received multiple reports of verbal altercations between respondent and the children's father, and also that the parents had driven under the influence of drugs or alcohol with the children in the car. Furthermore, evidence showed that respondent had gotten into a violent altercation with her neighbor with whom she had a long standing dispute. At the time the incident occurred, respondent was under the influence of alcohol and earlier and the police had directed respondent to stay away from the neighbor and remain inside her home or in her backyard. The ensuing physical altercation between respondent and the neighbor took place near where the children were located and resulted in the oldest child being struck in the mid-section

when the child tried to break up the fight. The police were called and the child, who was unable to breathe due to the blow, had to be taken by ambulance to the hospital. Respondent was criminally charged. Respondent's actions resulted in one child being physically injured and all the children being frightened by what they observed. Additionally, the court properly drew a strong negative inference from respondent's failure to testify. Based on the evidence, there was a sound and substantial basis in the record to support the court's decision

Matter of Heaven H., 121 AD3d 1199 (3d Dept 2014)

While Family Court Should Not Have Considered Mother's Medical Information Improperly Obtained by the Agency, This Was Not Reversible Error

Family Court granted the agency's motion for summary judgment adjudicating respondents to have derivatively neglected their seventh child. While the decision was affirmed, the Appellate Division noted that Family Court should not have considered the mother's medical records which were improperly obtained by the agency without the mother's authorization or a subpoena. However, this did not constitute reversible error. Here, due to ongoing and mutual domestic violence between respondents, six of their children were removed from their care and their parental rights to five of them were terminated due to permanent neglect. The sixth child was adjudicated to be derivatively neglected and respondent mother surrendered her parental rights to this child. Respondents' admitted to continuing and escalating domestic violence in their relationship and there was evidence of continuing, severe domestic violence committed by respondent father against the mother. Neither respondent appreciated the severity of the domestic violence or the safety concerns to their children. In support of its motion, the agency established that respondents had failed to enroll in or complete court ordered services and despite a no-contact order of protection, respondents continued to have contact and the subject child was conceived during the pendency of that order. Under these circumstances, the agency made a prima facie showing that the conditions which gave rise to the previous neglect findings were not so remote in time as to preclude a finding of derivative neglect.

Matter of Sumaria D., 121 AD3d 1203 (3d Dept 2014)

No Right to Appeal from Consent Order

Family Court adjudicated the subject children to be neglected. The Appellate Division affirmed. Respondent father consented to the court's finding of neglect. His argument that his consent was not voluntary because he was under stress and misinformed by his attorney was dismissed. Respondent should have moved to vacate the order, but even if the order was properly before the Court, upon a review of the record, respondent knowingly and voluntarily agreed to the order and he was properly informed of the consequences.

Matter of Connor S., 122 AD3d 1096 (3d Dept 2014)

Respondent's Sex Offender Status and Violent Conduct Posed an Imminent and Substantial Risk of Harm to the Children

Family Court adjudicated the mother's three children to be neglected and ordered that respondent, who was the father of the youngest child, have no unsupervised contact with the children for one year. The Appellate Division affirmed. Here, after receiving a report that respondent boyfriend was a level II sex offender and that the mother and boyfriend engaged in acts of domestic violence, the agency created a safety plan prohibiting respondent from being with the children unsupervised. After further investigation, neglect petitions against respondent and the mother were filed. The agency presented proof that just before the third child was born, respondent became enraged when the mother refused to allow respondent, who was intoxicated at the time, to drive the car and threw the keys to the ground. In the presence of the children, respondent and the mother had a "huge fight" and respondent forced the mother to get on her knees and get the keys. When one of the mother's children tried to intervene, respondent forcibly shoved him away. Furthermore, there was another incident at the hospital after the mother had given birth to the parties' child. The mother's oldest child, a 17-year-old girl, and respondent got into an argument that required intervention by a hospital staff member. The mother's children admitted to an agency employee that they did not feel secure in their home when respondent was present. Both children left the mother's home to live with their father. The mother admitted she and respondent had a troubled relationship. Additionally, respondent's sex offender status had

resulted from his conviction for second degree rape of a 15-year-old girl. However, respondent refused to acknowledge culpability for the crime and refused to undergo treatment. While respondent's status as an untreated sex offender alone did not create a presumption of neglect, the additional evidence regarding his conduct supported the court's determination that he posed an imminent and substantial risk of harm to the children.

Matter of Gianna O., 123 AD3d 1168 (3d Dept 2014)

Court Erred in Allowing Mother's Attorney to Withdraw and in Proceeding in Mother's Absence

Family Court determined that respondent mother neglected the subject children. The Appellate Division reversed and remitted for the assignment of counsel and a new hearing. The court erred in allowing the mother's attorney to withdraw and in proceeding with the hearing in the mother's absence because the attorney failed to provide reasonable notice to the mother that she planned to withdraw. Thus, although the record fully supported the finding that the mother neglected the children, that finding could not stand because the mother was denied due process.

Matter of Joslyn U., 121 AD3d 1521 (4th Dept 2014)

Court Erred in Failing to Adjourn Hearing

Family Court adjudged that respondent mother neglected her children. The Appellate Division modified and remitted to the trial court for a new dispositional hearing. The appeal was not moot. Although the mother consented to a subsequent finding of neglect, the finding of neglect here constituted a permanent and significant stigma that could affect the mother's status in future proceedings. The finding of neglect was supported by a preponderance of the evidence. Any hearsay that was improperly admitted was harmless because the result would have been the same if the hearsay had been excluded. The court erred, however, in denying the mother's attorney's request to adjourn the dispositional hearing because the mother was unable to attend. There was good cause for the request, the proceedings were not protracted, and this was the mother's first request for an adjournment.

Matter of Tyler W., 121 AD3d 1572 (4th Dept 2014)

Court Properly Excluded Stepfather From the Courtroom During Stepdaughter's Testimony

Family Court determined that respondent sexually abused his stepdaughter and derivatively neglected his other stepchildren. The Appellate Division affirmed. The findings of abuse were supported by a preponderance of the evidence. The court did not abuse its discretion in excluding respondent from the courtroom during his stepdaughter's testimony. The court properly balanced the respective interests of the parties and, based upon the hearing testimony, reasonably concluded that the stepdaughter would suffer emotional trauma if she were compelled to testify in open court. Further, the stepfather's counsel was allowed in the courtroom and was given the right to cross-examine the child; therefore, respondent's constitutional rights were not violated. The court's finding of sexual abuse was supported by a preponderance of the evidence. The out-of-court statements of the stepdaughter were sufficiently corroborated by her sworn in-camera testimony describing the incidents of sexual abuse. The consistency of her statements enhanced their reliability. The court did not err in finding derivative abuse of respondent's other stepchildren.

Matter of Lylly M.G., 121 AD3d 1586 (4th Dept 2014)

Neglect Determination Supported by Legally Sufficient Evidence

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. The evidence presented by petitioner provided a sound and substantial basis for the court's finding that the children were in imminent danger of impairment as a result of the mother's failure to exercise a minimum degree of care in providing the children with supervision or guardianship. Even assuming, arguendo, that the court did not adequately state the grounds for its determination, any error was harmless because the determination was amply supported by the record.

Matter of Jeromy J., 122 AD3d 1398 (4th Dept 2014)

Insufficient Evidence of Severe Abuse

Family Court adjudged that respondents Matthew E. and the subject children's mother abused and severely abused

Zoe L. and derivatively abused and derivatively severely abused Makela L. The Appellate Division modified by vacating the findings that Matthew E. abused Zoe and derivatively abused Makela and by vacating the findings of severe abuse with respect to Zoe and derivative severe abuse with respect to Makela. Petitioner established a prima facie case of abuse with respect to Zoe against the mother. Petitioner also established by a preponderance of the evidence that Makela was derivatively abused by the mother. However, the findings that Matthew abused Zoe and derivatively abused Makela were against the weight of the evidence. Further, there was insufficient evidence that Zoe was severely abused or Makela was derivatively severely abused by the mother or Matthew.

Matter of Zoe L., 122 AD3d 1445 (4th Dept 2014)

CHILD SUPPORT

Court Could Not Recalculate Accrued Child Support Arrears Where Plaintiff Failed to Seek Modification

Supreme Court granted defendant mother's motion to compel payment of child support, attorneys' fees and unpaid educational costs and denied plaintiff father's cross motion seeking child support and modification of the child support order. The Appellate Division affirmed. Pursuant to the parties' agreement the father was expressly responsible for the parties' older daughter's college expenses. The court properly determined that his obligation should not be reduced by any loans for which the daughter was responsible and were taken out to offset the amount due and owing. The father failed to seek modification of his child support obligation with respect to the younger daughter and, therefore, the court was precluded from recalculating accrued child support arrears or otherwise modifying the father's support obligation. Further, that child had moved out of the father's residence, into her own apartment, and continued to receive assistance from the mother to subsist. It was not an abuse of discretion to order the father to pay in a lump sum, in view of the father's net worth statement, indicating that he had the ability to meet his obligations by sale of his real property in upstate New York or otherwise.

Riemenschneider v Barton, 121 AD3d 546 (1st Dept 2014)

Incarceration For Support Non-Payment Affirmed

Family Court, upon the Support Magistrate's fact-finding determination that respondent father willfully violated a child support order, committed him to the Department of Corrections for a term of three months weekend incarceration, unless discharged by payment of a purge amount of \$5000. The Appellate Division affirmed. The Support Magistrate properly found that respondent willfully violated the order of child support. Undisputed evidence established that respondent stopped paying child support in 2011, which constituted prima facie evidence of a willful violation. In response, respondent failed to show by competent, credible evidence that the violation was not willful. While the record showed that respondent was unemployed, he gave conflicting and evasive testimony regarding his address, income and efforts to find employment. Further, rather than search diligently for employment that might allow him to make his child support payments, he opted to depend on his brother and on public assistance that purportedly provided him with only sufficient income to support himself and his non-subject child.

Matter of Elba S. v Sadrud-Din S., 121 AD3d 550 (1st Dept 2014)

Three-Months Incarceration For Non-Payment of Support Affirmed

Family Court confirmed the finding of the Support Magistrate that respondent father willfully violated a child support order and committed respondent to the Department of Corrections for a three-month term. The Appellate Division affirmed. The matter did not need to be remanded for a new hearing because the transcripts from the willfulness and confirmation hearings were missing. Respondent never requested a reconstruction hearing even though he was aware some transcripts could not be produced. Further, respondent stipulated to the accuracy of the record and therefore suffered no prejudice. Respondent acknowledged the support arrears, which constituted prima facie evidence of willfulness. Respondent failed to offer some competent, credible evidence of his inability to make the required payments. Although respondent lost his job in 2009 and he testified about his income, assets and inability to find work, he failed to substantiate his claims with documentation. Although respondent did submit a job search diary, the

Support Magistrate, who was in the best position to evaluate his credibility, did not believe that he was searching for new employment commensurate with his qualifications and expertise. The court had broad discretion to impute income, particularly where, as here, there was evidence in the record suggesting that respondent had unreported income. In light of the proof that respondent owed \$27,646.27 in arrears, the \$10,000 he was required to pay to purge the contempt was not unreasonable.

Matter of Nancy R. v Anthony B., 121 AD3d 555 (1st Dept 2014)

Court Could Not Recalculate Accrued Child Support Arrears Where Plaintiff Failed to Seek Modification

Family Court imputed income to respondent father and declined to impute income to petitioner mother. The Appellate Division affirmed. In determining respondent's income, the support magistrate was not bound by the figure reported on respondent's most recent income tax return. Respondent, a practicing podiatrist since 1989, testified that he had no reported income, but his financial disclosure affidavit indicated monthly expenses greatly exceeding his reported income and he failed to explain the discrepancy. In imputing income to respondent, the support magistrate properly considered respondent's established podiatry practice and that he worked only three days per week. Respondent failed to support his claim that the support magistrate's determination of petitioner's income was improper - he did not challenge petitioner's testimony about her income or her financial disclosure affidavit or her profit and loss statement.

Matter of Safran v Nau, 123 AD3d 460 (1st Dept 2014)

Mother Not Entitled to Upward Modification

The parties' stipulation of settlement, which was incorporated but not merged into the parties' judgment of divorce, set forth the father's child support obligation, and was executed prior to the effective date of the 2010 amendments to FCA § 451 (*see* L 2010, ch 182, § 13). Therefore, in order to establish her entitlement to an upward modification of the father's child support obligation, the mother had the burden of establishing a substantial, unanticipated, and unreasonable change in circumstances resulting in a concomitant need (*see* FCA

§ 451 [2] [a]). Since the record demonstrated that the mother failed to meet her burden, the Family Court correctly granted the father's objections to the Support Magistrate's order which granted the mother's petition for an upward modification of his child support obligation.

Matter of Suchan v Eagar, 121 AD3d 910 (2d Dept 2014)

Father Not Entitled to Credit for Costs Associated with Child's College Room and Board

The parties' stipulation of settlement (hereinafter the stipulation), which was incorporated but not merged into the judgment of divorce, obligated the father to pay his pro rata share of the children's respective expenses pertaining to squash lessons, piano lessons, summer camp, unreimbursed medical expenses, and Hebrew school. However, the record was devoid of any evidence showing that the defendant paid his pro rata share of these expenses. Accordingly, the Supreme Court should have granted the mother's motion which was to direct the father to pay his pro rata share of those expenses. Further, the Appellate Division agreed with the mother that, pursuant to the stipulation, the father was entitled to a credit against his basic child support obligation for costs associated with the college room and board of one of the subject children, only with respect to the monetary contributions made by him after exhaustion of the custodial accounts the parties established for the payment of the subject child's college room and board expenses. Since it was undisputed that the custodial accounts were not yet exhausted at the time of the father's motion, and therefore, the father's obligation to contribute his respective share to the college room and board expenses had yet to arise, he was not entitled to the subject credit. Accordingly, the Supreme Court should not have granted the father's motion for a credit against his basic child support obligation for costs associated with the college room and board expenses of one of the subject children.

Hanau v. Cohen, 121 AD3d 940 (2d Dept 2014)

Substantial Change in Circumstances Warranted Upward Modification

The substantial increase in the father's income, plus the mother's evidence of specific increased expenses related to the parties' children, warranted an upward modification of the father's child support obligation based upon a

substantial change in circumstances. Further, under the circumstances of this case, the Support Magistrate providently exercised her discretion in determining that the father should pay a pro rata share of the expenses for parties' oldest son to attend an out-of-state public university (*see* DRL § 240 [1-b] [c] [7]).

Matter of O'Gorman v O'Gorman, 122 AD3d 743 (2d Dept 2014)

Father's Objection to Support Magistrate's Determination to Base Child Support Obligation Solely on Child's Needs Properly Denied

Although the father submitted a financial disclosure affidavit and various financial records to the Family Court, his affidavit and the accompanying records did not contain adequate information for the Support Magistrate to determine his income and assets. Under these circumstances, the Family Court properly denied the father's objection to the Support Magistrate's determination to base his support obligation solely on the child's needs (*see* FCA § 413 [1] [k]).

Matter of Weiss v Rosenthal, 122 AD3d 932 (2d Dept 2014)

Mother's Objections Were Untimely

Objections to an order of a Support Magistrate must be filed within 35 days of the date on which the order is mailed to the objecting party (*see* FCA § 439 [e]). Here, the mother filed her written objections to the Support Magistrate's order more than 35 days after the order was mailed to her. Accordingly, the Family Court properly denied the mother's objections as untimely.

Matter of Babb v Darnley, 123 AD3d 1028 (2d Dept 2014)

Father Was Evasive Concerning His Income and Earning Ability

The record supported the Support Magistrate's assessment of the parties' credibility. In light of the father's evasiveness concerning his income and earning ability, the Family Court properly determined that the Support Magistrate had insufficient information to determine the father's gross income. The Family Court properly denied

the father's objection to the Support Magistrate's determination to base his support obligation only on the children's needs, which was based on testimony elicited at the hearing (*see* FCA § 413 [1] [k]).

Matter of Andrzejczyk v Kotowski, 123 AD3d 1119 (2d Dept 2014)

Family Court Erred in Denying the Mother's Objections

The Family Court erred in denying the mother's objections to the Support Magistrate's orders dated October 28, 2013. Those orders denied her motion to modify a money judgment dated November 1, 2006, in favor of the county's Department of Social Services (hereinafter DSS) and against her in the principal sum of \$7,426 for child support arrears, so as to suspend the accrual of interest from July 31, 2013, the date she filed her modification petition, until such time as she began receiving income from employment or Social Security Disability Insurance benefits, and dismissed her modification petition. The mother's failure to allege any of the grounds listed in CPLR 5015 did not preclude her from seeking modification of the money judgment since the grounds set forth in the statute are not exhaustive. Additionally, FCA § 451 provides the Family Court with continuing jurisdiction over any support proceeding brought under Family Court Act Article 4 "until its judgment is completely satisfied," and authorizes it to "modify, set aside or vacate any order issued in the course of the proceeding" without limitation as to grounds (*see* FCA § 451 [1]). Contrary to the Family Court's conclusion, the prohibition contained in FCA § 451 on modifying or vacating an order or judgment so as to reduce or annul child support arrears accrued prior to the making of the application did not preclude the modification the mother sought through her motion, inasmuch as she proposed only to suspend interest on the money judgment prospectively from the date her modification petition was filed (*see* FCA § 451 [1]). Moreover, DSS, the party in whose favor the money judgment was entered, expressly consented to the suspension of interest on the money judgment as requested by the mother.

Matter of Nassau County Dept. of Social Servs. v Schaap, 123 AD3d 1133 (2d Dept 2014)

Court Erred in Downwardly Modifying Child Support Order

Family Court denied the mother's objection to a Support Magistrate's order, downwardly modifying the father's child support obligation. The Appellate Division reversed. A parent seeking to downwardly modify a child support order arising from a stipulation must show the agreement was unfair when entered into or that there has been an unanticipated, substantial and unreasonable change in circumstances. Here, the father alleged that due to medical and mental health issues, he was unable to continue working in the tree removal business. However, he offered no competent medical evidence to support this claim. While he stated that an earlier injury to his back had worsened and thus he was no longer able to work in this field, evidence showed he continued to work in the tree removal business after this time. It was only later when he injured his arm with a chain saw during the course of his work that he stopped removing trees. Based on this, the father failed to meet his burden of proof.

