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Legal Strangers: Redefining Who Is a 'Parent'*

Alton L. Abramowitz, New York Law Journal**

The genesis of this article can best be stated as a need for the definition of "parent" to quickly evolve under New York law in order to protect same-sex couples and their children, so that their families enjoy the same fundamental rights throughout the marriage and in the unhappy event of a divorce.

As the U.S. Supreme Court stated in [Lehr v. Robertson](#), 463 U.S. 248, 256 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983):

The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.

At common law, "parentage was derived from two events, a child's birth to its mother and the mother's marriage to a man. Children born out of wedlock had only one legal parent, their birth mother. Recognizing the many advantages that flowed to children from having two parents, legislatures enacted filiation or paternity proceedings to confer legal parentage on non-marital genetic fathers, a status which carries support and other obligations." [In re Adoption of Sebastian](#), 25 Misc.3d 567, 879 NYS2d 677, 679 (Sur. Ct. 2009). Under New York Law, parentage is determined from either a biological connection to a child or the adoption of a child. New York does not place any restrictions on who can adopt.

However, there is nothing currently protecting non-biological caregivers who have raised a child as part of a same-sex couple and assumed parental roles and responsibilities since the child's birth. The definition of parent has not evolved in this state to protect the rights of same-sex unmarried couples and their children in terms of protections such as affording the non-biological, but intended parent, the right to seek custody and visitation of the child in line with the best interests of the child. Without these protections, these relationships—and the best interest of these children—are unguarded and potentially at the mercy of the biological parent.

Insight From 'Suarez'

A recent Court of Appeals decision, while not directly addressing the issue of same-sex parents, may provide insight into how the law may evolve when addressing such vital matters—or, more likely, will highlight the need for legislative action to provide a statutory avenue to custody for non-biological parents in same-sex and non-marital relationships in the same manner as grandparents.

CONTENTS

News Briefs	Page	5
Recent Books & Articles	Page	8
Federal Cases	Page	11
Court of Appeals	Page	13
Appellate Divisions	Page	14

In *Suarez v. Williams*, No. 198, NYLJ 1202745008614 at *1 (Dec. 16, 2015), the Court of Appeals awarded custody of a child to his paternal grandparents, despite the biological mother's objection.

In *Suarez*, the child lived with his paternal grandparents from the time he was 10 days old until he was almost 10 years old. The father had moved out of the state, and the mother lived in close proximity to the grandparents; in order to facilitate the mother's relationship with the child, each time the grandparents changed their residence, they assisted a parallel move by the mother so that she could be close to the child. At one point, a court awarded primary physical custody to the mother, in an action of which the grandparents were unaware; however, despite this order, the child never lived with the mother. Instead, she continued to live with the grandparents. Significantly, as the court specifically noted, the mother had given the grandparents the authority to make decisions on behalf of the child, and that authority was not limited in either scope or duration; and, importantly, with her authorization, the grandparents did in fact make decisions for the child, while keeping the mother apprised of their actions.

Judge Leslie E. Stein, writing for the Court of Appeals, held that the mother had "relinquished" control over the child to the grandparents, despite having regular contact with the child. The court found that because the mother "has effectively transferred custody of the child to the grandparents for a prolonged period of time, the circumstances rise to the level of extraordinary, as required under our law to confer standing upon the grandparents to petition the courts to formally obtain legal custody." Upon finding that standing existed, the court further found that the role played by the grandparents in the child's life warranted an award of custody to them.

In her careful and thorough analysis, Judge Stein discussed the variety of factors for determining whether "extraordinary circumstances" exist to grant standing to grandparents as codified under Domestic Relations Law (DRL) §72(2). Those factors include "the length of time the child has lived with the grandparent, the quality of that relationship, and the length of time the biological parent allowed such custody to continue without trying to assume the primary parental role." While DRL §72 exclusively addresses the rights of grandparents, could a court

decide similarly, were it given identical facts, with respect to a non-biological parent in a same-sex couple, regardless of whether that couple were married?

Same-Sex Relationships

Because only one partner in a same-sex couple may have a biological connection to the child, the non-biological parent can only establish parentage through second parent adoption. Without the protection of a biological or adoptive connection, the rights of these parents are often neglected in favor of the biological parent, regardless of whether the non-biological parent has raised the child since birth and had a meaningful relationship with the child, and regardless of the effect the severance of the relationship would have on the child.

For all intents and purposes, the non-biological parent is in an analogous position, vis-à-vis the child, as grandparents such as those in *Suarez*, who had legal and physical custody of the child in practice, but (until the Court of Appeals determination), not under the law, and so that "in practice" a custodial relationship could be trumped, at any point, by the biological parent. Grandparents, however, have a statutory basis to seek custody pursuant to DRL §72; non-biological parents in same-sex, non-marital relationships do not yet have such a statutory avenue to seek custody.

A recent Fourth Department case highlights the plight of non-biological parents in same-sex relationships, and underscores the need for an expansion of the law to address such situations. In [*Matter of Barone v. Chapman-Cleland*](#), 129 A.D.3d 1578 (4th Dept. 2015), the petitioner had sought custody of, and visitation with, the son of her former same-sex partner, to whom she was never married. The Family Court, Chautauqua County (Judith S. Claire, J.) by Order dated Jan. 24, 2014, denied the petition, and an appeal was taken by the attorney for the child, who argued that "the standing accorded to parents should extend to those who have a recognized and operative parent-child relationship, regardless of their sexual orientation." Id at 1579.

The Fourth Department held that the petitioner "failed to sufficiently allege any extraordinary circumstances to establish her standing to seek custody as a non-biological, nonadoptive parent." The court further stated, "the Court of Appeals recently reiterated that a non-biological, nonadoptive parent does not have standing to seek visitation when a biological parent who

is fit opposes it, and that equitable estoppel does not apply in such situations even where the nonparent has enjoyed a close relationship with the child and exercised some control over the child with the parent's consent." (citing *Matter of Palmatier v. Dane*, 97 A.D.3d 864, 948 N.Y.S.2d 181 [3d Dept. 2012]; see *Debra H v. Janice R.*, 930 N.E.2d 184 [2010].

The Barone court continued, "[w]e reiterate that, as the Court of Appeals unequivocally stated 'any change in the meaning of parent under our law should come by way of legislative enactment rather than judicial revamping of precedent,'" citing *Debra H.*

Other States

Some states do recognize that a non-biological and non-adoptive parent can seek custody and visitation with the child, including: Alaska, Arkansas, Arizona, Colorado, Connecticut, Indiana, Kentucky, Maine, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Washington, West Virginia, and Wisconsin. (See, National Center for Lesbian Rights, Legal Recognition of LGBT Families Fact Sheet, www.nclrights.org).

Other states, such as Rhode Island and Maryland, have recognized that their paternity statutes apply equally to women. See, *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007). Still other states have enacted statutes that give a non-biological parent who has assumed a parental role in the child's life a right to seek custody and visitation. For example, the District of Columbia in D.C. Code §16-831.01 defines de facto parent as an individual:

Who: (i) lived with the child in the same household at the time of the child's birth or adoption by the child's parent; (ii) has taken on full and permanent responsibility as the child's parent; and (iii) has held himself or herself out as the child's parent with the agreement of the child's parent or if there are 2 parents, both parents; or (B) Who: (i) has lived with the child in the same household of at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody; (ii) has formed a strong emotional bond with the encouragement and intent of the child's parent that a parent-child relationship forms between

the child and the third party; (iii) has taken on full and permanent responsibilities as the child's parent; and (iv) has held him or herself out as the child's parent with the agreement of the child's parent, or if there are 2 parents, both parents.

Definition Must Evolve

New York has had legislation in the works for several years to protect the right of same-sex couples to preserve their relationships with children born of their relationships, whether the parents are married or not and regardless of whether there is a biological connection to the child. See The Child-Parent Security Act (A.4319/Paulin) (S.02765/Hoylman). The purpose of the bill is to repeal section §73 and Article 8 of the New York Domestic Relations Law, as they relate to the "legitimacy of children born by artificial insemination and surrogate parenting contracts."

Domestic Relations Law §73 legitimizes children born by artificial insemination, speaks only of children born to a heterosexual marriage, using the terms "husband" and "wife." The Child Parent Security Act uses terms such as "intended parents". Under Article 8 of the Domestic Relations Law, paid surrogate parenting contracts are deemed contrary to public policy and are void and unenforceable. The Child-Parent Security Act seeks to clearly define who a child's parents are and also would legalize compensated surrogacy arrangements in the state to afford same-sex couples the right to plan a family without having to leave the state to take advantage of surrogacy laws elsewhere. New York is one of only a handful of states that does not permit paid surrogate parenting contracts.

The right of non-biological parents in unmarried same-sex couples to be called a parent is something the recently deceased Judge Judith S. Kaye addressed in *Alison D. v. Virginia M.*, *Alison D. v. Virginia M.*, 572 N.E.2d 27 [1991], almost 25 years ago. While *Alison D* dealt with visitation, not custody, the same arguments regarding the protection of the best interest of the child also apply to custody determinations. The definition of parent—and, therefore, who may petition a court for custody and visitation of a child—must be broadened to include same-sex intended parents who are not married to one another. As Judge Kaye stated in her dissent in *Alison D*:

The majority insists, however, that, the word

'parent' in this case can only be read to mean biological parent; the response 'one fit parent' now forecloses all inquiry into the child's best interest, even in visitation proceedings. We have not previously taken such a hard line in these matters, but in the absence of express legislative direction have attempted to read otherwise undefined words of the statute so as to effectuate the legislative purposes. The Legislature has made plain an objective in section 70 to promote 'the best interest of the child' and the child's 'welfare and happiness' (Domestic Relations Law §70.) Those words should not be ignored by us in defining standing for visitation purposes—they have not been in prior case law.

The time has come for the Legislature to act to broaden the definition of parent to fit our ever evolving society. Now that same-sex couples have been granted the long overdue right to marry, same-sex couples must also be granted the right to be parents, with all of the same rights and responsibilities of heterosexual parents, regardless of the ways in which their families are created. Otherwise, the children of such families will continue to be relegated to an uncertainty regarding the permanency of their relationship with a non-biological parent which their counterparts do not face.

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***Alton L. Abramowitz is a senior partner at Mayerson Abramowitz & Kahn. He completed his service last month as chair of the Family Law Section of the New York State Bar Association. Atty K. Bruggemann, an attorney with the firm, assisted in the preparation of this article.*

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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

On March 2, 2016, the Appellate Divisions in the 1st, 2nd, 3rd and 4th Judicial Departments, together with their respective Attorney for the Child programs, co-sponsored *New Child Welfare Legislation 2016, an Introduction to Three New Legislative Bills: (1) Requirement that AFCs consult with all children over the age of 10 of their right to attend permanency hearings; (2) the rights of non-respondent parents to participate in Article 10 proceedings; and (3) all Article 10 Orders of Protection will now be entered in the statewide registry.* The presenter was Margaret A. Burt, Attorney at Law. This seminar was held at the Office of Attorneys for Children, Appellate Division Second Judicial Department, Brooklyn, New York. This program, together with accompanying handouts, can be viewed online. Please contact Gregory Chickel at gchickel@nycourts.gov to obtain access to our website.

On March 4, 2016, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored *Strong Families New York City, Improving Well-being and Permanency Outcomes for Children and Families Involved in the Foster Care System.* The speakers were Andrew White, Deputy Commissioner, Policy,

Planning and Measurement Division, Administration for Children's Services; and Ina Mendez, Assistant Commissioner, Office of Title IV-E Implementation and Support, Administration for Children's Services. This seminar was held at the Kings County Family Court, Brooklyn, New York.

On February 25, 2016, the Appellate Division, Second Judicial Department, the Office of Attorneys for Children, the New York County Family Court, the Richmond County Family Court, the Children's Law Center, the Adoptions/TPR Subcommittee of the New York City Family Court Child Protective Advisory Committee, and the Child Welfare Court Improvement Project co-sponsored *Are you still my family? Post-Adoption Sibling Visitation.* The speaker was Dawn J. Post, Esq., Co-Borough Director, the Children's Law Center. This seminar was held at the Richmond County Family Court, Staten Island, New York.

On February 4, 2016, the Appellate Division, Second Judicial Department, the Office of Attorneys for Children, the Kings County Family Court DMR Committee, and the Child Welfare Court Improvement Project co-sponsored *The Consequences of Immigration: How Immigration Policies and Procedures Impact upon Article 10 Proceedings.* The speakers were Lee Wang, Esq. and Genia Blaser, Esq., the Immigration Defense Project. This seminar was

held at the Kings County Family Court, Brooklyn, New York.

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

THIRD DEPARTMENT NEWS

Liaison Committees

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts will be meeting on Thursday, May 5, 2016 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. If you have any questions about the meetings, kindly contact your liaison committee representative, whose name can be found in our Administrative Handbook, pp. 18-22, <http://www.nycourts.gov/ad3/oac/AdministrativeHandbook>

Training News

Training dates for Spring 2016 CLE programs are listed below and agendas are available on the Third Department OAC web page located at: <http://www.nycourts.gov/ad3/oac/SeminarSchedule.html>.

Introduction to Effective Representation of Children (for new and prospective panel members)

Thursday, April 14 & Friday, April 15, 2016

Ballroom 84, East Avenue Inn & Suites
Rochester, NY

Trauma Informed Practice: A Changing & Supportive Approach to Advocacy

Friday, April 29, 2016

Dean Alexander Moot Court Room
Albany Law School - Albany, NY

Topics will include the effect of trauma on children involved in high-conflict custody cases and vicarious trauma experienced by Family Court practitioners. Nationally recognized faculty will offer practice techniques and methods for recognizing the effects of and how to effectively deal with this prevalent and difficult issue.

The John T. Hamilton, Jr., Esq. Award for Excellence in the Legal Representation of Children will be presented during the luncheon portion of the program.

Children's Law Update 2016

Friday, May 6, 2016
Crowne Plaza Resort
Lake Placid, NY

Child Sex Abuse: Competency & Credibility of Children
(collaborative seminar with the Fourth Judicial Department, Office of Attorneys for Children)

Friday, June 3, 2016
Room 184
Cornell Law School - Ithaca, NY

PINS Practice Manual

The 2016 editions of the Legal Aid Society, Juvenile Rights Practice, PINS Proceedings Practice Manual and Juvenile Delinquency Disposition and Appeals Manual together with practice manuals for other types of proceedings, are now available on the OAC web page located at

<http://www.nycourts.gov/ad3/Members-Only/JRPPpracticeManuals.html>, To obtain the access codes, you may email ad3oac@nycourts.gov.

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, Administrative Forms, Court Rules, Frequently Asked Questions, seminar schedules and agendas, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The *News Alert* feature currently includes information regarding Language Line, a telephonic interpreter service for use by panel members.

FOURTH DEPARTMENT NEWS

Appeals

Substitution Requests - When sending Linda Kostin a letter requesting substitution on an appeal, you must "cc" parties' counsel and pro se parties. With

your letter of substitution, you also must include copies of the notice of appeal, affirmation of service if you served a notice of appeal, order appealed from, and decision, if any.

Motion Fees - AFC are exempt from motion fees, see Matter of Celene C.P., 204 AD3d 1072; CPLR 8017.

Late Spring Seminar Schedule

Fundamentals of Attorney for the Child Advocacy Seminars

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

April 14-15, 2016

Fundamentals of Attorney for the Child Advocacy
East Avenue Inn & Suites
Rochester, NY

May 4, 2016

Topical – Domestic Violence
Center for Tomorrow
Buffalo, NY

June 3, 2016

Child Sex Abuse Seminar: Competency and Credibility of Children
Cornell University (closed)
Ithaca, NY

Tentative Fall Seminar Schedule

September 29, 2016

Update

Embassy Suites
Syracuse, NY

October 27, 2016

Update

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.

October 13-15, 2016

Fundamentals of Attorney for the
Child Advocacy
Albany, 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.

RECENT BOOKS AND ARTICLES

ATTORNEY FOR THE CHILD

Kristine Simpson, *Mississippi's Guardian Ad Litem Need Clarification of Their Role and Responsibilities*, 84 Miss. L. J. 1065 (2015)

CHILD WELFARE

Allison Newcombe, *An Advocate's Guide to Protecting Trafficking Victims in the Child Welfare System*, 34 No. 10 Child L. Prac. 145 (2015)

Starla J. Williams, *Violence Against Poor and Minority Women & The Containment of Children of Color: A Response to Dorothy E. Roberts*, 24 Widener L. J. 289 (2015)

CHILDREN'S RIGHTS

Ian Forster, *Fair Play for Those Who Need it Most: Athletic Opportunities for High School Student Athletes With Disabilities*, 22 Jeffrey S. Moorad Sports L. J. 693 (2015)

Lotem Perry-Hazan, *Freedom of Speech in Schools and the Right to Participation: When the First Amendment Encounters the Convention of the Rights of the Child*, 2015 B.Y.U. Educ. & L. J. 421 (2015)

Olga Voinarevich, *A Fairy Tale Interrupted: The Long-Term Impacts of Child Marriage in Yemen and the Necessary Adjustments to Both Local and International Laws to Stop the Practice and to Protect Voiceless Child Brides*, 16 Rutgers Race & L. Rev. 203 (2015)

CONSTITUTIONAL LAW

Amanda Harmon Cooley, *Constitutional Representations of the Family in Public Schools: Ensuring Equal Protection for All Students Regardless of Parental Sexual Orientation or Gender Identity*, 76 Ohio St. L. J. 1007 (2015)

Brian J. Fahey, J.P. ex rel. A.P. v. Millard Public Schools: *A Limit on School Authority and What it Means for Students' Fourth Amendment Rights in Nebraska*, 93 Neb. L. Rev. 1012 (2015)

COURTS

Samantha Coleman, *The Crossover Court: An Integration of Child Welfare and Juvenile Justice, and the Next Step in the Reformation of the Juvenile Justice System in Texas*, 17 Scholar: St. Mary's L. Rev. & Soc. Just. 375 (2015)

Starla Doyal, *The Guardian Ad Litem as the Child's Privilege Holder*, 87 U. Colo. L. Rev. 205 (2016)

Elyse R. Grossman & Kathleen S. Hoke, *Guidelines for Avoiding the Pitfalls When Drafting Juvenile Curfew Laws: A Legal Analysis*, 8 St. Louis U. J. Health L. & Pol'y 301 (2015)

Hon. Paula J. Hepner, *Blueprint for Respect: Creating an Affirming Environment in the Courts for the Lesbian, Gay, Bisexual, and Transgender Communities*, 41 Wm. Mitchell L. Rev. 4 (2015)

Joan M. Shaughnessy, *The Other Side of the Rabbit Hole: Reconciling Recent Supreme Court Personal Jurisdiction Jurisprudence with Jurisdiction to Terminate Parental Rights*, 19 Lewis & Clark L. Rev. 811 (2015)

Alicia Summers & Christine Kiesel, *Enhancing the Quality of Hearings in New York State: Using Data to Drive Improvement*, 35 No. 1 Child L. Prac. 1 (2016)

CUSTODY AND VISITATION

Miles Mason Sr., *A Guide to the Independent Child Custody Evaluation*, 51-NOV Tenn. B. J. 12 (2015)

DIVORCE

Margaret Ryznar, *Alimony's Job Lock*, 49 Akron L. Rev. 91 (2016)

DOMESTIC VIOLENCE

Deborah Mas Cabrera, *Domestic Violence and Equal Protection of the Laws: A Look at Town of Castle Rock v. Gonzales and Lenahan v. United States*, 84 Rev. Jur.

U.P.R. 321 (2015)

Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 Vill. L. Rev. 145 (2015)

EDUCATION LAW

Regina Ramsey James, *How to Fulfill a Broken Promise: Revisiting and Reaffirming the Importance of Desegregated Equal Educational Access and Opportunity*, 68 Ark. L. Rev. 159 (2015)

Alex J. Kramer, *One Strike and You're Out: The Application of Labeling Theory to the New Jersey Anti-Bullying Bill of Rights Act*, 45 Seton Hall L. Rev. 261 (2015)

Simon Leefatt, *The Key to Equality: Why we Must Prioritize Summer Learning to Narrow the Socioeconomic Achievement Gap*, 2015 B.Y.U. Educ. & L. J. 549 (2015)

Kimbrilee M. Weber, *Banning 'Boobies?': A Standard for School Districts to Evaluate Plausibly Lewd, On-Campus Student Speech in Light of B.H. ex. rel. Hawk v. Easton Area School District*, 45 Seton Hall L. Rev. 647 (2015)

Lilah Hume Wolf, *Knowledge is Power: Assessing the Legal Challenges of Teaching Character in Charter Schools*, 26 Stan. L. & Pol'y Rev. 671 (2015)

FAMILY LAW

Allan Carlson, *"Family Cycles" and the Future of Family Law*, 29 BYU J. Pub. L. 431 (2015)

Daniela Catrocho, *Do You Know Where Your Children Are? Caylee's Law and a Parent's Fifth Amendment Privilege Against Self-Incrimination*, 39 Seton Hall Legis. J. 453 (2015)

Scott FitzGibbon, *The Law's Duty to Promote the Kinship System: Implications for Assisted Reproductive Techniques and for Proposed Redefinitions of Familial Relations*, 29 BYU J. Pub. L. 389 (2015)

Meredith Johnson Harbach, *Childcare Market Failure*,

2015 Utah L. Rev. 659 (2015)

Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 Emory L. J. 2047 (2015)

IMMIGRATION LAW

Robert F. Ley, *Are We Punishing "Illegal Citizen" Children to Deter Parents? Critiquing Birthright Citizenship Through the Citizens-Benefits Question and Citizenship Reductionism*, 33 Buff. Pub. Int. L. J. 23 (2014-2015)

JUVENILE DELINQUENCY

Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. Rev. 539 (2016)

Kevin J. Holt, *The Inbetweeners: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After Miller*, 92 Wash. U. L. Rev. 1393 (2015)

Erin D. Knight, *Brought Back to Life: Massachusetts Supreme Judicial Court Resuscitates Parole Eligibility for Juveniles Convicted of First-Degree Murder*, 49 Suffolk U. L. Rev. 139 (2016)

Brittany Libson, *Promoting Parental Guidance: An Argument for the Parent Child Privilege in Juvenile Adjudications*, 53 Am. Crim. L. Rev. 137 (2016)

Alex Mazurek, *Criminal Law: No Looking Back: Narrowing the Scope of the Retroactivity Doctrine for Juveniles Sentenced to Life Without Release- - Roman Nose v. State*, 41 Wm. Mitchell L. Rev. 330 (2015)

Kathryn Monahan et. al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 Crime & Just. 577 (2015)

TERMINATION OF PARENTAL RIGHTS

Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents With Mental Challenges*, 39 Law & Psychol. Rev. 205 (2014-2015)

Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents With Mental Disabilities*, 26 Stan. L. & Pol'y Rev. 307 (2015)

FEDERAL COURTS

Petitioner's ICARA Claim Not Mooted by Full Custody Order Respondent Obtained From New York State Family Court

The mother, a citizen of the United Kingdom who resided in Northern Ireland, filed a petition under the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. Section 9001 et seq. ICARA implemented the Hague Convention on the Civil Aspects of International Child Abduction. In her petition, the mother alleged that respondent father wrongfully abducted their son to the United States. The District Court denied her petition, finding that even though Northern Ireland was the child's habitual residence, the child's preference for staying in the United States excepted him from being returned. Petitioner appealed to the Second Circuit. While that appeal was pending, New York State Family Court granted full custody to respondent father. Respondents moved to dismiss petitioner's federal appeal as moot, on the ground that the Court could no longer grant effective relief. The Court denied respondents' motion. Petitioner's appeal was not rendered moot by the full custody order that respondent obtained from Family Court. Although the question of whether a state custody order mooted an ICARA claim was one of first impression, the Seventh Circuit already concluded that allowing an abducting parent to render a petition for return moot by racing to a courthouse in his/her chosen country to obtain a custody judgment would turn the Hague Convention on its head. To hold otherwise could encourage the jurisdictional gerrymandering that the Convention was designed to prevent.