Matter of Hoyle v Hoyle, 121 AD3d 1194 (3d Dept 2014)

Court's Decision to Suspend Non-Custodial Parent's Child Support Obligation and Refund Certain Monies to her was Not an Abuse of Discretion

Supreme Court's decision to retroactively suspend the wife's child support obligation and refund certain child support monies to her was not an abuse of discretion. A noncustodial parent's duty to support her children may be suspended where it is established that the custodial parent "wrongfully interfered with or withheld visitation". Here, while the court determined both parties engaged in acts of domestic violence against the other, the husband who was the custodial parent, interfered with the wife's attempts to engage in therapeutic counseling with the children. During the pendency of this case, the wife continued to make child support payments. Initially, she made the payments directly to the husband and then later to an escrow fund established by the support collection unit, which was held pending the resolution of the interference claim. Supreme Court properly suspended her child support payments retroactive to the date the escrow fund was established and correctly directed the return of the escrow monies to her. However, the court improperly determined the award due the wife since it took into consideration the child support monies she had paid

directly to the husband. This violated the "strong policy against restitution or recoupment of support overpayments".

Matter of Whitaker v Case, 122 AD3d 1015 (3d Dept 2014)

No Abuse of Discretion In Court's Determination That Respondent's Terms of Imprisonment Run Consecutively

Family Court revoked two previous suspended orders of commitment issued against respondent father and ordered that the six-month terms of imprisonment run consecutively. The Appellate Division affirmed. Here, petitioner had previously filed two willful violation petitions against respondent and each time respondent had defaulted in his appearance before the Support Magistrate. He had later appeared at the confirmation hearings before Family Court after a warrant had been executed, but had failed to contest the petitions. Both times, Family Court had found respondent to have willfully violated the support orders and ordered six-months jail time with each term suspended. Respondent's due process rights were not violated because on previous occasions, he had been properly served with the violation petitions, provided with notice of the hearings and represented by counsel. Furthermore, there was no abuse of discretion in the court's determination that the sentence run consecutively since respondent had both failed to contest the support amounts due and willfully refused to pay the amounts due.

Matter of Columbia County Support Collection Unit v Risley, 122 AD3d 1097 (3d Dept 2014)

Waiver of Child Support Must Be Voluntary and Intentional

Family Court properly rejected the father's claim that the mother had waived her right to receive child support and determined he had willfully violated the prior child support order. The Appellate Division affirmed. Here, based on notes sent by the mother to the father informing him that the younger child, who had graduated from school, was employed and that both subject children were claiming themselves for tax purposes, the father's attorney advised him to stop paying child support. Thereafter, the father's attorney sent a letter to the mother indicating the

notes sent by her to the father represented an admission that both children were emancipated and that child support payments by the father would terminate on a certain date. While a parent can expressly waive child support, such waiver must be a voluntary and intentional abandonment of a known right. The mother's notes did not reflect a voluntary and intentional abandonment of her right to receive child support. Additionally, the mother was unaware she could challenge the attorney's letter and thus her failure to immediately file an enforcement proceeding was not an implied waiver of her right to receive child support. The father should have pursued a modification petition to modify or terminate his support obligation instead of resorting to self-help.

Matter of Hastie v Tokle, 122 AD3d 1129 (3d Dept 2014)

De Novo Determination of Child Support is Required

Supreme Court properly denied the wife's request for upward modification of the husband's child support obligation and did not abuse its discretion by denying the wife's request to have the husband contribute to the child's private school tuition expenses. However, there was merit to the wife's claim that the parties' separation and modification agreements failed to comply with the CSSA, and thus a de novo determination of the husband's child support obligation was required. Here, the wife's request for support modification failed to show the agreement was unfair or inequitable when entered into or that there had been an unanticipated and unreasonable change of circumstances resulting in a failure to meet the children's adequate needs. Additionally, the parties' divorce and underlying agreements were silent as to the parents' obligation towards the private school tuition costs of the children. The court could have ordered the husband to contribute if justice so required. But in this case, the only evidence offered to support the wife's application was her subjective belief the child would benefit from a smaller classroom and a more structured environment. However, a de novo determination of child support was warranted since the original agreement failed to indicate what the presumptive amount of child support would be when the parties deviated from the presumptive amount. Furthermore, it failed to state the parties' pro rata share of child care and medical expenses, and it did not indicate the reasons for deviating from such amount. The problems with the original agreement were not cured by the subsequent modification order because the order

failed to set forth what the presumptive pro rata shares would be under the CSSA and did not include the financial information to support such deviation.

Matter of Malone v Malone, 122 AD3d 1190 (3d Dept 2014)

Father Submitted to Jurisdiction of New York

Family Court denied the objections of respondent father to the order of the Support Magistrate. The Appellate Division affirmed. The court had jurisdiction over respondent because he had appeared before the court previously and admitted that he was the child's father. His voluntary appearance clearly indicated that he consented to New York's personal jurisdiction over him. The Magistrate did not err in failing to calculate respondent's child support obligation based upon 25% of his income. Here, the dispute concerned only one of the children. A court in Virginia previously granted the parties a divorce and directed respondent to pay child support for the parties other child. Later, the mother commenced this proceeding for support of the subject child who was born after the divorce was finalized. Because the Magistrate had no jurisdiction over the support proceeding in Virginia, she properly used the presumptive percentage of 17% in calculating the father's child support obligation and properly determined respondent's annual adjusted gross income after deducting the amount the father was paying for the other child's support. The Magistrate also properly ordered the father to pay \$155 for child care services and determined that he owed support arrears in the amount of \$10,236.33. The Magistrate did not err in finding respondent in willful violation of the support order inasmuch as he failed to provide full financial documentation.

Matter of Pitka v Pitka, 121 AD3d 1521 (4th Dept 2014)

Father Willfully Violated Child Support Order

Family Court confirmed the determination of the Support Magistrate that respondent father willfully violated an order of child support and sentenced him to a term of incarceration of 60 days. The Appellate Division affirmed. The mother proved that the father failed to pay support as ordered. The father then failed to meet his burden to show competent medical evidence to support his testimony that mental health problems interfered with

his ability to obtain gainful employment to meet his child support obligation or establish that he made reasonable efforts to obtain such employment. The father failed to preserve for review his contention that the Magistrate improperly assisted the mother with her testimony and was biased against him. The father's contention that he was denied effective assistance of counsel was rejected because he failed to show the absence of strategic or other legitimate explanations for counsel's alleged shortcomings.

Matter of Reinhardt v Hardison, 122 AD3d 1448 (4th Dept 2014)

CUSTODY AND VISITATION

Sound and Substantial Basis For Award of Custody to Father

Supreme Court, among other things, dissolved the parties' marriage and awarded plaintiff father physical and legal custody of the parties' child. The court properly considered all the circumstances and the best interests of the child in awarding plaintiff sole legal custody. There was a sound and substantial basis for the court's determination. While the child initially wanted to move to Paris and live with defendant and the forensic evaluator expressed some concerns about plaintiff's parenting, the expert also testified about serious concerns about defendant, including her suicide attempts and her rigidity. More significantly, in 2012 it came to light that defendant had been manipulating and pressuring the 13-year-old child and her contact with him was temporarily suspended. During a *Lincoln* hearing, the child revealed to the court his deep-seated issues with defendant and the court continued plaintiff's temporary custody. Instead of addressing these issues, defendant called two witnesses to attack the child's veracity. Defendant then elected to return to France before her cross-examination was completed and the court reasonably drew a negative inference about her credibility and fitness as a parent. The record demonstrated that defendant was well aware of the child's allegations and that she had every opportunity to address and respond to them and that she had not established that the court abused its discretion in refusing to release the transcripts of the *Lincoln* hearings.

Cohen v Cohen, 120 AD3d 1060 (1st Dept 2014)

Denial of Relocation Petition Reversed

Family Court denied, after a hearing, petitioner father's motion to relocate to Virginia with the parties' child. The Appellate Division reversed. The record did not support the Referee's determination that the child's best interests would be served by denying the father's relocation application. While not determinative, the child had indicated a preference to relocate with the father to Virginia. There was sufficient evidence to support the father's claim that there would be economic and educational benefits to the child, and that the child's contact with his mother would not be substantially impacted because the father had offered liberal access to the child.

Matter of Dexter A. v Georgia G., 120 AD3d 1106 (1st Dept 2014)

Motion to Vacate On-The-Record Custody Agreement Properly Denied

Supreme Court denied the father's motion to vacate a prior on-the-record custody agreement. The Appellate Division affirmed. The court properly denied defendant's motion to set aside the prior on-the-record custody agreement inasmuch as there was no showing of fraud, overreaching, mistake or duress. The parties were represented by able counsel, had been negotiating custody for some time, and spent an entire day resolving the agreement. Defendant was actively involved in the negotiations and several of his modifications were incorporated into the agreement. Further, the court conducted a proper allocution of defendant and properly determined that he knowingly and voluntarily accepted its terms. Defendant did not demonstrate a change in circumstances since the time of the agreement that would warrant its modification. There was no basis to find that the agreement was not in the best interests of the child.

Klauer v Abeliovich, 120 AD3d 1114 (1st Dept 2014)

AFC Properly Informed Court of Child's Preference But Advocated Otherwise

Family Court awarded petitioner father sole legal and physical custody of the parties' child with visitation to respondent mother. The Appellate Division affirmed. There was a sound and substantial basis for the court's

determination. The court properly considered the appropriate factors in making its determination and gave appropriate weight to the testimony and recommendations of the court-appointed forensic expert. The court properly considered the evidence that, among other things, the mother deliberately and continually disparaged the father in the child's presence, which caused the child anxiety and impeded the father's visitation with the child. Additionally, the father was more stable and better suited to meet the child's medical and educational needs. In the mother's care, the child developed bottle rot and was still wearing diapers at the age of five. The mother repeatedly changed the child's pre-school without consulting the father and moved to several different residences. The court properly considered the mother's allegations of domestic violence and concluded that they were not credible. The AFC acted properly in apprising the court of the then five-year-old child's expressed preference to live with the mother, but advocated otherwise, based upon her determination that the child lacked capacity for a knowing, voluntary and considered judgment.

Matter of Alfredo J.T. v Jodi D., 120 AD3d 1138 (1st Dept 2014)

Dismissal of Petition on Forum Non Conveniens Ground Reversed

Family Court granted respondent mother's motion to dismiss the father's petition for visitation on forum non conveniens grounds. The Appellate Division reversed. The court improvidently exercised its discretion inasmuch as the record indicated that the court failed to consider all relevant factors before making its determination. There was no indication that the court considered the distance between New York and Florida, the relative financial conditions of the mother and father, any agreement between the parties on jurisdiction, or the nature and location of evidence required to resolve the pending litigation regarding the father's visitation rights. Thus, the matter was remanded so the court could consider all factors in determining whether New York was an inconvenient forum and Florida a more appropriate forum.

Matter of Jeremy A. v Vianca G., 120 AD3d 1147 (1st Dept 2014)

Parties' Breakdown in Communications Constituted Sufficient Change in Circumstances

Supreme Court modified the parties' custody agreement and granted sole legal custody of the parties' son to defendant mother. The Appellate Division affirmed. The court's determination had a sound and substantial basis. The record established that there was a complete breakdown in communication between the parties resulting in their inability to agree on issues concerning the child. The parties had filed approximately nine motions, within a period of less than five years, seeking judicial intervention in various matters concerning the child. The inability to communicate and the father's palpable disdain for the mother constituted a sufficient change in circumstances warranting modification of the agreement.

Sequeira v Sequeira, 121 AD3d 406 (1st Dept 2014)

Parties' Animosity Toward Each Other Constituted Sufficient Change in Circumstances

Supreme Court modified a joint custody order and awarded sole custody of the parties' child to respondent mother. The Appellate Division affirmed. The hearing evidence showing that since shortly after an order granting the parties joint custody of the child was entered, the parties were unable to get along, frequently engaging in intense and even violent altercations, at times in the presence of the child, established that there was a change of circumstances and modification of the joint custody order was warranted. The determination that it was in the best interests of the child that sole custody be granted to respondent had a sound and substantial basis in the record. The record showed that respondent had long been almost solely responsible for the child's education and healthcare and that the child was healthy and doing very well in school. Respondent was much more capable than petitioner of meeting the child's financial needs. The court did not err in rejecting the forensic psychologist's findings that respondent was an angry person and that petitioner was the better parent. The court was not required to accept the expert's finding and he based his findings on a few hours of observation of the parties, whereas the court had extensive contacts with the parties over the last several years.

Matter of Dean W. v Karina McK., 121 AD3d 440 (1st Dept 2014)

Dismissal of Grandparent Visitation Petition Affirmed

Family Court dismissed grandmother's petition for visitation with the subject children. The Appellate Division affirmed. Petitioner did not have a right to assigned counsel because she failed to demonstrate that she had standing to pursue visitation or that visitation would be in the children's best interests. Petitioner visited the children twice after their births and was unable to demonstrate a sufficient existing relationship with them. She also failed to show conditions existed where equity would have seen fit to intervene. Even assuming petitioner had standing, the evidence showed that the court properly determined that the children's best interests would be served by denying the petition, particularly in view of the lack of any meaningful relationship with the children.

Matter of Diane T. v Lydia Tamelka T., 121 AD3d 463 (1st Dept 2014)

Sole Custody to Father Affirmed

Family Court granted the father's petition to modify a prior order awarding sole custody of the parties' child to mother and awarded sole legal and physical custody to the father. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination that the best interests of the child were served by awarding sole legal and physical custody to the father. After issuance of the prior custody order, the mother's living conditions changed to the extent that the child lacked a stable and secure home environment. The mother moved several times between shelters and her mother's home, where the child was exposed to verbal abuse and incidents of violence. A police officer who witnessed custody exchanges testified that the child would cry when she had to leave her father to stay with her mother. The mother interfered with the father's visitation, disappearing for several months, and failing to consult with the father about the child's needs as required by the order. The father had a stable home for the child, stable employment, and flexible hours to care for the child. The court properly credited the testimony of the expert in child psychology, who concluded that it was in the best interests of the father to have custody and the mother

visitation. The AFC also supported the award of sole custody to the father.

Matter of Frederick A. v Lisa C., 121 AD3d 495 (1st Dept 2014)

Court Properly Declined Jurisdiction Over Visitation Petition - No Nonfrivolous Issues on Appeal

Family Court declined to exercise jurisdiction over the father's petition for visitation with the subject child, and stayed dismissal of the petition on condition, among other things, that he commence a visitation proceeding in Ohio. The Appellate Division affirmed and granted the application of petitioner's counsel to withdraw. There were no nonfrivolous issues that could be raised on appeal. The court did not abuse its discretion in determining that it would decline jurisdiction on the ground that Ohio was the more appropriate forum to decide whether petitioner should have visitation with the subject children. Petitioner had virtually no contact with the children since 2008, over three years before the children and their mother moved to Ohio, and the evidence regarding the children's well-being, care and personal relationships were more readily available in Ohio.

Matter of Eric R. v Celena P., 121 AD3d 524 (1st Dept 2014)

Sole Custody to Mother Affirmed

Family Court granted the mother's petition for sole legal and physical custody of the parties' child. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination. With the exception of a short period, during which petitioner worked and was the sole financial support of the family, she maintained physical custody of the child since he was born. Since 2012, petitioner had cared for the child without any support, financial, emotional, or otherwise, from respondent, who had not even visited with the child since that time, despite an order directing supervising visitation. The record established that the child had been well cared for by petitioner, who had a stable job and home environment and provided for the child's needs. The court properly considered respondent's history of domestic violence against petitioner in making the custody determination. Respondent was not denied a fair trial or

the right to present his case because of the court's intervention in the questioning of the witnesses or any alleged bias on the part of the court.

Matter of Rena M. v Derrick A., 122 AD3d 457 (1st Dept 2014)

Petitioner Failed to Show Change in Circumstances

Family Court denied respondent mother's motion to dismiss the petition for modification of custody of the parties' child. The Appellate Division reversed and dismissed the petition. Petitioner, the noncustodial parent, failed to make the requisite showing of a change of circumstances to warrant a hearing on the petition. His submission of an online listing that showed that respondent advertised an apartment for rent in her building was not evidence that respondent's residence was being used as a hotel and that, as a result, the child was dispossessed of and denied his living space in the apartment. Further, petitioner's allegations that respondent hired a babysitter who scratched the child, and was fired almost two years before this petition was filed, did not constitute evidence of a substantial change in circumstances.

Matter of Benjamin Sze-Bin W. v Kerry S. W., 122 AD3d 473 (1st Dept 2014)

Adult Cousin Properly Denied Custody of Child: Cousin Lived in Home With Registered Sex Offender

Family Court denied the petition of the child's adult cousin for custody of the subject child. The Appellate Division affirmed. It was not in the best interests of the child, who had been placed in a non-kinship foster home, to grant the custody petition of the child's adult cousin. Petitioner and her then three-year-old daughter were residing in a household that included a registered sex offender, when she filed the custody petition, and she remained there for a year, despite knowing that she was unlikely to obtain custody under that arrangement. The court properly took account of petitioner's financial issues, which could have resulted in her returning to the home where the sex offender resided, the limited contact between petitioner and the child, and the effect awarding custody to petitioner would have upon the agency's ability to reunite the child with respondent mother.

Matter of Nikole S. v Jordan W., 123 AD3d 497 (1st Dept 2014)

Court Erred in Denying Motion to Direct Father to Cooperate in Obtaining Child's Passport

Family Court denied petitioner mother's motion for an order directing respondent father to cooperate and execute all documents necessary to obtain a renewal passport for the subject child. The Appellate Division reversed and granted the application. The 2007 parenting agreement contemplated air travel by the child with one parent and did not prohibit either party from traveling outside the U.S. with the child. The mother had traveled internationally with the child both before and during the parties' separation, until the child's passport expired in 2009. Although the parenting agreement required the parties to execute all documents necessary to give the agreement full effect, the father refused to execute documents relevant to the child's passport renewal. The Father failed to demonstrate that there had been a significant change in circumstances warranting modification of the agreement to prohibit international travel. The evidence did not support the court's finding that the mother would permanently remove the child from the country if she obtained the passport. Although the father claimed that the parties' relationship had deteriorated and he feared the mother would abscond with the child, he acknowledged that the mother had complied with all aspects of the parenting agreement, had never threatened to take the child, and had returned from all prior trips with the child, which she took with the father's consent, in a timely manner and without incident. Moreover, the mother was a U.S. citizen with significant family connections here. The AFC had all time supported the mother's application.