Tann v. Bennett, 807 F.3d 51 (2d Cir. 2015)

FAPE Denied and IDEA Violated Where Department Violated Plaintiffs' Procedural Right to Participate in Development of Child's IEP by Refusing to Discuss Bullying with Plaintiffs

Plaintiffs started a New York State administrative action seeking reimbursement for their daughter, L.K.'s 2008-2009 tuition for Summit, a private school for students classified as learning disabled, arguing, among other things, that the New York City Department of

Education (the "Department") violated the Individuals with Disabilities Education Act (IDEA) by refusing to discuss their concerns about the bullying that L.K. was subjected to. Plaintiffs lost at both levels of administrative review: first before the Initial Hearing Officer (IHO), and then before the State Review Officer (SRO). Plaintiffs appealed to the District Court, which concluded that students had the "right to be secure" in school and that significant, unremedied bullying could constitute the denial of a free and appropriate public education (FAPE). The court developed a four-part test to determine whether bullying resulted in a denial of a FAPE, and remanded the case to the IHO to consider plaintiffs' claims under that test. Plaintiffs again lost before the IHO and the SRO and again appealed to the court, which granted summary judgment in plaintiffs' favor. The court held that the Department's refusal to permit plaintiffs to discuss bullying in the development of L.K.'s Individualized Education Program (IEP) violated the IDEA. Because the court also held that Summit was an appropriate placement and that the equities favored reimbursement, it entered judgement in favor of plaintiffs. The Department appealed. The Second Circuit affirmed. The Court had not previously determined whether the bullying of a student with a disability was an appropriate consideration in the development of an IEP and could result in the denial of a FAPE under the IDEA. Because the Department conceded that it could be an appropriate consideration when it "reache(d) a level where a student (was) substantially restricted in learning opportunities," the Court assumed as much without deciding the issue. Also, the Department's concession recognized that a child with a disability who was severely bullied by her peers may not be able to pay attention to her academic tasks or develop the social and behavioral skills that were an essential part of any education, and it accorded with the position of the United States as amicus curiae in this appeal and with guidance from the United States Department of Education. The Department denied L.K. a FAPE and violated the IDEA when it violated plaintiffs' procedural right to participate in the development of L.K.'s IEP by refusing to discuss the bullying with plaintiffs. Plaintiffs had reason to believe that the bullying would interfere with L.K.'s ability to receive meaningful educational benefits. There was

evidence that bullying negatively affected her “ability to initiate, concentrate, attend and stay on task with her homework assignments and activities after school,” as well as evidence that she dreaded going to school, counted the days until the end of school, and was frequently tardy, arguably due to her fear of being bullied. She came home crying and complained about bullying on a near daily basis. Three of L.K.’s Special Education Itinerant Teachers confirmed that she was constantly teased, excluded from groups, and subjected to a hostile environment. The Department’s arguments were rejected that plaintiffs suffered no harm, insofar as L.K.’s IEP already addressed bullying by including goals for improving her behavior in a manner that might reduce future bullying, and that some anti-bullying strategies were better addressed through channels other than the IEP. Denying the parents the opportunity to discuss bullying during the creation of the IEP not only potentially impaired the substance of the IEP, but also prevented them from assessing the adequacy of their child’s IEP. Plaintiffs met their burden to show that their choice of a private placement was appropriate and that the equities favored reimbursing them.

T.K. v. New York City Dept. of Education, 810 F.3d 869 (2d Cir. 2016)

COURT OF APPEALS

Misdemeanor Information Facially Sufficient

By a misdemeanor information, defendant was charged with criminal possession of a controlled substance in the seventh degree and unlawful possession of a knife. After his arraignment, defendant moved to dismiss the information on facial sufficiency grounds, and the court denied his motion. Thereafter, defendant pleaded guilty to the charge of seventh-degree criminal possession of a controlled substance in full satisfaction of the information. Defendant received a sentence of 30 days in jail, which was set to run concurrently with his sentence upon an unrelated misdemeanor charge and with his punishment for violating the terms of his parole in a prior felony case. The Appellate Division affirmed, rejecting defendant's challenge to the facial sufficiency of the drug-related charge to which he had pleaded guilty. The Court of Appeals affirmed. The information was facially sufficient because it contained adequate allegations that the officer had the requisite training and experience to recognize the substance in defendant's possession as a controlled substance, and that the officer reached his conclusion about the nature of the substance based on its appearance and placement within a favored apparatus of drug users, a glass pipe. That the substance at issue was a burnt residue did not dictate a different result. An information's description of the characteristics of a substance combined with its account of an officer's training in identifying such substances, the packaging of such substance and the presence of drug paraphernalia, could support the inference that the officer properly recognized the substance as a controlled substance. Certainly, if defendant chose to go to trial, he was not foreclosed from arguing in his defense that the contents of his pipe were not illegal.

People v. Smalls, 26 NY3d 1064 (2015)

Plain View Doctrine Did Not Support Warrantless Seizure

After defendant walked in to a hospital seeking treatment for a gunshot wound, the hospital, pursuant to its protocol and as required by Penal Law § 265.25, reported the shooting to the police. Defendant, who was wearing hospital clothing, told a police officer who

responded to the hospital that he had been "shot in [a nearby] [p]ark." After "dealing with ... defendant" for "[a] little over an hour," the officer was directed to clothing defendant "wore when he came to [the] [h]ospital." The clothes were in a clear plastic bag on the floor of a trauma room a short distance away from the stretcher on which defendant was situated in a hallway. In the bag the officer observed the "jeans that [defendant] was wearing that night, boxers, and his sneakers." The officer seized the bag, and, as he vouchered the clothing, inspected each garment. Based at least in part on observations the officer made during the inventory process, authorities believed that defendant had accidentally shot himself with a gun he carried in his waistband, and he was subsequently charged with criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree. Defendant sought suppression of the clothes based on what defense counsel characterized as the unlawful warrantless seizure of those items. Supreme Court denied suppression. Defendant was convicted of the crimes following a jury trial. The Appellate Division affirmed. The Court of Appeals reversed. The hearing court erred in denying defendant's motion to suppress the clothes seized by police. The plain view doctrine did not support the warrantless seizure. The evidence did not show that, before the seizure, the officer knew that entry and exit wounds were located on an area of defendant's body that would have been covered by the clothes defendant wore at the time of the shooting, or had a reasonable belief that the shooting had affected defendant's clothes. Thus, there was no record support for the lower courts' conclusion that the officer had probable cause to believe that the clothes were the instrumentality of a crime.

People v. Sanders, __ NY3d __, 2016 WL 697944 (2016)

APPELLATE DIVISIONS

ADOPTION

Father's Consent to Children's Adoption Not Required

Family Court denied respondent father's motion to vacate orders entered upon the father's default and reiterated findings that the father's consent was not necessary for the adoption of the subject child. The Appellate Division affirmed. The father failed to demonstrate a reasonable excuse for his default or a meritorious defense. Based upon the father's account, he should have arrived in court on time despite the alleged traffic delay. He also failed to substantiate the delay or to contact his counsel or the court to advise that he would be late. Regarding his defense, the father failed to show that he consistently provided the child with financial support and therefore his consent was not required.

Matter of Rickelme Alfredo B., 132 AD3d 490 (1st Dept 2015)

Father's Consent to Adoption Was Not Necessary Based upon Abandonment

The order appealed from, after a hearing, determined that the father had abandoned the subject child and that based upon such abandonment, the father's consent was not necessary for the adoption of the child. The mother of the subject child, T., and her husband petitioned to adopt T. The petitioners alleged that they resided with T. and that the consent of T.'s father was not needed because the father abandoned T. in 2008. Under DRL § 111 (2) (a), consent to adoption is not required of a parent who evinces an intent to forego his or her parental rights and obligations by his or her failure for a period of six months to contact or communicate with the child or the person having legal custody of the child although able to do so (*see* DRL § 111 [2] [a]). Here, the petitioners met their burden in establishing abandonment by clear and convincing evidence. The evidence showed that the father failed to see the child for four years, failed to financially support the child for years, and did not maintain any contact with the child through gifts or cards or any form of correspondence. The father failed to communicate with the mother and

admitted to hanging up on her when she phoned him on an annual basis. Under these circumstances, the petitioners met their burden of establishing that the father abandoned the subject child.

Matter of Tyler, 134 AD3d 1130 (2d Dept 2015)

Father's Consent To Adoption of Children Not Required

Surrogate's Court determined that, based on the ground of abandonment, the consent of the biological father was not necessary for adoption of the subject children by the biological mother's husband. The Appellate Division affirmed. A biological parent's consent is not required where it is shown by clear and convincing evidence that the parent has "demonstrated an intent to forgo his or her parental or custodial rights and obligations, as revealed by the failure to visit or communicate with the children or their legal custodian for a six-month period, despite being able to do so". Here, the record showed the father's conduct clearly and convincingly evinced an intent to forgo his parental rights. Testimony showed the father had not seen the children for five years and had not spoken to them by telephone for four years. Although the father stated he loved the children, he did not dispute his absence from their lives and agreed he had not made efforts to contact them or their mother for two years. Even though the father alleged his absence was due to ongoing issues with depression and alcoholism and the intermittent treatment he sought for these problems, he offered no proof that the programs in which he was involved prevented or even discouraged his contact with the children. Similarly, he offered no proof for his argument that the mother intimidated him. Had he really wanted to see his children, he could have accessed the aid of Family Court.

Matter of Emma K., 132 AD3d 1111 (3d Dept 2015)

CHILD ABUSE AND MALTREATMENT REGISTRY

Denial of Petition to Seal ACS Report Against Father For Maltreatment Confirmed

Family Court denied petitioner father's request that respondent ACS's report against him for maltreatment of his children be sealed and amended from indicated to unfounded. The Appellate Division confirmed. OCFS's determination that ACS proved, by a preponderance of the evidence, that petitioner maltreated his children was supported by substantial evidence, including NYPD domestic violence reports and the testimony and progress notes of an ACS caseworker. The evidence showed that petitioner committed acts of domestic violence against one child and the children's mother in the children's presence, causing them imminent or actual harm to their physical and emotional health.

Matter of Gargano v New York State Off. of Children & Family Servs., 133 AD3d 556 (1st Dept 2015)

CHILD ABUSE AND NEGLECT

Finding of Mother's Derivative Neglect of Child Affirmed

Family Court granted petitioner agency's motion for summary judgment, finding that respondent mother derivatively neglected the subject child. The Appellate Division affirmed. The agency made a prima facie showing of derivative neglect of the subject child, based upon prior orders issued nine months before the instant action was commenced, finding that the mother and father neglected two older children who suffered unexplained, serious injuries in their care. Further, a recent permanency order found that continued placement of the subject child's siblings was in their best interests. Also, after an evidentiary hearing on the agency's motion to suspend supervised visitation, the court found that the mother failed to take steps to distance herself from the abusive father and had continued to see him and allowed him unsupervised access to the baby in violation of a protective order.

Matter of Baby Girl A., 132 AD3d 419 (1st Dept 2015)

Substantial Probability Mother's Psychiatric Condition and Substance Abuse Placed Newborn at Imminent Risk of Harm

Family Court, after a hearing, determined that respondent mother neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence established that there was a substantial probability that the teenaged mother's untreated psychiatric condition and substance abuse problems would place the newborn child at imminent risk of harm if released to the mother's care. Further, during the mother's pregnancy, she failed to plan for the care of the child and was frequently absent without leave from the residential facility where she had been placed as a result of juvenile delinquency proceedings. The court properly drew a negative inference from the mother's failure to testify and her failure to appear at the hearing on several dates.

Matter of Jasiah B., 132 AD3d 443 (1st Dept 2015)

Mother's Untreated Mental Illness Posed Substantial Probability Child Would be at Imminent Risk if Released to Her Care

Family Court, upon inquest after respondent mother's default, determined that respondent neglected the subject child and transferred custody of the child to the Commissioner of Social Services until the next permanency hearing. The Appellate Division dismissed the appeal. The order on default was not appealable. In any event, the finding of neglect was supported by a preponderance of the evidence. Respondent's medical records and the testimony of a caseworker demonstrated that respondent suffered from untreated mental illness and had a history of erratic and aggressive behavior, which continued in the hospital after the child's birth, raising the substantial probability that the child would be in imminent risk of impairment if released to the mother's care.

Matter of Mesiah Elijah B., 132 AD3d 458 (1st Dept 2015)

Father's Neglect of Child Based Upon Domestic Violence Affirmed

Family Court determined that respondent father

neglected the subject child. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. The child's out-of-court statements, regarding respondent's violence against the mother, were corroborated by the testimony of the mother and an agency caseworker, and the mother's medical records. The contention that the neglect finding was erroneous because based upon a single incident was rejected. A single incident where the parent's judgment was strongly impaired and the child was exposed to a substantial risk of harm could sustain a finding of neglect. The court properly discredited respondent's testimony that he did not have a history of violence towards the mother, given that respondent admitted to pushing the mother on the date of the incident and that there was an order of protection against him based upon a subsequent incident.

Matter of Allyerra E., 132 AD3d 472 (1st Dept 2015)

Neglect of Child Based Upon Mother's Failure to Protect Child From Harmful Effects of Domestic Violence Affirmed

Family Court found that respondent mother neglected her child. The Appellate Division affirmed. The record showed that the child was subject to actual or imminent danger of injury or impairment of her emotional or mental condition from exposure to repeated incidents of domestic violence occurring in her home. The impairment to the child's emotional health was attributable to the mother's unwillingness or inability to exercise a minimum degree of care to protect the child from the effects resulting from domestic violence, including the mother's denial that the father was committing domestic violence, her multiple refusals to receive services, and her failure to enforce an order of protection. The child's out-of-court statements that she saw an altercation in November between the father and mother was corroborated by the caseworker, respondent, and the police officer who responded to a 911 call and observed the mother's injuries. The child's out-of-court statement that she was frightened and saddened by the November altercation was sufficient to demonstrate that she was in imminent risk of emotional and mental impairment. The child's out-of-court statements regarding past incidents of violence before the November altercation was corroborated by the mother's testimony that the father had hit her before

when the child was present.

Matter of Serenity H., 132 AD3d 508 (1st Dept 2015)

Father Sexually Abused and Neglected One Child and Derivatively Abused and Neglected Other Children

Family Court determined that respondent father sexually abused and neglected the eldest child and derivatively sexually abused and neglected the child's two siblings. The Appellate Division affirmed. The determination with regard to the eldest child was supported by a preponderance of the evidence and the testimony of the child was not necessary to make a fact-finding of abuse or neglect. The child's detailed out-of-court statements were sufficiently corroborated by the expert testimony of a child psychologist that the child suffered from depression, culminating in a suicide attempt, consistent with sexual abuse and not otherwise explained. The testimony of the guidance counselor concerning the child's behavior in school, the child's consistent statements concerning the abuse, and the medical records and progress notes recording prior statements by the child, provided further corroboration. The court was entitled to draw a negative inference against the father based upon his failure to testify and offer an innocent excuse for his actions.

Matter of Dorlis B., 132 AD3d 578 (1st Dept 2015)

Determination of Educational Neglect Reversed

Family Court determined that respondent mother neglected the subject child. The Appellate Division reversed. Petitioner failed to demonstrate by a preponderance of the evidence that the mother educationally neglected the children. Respondent testified that the children were late to school because it took over an hour to travel from their shelter to the children's school, and because the shelter's rules prevented her from leaving the shelter before 6 a.m. She ultimately succeeding in transferring to a shelter closer to the school and the children's attendance improved. Petitioner also failed to show that the lateness placed the children in imminent danger of impairment because there was no causal link between the lateness and the children's academic performance.

Matter of Nashawn Dezmen C., 133 AD3d 434 (1st Dept 2015)

Findings of Derivative Abuse Against Respondent Vacated - She Was Not Children's Parent

Family Court found that respondent severely abused one of her daughters, Z, and derivatively severely abused four other subject children. The Appellate Division modified by vacating the finding of derivative severe abuse as to two of the subject children, C and J. Petitioner satisfied its burden of making a prima facie showing of severe abuse. Petitioner introduced medical testimony establishing that Z sustained a fractured femur and fractured vertebrae, which required spinal surgery, that was of such a nature as would ordinarily not be sustained except by reason of the acts or omissions of the parent or other persons responsible for the care of the child. Respondent's explanations for the injuries were implausible or otherwise unreasonable. The court's findings of derivative abuse regarding respondent's other two daughters was proper inasmuch as her actions demonstrated that she had a fundamental defect in her understanding of her parental obligations. However, because severe abuse requires acts committed by a parent and respondent was not the mother of either C or J, the findings of derivative neglect with respect to those children were vacated.

Matter of Kaylene H., 133 AD3d 477 (1st Dept 2015)

Father's History of DV Supported Neglect Finding

Family Court, among other things, determined that respondent father neglected the subject child and committed family offenses warranting a five-year order of protection against him. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence, including the mother's testimony that the father had engaged in repeated and serious acts of domestic violence against her in the presence of the child, and had inflicted harm against the child, including hitting him with an extension cord and punching him in the face. The court's determination that visitation should be limited to once a month and that the father should complete programs to address his history of violence, even if those programs were not available to him during his incarceration, was in the child's best interests. The court properly determined

that the fact-finding order in the neglect proceeding had collateral estoppel effect, and precluded the father from relitigating the same issues in the family offense proceeding. The allegations of domestic violence were identical in both proceedings and the father had a full and fair opportunity to litigate the allegations in the neglect proceedings, but chose to defend only by cross-examining the mother.

Matter of Darren S., 133 AD3d 534 (1st Dept 2015)

Finding That Respondent Abused his Adoptive Brother and Derivatively Abused Other Children Affirmed

Family Court found that respondent sexually abused the oldest subject child, his adoptive brother, and derivatively abused the other two subject children. The Appellate Division affirmed. Respondent failed to preserve his contention that he was not a person legally responsible for two of the subject children and the Appellate Division declined to consider it. Alternatively, the contention lacked merit. The findings of sexual abuse and derivative abuse were supported by a preponderance of the evidence. The oldest child's testimony was competent evidence that respondent sexually abused him on about 20 occasions and the fact that he did not have a physical injury or that there was no corroboration of his testimony did not require a different result. Given the severity and nature of the abuse inflicted upon the older child, the court properly found derivative abuse as to the other children.

Matter of Alijah S., 133 AD3d 555 (1st Dept 2015)

Respondent's Mental Illness And Drug Use Resulted in Neglect and Derivative Neglect of Children

Family Court determined that respondent mother neglected her older child and derivatively neglected her other child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent neglected her older child. The evidence showed that respondent suffered from bipolar disorder, post-traumatic stress disorder and borderline personality. As a result of her untreated mental illness and marijuana use, three of respondent's other children were no longer in her care. At the time of the subject older child's birth, because of respondent's

longstanding uncontrolled mental illness, as manifested by her bizarre behavior in the hospital after giving birth, as well as the need for mental health service to manage her symptoms, that child was in danger of neglect. Also, while the dispositional hearing was pending and during the time respondent was pregnant with the younger subject child, the mother was diagnosed with the above-mentioned mental disorders, with a recommendation that it would be unsafe to discharge the older child to respondent's care. The record also showed that respondent cared for the older child without supervision in violation of court order. The finding of derivative neglect with respect to the younger child was proper inasmuch as that child was born close in time to the period in which conditions underlying respondent's history of neglect existed.

Matter of Essense S., 134 AD3d 415 (1st Dept 2015)

Respondent's Failure to Protect Child From Sexual Abuse Constituted Neglect

Family Court found that respondent mother neglected her child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the mother neglected her child. At the fact-finding hearing, the child testified that her half-brother sexually abused her for nearly four years and that, although she alerted her mother on two occasions about the abuse, her mother failed to protect her.

Matter of Giannis F., 134 AD3d 457 (1st Dept 2015)

Respondents' Abused Infant by Exposing Him to Opiates

Family Court determined that respondents mother and father abused the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the determination that respondents abused the then seven-week-old child by exposing him to opiates, resulting in a life-threatening condition. Petitioner met its prima facie burden by demonstrating that the child's condition would normally not occur but for the acts or omissions of his parents or persons legally responsible for him, and that respondents were caretakers at the time the exposure occurred. The evidence showed that the child lived with the mother and grandmother and that the father visited frequently. They were the only

individuals responsible for the child's care in the days before the overdose. Petitioner's expert, a forensic toxicologist, opined without contradiction that the precise time of the child's exposure to opiates could not be determined. Neither respondent rebutted the evidence with a showing that the exposure did not occur during a time when they were not with the child or by explaining how the exposure occurred. The court properly drew a negative inference from the father's failure to testify.

Matter of Nabel C., 134 AD3d 504 (1st Dept 2015)

Respondent Severely Abused Her Child and Derivatively Abused Other Children

Family Court found that respondent mother severely abused her youngest child and derivatively abused her other children. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that respondent severely abused the youngest child. Petitioner introduced expert medical testimony that the seven-week-old child presented at an emergency room with multiple fractures to his ribs, left leg and skull, and retinal hemorrhages to both his eyes, and that his injuries were the result of nonaccidental trauma that would not ordinarily occur except by reason of acts or omissions of respondent or the child's father. Petitioner's evidence showed that respondent failed to obtain prompt medical attention for the child even though she observed that the child was in pain and was twitching. Petitioner also established that the mother and father were the only caretakers that had access to the child when the injuries occurred. It was not necessary for petitioner to establish that the mother or father actually inflicted the injuries or that they did so together. Respondent's denial of fault and attempt to blame her three-year-old-child for the injuries was insufficient to rebut petitioner's prima facie evidence of severe abuse. A preponderance of the evidence supported the finding that respondent neglected the subject children by misusing marijuana and respondent failed to establish that she was voluntarily and regularly participating in a drug rehabilitation program.

Matter of Nyheem E., 134 AD3d 517 (1st Dept 2015)

Children at Imminent Risk of Impairment Due to Father's Untreated Mental Illness

Family Court determined that respondent father neglected his children. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent neglected his children. The evidence showed that the father's untreated mental illness, aggressive and violent behavior toward the mother, and his admission that he had been diagnosed with bipolar disorder, raised a substantial probability of neglect that placed the children at imminent risk of impairment if released to his care. The court properly granted petitioner's motion to amend the petition to conform to the evidence. The father had ample notice of the new allegations and an opportunity to respond. The record also supported the alternative theory of neglect based upon the father's failure to protect the children from the mother's neglect, which he knew or should have known created a risk of harm to them.

Matter of Enrique S., 134 AD3d 576 (1st Dept 2015)

Mother Neglected Child by Inflicting Excessive Corporal Punishment

Family Court found that respondent mother neglected her older child and derivatively neglected her other child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent neglected her older child by inflicting excessive corporal punishment on him. The older son's out-of-court statements that respondent had a history of hitting him with a belt, causing bruises, were properly admitted inasmuch as his statements were corroborated by petitioner's caseworker's observation of bruises on the child, photographs depicting the injuries, medical records, and the mother's admissions. Respondent failed to preserve her contention that there was insufficient evidence of her older child's physical, mental or emotional condition and, in any event, it was without merit. There also was no merit to respondent's contention that this case involved a single instance of reasonable discipline. The child told the caseworker and his grandmother about prior instances where respondent hit the child with a belt or her hands and respondent acknowledged threatening the child with a belt and that the child "bruises easily." There was also evidence that the mother's boyfriend inflicted excessive

corporal punishment against the older child and the mother knew or should have known about it but failed to protect the child. The evidence of the mother's neglect of the older child supported the finding of derivative neglect of the younger child.

Matter of Jaysen R., 134 AD3d 638 (1st Dept 2015)

Petitioner Failed to Establish Neglect

The mother and father lived with their child in a shelter that housed six to eight other families. The county's Department of Social Services (hereinafter DSS) filed child neglect petitions alleging, inter alia, that the mother and father neglected the subject child by leaving him in the living room of the shelter while they were in other areas of the shelter, failing to properly maintain the subject child's crib, missing various appointments for voluntary services offered to the parents, and failing to comply with certain rules of the shelter. After a hearing, the Family Court found that DSS established all of the allegations contained in the petitions and determined that the mother and father had neglected the subject child. The mother and father separately appealed. The Appellate Division reversed. Here, the Family Court's finding of neglect was not supported by a preponderance of the evidence (*see* FCA § 1046 [b] [i]). DSS failed to sustain its burden of demonstrating that the child's physical, mental, or emotional condition was in imminent danger of becoming impaired as a result of the alleged instances of neglect contained in the petition. Although DSS presented evidence indicating that the subject child had been left in the living room of the shelter while the mother and father were in different areas of the shelter, DSS failed to demonstrate that the child was left alone for any more than a brief period of time, or that the child was otherwise left alone under circumstances that posed an "imminent danger" to his physical, mental, or emotional well-being (*see* FCA § 1012 [f][i][B]). Accordingly, the Family Court should have denied the petition and dismissed the proceeding.