Matter of Noella Lum B. v Khristopher T.R., 123 AD3d 531 (1st Dept 2014)

Relocation Properly Denied

Family Court denied petitioner mother's petition to relocate with the parties' child to Florida. The Appellate Division affirmed. While petitioner established that there was a slight economic advantage to the move, that advantage did not outweigh the disruption in the child's bond with respondent resulting from the move.

Matter of Diana M. v Nityanan T., 123 AD3d 632 (1st Dept 2014)

Petitioner Mother Entitled to Attorneys' Fees

Family Court granted respondent mother's motion for an award of attorneys' fees in the amount of \$105,680 from petitioner father in connection with custody and visitation proceedings. The Appellate Division affirmed. The court properly found that petitioner was the monied party based upon his admission of ownership of a five-acre property in New York that was listed for sale at almost \$13 million, the rental income derived from that property, and the significant amounts of money petitioner receives from his father on a regular basis. Petitioner had filed three petitions alleging violations of court orders, an enforcement petition, and a letter motion, all of which were dismissed or withdrawn after argument. The court carefully considered the billing records and properly credited the testimony related to the fees in finding that they were reasonable.

Matter of Ralph D. v Courtney R., 123 AD3d 635 (1st Dept 2014)

Sole Custody to Father Affirmed

Family Court awarded sole legal and physical custody to the father. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination that the best interests of the child were served by awarding sole legal and physical custody to the father. The evidence showed that the mother had not behaved in the child's best interests inasmuch as she impeded the father's visitation with the child. The mother also instigated arguments and otherwise acted out aggressively, sometimes with violence, in the presence of the child, father, and others. The evidence showed that the father was more stable and had taken good care of the child.

Matter of Elissa A. v Samuel B., 123 AD3d 638 (1st Dept 2014)

Father Was Better Able to Provide Child with a Stable and Structured Environment

The record revealed that both parents loved the subject child and were able to provide for the child's well-being

and promote her relationship with the other parent. However, the record also showed that the father, who had been caring for the subject child for a period of three years during the pendency of neglect proceedings against the mother, was better able to provide a stable and structured environment. Further, during the period when the father had temporary custody of the child, her school work and grades dramatically improved. Accordingly, the Family Court's determination, to award sole custody of the child to the father with certain visitation to the mother, was supported by a sound and substantial basis in the record.

Matter of Ivory B. v Shameccka D.B., 121 AD3d 674 (2d Dept 2014)

Petitioner Failed to Sufficiently Allege Any Extraordinary Circumstances

The petitioner, who was neither an adoptive parent nor a biological parent of the subject children, failed to sufficiently allege any extraordinary circumstances to establish her standing to seek custody, and could not rely on the doctrine of equitable estoppel to establish her status as a de facto parent. Further, contrary to the contention of the attorney for the children, the doctrine of judicial estoppel was not applicable as the respondent did not obtain a favorable judgment as a result of a contrary position in a prior proceeding.

Matter of A.F. v K.H., 121 AD3d 683 (2d Dept 2014)

Father's Conduct in Violating Provisions of Visitation Order Not Willful

The mother appealed from an order of the Family Court which denied her motion to hold the father in civil and criminal contempt for willfully violating the visitation provisions of an order of the same court. The mother failed to demonstrate that the father's conduct, in failing to exercise his own right to visitation, was calculated to or actually did defeat, impair, impede, or prejudice her rights (*see* JL§ 753). Moreover, the Family Court's determination that the father's conduct was not willful had ample support in the record. Accordingly, the Family Court properly denied the mother's motion.

Matter of Figueroa-Rolon v Torres, 121 AD3d 684 (2d Dept 2014)

Record Supported Award of Extended Visitation to Father

The Family Court's determination not to impose geographical limitations on the father's visitation with the child during the father's vacation from employment had a sound and substantial basis in the record. With respect to the father's extended visitation during vacations, the Family Court properly considered evidence that the separation of a child under the age of three from his or her primary caretaker for long periods might create stress for a child, and balanced that consideration with the child's age, which was over three years old, and the father's right to meaningful visitation. Accordingly, the extended visitation awarded to the father during his vacations, from Saturday until Sunday of the following week, which was exercisable every six weeks, had a sound and substantial basis in the record. The Appellate Division did not review the mother's contention that the father's extended schedule unfairly deprived her of alternate weekends with the parties' child, as the Family Court's intention in that regard was ambiguous. The Family Court's order was silent with respect to whether the interruption in the father's alternate-weekend visitation schedule contemplated a simple reversion to an alternate-weekend schedule in between the father's extended visits, or whether adjustments to the alternate-weekend schedule were contemplated to give the mother compensating weekends. The Appellate Division agreed with the mother that the court should have addressed the issue of holiday visitation in the order. Accordingly, the matter was remitted to the Family Court for the issuance of an amended order resolving the aforementioned ambiguity with respect to the father's extended visitation and setting forth a schedule of holiday visitation that was in the best interests of the child.

Matter of Rodriguez v. Silva, 121 AD3d 794 (2d Dept 2014)

Family Court Properly Granted Maternal Grandmother's Petition Without a Hearing

The Family Court did not improvidently exercise its discretion in granting the maternal grandmother's petition for sole legal and physical custody of the subject child and, in effect, permitting the maternal grandmother to return to Guyana with the child, where they will live with the child's half-brother. Moreover, under the

circumstances of this case, the court was not required to hold a hearing on the petition. By virtue of a related guardianship proceeding, the court was fully familiar with the relevant background facts—including the father's incarceration, the maternal grandmother's existing relationship with the subject child, and the subject child's strong attachment to his half-brother after the death of their mother. Thus, the court had sufficient information to determine that granting the petition was in the child's best interests.

Matter of Singh v Cassadean, 121 AD3d 799 (2d Dept 2014)

Letters from OCFS Did Not Meet the Criteria for Newly Discovered Evidence

The Supreme Court properly denied the mother's motion which was pursuant to CPLR 5015 (a) (2) to vacate an order awarding the father sole legal and physical custody of the parties' child, on the ground of newly discovered evidence. The letters from the New York State Office of Children & Family Services (OCFS) that the mother relied on were not in existence at the time of the Family Court's custody determination. As such, they did not meet the criteria for newly discovered evidence pursuant to CPLR 5015 (a) (2). Specifically, the evidence must have been in existence at the time of the original order or judgment, but undiscoverable with due diligence. In any event, the mother failed to demonstrate that the evidence would likely have produced a different result (*see* CPLR 5015 [a] [2]).

Matter of Monasterska v Burns, 121 AD3d 902 (2d Dept 2014)

Record Did Not Support Determination to Condition Father's Unsupervised Visitation with Child

The father appealed from an order of the Family Court which conditioned the father's future unsupervised visitation with the child on his submission of evidence of "medical clearance" and upon his continued submission of "medical clearance" evidence on an annual basis. Specifically, the father had to submit a statement of a physician or nurse practitioner either: (1) confirming that the father had not experienced a loss of consciousness due to his diabetes or other medical condition in the previous 12-month period; or, (2) if the father had

experienced a loss of consciousness in the previous 12-month period, confirming (a) that such loss of consciousness was due solely to a change in medication directed by a physician or nurse practitioner, or (b), that the physician or nurse practitioner was aware of such incident or incidents and nonetheless recommended that the father was fit to drive a car and care for the child without supervision, and opining that the father's condition would not interfere with his safe operation of a car or his safe care of the child. Once the father obtained his first "medical clearance," the father thereafter was obligated to annually provide such a statement of "continued medical clearance," or else all visitation was to revert to supervised visitation "until such proof of medical clearance is provided." Although evidence showed that the father, a diagnosed diabetic, had an unhealthy blood sugar level on several occasions resulting in, inter alia, profuse sweating and disorientation, there was no evidence that he had such blood sugar episodes in the year preceding the hearing, or that the child was endangered or detrimentally affected when the father had an unhealthy blood sugar level. On this record, it was not established that unsupervised visitation would be detrimental to the child.

Matter of Dolan v Masterton, 121 AD3d 979 (2d Dept 2014)

Father's Refusal to Cooperate with Mother Made Joint Custody Impossible

The mother established that a sufficient change in circumstances had occurred since the time that the parties entered into the joint custody order. First, the mother demonstrated that the father refused to communicate with her and persisted in using their teenaged son as an intermediary to convey written directives to her in English, which the mother does not speak. The mother also established that the father contacted and informed their son's teacher that the mother was interfering with the father's custody, that the father would show up at their home on various pretexts, without notice, to visit the children, and that he would readily violate the joint custody order by refusing to return the children in conformance with the visitation schedule, even when requested to do so by the police, whom the mother was required to call on one occasion for assistance. Further, the father evicted the mother and the children from the Queens home that he owned, where they had lived for

nine years, rent-free, used the eviction to seek temporary custody of the children, and also attempted to prevent the mother from relocating with the children to New Jersey to live with extended family. The forensic evaluator submitted a comprehensive evaluation of the family in 2005, which she updated during these proceedings, and testified at trial that the father's conduct demonstrated a wholesale disregard of his responsibilities as joint custodian of the children and a failure to consider the children's best interests before proceeding in his own self-interest, often to the children's detriment. The evidence also showed that the mother supported the father's relationship with the children and would continue to do so. Accordingly, the Family Court's determination awarding the mother sole legal and physical custody of the children had a sound and substantial basis in the record.

Matter of Lazo v Cherrez, 121 AD3d 999 (2d Dept 2014)

Relocation with Mother to New Jersey Was in the Children's Best Interests

Contrary to the father's contention, the Family Court possessed adequate relevant information to enable it to make an informed and provident determination, without a hearing, as to whether it was in the subject children's best interests to relocate to New Jersey with their mother. The Family Court conducted more than 16 hearings involving custody and visitation issues between the same parties in which the best interests of the children were paramount, and had the assistance of the attorney for the children, who participated in all the proceedings and supported the determination allowing the mother to relocate. The Family Court also was familiar with the comprehensive reports of the court-appointed forensic evaluator, who separately interviewed the parties and the children, and opined that it was in their best interests for the mother to have custody. Accordingly, the Family Court's determination not to extend what was already a protracted litigation by conducting an evidentiary hearing before authorizing the mother to relocate to New Jersey was a provident exercise of discretion, and supported by a sound and substantial basis in the record.

Matter of Lazo v Cherrez, 121 AD3d 1002 (2d Dept 2014)

Mother Demonstrated a Sufficient Change in Circumstances to Warrant Modification

The Family Court's determination that the evidence did not demonstrate a sufficient change in circumstances was not supported by a sound and substantial basis in the record. The record revealed that the child's relationship with the father had deteriorated since the issuance of the prior custody order and that the mother exhibited a greater sensitivity to the child's emotional and psychological needs. Additionally, the hearing testimony established that the father denigrated the mother in the child's presence. Moreover, the attorney for the child advocated for residential custody to be awarded to the mother, since the child, who was 13 years old, communicated a strong preference to reside with the mother. Under the circumstances, the mother demonstrated a sufficient change in circumstances to warrant modification of the custody arrangement so as to award her sole residential custody of the subject child. Accordingly, the order was reversed, the mother's petition to modify the order so as to award her sole residential custody of the subject child was granted, and the matter was remitted to the Family Court for further proceedings to establish an appropriate visitation schedule for the father.

Matter of Burke v Cogan, 122 AD3d 625 (2d Dept 2014)

Record Did Not Support Determination to Award Father Sole Legal and Physical Custody of Child

The Family Court's determination awarding the father sole legal and physical custody of the child did not have a sound and substantial basis in the record. Specifically, the Family Court's conclusion that neither party was the primary caregiver for the child was not supported by the record, which showed that the mother was the child's primary caregiver for the majority of his life, until the father was temporarily awarded residential custody shortly before the custody hearing was conducted. The evidence in the record did not support the Family Court's findings that the father was the "more likely to provide for and nurture the subject child's emotional, social, physical and intellectual needs," and to foster the child's relationship with and ensure meaningful contact with the noncustodial parent. In addition, although not determinative, the position of the attorney for the child, as articulated after the hearing, that the child was more

bonded to the mother and that she should have had residential custody of him, was entitled to some weight. The Family Court, in its custody determination, made no mention of the position of the attorney for the child, and that position appeared not to have been taken into account at all. Accordingly, the order was reversed, the father's petition for sole legal and physical custody of the subject child was denied, the mother's separate petition for sole legal and physical custody of the subject child was granted, and the matter was remitted to the Family Court to establish an appropriate visitation schedule for the father, and thereafter the effectuation of the transfer of the subject child from the custody of the father to the custody of the mother.

Matter of Guiracocha v Amaro, 122 AD3d 632 (2d Dept 2014)

Record Supported Award of Sole Custody to Father

The Family Court's determination to grant sole custody of the parties' daughter to the father had a sound and substantial basis in the record. The evidence at the hearing established that the child, who was six years old at the time of the hearing, had been in the father's care since at least February of 2011, after the mother, who lived in Florida, sent her to live with the father who lived in New York. The evidence further showed that the child was happy and well-adjusted, was close to her father and mother, and was doing satisfactorily in school. In addition, the evidence showed that the father was financially able to provide for the child, had provided a good home environment, had adequately provided for the child's emotional and intellectual development, and had fostered the child's continued relationship with the mother. Accordingly, the Family Court's award of sole custody to the father was not an improvident exercise of discretion.

Matter of McLennan v Gordon, 122 AD3d 742 (2d Dept 2014)

Grandmother's Petition for Custody Properly Dismissed

The subject child had been living in foster care since May of 2011. The petitioner, the child's paternal grandmother, petitioned for custody of the child in February of 2013. In May of 2013, the parental rights of the child's parents

were terminated, guardianship and custody of the child were transferred to the county's Department of Social Services, and she was freed for adoption. The grandmother's custody petition was thereafter dismissed. The Appellate Division found that the Family Court properly denied the petition for custody without a hearing, as the petitioner's recourse was to seek adoption, not mere custody of the child.

Matter of North v Christine Y., 122 AD3d 864 (2d Dept 2014)

Prior Interim Custody Order Did Not Require Change-of-Circumstances Analysis in Determining Permanent Award

The Supreme Court's determination that it was in the child's best interests to award physical custody of her to the father had a sound and substantial basis in the record. Contrary to the mother's contention, the existence of an interim order awarding her physical custody did not require the court to engage in a change-of-circumstances analysis in determining the permanent award after a hearing had been held. The award of temporary custody to a parent before a hearing is conducted is only one factor to be considered in awarding permanent custody. The permanent award made after a hearing is treated as an initial custody determination, and court is not required to engage in a change-of-circumstances analysis before awarding custody to the other parent. Further, under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in determining the issue of custody without a forensic evaluation of the parties and child as there was no credible evidence presented at the hearing that warranted a forensic evaluation.

McDonald v McDonald, 122 AD3d 911 (2d Dept 2014)

Father's Motion to Vacate Order Entered on Consent Properly Denied

The Family Court properly denied the father's motion to vacate an order dated June 17, 2013, entered on consent, which suspended his visitation rights and directed the father and the child to communicate by letter via their therapists. A review of the record revealed that the Family Court conducted a proper allocution of the father, determining that he voluntarily and knowingly accepted

the terms of the stipulation. Moreover, the father's assertion that he felt "frightened" by his attorney was insufficient to establish a claim of mistake or duress so as to warrant setting aside the stipulation of settlement. The father's contention that his attorney advised him that he would be able to withdraw from the settlement at any time could not be reviewed, as it relied upon conversations that were de hors the record. The contention that the provision set forth in the order dated June 17, 2013, regarding communication between him and the child, constituted an improper delegation of authority to make determinations regarding the best interests of the child, was improperly raised for the first time on appeal (*see* CPLR 5501). Therefore, there was no merit to the father's contention that his counsel was ineffective for permitting him to enter into the subject stipulation of settlement.

Matter of Richmond v Perez, 122 AD3d 928 (2d Dept 2014)

New Developments Re: Child's Living Situation Rendered the Record Insufficient for Review

In this appeal from an order of the Family Court, made after a hearing, which granted the father's petition to modify a prior order so as to award him sole custody of the child, new developments were brought to the attention of the Appellate Division by the attorney for the child, which rendered the record insufficient for the Court's review. These developments included the fact that shortly after the child moved to the father's home, she returned to live with the mother in the home of the maternal grandparents with the father's consent. Additionally, the father was arranging for his girlfriend, his girlfriend's daughter, and their new baby to live at his home, which was not disclosed at the subject hearing. Under these circumstances, the record was no longer sufficient to determine which arrangement was in the best interests of the child. Accordingly, the order was reversed and the matter was remitted for a re-opened hearing, and a new custody determination.

Matter of Bosque v Blazejewski-D'Amato, 123 AD3d 704 (2d Dept 2014)

Family Court Failed to Consider the Extreme Acrimony Between Parties in Denying Mother's Petition for Modification

The mother appealed from a decision of the Family Court which denied her petition for modification of a custody award seeking sole legal custody of child. The Family Court's determination, that there was no change in circumstances warranting a modification of a custody award to grant sole legal custody to the mother, was not supported by a sound and substantial basis in the record as the court failed to account for the extreme acrimony between parties. As to physical custody of the child, the Appellate Division agreed with the Family Court that the child should have remained with the mother. The Family Court adequately explained its reasons for disregarding the recommendation of a court-appointed expert, and its determination, to credit the testimony of the mother's expert witness instead of the testimony of the court-appointed expert, was supported by a sound and substantial basis in the record. The mother had retained primary physical custody of the child since birth, was a committed parent, and was very involved with the child's education, recreational activity and daily needs. Moreover, there was no proof that the father was a more fit parent than the mother or that he would have been able to provide a better home environment or better care for the child. In view of the foregoing, the Family Court should have awarded the mother sole legal custody of child.

Matter of Florio v Niven, 123 AD3d 708 (2d Dept 2014)

Visitation with Noncustodial Parent Is Presumed to Be in Child's Best Interest Even When That Parent Is Incarcerated

Generally, since visitation with a noncustodial parent is presumed to be in the best interests of a child, even when that parent is incarcerated, the Appellate Division found that the Family Court erred in declining to sign the mother's order to show cause accompanying her petition for visitation. Accordingly, the order was reversed and the matter was remitted Family Court, so as to sign the mother's order to show cause commencing a visitation proceeding.