Matter of I.A., 132 AD3d 757 (2d Dept 2015)

Error to Dismiss Petitions

Upon reviewing the record, the Appellate Division found that the petitioner presented a prima facie case of

neglect against the father by presenting evidence that he engaged in acts of domestic violence against the mother in the children's presence (*see* FCA §§ 1012 [f] [i] [B]; 1046 [a] [vi]). The evidence presented at the fact-finding hearing included medical records containing an admission by the mother to an emergency room social worker that the children witnessed the father physically abusing her, and the father did not object to the admissibility of this statement. Moreover, the mother's admission to the emergency room social worker that the father subjected her to domestic violence in view of the children, together with evidence that social workers had developed a reasonable safety plan which she did not follow while continuing to share a home with the father and the children, established a prima facie case of neglect against the mother based upon her failure to protect the children from the father's domestic violence. Accordingly, the Family Court erred in dismissing the petitions for failure to make out a prima facie case. Since the Family Court terminated these proceedings at the close of the petitioner's direct case upon an erroneous finding that a prima facie case had not been established, a new hearing was required.

Matter of Ruben G., 132 AD3d 761 (2d Dept 2015)

Single Incident Did Not Support Finding of Neglect

The Family Court properly determined that the respondent, the subject child's 32-year-old brother who resided with the child and their mother, was a "person legally responsible" for the care of the child and, as such, was a proper party to the child protective proceeding (*see* FCA § 1012 [g]). However, the Family Court's finding of neglect against the respondent was not supported by a preponderance of the evidence. The evidence presented at the fact-finding hearing established that the respondent had struck the child, his 15-year-old sister, in the face, while he was attempting to stop the child from disobeying their mother's rule forbidding the child from having guests in the home. Although a single incident may sometimes suffice to sustain a finding of neglect, here, the record did not support such a finding. Given the age of the subject child, the provocation, and the dynamics of the incident, the respondent's act against his sister did not constitute neglect. Accordingly, the Family Court should have denied the petition and dismissed the

proceeding.

Matter of Allyssa O., 132 AD3d 768 (2d Dept 2015)

Record Did Not Support Finding of Neglect

Here, the record did not support the Family Court's determination that the County's Department of Social Services (hereinafter DSS) established, by a preponderance of the evidence, that the father neglected the subject child by engaging in acts of domestic violence against the mother in the child's presence which created an imminent risk of impairment to the child's physical, mental, or emotional condition. At the fact-finding hearing, DSS presented only the testimony of a caseworker, who relayed statements made to her by the father after the incident. The mother did not testify, and the child was too young to provide a statement to DSS. The caseworker testified that the father told her that he and the mother had a fight, and that subsequently, while he was in the shower, the mother called the police out of spite and reported that the father had a knife. According to the caseworker's testimony, the father "initially told me that he did not have the knife. Then he said he gave the knife to the police, and then he said, no, I stashed it in the woods." The caseworker further testified that the father told her that the child was present in the house at the time of the incident. The caseworker did not testify as to the child's location in the house. The court found that "the testimony of [the father] through the caseworker is incredible," and that DSS had "proven their case." The Appellate Division found that the evidence presented by DSS did not establish, by a preponderance of the evidence, that an incident of domestic violence occurred. Further, if the father did perpetrate acts of domestic violence, DSS did not establish that the acts occurred in the presence of the child, or that the child's physical, mental, and emotional condition was impaired or in imminent danger of becoming impaired as a result of the acts.

Matter of Gianna A., 132 AD3d 855 (2d Dept 2015)

Vacating Adjudication of Neglect upon Dismissal of Petitions Warranted

Upon reviewing the record, the Appellate Division found that under the circumstances of this case, the

Family Court properly directed dismissal of the petitions after the expiration of the six-month suspended judgment period, as the aid of the court was no longer required. However, the court should have also exercised its discretion by directing that, upon the dismissal of the petitions, the adjudication of neglect shall be vacated (*see* FCA § 1061). As a general rule, a parent's compliance with the terms and conditions of a suspended judgment does not eradicate the prior neglect finding. Here, however, there were a number of factors warranting the vacatur of the neglect findings. The parents' underlying conduct was aberrational in nature, the lead condition at the family home had been abated, the children's blood lead levels after the six-month suspended judgment period were within acceptable ranges, the parents fully complied with the conditions of the suspended judgment, there was no risk that the circumstances of lead exposure would recur, and there was no likelihood that these circumstances would warrant further judicial proceedings (*see* FCA § 1051[c]). Accordingly, the Family Court should have directed that, upon the dismissal of the petitions, the adjudication of neglect should have been vacated.

Matter of Anoushka G., 132 AD3d 867 (2d Dept 2015)

Finding of Neglect Against Parents Warranted Based upon Child's Proximity to Readily Accessible Drugs

The Family Court erred in granting the parents' respective motions to dismiss the neglect petition insofar as asserted against each of them. The petitioner established by a preponderance of the evidence that, in executing a search warrant at the father's apartment, the police found illegal drugs, including multiple individual packages of crack cocaine and heroin and a large quantity of marijuana, in various locations throughout the home within the reach of the approximately three-year-old child. As the Family Court correctly found, the hearing evidence further established that the mother knew or should have known about the accessible drugs in the home despite her residence elsewhere, inasmuch as she was undisputedly present there virtually on a daily basis. The parents' conduct in placing the child in proximity to readily accessible drugs posed an imminent danger to the child's physical, mental, and emotional well-being. Thus, the evidence was

sufficient to support a finding of neglect against each parent.

Matter of Jaielly R. H., 132 AD3d 993 (2d Dept 2015)

Recorded Supported Findings of Neglect

The petitioner established that the mother failed to exercise the minimum degree of care necessary to protect her daughter, C., from the physical abuse inflicted by an older sibling, despite the mother's knowledge of numerous instances of such abuse. The physical abuse of C. occurred in the presence of the mother's granddaughter, N., and impaired, or created an imminent danger of impairing the physical, mental, or emotional condition of N. (*see* FCA § 1046 [b] [1]). Further, the Family Court's reconstruction of testimony from a day of the fact-finding hearing that had not been recorded was adequate to protect the mother's rights. Accordingly, the petitioner established by a preponderance of the evidence that the mother neglected C. and N. Orders affirmed.

Matter of Christine C., 133 AD3d 597 (2d Dept 2015)

Family Court Erred in Granting Father's Motion to Dismiss

Contrary to the Family Court's determination, viewing the evidence in the light most favorable to the County's Department of Social Services (hereinafter DSS) and affording it the benefit of every favorable inference which could be reasonably drawn from the evidence, DSS presented a prima facie case of neglect as to the father (*see* FCA § 1012 [f]). A DSS caseworker testified at the fact-finding hearing that, after the subject child was removed from his grandparents' home and placed in a youth shelter, she contacted the father to help him develop a long-term plan for the child. The father told the caseworker, among other things, that he was unwilling to take the child home and that the child should remain in the shelter, so that the child would learn a lesson about being a liar and causing trouble. The caseworker testified that the father thereafter failed to meaningfully communicate with DSS or plan for the care of the child. On this record, DSS established a prima facie case of neglect as to the father. Accordingly, the Family Court erred in granting the father's motion to dismiss the petition insofar as

asserted against him. Since the court terminated the proceeding at the close of the petitioner's direct case upon an erroneous finding that a prima facie case had not been established, a new hearing, and a new determination of the petition insofar as asserted against the father, was required.

Matter of Marques B., 133 AD3d 654 (2d Dept 2015)

Family Court Lacked Authority to Enter Judgment of Neglect

The petition alleged that on July 1, 2011, the mother neglected the subject child by purchasing heroin and using it in the subject child's presence. The petition further alleged that on the same day, the mother was arrested and charged with crimes including criminal possession of a controlled substance in the seventh degree. At a conference held on January 15, 2013, the Family Court received a copy of a certificate of disposition from the Dobbs Ferry Village Court, Criminal Part. The certificate of disposition stated that on April 12, 2012, the mother was convicted of two crimes relating to an arrest that took place on July 1, 2011. One of the crimes the mother was convicted of was criminal possession of a controlled substance in the seventh degree. Without proceeding to a hearing, the Family Court took judicial notice of the certificate of disposition and entered a finding of neglect against the mother, finding that the date of arrest and the conviction of criminal possession of a controlled substance in the seventh degree matched the date of arrest and one of the crimes alleged in the petition. The mother appealed. The Appellate Division reversed. The record revealed that the Family Court did not enter the finding of neglect by neither upon consent of all the parties and the attorney for the child nor upon a motion by the petitioner for summary judgment. Thus, the Family Court, which simply took judicial notice at a conference of a certificate of disposition, lacked the authority to enter a finding of neglect. Accordingly, the matter was remitted to the Family Court for further proceedings on the petition.

Matter of Vincent M., 133 A.D.3d 662 (2d Dept 2015)

Family Court Did Not Delegate its Authority to the Children's Therapist

Contrary to the father's contention, the Family Court did not improvidently exercise its discretion in declining to award the father visitation during the period in which further information was gathered from the children's therapist. The best interests of the children determine whether visitation should be permitted to a parent who has committed neglect. Considering the multiple neglect findings against the father, his denial of any wrongdoing, his need for services, as well as his angry and hostile demeanor at court appearances, the Family Court's determination as to visitation had a sound and substantial basis in the record. Further, contrary to the father's contention, the Family Court did not delegate its authority to determine the best interests of the children to their therapist. Rather, the Family Court expressed its intention to gather information from the children's therapist to assist it in determining the best interests of the children. Accordingly, the order was affirmed.

Matter of Ni-Na C., 134 AD3d 702 (2d Dept 2015)

Mother Presented Sufficient Evidence to Rebut Petitioner's Case

The mother appealed from an order of fact-finding of the Family Court, dated June 11, 2013. The order, after a hearing, determined that the mother abused the child B. and derivatively abused the children M. and S. The record revealed that the petitioner established a prima facie case of abuse (*see* FCA § 1046 [a] [ii]; [b] [I]). Contrary to the petitioner's contention, however, the mother presented sufficient evidence to rebut the petitioner's case, through the testimony of her expert witness. The mother's expert witness testified that the injuries sustained by the child B., a sibling of the children M. and S., occurred during a period of time when the petitioner had not established that B. was in the exclusive care of the mother. Additionally, the expert opined that the injuries could have resulted from alternate mechanisms. Thus, the petitioner failed to establish, by a preponderance of the evidence, that the mother abused B. and derivatively abused M. and S. Accordingly, the order of fact-finding was reversed, the petitions were denied, the proceedings were dismissed, and the order of disposition was vacated.

Matter of Miguel G., 134 AD3d 711 (2d Dept 2015)

Record Supported Finding of Neglect Based upon Excessive Corporal Punishment

Here, the Family Court's finding that the mother neglected the subject child, J., by inflicting excessive corporal punishment upon her was supported by a preponderance of the evidence. At the hearing, the petitioner introduced into evidence certain out-of-court statements by J., to the effect, that her mother hit her in the eye with a telephone during the course of an altercation the mother had instigated between them. Those statements were corroborated by testimony as to the caseworkers' observations of J.'s injuries and the mother's own testimony concerning the altercation (*see* FCA § 1046 [a] [vi]). The evidence at the hearing also supported the Family Court's finding that the mother derivatively neglected her other children (*see* FCA § 1046 [a] [i]).

Matter of Jehozadak B.W., 134 AD3d 729 (2d Dept 2015)

Order Does Not Have to Be Reduced to Writing to Be Binding

Respondent mother stipulated to a finding of neglect and consented to a dispositional order. Thereafter, the agency filed a violation petition alleging respondent had wilfully violated the order. Respondent moved to dismiss the violation petition on the basis that no violation had occurred since Family Court had failed to issue a written dispositional order. Family Court dismissed her motion and the Appellate Division affirmed. Although the court issued the written dispositional order after the violation petition was filed, the transcript of the dispositional proceeding reflected respondent's stipulation to the conditions in open court and therefore those conditions were binding on respondent regardless of whether the conditions were reduced to a written order.

Matter of Robert P., 132 AD3d 1032 (3d Dept 2015)

Prior Severe Abuse, Abuse & Neglect Adjudications Were Sufficiently Proximate in Time to Support Court's Derivative Neglect, Abuse and Severe Abuse Findings

In a prior Article 10 proceeding, Family Court

determined respondent father had abused, neglected and severely neglected seven of his biological children and his former wife's daughter based on his sexual abuse of the daughter. The Appellate Division affirmed the finding. Thereafter, respondent's eighth child was born and shortly after the birth, the agency filed article 10 petitions against respondent alleging derivative neglect, abuse and severe abuse. Family Court granted the agency's application. The Appellate Division affirmed. Here, during fact-finding, respondent had not objected to the court taking judicial notice of the prior orders of neglect, abuse and severe abuse that had been issued against him. Additionally, testimony from the caseworker showed respondent had failed to complete all recommended treatment, including family counseling, and respondent continued to deny he had sexually abused the daughter. Furthermore, the prior acts of sexual abuse leading to the initial adjudication were sufficiently proximate in time to permit the court's conclusion that the problems continued to exist and with the exception of his two oldest children, who were now 17 and 18-years-old, respondent was not allowed unsupervised contact with any of the other children. Giving due deference to the court's credibility determinations, the order was supported by a preponderance of the evidence.

Matter of Iryanna I., 132 AD3d 1096 (3d Dept 2015)

Subsequent Neglect Determination Rendered Appeal Moot

Mother refused to listen to the 14-year-old child's allegations that mother's boyfriend had inappropriately touched her. The child contacted the police and later, the boyfriend admitted to the police that he had sexual contact with the child. Thereafter, Family Court granted the request of petitioner agency and the child's attorney to have the child removed from the mother's home and directed the agency to file a neglect petition. After a §1028 hearing, the court denied the mother's request for return of the child. The mother appealed and during the pendency of the appeal, the court held a hearing on both the neglect petition and the maternal aunt's application for guardianship of the subject child, determined the child to be neglected and appointed the aunt as the child's guardian. Since the temporary removal order was superseded by the final orders, the matter was deemed moot.

Matter of Karrie-Ann ZZ., 132 AD3d 1180 (3d Dept 2015)

Mother's Statements to Caseworker and Children's Statements to Caseworker Provided Sufficient Corroboration

Family Court determined respondent parents had neglected their one biological child and the mother's child from a prior relationship based on domestic violence by the father against the mother, the father's use of excessive corporal punishment against the mother's child, who was the older of the two children and the mother's failure to protect the children. The Appellate Division affirmed. Here, the agency's caseworker testified the mother admitted the father had physically abused her and called her derogatory names in front of the children. The mother also informed the caseworker the father had hit the older child and called both children derogatory names and the older child did not want to go school for fear that the father would kill the mother. Additionally, while the caseworker was present, the father came to the family residence and began to argue with the mother. Both children confirmed to the caseworker that the father was abusive to them and their mother. Giving due deference to the court's credibility determinations and based on the consistency between the mother's statements to the caseworker and the children's statements to the caseworker, which provided sufficient corroboration, there was a sound and substantial basis in the record to support the court's finding.

Matter of Justin A., 133 AD3d 1106 (3d Dept 2015)

Evidence of Child Sexual Abuse Insufficient Since Agency's Witnesses Were Not Experts in this Area

Family Court adjudicated respondent mother's two children to be neglected. The Appellate Division reversed the neglect and derivative neglect findings that were based on actions by respondent in allowing the daughter to be sexually abused, but found the neglect findings were warranted based on respondent's behavior in exposing the children to adjudicated and suspected sex offenders. Additionally, there was evidence the daughter suffered from poor hygiene, had wheezing attacks from exposure to second-hand smoke, and multiple candidal infections of the diaper area

which persisted despite medical treatment. This suggested the child was not being given the prescribed medication or kept clean. Respondent also acknowledged she told her son to go alone to a relative's home where a vicious dog that had previously bitten respondent was present, and the dog bit the son, who required stitches. With regard to the alleged sexual abuse of the daughter, petitioner agency's expert witnesses did not have the level of expertise in the area of child sexual abuse that respondent's expert witness possessed. Respondent's witness was highly qualified in this area. One of petitioner's witnesses was board-certified in family medicine, had participated in general training in child sexual abuse and completed one sexual assault examination of a child at least 15 years earlier, and had treated the subject child after her birth and seen her about 20 times before she was brought in for a sexual assault examination. However, she had to obtain guidance from an experienced pediatrician regarding "the correct way to examine a child". Although she later found there was a "[h]igh probability" the daughter had been sexually abused, there were discrepancies between the physical findings in her written report and those described in her testimony. She did not know the meaning of certain terms used by the other witnesses. The probative value of her testimony as to whether the daughter had been sexually abused was low, and her opinion should have been given little weight. Petitioner's other witness was properly permitted to testify as an expert since she was licensed as a registered nurse, had practiced as an emergency room nurse for 17 years, and was certified in emergency room medicine as well as other specialties. However, although she had participated in two sexual assault nurse examiner (SANE) trainings, she had not yet completed all of the requirements for SANE certification. Although she had performed sexual assault examinations of three female children under the age of five, her lack of SANE certification and limited pediatric sexual abuse experience should have been considered by Family Court in weighing her testimony. Family court's rejection of respondent's expert's opinion solely because he had not examined the subject child was significant since respondent's expert had extensive, specialized training and experience in this area and his criticisms of the procedures followed by petitioner's experts were un rebutted.

Matter of April WW., 133 AD3d 1113 (3d Dept 2016)

Prima Facie Evidence of Drug Abuse

Family Court determined the subject child had been neglected by respondents mother and step-father. The Appellate Division affirmed. Proof that a parent repeatedly abuses drugs or alcohol constitutes prima facie evidence of neglect and, pursuant to FCA §1046, if proven, petitioner is not required to introduce evidence of specific parental conduct showing actual harm or danger to the child. Here, the evidence showed respondents smoked marihuana during the day, every day. Additionally, they frequently used marihuana in the presence of the child to a point where their judgment was substantially impaired. The child tried to get help because of the "drug-infused atmosphere" in the home. Evidence also showed a marihuana supplier came to the home once or twice a month, often when the child was present and respondents sold marihuana to many individuals who came to the home, including some who attended school with the child and sometimes involved the subject child in the transactions. Furthermore, respondents chose not to testify and they presented no evidence to show either of them had attended any rehabilitative program during the relevant time.

Matter of Jillian B., 133 AD3d 1131 (3d Dept 2015)

Father Neglected Children By Driving in Reckless Manner While Impaired by Alcohol and While Children Were Passengers in Car

There was a sound and substantial basis in the record for Family Court's finding that respondent father had neglected his two children by driving in a reckless manner while impaired by alcohol and while the children were passengers in his car. Here, the evidence showed respondent, while driving his children to school, was observed by a State Trooper to be swerving into the oncoming lane onto the path of a dump truck. The trooper detected the odor of alcohol inside the vehicle and saw respondent's daughter seated in the front seat. Respondent admitted he had "three to four beers the night before" and failed four field sobriety tests. The trooper testified he believed respondent was impaired by alcohol. Caseworkers who had spoken with the children testified the children told them they were scared by respondent's erratic driving. Respondent failed to testify and this allowed the court

to draw the strongest possible inference against him.

Matter of Emmett RR., 134 AD3d 1189 (3d Dept 2015)

Respondent's Infliction of Excessive Corporal Punishment Results in Neglect Finding

There was ample proof to support Family Court's determination that respondent had neglected his oldest child and derivatively neglected the other three children due to his infliction of excessive corporal punishment of the oldest child. The oldest child sustained a facial injury, which appeared to be consistent with an adult handprint. This marking was photographed the day after the incident and was observed by an agency employee, who investigated the incident, and the doctor who examined the child. The child later revealed that her father had struck her in the face after she told her mother he had not helped her with her homework. Two of the other subject children disclosed respondent had struck the oldest child and although none of the children testified, their out-of-court statements cross-corroborated each other's statements and was further corroborated by the testimony and documentary evidence presented at the hearing. Additionally, proof of neglect of one child supported a finding of derivative neglect of the other children. The record showed respondent's understanding of parenthood was fundamentally flawed, and he had failed to engage in rehabilitative services after a prior finding of neglect.

Matter of Dawn M., 134 AD3d 1197 (3d Dept 2015)

Appeal Rendered Moot

After a permanency hearing, Family Court continued placement of the child in foster care, modified respondent father's visitation with the child and issued an order of protection against respondent. Respondent appealed but by the time the appeal was heard, the order of protection had expired and a subsequent permanency order substantially modifying the prior order had been issued which rendered both issues moot.

Matter of Justyce HH., 134 AD3d 1198 (3d Dept 2015)

Court Erred in Denying Respondent Mother's Motion to Dismiss Petition

Family Court found that respondent mother neglected her five children and granted permanent custody of the children to their father. The Appellate Division reversed and dismissed the petition. Family Court erred in denying the mother's motion for a directed verdict dismissing the petition. For a finding of neglect, proof was required of actual or imminent physical, emotional, or mental impairment to a child, and proof that any such actual or imminent impairment need be a consequence of the parent's failure to exercise a minimum degree of parental care. The children were living with their father for over two months before the petition was filed, and thus they did not face "imminent" danger of impairment. Under these circumstances, petitioner had the burden of demonstrating actual physical, emotional or mental impairment to the children that resulted in serious harm to the children, not just what might be deemed undesirable parental behavior. The proof adduced by petitioner, which concerned only the 18 days that the children resided in Lewis County with their mother and her boyfriend before moving in with their father, failed to meet that burden. The children's father, who resided in Jefferson County, did not have firsthand knowledge concerning the allegations in the petition, and he acknowledged that he never had any concerns about the care of the children when they resided with the mother. The testimony of petitioner's other witness, the Lewis County caseworker, at most demonstrated that the conditions at the residence where the children lived and the manner in which they dressed and attended to hygiene were less than optimal, but it did not appear that those conditions resulted in any actual physical, emotional or mental impairment to the children.

Matter of Christian J.S., 132 AD3d 1355 (4th Dept 2015)

Petitioner Established Medical & Educational Neglect

Family Court adjudged that respondent Jasmine G. neglected the subject children and granted sole custody of the children to their father. The Appellate Division affirmed. The children, upon the consent of respondent mother and the father, were residing with a nonrelative, respondent Jasmine G. Petitioner established educational and medical neglect of Dayshaun by Jasmine G. Petitioner presented evidence establishing a

significant, unexcused absentee rate with respect to Dayshaun and Jasmine G. failed to establish a reasonable justification for the absences or otherwise rebut the evidence of educational neglect. Petitioner also established a prima facie case of medical neglect by presenting evidence of Jasmine's G.'s failure to follow recommendations for Dayshaun upon his discharge from psychiatric hospitalizations, and she failed to rebut that evidence. The court properly determined that the evidence of neglect with respect to Dayshaun demonstrated such an impaired level of judgment as to create a substantial risk of harm for any child in Jasmine G's care. Thus, the findings of derivative neglect with respect to the other children was warranted. The court did not err in awarding sole custody of two of the children to the father. Contrary to respondent's contention, it was not established that the father relinquished his right of custody and, therefore, it was not necessary for the court to engage in a best interests analysis before awarding custody of the children to him.

Matter of Dayshaun W., 133 AD3d 1347 (4th Dept 2015)

Petitioner Established Father Abused Child

Family Court found that respondent father abused the subject child. The Appellate Division affirmed. Petitioner established a prima facie case of abuse by submitting evidence that the child sustained injuries that ordinarily would not occur absent an act or omission of the father and that the father was the caretaker of the child at the time the injury occurred. The father failed to rebut the presumption that he was responsible for the child's injuries. The court's decision properly set forth the grounds for its determination.