Matter of Georghakis v Matarazzo, 123 AD3d 711 (2d Dept 2014)

Application to Expand Father's Unsupervised Visitation Required a Hearing

The Family Court held a hearing with respect to, *inter alia*, the father's petition for custody of the subject child, at which the father testified. Following his testimony, the father made an application to expand his unsupervised visitation with the child. As of that date, the father's visitation with the child consisted of one two-hour visit per week, with the first hour supervised and the second hour unsupervised. The petitioner agency and the attorney for the child opposed the father's application based on, among other things, the recommendation of a psychologist who prepared a report, which had not yet been admitted into evidence. According to the attorney for the child, the psychologist recommended that all parts of the visitation be monitored by the agency. In the order appealed from, the Family Court granted the father's application, without conducting a full hearing with respect to the father's application. On appeal, the petitioner agency argued that the court should not have granted the father's application, since it did not possess sufficient information to determine whether expanded unsupervised visitation was in the best interests of the child. The Appellate Division agreed. Modification of an existing court-sanctioned visitation arrangement is permissible only upon a showing that there has been a change in circumstances such that a modification is necessary to ensure the continued best interests and welfare of the child. Generally, an evidentiary hearing is necessary regarding a modification of visitation. However, a hearing is not necessary where the court possesses adequate relevant information to make an informed determination of the child's best interests. Here, the Family Court did not possess adequate relevant information to determine whether it was in the subject child's best interests to expand the father's unsupervised visitation with the child. Accordingly, the order was reversed, and the matter was remitted for an evidentiary hearing on the issue of the father's visitation and a new determination as to the father's application.

Matter of Jasiah T.-V.S. J., 123 AD3d 717 (2d Dept 2014)

Petition for Enforcement of Visitation Provision of Judicial Surrender Agreement Required a Hearing

In a proceeding pursuant to SSL § 383-c to enforce the visitation provision of a judicial surrender of a child that

resulted in the adoption of the child, J.A., the biological mother, appealed, by permission, from an order of the Family Court, which, sua sponte, dismissed her petition with prejudice. SSL§ 383-c (2) (b) permits the parties to a judicial surrender agreement to provide for a biological parent's continued communication or contact with the child. In determining whether to approve the agreement, the court must determine whether continued contact with the biological parent would be in the child's best interests (*see* SSL § 383-c [2] [b]). A provision providing for visitation with the biological parent is not legally enforceable unless the court that approved the surrender agreement states, in a written order, that the provision would be in the child's best interests (*see* DRL §12-b [2]; SSL § 383-c [2] [b]). Even then, in an enforcement proceeding pursuant to DRL § 112-b, a court “shall not enforce an order under this section unless it finds that the enforcement is in the child's best interests” (*see* DRL § 112-b [4]). Here, the Family Court dismissed the petition without affording the biological mother an opportunity to establish that enforcement of the visitation provision of the surrender agreement would have been in the child's best interests. Thus, there was no hearing record for the Appellate Division to review. It was noted that the Family Court was not required to hold a hearing so long as there was adequate relevant information to enable it to make an informed and provident determination with respect to the best interests of the children. While the Family Court might very well have been aware of facts and circumstances that might have supported a determination that enforcement of the visitation provision would not have been in the child's best interests, the record did not contain those facts. Accordingly, the Appellate Division was unable to conduct an effective appellate review of the court's determination. In conclusion, the Court could find no sound and substantial basis in the record for the Family Court's determination that enforcement of the visitation provision of the surrender agreement was not in the child's best interests. Therefore, the order was reversed, and the matter was remitted to the Family Court for a hearing to determine whether enforcement of the visitation provision of the surrender agreement was in the child's best interests. A dissenting justice observed that in dismissing the petition, the Family Court expressly noted that the petitioner had a long history before it, and that the court had made five prior findings of neglect against her, as well as terminated her rights with respect to two of her children. Thus, it was within the Family Court's power to take judicial

notice of its own prior and present proceedings and orders involving the petitioner, the subject child, and the petitioner's other children in determining whether enforcement of the judicial surrender agreement was in the child's best interests.

Matter of Jayden A., 123 AD3d 819 (2d Dept 2014)

Judicial Estoppel Applied in Custody Proceeding Brought by Domestic Partner

The record revealed that J. and E., who were registered as domestic partners, decided to have a child through artificial insemination. J. became pregnant and gave birth to the subject child; and E. was present during the insemination procedure and the birth of the child. They shared in the responsibilities of caring for the child, but E. never adopted the child. Several years later J. and E. ended their romantic relationship and E. moved out of the home. After E. moved out she continued to visit with the child several days a week. J. then filed a petition seeking child support from E. After a hearing, the Family Court issued an order in which it determined that “the uncontroverted facts establish” that E. “is a parent to [the child]; and as such, is chargeable with the support of the child.” E. then commenced a proceeding pursuant to Family Court Article 6 seeking custody and visitation. She claimed that she had standing as an “adjudicated parent” pursuant to the Family Court’s order in the support proceeding. J. moved to dismiss the petition on the ground that E. did not have standing under DRL § 70, since she was not a biological or adoptive parent of the child. The Family Court denied J.’s motion, finding that she was judicially estopped from arguing that E. was not a parent of the child since she had asserted in the support proceeding that E. was a parent of the child, and had secured a support award on that basis. The Appellate Division affirmed, finding that the application of the doctrine of judicial estoppel was appropriate under the circumstances of this case.

Matter of Arriaga v Dukoff, 123 AD3d 1023 (2d Dept 2014)

Record Supported Determination That Supervised Visitation Was in the Child’s Best Interests

Contrary to the mother's contention, the Family Court's determination that it was in the child's best interests to

continue the child's custody with the father was supported by a sound and substantial basis in the record. Further, the Family Court's determination that it was in the child's best interests to have the child's maternal grandmother supervise the mother's visitation with the child was based, in part, on the court's consideration of the wishes of the child, who was 12 years old and sufficiently mature to express her wishes to the court during an in camera interview. That determination also had a sound and substantial basis in the record.

Matter of Morocho v Jordan, 123 AD3d 1037 (2d Dept 2014)

Record Supported Family Court's Denial of Mother's Request for New Assigned Counsel

In a custody proceeding, the Family Court did not improvidently exercise its discretion in denying the mother's request for new assigned counsel. This was her fifth such request. The Family Court had entertained, and granted, four previous requests to assign counsel to the mother. Nor did the court err in denying the mother's request to adjourn the hearing and appointing her former assigned attorney as stand-by counsel. While an indigent party has a right to assigned counsel in a Family Court custody proceeding, this entitlement does not encompass the right to counsel of one's own choosing. An indigent party is entitled to new assigned counsel only upon a showing of good cause for a substitution. On this record, the Family Court did not improvidently exercise its discretion in denying the mother's application for substitution of counsel or for an adjournment of the hearing.

Matter of Munoz v Edmonds-Munoz, 123 AD3d 1038 (2d Dept 2014)

Sufficient Showing of Extraordinary Circumstances

Family Court dismissed the parents' modification and violation petitions and continued custody of the subject child with the paternal aunt. The mother appealed and the Appellate Division affirmed. The court properly found there was a sufficient showing of extraordinary circumstances. Here, the evidence showed the parents withdrew from their parental role, surrendering custody of the child to the aunt for much of the child's life and the child had a strong bond with her aunt. From the child's

birth until she was five-years-old, custody was shared between the mother and the aunt, with the aunt having the child three quarters of the time. Thereafter, upon the parents' default, the aunt obtained legal custody of the child and continued to have custody of her for four more years until this application was made by the parents. Although the child spent a substantial period of time with her parents on two separate occasions, she always returned to the aunt. Furthermore, the aunt provided all the financial, medical and educational support for the child, while the parents did not provide any type of support. Additionally, the aunt fully met the child's serious health needs, which required constant monitoring. There was a sound and substantial basis in the record for custody to remain with the aunt. The child had a close relationship with her aunt as well as her paternal grandmother, who lived near the aunt. On the other hand, the child had twice witnessed her mother being the victim of her father's domestic violence and the father had issues with alcohol abuse.

Matter of Battisti v Battisti, 121 AD3d 1196 (3d Dept 2014)

Sound and Substantial Basis in the Record to Award Father Sole Legal Custody

After a hearing, Family Court awarded sole legal custody of the parties' child to the father. The Appellate Division affirmed. The court's determination that the father was able to offer the child a more stable environment and was willing to foster a relationship between the child and his mother was supported by a sound and substantial basis in the record. Furthermore, due deference was given to the court's credibility assessments. Here, the father had been living with the mother and the subject child, as well the mother's children from other relationships, until he got into an altercation with the mother's teen-age son. Thereafter, the father moved in with his mother, the subject child's paternal grandmother. The evidence showed the father held the same job for over 17 years, had a close relationship with the child, was involved in the child's activities and provided proper discipline. Even though there were two indicated reports of domestic violence against the father while the family was living together, he had subsequently attended anger management counseling and there were no further incidents. Although the father's earlier altercation with the teen-age son resulted in criminal charges being filed against him, these

were later dismissed and the mother confirmed the father had never been violent towards the subject child. The father was also worried about the child's safety in the mother's home based on his belief she would be unable to protect the child from her teen-age son. On the other hand, the mother, as well as her 27 year-old son, were antagonistic towards the father and his family during visitation exchanges and called them vulgar names. The mother's testimony as well as the testimony of her children that the father regularly assaulted the children was not credible. Furthermore, the mother admitted to having been convicted of forgery and falsifying documents related to child support payments and claimed she would "do it again for [her] kids." She was unable to credibly explain the death of a dog left in the apartment she had abandoned, and although she and her other children had moved into her 27-year-old son's home, she claimed she had no information regarding the 27 year old son's previous arrest or incarceration.

Matter of Koch v Koch, 121 AD3d 1201 (3d Dept 2014)

Father's Use of Corporal Punishment Supports Court's Order Directing His Visits With Children Be Supervised

Family Court awarded the mother and children a two-year order of protection against the father, continued primary, physical custody of the children with the mother and modified the father's contact with the children to supervised visitation. The father appealed only from that provision of the custody order modifying his visitation rights. The Appellate Division affirmed. There was no abuse of discretion in the court's order. Here, while driving the subject children home, the father became irate when his 10-year-old son accidentally urinated in the car. The father hit the child in the face and chest and also struck the mother when she tried to intervene. The father, who had a history of temper outbursts and inappropriate use of corporal punishment, repeatedly stated it was his right to hit his children in anyway he felt was necessary and stated he would continue to do so. He informed the court he would not participate in the children's therapy. Furthermore, the caseworker assigned to investigate the allegations against the father testified the father told her he had "whooped his children's ass [es]" and hit them in the face and chest and would continue to do so. Additionally, although the caseworker recommended anger management and parenting classes for the father, he

informed her he would not engage in such services.

Matter of Raychelle J. v Kendell K., 121 AD3d 1206 (3d Dept 2014)

Relocation Not in Children's Best Interests

After a hearing, Family Court denied the mother's petition to relocate to Ohio, awarded the parties joint legal custody of the children with physical custody to the mother and parenting to the father. The Appellate Division affirmed. The testimony revealed that both parents had a close and loving relationship with the children, and the record failed to show that the move would be in the children's best interests since their economic, emotional or educational well-being would not be enhanced by the move. Furthermore, there was evidence that the move would significantly impact on the relationship between the father and the children since the driving time between the father's home and the proposed location in Ohio would be between 6 ½ to 7 hours.

Matter of Cowper v Vasquez, 121 AD3d 1341 (3d Dept 2014)

Sound and Substantial Basis in the Record to Modify Custody

Family Court modified a prior custody order, transferred physical custody of the child from the mother to the father and awarded the father sole, legal custody of the subject child. The Appellate Division affirmed. There was sound and substantial basis in the record for the court's decision. Here, the mother's older son had moved into her home after the prior order of custody had been issued and began to commit acts of physical and verbal abuse against family members as a result of his drug use. The subject child's behavior began to deteriorate due to all the conflict in his home and he was suspended from school and daycare. Even after a particularly violent attack by the older son against family members, the mother continued to allow him to live with her and the child. The mother testified she had called the police to her home more than once as a result of her older son's violent behavior. This evidence supported the court's finding there had been a sufficient change in circumstances. It was in the child's best interests to modify custody. The mother was aware her older son was facing criminal charges in North

Carolina, as a result of beating up another one of the mother's sons, when she allowed him to move into the home she was sharing with the subject child. Thereafter, she allowed him to live with her periodically even though she was aware of his violent behavior. She allowed him to be in contact with the subject child even after an order of protection had been issued precluding such contact and she knew that such contact caused the subject child distress. Additionally, the mother frequently changed residences, was unemployed, and made unfounded allegations of abuse against the child's father and his family.

Matter of Clark v Hart, 121 AD3d 1366 (3d Dept 2014)

Sound and Substantial Basis in the Record to Award Joint Legal and Physical Custody

Family Court's award of joint legal and physical custody of the minor child to the parents was based on a sound and substantial basis in the record. Additionally, there was no error in its determination that the mother had wilfully violated a temporary custody order. Here, both parents were fit and loving parents and able to provide the child with a stable home. Although the mother was the primary caretaker during the first 10 months of the child's life, the father did not learn of the child's birth until the child was five- months-old. Even though the father waited until the child was ten-months-old before actively taking a parenting role, his actions thereafter showed he was engaged wholeheartedly in the child's life. He earnestly participated in programs aimed at improving his parenting skills. Furthermore, both parents had stable home environments and support systems. Finally, the mother's refusal to turn over the child to the father on two occasions pursuant to the terms of a temporary custody order supported the court's finding of willful violation.

Matter of Teri v Elliot, 122 AD3d 1092 (3d Dept 2014)

Father's Bizarre and Alienating Behaviors Supports Sole Legal Custody to Mother

Family Court modified an order of joint legal and physical custody to sole legal custody to the mother and supervised, therapeutic visits to the father. The Appellate Division affirmed. There was sufficient change of circumstances to warrant a modification of the prior order. The record revealed a litany of bizarre and

detrimental actions taken by the father, which often involved the children and were aimed at degrading the mother. Additionally, the father hindered the mother's access to the children and undermined her relationship with them. Giving due deference to Family Court's credibility determinations and based on the evidence, modification of the order was in the children's best interests.

Matter of Cid v DiSanto, 122 AD3d 1094 (3d Dept 2014)

Family Court Did Not Err in Awarding Primary, Physical Custody to Mother and Denying Overnight Visits to Father

Family Court did not err in awarding joint legal custody to the parents with primary, physical custody of the child to the mother and specific visitation times, but no overnight visits to the father. The mother had always been the primary caretaker and had a stable home with an extended family. The father sometimes placed his interests ahead of the child and had anger issues. Testimony showed he yelled at the infant child and at least on one occasion, he had an angry outburst when the child awoke crying in the middle of the night. While both parents had flaws, there was a sound and substantial basis in the record to support the court's determination that custody to the mother was in the child's best interests. Additionally, the court did not abuse its discretion in ordering that the child not be left in the exclusive care of the father's paramour during his visitation periods. The paramour was 20-years-old while the father was 37, and her judgment and maturity were at issue. The record showed she once stood in front of the father's vehicle to prevent him from going to visit the child and she got into arguments with the mother. Additionally, she had recklessly or negligently hit the father's dog with a vehicle.

Matter of Carr v Stebbins, 123 AD3d 1164 (3d Dept 2014)

Mother was Provided Meaningful Representation by Counsel

Family Court modified a previous order of custody by awarding the father primary, physical custody of the child and dismissing the mother's custody violation petition. The Appellate Division affirmed. The mother's sole

contention on appeal was that she was denied effective assistance of counsel. However, the record showed that mother's counsel provided her with meaningful representation. He conducted an effective direct examination of the mother relative to the child's best interests and elicited testimony to show the father's lack of fitness as a parent. The fact that he did not bring up the mother's prior drug use, her acrimonious relationship with her roommate or the suspension of her driver's license during his direct examination of the mother, but rather engaged in redirect after those issues came to light, could be attributed to legitimate trial tactics.

Matter of Robinson v Bick, 123 AD3d 1242 (3d Dept 2014)

Family Court Properly Deemed Mother to be in Default

Family Court deemed respondent mother to be in default and awarded custody of five children to paternal grandparents. The Appellate Division affirmed. Here, three of the children lived with the grandparents and the mother had relocated near Syracuse with the other two children. After many attempts, respondent was personally served with the grandparents' custody petition but failed to appear in court on the scheduled date. Thereafter, the court re-scheduled the matter and provided proper notice to respondent at her address. Respondent advised the court she would appear by telephone and gave her address to the court, but again failed to appear. The court re-scheduled the matter for a hearing and advised respondent, by mail, of the consequences if she failed to appear. Additionally, the court informed her of the right to counsel and included a public defender application. Thereafter, counsel from the public defender's office filed a notice of appearance on the mother's behalf. Respondent also faxed a note to the court indicating she would appear by telephone for a support hearing. On the date of the hearing, respondent failed to appear but her counsel appeared. However, respondent's counsel failed to participate in the hearing and despite counsel's appearance the court properly deemed the mother was in default. Furthermore, the mother was extended every accommodation by the court and having defaulted, respondent was precluded from appealing the order without first attempting to vacate the default order.

Matter of Deshane v Deshane, 123 AD3d 1243 (3d Dept 2014)

Mother Willfully Violated Court Order

Supreme Court found respondent mother had willfully violated the prior order of custody issued by Family Court and imposed a suspended six-day jail sentence. The Appellate Division affirmed. Clear and convincing evidence supported the court's finding. The mother had waived her right to a hearing, admitted she was aware of the terms and conditions of the custody order which stated the father was to have the child on Halloween, and admitted she had failed to make the child available to him. Supreme Court properly made further inquiry into the mother's understanding of the order and the basis for her belief before accepting her admission.

Matter of Hardcastle v Whiteford, 123 AD3d 1246 (3d Dept 2014)

Father's Failure to Properly Home School Children Results in Physical Custody to Mother

Family Court modified a joint legal and physical custody order and awarded the mother physical custody of the children with parenting time to the father. The Appellate Division affirmed. Here, after the prior order had been issued, the father moved to a farm 100 miles away from the mother's home. The parties agreed the children would live with their father on weekdays and be home schooled by him and the mother would have the children on weekends. The father agreed to be responsible for all aspects of the children's educational instruction and associated paperwork. However, the mother soon became concerned with the children's educational well-being. Evidence showed the father had failed to file paperwork with the school district as required by State law and he filed the first quarterly report months late. There was also conflicting information as to whether the children were receiving adequate instruction or progressing educationally. Additionally, the father failed to comply with the parties' agreement regarding transporting the children to the mother's home. While the mother was also uncooperative with the father regarding scheduled visits with the children, based on the circumstances and giving due deference to the court's credibility determinations, there was no error in the court's determination that physical custody to the mother was in the children's best

interests.