Matter of Zarhianna K., 133 AD3d 1368 (4th Dept 2015)

CHILD SUPPORT

No Basis to Vacate Respondent's Child Support Arrears

Family Court denied respondent's objections to the support magistrate's determination that there was no basis to vacate his child support arrears. The Appellate

Division affirmed. A child born of the marriage is presumed to be the legitimate child of the marriage. Here, respondent acknowledged that he knew immediately after the child's birth that he was not the child's biological father, but he took no steps to rebut the presumption of legitimacy at any time before 2006, when, relying on the divorce court's finding that there were no children of the marriage, he sought to vacate the support order as to arrears and the money judgment as to arrears. Child support arrears cannot be modified retroactively and under the Family Court Act the court has no discretion to cancel, reduce, or modify child support arrears accrued prior to the making of an application for such relief.

Matter of Mary P. v Joseph T. P., 132 AD3d 404 (1st Dept 2015)

Invalidating Parties' Stipulation Beyond The Power of Family Court

Family Court denied respondent father's petition to dismiss the mother's petition for upward modification of his child support obligation and directed a de novo hearing on the issue of child support. The Appellate Division modified by deleting the directive that a de novo hearing be held and remanded the matter for a modification hearing. The support magistrate's sua sponte determination that the parties' stipulation was not in compliance with the CSSA and thus provided a basis for a de novo hearing on child support was tantamount to invalidating the stipulation, which was beyond the power of Family Court. The father's motion to dismiss the petition for failure to plead facts warranting modification of child support was properly denied because the petition and supporting affidavit alleged that the father did not meet his support obligations, that the child's expenses had increased, and that there had been a significant increase in the father's financial resources since the parties entered into the stipulation.

Matter of Georgette D.W. v Gary N.R., 134 AD3d 406 (1st Dept 2015)

Petition For Downward Modification of Child Support Properly Denied

Family Court denied petitioner's objections to the

support magistrate's order, denying the father's petition for a downward modification of a 2012 child support order. The Appellate Division affirmed. The petition concerned whether petitioner's loss of employment constituted a sufficient change in circumstances to warrant the downward modification. After a hearing, the support magistrate concluded that because petitioner failed to make diligent efforts to secure new employment, no modification was warranted. That conclusion was amply supported by the evidentiary record. Other issues raised by petitioner were all previously determined in earlier proceedings that were never appealed or the appeals filed were not timely perfected. Petitioner had no right to re-litigate those issues as part of the current petition and those earlier determinations were not reviewable on this appeal.

Matter of Christopher H. v Marisa S. H., 134 AD3d 469 (1st Dept 2015)

Child's Change of Residence to Other Parent Constituted Change in Circumstances

Supreme Court, among other things, suspended plaintiff father's child support payments, denied the mother's request to hold the father in contempt and denied the mother's motion to dismiss the father's fraud claim. The Appellate Division modified by dismissing the fraud claim. The father established a change in circumstances warranting modification of child support inasmuch as where a child was living with one parent but subsequently chose to live with the other there was a "substantial change" in circumstances. The father did not violate earlier orders cautioning the father against denigrating the mother in front of the children or to mental health professionals. Statements made by the father to educational and healthcare professionals regarding the mother's mental health were made in the course of the son's medical treatment and did not appear to denigrate the mother. The father did not violate a stipulation between the parties by filing a fraud action because that stipulation provided an exception for court filings. However, the court should have granted the mother's motion to dismiss the fraud claim, which sought recovery of allegedly fraudulently obtained payments for add-on child care expenses, as barred by collateral estoppel. The father had a full and fair opportunity to raise the issue in the course of

defending his self-help withholding of child support.

Owsley v Cordell-Reeh., 134 AD3d 520 (1st Dept 2015)

Mother's Conclusory Allegation of Father's Undue Influence on Child Insufficient to Warrant Hearing

Supreme Court granted plaintiff father's motion for termination of his child support obligation, based upon a showing of a substantial change in circumstances resulting from a change in the child's residence from defendant mother to him. The Appellate Division affirmed. The court was not required to conduct a hearing because no triable issues of fact were raised. The mother acknowledged in her opposing affidavit that the child had resided with the father since 2013, and the 19-year-old child also averred the same in her affidavit. The mother's allegation of the father's undue influence on the child and other allegations about the child's execution of her affidavit were conclusory and insufficient to warrant a hearing. The child's affidavit, based upon her personal knowledge of her intent not to return to the mother's home, did not constitute inadmissible hearsay. The mother's statements in her affidavit, based upon what the child purportedly told her, however, were properly rejected as inadmissible hearsay and double hearsay.

Rubin v Rubin., 134 AD3d 572 (1st Dept 2015)

No Intent in Parties' Stipulation to Reduce Child Support Upon Emancipation of Older Child

Supreme Court denied plaintiff father's motions for a declaration that the parties' older child was emancipated or alternatively that she would be emancipated on her 22nd birthday and for child support to be adjusted accordingly; to compel financial disclosure of defendant mother; granted the mother's motion to direct the father to resume payment of all child support and add-on expenses; and reserved decision on the mother's application for counsel fees. The Appellate Division affirmed. The parties stipulation of settlement does not provide for the reduction or recalculation of plaintiff's child support obligation upon the emancipation of the older child. There are provisions in the stipulation that do provide for a termination or reduction of plaintiff's obligations

upon the happening of specific events and both parties were represented by counsel during its negotiations and, therefore, the inescapable conclusion was that the parties did not intend to include a similar provision concerning the emancipation of the older child. Plaintiff was free to make a motion for a downward modification of the unallocated support obligation. The dissent would have determined that the parties did intend to a reduce child support upon the occurrence of an emancipation event.

Schulman v Miller, 134 AD3d 616 (1st Dept 2015)

Father Entitled to Child Support Credit

The parties' separation agreement provided that the father would receive a dollar for dollar credit in child support for every dollar he spent on the children's college, room and board. The father's payments for the children's college expenses were made from custodial accounts set up by the father and funded with monies inherited by the father. The mother argued that the separation agreement was not intended to provide for a child support credit under those circumstances because the agreement did not designate the custodial accounts as the father's separate property. Despite the lack of this express designation, however, the parties did not dispute that the father was listed as the owner of the custodial accounts and that he received the money used to fund them as an individual inheritance from his late brother, thereby constituting his separate property. Under these circumstances, where the father paid for the son's college expenses from the custodial account that the father set up and funded with his inherited money, the father was spending money on the son's college expenses and was entitled to a child support credit in accordance with the plain meaning of the separation agreement.

Matter of Brandt v Peirce, 132 AD3d 665 (2d Dept 2015)

Family Court Had Jurisdiction to Consider Mother's Petition

The record revealed that after determining that the mother had previously obtained money judgments or orders directing the entry of money judgments against the father for arrears that had accrued under the

judgment of divorce, the Support Magistrate issued an order which dismissed the mother's petition seeking to adjudicate the father in willful violation of his child support obligations. The Support Magistrate concluded that once the child support arrears were reduced to money judgments, the Family Court lacked jurisdiction to consider any additional enforcement mechanisms for the failure to pay the arrears secured by those judgments, and the mother's only remedies were governed by the CPLR. The mother filed objections to the Support Magistrate's order. The Family Court denied the mother's objections, and the mother appealed. The Appellate Division reversed. FCA § 460(3) makes clear that the entry of a money judgment is a form of relief mandated "in addition to any and every other remedy which may be provided under the law including, but not limited to, the remedies provided under the provisions of section four hundred fifty-four of this act" (*see* FCA § 460[3]). The remedies provided by FCA § 454 include a provision authorizing the court to commit a respondent to jail for a term not exceeding six months upon a finding that the respondent has willfully failed to obey any lawful order of support (*see* FCA § 454[3][a]). Accordingly, the Support Magistrate erred in concluding that the Family Court lacked jurisdiction to consider the mother's petition which sought to adjudicate the father in willful violation of his child support obligations simply because the arrears accrued under the judgment of divorce had already been reduced to money judgments or orders directing the entry of money judgments. Thus, the order was reversed, and the matter was remitted to the Family Court for a hearing on the mother's petition.

Matter of Damadeo v Keller, 132 AD3d 670 (2d Dept 2015)

Supreme Court Providently Exercised its Discretion in Imputing Income to Father

Upon reviewing the record, the Appellate Division found that the Supreme Court providently exercised its discretion in imputing income to the father in the amount of \$120,000 per year based upon all the circumstances, including evidence which tended to show that he earned more than he claimed. Moreover, based on the income imputed to the parties, the court providently calculated the father's basic support obligation pursuant to the Child Support Standards Act

(*see* DRL § 240 [1-b]). Further, the court properly directed that the father pay 80% of the children's unreimbursed reasonable health care expenses, 80% of reasonable and necessary child care expenses, including summer camp expenses, and 80% of the expenses for the children's tutoring and extracurricular activities (*see* DRL § 240 [1-b] [c] [4], [5] [v]; [7]), based upon the finding that he earned 80% of the combined parental income. Further, while the court properly directed that the father maintain health insurance for the benefit of the children, it should have directed that the mother's 20% pro rata share of such costs be deducted from the father's basic support obligation (*see* DRL § 240 [1-b] [c] [5] [ii]).

Bauman v Bauman, 132 AD3d 791 (2d Dept 2015)

Record Supported Support Magistrate's Deviation from CSSA

The parties, who have four children, were divorced by a judgment dated August 25, 2011, which awarded the mother \$930 per week in child support. In 2012 the father petitioned for a downward modification of his child support obligation, claiming that his obligation should have been reduced as the two eldest children had become emancipated. After a hearing, the Support Magistrate determined that the father was only required to provide support for the two youngest children, then calculated each parent's pro rata share of the basic child support obligation pursuant to the Child Support Standards Act [hereinafter CSSA] (*see* DRL § 240 [1-b]). The Support Magistrate imputed income to the father for various bills paid by the father's employer, and determined that the father's pro rata share of the basic child support obligation was \$447 per week. However, the Support Magistrate deemed this amount to be "unjust or inappropriate" in light of the financial support the father received from his girlfriend. Therefore, the Support Magistrate deviated from the CSSA, and determined that the father's new child support obligation would be \$650 per week. The father filed objections to the Support Magistrate's order, and his objections were denied by the Family Court. The father appealed. In calculating a party's income pursuant to the CSSA, a court need not rely upon a party's own account of his or her finances. Rather, the court may impute income based upon various factors, including "automobiles or other perquisites that are

provided as part of compensation for employment,” and “fringe benefits provided as part of compensation for employment” (*see* FCA § 413 [1] [b] [5] [iv]). Here, the father testified that his employer covered certain expenses, including his car payment of \$850 per month. Therefore, the Support Magistrate providently exercised her discretion in imputing income to the father. The CSSA provides that if the court finds that the noncustodial parent's basic child support obligation is “unjust or inappropriate,” the court shall order the noncustodial parent to pay such an amount that the court finds just and appropriate (*see* DRL § 236 [B] [5-a] [e] [1]). The court's determination must be based upon the statutory factors enumerated in FCA § 413 (1) (f) (1), including “[t]he financial resources of the custodial and non-custodial parent, and those of the child.” The court may also consider any other factors it deems relevant. Here, the father testified that he resided with his girlfriend, and did not financially contribute to any of their household expenses. Accordingly, in light of the financial support the father received from his girlfriend, the Support Magistrate providently exercised her discretion in deviating from the presumptively correct amount of child support and directing the father to pay \$650 per week.

Matter of Geller v Geller, 133 AD3d 599 (2d Dept 2015)

Record Did Not Support Downward Modification

The parties' stipulation of settlement provided that the father would pay \$2,900 per month in child support for the parties' three daughters, to be continued until the children were emancipated. The stipulation further provided that a child was considered “emancipated” should she permanently reside away from the mother. Even assuming that the temporary change of custody with respect to the child, S., from the mother to the father constituted an act of emancipation, this did not automatically reduce the unallocated amount of support owed under the stipulation, in view of the express terms of the stipulation itself and the fact that the parties' two other children remained unemancipated. Rather, a party seeking a downward modification of an unallocated order of child support based on the emancipation of one of the children has the burden of proving that the amount of unallocated child support is excessive based on the needs of the remaining children.

Here, the father failed to make the requisite showing. Therefore, the Supreme Court should have denied that branch of the father's motion which was for a downward modification of his child support obligation. Accordingly, the order was modified and the matter was remitted.

Goodman v Pettit, 133 AD3d 630 (2d Dept 2015)

Error to Grant Mother's Motion to Dismiss

Contrary to the Support Magistrate's conclusion, the father's petition was sufficient to state a cause of action for a downward modification of his child support obligation. The father alleged in his petition that his income had decreased since the parties entered into the stipulation of settlement, and alleged in his financial disclosure affidavit that his twin children were going away to college and that their tuition, room, and board would be paid out of a Uniform Transfers to Minors Act account funded by him. Furthermore, although the father was employed when the amount was agreed upon, the child support amount was based upon his imputed income and his expectation that he would soon secure more lucrative employment. That employment opportunity did not arise, and the father alleged that he was only able to meet his support obligations by depleting his financial resources. Since the allegations in the father's petition, if substantiated, were sufficient to constitute a substantial and unanticipated change in circumstances warranting a modification of his child support obligation, the Support Magistrate should not have granted the mother's motion to dismiss his petition for failure to state a cause of action. Accordingly, the order was reversed and the matter was remitted.

Matter of Milton v Tormey-Milton, 133 AD3d 857 (2d Dept 2015)

Father Failed to Demonstrate a Reasonable Excuse for Default

A party seeking to vacate a default must establish a reasonable excuse for the default, as well as a potentially meritorious defense to the relief sought in the petition (*see* CPLR 5015 [a] [1]). The determination of whether to relieve a party of an order entered upon his or her default is within the sound discretion of the Family Court. Here, the father's

proffered excuse for failing to appear at a scheduled hearing on the mother's petition for an upward modification of his child support obligation was that he had "an anxiety condition" which made him "unable to fully concentrate at times," and "could cause intermittent confusion." This excuse was both too general and too equivocal to explain why he failed to appear at the hearing, of which he admitted he was provided notice. Since the father failed to demonstrate a reasonable excuse for the default, it was unnecessary to consider whether he offered a potentially meritorious defense to the mother's petition. Accordingly, the Family Court properly denied the father's objections to the Support Magistrate's order denying his motion to vacate his default.

Matter of Crai v Crai, 134 AD3d 705 (2d Dept 2015)

Court Failed to Consider Temporary Support Payments in Calculating Retroactive Support

FCA § 440 (1) (a) provides that when an order of support is to be enforced by the support collection unit (hereinafter the SCU), the Family Court must establish the amount of retroactive support (*see* FCA § 440 [1] [a]). Any amount of temporary support which has been paid is to be taken into account in calculating any amount of such retroactive support due (*see* FCA § 440 [1] [a]). Here, in establishing \$1,996.90 as the amount of retroactive support owed by the father in the order dated August 23, 2013, the Support Magistrate neither took into account the temporary support payments totaling \$1,568 made by the father through the SCU during the retroactive period from March 13, 2013, to August 23, 2013 (*see* FCA § 440 [1] [a]), nor directed the SCU to reduce the amount of retroactive support calculated in the order by the sum of temporary support payments made by the father through the SCU during the retroactive period. Accordingly, the father's objection to so much of the Support Magistrate's order as directed him to pay retroactive support in the sum of \$1,996.90 for the period from March 13, 2013, until August 23, 2013, should have been granted.

Matter of Davis v Hillord, 134 AD3d 706 (2d Dept 2015)

Father Failed to Demonstrate He Was Incapable of Obtaining Employment

Where loss of employment is the basis of the petition for downward modification, the parent must submit competent proof that the termination occurred through no fault of the parent and the parent has diligently sought re-employment commensurate with his or her earning capacity. Here, although the father claimed that he had been forced to retire from his job because his deteriorating eyesight prevented him from driving safely, which was one of his job duties, he failed to proffer any competent medical testimony supporting this claim. In addition, the father failed to demonstrate that he was incapable of working or had made a good faith effort to obtain other employment commensurate with his abilities or qualifications. Similarly, the father did not present any evidence that his retirement was in fact involuntary. Accordingly, the Family Court properly denied the father's objections to the Support Magistrate's order denying his petition seeking a downward modification of his child support obligation. Further, the record demonstrated that the father's child support arrears were greater than the amount of support due for a period of four months, which constituted a basis for suspending driving privileges (*see* SSL § 111-b [12] [b] [1]; *see also* FCA §§ 454 [2] [e]; 458-a [a]). Therefore, the Family Court properly upheld the determination of the New York City Human Resources Administration Child Support Collection Unit denying the father's challenge to a notice to suspend his driver license.

Matter of Cato v Cato, 134 AD3d 821 (2d Dept 2015)

Father Failed to Establish That He Used His Best Efforts to Obtain Employment

In a child support proceeding, the father was directed to pay child support in an order dated May 25, 2012. In August of 2014, the father sought downward modification of his child support obligation. A support magistrate dismissed the father's petition in an order dated December 22, 2014. In an order dated February 4, 2015, the Family Court denied the father's objections to the support magistrate's order. The father appealed. The Appellate Division affirmed. The record supported the Family Court's determination that the father failed to establish that he used his best efforts to obtain

employment which was commensurate with his qualifications and experience, or that his current income was commensurate with his earning capacity so as to warrant a downward modification of his child support obligation. The father failed to submit evidence such as résumés that he had sent to potential employers, or proof that he had been on any interviews in search of employment commensurate with his education, ability, and experience. Accordingly, the Family Court properly denied the father's objections to the order dated December 22, 2014.

Matter of Fantau v Fantau, 134 AD3d 1109 (2d Dept 2015)

Increase in Father's Income Alone Insufficient Basis for Upward Modification

Pursuant to an oral stipulation, divorced parties of five children agreed the father would pay \$16,500 annually in child support as well as maintenance and agreed that termination of maintenance payments would constitute a sufficient change in circumstances to warrant a recalculation of child support. Thereafter, the father moved to terminate maintenance on the ground the mother was living with her paramour and the mother cross moved for an upward modification of child support based on an increase in the father's income. Supreme Court, among other things, denied the mother's motion and granted the father's motion to terminate maintenance. The Appellate Division affirmed. Here, the increase in the father's income, standing alone, did not constitute a sufficient basis for an upward modification and while the parties agreed that termination of maintenance would constitute a change in circumstances for child support purposes, the mother failed to submit a statement of net worth or any other financial documentation in support of her cross motion.

Grace v Grace, 132 AD3d 1218 (3d Dept 2015)

Family Court Properly Dismissed Father's Downward Modification Petition

Family Court denied the father's objections to an order issued by the Support Magistrate, which dismissed, with prejudice, the father's downward modification of child support petition, based on the father's failure to

show there had been a substantial change in circumstances. The Appellate Division affirmed. Here, the father failed to submit credible evidence of his income during the relevant period and the financial information he did provide was an incomplete account of his financial situation, and which, by the father's own admission, were "rough guesses or guesstimates" of his income.

Matter of Jeffers v Jeffers, 133 AD3d 1139 (3d Dept 2015)

Appeal of Nonfinal Order Must Be Dismissed

The Support Magistrate dismissed the father's petition for downward modification of child support and ordered an increase in the father's biweekly support obligation as well as his pro rata share of other expenses. The father objected and Family Court determined the Support Magistrate had incorrectly calculated the father's income and remanded the case for recalculation of child support. The mother appealed. The Appellate Division found since the order being appealed was a nonfinal order and the mother had not sought permission to appeal, the matter was not properly before the Court and thus had to be dismissed.

Matter of McCoy v McCoy, 134 AD3d 1206 (3d Dept 2015)

Costs of Providing Housing, Clothing and Food During Custodial Periods Do Not Qualify as Extraordinary Expenses

Following a hearing, the Support Magistrate reduced the father's support obligation from \$186 to \$92 per week. The mother filed objections and Family Court granted her objections finding that the record did not support a deviation from the CSSA. The Appellate Division affirmed. Despite the father's claim that he was the custodial parent for purposes of child support, neither party disputed the Support Magistrate's findings that during the school year the child spent an equal number of overnights with each parent and during the summer months, the child was with the mother eight nights and the father six nights. Because the parents had a "close to equally shared physical custody", Family Court properly determined that the father, as the more monied spouse, was the noncustodial parent.

Despite the father's argument that the child was with him on more days during the relevant period, "shared" custody did not mean "equal" custody and more weight could not be given to custodial days as compared to overnight custodial periods. Additionally, strict adherence to the CSSA did not lead to unjust or inappropriate results. The father's contentions that his grocery and other bills were higher when the child was with him during the summer were unavailing. Costs of "providing suitable housing, clothing and food for a child during custodial periods [did]..not qualify as extraordinary expenses so as to justify a deviation from the presumptive amount."

Matter of Mitchell v Mitchell, 134 AD3d 1213 (3d Dept 2015)

No Review of Respondent's Contention Raised for First Time on Appeal

Family Court found that respondent father willfully failed to obey an order of the court and sentenced him to six months incarceration. The Appellate Division dismissed the appeal from the order insofar as it found that respondent willfully disobeyed a support order, and affirmed. No appeal lies from an order entered by consent upon the stipulation of the appealing party. Respondent's contention that the court erred in failing to cap his support arrears at \$500 was raised for the first time on appeal, and thus was not preserved for review. In any event, respondent failed to establish that his income was below the federal poverty income guidelines when the arrears accrued. Therefore, the Appellate Division declined to exercise its power to review his contention that his arrears should be capped.

Matter of Erie County Dept. of Social Servs. v Morris, 132 AD3d 1292 (4th Dept 2015)

Error to Terminate Child Support on Ground of Emancipation Without Hearing

In a postjudgment matrimonial proceeding, Supreme Court granted that portion of the motion of defendant father seeking to terminate child support for his daughter on the ground of emancipation. The Appellate Division modified by denying the motion and remitted. Although defendant submitted evidence in support of his motion that the child was working full time, he did

not submit proof that the child was economically independent. There was no proof regarding where she lived, or who paid her bills, and it was therefore error for the court to grant that part of the motion without a hearing. Indeed, the determination of economic independence necessarily involved a fact-specific inquiry. Defendant's allegations in support of his motion also raised an issue of fact concerning constructive emancipation. Under the doctrine of constructive emancipation, a child of employable age who actively abandoned the noncustodial parent by refusing all contact and visitation may forfeit any entitlement to support. However, where it was the parent who caused a breakdown in communication with the child, or made no serious effort to contact the child to exercise his or her visitation rights, the child would not be deemed to have abandoned the parent. Defendant asserted, and plaintiff did not dispute, that there was no relationship between defendant and the child, but the cause of the breakdown in communication was not established. Therefore, a hearing should be held on this issue as well.

Melgar v Melgar, 132 AD3d 1293 (4th Dept 2015)

Appeal From Order Committing Respondent to Jail Moot

Family Court entered an order committing respondent father to jail for a term of six months for his willful violation of an order of child support. The Appellate Division dismissed. Inasmuch as respondent's jail term had already been served, the appeal was moot.

Matter of Ontario County Support Collection Unit v Falconer, 132 AD3d 1354 (4th Dept 2015)

Sentence Illegal for Willful Violation of Child Support Order

Family Court confirmed the determination of the Support Magistrate that respondent father willfully violated an order of child support, and imposed a sentence of three months in jail and three years probation. The Appellate Division modified by vacating the sentence of probation. The father's contention that he was deprived effective assistance of counsel was rejected. However, although the father did not challenge the legality of his sentence, the sentence

imposed was illegal. Family Court Act § 454 (3) explicitly allowed the court a choice of probation or jail upon a finding of a willful violation of a support order, but it did not authorize both probation and a jail term. The record established that the father had completed his three-month jail term. Thus, the additional sentence of probation was vacated.

Matter of Heffner v Jaskowiak, 132 AD3d 1418 (4th Dept 2015)

Court Erred in Determining Defendant Had No Obligation to Contribute to Cost of Son's College Education

Supreme Court entered a judgment of divorce that, among other things, determined that defendant father had no obligation to contribute to the cost of the college education of the parties' son. The Appellate Division vacated the pertinent decretal paragraph and directed defendant to pay toward the cost of his son's college education 50% of the cost of an education at a college in the State University of New York system, with a credit for the \$5,000 that defendant contributed to the son's college expenses pursuant to a prior order, and remitted for a calculation the amount of defendant's contribution. The court also erred in refusing to direct defendant to contribute to the cost of the son's education at a private college. Consideration was given to the parents' educational background, the child's scholastic ability, and the parents' ability to pay. Upon remittal, The court could consider whether defendant was entitled to a credit against child support for college expenses taking into account the needs of the custodial parent to maintain a household and provide certain necessities.