Matter of Dench-Layton v Dench-Layton, 123 AD3d 1350 (3d Dept 2014)

Mother's Actions in Placing Her Own Needs Before Needs of Child Results in Custody to Father

After a hearing, Family Court awarded the parties joint legal custody with physical custody of the 10-year-old child to the father. The Appellate Division affirmed. Here, after the birth of the child, the mother left the child in the care of the maternal grandmother and left the area for five years, in order to pursue a college degree and occasionally visited the child. After graduation, she and her then-boyfriend moved to Delaware for three years. Thereafter, she returned to New York and two years later, indicated to the grandmother she intended to relocate with the child to Saratoga county. The grandmother filed for custody and obtained temporary legal custody. However, she withdrew her petition and the father, who had also petitioned for custody, was awarded temporary custody. The father had enlisted in the military before the child's birth and had twice been deployed to Iraq. He did not see the child until he was discharged in 2007. The record showed that although the maternal grandmother had raised the child until the age of nine, at the time of trial, the relationship between the mother and maternal grandmother had deteriorated and the mother no longer maintained contact with the grandmother and criticized the manner in which she had cared for the child. The mother placed her own interests before the interests of the child in choosing not to reunite with the child after finishing college and waiting for years to petition for custody. While the father was not perfect, he made attempts to visit the child while on leave from military duty. The mother had informed the father he had no place in the child's life. Additionally, once he was discharged from the military, the father made efforts to gain the trust of the grandmother and began to build a relationship with the child. Although the father had struggled with posttraumatic stress disorder and alcohol related driving offenses, testimony showed he had been successful in his rehabilitation and was committed to providing the child with a safe and stable environment. He also felt it was important for the child to maintain a relationship with the grandmother who had raised her from birth. Even though the mother and her husband could provide the child with financial security, relocation was not in her best interests.

The child had lived in the same area since birth, had strong bonds with the father's family, had established friendships and was involved in activities with the father. Taking the child's wishes into consideration and given the fact that the child needed stability, the court's decision was based on a sound and substantial basis in the record.

Matter of King v Chester, 123 AD3d 1352 (3d Dept 2014)

Family Court Erred in Dismissing Grandmother's Visitation Modification Petition

Family Court granted the child's biological mother and adoptive father's motion to dismiss paternal, biological grandmother's visitation modification petition, based on a failure to allege a sufficient change in circumstances. The Appellate Division reversed. Here, following the death of the child's biological father, the grandmother was granted certain periods of visitation with the then two-year-old child. Five years later she applied, pro se, to increase the visits to include an overnight. The grandmother asserted that since the child was now older and a close bond had developed between the two of them, she wanted overnights in order to spend more time with the child. The overnights would also allow the child to spend more time with family members who lived further away. The court should have liberally construed the allegations as the petition was filed pro se. Furthermore, the allegations adequately asserted a change in circumstances. When the prior order had been issued, overnight visits were not addressed due to the age of the child. Additionally, given the child's current age, her wishes should have been ascertained.

Matter of Ford v Baldi, 123 AD3d 1399 (3d Dept 2014)

New York Had Subject Matter Jurisdiction

Family Court had subject matter jurisdiction and personal jurisdiction over respondent mother to award maternal grandmother visitation with the subject child. Here, the mother and child lived in New York with the grandmother for two years before moving to Florida. The grandmother filed for visitation two months after the child had moved. While Family Court correctly determined New York was the home state, it erred when it concluded the grandmother was a "person acting as a parent" under the UCCJEA. DRL §76 (1)(a) defines a " person acting as a parent" as someone who has physical custody of the child

or has been awarded custody of the child. The grandmother did not claim a right to either. However, at the time the visitation application was made, the child did not have a home state for UCCJEA purposes and New York could exercise jurisdiction because the child and the mother had significant connection with New York pursuant to DRL § 76 (1)(b). The evidence showed that although the child had lived outside of New York for much of her life, she spent four to five full summers and attended summer camp in New York and visited the grandmother's home on many, unspecified school breaks, long weekends and vacations. Additionally, when the child did reside in New York, she attended school and developed relationships with her maternal grandparents and other family members. Furthermore, since the mother had been personally served with the court papers, New York had personal jurisdiction over her, or in any event, there was no basis to dismiss the petition for lack of personal jurisdiction.

Matter of Breselor v Arciniega, 123 AD3d 1413 (3d Dept 2014)

Not in Child's Best Interests to Visit Incarcerated Father

Family Court denied the father's petition to modify a prior order of custody and visitation with respect to the parties' eight-year-old son. The Appellate Division affirmed. The father was sentenced in 2006 to a determinate sentence of 20 years incarceration on his conviction of rape in the first degree and criminal sexual act in the first degree. The court properly determined that although there had been a change in circumstances, based upon evidence presented at the hearing, including the testimony of the child's psychologist that visitation would be detrimental to the child, it was not in the child's best interests to have visitation with the father at the correctional facility. The record demonstrated that the father failed to establish a meaningful relationship with the child. He had been incarcerated since the child was in utero, he had never met the child, and the child indicated that he did not want to visit the father. Thus, there was a sound and substantial basis for the court's determination.

Matter of Fewell v Ratzel, 121 AD3d 1542 (4th Dept 2014)

Nonparent Established Extraordinary Circumstances

Family Court granted mother and nonparent (Cole) joint custody of the subject child, designated Cole as the primary residential parent and granted the mother unsupervised visitation. The Appellate Division affirmed. The AFC's contention that the mother's appeal was moot in light of a subsequent order in the case was rejected. The finding that there were extraordinary circumstances could have enduring consequences for the parties. The court properly determined that Cole met her burden of establishing extraordinary circumstances warranting consideration of the best interests of the child. The mother continually demonstrated her unwillingness or inability to place the child's best interests above that of the mother's husband, who had various mental health issues and refused treatment and medication.

Matter of Van Dyke v Cole, 121 AD3d 1584 (4th Dept 2014)

Father Failed to Show Changed Circumstances

Family Court denied father's petition seeking to modify a prior order of custody and visitation by, among other things, providing increased visitation with his son. The Appellate Division affirmed. The order of visitation could not be modified unless there was a sufficient change in circumstances since the prior order that, if not addressed, would have an adverse effect on the child's best interests. The father failed to demonstrate such a change in circumstances. The record did not support the father's contention that the court drew a negative inference against him for his failure to testify.

Matter of Miller v Pederson, 121 AD3d 1598 (4th Dept 2014)

Suspension of Mother's Visitation Lacked Sound and Substantial Basis

Family Court granted that part of stepmother's petition seeking to terminate petitioner mother's physical visitation with the subject child. The Appellate Division vacated the directive terminating mother's physical visitation with the child and remitted for determination of an appropriate visitation schedule. The stepmother established a change in circumstances since entry of the guardianship order sufficient to warrant reexamination of

the visitation arrangement. The record established that the relationship between the child and mother had deteriorated significantly to the point where the child did not want to visit with the mother. However, the court's suspension of the mother's physical visitation with the child lacked a sound and substantial basis. The record lacked substantial evidence that visitation with the mother was detrimental to the child's welfare. Although the child did not wish to visit with the mother, her wishes were not determinative.

Matter of Tuttle v Mateo, 121 AD3d 1602 (4th Dept 2014)

Father Required to Undergo Sex Offender Risk Assessment Before Visitation Considered

Family Court dismissed father's petition for visitation with the parties' two-year-old daughter. The Appellate Division affirmed. Although there was a rebuttable presumption that visitation with the noncustodial parent was in the child's best interests, the court may deny visitation to parties who refuse to submit to examinations. Here, the record reflected that the father was a level one sex offender who was convicted of rape in the third degree for having sexual intercourse with the child's then-underage mother and that the child was the product of the rape. The father admitted that he failed to complete the court-ordered sex offender risk assessment and he failed to accept fault for the rape of the mother. The court did not err in ordering the father to undergo another sex offender risk assessment with an objective evaluator before reapplying for visitation.

Matter of Cardwell v Mighells, 122 AD3d 1293 (4th Dept 2014)

Sole Custody of Child to Father Affirmed

Family Court dismissed the mother's petition for modification of an order of custody and visitation. The Appellate Division affirmed. The court erred in dismissing the petition upon respondent father's motion to dismiss. Accepting the mother's proof as true, she established that she successfully completed a substance abuse program and thus, in accordance with a provision of the prior consent order, she satisfied the requisite significant change in circumstances to allow the court to consider whether a change in custody was in the child's

best interests. Further, the mother and maternal grandmother testified about the child's marked change in behavior since residing with the father and the mother presented evidence of a significant bruise on the child's back that she believed was inconsistent with the child's explanation for the injury. However, based upon the Appellate Division's review of the entire record, it concluded that it was in the best interests of the child to award sole custody of the child to the father. The father presented evidence that the mother had made numerous unfounded reports of alleged physical abuse of the child to CPS and the police. The father also presented evidence from a neighbor, who was a mandated reporter and who had a close relationship with the child, regarding the child's behavior and demeanor while living in the father's house. The record also supported the court's determination that given the acrimonious relationship of the parties, a change in joint custody to sole custody to the father was in the child's best interests.

Matter of Gelster v Burns, 122 AD3d 1294 (4th Dept 2014)

Primary Residential Custody of Child to Mother Affirmed

Supreme Court denied the father's motion, made during the pendency of the divorce action, to modify the existing custody arrangement by transferring primary residential custody of the parties' child from the mother to him. The Appellate Division affirmed. Although it was undisputed that there were sufficiently changed circumstances to justify the court's reexamination of the stipulated custody arrangement, there was a sound and substantial basis in the record for the court's determination that it was in the child's best interests to retain primary residential custody with the mother. The court did not err in summarily denying the father's motion to reduce his child support obligation because the father failed to provide an updated statement of net worth in support of his motion. Given the wealth disparity between the father and mother, the court did not err in awarding counsel fees to the mother.

Rech v Rech, 122 AD3d 1286 (4th Dept 2014)

Sole Custody of Child to Father Affirmed

Family Court awarded petitioner father sole custody of the subject children. The Appellate Division affirmed.

The court's determination in awarding sole custody to the father was based upon a first-hand assessment of the parties' credibility and was entitled to great weight. Here, there was a sound and substantial basis in the record for the court's determination. Even assuming, arguendo, that the court erred in transferring temporary custody of the children to the father, reversal was not required because the court subsequently conducted the requisite evidentiary hearing and the record of the hearing fully supported the court's determination.

Matter of Van Court v Wadsworth, 122 AD3d 1339 (4th Dept 2014)

Relocation in Children's Best Interests

Family Court awarded petitioner father custody of the subject children. The Appellate Division affirmed. The court properly determined that relocation was in the best interests of the children after considering all the relevant factors, even though the father had already relocated with the children. While removal of the children without seeking permission should not be encouraged, an award of custody must be based upon the children's best interests and not a desire to punish a recalcitrant parent. Although the mother made a showing of changed circumstances and there were several factors that favored an award of custody to her, a review of all the relevant factors supported the court's determination. Even assuming, arguendo, that the children were aggrieved by the issue raised on appeal by the AFC, the issue was not properly before the Court because the AFC did not file a notice of appeal.

Matter of Baxter v Borden, 122 AD3d 1417 (4th Dept 2014)

FAMILY OFFENSES

No Reasonable Excuse For Respondent's Default

Family Court denied respondent father's motion to vacate a five-year order of protection entered after an inquest conducted upon his default. The Appellate Division affirmed. Respondent failed to show a reasonable excuse for his failure to appear at the hearing on the family offense petition. His excuse that he forgot and thought his employer would remind him was unreasonable. Respondent was present during the scheduling of the

hearing and it was his responsibility to appear. The court properly denied respondent's counsel's request for an adjournment because counsel failed to offer a reasonable excuse for respondent's absence.

Matter of Jenny F. v Felix C., 121 AD3d 413 (1st Dept 2014)

Family Court Properly Denied Mother's Application to Add Child as a Person Protected by an Order of Protection

In May 2013, the petitioner filed a family offense petition in Family Court seeking an order of protection against the respondent for herself and the parties' child, alleging that the respondent had committed a multitude of family offenses against her and the child. On the date of the fact-finding hearing, the respondent, who had previously appeared in the proceeding with counsel, did not appear. The Family Court then conducted an inquest, at which the petitioner testified and requested a finding of aggravating circumstances and a five-year order of protection for herself and the child. Thereafter, the Family Court determined that the respondent's conduct constituted harassment in the second degree and criminal mischief in the fourth degree, but that the evidence did not support a finding of aggravating circumstances. The court then issued an order of protection, upon default, directing that the respondent stay away from the petitioner and refrain from any type of communication with her for a period of one year, up to and including July 30, 2014. The order of protection did not include the child as a protected person, but did specify that it was subject to any future orders of custody and/or visitation involving the child. The petitioner argued that the Family Court erred in declining to find that aggravating circumstances existed, and erred in declining to add the child as a person protected by the order of protection. It was noted that the petitioner's appeal from the order of protection had not been rendered academic, even though it had expired by its terms. The Appellate Division agreed with the Family Court's determination that the evidence did not support a finding of aggravating circumstances as defined in FCA § 827 which delineates the specific situations under which such finding can be made (*see* FCA § 827[a][vii]). In addition, the Family Court providently determined, in effect, that the evidence did not support the petitioner's application to add the child as a person protected by the order. Although a Family Court may require a petitioner or

respondent to “observe such other conditions as are necessary to further the purposes of protection” (*see* FCA § 842[k]), here, there was no evidence that adding the child to the order was needed to further the purposes of protection, and there was no testimony adduced establishing that the addition of the child to the order was reasonably necessary to protect him from future family offenses.

Matter of Leon v. Landaverde, 121 AD3d 898 (2d Dept 2014)

Dispositional Hearing Was Not Required Prior to Issuing Final Order of Protection

The petitioner commenced a family offense proceeding against her adult son, the respondent, who had been living with her since he was a child. After a hearing, the Family Court found that the respondent had committed the family offenses of menacing in the third degree, harassment in the second degree, assault in the third degree, reckless endangerment in the second degree, and criminal mischief in the fourth degree. Based on those findings, the court entered a final order of protection against the respondent with a duration of one year. The respondent appealed. Upon reviewing the record, the Appellate Division found that a fair preponderance of the credible evidence adduced at the fact-finding hearing supported a finding that the respondent committed the family offenses of menacing in the third degree (*see* PL § 120.15), and harassment in the second degree (*see* PL § 240.26 [3]). However, contrary to the Family Court's finding, the evidence proffered at the hearing was insufficient to establish by a fair preponderance of the evidence that the respondent committed the family offense of assault in the third degree. No evidence was presented that petitioner's physical condition was impaired, and there was insufficient evidence to establish that she suffered substantial pain (*see* PL (see §§ 120.00 (1); 10.00 [9])). Further, the evidence proffered at the hearing was insufficient to establish by a fair preponderance of the evidence that the respondent committed the family offense of reckless endangerment in the second degree, since the respondent's actions did not create a substantial risk of serious physical injury or the family offense of criminal mischief in the fourth degree, as there was no proof of property damage (*see* PL §§ 120.20; 145.00). The Appellate Division, however, concluded that the terms and duration of the order of protection were

nevertheless appropriate. Also, contrary to the respondent's contention, the Family Court's decision not to hold a dispositional hearing prior to issuing the final order of protection did not require reversal. The respondent's allegation that the court improperly threatened a less favorable disposition if he insisted upon such a hearing was not supported by the record.

Matter of Campbell v Campbell, 123 AD3d 1123 (2d Dept 2014)

Appeal Deemed Moot

Family Court granted petitioner aunt and the children an order of protection against the mother due to the mother's harassing phone calls and removal of one of the pets from the aunt's house. The mother appealed but by the time the matter was heard, the order of protection had expired and therefore the appeal was deemed moot.

Matter of Lina Y. v Audra Z., 122 AD3d 1084 (3d Dept 2014)

Family Court Properly Determined it Had Subject Matter Jurisdiction to Hear Proceeding

Family Court determined that the intermittent dating relationship between two 13-year-olds, who began dating several years earlier, qualified as an intimate relationship within the definition of FCA § 812, and granted the mother's petition for an order of protection on behalf of her daughter against respondent boyfriend. The Appellate Division affirmed. It is well established that a parent has standing to commence an order of protection on behalf of his or her child. Additionally, the court had subject matter jurisdiction to hear this case. The parties' boyfriend-girlfriend relationship began in the fifth grade, when the relationship was defined by the parties' holding hands, kissing and exchanging texts. During the sixth grade, respondent made the daughter to touch his penis and he put his hand down her shirt to touch her breasts without her permission. The parties' did not date for most of the seventh grade, but they began talking again and in the eighth grade, the daughter agreed to have oral sex with respondent if he left her alone. Later that year they met again at which time there was sexual intercourse even though the daughter testified she asked him to stop. Based on the evidence presented, the court properly determined it had jurisdiction to hear and issue a decision

in this matter.

Matter of Samantha I. v Luis J., 122 AD3d 1090 (3d Dept 2014)

Standard of Proof on Willful Violations Changed to "Beyond a Reasonable Doubt"

Family Court determined, upon clear and convincing evidence, that respondent had willfully violated a two-year order of protection, ordered a mental health evaluation of respondent and sentenced her to 75 days in jail. While the Appellate Division affirmed the order, it recognized that case law regarding the level of proof necessary for willful violations of an order of protection was inconsistent, due in part to statutory silence as to the quantum of proof in such proceedings. Where individuals such as respondent were found to have violated an order of protection, and given the punitive remedy of incarceration with no means to shorten the term of incarceration through extinguishment of the contempt, the standard of proof to establish violation should not be clear and convincing evidence but beyond a reasonable doubt. Upon a review of the record and the evidence presented in this case, the Appellate Division determined the court had the necessary proof to find respondent had, beyond a reasonable doubt, willfully violated the order of protection. Furthermore, the Appellate Division directed that all third department cases indicating otherwise should not be followed.

Matter of Stuart LL. v Amy LL., 123 AD3d 218 (3d Dept 2014)

JUVENILE DELINQUENCY

Court Properly Adjudicated Respondent a JD Rather Than Ordering ACD

Respondent was adjudicated a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would have constituted the crime of criminal possession of stolen property in the fifth degree and placed her with ACS for 12 months. The Appellate Division affirmed. The court properly exercised its discretion in adjudicating respondent a JD and placing her with the Close to Home Program rather than ordering an ACD. It was the least restrictive alternative consistent with respondent's needs and the community's need for

protection. Respondent had already received an ACD and a juvenile delinquency adjudication as the results of prior arrests. Also, respondent had a history of violent and aggressive behavior, she demonstrated a pattern of truancy and absconding from placements, her home life was unstable and lacking proper adult supervision, and she was not compliant with taking prescribed psychiatric medications.

Matter of Shayolanda M., 120 AD3d 1130 (1st Dept 2014)

Court Properly Denied Respondent's Motion to Convert JD to PINS Proceeding

Respondent was adjudicated a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would have constituted the crime of unauthorized use of a vehicle in the third degree and placed her on probation for 12 months. The Appellate Division affirmed. The court properly exercised its discretion in denying her motion to convert the JD petition into a PINS petition. Respondent's misconduct went far beyond disobedience to her parents. She drove her parents car without permission, endangering others, including her passenger. Respondent also used alcohol and marijuana and her behavior at home and at school was generally poor, notwithstanding some degree of improvement.

Matter of Nazarary McK., 123 AD3d 480 (1st Dept 2014)

Respondent Not Barred from Invoking Defense of Justification Based on Self-defense

The record revealed that the complainant, who was then in eighth grade, wore his mother's wig to school as a joke. As he entered the school cafeteria during the breakfast period and sat down with friends, a group of seventh-grade students including the respondent, who was then 12 years old, began taunting the complainant with various anti-homosexual/transgender epithets. About 20 seconds later, the complainant stood and approached the respondent's neighboring table and demanded that the boys stop their taunting. One of the respondent's companions stood and confronted the complainant and, as they argued, the respondent approached. Thereafter, the situation quickly degenerated into a physical fight, during which the right lens of the complainant's glasses broke

and cut his right eye, leaving him blinded in that eye despite multiple surgeries attempting to restore his sight. The presentment agency thereafter filed a petition alleging that the respondent committed acts which, if committed by an adult, would have constituted the crimes of assault in the third degree as a hate crime, menacing in the third degree as a hate crime, and criminal mischief in the fourth degree as a hate crime. At the fact-finding hearing, a surveillance video, on which most of the incident was captured, was admitted into evidence. After the fact-finding hearing, the Family Court found that the respondent had committed acts which, if committed by an adult, would have constituted the crimes enumerated in the petition, concluding that the presentment agency had disproved, beyond a reasonable doubt, the defense of justification based upon self-defense. The Appellate Division found that the Family Court's rejection of the respondent's defense of justification based upon self-defense was contrary to the weight of the evidence. The surveillance video recording that was entered into evidence showed that, after the respondent allegedly threatened to knock the complainant's glasses off, he extended his hands, palms up, in a peacemaking gesture and then withdrew for approximately 20 seconds. Accordingly, the evidence did not support the conclusion that the respondent, by his conduct or by verbal threats, was the initial aggressor. Moreover, the evidence also showed that the respondent withdrew from the confrontation in any event. Contrary to the presentment agency's contention, under these circumstances, the respondent was not barred from invoking the defense of justification based on self-defense (*see* PL § 35.15 [1] [b]). The evidence further demonstrated that, when the respondent again approached the complainant, who was then engaged in a verbal altercation with the respondent's companion, the complainant, not the respondent, initiated the physical confrontation by pushing the respondent's left shoulder and grabbing his shirt. Although the video recording showed that the respondent then briefly raised his fist, and then lowered it, it was the respondent's companion who hit the complainant while the respondent grabbed the complainant's backpack in an apparent attempt to pull him away. Only when the complainant turned to the respondent and grabbed him by the neck with both hands did the respondent throw a wild punch toward the complainant's face. The fight then continued, mainly outside the scope of the surveillance camera, but the video recording showed that the complainant had the respondent in a headlock for several seconds while the

respondent struggled to break free. The Appellate Division further found that the respondent's verbal threat to knock the complainant's glasses off was not sufficient to sustain a charge of menacing, and although the complainant testified that he was afraid of the respondent, the video recording did not establish that the complainant had a well-founded fear of physical injury. The video recording showed that the complainant was both larger and several inches taller than the respondent and, more importantly, that the complainant repeatedly re-engaged both the respondent and his companion despite ample opportunities to retreat safely, and that the complainant was the primary physical aggressor. Accordingly, the charge of menacing was also dismissed.

Matter of Mondy E., 121 AD3d 785 (2d Dept 2014)

Person in Need of Supervision Was the More Appropriate Adjudication

In this juvenile delinquency proceeding, the Appellate Division exercised its discretion under FCA§ 311.4 (2) and modified the order of disposition to adjudicate the respondent a person in need of supervision rather than a juvenile delinquent. The proceeding was commenced as a result of an argument between the respondent, then age 14, and his mother in their home. After the argument escalated, the respondent punched and damaged a television that belonged to his mother. The respondent had no prior delinquency finding, and he accepted responsibility for his actions. Further, the respondent's mother made great efforts to play an active and positive role in the respondent's home and school life. While the record showed that the respondent had a history of curfew violations and several school absences, it further demonstrated that he was making significant improvements in these areas by the close of the dispositional hearing. The Appellate Division noted that the Family Court could have required the Probation Department or another agency to monitor the respondent's school attendance and curfew without adding the stigma of a juvenile delinquent adjudication. The Appellate Division concluded that under the particular circumstances of this case, the respondent should have been adjudicated a person in need of supervision rather than a juvenile delinquent.

Matter of Dylan P., 121 AD3d 1118 (2d Dept 2014)

Limited Scope of Cross-Examination of Witness at Suppression Hearing Was Proper

Contrary to the respondent's contention, the Family Court did not improvidently exercise its discretion in restricting the scope of his counsel's cross-examination of a police witness at the suppression hearing, as the challenged line of questioning was of limited relevance. Further, the Family Court's denial of the respondent's counsel's application to give a summation at the conclusion of the suppression hearing was not error (*see* FCA §§ 330.2; 342.1 [5]). Under these circumstances, the respondent was properly adjudicated a juvenile delinquent.

Matter of Courtland H., 122 AD3d 736 (2d Dept 2014)

DNA Evidence Not Subject to Suppression

The respondent appealed from an order of disposition which adjudicated the respondent a juvenile delinquent, upon a finding, made after a hearing, that the respondent committed acts which, if committed by an adult, would have constituted the crimes of attempted sexual misconduct, attempted criminal sexual act in the third degree, attempted criminal sexual act in the first degree, sexual misconduct, criminal sexual act in the third degree, criminal sexual act in the first degree, sexual abuse in the third degree, and sexual abuse in the first degree, and placed him on probation for a period of 18 months. Contrary to the respondent's contention, he was not deprived of his right to due process because of an unreasonable delay in prosecution. Further, when read in its entirety, the petition, including the supporting depositions, contained nonhearsay allegations which, if true, established every element of the charged crimes and the respondent's commission thereof (*see* FCA § 311.2[3]). The Family Court did not err in failing to suppress a buccal swab and the DNA evidence developed therefrom. The respondent's mother was notified approximately 24 hours prior to the administration of the buccal swab. Further, the respondent and his mother voluntarily appeared for the buccal swab. Significantly, the respondent did not challenge that the presentment agency established probable cause to obtain the buccal swab for the purpose of DNA testing. Accordingly, under the particular circumstances of this case, reversal was not required. As to the legal sufficiency of the evidence, the Appellate Division found that it was legally sufficient to establish, beyond a reasonable doubt, that the respondent

committed acts, which, if committed by an adult, would have constituted the subject crimes.

Matter of Dayshawn S., 122 AD3d 748 (2d Dept 2014)

Gun Discarded During Pursuit Not Subject to Suppression

Police officers testified at a *Mapp/Dunaway* hearing that on New Year's Eve, December 31, 2012, they each heard multiple gunshots in what was a known high-crime neighborhood; that minutes later, the respondent was observed four or five blocks from the area of the gunshots with a male companion; that the respondent held a bulge that was visible at his waistband which, according to one of the officers, was consistent with the carrying of a gun; that upon seeing the police officers, the respondent immediately fled; that the respondent held his waistband with his right hand as he ran; and that the respondent threw a firearm to the ground with his right hand during the police officers' pursuit. The hearing court expressly credited the testimony of the testifying officers and concluded that, under the circumstances of the case, the officers had reasonable suspicion to believe that a crime had been committed or was about to be committed, and denied suppression. The Appellate Division agreed with the Family Court that the pursuit of the respondent was justified. Accordingly, the gun he discarded during the pursuit was not subject to suppression as a result of any unlawful police conduct. A dissenting justice opined that the police lacked reasonable suspicion to pursue the respondent, and that the gun evidence should therefore have been suppressed, noting that the police officers did not mention the gunshots in their stop and frisk report, did not report the gunshots when they heard them, and did not receive any 911 calls or other complaints about gunshots, strongly suggesting that, in the minds of the police officers, the gunshots did not factor into their decision to approach the respondent and his companion.

Matter of Ya-Sin S., 122 AD3d 751 (2d Dept 2014)

Police Officers Had Probable Cause to Arrest Juvenile for Criminal Possession of a Weapon

Contrary to the respondent's contention, the testimony of police officers at the suppression hearing that the respondent was observed at approximately 8:05 p.m. on May 15, 2013, while it was still light outside, walking

towards them on a public sidewalk holding a sweatshirt in such a way that the butt of a gun was partially visible, was not so implausible as to be unworthy of belief. Moreover, the hearing testimony did not support the respondent's contention that the officers' testimony was a fabrication that was patently tailored to nullify constitutional objections. Thus, upon crediting the officers' testimony, the Family Court correctly concluded that the police had probable cause to arrest the respondent for committing an act which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree (*see* PL 265.03). Accordingly, the Family Court properly denied the respondent's motion to suppress physical evidence.

Matter of Jashaun A., 122 AD3d 833 (2d Dept 2014)

Officers Responding to Dispute at Restaurant Had Common-Law Right to Inquire of Respondent

The respondent appealed from an order of disposition of the Family Court, which, adjudicated the respondent a juvenile delinquent, upon a fact-finding determination, made upon his admission that he committed an act which, if committed by an adult, would have constituted the crime of criminal possession of a weapon in the second degree, and placed him on probation for a period of 18 months. The evidence adduced at the suppression hearing established that, in response to a radio call reporting a dispute inside of a McDonald's restaurant involving a group of people, a marked police van and an unmarked police vehicle responded to the scene. Immediately after arriving, police officers observed the respondent as he left the McDonald's restaurant with several people. The officers testified that the respondent repeatedly turned around as he walked away from the restaurant, and looked toward the marked police van. The arresting officer further testified that he believed that the bulge in the respondent's right jacket pocket was a firearm because of the weight of the object, the way the respondent held onto the object, and the manner in which the respondent pressed his right arm against his side. Contrary to the respondent's contention, the totality of the circumstances gave the officers a founded suspicion that criminal activity was afoot, which gave rise to the officers' common-law right to inquire. While the respondent was correct that, initially, he had a constitutional right to be let alone and to refuse to respond to police inquiry, under the circumstances presented here, the arresting officer's

conduct in following and stepping in front of the respondent in an attempt to engage him was a continuation of the officer's own common-law right to inquire, not a seizure. Hence, the conduct of the arresting officer in this regard was not improper. Moreover, although the respondent continued to walk away from the arresting officer, the arresting officer kept pace with him, and ultimately approached him until they were only an arm's length away from each other. As such, it was proper for the officer to request that the respondent make his hands visible as a reasonable precautionary measure. Additionally, from this close proximity, the officer observed what appeared to be the outline of a firearm in the respondent's right jacket pocket, which appeared to be pointed at the officer, placing him in fear for his safety. The officer thus properly conducted a limited pat-down search to determine if the bulge was a weapon. The presentment agency further established that the arresting officer, upon patting down the outside of the respondent's right jacket pocket, and feeling the outline of a gun, had a reasonable suspicion that the respondent was armed and, thus, properly frisked the respondent, whereupon he recovered a loaded handgun (*see* CPL 140.50 [3]).

Matter of Shariff H., 123 AD3d 714 (2d Dept 2014)

Respondent's Right to a Speedy Trial Not Violated

The Family Court properly denied the respondent's motion to dismiss the petition on the grounds that the length of time that elapsed between the commencement of his dispositional hearing and its conclusion violated his statutory right to a speedy dispositional hearing under FCA § 350.1, and violated his due process rights under the New York Constitution. Contrary to the respondent's contention, FCA § 350.1 does not provide him with a remedy, inasmuch as it sets time limits only for the commencement of the dispositional hearing, not its completion. As to his argument that the delay violated his due process rights, the Appellate Division did not find that dismissal of the petition was warranted on the ground of a due process violation. Further, the Family Court did not improvidently exercise its discretion in declaring a mistrial and recommencing the dispositional hearing when the case was reassigned to it upon the retirement of the prior presiding judge (*see* FCA § 340.2).

Matter of Richard R., 123 AD3d 1043 (2d Dept 2014)

Juvenile Delinquency Adjudication Reversed Due to Facially Invalid Petition

Family Court adjudicated respondent a juvenile delinquent based on a finding that he committed an act that, if committed by an adult, would constitute the crimes of robbery in the second degree and petit larceny. The Appellate Division reversed and agreed with respondent that the petition was jurisdictionally defective. A juvenile delinquency petition must contain "a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the crime charged and respondent's commission thereof". Here, the petition alleged respondent, while assisted by two other males, forcibly stole two cell phones and a wallet from the victim and in support of the petition, petitioner included, among other things, an incident report and a sworn deposition from the victim. The deposition stated the perpetrator was a male wearing a "blue winter coat with white stripes on the left sleeve". Additionally, a surveillance video camera showed four individuals walking on the sidewalk and one of them was identified by respondent's school principal, as the respondent. However, neither the deposition nor the surveillance video established that respondent was the individual who committed the act. Furthermore, the victim's letter to the investigating officer identifying respondent as the person wearing the blue jacket with white stripes on the sleeve was unsigned and unsworn, and thus did not constitute a nonhearsay identification of respondent as the person who committed the acts, thereby rendering the petition facially invalid.

Matter of Jayquan VV., 123 AD3d 1416 (3d Dept 2014)

JD Adjudication Affirmed

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that he committed acts that, if committed by an adult, would constitute the crimes of forcible touching and endangering the welfare of a child. The Appellate Division affirmed. Even assuming, arguendo, that respondent preserved the issue of legal sufficiency, the evidence was legally sufficient. Upon the exercise of its independent power of factual review, the Appellate Division was satisfied that the court properly credited the testimony of the two principal witnesses and that the court's findings were not against

the weight of the evidence. Respondent's contention that the court's extensive questioning of the witnesses deprived him of a fair trial was not preserved and was without merit. His contention that he was entitled to a new trial because his appearance ticket did not conform to the Family Court Act was unpreserved and was not reached in the interests of justice. Respondent was not denied effective assistance of counsel.

Matter of Shannon F., 121 AD3d 1595 (4th Dept 2014)

JD Adjudication Modified to PINS Finding

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that she committed an act that, if committed by an adult, would constitute the crime of assault in the third degree. The Appellate Division modified by substituting the JD adjudication for a finding that respondent was a PINS. The court abused its discretion in denying respondent's motion, pursuant to the Family Court Act, to substitute a finding that she was a PINS for a finding that she was a JD, inasmuch as she demonstrated no danger to the community at large and could have received the same placement under a PINS disposition. Under the circumstances here, respondent's conduct was consistent with PINS behavior, not with juvenile delinquency.

Matter of Kayla F., 122 AD3d 1399 (4th Dept 2014)

JD Adjudication Based Upon Manslaughter Affirmed

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that he committed an act that, if committed by an adult, would constitute the crime of manslaughter in the second degree. The Appellate Division affirmed. There was legally sufficient evidence to support the finding that respondent caused the death of the victim. The evidence established that, while participating in a "game" called "knockout," respondent and his accomplice each struck a blow to the victim's head. Respondent's accomplice struck the first blow and respondent struck the second blow, after which the victim collapsed. The Medical Examiner opined to a reasonable degree of certainty that the second blow was the cause of death.

Matter of Ander G., 122 AD3d 1447 (4th Dept 2014)

PATERNITY

Presumption of Legitimacy Overcome

Family Court denied respondent's request for a genetic marker test and declared him to be the father of the subject child. The Appellate Division affirmed. The presumption of legitimacy was overcome by the mother's testimony that she and her ex-husband, though still married at the time of the child's birth, had been separated for several years, and that she was in an exclusive sexual relationship with respondent during the relevant period prior to the child's birth. The evidence at the hearing established that the six-year-old child considered respondent to be her father, that she missed him, and that she had formed a familial bond with several of his relatives, including his two other children, whom she identified as her brother and sister. The evidence also established that the child called respondent daddy, he introduced her to relatives as his daughter, and he did not dissuade her from forming relationships with his other children and relatives. Thus, the court properly concluded that the best interests of the child required that respondent be equitably estopped from denying paternity.

Matter of Kerry Ann P. v Dane S., 121 AD3d 470 (1st Dept 2014)

Petitioner Equitably Estopped From Asserting Paternity

Family Court granted respondent Kwamel B.'s motion to dismiss the petition of John S. for a declaration of paternity of the subject child. The Appellate Division affirmed. The court properly determined that it was in the child's best interests to equitably estop petitioner from asserting paternity. The evidence showed that petitioner failed to establish any kind of meaningful bond during the child's life, that the child recognized Kwamel as his father, that Kwamel had been the child's primary caretaker, and that it would be detrimental to the child's best interests to disrupt his close relationship with Kwamel. Petitioner's contention that he promptly asserted his paternity rights was without merit, given his unexplained delay in bringing the petition for over two years after he met the child and was told he was the child's father.