D'Amato v D'Amato, 132 AD3d 1424 (4th Dept 2015)

No Error in Increasing Father's Child Support Obligation

Family Court denied the objections of respondent father to an order of the Support Magistrate. The Appellate Division affirmed. The court did not err in denying respondent's objection to that part of the Support Magistrate's order refusing to apply his payments for his daughter's college expenses as a credit against his child support obligation. The child received certain

grants and awards that paid for some of her expenses, and the Support Magistrate properly concluded that the college bills did not establish what part, if any, of those grants and awards was applied to room and board. Consequently, respondent failed to establish that the payments were duplicative of his child support obligation. The Support Magistrate also properly concluded that petitioner was required to maintain a residence for the parties' other child throughout the year, and for the college student during school breaks. Although a support magistrate was also permitted to consider current income figures for the tax year not yet completed, he or she was not required to do so. Accordingly, the Support Magistrate properly used the prior year's income tax figures to calculate both parties' incomes. Moreover, the Support Magistrate did not improvidently exercise her discretion in declining to impute additional income to petitioner, and the court properly denied respondent's objections to that part of the Support Magistrate's order refusing to characterize the health insurance premiums that he paid on behalf of the subject children as an unreimbursed health care expense that should be divided between the parties.

Matter of Delsignore v Delsignore, 133 AD3d 1207 (4th Dept 2015)

Court Erred in Making Child Support Award Without Determining Whether Wife's Share Was Unjust or Inappropriate Based on Factors Set Forth in DRL § 240 (1-b)(f)

Supreme Court entered a judgment of divorce that, among other things, ordered the wife to pay child support. The Appellate Division modified by striking the phrase "with primary physical residence of the subject child awarded to the mother, with visitation to the father" from the fourth decretal paragraph, and by vacating the award of child support, and remitted the matter for further proceedings. Pursuant to a prior stipulation, the parties agreed to shared custody with an approximately even distribution of parenting time, and the court accepted that stipulation by ordering that the stipulation be incorporated in, but not merged, into the judgment of divorce. That stipulation, as the court noted in its decision, "(revealed) a truly 50-50 shared parenting plan. Thus, neither parent (was) the primary physical custodian." Consequently, the court erred in

awarding primary physical residence to the mother. The court also erred in its child support award. The three-step statutory formula of the Child Support Standards Act (CSSA) for determining the basic child support obligation must be applied in all shared custody cases, and the noncustodial parent must be directed to pay a pro rata share of that obligation unless the court finds that amount to be unjust or inappropriate based upon a consideration of the factors set forth in Domestic Relations Law (DRL) § 240 (1-b)(f). Although the court properly determined that the wife was the noncustodial parent for CSSA purposes because her income exceeded the income properly imputed to the husband, the court erred in making its child support award pursuant to the CSSA without determining whether her share was unjust or inappropriate based on the factors set forth in DRL § 240 (1-b)(f). Moreover, the court erred in failing to deduct the wife's FICA tax payments from her gross income pursuant to DRL § 240 (1-b)(b)(5)(vii)(H).

Shamp v Shamp, 133 AD3d 1213 (4th Dept 2015)

Amount of Father's Child Support Arrears Affirmed

Supreme Court determined that the amount of defendant father's child support arrears was \$489,635.04. The Appellate Division affirmed. Defendant's contentions relating to a prior order, where his appeal was not perfected, were deemed abandoned. Defendant's contention that at the hearing on the postjudgment child support arrears, the court erred in refusing to admit into evidence a transcript of the deposition of plaintiff mother, was rejected. Extrinsic evidence cannot be used to impeach credibility on a collateral issue and the record established that the transcript concerned prejudgment support payments. The court did not abuse its discretion in denying defendant's motion for leave to renew inasmuch as defendant failed to provide a reasonable justification for his failure to present the facts on the prior motion.

Mura v Mura, 133 AD3d 1326 (4th Dept 2015)

Father's Appeal of Revoked Suspended Judgment and Commitment to Jail Dismissed

Family Court revoked a suspended judgment and

committed respondent father to jail for a period of six months. The Appellate Division dismissed the appeal. Because respondent served his sentence, the appeal was moot. To the extent that the appeal was not moot, respondent failed to appeal from the order finding him in willful violation of the order requiring him to pay child support.

Matter of Davis v Williams, 133 AD3d 1354 (4th Dept 2015)

Court Erred in Granting That Part of Plaintiff's Motion for Upward Modification of Child Support

Supreme Court granted that part of plaintiff mother's motion for an upward modification of child support. The Appellate Division reversed. The court erred in concluding that it was required to recalculate child support upon the termination of defendant father's maintenance obligation and in granting that part of plaintiff's motion on that ground. The judgment of divorce reflected an award of child support to plaintiff in which defendant's maintenance payments had been deducted from his income in calculating child support, but there was no provision in the judgment for an adjustment to child support upon the termination of maintenance, as required by Domestic Relations Law Section 240 (1-b) (b) (5) (vii) (C). Neither party took an appeal from the judgment of divorce, however. The court erred in essentially correcting the error upon plaintiff's subsequent request for a modification of child support. Rather, plaintiff was required to show a substantial change in circumstances warranting an upward modification of child support, and she failed to make that showing.

Mancuso v Mancuso, 134 AD3d 1421 (4th Dept 2015)

Support Magistrate Erred in Relying on Facts Not in Evidence

Family Court denied the objections of the father to an order of the Support Magistrate, who denied in part the father's petitions seeking a downward modification of his child support obligation. The Appellate Division reversed and remitted for a new hearing. In determining a party's child support obligation, a court need not rely upon the party's own account of his or her finances, but could impute income based upon the

party's past income or demonstrated earning potential. In imputing income to the father, the Support Magistrate erred in relying on facts that were not in evidence.

Matter of Figueroa v Figueroa, 134 AD3d 1592 (4th Dept 2015)

CUSTODY AND VISITATION

Sound and Substantial Basis For Award of Custody to Father

Family Court granted the petition of father to modify a prior order of custody by awarding the father sole custody of the subject child, with bimonthly supervised visitation with respondent mother. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination. The father sought custody of his young son after the child reported that he had been sexually and physically abused while in his mother's care. The court properly considered the totality of the evidence, including a forensic report finding that the child could suffer significant emotional stress if returned to his mother, and the testimony of multiple witnesses that the father was ably meeting the child's medical and educational needs.

Matter of Neil S. v Valynda G., 132 AD3d 422 (1st Dept 2015)

Respondent Failed to Establish Reasonable Excuse and Meritorious Defense Sufficient to Vacate Default

Family Court denied respondent mother's motion to vacate a final order of custody to petitioner. The Appellate Division affirmed. Respondent's claim that she did not receive notice of the April hearing was credibly refuted by the mailing sent to her by the clerk of the court to her confidential address, and the affidavit of the AFC stating that he provided respondent with actual notice of the hearing during a telephone call. Further, respondent provided no documentary evidenced to support her defense claim that she was in a car accident, asked petitioner to keep the child for a few more weeks, and was unable to reach petitioner from January to March.

Matter of Colin D. v Latoya A., 132 AD3d 438 (1st Dept 2015)

Grant of Annual Visitation With Incarcerated Father Affirmed

Family Court granted the father's petition for visitation with his children to the extent of awarding an annual visit at the Southport Correctional facility or any facility where he was incarcerated that was within the same proximity as Southport, on condition that he pay the mother \$200 towards the cost of the visit within 90 days before it was held. The Appellate Division affirmed. The court's decision to allow the father visitation one time per year had a sound and substantial basis in the record. The court properly took into account the totality of the circumstances, including the children's position, and the burden and cost involved in the lengthy trip from Bronx County to an upstate facility, in determining that an annual visit was in the children's best interests. The fact that the mother objected to having to make the trip was not a reason to deny the father visitation. The request of the AFC that the geographic proximity requirement be clarified and the father's concern about lack of communication would best be addressed in the context of a modification petition.

Matter of William G. v Saline G. A., 132 AD3d 440 (1st Dept 2015)

Sole Custody to Father Affirmed

Family Court granted sole legal and physical custody of the subject child to petitioner father. The Appellate Division affirmed. There was ample support for the court's finding that custody to the father was in the child's best interests. The evidence established that the father was a suitable caretaker and able to provide a stable home for the child, had done so for four months, and the child was doing well in his care. The father was living with the paternal grandfather in a four bedroom home with room for the child. The grandfather was willing and able to provide financial support to the father and child. Additionally, the paternal grandmother and paternal aunt lived nearby and were willing and able to assist the father in caring for the child. The mother suffered from mental illness characterized by, among other things, bipolar disorder, anxiety and

depression. Before relocating from Boston, the mother alternated between several shelters and the home of the paternal grandmother, who often provided primary care for the child. Since her unplanned move to New York, with no arrangements for her mental health treatment, she lived in various shelters where she had gotten into physical altercations with shelter staff and residents in the presence of the child, resulting in the child's removal from her care and a neglect finding.

Matter of Joshua C. v Tenequa A., 132 AD3d 497 (1st Dept 2015)

Twelve-Year-Old Child's Disinclination to Overnight Visitation Not Determinative

Family Court granted the father's petition for overnight visitation with the parties' child. The Appellate Division affirmed. The Referee's finding that awarding overnight visitation to the father was in the child's best interests was supported by a sound and substantial basis in the record. The 12-year-old child's disinclination towards overnight visitation was not determinative. The record supported the finding that respondent mother's negative attitude about overnight visits and her enmeshed relationship with the child were major causes of the child's anxiety and opposition. The Referee properly discounted the court-appointed psychologist's testimony that overnight visitation would not be recommended at that time given the passage of time since the report was made, the fact that the child was in therapy, and evidence that the child had a good relationship with the father.

Matter of Jose F. v Sylvia P., 132 AD3d 592 (1st Dept 2015)

Modification of More and Overnight Visitation With Father Affirmed

Family Court granted the father's petition for modification of a visitation order to provide expanded and overnight visitation. The Appellate Division affirmed. The determination that awarding increased visitation to the father was in the child's best interests was supported by a sound and substantial basis in the record. There was a change in circumstances in that respondent mother failed to comply with the agreed visitation schedule, petitioner moved to a home in

Pennsylvania, and the teenaged child expressed a strong desire to spend more time with her father and to stay at his home overnight.

Matter of Leon T v Marie J., 132 AD3d 602 (1st Dept 2015)

Sole Custody to Mother Affirmed

Family Court awarded sole custody of the subject children to petitioner mother with visitation to respondent father. The Appellate Division affirmed. The determination that it was in the children's best interests to award sole custody to the mother with visitation to respondent father was supported by a sound and substantial basis in the record. The Referee correctly considered, among other things, the mother's role as primary caretaker, the father's lack of participation in the children's educational and medical care, his history of domestic violence against the mother, his lack of suitable housing, and his failure to take advantage of previous court-ordered visitation.

Matter of Kougne T. v Mamadou D., 133 AD3d 455 (1st Dept 2015)

Sole Custody to Mother Affirmed

Family Court granted the mother's petition for sole legal and physical custody of the subject child, denied respondent father's cross petition for custody, and awarded him visitation. The Appellate Division affirmed. While both parties cared for the child prior to their separation, the mother was the child's primary caretaker. She made all child care arrangements for the child and she pursued her suspicion that the child suffered from speech delay, despite the father's and the pediatrician's dismissal of her concerns. The mother attended to all the child's medical needs and enrolled him in a school that provided speech therapy. The mother provided a stable home environment, while the father had a history of aggressive behavior and excessive alcohol consumption, including two DUI convictions. The record also established that the mother was more likely to foster a continued relationship with the father.

Matter of Celina S. v Donald S., 133 AD3d 471 (1st Dept 2015)

Court Not Bound to Follow Forensic Evaluator's Recommendation

Supreme Court, among other things, awarded the parties joint legal custody of their child with separate decision-making zones and a near 50-50 parental access schedule. The Appellate Division affirmed. The court's determination that it was in the child's best interests for the parties not to have a 50-50 access schedule had a sound and substantial basis in the record. The temporary 50-50 schedule had too many transitions and opportunities for conflict. The court was not bound to follow the recommendation of the court-appointed forensic evaluator. While the court found the evaluator's clinical observation about the parties to be accurate and convincing, the court also concluded that she was overly optimistic about the parties' ability to work together in the future. The court's conclusion was based upon consideration of the hostility and strife between the parties, which the court did not believe would subside after the divorce.

Tatum v Simmons, 133 AD3d 550 (1st Dept 2015)

AFC Entitled to Compensation From Father Even in Absence of Perfect Compliance With NYCRR

Family Court directed respondent father to pay the AFC \$9,840, as his share of legal services the AFC provided to the children during the underlying custody proceeding. The Appellate Division affirmed. When the AFC was appointed by the court, the parties were directed to pay his fees. The AFC represented the children during the course of the divorce, including bringing a motion to restrain the father from firing the children's nanny and opposing the mother's motion for an order of protection and bringing a cross motion for appointment of a parenting coordinator. The AFC's cross motion was granted and the children's legal fees were reapportioned. The father, who was represented at that time, raised no objection to the cross motion or complained that he had not received periodic bills from the AFC. After the parties settled the custody dispute by entering into a stipulation of settlement, the AFC sent the father a bill for his share of the legal fees, \$9,840, and the father refused to pay it. After conducting a two day testimonial hearing, the court held that the AFC was entitled to collect the full amount of the father's share of the AFC's bill for legal

services. The fact that the father sometimes supported or opposed relief sought by one of the parents was not evidence of bias. There was nothing in the record to support the conclusion that the AFC had a personal, unreasonable prejudgment of any of the issues affecting his clients that interfered with his representation of them. It was not an abuse of discretion for the court to conclude that the AFC was entitled to compensation, even in the absence of perfect compliance with 22 NYCRR 1400.2. Although there was only one itemized bill, and not one bill sent every 60 days, the court not only set the hourly rate that could be charged, but also conducted a testimonial hearing on the reasonableness of the fees. The same referee presided over the matter for its duration, thereby giving the fees that were ultimately awarded the high level of scrutiny required.

Matter of Donna Marie C. v Kuni C., 134 AD3d 430 (1st Dept 2015)

Mother Failed to Show Reasonable Excuse For Her Default or Meritorious Defense to Custody Petition

Family Court denied respondent mother's motion to vacate a final order, entered upon her default, granting custody of the children to petitioner father. The Appellate Division affirmed. The mother failed to demonstrate both a reasonable excuse for her default and a meritorious defense to the father's custody petition. The court reasonably found that, notwithstanding the mother's dental condition, she could have appeared for the custody hearing that had been scheduled for several months. The mother's note from her doctor did not substantiate her excuse, because it failed to specify when he examined her, what serious condition she suffered from, and why she could not appear. The mother also failed to proffer any evidence that would have warranting a finding that the children's best interests would be served by denying the father's custody petition. The children had been removed from the mother's care following entry of neglect findings against her, and temporary custody was awarded to the father, who had received training to care for their special needs, The children were thriving in the father's care, and they expressed a strong desire to remain with him and not return to the mother.

Matter of Michael A.H. v Rosemary H., 134 AD3d 485 (1st Dept 2015)

Record Supported Unsupervised Visitation

The Family Court's determination that it was in the best interests of the child for the father to have had physical custody of her was supported by a sound and substantial basis in the record. The evidence presented at the hearing showed that the father's home environment was more suitable for the child, both in terms of stability and quality. Furthermore, the evidence demonstrated that the father had a superior ability to provide for the child financially, and was more likely than the mother to foster a relationship between the child and the noncustodial parent. The Family Court also providently determined that the mother's visitation with the child should have been unsupervised. The Family Court, which heard and saw the witnesses, determined that there was no basis for the father's claims that the mother planned to abscond with the child to China, and no other ground for requiring visitation to be supervised was proffered. Moreover, the father's mother, who supervised much of the mother's visitation, testified that the mother and the subject child were attached and loved one another, and that their interactions were warm. Under those circumstances, it was not established that unsupervised visitation would have been detrimental to the child.

Matter of O'Neil v Chen Yan Xu O'Neil, 132 AD3d 680 (2d Dept 2015)

Record Supported Determination to Award Custody to Father

The parties had one child, born in August of 2001. In 2004, the mother obtained an order awarding her custody of the child, and thereafter moved with the child to Georgia, where they remained until August of 2011. During that time, the father had extended visits with the child in Georgia and New York and maintained a healthy relationship with the child. In August of 2011, the mother accepted a job requiring her to live abroad in the Middle East for two years. The father commenced a proceeding seeking to modify the prior order awarding custody of the parties' child to the mother so as to award him custody of the child, and the mother cross-petitioned to relocate with the child to Georgia. After a hearing, the Family Court granted the father's petition and denied the mother's cross petition. Contrary to the mother's contention, the Family Court's

determination that the requisite change in circumstances existed which warranted an award of custody to the father, had a sound and substantial basis in the record. While both parties appeared to be capable and loving parents, the child had thrived under the father's care in New York, the child indicated that he preferred to live with the father, and the father was better able to provide the child with a stable home environment. The Family Court's determination was further supported by the recommendation of the court-appointed forensic psychologist, and by the position taken by the attorney for the child. Although the recommendations of court-appointed evaluators and the attorney for the child are not determinative, they are factors to be considered and are entitled to some weight.

Matter of Wosu v Nettles, 132 AD3d 688 (2d Dept 2015)

Mother Did Not Knowingly, Intelligently, and Voluntarily Waive Her Right to Counsel

The fact that mother's three appointed attorneys successfully sought to be relieved of their assignment did not serve to extinguish the mother's right to have an attorney assigned to represent her in Family Court proceedings on her and the father's separate petitions for sole legal and physical custody of their child (*see* FCA § 262 [a],[b]). A party to a Family Court proceeding who has the right to be represented by counsel may only proceed without counsel if that party has validly waived his or her right to representation (*see* FCA § 262[a]). Here, the record did not demonstrate that the mother waived her right to counsel. Although the Family Court discussed the risks of proceeding pro se, it never determined, in the first instance, whether the mother wanted to waive her right to have an attorney assigned to represent her. Indeed, the Family Court conducted no inquiry to determine whether the mother was waiving her right to counsel, and the record demonstrated that the mother "did not wish to proceed pro se, but was forced to do so" even though she was entitled to have an attorney assigned to represent her. Accordingly, since the mother did not knowingly, intelligently, and voluntarily waive her right to counsel, the Family Court's order was reversed and the matter was remitted to the Family Court for a determination of whether the mother wished to waive

her right to counsel, the assignment of new counsel if warranted, and a new hearing on the petitions and a new determination thereafter.

Matter of Tarnai v Buchbinder, 132 AD3d 884 (2d Dept 2015)

Father's Waiver to His Right to Counsel Was Clear and Unequivocal

Here, the Family Court conducted a sufficiently searching inquiry to ensure that the father's clear and unequivocal waiver of his right to counsel was knowingly, voluntarily, and intelligently made. The court advised the father of the dangers and disadvantages of giving up the fundamental right to counsel, and the father acknowledged his understanding of those perils and repeated his desire to proceed pro se. Contrary to the father's contention, mere ignorance of the law cannot vitiate an effective waiver of counsel. In addition, there was no merit to the father's contention that the Family Court erred in directing his assigned counsel to remain in the case as his legal advisor. There was no indication in the record that the father objected to his assigned counsel acting as his legal advisor for the remainder of the hearing, nor was he entitled to assigned counsel of his choice. Moreover, there was no basis to disturb the Family Court's order awarding sole custody of the child to the mother. Contrary to the father's contention, the Family Court properly determined that the best interests of the child were served by awarding sole custody to the mother, with liberal visitation to him. That determination was supported by the record, including the testimony of the parties and the recommendations of the forensic expert and attorney for the child.

Matter of Ryan v Alexander, 133 AD3d 605 (2d Dept 2015)

Family Court Erred in Dismissing Petition; Retained Jurisdiction

Pursuant to a prior order of custody and visitation, the mother was awarded physical custody of the parties' child and the father was awarded liberal visitation. The mother and father each filed petitions to modify the prior order of custody and visitation, but soon thereafter, the mother absconded with the child and

apparently relocated to North Carolina, although her exact whereabouts were unknown. After dismissing the mother's petition for failure to prosecute and relieving her attorney, the Family Court dismissed the father's modification petition. The court reasoned that, without the child's participation in the proceeding, it could not determine whether a transfer of physical custody to the father was in the child's best interests. Here, it could not be disputed that the mother had willfully interfered with the father's right to visit with his child. Furthermore, the Family Court retained exclusive continuing jurisdiction over its prior order of custody and visitation, despite the mother's apparent relocation to North Carolina (*see* DRL § 76-a [1] [a]). Therefore, under the circumstances of this case, the Appellate Division reinstated the father's modification petition, and the matter was remitted to the Family Court, for a hearing on the issue of custody of the child, even if the child could not be present at the hearing, and, thereafter, a determination on the merits of the father's petition.

Matter of Pettiford v Clarke, 133 AD3d 666 (2d Dept 2015)

Updated Forensic Report Not Warranted

In a custody proceeding, the primary issue with respect to the children's best interests was which parent was better able to avoid conflict between the parties and foster the children's relationship with the noncustodial parent. Contrary to the mother's contention, this question did not present sharp factual disputes upon which the report of a court-appointed forensic examiner could have shed light. Thus, the Family Court providently exercised its discretion in denying the mother's request for the appointment of a forensic evaluator to produce an updated report in this case. Furthermore, the evidence presented at the hearing supported the court's conclusion that the father was willing and able to assure meaningful contact between the children and the noncustodial parent and that the mother was not willing to do so. Accordingly, the court's determination that the children's interests were best served by awarding the father sole custody, while maintaining liberal parenting time for the mother, had a sound and substantial basis in the record.

Matter of Keyes v Watson, 133 AD3d 757 (2d Dept 2015)

Father's Motion to Enjoin Mother from Relocating Granted

A parent seeking to relocate with a child bears the burden of establishing by a preponderance of the evidence that the proposed move would be in the child's best interests. The factors to be considered include, but are certainly not limited to each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. Here, the mother's move from East Hampton to Westhampton Beach significantly limited the father's contact with the children. By lengthening the father's commute from a few minutes to almost an hour, the move effectively cut the father's weekday visitation in half. The mother also failed to demonstrate, by a preponderance of the evidence, that the children's lives would be enhanced economically, emotionally, or educationally by the move. Thus, the Supreme Court properly granted the father's motion to enjoin the mother from relocating to Westhampton Beach.

Quinn v Quinn, 134 AD3d 688 (2d Dept 2015)

Record Supported Family Court's Determination to Grant Father Overnight Visitation with Children

In determining visitation rights, the most important factor to be considered is the best interests of the children. The determination of visitation issues is entrusted to the sound discretion of the Family Court, and its determination will not be disturbed on appeal unless it lacks a sound and substantial basis in the record. Here, contrary to the mother's contention, the Family Court did not improvidently exercise its discretion in setting forth the father's visitation schedule upon remittal from the Appellate Division. The Family Court's determination that it was in the children's best interests for the father to have overnight visitation with them beginning at 3:30 p.m. each Thursday and ending at the start of school on Friday

morning, and on alternate weeks during their summer vacation, had a sound and substantial basis in the record.

Matter of Fowler v Rivera, 134 AD3d 708 (2d Dept 2015)

Joint Legal Custody No Longer Feasible

The parties, who were never married, have two children together. On February 16, 2012, the parties consented to the entry of an order of custody and visitation which provided, inter alia, that the parties would share joint legal custody of the children, with residential custody to the mother, and parenting time to the father. On July 3, 2014, the mother filed a petition, inter alia, to modify the order of custody and visitation so as to award her sole legal custody of the children and to require therapeutic supervised visitation for the father. On August 13, 2014, the father filed a petition to modify the order of custody and visitation so as to award him sole legal and residential custody of the children. In the order appealed from, the Family Court, after a hearing, in effect, denied, with prejudice, both petitions, finding that neither party had sufficiently demonstrated a substantial change in circumstances since the date of the last order warranting a modification. The mother appealed from the order which denied her petition to modify the order of custody and visitation so as to award her sole legal custody of the children. Upon reviewing the record, the Appellate Division found that the evidence adduced at the hearing established that a substantial change in circumstances had occurred since the February 16, 2012, order of custody and visitation was issued such that modification of that order was necessary to protect the best interests of the children. The parties' relationship was strained when they entered into the custody and visitation agreement, and it subsequently deteriorated to the point that they did not communicate at all, and did not engage in joint decision making with respect to the children. Therefore, joint legal custody was no longer feasible. Joint custody is inappropriate where, as here, the parties are antagonistic toward each other, do not communicate at all, and have demonstrated an inability to cooperate on matters concerning the children. The continued deterioration of the parties' relationship was a change in circumstances warranting a change in the joint custody arrangement. The totality of the circumstances justified

modifying the order of custody and visitation so as to award sole legal custody of the children to the mother. The mother, as the residential parent, had more involvement with the children's needs on a day to day basis. Moreover, the record showed that the mother made decisions about the children's educational needs, while the father denied that any such educational needs existed.

Matter of Moore v Gonzalez, 134 AD3d 718 (2d Dept 2015)

New Developments Rendered the Record No Longer Sufficient to Determine Best Interests

In an order dated August 15, 2014, made after a hearing, the Family Court granted the father's petitions to enforce the provisions of a prior order of custody and visitation dated June 18, 2013, which change his supervised visitation with the subject child to unsupervised visitation, and to modify the order dated June 18, 2013, so as to expand his visitation time with the child. The mother appealed. Although the record indicated that the father complied with certain conditions set forth in the prior order of custody and visitation dated June 18, 2013, which were required for him to progress to unsupervised visitation with the child, on appeal, new developments were brought to the attention of the Appellate Division by the attorney for the child. These developments included a criminal proceeding pending against the father in connection with his alleged violation of an order of protection granted in favor of the mother. Additionally, the attorney for the child indicated that the father was not having visitation time with the child, and that an order was issued by the Family Court in April 2015 which would allow the father to have supervised visitation upon proof of, among other things, his compliance with the Department of Probation, including negative drug screenings. In light of the significant new developments brought to the Court's attention by the attorney for the child, the record was no longer sufficient to determine whether unsupervised and expanded visitation with the father was in the best interests of the child. Accordingly, the order was reversed and the matter was remitted to the Family Court for a reopened hearing, at which the new facts were to be considered, and a new visitation determination thereafter.

Matter of Poit v Kochem, 134 AD3d 722 (2d Dept 2015)

Mother Established That Relocation Was in Child's Best Interests

The Family Court's determination that the child's best interests were not served by relocating with her mother to Florida was not supported by a sound and substantial basis in the record. Although both parties were loving parents, the mother had been the child's primary caretaker for all but one year of the child's life, and the child was 11 years old at the time of the hearing. The record indicated that the child had established a primary emotional attachment to the mother and that the child's emotional well-being suffered after she was removed from the mother's care. Furthermore, the child repeatedly expressed that she wished to relocate to Florida with her mother. While a child's preference is not determinative, it is some indication of what is in the child's best interests, particularly where, as here, the court's interviews with the child demonstrate the child's level of maturity and ability to articulate her preferences. Moreover, the child's relationship with her half-sibling, who resides in Florida, would be disrupted if she remained in the father's care, and the record indicated that the child and her half-sibling had developed an emotional bond. The record also supported a finding that the denial of the mother's petition to relocate and an award of sole residential custody to the father would have a potentially negative impact on the child's relationship with her mother. Although the mother's relocation would inevitably have an impact upon the father's ability to spend time with the child, a liberal visitation schedule, including extended visits during summer and school vacations, would allow for the continuation of a meaningful relationship between the father and the child. Upon weighing the relevant factors, the Appellate Division found that the mother established that the best interests of the subject child would be served by permitting the relocation. Accordingly, the Family Court should have granted the mother's petition to relocate with the child to Florida. Order reversed.

Matter of Ceballos v Leon, 134 AD3d 931 (2d Dept 2015)

Error to Dismiss Petition for Lack of Subject Matter Jurisdiction; Hearing Required

The parties are the married parents of two young children. The parties lived with their children in New York until approximately May 20, 2014, when they traveled to Bangladesh to visit family members. The mother alleged that while abroad, the father confiscated the children's passports, rendering them unable to return to the United States. The father disputed that allegation. The mother commenced a proceeding by petition dated December 15, 2014, seeking sole custody of the two children. The Family Court dismissed the petition, without a hearing, based on its finding that it lacked subject matter jurisdiction over the proceeding. Under the circumstances presented, the Family Court erred in determining that it lacked subject matter jurisdiction without conducting a hearing. Under the Domestic Relations Law, a state may have jurisdiction over a child custody proceeding if the "state is the home state of the child" (*see* DRL § 76 [1] [a]). A home state is defined as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding" (*see* DRL § 75-a [7]). The definition of a home state also permits a period of temporary absence during the six-month time frame necessary to establish home-state residency (*see* DRL § 75-a [7]). In addition, it is established that a parent may not wrongfully remove or withhold a child from the other parent for the purpose of establishing a 'home state' for that child. Here, there are disputed allegations as to the circumstances of the continued presence of the children in Bangladesh. Thus, under the circumstances of this case, the Family Court erred in dismissing the petition based on lack of subject matter jurisdiction without conducting a hearing as to whether the children were wrongfully prevented from returning to New York during the six-month period preceding the petition. If that was the case, New York remained the home state of the children in light of such wrongdoing. Accordingly, the order was reversed, the petition was reinstated and the matter was remitted.

Matter of Padmo v Kayef, 134 AD3d 942 (2d Dept 2015)

Mother Sufficiently Alleged a Change in Circumstances

In December 2008, the grandmother of the subject child filed a petition seeking custody of the subject child. The Family Court subsequently issued an order dated April 17, 2009, on the consent of the mother and grandmother, awarding sole custody of the subject child to the grandmother. In May 2014, the mother filed a petition to modify the order dated April 17, 2009, so as to award her sole custody of the subject child. After a hearing, the court issued an order dated December 23, 2014, which, *inter alia*, denied the petition and established a visitation schedule for the mother. In an order dated March 4, 2015, the Family Court declined to sign the mother's order to show cause accompanying her petition to hold the grandmother in contempt of the order dated December 23, 2014, and to modify that order so as to award the mother sole custody of the subject child. The mother appealed both orders. In this case, the Family Court properly determined that the grandmother sustained her burden of demonstrating extraordinary circumstances, based on an extended disruption of parental custody (*see* DRL § 72 [2] [a], [b]). Moreover, the Family Court's determination that it was in the child's best interests to remain in the custody of the grandmother was supported by a sound and substantial basis in the record. Thus, the order dated December 23, 2014 was affirmed. As to the order dated March 4, 2015, the Family Court erred in declining to sign the mother's order to show cause accompanying the petition. Modification of a custody order is permissible upon a showing that there has been a change in circumstances such that modification is necessary to ensure the best interests of the child. Here, the allegations in the mother's petition, as detailed in her accompanying affidavit, would, had they been proven, tended to establish that the grandmother interfered with the mother's visitation rights. That interference might have constituted a change in circumstances sufficient to warrant a change in custody. Moreover, the allegations would, had they been proven, have tended to establish that the grandmother should have been held in civil contempt for disobeying the visitation provisions of the order dated December 23, 2014. Accordingly, the Appellate Division reversed the order dated March 4, 2015, and remitted the matter to the Family Court to sign the mother's order to show cause.

Matter of Lallas v Bolin, 134 AD3d 1038 (2d Dept 2015)

Family Court Improvidently Exercised its Discretion in Denying Mother's Motion to Vacate

The father commenced several related custody and visitation proceedings when the subject child was approximately six years old. The child had resided with the mother since birth. About nine months after the commencement of these proceedings, the mother failed to appear for a scheduled court date. Her attorney moved for an adjournment, the Family Court denied the motion, and the mother's attorney declined to participate in the proceedings without the mother present. The court conducted an inquest in the mother's absence and thereafter entered an order dated September 4, 2014, upon the mother's failure to appear, granting the father's petition for sole legal and physical custody of the child. The mother subsequently moved to vacate that order, contending, inter alia, that her failure to appear at the scheduled court date was not willful. In an order dated October 7, 2014, the court denied the mother's motion, and the mother appealed. The determination of whether to relieve a party of an order entered upon his or her default is a matter left to the sound discretion of the Family Court. A party seeking to vacate an order entered upon his or her default is required to demonstrate a reasonable excuse for the default and the existence of a potentially meritorious cause of action or defense. However, the law favors resolution on the merits in child custody proceedings, and thus the general rule with respect to opening defaults in civil actions is not to be rigorously applied to cases involving child custody. Under the circumstances presented here, and in light of the policy favoring resolutions on the merits in child custody proceedings, the Family Court improvidently exercised its discretion in denying the mother's motion to vacate the order dated September 4, 2014, entered upon her failure to appear. Accordingly, the Appellate Division reversed the order dated October 7, 2014, granted the mother's motion to vacate the order dated September 4, 2014, and remitted the matter to the Family Court for further proceedings on the petitions.

Brice v Lee, 134 AD3d 1106 (2d Dept 2015)

No Showing of a Change in Circumstances

Family Court properly dismissed the mother's application to modify a prior order of custody finding she had failed to establish a change in circumstances. Here, the parents had joint legal custody, with primary physical custody to the father and daily Skype or telephone contact with the child to the mother. Thereafter, the mother alleged the father was homeless and had failed to provide the mother with daily contact with the child as dictated by the prior order. However, the mother later conceded the father was not homeless and she was in fact being provided with daily contact with the child. Although the mother expressed concern that the father's epilepsy prevented him from properly caring for the child, his medical condition was known to the mother at the time the prior order was entered and no evidence was presented to support this claim.

Matter of Tyrel v Tyrel, 132 AD3d 1026 (3d Dept 2015)

Sound and Substantial Basis in the Record to Support Primary Physical Custody to Mother

Parents of a young child who lived in two different counties, the mother residing in Albany County and the father in Fulton County, stipulated to an order of joint legal and physical custody, with the understanding that if either party wished to modify the order in the future, the sole issue would be the child's best interests without a showing of a change in circumstances. When the child reached kindergarten age and the issue of which school district the child would attend became imminent, a flurry of modification and violation petitions were filed by both parties in two different counties. The matter was finally transferred to Fulton County Family Court. After a hearing, the court modified the order and awarded primary physical custody to the mother with parenting time to the father. The Appellate Division affirmed. The record showed the mother's testimony was the more credible of the two. The mother testified the parties had agreed the child would attend school in Albany County and prior to commencement of these proceedings, the child had already been enrolled in kindergarten and had participated in school orientation. The father however, had misrepresented the facts and had obtained a temporary order of custody. He had come to the

mother's home with the police, family and friends, to remove the child. Showing further bad judgment, he had also and without notice to the mother, enrolled the child in school in Fulton County, switched her pediatrician and made phone calls to the mother on speaker phone in order for neighbors and family members to hear their conversation. Additionally, the father's wife had confronted the mother over a sunburn the child had sustained while in the mother's care, and the argument had escalated to the point where it became a heated exchange and swearing in front of the child. While the mother also showed some bad judgment, on the whole there was a sound and substantial basis for the court's decision.

Matter of Andrea CC. v Eric DD., 132 AD3d 1028 (3d Dept 2015)

Sound and Substantial Basis in the Record to Support Sole Legal Custody to Mother

Family Court modified a prior order of joint legal custody and awarded sole legal custody of the child to the mother. The father appealed but by the time the appeal was heard, Family Court had issued a subsequent order, continuing sole legal custody with the mother and awarding the father supervised parenting time. Since the subsequent order did not modify the prior custodial arrangement and included no provision that it superceded all prior orders, that portion of the prior order awarding sole legal custody to the mother was still appealable. Since there was no argument as to whether there had been a change in circumstances, the only concern was whether the order was in the child's best interests. There was a sound and substantial basis in the record for the court's order. Here, the child had emotional and behavioral issues and the professionals who treated the child agreed the mother was supportive of the child and cooperated with all providers while the father frequently disagreed with the advice of health care professionals regarding the child and was often disruptive during the child's appointments, which caused the child's pediatrician to discontinue treating the child. Additionally, a court order had to be issued barring the father from attending the child's therapy sessions. Although the attorney for the child advocated for sole custody to the father, the record showed the father was overly indulgent and permissive and the child would have to change schools

if custody were granted to the father and the record showed the move to another school would be detrimental to the child.

Matter of Blagg v Downey, 132 AD3d 1078 (3d Dept 2015)

Insufficient Grounds to Find Extraordinary Circumstances

Family Court erred in determining extraordinary circumstances existed sufficient to allow the maternal aunt to have standing to pursue custody of the 15-year-old minor child. Here, the child stayed with the aunt for 10 days while the mother was hospitalized due to mental health concerns. During the mother's hospitalization, the aunt applied for temporary custody and after a hearing, was awarded sole custody. The record showed that during her hospitalization, the mother attempted to maintain contact with the child, and when she was released, she attempted to see the child but was hindered by distance, since the aunt lived one hour away and the mother had no transportation. Additionally, the mother's medical issues, eviction from her home and the parties' animosity towards each other also contributed to lack of contact between the mother and child. Furthermore, although there was an indicated report against the mother by CPS for inadequate guardianship, this was later determined to be unfounded. The mother did not neglect her responsibilities as a parent during the course of the hearing but continued therapy, obtained a suitable apartment and car and became employed as an adjunct professor. While the mother's health crisis would have been frightening to the child, the child's relationship with the mother had not deteriorated. The child was intelligent and well-adjusted and the mother had "played a significant role and had done a good job raising" the child. The aunt, who had resources, did not provide any assistance to the mother and the court erred in failing to provide a specific visitation schedule for the mother, despite her repeated requests, relying instead on the aunt to work out visitation with the mother.

Matter of Lina Y. v Audra Z., 132 AD3d 1086 (3d Dept 2015)

Petitioners Satisfied Burden of Establishing

Extraordinary Circumstances

The mother left her three-year-old subject child in the care of petitioner day care provider and her husband when she entered an inpatient facility for drug abuse treatment, giving petitioners the authority to take care of the child for 180 days. Thereafter, petitioners applied for and were granted custody of the child. The Appellate Division affirmed. The mother appealed, arguing that the court erred in finding extraordinary circumstances existed sufficient to grant standing to petitioners. A parent has a superior claim over a non parent absent "surrender, abandonment, persistent neglect.... or the existence of other extraordinary circumstances". Here, the mother acknowledged she is a drug addict, addicted to heroin and had begun using when she was 20- years-old. Additionally, a drug abuse counselor who testified on behalf of the mother, defined the mother as "kind of sober". The mother admitted that within the past year, she was unable to remember a whole month due to drug use and she admitted she had been the primary care giver for her child during this time. Furthermore, the mother admitted she had given the child to other persons during the times she was using drugs since she was unable to care for the child at such times. Based on this evidence, the court properly determined petitioners' had satisfied the burden of proving extraordinary circumstances.

Matter of Lisa UU. v Sarah VV., 132 AD3d 1094 (3d Dept 2015)

Relocation Was in the Child's Best Interests

The mother was allowed to relocate with the minor child. Thereafter, she returned to New York at which time the father obtained physical custody. The father then filed to relocate to Atlanta and the mother filed both modification and violation petitions. After a hearing, the court granted the father's relocation petition with visitation to the mother. The Appellate Division affirmed determining there was a sound and substantial basis for the court's order. Testimony established that relocation was in the child's best interests. The father had extended family in Georgia and had received a job offer in that state, which would provide the child with substantial economic benefits since the father and his partner could almost double

their combined salaries if they moved. Also, the father's 9-5 schedule would allow him to spend greater time with the child. Additionally, the school the child would attend in Georgia had the same activities in which the child currently participated. The mother had recently moved to a new house and the lease only allowed four people to reside in the home. The mother currently lived there with her husband and two children. She acknowledged she had not yet obtained consent for the subject child to also reside with her. Furthermore, the then 13-year-old subject child publicly informed the court she wished to relocate and given her age, her preference could be given considerable weight in making a best interest determination.

Matter of Barner v Hampton, 132 AD3d 1098 (3d Dept 2015)

Prior Agreed-Upon Order Remained in Child's Best Interests

Parties filed a series of petitions alleging violations and sought to modify a prior, agreed-upon joint legal custody order, which provided primary, physical custody to the mother and parenting time to the father. After a hearing, Family Court dismissed all petitions and determined the prior order was in the child's best interests. The father appealed and the Appellate Division affirmed, finding there was a sound and substantial basis in the record. Here, both parents showed poor judgement and exhibited inappropriate behavior after the prior order had been issued. The record showed the mother had appeared uninvited at the father's home in an intoxicated state and thereafter was arrested for disorderly conduct. Additionally, she was placed on probation for driving drunk. The parties engaged in verbal and physical disputes against each other and both parents were the subjects of indicated reports due to their mutual acts of domestic violence in the presence of the child. However, the court found not credible the father's testimony that he was blameless for the problems in the parties' relationship. On the other hand, the mother acknowledged she shared responsibility for the parties' problems and was open about her self-destructive behavior. Furthermore, while both parents had matured in the following years, were employed, had supportive environments and the mother remained compliant with the terms of her

probation regarding her substance abuse issues, the mother was also more willing to foster a relationship between the father and the child, provide him with frequent parenting time and help him with transportation. The Appellate Division noted its disapproval of the mother's privately retained counsel's conduct for his failure to submit an answering brief on the appeal and his failure to respond to numerous attempts by the Court to ascertain whether a brief would be submitted.

Matter of Hrostowski v Micha, 132 AD3d 1103 (3d Dept 2015)

Children's Best Interests to Limit Mother's Parenting Time

Family Court modified a prior order of custody and visitation by restricting the mother's visitation to one day every fourth weekend and directing the mother's paramour not be in the area when the children were visiting. The Appellate Division affirmed, finding there was a sound and substantial basis in the record to support the court's decision. Here, testimony showed that during a verbal argument between the parties, the mother's paramour intervened and threatened the father with a box cutter, which caused the mother to laugh and tell the father he was "going to get what [was]..coming to [him]". The children were present during this incident and became afraid of the paramour and afraid of visiting the mother. The court initially entered a temporary order prohibiting the paramour from being present during visitation but the mother continued to disregard the court's order and the children became more reluctant to visit the mother. The court responded by limiting the mother's contact with the children in an effort to prevent further damage of the relationship between the mother and the children, which was in the children's best interests.

Leonard v Leonard, 132 AD3d 1118 (3d Dept 2015)

Supervised Visits in Children's Best Interests

Family Court determined the mother had neglected the subject children and removed them from her care. Thereafter, the father, who had supervised parenting time with the children, was released from jail and he applied to modify the order, seeking unsupervised

parenting time. After a hearing, Family Court continued supervised parenting time, at least twice weekly. The Appellate Division affirmed. The only issue on appeal was whether the order was in the children's best interests. Here, the father regularly missed scheduled visits with the children and when he did attend, he failed to properly discipline them or provide them with adequate supervision. His visits were characterized as "chaotic" by the agency and the father had a history of mental health issues dating back several years, and no evidence was presented to show whether the issues had been addressed or treated. The father also admitted he smoked marijuana and at times had been under the influence while caring for the children.

Matter of Walter TT. v Chemung County Department of Social Services, 132 AD3d 1170 (3d Dept 2015)

Father Met Burden of Showing Change in Circumstances

Family Court modified a prior order of support and awarded the father primary physical custody of the subject children. The Appellate Division affirmed. Contrary to the mother's arguments, the father met the burden of showing a change in circumstances. When the prior order was entered, the parties were living eight miles apart in Tioga county with the children residing with the mother. Thereafter, there were many domestic violence incidents between the mother and her live-in boyfriend resulting in the mother's neighbors calling the police multiple times. The maternal grandfather testified the mother had been the victim of the boyfriend's domestic violence. The mother and her boyfriend were evicted and the two, along with the subject children, moved one hour away to Chenango County. The mother failed to inform the father of the impending move and only told him after she had moved. Additionally, when the father drove to the mother's new address, as listed in her court petition, he discovered an uninhabited trailer with no electrical service. The father later discovered the mother and children had moved in with the boyfriend's mother. Although the mother did not challenge the best interest determination, based on the evidence in the record and giving due deference to the court's credibility determinations, there was a sound and substantial basis for the court's decision.

Matter of Hartjen v Hartjen, 132 AD3d 1172 (3d Dept 2015)

Father Demonstrated a Child-Centered Approach to Parenting

After fact-finding and Lincoln hearings, Family Court modified a prior joint legal custody order, and awarded the father primary legal and physical custody of the child with parenting time to the mother. The Appellate Division affirmed. Here, the change in circumstances was based on the parties' deteriorated relationship which resulted in their inability to meaningfully communicate or cooperate on behalf of the child. Giving due deference to the court's credibility determinations, its decision to award custody to the father was supported by a sound and substantial basis in the record. The father, who was a self-employed contractor, had a flexible work schedule, an established daily routine for the subject child and a "child-centered" approach to raising her. He could also provide the child with a more stable and consistent home environment than the mother. The mother, who was a substitute teacher, had a demonstrated animosity toward the father and it was more likely the father would be the parent to foster a positive relationship between the child and the other parent.

Matter of Zahuranec v Zahuranec, 132 AD3d 1175 (3d Dept 2015)

Ample Support to Show it Was in Child's Best Interests to Award Father Custody

Family Court granted the father's application to modify a prior order of joint legal custody with primary legal custody to the mother, and awarded the father sole legal and physical custody of the child. The Appellate Division affirmed. Here, there was a sufficient showing of a change in circumstances. The evidence showed the mother was living in a home in Chenango County, her fourth residence in five years, with her boyfriend and the subject child. A while later the boyfriend moved to Broome County, without providing his address to the mother. The mother, who was nine months pregnant with the boyfriend's child, had been drinking and decided to drive to Broome County on an "extremely snowy" night, using back roads since her license was suspended. She took along the then five-

year-old subject child. The car became stuck in a snowbank and when state troopers came to assist her, they noted she smelled of alcohol, had "slurred speech", droopy eyes and poor coordination. The mother refused a sobriety test and was arrested. Additionally, the record showed the mother had a difficult time getting the child to school in a timely manner, saying she was not a "morning person". There was also ample support to show it was in the child's best interests to have custody awarded to the father. He was gainfully employed as a carpenter and had a flexible work schedule. He had a valid driver's license, was living with his family in an effort to save money to buy his own home. The mother was unemployed, her driver's license was suspended, and she depended entirely on public assistance, child support and help from her family. Neither she nor her boyfriend was employed and while she indicated she was seeking help for her alcohol issues, she offered no documentation to support this statement.

Matter of Menhennett v Bixby, 132 AD3d 1177 (3d Dept 2015)

Court Properly Determined There Was a Change in Circumstances

Family Court modified a prior order of custody and awarded the father sole legal and physical custody of the child. The mother appealed arguing the father failed to establish a change in circumstances. The Appellate Division disagreed and affirmed the order. Here, the evidence showed that since the entry of the prior order, the parents became unable to effectively communicate regarding the child and in fact rarely communicated. The mother accused the father of mistreating the child and failing to provide her with proper nutrition. Additionally, the mother switched the child's pediatrician without informing the father and would not allow the father to take the child to her appointments. Based on this evidence, the court properly determined there had been a showing of a change in circumstances.

Matter of Schlegel v Kropf, 132 AD3d 1181 (3d Dept 2015)

Although Grandfather Had Standing to Pursue Visitation With Grandchild, Visitation With Grandfather Was Not in Child's Best Interests

Family Court determined it would not be in the child's best interests to award petitioner/maternal grandfather visitation with the minor child. The Appellate Division affirmed. Here, the parties agreed petitioner had standing to seek visitation and despite the historically, difficult relationship between the mother and petitioner, petitioner was allowed to develop a close relationship with the child. However, due to miscommunication, an incident occurred where petitioner and his wife thought they were to visit the child at a set time and when they came to the child's home, no one was there. Petitioner and his wife felt "disrespected" and two weeks later, became engaged in an altercation with school officials at the child's school despite the school officials' requests not to do so. Additionally, although the mother was willing to have petitioner visit the child at her home so she could monitor his behavior, he refused to agree to this visitation option and proceeded instead, through court intervention, to compel visitation at a locale that was more to his liking. Petitioner failed to consider how his behavior could have a damaging impact on the child and he failed to respect the parents' wishes regarding visitation. Furthermore, both the trial and appellate attorneys for the child argued it would not be in the child's best interests to award visitation to petitioner. Based on this and giving due deference to the court's credibility determinations, there was a sound and substantial basis for the court's decision.