Matter of John S. v Imari W., 121 AD3d 538 (1st Dept

2014)

Mother Failed to Show Harm to Child if Paternity Proceeding Went Forward

Family Court declared petitioner to be the biological father of the subject child. The Appellate Division affirmed. Respondent mother initially consented to the DNA test that found a 99.99% probability that petitioner was the child's biological father. Thereafter, respondent raised an equitable estoppel defense based upon the presence of another man in the child's life who acted as a "father figure" to the child. The AFC did not assert equitable estoppel on the child's behalf, because the child would not be harmed, whatever the test found. It was in the child's best interests to deny respondent's motion, without a hearing, because there was no evidence that the child would suffer irreparable loss of status, destruction of family image, or other harm to his physical or emotional well-being if the proceeding went forward. Because a DNA test with at least a 95% probability of paternity created a rebuttable presumption of paternity, the DNA test results were properly admitted into evidence and relied upon by the Referee.

Matter of Kerry S. v Avela B., 122 AD3d 429 (1st Dept 2014)

Paternity Proceeding Barred By Res Judicata

A paternity proceeding was commenced in Alabama by the mother, on behalf of the subject child, against respondent. Respondent appeared and underwent a DNA test but the mother failed to appear and later moved to dismiss her petition with prejudice, which the court granted. Ten years later, the mother again initiated a paternity proceeding in New York, pursuant to UIFSA, against Respondent. Respondent moved for summary judgment, seeking dismissal of the petition on the grounds of res judicata and/or equitable estoppel. Family Court dismissed respondent's equitable estoppel defense and on appeal from this order, the Appellate Division affirmed. Respondent again moved for summary judgment requesting dismissal and argued the proceeding was barred by res judicata and equitable estoppel. Family Court denied the relief and this time sanctioned respondent's counsel in the amount of \$1,000 for frivolous motion practice. After a hearing, Family Court issued an order of filiation against respondent and

awarded the mother child support. Respondent appealed, arguing that the court failed to apply the full faith and credit clause and the principles of res judicata based on the Alabama order. The Appellate Division reversed. Res judicata bars successive litigation based on the same transaction if there is a judgment on the merits and one against whom the doctrine is invoked is the same party or was in privity with that party. Here, the Alabama proceeding involved the same parties and the same, underlying issues. Additionally, the Alabama court had personal jurisdiction over respondent. Furthermore, the imposition of sanctions against respondent's counsel was unwarranted.

Matter of Starla D. v Jeremy E., 121 AD3d 1221 (3d Dept 2014)

PINS

Required Notice Not Provided as Mandated by FCA § 735 (g) (ii) (b)

In this appeal, the respondent argued that petition to adjudicate him a person in need of supervision (hereinafter PINS) failed to include a notice mandated by FCA § 735 (g) (ii) (B). The Appellate Division noted that the respondent did not appeal from the order of fact-finding and disposition which adjudicated him to be a PINS, and raised this issue for the first time on appeal from a subsequent order. Nevertheless, the Appellate Division reached the merits and agreed with the respondent that the required notice was not provided. Accordingly, the order appealed from was reversed, the order of fact-finding and disposition was vacated, and the proceeding was dismissed .

Matter of Sage G., 121 AD3d 985 (2d Dept 2014)

TERMINATION OF PARENTAL RIGHTS

No Exceptional Circumstances to Warrant Extension of Suspended Judgment

Family Court terminated respondent mothers' parental rights to the subject children upon a finding that she violated the terms of a suspended judgment. The Appellate Division affirmed. A preponderance of the evidence supported the finding that it was in the

children's best interests to terminate the mother's parental rights and free the children for adoption by the foster mother, who had cared for them for more than five years. The record did not present extraordinary circumstances that would have warranted an extension of the suspended judgment. The mother violated the terms of the suspended judgment by testing positive for drugs, and she failed to demonstrate that she had made significant progress in overcoming her drug problem.

Matter of Justin S., 121 AD3d 405 (1st Dept 2014)

Father's Parental Rights Properly Terminated

Family Court terminated respondent father's parental rights upon a finding of permanent neglect and transferred custody and guardianship of the children to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The record demonstrated by clear and convincing evidence that the agency made diligent efforts to encourage and strengthen respondent's parental relationship with her children by referring her to individual counseling and programs devoted to parenting skills, domestic violence and anger management. However, respondent failed to plan for the children's future by refusing to undergo a mental health evaluation or to comply with random drug and alcohol testing. There was a lack of evidence that respondent obtained adequate housing or stable employment. Respondent also frequently failed to attend scheduled visitation with the children.

Matter of Edgardo Yadiel N., 121 AD3d 410 (1st Dept 2014)

Respondent's Medical Records Admissible Under Business Records Exception to Hearsay Rule

Family Court, upon a finding of mental illness, terminated respondent father's parental rights to the subject child and committed the child's custody and guardianship to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence, including the uncontroverted expert testimony of the court-appointed psychologist who testified that respondent suffered from schizophrenia, supported the determination that respondent was presently and for the foreseeable future unable to provide proper and adequate care for the child.

Respondent's medical records containing diagnoses were admissible under the business record exception to the hearsay rule, as germane to his treatment.

Matter of Skylar F., 121 AD3d 611 (1st Dept 2014)

Despite Mother's Completion of Programs She Had no Empathy or Understanding of Children

Family Court terminated respondent mother's parental rights upon a fact-finding determination that she permanently neglect the subject children and transferred custody and guardianship of the children to petitioner and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The record demonstrated by clear and convincing evidence that the agency made diligent efforts to reunite the mother with the children but the mother, while completing a multitude of programs and engaging in mental health therapy, never developed the ability to empathize with or understand the children. Also, the mother exposed her then three-year-old son to the home birth of a sibling, rather than comply with the agency's direction to return him to the foster home before the birth. The court properly found, by a preponderance of the evidence, that it was in the best interests of the children to terminate the mother's parental rights to free them for adoption by their foster mother.

Matter of Natina F., 122 AD3d 437 (1st Dept 2014)

Although Mother Substantially Completed Services She Failed to Gain Insight Into Her Parenting Problems

Family Court terminated respondent mother's parental rights upon a fact-finding determination of permanent neglect and transferred custody and guardianship of the children to petitioner and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that respondent failed during the relevant time period to plan for the future of the children, despite petitioner's diligent efforts to encourage and strengthen the parental relationship. The children came into care after they and their older sibling left home to stay with relatives, and disclosed that there was domestic violence in the home committed by the father of one of the children and that they feared for their safety. A finding of neglect was

entered against respondent based upon her excessive corporal punishment against the children and her failure to protect them from excessive corporal punishment inflicted by the father and from the children witnessing domestic violence by the father against her. Although respondent substantially completed required services in her service plan, she failed over the following eight years to acknowledge the issues that caused the children to flee her home in fear or to gain insight into her parenting problems. A preponderance of the evidence demonstrated that it was in the best interests to free the children for adoption. Although one child's placement was unclear, a suspended judgment was not required because the record demonstrated that respondent had made no progress in attaining the ability to care for him.

Matter of Leroy Simpson M., 122 AD3d 480 (1st Dept 2014)

Motion to Vacate TPR Order Properly Denied

Family Court denied respondent mother's motion to vacate an order of fact-finding and disposition determining that she permanently neglected the subject child, terminated her parental rights, and committed the custody and guardianship of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. Respondent failed to provide either a reasonable excuse for her failure to appear at the hearings or a meritorious defense to the permanent neglect petition. Respondent's documentation did not demonstrate that her appointment with the Department of Homeless Services was scheduled in advance or that it could not have been rescheduled. In any event, it did not excuse her from notifying her attorney or the court, especially since she knew the date of the fact-finding hearing two months earlier. The mother's partial compliance with requisite services was insufficient to establish a meritorious defense.

Matter of Zion Nazar H-S., 122 AD3d 486 (1st Dept 2014)

Father's Abandoned Child

Family Court determined that respondent abandoned the subject child. The Appellate Division affirmed. Clear and convincing evidence, including respondent's testimony, established that he abandoned his child. His incarceration

during the relevant period did not excuse him from his parental obligations. Petitioner agency was not required to show diligent efforts to reunite the family or assist respondent in establishing contact and there was no evidence that the agency discouraged respondent from having contact.

Matter of Zayvion Jamel Lewis S., 122 AD3d 546 (1st Dept 2014)

TPR Based Upon Mental Illness Affirmed

Family Court, upon a fact-finding determination that respondent father was unable to care for his child presently and for the foreseeable future due to mental illness. The Appellate Division affirmed. The finding that the father suffered from a mental illness was supported by clear and convincing evidence. As a result of respondent's mental illness, he was presently and for the foreseeable future unable to provide adequate care for the child and the child would be in danger of becoming a neglected child if he was ever placed in respondent's care. Respondent had faced an almost life-long battle with mental illness, as documented in his medical records and as testified to by the expert psychologist. He had spent the last several years in a psychiatric facility, his illness at times manifested in angers, and the evidence established that he had no insight into his psychiatric problems and inability to care for the child. The expert's reliance on extensive medical records and clinical interview were a sufficient basis for the proffered opinions.

Matter of Donovan Jermaine R., 123 AD3d 593 (1st Dept 2014)

Mother's Consistent Visitation with Child Did Not Preclude Finding of Permanent Neglect

The evidence at the hearing showed that for a period of one year following the child's placement with the agency, the mother failed to establish a separate residence, and complete domestic violence and other counseling. She thereby failed to plan for the child's future by taking steps to correct the problems that had caused the child's removal and were preventing the child from being returned to her care. The mother's consistent visitation with the subject child did not preclude a finding of permanent neglect in light of her failure to gain insight

into the behavior that caused the child's removal and plan for the child's future. Furthermore, the Family Court correctly determined that it was in the best interests of the child to terminate the mother's parental rights and free the child for adoption.

Matter of Tatiana E., 121 AD3d 682 (2d Dept 2014)

Record Did Not Support Mother's Contention That She Was Physically Unable to Attend Visits

The petitioner established, by clear and convincing evidence, that it exercised diligent efforts to encourage and strengthen the parental relationship by developing a service plan with the mother, which included therapy and psychiatric treatment, parenting skills courses, and regular visitation, and referring her to parenting programs, repeatedly encouraging her to attend those programs and therapy and to follow through with the service plan, and monitoring her progress (*see* SSL § 384-b [7] [f]). The mother's contention that the petitioner failed to create a service plan tailored to her needs was without merit in light of her failure to consistently attend the mental health treatment services and her failure to follow through with the petitioner's repeated referrals to parenting programs. The petitioner also established that, despite its diligent efforts, the mother failed, for a period of more than one year, to maintain contact with or plan for the future of the subject child, failed to consistently attend visitation sessions with the subject child, and otherwise failed to comply with the service plan (*see* SSL § 384-b [7] [c]). The record did not support the mother's contention that she was physically unable to attend the visits. Accordingly, the Family Court properly found that the mother permanently neglected the subject child and properly concluded that it was in the child's best interests to terminate the mother's parental rights and transfer custody and guardianship of the child to the petitioner for the purpose of adoption.

Matter of Javon D.B., 121 AD3d 781 (2d Dept 2014)

Father Complied with Service Plan but He Lacked an Understanding of Children's Special Needs

The Family Court properly determined that the best interests of the children would be served by terminating the father's parental rights and freeing the children for adoption by their respective therapeutic foster parents.

The entry of a suspended judgment was not warranted despite the father's compliance with his service plan, because, among other things, he lacked an understanding as to the children's special needs, and because the children had bonded with their respective foster parents, who competently and consistently provided for their specialized needs and who wished to adopt them. The father's contention that the children should have been placed in the custody of one of his sisters was without merit. There is no presumption that the children's best interests will be better served by return to a family member, and here it was not in the children's best interests to do so. Contrary to the contentions of the intervenor paternal aunt, the Family Court providently denied her petition for custody of the children because custody with her would not have been in the best interests of the children. The intervenor paternal aunt failed to preserve for appellate review her contention that the Family Court should have ordered an updated forensic evaluation.

Matter of Nyasia E.R., 121 AD3d 792 (2d Dept 2014)

Father Failed to Submit to a Mental Health Evaluation and Required Psychotherapy Despite Petitioner's Diligent Efforts

The Family Court properly determined that there was clear and convincing evidence that the father permanently neglected the subject children by failing, for one year following the children's entrance into foster care, to plan for their return. The record established that the petitioner made diligent efforts to help the father comply with his service plan, which required him to submit to a mental health evaluation, to complete a course of psychotherapy, to complete parenting skills training, to complete a domestic violence program, and to maintain regular visits with one of the children. The record established that at the time of the filing of the petition, the father still had not submitted to a mental health evaluation and had not completed the required psychotherapy. Accordingly, the Family Court properly determined that termination of the father's parental rights and transferring custody and guardianship of the children to the petitioner for the purpose of adoption was in the children's best interests.

Matter of Dianelys T.W., 121 AD3d 801 (2d Dept 2014)

Record Supported Family Court's Determination of Permanent Neglect

The Family Court properly determined, based on clear and convincing evidence, that the mother permanently neglected the subject child by failing, for one year following the child's placement into foster care, to plan for her return. The evidence at that fact-finding hearing established that the petitioner made diligent efforts to help the mother comply with her service plan. At the time the instant petition was filed, the mother still had not found suitable housing or planned for the return of the child. The court also properly determined that termination of the mother's parental rights was in the child's best interests. Further, there was no merit to the mother's contention that she was not afforded the effective assistance of counsel in the Family Court.

Matter of Kaydance H.G., 122 AD3d 630 (2d Dept 2014)

Mother Failed to Present a Reasonable Excuse for Her Default

The mother appealed from an order of fact-finding and disposition of the Family Court, which, upon an order of the same court, denied her motion to vacate her default in appearing at a fact-finding hearing, terminated her parental rights and transferred custody and guardianship of the subject child to the petitioner for the purpose of adoption. The Appellate Division affirmed the order of fact-finding and disposition. Contrary to the mother's contention, the Family Court providently exercised its discretion in denying her motion to vacate her default in appearing at the fact-finding hearing. The mother failed to present a reasonable excuse, as the record revealed that, although the door to the courtroom where the hearing was conducted may have been inadvertently locked when the mother first arrived, she was advised by cell phone shortly thereafter by her legal representative that the door was unlocked, and that she should return immediately for the hearing. The record further revealed that the court granted the mother a brief recess to appear, but she failed to appear at any point during the hearing, without any explanation for her failure to return to the courtroom. Since the mother failed to establish a reasonable excuse for her default, the Appellate Division did not consider the issue of whether she presented a potentially meritorious defense to the allegations in the

petition.

Matter of Stephen Daniel A., 122 AD3d 837 (2d Dept 2014)

Mother Failed to Plan for Child's Return Despite Diligent Efforts by the Petitioner

The Family Court, after fact-finding and dispositional hearings, found that the mother permanently neglected the subject child, terminated the mother's parental rights, and transferred the guardianship and custody of the subject child to the petitioner for the purpose of adoption.

Contrary to the mother's contention, she was not deprived of her right to be present when the Family Court denied her attorney's application to delay the start of the fact-finding hearing until the mother's arrival. The mother's attorney could not offer an excuse for the mother's absence at the beginning of the fact-finding hearing. The mother did not call her attorney, her guardian ad litem, the court, or the agency to state that she would be delayed. Moreover, the mother was afforded due process, because both her attorney and her guardian ad litem were present during the direct testimony of the witness who testified in the mother's absence. In addition, after the mother appeared late, the court afforded the mother's attorney an opportunity to conduct cross-examination. Upon further review of the record, the Appellate Division found that the Family Court properly determined that there was clear and convincing evidence that the mother permanently neglected the subject child, by failing for a year following the child's entrance into foster care, to plan for his return. The record revealed that the petitioner made diligent efforts to help the mother comply with her service plan, which required the mother to submit to a mental health evaluation, seek recurrent mental health services, attend parenting skills classes, and have regular supervised visitation with the child. Additionally, at the time of the filing of the petition, the mother still had not participated in mental health services, and, supervised visitation with the child had been terminated two years prior, because the mother had a physical altercation with the foster mother and agency worker in the child's presence. There was no merit to the mother's contention that the foster care mother thwarted the mother's reunification with the subject child.

Matter of Sean P.H., 122 AD3d 850 (2d Dept 2014)

Mother Failed to Adequately Plan for Child's Future Despite Diligent Efforts by Petitioner

The Family Court properly found that the mother permanently neglected the subject child. The petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [7]). These efforts included scheduling and facilitating visitation, referring the mother to parenting classes, monitoring the mother's participation in the mental health treatment program she selected, meeting with the mother to review the service plan, and explaining the importance of complying with the plan. The mother argued that the petitioner failed to specifically tailor its efforts to her individual situation because it did not take sufficient steps to ensure that she obtained a mental health evaluation and treatment. However, the mother's caseworker testified at the hearing that the mother wished to have her own attorney, rather than the caseworker, provide her with a referral for mental health evaluation and treatment. The evidence presented at the hearing established that the mother did in fact obtain an evaluation and schedule appointments at the mental health treatment program that she selected, but did not keep her appointments for treatment, and maintained that the treatment was unnecessary. The mother also failed to complete parenting classes and maintain regular visitation with the child. Under these circumstances, the Family Court properly found that, despite diligent efforts by the petitioner, the mother failed to adequately plan for the subject child's future, and, therefore, permanently neglected her. The Family Court also properly determined that termination of parental rights, rather than the entry of a suspended judgment, was in the best interests of the subject child (*see* FCA § 631).

Matter of Dayyana M., 122 AD3d 854 (2d Dept 2014)

Mother Substantially and Continuously Maintained Contact with Her Children and Complied Substantially with Service Plan

The petitioner established, by clear and convincing evidence, that it exercised diligent efforts to encourage and strengthen the parental relationship by monitoring the mother's progress while she resided with the children in residential drug treatment programs, counseling her with regard to the importance of remaining in treatment, providing referrals for housing, drug treatment, and

mental health services when the mother returned to the community, and arranging for visitation after the children were removed from the mother's care (*see* SSL § 384-b [7] [f]). However, the petitioner failed to establish, by clear and convincing evidence, that during the relevant statutory period, the mother failed substantially and continuously to maintain contact with the children or plan for their future, although physically and financially able to do so (*see* SSL § 384-b [7] [a]). The record revealed that the children came into the care and custody of the county's Department of Social Services on June 30, 2011. On July 26, 2011, the mother entered a residential drug treatment program and, thereafter, sometime prior to September 19, 2011, the children were discharged to the mother at the treatment program on a trial basis. The mother remained in residential drug treatment with the children until the Family Court, in April 2012, permitted her to return to leave with the children and to enter outpatient treatment. On June 6, 2012, the children were removed from the mother's care based on a report that the mother may have been using substances again. After the children were removed, the mother consistently visited the children. Although the mother relapsed on one occasion during the relevant statutory period, did not comply with the court's mandate that she attend substance abuse therapy sessions at a 90% rate, and inconsistently attended appointments for mental health treatment, it cannot be said, on this record, that the mother failed to plan for the return of the children. The mother maintained consistent contact with the children, and the record demonstrated a very strong and loving bond between the mother and the children. The record further demonstrated that the mother planned for the children's future by substantially complying with the terms of prior court orders, including participating in residential and outpatient drug treatment programs and completing important parenting classes. Thus, the record supported the conclusion that the mother planned for the future of the children to the extent she was physically and financially able to do so (*see* SSL § 384-b [7] [a]). Under these circumstances, the Family Court erred in adjudicating the children permanently neglected by the mother and terminating her parental rights.

Matter of Winstoniya D., 123 AD3d 705 (2d Dept 2014)

Record Supported Finding That Respondents Permanently Neglected Their Children

In September and December of 2010, the petitioner agency filed 3 petitions alleging that the respondent parents permanently neglected their 3 children pursuant to SSL § 384-b. Here, the credible evidence showed that, contrary to her claims, the mother failed to consistently visit the children and did not comply with her mental health treatment program. The mother's behavior in court and her repeated hospitalizations belied her claim that she was taking her medication on a consistent basis. Further, the father admittedly continued to take drugs and did not complete a drug rehabilitation program, which was the main component of mandatory services that he was required to complete as part of the plan to reunite with the children. Additionally, the agency's credible evidence showed that the father's visitation with the children was inconsistent. Therefore, the Appellate Division affirmed the Family Court's finding of permanent neglect as to both parents. In addition, the Appellate Division affirmed the Family Court's determination that it was in the children's best interests to terminate the parental rights of the respondents and free the children for adoption by their respective foster mothers (*see* FCA § 631).

Matter of Joshua E.R., 123 AD3d 723 (2d Dept 2014)

Record Supported Finding of Severe Abuse

The Family Court properly granted a petition for a determination that the subject child was a severely abused child under SSL § 384-b (8), and thereupon to terminate the father's parental rights and free the child for adoption. The petitioner established the father's severe abuse of the child by providing evidence of his conviction of murder in the second degree for killing the child's mother and his subsequent imprisonment. The petitioner also established that reasonable efforts to return the child to the father's home were excused as being detrimental to the best interests of the child (*see* SSL § 384-b [8] [a] [iii], [iv]; PL § 125.25). Moreover, the Family Court providently exercised its discretion in rejecting the father's application for an adjournment pending the outcome of his criminal appeal. An order terminating parental rights on the ground that such parent was convicted of murdering the other parent may be affirmed notwithstanding the

pendency of an appeal challenging such conviction.

Matter of Rodney J.R., 123 AD3d 727 (2d Dept 2014)

Record Did Not Support Termination of Mother's Parental Rights

Here, the preponderance of the evidence supported a finding that the mother failed to comply with certain conditions set forth in the suspended judgment. However, the evidence did not support the Family Court's conclusion that it was in the best interest of the child to terminate the mother's parental rights. Although the child had spent several years in foster care, the child was not residing in a preadoptive home, and there was no indication that termination would increase the child's opportunities for adoptive placement. Further, the testimony elicited at the hearing demonstrated that the mother genuinely loved the child and that there was a strong bond between the child and his mother. The mother faithfully adhered to the twice-a-week visitation schedule. She acted appropriately with the child during those visits, and the child enjoyed the visits. A caseworker characterized the relationship between the mother and the child as positive. Moreover, the mother took steps to address her drug dependency, and expressed a willingness to participate in another drug program. Under these circumstances, the determination to terminate the mother's parental rights was not in the best interests of the child. Accordingly, the order was reversed and the matter was remitted to the Family Court for a new dispositional hearing to determine the best interests of the child.

Matter of Phoenix D.A., 123 AD3d 823 (2d Dept 2014)

Petition to Restore Parental Rights Properly Dismissed

A petition for modification of a dispositional order so as to restore parental rights may only be filed where all the conditions of FCA § 635 have been met. FCA § 635 (d) provides, in relevant part, that the child must remain under the jurisdiction of the Family Court and must not have been adopted. Here, the older child was no longer under the jurisdiction of the Family Court as she was over the age of 21 (see FCA §§ 1055 [e]; 1087 [a]). Additionally, the other child had been adopted. Accordingly, the Family Court properly dismissed the

petition.

Matter of Kimberly J.G., 123 AD3d 937 (2d Dept 2014)

Record Supported Termination of Mother's Parental Rights and Adoption by Foster Parent

The Family Court properly found that the mother permanently neglected the subject child (*see* SSL § 384-b [7] [a]). Contrary to the mother's contention, the petitioner established by clear and convincing evidence that it made diligent efforts to assist the mother in maintaining contact with the child and planning for the child's future. These efforts included scheduling and facilitating visitation, developing a service plan, making referrals for mental health evaluation and treatment programs, making referrals for parenting skills and anger management classes, advising the mother as to how to obtain housing and a source of income, encouraging the mother to comply with the service plan, and warning the mother of the consequences of noncompliance (*see* SSL § 384-b [7] [f]). Despite these efforts, the mother failed to plan for the child's future by failing to complete the necessary programs and by failing to take steps to secure appropriate housing or a source of income (*see* SSL § 384-b [7] [c]). To the extent that the mother did attend any parenting or anger management classes, she never gained insight as to why she needed to attend those classes. Accordingly, the Family Court correctly found that the child was permanently neglected. Moreover, based on the evidence adduced at the dispositional hearing, the Family Court properly determined that the best interests of the child would be served by terminating the mother's parental rights and freeing the child for adoption by her foster parent, with whom she had been residing since birth.

Matter of Davina R.M.R.L., 123 AD3d 1126 (2d Dept 2014)

TPR in Child's Best Interests

Family Court adjudicated the subject child to be permanently neglected and terminated respondent mother's parental rights. The Appellate Division affirmed. The agency made diligent efforts to encourage and strengthen the parental bond between respondent and the child. Respondent, who was 15-years-old when the child was born, argued that the services provided were

inadequate because of her youth. She stated she should have been placed in foster care with the child since her mother, the subject child's maternal grandmother, failed to provide transportation and other support which interfered with her progress. However, since respondent was not the subject of this proceeding, the court properly concluded that there was no statutory authority by which respondent could have been placed in foster care in a permanent neglect proceeding. Even if such placement had been feasible, it was respondent's own actions, including ongoing substance abuse, truancy, criminal conduct and refusal to abide by household rules, which would have made placement of respondent in foster care not feasible nor in the subject child's best interests. There was clear and convincing evidence that despite the services provided by the agency, respondent failed to plan for the future of the child. Among other things, she enrolled in but failed to complete parenting classes, she continued to have contact with the child's father despite mutual orders of protection issued against them due to domestic violence, she would not live with her mother and step-father and failed to find stable housing. She was suspended from school after being found to be in possession of another student's prescription medication and was caught shop-lifting which led to criminal charges against her. Additionally, she was discharged unsuccessfully from outpatient substance abuse treatment after repeatedly testing positive for marijuana. Although respondent did visit with the child regularly, she failed to comply with requirements, such as bringing a diaper bag and never progressed beyond supervised visitation. It was in the child's best interests to terminate respondent's parental rights. Even though respondent did take some steps towards maturity she failed to maintain stable relationships and her housing situation had not improved. Shortly before the dispositional hearing, she married a 20-year-old man after a brief relationship and moved with him into his parent's home, but the marriage fell apart within a few months based on allegations she had been unfaithful to her husband. She was asked to leave her husband's home and moved back in with her mother. The subject child, who was two-years-old by the this time, had been living with the foster parents since he was a few months old and they wished to adopt him.

Matter of Carter A., 121 AD3d 1217 (3d Dept 2104)

Sound and Substantial Basis to Terminate Parental Rights on the Grounds of Mental Illness

Family Court terminated respondent father's parental rights on the basis of his mental illness. The Appellate Division affirmed. The agency demonstrated that the father is and for the foreseeable future would be, unable to provide proper and adequate care for the subject child by reason of his mental illness. Respondent's claim that the testimony by the agency's expert witness, a licensed psychologist, lacked proper foundation was waived since he had not raised this objection during the hearing. The expert witness testified that his interview with the father was as important in the formulation of his opinion as the background information he had obtained. The expert explained the father would be unable, at the present time or in the foreseeable future, to care for the child without placing her at risk for abuse. The father suffered from multiple conditions, including a longstanding personality disorder, delusional disorder and other specified disruptive impulse control conduct disorder and his lack of anger control presented a risk to the child's welfare. Additionally, the father's anger contributed to his delusions and extreme behavior. He also showed poor judgment by continuing to reside with his current wife, despite the fact she had fractured the child's wrist. Since there was no competing expert witness and giving due deference to the court's credibility assessments, there was a sound and substantial basis in the record for the court's decision.

Matter of Kaitlyn X., 122 AD3d 1170 (3d Dept 2014)

Sound and Substantial Basis in the Record to Terminate Respondent's Parental Rights

Family Court terminated respondent mother's parental rights on the grounds of permanent neglect. The Appellate Division affirmed. Here, the permanent neglect petition was filed based on respondent's refusal to comply with the Article 10 dispositional order which directed respondent to undergo a mental health evaluation, receive treatment and engage in family counseling. The agency showed, by clear and convincing evidence, it made diligent efforts to strengthen the parent-child relationship. Specifically a two-step plan was developed towards reunification. The first step was to evaluate the child's educational needs while maintaining the mental health needs of respondent and the child and ensuring continuation of the parental relationship through visitation. The second step required, among other things, respondent's attendance and participation in the follow-up

meetings to discuss the recommendations made and to develop a service plan. However, respondent continuously refused to acknowledge the reasons which led to the child's placement in the agency's custody and failed to plan for the child's future. Respondent failed to engage in the necessary services and while she attended most of the supervised visits with the child, she refused to discuss evaluative recommendations and refused to participate in the recommended counseling including family therapy, or mental health treatment either for herself or the child. It was not in the child's best interest to grant respondent a suspended sentence. Although respondent and the child enjoyed a loving relationship, respondent failed to take advantage of the numerous services offered to her and made minimal efforts to resolve the issues that led to the child's removal from her care. Furthermore, the child had been in his therapeutic foster home for over four-years and his special needs were being addressed. Considering the circumstances, there was sound and substantial basis in the record to terminate respondent's parental rights.

Matter of Samuel DD., 123 AD3d 1159 (3d Dept 2014)

Mother's Failure to Recognize Danger Posed to Subject Children Due to Sexual Abuse of One Child Supports Termination of Her Parental Rights

Family Court had a sound and substantial basis in the record to terminate respondent mother's parental rights on the grounds of permanent neglect. Here, the children were removed due to sexual abuse of one of the three subject children by the father of one of the children. Respondent lost custody due to her inability to recognize the danger posed by the father, and she was unable to understand and address the children's issues. Additionally, she lack suitable housing and was unemployed. The agency fulfilled its obligation to engage in diligent efforts to reunite respondent with her children. Although there were times when there was a lack of coordination and unclear communication between the agency and the service provider, especially with regard to whether respondent's out-of-state aunt was a suitable placement option for the children, and there was turnover in the personnel working with respondent, the court appropriately found these incidents were due to length of time the children had spent in the agency's care. The record showed that despite the services provided to respondent, she made little or no progress in addressing

the issues that prevented the children's return. Additionally, it was in the children's best interests to terminate respondent's parental rights. They had made considerable improvement while in foster care and had bonded with their foster family, who wished to adopt them.

Matter of Destiny EE., 123 AD3d 1165 (3d Dept 2014)

Agency Required to Provide Appropriate, Not Better, Services to Encourage and Strengthen Parent-Child Relationship

Family Court terminated respondent mother's parental rights on the grounds of permanent neglect. The Appellate Division affirmed. The court properly found the agency had made diligent efforts to encourage and strengthen the parent-child relationship. The agency created a plan which focused on three main issues which prevented reunification; respondent's aggressive behavior, poor parenting skills and her tendency to engage in relationships which included domestic violence, and offered services to address these problems. Although respondent attended parenting and anger management classes, she later yelled at her child during supervised visitation and her anger related behavior towards some of the adults resulted in police involvement. Additionally, despite enrolling and participating in a domestic violence class, respondent continued to involve herself with men who had a history of domestic violence towards her and other women. Furthermore, although respondent enrolled in the Family Court drug treatment program, she tested positive for marijuana multiple times. The agency referred her to an inpatient drug program but respondent denied having a problem and left the program early, against medical advice. Respondent later completed an inpatient program and entered outpatient treatment, but was eventually dropped from the program due to poor attendance. She failed to continue with mental health counseling after she finished the inpatient program. Even though she enrolled in another outpatient program, she had not completed it by the time the petition was filed. While respondent argued that the agency failed to refer her to services to address her past sexual abuse, the social worker testified that the outpatient drug treatment program was designed for people with dual diagnosis of substance abuse and emotional trauma. Finally, the court did not deny respondent due process by precluding her expert witness since the admissibility of expert testimony

is generally left to the trial court's discretion. Although the mother's expert would have testified about a more current method of dual diagnosis treatment, this information wasn't relevant to due diligence since the agency's obligation was to provide the mother with appropriate, not better, services.

Matter of Angelo AA., 123 AD3d 1247 (3d Dept 2014)

DSS Made Requisite Diligent Efforts

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of proving by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and children. Among other things, petitioner referred the father for mental health counseling, parenting classes, and a drug and alcohol evaluation, but he did not pursue these opportunities. DSS also assisted the father with obtaining housing, arranged for weekly visitation with the children prior to the father's incarceration, and arranged for one visit while he was incarcerated. DSS had previously paid the father's rent for an entire year even though he was working at the time and one of the children was receiving Social Security disability benefits. Although DSS may have contemplated adoption as an eventual outcome for the children shortly after they were removed from the father's care, DSS was allowed to evaluate and plan for other potential future goals where reunification with a parent was unlikely.

Matter of Anastasia S., 121 AD3d 1543 (4th Dept 2014)

Mother Did Not Waive Right to Appeal by Stipulating to Permanent Neglect

Family Court terminated respondent mother's parental rights on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner agency. The Appellate Division affirmed. Although the mother stipulated to the finding of permanent neglect, she did not thereby waive her right to appeal from the court's determination terminating her parental rights. However, the evidence supported the court's determination that termination was in the child's best interests. The mother's short-term progress was not sufficient to warrant the prolongation of the child's unsettled familial status.

Matter of Taleeya M., 121 AD3d 1583 (4th Dept 2014)

TPR Based Upon Father's Mental Illness Affirmed

Family Court terminated the parental rights of respondent father on the ground of mental illness. The Appellate Division affirmed. Petitioner presented clear and convincing evidence establishing that the father was presently suffering from a mental illness that was manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if the child was placed in the custody of the father, the child would be in danger of becoming a neglected child. The court-appointed psychologist testified that the father had schizophrenia, which caused him to experience hallucinations that interfered with his ability to care for the child. The father failed to take his medication, which further exacerbated his symptoms. The psychologist's testimony was supported by the testimony of the father's caseworker who supervised his visitation with the child.

Matter of Star C., 121 AD3d 1597 (4th Dept 2014)

Court Did Not Abuse Discretion in Refusing to Extend Suspended Judgment

Family Court terminated the parental rights of respondent mother. The Appellate Division affirmed. Petitioner met its burden of proving by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and child. The mother was in foster care at the time of the child's birth pursuant to a PINS order and, among other things, petitioner provided the mother with referrals to parenting classes and with placements that would have given her needed structure. The mother did not comply with her service plan and she fled placements on a number of occasions, each time missing visits with the child. The court did not abuse its discretion in refusing to enter a suspended judgment. The mother's negligible progress in addressing the issues that necessitated the child's removal did not warrant the prolongation of the child's unsettled familial status.

Matter of Sapphire A.J., 122 AD3d 1296 (4th Dept 2014)

TPR Based Upon Mother's Mental Illness Affirmed

Family Court terminated the parental rights of respondent mother on the grounds of mental illness and permanent neglect. The Appellate Division modified by dismissing the petition based upon permanent neglect. Petitioner presented clear and convincing evidence establishing that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child. The court-appointed psychologist testified that the mother suffered from paranoid schizophrenia, which caused her to have delusions and grossly erroneous beliefs. According to the psychologist, the mother was unable to care for the child because of her illness and, because of the child's special needs, he would be in even greater danger if placed with the mother. Although a psychologist who had met with the mother once, testified that she saw no evidence that the mother suffered from a major mental illness, she also testified that she was not advocating that the child be placed with mother presently because there were issues. The mere possibility that the mother's condition might improve in the future was insufficient to vitiate the court's determination. The court erred in terminating the mother's parental rights on the ground of permanent neglect. The mother could not be mentally ill to a degree warranting termination of her parental rights and at the same time be found to have failed to plan for the child's future although physically and financially able to do so.

Matter of Joseph E.K., 122 AD3d 1373 (4th Dept 2014)

Court's Determination to Revoke Suspended Judgment Reversed

Family Court revoked a suspended judgment and terminated the parental rights of respondent mother. The Appellate Division reversed. Petitioner established by a preponderance of the evidence that the mother failed to comply with the terms of a suspended judgment. Nevertheless, based upon new facts and allegations that the Appellate Division could properly consider, it was not clear that termination of the mother's parental rights was in the children's best interests.

Matter of Darlenea T., 122 AD3d 1416 (4th Dept 2014)

TPR Based Upon Mother's Mental Illness Affirmed

Family Court terminated the parental rights of respondent mother with respect to the subject children on the ground of mental illness. The Appellate Division affirmed. The appeal was dismissed insofar as it concerned the older child because she had attained the age of majority. Petitioner presented clear and convincing evidence establishing that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the remaining children. The testimony of petitioner's witnesses, including a psychologist, established that the mother was so disturbed in her behavior, feeling, thinking and judgment that, if the remaining children were returned to her, they would be in danger of becoming neglected children.

Matter of Delia S., 122 AD3d 1416 (4th Dept 2014)