Matter of Articolo v Grasson, 132 AD3d 1193 (3d Dept 2015)

Substantial Basis in the Record to Support Custody to Paternal Grandmother

Family Court issued an order of joint legal custody between the mother and paternal grandmother, with physical custody of the mother's two daughters to the grandmother and parenting time to the mother. The Appellate Division affirmed. Here, there was a sound and substantial basis in the record for the court's finding of extraordinary circumstances. The record showed the mother had been the subject of four indicated reports of abuse and maltreatment involving inadequate guardianship and excessive corporal punishment.

There was testimony from caseworkers that the mother's then residence was filled with trash bags, spoiled food and soiled diapers. One caseworker testified she saw one of the children playing with a soiled diaper and trying to crawl into an open trash bag which was on the floor of the living room and another testified this garbage problem in the mother's home was "chronic". Additionally, the mother admitted to "losing it" and spanking the children "excessively". The maternal grandmother testified she heard and saw the mother strike one of the children repeatedly. Furthermore, the mother admitted to lying about an injury on one of the subject children's faces and admitted she had struck the child. Even the mother's friends testified the mother had a "rough and aggressive" parenting style. Although Family Court's decision made no reference to a best interests analysis, given the well-developed record, there was ample proof to support the court's determination that it was in the children's best interests to reside with the grandmother. The record showed that although the sleeping arrangement for the girls in the grandmother's home was not ideal, the mother had at this time begun residing with her husband, who was a convicted "violent felon" and was currently on parole. Moreover, the mother had unaddressed mental health issues, was living in a motel with her husband, neither of whom were employed. Even though the mother's visits with her daughters were going well, she still had little or no involvement with the children's educational or medical providers.

Matter of Renee TT. v Britney UU., 133 AD3d 1101(3d Dept 2015)

Although Children's Wishes Were Not Dispositive, They Were Entitled to Consideration

Family Court modified a prior order of joint legal custody with primary, physical custody to the maternal grandmother and awarded the father sole legal custody of the two children with parenting time to the mother and visitation to the grandmother. The Appellate Division determined the court's best interests analysis was flawed due to, among other things, its premise that the father had a superior parental right despite a finding of extraordinary circumstances, and remitted the matter. Here, the evidence showed the older child had lived with the grandmother even before being placed in the

grandmother's legal custody and she and the younger child had continuously resided with the grandmother for the next five years. The father admitted he had not acted as a responsible parent for the children during their early years and that the grandmother had been the primary caretaker. Additionally, the children had developed a very strong emotional bond with their grandmother. Based on these factors the court properly concluded extraordinary circumstances existed. The evidence showed both the father and grandmother appeared to be loving and capable caretakers who appreciated the other's importance to the children and the father had made substantial improvements in his life by completing drug rehabilitation, maintaining stable employment and residing in a stable home in a good neighborhood with his wife and her children. However, while children's wishes are not dispositive, they are entitled to consideration and pertinent to the issue of best interests. In this case, all parties were aware of the children's preference, the attorney for the children's strongly advocated to have the children remain in the grandmother's care and despite the father's belief, the children's preference to live with the grandmother had not diminished over time. While the powers of the Appellate Division were as broad as Family Court's in a custody matter, given the fact the record was two-years-old, it was best to remit the matter.

Matter of Rumpff v Schorpp, 133 AD3d 1109 (3d Dept 2015)

Relocation Did Not Significantly Impact Father's Parenting Time With Child

Family Court properly modified a prior order of shared custody and awarded the mother primary, physical custody of the child and permission to relocate. Despite the father's claim that he did not give prior consent to have a JHO hear this matter, the record showed he did consent and thus the proceeding was not jurisdictionally defective. Contrary to the father's claim, the record demonstrated the court considered the relevant factors in determining relocation was in the child's best interests. Throughout the child's life, the mother had worked in Plattsburgh, which was 50 miles from the father's home. She testified she had recently married and moved into a home with her husband in Plattsburgh and planned to enroll the child in a pre-k program. She had changed her work schedule to

accommodate the child's needs. Evidence showed the mother had been the one to take care of the child's medical and dental needs, arrange for daycare and preschool, purchase the child's clothes and provide all the transportation to ensure the father had parenting time. Given the short distance between the parties' homes and the fact that the father's frequent parenting time with the child would not be significantly impacted, there was a sound and substantial basis in the record to find relocation was in the child's best interests.

Matter of Noel v LePage, 133 AD3d 1129 (3d Dept 2015)

Overwhelming Evidence of Parental Alienation By Mother Results in Sole Custody to Father

Family Court properly modified a prior order of custody and awarded the father sole legal and physical custody of the three children and suspended all contact between the mother and the children for a period of six months, to be followed by therapeutic visitation. The Appellate Division affirmed. Here, due to the mother's history of non appearance at prior proceedings, the court advised her that failure to appear would result in dismissal of her petition and any claimed inability to appear would have to be supported by an affidavit by a treating physician. The mother failed to appear and submitted an affidavit which was deemed insufficient by the court and her modification petition was dismissed. Thereafter, Family Court scheduled a pre-hearing conference and again warned mother's counsel that the mother's failure to appear would result in a default judgment against her. Once more, the mother failed to appear and the court advised the parties the matter would proceed to a hearing and the court reserved the right to curtail the mother's proof due to her failure to appear. The mother appeared for the hearing telephonically and the court permitted the mother to present evidence and witnesses only for rebuttal purposes, and allowed the mother's counsel to cross-examine the father and his witnesses. The court's imposition of sanctions against the mother was not an abuse of discretion given the mother's documented failure to comply with the court's orders. Furthermore, the father offered sufficient proof to show there had been a change in circumstances and that joint legal custody was no longer workable. After the prior order had been issued, the mother, among other things, filed

false criminal complaints against the father, denied him parenting time with the children, made unilateral decisions regarding the children and would only communicate with him by mail. The mother's actions resulted in the children refusing to engage, in anyway, with the father. A forensic evaluator, who had evaluated the parties, testified the mother had a narcissistic personality disorder and blamed the father for all her problems and difficulties. A family counselor testified the mother's "campaign of negativity and denigration" had alienated the children from their father. Due to the overwhelming evidence of parental alienation, which was unrebutted, it was in the children's best interests to have sole custody awarded to the father. Although the court's determination was contrary to the children's preference, their wishes were deemed informative rather than dispositive since their relationship with the father was a product of manipulation.

Matter of Gerber v Gerber, 133 AD3d 1133 (3d Dept 2015)

On Motions to Dismiss, Pleadings Should Be Afforded Liberal Construction

Family Court erred in granting respondent father's motion to dismiss his ex-wife's amended petition for guardianship of respondent's daughter, by failing to liberally construe the pleading pursuant to CPLR § 3211, and finding the allegations were insufficient to warrant an evidentiary hearing. The ex-wife's petition alleged, among other things, that she had been the primary caregiver of the child for 10 years, had a close loving bond with the child, and respondent father, who had moved to Pennsylvania, had failed to have any contact with the child for this entire period of time until she commenced the guardianship petition. She also alleged that when respondent came to her home he frightened the child by attempting to break into the house while yelling and cursing. However, Family Court solely focused on whether the ex-wife had shown respondent had abandoned the child. By doing so, the court did not engage in a necessary, comprehensive analysis of the factors alleged to see if the cumulative effect of all issues presented showed extraordinary circumstances and in this case, the petitioner alleged sufficient facts to warrant a hearing.

Matter of Romena Q. v Edwin Q., 133 AD3d 1148 (3d Dept 2015)

No Right of Appeal From Temporary Order

The mother appealed from a temporary order granting sole custody to the father. The appeal was dismissed since there was no right of appeal from a temporary order. Additionally, since no application for leave to appeal had been made and in light of the fact that a final order had been issued by Family Court which superseded the temporary order, the matter was moot.

Tina X. v John X., 134 AD3d 1174 (3d Dept 2015)

Family Court Erred in Dismissing Mother's Petitions

The mother filed to modify and enforce a prior custody order, seeking joint legal and sole physical custody of three children due to concerns over corporal punishment, parental alienation, sexualized behavior of the youngest child, and behavioral and academic difficulties of two of the children. At the close of the mother's proof, the father successfully moved to dismiss, arguing that the mother failed to set forth a sufficient change in circumstances. The Appellate Division reversed. Here, the prior order was based on a stipulation and as such, less weight was afforded such agreements. The mother demonstrated that since the issuance of the prior stipulated order, the youngest child had been diagnosed with ADHD, which had contributed to social and academic issues for the child despite the medication she was taking and the middle child had also experienced academic problems. Additionally, the mother provided proof that the father had interfered with her parenting time with the two younger children and had used corporal punishment on the youngest child. Furthermore, testimony from the mother's psychotherapist showed the mother's mental health had stabilized. Based on this, the mother sufficiently established a change in circumstances to warrant a review of the custody order to see if it continued to ensure the children's best interests.

Matter of Caswell v Caswell, 134 AD3d 1175 (3d Dept 2015)

New York Was Home State of Child

Parties were divorced in Florida in 2009, and they entered into an agreement which provided sole legal custody of the subject child to the mother and no visitation to the father. In 2010, the father returned to New York and shortly thereafter, the mother followed with the child. The mother and the child remained in New York for the next two years. Subsequently, the father filed visitation petitions and the mother filed a petition to relocate to Florida with the child. At no time during this period did either party refer to the prior Florida order. Family Court issued temporary orders and then a final order allowing the mother to relocate to Florida and provided the father with parenting time in the summer. Subsequently, the mother moved to vacate the order contending New York lacked subject matter jurisdiction over custody and visitation issues. Family Court determined Florida had exclusive and continuing jurisdiction over the parties and vacated all orders. The Appellate Division reversed. Contrary to Family Court's findings, New York did have subject matter jurisdiction over this matter. Pursuant to the UCCJEA provisions codified in DRL § 76 (1)(a), New York was the home state of the child since, by the mother's own admissions, she and the child had been residing in this state for over two years and the mother had given no indication that her presence in this state was temporary. Although the mother argued Florida was her legal residence, the determination of home state under the UCCJEA "was separate and distinct from the determination of either the parents' or the child's legal residence". Additionally, under DRL §76-b(2), the record showed the mother did not presently reside in any other state and the mother had, on multiple occasions, supplied the court with her New York address. Moreover, contrary to the mother's argument, the UCCJEA, was not preempted by the PKPA since no conflict existed between the two provisions in this case. The PKPA provides that once a state court has made a custody or visitation determination, that court's jurisdiction continues so long as such court has jurisdiction under the law of such state. Although the PKPA allows for periods of temporary absence from the state, given the length of time the mother and child remained in New York, the mother's absence from Florida could not be viewed as temporary. Florida lost jurisdiction

by virtue of the fact that for at least two years, neither the father, the mother nor the child resided in that state.

Matter of Lewis v Martin, 134 AD3d 1179 (3d Dept 2015)

Family Court Properly Directed No Contact Between Father and Children

Family Court properly awarded paternal relatives sole legal and physical custody of the two subject children and directed no contact between the father and the children. Here, the two subject children were removed from their parents' care and placed in the care of paternal relatives after the father was accused and later convicted of raping, sodomizing and sexually assaulting, over a period of time, his two teenage stepchildren who lived in the family home, one of whom was under the age of 13 when the abuse began. Thereafter, in 2008, the father was found to have severely abused the younger step-child and derivatively neglected all the children and orders, including a no-contact order of protection until 2020 on behalf of the subject children, were issued. The father was represented by counsel throughout the course of these proceedings and he did not move to modify or challenge the earlier no-contact order of protection. While the father opposed the paternal relatives' custody petition, he did not testify nor offer witnesses or ask for contact with the children and his attorney indicated the father simply wanted the children to be aware that "he.. [was] alive and exists." Although the children asked about the father, they expressed no desire to have contact with him.

Matter of Kayley E., 134 AD3d 1195 (3d Dept 2015)

Family Court Did Not Abuse its Discretion in Only Partially Granting Father's Discovery Demands

Family Court did not abuse its discretion in only partially granting the father's motion to compel discovery pertaining to the mother's alleged alcohol and substance abuse issues, by limiting the scope of discovery to the time period after issuance of the prior custody order. Additionally, the court did not abuse its discretion in denying the father's motion for psychological evaluations since the information

regarding the mother's alleged alcohol and substance abuse issues was already before the court, and the evaluation would have provided minimal additional value. Furthermore, there was no error in the court's granting of the mother's cross petition for summary judgment dismissing the father's modification petition. The mother had submitted, in support of the motion, an agreement executed by the parties subsequent to the issuance of the court's order, which addressed parenting time matters during the children's spring break and also addressed all issues raised by the father and thus there were no issues of fact for the court to decide. While the father argued the agreement was not intended to settle all proceedings, the unambiguous language of the agreement showed otherwise.

Matter of Ryan v Nolan, 134 AD3d 1259 (3d Dept 2015)

Unlikely Contested Custody Case Presented No Nonfrivolous Issues

Family Court awarded sole legal and physical custody of the subject children to the father. The mother appealed and mother's appellate counsel sought to be relieved on the basis that there were no nonfrivolous issues to be raised. Upon review, the Appellate Division determined that at least one potentially nonfrivolous issue, concerning the court's award of sole legal custody, was at issue and determined a new appellate counsel would be appointed to represent the mother. The Court noted that an *Anders* brief filed in a such as case as this might not reflect effective advocacy since it was a contested custody case and the order was issued after a full evidentiary hearing.

Matter of Driscoll v Oursler, 134 AD3d 1266 (3d Dept 2015)

Subsequent Order Rendered Appeal Moot

Family Court issued an order of joint legal custody with primary, physical custody to the father and telephonic contact and supervised parenting time to the mother. The father appealed challenging the court's award of joint legal custody. During the pendency of the appeal, the father filed a modification petition in Family Court and the court

issued a subsequent order modifying joint to sole legal custody. Since this order superceded the order on appeal, the matter was dismissed as moot.

Matter of Dalmida v Livermore, 134 AD3d 1306 (3d Dept 2015)

Family Court's Award of Sole Legal Custody Was Not Supported by a Sound and Substantial Basis in the Record

Family Court awarded the mother sole legal and physical custody of the minor children with visitation to the father. The Appellate Division determined the court's order of sole legal custody was not supported by a sound and substantial basis in the record and modified the award of sole legal to joint legal custody and granted the father expanded parenting time with the children. Here, both parties were fit parents, had stable homes and no substance abuse issues. Both the mental health and substance abuse evaluators recommended joint legal custody. However, Family Court, in rendering its decision, primarily focused on the older child's emotional and academic issues. Specifically, the court focused on an incident where the older child, while unsupervised at the mother's home, shot another child with a pellet gun. As a result of this incident, the mother was the subject of an investigation by child protective services and an "indicated" finding. The record showed the older child had a history of aggression toward animals, which the mother attributed to the father taking the children hunting and trapping at a young age, but, at the time of trial, the father had refrained from taking the children trapping for a period of at least two years in an effort to comply with an earlier recommendation from child protective services. The father indicated he wanted to raise his children in the hunting and trapping "way of life," teaching them to raise animals for food, but he testified he did not permit his children to use guns unsupervised and was attempting to educate them in safety and proper usage. He testified that he would consider refraining from hunting with his older child if advised by a professional to do so. Furthermore, the court's finding the mother was in a better position to support the children academically was incorrect since the father spent time on a regular basis helping the children with homework. Finally, the court erred

in not considering the children's wishes due to its determination that the parents' attempts to influence the children cancelled out their wishes. While the record showed the mother had attempted to influence the children, there was no evidence the father had done so and in fact, the father openly expressed the importance of encouraging the children's relationship with their mother.

Matter of Lilly NN. v Jerry OO., 134 AD3d 1312 (3d Dept 2015)

Mother Should Have Obtained Father's Consent Before Enrolling Child in Reading Program

Supreme Court determined the mother had wilfully violated a prior order of custody and visitation by failing to comply with provisions of the prior order which directed each party to provide timely notice to the other of the child's medical appointments and ordered neither party could enroll the child in any organized activity without consent of the other party. Although the Appellate Division affirmed the order, it disagreed with the court's finding of wilfulness based on the mother's failure to give the father timely notice of the child's dental appointment. However, it supported the finding based on the mother's enrollment of the child in a reading program without obtaining the father's prior consent.

Matter of Eller v Eller, 134 AD3d 1319 (3d Dept 2015)

Imposition of Supervised Visitation Proper

Supreme Court modified the existing custody and visitation arrangement by directing that respondent mother have supervised visitation with the parties' children. The Appellate Division affirmed. The record established that the mother, who struggled with substance abuse and various mental health issues, including bipolar disorder, had difficulty controlling her reactive behavior, which largely consisted of verbal abuse and inappropriate text messages and included some physical abuse. As a result, the mother engaged in erratic and abusive behavior toward the children, who struggled emotionally and required counseling. The mother's therapist testified that the mother's relationship with

the children and her visitation with them was a trigger for her reactive behavior, and that supervised visitation was appropriate. The mother's contention was rejected that the court abused its discretion in relying on the testimony of the children's counselor because she was not qualified as an expert and admitted that she was biased. The counselor was permitted to testify as a fact witness. The evidence supported a determination that prohibiting text messaging contact with the mother was in the children's best interests, and she was not precluded from communicating with the children in any other manner.

Matter of Procopio v Procopio, 132 AD3d 1243 (4th Dept 2015)

Family Court Erred in Granting Motion to Dismiss

Family Court dismissed the mother's amended petition to modify a prior order pursuant to which respondent father had sole custody of the parties' child. The Appellate Division reversed, reinstated the amended petition, and remitted. The court erred in granting respondent father's motion to dismiss the amended petition at the close of the mother's case. Accepting the mother's proof as true and affording her the benefit of every favorable inference, the mother presented sufficient prima facie evidence of a change in circumstances that might warrant modification of custody in the best interests of the child. The mother established through her testimony and documentary exhibits that, for a significant period of time, the child resided with the paternal grandmother in Syracuse while the father "lived out of Syracuse." Such evidence established that the father abdicated his role as the child's primary caregiver, at least temporarily, by leaving the child with the grandmother. In addition, the mother established that her work schedule had changed substantially since the entry of the prior custody order, inasmuch as her status in the Army Reserves had changed to inactive and thus she would not be called to active duty training or deployed. Accordingly, the mother met her burden of demonstrating a sufficient change in circumstances to require consideration of the welfare of the child.

Matter of McClinton v Kirkman, 132 AD3d 1245 (4th Dept 2015)

Elimination of Grandmother's Visitation in Best Interests of the Children

Family Court terminated respondent grandmother's visitation with the subject children. The Appellate Division affirmed. The court properly determined that it was not in the children's best interests to continue visitation with the grandmother. The grandmother's contention was rejected that the court erred in admitting hearsay statements of the subject children in evidence at the hearing in the petition. There is an exception to the hearsay rule in custody cases involving allegations of abuse and neglect, which applies where, as here, the statements were corroborated. The statement of each child tended to support the statement of the other, and, viewed together, the statements gave sufficient indicia of reliability to each child's out-of-court statement. Moreover, there was additional corroboration from other witnesses who testified at the hearing. The record did not support the grandmother's contention that the change in visitation would eliminate contact between the subject children and their half-siblings. In any event, although sibling relationships should not be disrupted absent some overwhelming need to do so, here there was such a need. It was in the best interests of the children to eliminate the grandmother's visitation in view of the grandmother's failure to abide by court orders, the grandmother's animosity toward the father, with whom the children resided, and the fact that the grandmother frequently engaged in acts that undermined the subject children's relationship with their father.

Matter of Ordonez v Campbell, 132 AD3d 1246 (4th Dept 2015)

Father's Contentions Not Properly Before the Appellate Division

Family Court dismissed the father's petition. The Appellate Division affirmed. The father filed a petition alleging that respondent mother violated an order of custody and visitation, and he also filed two petitions seeking modification of that order. Inasmuch as the order on appeal dismissed only the

father's violation petition, his contention that Family Court improperly dismissed his modification petitions was not properly before the Appellate Division.

Matter of Mead v Horn, 132 AD3d 1276 (4th Dept 2015)

Supervised Visitation Properly Imposed

Family Court modified the existing custody and visitation order by, among other things, directing that respondent father have supervised visitation with the parties' child. The Appellate Division affirmed. The Referee properly determined that petitioner mother established a sufficient change in circumstances that reflected a genuine need for the modification so as to ensure the best interests of the child. The mother established that the father, who had a long history of substance abuse problems, was again using various illegal drugs, including cocaine, heroin and marijuana. Indeed, the father admitted that he had used illegal drugs only a few weeks before the hearing on the mother's petition. The mother also established that the father had demonstrated behavioral changes consistent with his behavior during prior periods of time in which he had been using illegal substances, such as missing visitation with the child for extended periods of time. Accordingly, the Referee's determination to impose supervised visitation was supported by the requisite sound and substantial basis in the record.

Matter of Creek v Dietz, 132 AD3d 1283 (4th Dept 2015)

Affirmance of Award of Sole Custody to Father, Limited Visitation to Mother

Family Court dismissed the mother's modification and violation petitions, and granted respondent father's cross petitions seeking, among other things, modification of a prior order of custody and visitation, and awarded the father sole custody of the parties' children with limited visitation to the mother. The Appellate Division affirmed. Family Court's best interests determination was supported by a sound and substantial basis in the record, and the court properly considered the appropriate factors in awarding sole custody to the father. The evidence

established that the mother made numerous unfounded reports of alleged abuse of the children to Child Protective Services. The evidence further established that the mother violated a prior court order forbidding her from taking the children with her to visit her husband in prison. In addition, the record supported the court's determination that the father was able to provide a more stable home environment and that the father was better able to meet the children's needs than the mother, who suffered from mental health issues, was unfamiliar with the children's developmental and educational needs, and had repeatedly relocated to the detriment of the children. The children's wishes were a necessary factor to consider; however, the court was not required to abide by the wishes of the children to the exclusion of other factors in the best interests analysis.

Matter of Burns v Herrod, 132 AD3d 1336 (4th Dept 2015)

Family Court Had Authority to Address Sua Sponte Issue of Custody

On the mother's petition to modify the parties' existing visitation schedule with respect to their child, Family Court, sua sponte, determined that the existing joint custody arrangement was unworkable and entered an amended order awarding sole custody and primary physical residence to the mother, and visitation and access to respondent father. The Appellate Division affirmed. The father's contention was rejected that the court lacked jurisdiction to determine the issue of custody. The record established that the court informed the parties on two occasions prior to the hearing that sole custody was at issue. In addition, during the hearing, and before the father engaged in cross-examination or called his first witness, the court specifically warned the father that he could lose custody if he failed to present evidence contradicting the mother's testimony. The father demonstrated his understanding of the court's intent to determine the issue of custody by referencing it during his opening statement, by presenting testimony and evidence in support of his request therefor and, in his summation, by characterizing the proceeding as a contested custody matter and specifically requesting that he be awarded sole custody. The court's custody

determination was supported by a sound and substantial basis in the record.

Matter of Warren v Miller, 132 AD3d 1354 (4th Dept 2015)

Court's Error Was Harmless in Not Admitting Video in Evidence

Family Court awarded sole custody of the subject child to respondent mother. The Appellate Division affirmed. The court erred in not admitting in evidence a video depicting the child in a vehicle with the mother on the ground that only the creator of that video could lay a proper foundation for its admission in evidence. During her testimony, the mother denied recording the video and testified that her older son recorded it. The father sought to introduce the video, which was sent by the mother to the father's cell phone, to show that the mother was engaged in distracted driving by taking a video of the child while driving the vehicle. The father also sought to introduce the video to show that the mother was not a credible witness because the video supported the father's assertion that the mother recorded the video, not her older son. A video may be authenticated by a person other than the creator of the video where the testimony of a witness to the recorded events demonstrates that the videotape accurately represents the subject matter depicted. Thus, the court erred in not admitting the video on the ground that the mother did not record it. However, the error was harmless. Inasmuch as the father watched the video and testified to its contents, the admission of the video would have been cumulative of the testimony.

Matter of Blair v DiGregorio, 132 AD3d 1375 (4th Dept 2015)

Order Reversed Where Court Did Not Obtain Personal Jurisdiction Over Mother By "Nail and Mail" Service

Family Court denied respondent mother's motion seeking to vacate a default order granting petitioner father sole custody of their child, and to dismiss the father's petition for custody. The Appellate Division reversed, vacated the default order and dismissed the petition. The court erred in denying the mother's

motion inasmuch as the court did not obtain personal jurisdiction over her by the “nail and mail” method of service because petitioner father failed to meet the due diligence requirements of CPLR 308 (4). The affidavit of service did not contain any averment whether the process server made an attempt to effectuate service at the mother’s “actual dwelling place or usual place of abode,” or whether he made genuine inquiries to ascertain the mother’s actual residence or place of employment. Three attempts at service, all on weekdays during normal business hours, did not satisfy the due diligence requirement of CPLR 308 (4).

Matter of Kader v Kader, 132 AD3d 1376 (4th Dept 2015)

Court Had Authority to Vacate Consent Order and Conduct De Novo Hearing

Family Court awarded petitioner mother sole legal custody of the parties’ child. The Appellate Division affirmed. Respondent father’s contention was rejected that Family Court erred in vacating a prior order of custody and visitation entered upon the consent of the parties and in conducting a de novo hearing. A court retains inherent authority to vacate its own order in the interest of justice, even when entered upon consent. Such authority was inherent and did not depend on any statute. The mother had the right to the assistance of counsel, and the conceded failure of the court to advise her of that right was a sufficient basis for vacating the resulting order in the interest of justice.

Matter of Morgan v Peterson, 132 AD3d 1419 (4th Dept 2015)

Family Court Erred in Failing to Award Father Visitation on Holidays and Birthdays

Family Court awarded petitioner mother sole legal and primary physical custody of the subject child. The Appellate Division modified by granting respondent father visitation on holidays and birthdays, and remitted the matter. There was a sound and substantial basis for the court’s determination awarding the mother’s sole custody. Although the record did not support the court’s conclusion that the father smoked marihuana,

nevertheless there was no basis to disturb the court’s determination. Joint custody would not be imposed on embattled and embittered parents who appeared unable to put aside their differences for the benefit of the child. However, the court erred in failing to award the father visitation on holidays and birthdays. Therefore, the order was modified and the matter remitted for a determination of that visitation schedule.

Matter of Campbell v Knapp, 132 AD3d 1420 (4th Dept 2015)

As Contended By AFC, Family Court Erred in Adopting Report of Referee

Family Court awarded sole custody of the parties’ children to petitioner father. The Appellate Division reversed and remitted for compliance with 22 NYCRR 202.44. The Attorney for the Child correctly contended that the court erred in adopting the report of the Referee that recommended granting the father’s petition to modify an existing custody order without providing the parties notice of the filing of the report and affording them an opportunity to object to it. The record established that the Referee was authorized only to hear the matter and issue a report inasmuch as the mother did not consent to the referral to the Referee for a final determination on the father’s petition. Pending the court’s determination upon remittal, the custody and visitation provisions in the order appealed from remained in effect.

Matter of Witzigman v Witzigman, 132 AD3d 1426 (4th Dept 2015)

Mother’s Appeal Mooted by Other Petitions

Family Court granted sole custody of the parties’ children to petitioner father. The Appellate Division dismissed the appeal. While this appeal was pending, the parties filed additional modification petitions, and, after a hearing, the court issued an order continuing sole custody of the children with the father and visitation to the mother. Therefore, the appeal was moot. The exception to the mootness doctrine did not apply.

Matter of Trobley v Payne, 133 AD3d 1252 (4th Dept

2015)

Court Erred in Granting AFC's Petition to Suspend Father's Visitation

Family Court, among other things, denied the father's petition seeking joint custody and modified the terms of the father's visitation with the subject child. The Appellate Division modified by denying the petition of the AFC. The court erred in failing to issue findings of fact or conclusions of law in determining whether it was in the best interests of the child to modify the prior custody arrangement. The record was sufficient for the Appellate Division to make that determination however. Even assuming that the father made the requisite showing of a change in circumstances, it was not in the child's best interests to change custody from sole custody to joint custody. The father suffered from mental illness and did not have a stable living situation. In addition, the parties' relationship made a joint custody arrangement infeasible. The court also erred in granting the AFC's petition insofar as it ordered that visitation with the child would be at such times as may be agreed and arranged between the father and the child and that the child would be expected to initiate contact with the father for visitation. Because the AFC failed to rebut the presumption that a noncustodial parent will be granted visitation, and failed to establish that visitation with the father would be detrimental to the child, she did not overcome the presumption that visitation with the father was in the child's best interests. By allowing the child to dictate the terms of the visitation, the court's order tended to unnecessarily defeat the right of visitation. A court cannot delegate its authority to determine visitation to a parent or a child. Here, the court's order had the practical effect of denying the father his right to visitation with his child indefinitely, without the requisite showing that visitation would be detrimental to the child's welfare.

Matter of Merkle v Henry, 133 AD3d 1266 (4th Dept 2015)

Half-Brother of Child Established Extraordinary Circumstances

Family Court granted custody of the subject child to

petitioner, the child's half-brother. The Appellate Division affirmed. The court erred in drawing a negative inference against the respondents mother and father for their failure to testify inasmuch as they were both called as witnesses and were questioned by their own attorneys and the AFC, and, therefore, they did in fact testify. The court properly determined that petitioner met his burden to show extraordinary circumstances warranting a best interest inquiry. The evidence established that the mother and father changed residences frequently over a period of 18 months, and were evicted from one residence and were homeless for several months, living in a tent or in their vehicle. The child changed schools five times in four school districts over that time period and with each change missed several days and sometimes weeks of school. The evidence also established that the child had poor hygiene. The best interests of the child were served by awarding custody of the child to petitioner with visitation to the mother and father. Petitioner lived with the child and the mother until 2012 and he had regular visitation with the child since May 2013. He had full-time employment and had his own residence, and, unlike the mother and father, he showed the ability to plan and budget and prioritize for the child. He also planned for the child's schooling and medical needs. The dissent would have reversed, on the ground that petitioner failed to establish extraordinary circumstances.

Matter of Stent v Schwartz, 133 AD3d 1302 (4th Dept 2015)

Adjusted Visitation Schedule Not in Children's Best Interests

Supreme Court granted defendant father visitation from Wednesday evening through Friday morning and on alternate weekends. The Appellate Division reversed. Because the mother submitted a motion and the father submitted a cross motion where they requested modification of the visitation schedule and the parties and the AFC entered into a stipulation whereby the court would fashion a new visitation schedule based upon the parties' submissions, the father had adequate notice that the visitation schedule was at issue and he was not prejudiced by the action of the court. Further, because the father stipulated that the court could fashion a new visitation schedule,

he waived his contention that the mother failed to establish changed circumstances warranting review of the judgment. However, the visitation schedule was not in the children's best interests because it conflicted with the father's work schedule and would prevent the father from exercising his visitation rights. Thus, the case was remitted to the court for a new visitation schedule that did not conflict with either parent's work schedule.

Panaro v Panaro, 133 AD3d 1306 (4th Dept 2015)

Court Properly Terminated Grandmother's Visitation With Grandchildren Who Had Been Adopted

Family Court terminated respondent grandmother's visitation with the subject child. The Appellate Division affirmed. Petitioners were awarded custody of the subject child after the child's mother forfeited her parental rights, subject to the condition that respondent would have one hour of supervised visitation with the child every two weeks. Thereafter, petitioners sought termination of respondent's visitation and the court issued two temporary orders directing respondent to refrain from bringing food or drink to visitation; to refrain from undressing the child at visitation; and to refrain from contacting the child outside of visitation. Thereafter, respondent's visitation was terminated following a hearing. The court properly determined that a change of circumstances had occurred and it was not in the child's best interests to continue visitation with respondent, in view of respondent's failure to abide by court orders concerning her conduct during visitation, her refusal to refer to the child by the name given to him by petitioners, and, as explained by petitioners expert, the negative impact that continued visitation could have on the child's relationship with petitioners.

Matter of Macri v Brown, 133 AD3d 1333 (4th Dept 2015)

Father Established Changed Circumstances

Family Court returned two of the subject children to the custody of their father. The Appellate Division affirmed. The court did not err in modifying the

existing custody arrangement by awarding custody of the children to the father. The father established changed circumstances warranting an inquiry into whether the best interests of the children would be served by modifying the existing custody arrangement. The parties' acrimonious relationship and inability to communicate rendered the existing custody arrangement inappropriate. The court's determination regarding best interests was supported by a sound and substantial basis in the record and the court properly considered the appropriate factors in awarding sole custody to the father.

Matter of Daila W., 133 AD3d 1353 (4th Dept 2015)

Father Properly Granted Sole Custody

Family Court granted petitioner father sole custody of the subject child. The Appellate Division affirmed. The record established that the court fully considered the evidence that the father committed an act of domestic violence against the mother and properly determined that it was in the child's best interests to remain in the custody of the father despite the evidence of domestic violence. The court properly determined that an award of custody to the father was in the child's best interests. The court's determination that the father was better able to provide for the child's needs was supported by a sound and substantial basis in the record. Although the award of sole custody to the father would limit the amount of time the child would spend with his half-siblings, the visitation schedule was a countervailing benefit because the child would be able to spend a substantial amount of time with his half-siblings during the summer. Sole custody to the father was the most appropriate result in light of evidence that the mother was attempting to exclude the father from the child's life, while the father was willing to foster a relationship between the mother and the child.

Matter of Saunders v Stull, 133 AD3d 1383 (4th Dept 2015)

Daughter's Out-of-Court Statements Related to Alleged Sexual Abuse Not Reliably Corroborated

Family Court granted the father's petition to modify the visitation provisions of the judgment of divorce,

and denied the mother's petitions seeking termination of the father's visitation and a determination that the father committed a family offense based on allegations that the father had sexually abused the parties' daughter. The Appellate Division affirmed. With respect to the parties' article 6 petitions, the court did not abuse its discretion in determining that the daughter's out-of-court statements related to the alleged sexual abuse were not reliably corroborated. There was no direct or physical evidence of abuse. Thus, the case turned almost entirely on issues of credibility. Although the mother correctly noted that some corroboration could be provided through the consistency of a child's statements and that a child's out-of-court statements could be corroborated by testimony regarding the child's increased sexualized behavior, the court determined that the mother's witnesses - who provided the corroborative testimony regarding the daughter's purportedly consistent statements and sexualized behavior - were not credible. In particular, the court did not credit the mother's expert therapist because the therapist assumed from the onset that the daughter had been abused and relied on evidence based predominately on contact with the daughter in circumstances controlled by the mother and her family. Indeed, the court-appointed psychologist who evaluated the daughter criticized various aspects of the approach employed by the therapist. Absent the court's determination that the mother's witnesses were credible, the court-appointed psychologist could not conclude that the daughter had been abused. The court properly gave weight to the opinion of the court-appointed psychologist. Inasmuch as the court determined that the evidence did not establish that the father had sexually abused the daughter, there was no compelling reason to deny the father visitation. The court did not err in dismissing the mother's family offense petition.

Matter of East v Giles, 134 AD3d 1409 (4th Dept 2015)

Court Properly Denied Father's Motion to Vacate a Default Order

Supreme Court denied respondent father's motion to vacate a default order that awarded petitioner mother sole custody of the parties' children, and limited the

father's contact with the children to agency-supervised visitation. The Appellate Division affirmed. Although default orders were disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments were not to be applied as rigorously in those cases, that policy did not relieve the defaulting party of the burden of establishing a reasonable excuse for the default or a meritorious defense. Here, the father established neither. Text messages that he sent to the mother established that his failure to appear in court was willful and intentional. Even assuming, *arguendo*, that the father established a reasonable excuse for his default based on the fact that he had changed residences several times, and thus may not have received notice, the father failed to establish a meritorious defense. The father's bare assertion that he had a meritorious defense without stating the facts or legal arguments to establish that defense was insufficient.

Matter of Strumpf v Avery, 134 AD3d 1435 (4th Dept 2015)

Award of Joint Legal Custody to Grandparents and Father in Child's Best Interests

Family Court awarded petitioner grandparents and respondent father joint legal custody of the subject child. The Appellate Division reversed, having determined that petitioners did not demonstrate extraordinary circumstances sufficient to deprive the mother of custody of her child (*see Matter of Suarez v Williams*, 128 AD3d 20). The Court of Appeals reversed and remitted (*see Matter of Suarez v Williams*, 26 NY3d 440). Upon remittitur, the Appellate Division affirmed. Family Court's determination that it was in the child's best interests to remain in the primary physical custody of the grandparents was supported by a sound and substantial basis in the record.

Matter of Suarez v Williams, 134 AD3d 1479 (4th Dept 2015)

Mother's Relocation Petition Properly Denied

Family Court denied the mother's petition seeking relocation with the parties' child from Clinton to

Corning, which was a distance of about 125 miles. The Appellate Division affirmed. The court's determination had a sound and substantial basis in the record. Her primary motivation for relocating was to live with her fiancé and her income would not increase because of the move. Although the mother's standard of living would improve if she lived with her fiancé, neither she nor her fiancé testified that he could not or would not move to Clinton. Further, the child's half sister, as well as other of petitioner's and respondent's relatives, live in Clinton. The father spent significant time with the child in Clinton and his relationship with her would likely be adversely affected by the move.

Matter of Williams v Luczynski, 134 AD3d 1576 (4th Dept 2015)

FAMILY OFFENSE

Insufficient Evidence of Family Offense

Family Court dismissed the family offense petition. The Appellate Division affirmed. The motion to dismiss was properly granted because petitioner failed to establish that respondent committed acts constituting harassment in the second degree. The evidence established no more than disputes between an estranged couple concerning household expenses, use of electricity and similar matters.

Matter of Marilyn C. v Olsen C., 132 AD3d 406 (1st Dept 2015)

Order of Protection Modified by Vacating Findings of Criminal Mischief and Disorderly Conduct

Family Court determined that respondent committed the family offense of harassment in the second degree, criminal mischief, and disorderly conduct. The Appellate Division modified by vacating the findings of criminal mischief and disorderly conduct. That part of the order based upon criminal mischief and disorderly conduct was unsupported by the record. However, the finding that respondent committed harassment in the second degree had a sound and substantial basis in the record. Accepting petitioner's version of the facts as true, petitioner was

threatened, or at least seriously annoyed, by respondent's repeated, strange and threatening behavior.

Matter of Lisa W. v John M., 132 AD3d 459 (1st Dept 2015)

Insufficient Evidence of Family Offense

Family Court dismissed the petition for an order of protection. The Appellate Division affirmed. The motion to dismiss was properly granted because petitioner failed to establish by a fair preponderance of the evidence that respondent's alleged conduct established a family offense. Petitioner alleged that respondent walked by her apartment building when she was in the front yard and stared at her in such a way that she was afraid and intimidated. She also alleged that respondent came into a store where she was and walked within two feet of her and called her a derogatory name. Even if those allegations were true, they did not support a determination that respondent's conduct constituted either harassment or disorderly conduct.

Matter of Teanna P. v Davis M., 134 AD3d 654 (1st Dept 2015)

Parties Not in an Intimate Relationship Pursuant to FCA § 812

The petitioner alleged that he hired the respondent in November 2013 to perform various "handyman" services for him, and that soon thereafter, the respondent moved into his apartment and provided those services as well as some personal care assistance. In November 2014, after the respondent allegedly threatened the petitioner with a knife, the petitioner brought a family offense petition in Family Court seeking an order of protection. After a brief hearing, the Family Court dismissed the proceeding for lack of subject matter jurisdiction, concluding that there was "lack of a relationship required by Family Court § 812 [1]." The petitioner appealed. Pursuant to FCA § 812 (1), the Family Court's jurisdiction in family offense proceedings is limited to certain proscribed criminal acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household."

The definition of “members of the same family or household” includes “persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship” (*see* FCA § 812 [1] [e]). Expressly excluded from the definition of “intimate relationship” are “casual acquaintance[s]” and “ordinary fraternization between two individuals in business or social contexts” (*see* FCA § 812 [1] [e]). Here, the Family Court correctly concluded that the relationship between the parties did not rise the level of an intimate relationship. The petitioner conceded that the respondent was not related to him by consanguinity and that there was no romantic relationship between them. The relationship between the petitioner and the respondent was essentially a business arrangement. Consequently, the Family Court properly dismissed the proceeding for lack of subject matter jurisdiction (*see* FCA § 812 [1] [e]).

Matter of Leff v Ryan, 134 AD3d 939 (2d Dept 2015)

Insufficient Evidence to Support Stay Away Provision on Behalf of Children

Family Court properly determined respondent father had committed a family offense against the mother and issued a one-year stay away order of protection on behalf of the mother but there was insufficient proof to support a stay away order on behalf of the children. Although the court failed to specify which family offense respondent had committed, an independent review of the record determined respondent had committed the crime of harassment in the second degree. Here, the mother testified respondent had access to a shotgun and on more than one occasion had threatened to “blow [her]head off” if the children were taken away from him, which caused the mother to fear for her safety. Additionally, she testified respondent had come into her bedroom wielding a butcher knife. However, the mother agreed the children should have contact with respondent and there was no testimony to indicate that the stay away provisions were “reasonably necessary” to protect the children.

Matter of Elizabeth X. v Irving Y., 132 AD3d 1100 (3d Dept 2015)

Mother's Pro Se Petition Sufficiently Stated Cause of Action

After initially issuing a temporary order of protection, Family Court granted the father's oral motion to dismiss the mother's amended petition for failure to state a cause of action. The Appellate Division reversed. Here, in her pro se petition, the mother alleged that over a course of three days the father had sent her multiple text messages in which he called her obscene names, said he hated her, wished her ill and stated he was going to “put a stop to [her]”. When the mother asked if he was threatening her, he responded affirmatively. The mother indicated she was fearful of the father based on the parties' history of domestic violence. Construed liberally and giving petitioner the benefit of every favorable inference, the allegations were sufficient to state a cause of action for either harassment in the first and/or second degree.

Matter of Chrisina Z. v Bishme AA., 132 AD3d 1102 (3d Dept 2015)

Not Clear if Parties Were Involved in Intimate Relationship

Petitioner filed a family offense against respondent, who had been her roommate for approximately eight months. Petitioner sought to be relieved of rent obligations due to the domestic violence inflicted upon her by respondent. After hearing petitioner was heterosexual and respondent was homosexual, the court granted respondent's oral motion to dismiss her petition and found that the parties did not have an intimate relationship within the meaning of FCA §812(1)(e). The Appellate Division reversed and remanded the matter for a new hearing based on its determination that the record was insufficient to conclude whether an intimate relationship existed between the parties. Petitioner's acknowledgment that she did not have a sexual relationship with Respondent did not justify, as a matter of law, that the two did not have an intimate relationship. Factors relevant to determining the existence of a intimate relationship include but are not limited to “the nature and type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons and the duration of

the relationship". These enumerated factors showed the Legislature did not intend to limit "intimate relationship" to those only involving sexual intimacy. The mere fact the parties cohabited is insufficient to establish the requisite intimate relationship given the multilayered inquiry necessary in such circumstances. Since petitioner was not allowed to develop the record, the matter needed to be remitted.

Matter of Arita v Goodman, 132 AD3d 1108 (3d Dept 2015)

Evidence Established Harassment in the Second Degree

In granting the petition, Family Court directed respondent to observe conditions of behavior specified in the order of protection, placed him on probation for one year, and ordered him to obtain a mental health evaluation and to follow its treatment recommendations. The Appellate Division modified by vacating that part of the order that ordered him to obtain a mental health evaluation. The court properly admitted evidence of conduct not alleged in the petition and exercised its discretion to amend the allegations of the petition to conform to the proof. The evidence adduced at the hearing established harassment in the second degree. Penal Law § 240.26 (3) did not unconstitutionally restrict respondent's freedom of speech - by its own terms it prohibited "a course of conduct" aimed at harassing another. The court erred, however, in ordering respondent to obtain a mental health evaluation. The court did not order the evaluation as a condition necessary to further the purpose of the order of protection and the court was not otherwise authorized to order the evaluation under the Family Court Act.

Matter of Martin v Flynn, 133 AD3d 1369 (4th Dept 2015)

Evidence Established Father Willfully Violated Order of Protection

Family Court sentenced respondent father to five weekends in jail for a willful violation of an order of protection. The Appellate Division affirmed. According deference to the court's credibility determinations, which credited the testimony of

respondent's son who described respondent's intentional contact with him, and rejected the testimony of respondent's alibi witness, there was clear and convincing evidence that respondent willfully violated the order of protection. The court did not err in precluding respondent from impeaching his son's testimony with two reports of prior sex abuse that petitioner found to be unfounded. The prior reports of abuse, that were not made by respondent's son, were determined to be unfounded partly because respondent's son asserted that no abuse had occurred. Thus, the reports were not relevant to respondent's son's credibility or any other issue. Further, because those reports were not admissible, respondent's counsel was not ineffective in failing to articulate the statutory basis for their admission.

Matter of Da'Shunna v Jefferson County Dept. Of Social Servs., 133 AD3d 1381 (4th Dept 2015)

JUVENILE DELINQUENCY

Respondent Properly Placed in Nonsecure Detention After Violating Probation

Upon respondent's admission to violating the conditions of his probation, Family Court placed him with ACS's Close to Home program for a period of 12 months. The Appellate Division affirmed. The court properly placed respondent in nonsecure detention, rather than restoring him to probation, given respondent's poor school disciplinary record and attendance record, his numerous missed curfews, his parents' inability to enforce his curfew or other probation conditions, his termination from a therapeutic program, and the Mental Health Study's recommendation for nonsecure placement.

Matter of Khalil S., 132 AD3d 410 (1st Dept 2015)

Probation, Not ACS, Least Restrictive Dispositional Alternative

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would have constituted the crime of assault in the third degree, and placed her on probation for 12 months. The

Appellate Division affirmed. The court properly exercised its discretion in adjudicating respondent a juvenile delinquent and placing her on probation, rather than ordering an ACD. Respondent pushed a sidewalk vendor to the ground and repeatedly punched her, causing injuries. Although this was respondent's first encounter with the juvenile justice system, the record demonstrated a history of violent attacks against other people stemming from emotional and anger management issues. Probation was necessary to ensure respondent's successful participation in a rehabilitation program.

Matter of Diamonte V., 132 AD3d 424 (1st Dept 2015)

JD Petition and Deposition Were Legally Sufficient

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would have constituted the crimes of assault in the second degree and criminal possession of a weapon in the fourth degree, and placed her on probation for 12 months. The Appellate Division affirmed. The petition and accompanying deposition were legally sufficient. The detailed factual allegations supported reasonable inferences that the victim sustained a physical injury and that the injury was inflicted by means of an object that constituted a dangerous instrument. The fact-finding determination was supported by legally sufficient evidence. The victim's testimony, together with corroborating evidence including a videotape, established the physical injury and dangerous instrument elements.

Matter of Brenda B., 134 AD3d 449 (1st Dept 2015)

Probation Was Least Restrictive Dispositional Alternative

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would have constituted the crime of sexual abuse in the first degree, and placed him on probation for 12 months. The Appellate Division affirmed. The court properly exercised its discretion in placing respondent on probation, rather

than ordering an ACD, given the seriousness of the sex offense against a much younger child and that an ACD would not have provided sufficient supervision. Respondent needed a therapy program that was scheduled to conclude more than one year after disposition.

Matter of Nikolas D., 134 AD3d 458 (1st Dept 2015)

JD Adjudication Not Against The Weight of The Evidence

Respondent was adjudicated a juvenile delinquent upon fact-finding determinations that he committed acts that, if committed by an adult, would have constituted two counts of attempted robbery in the second degree, and placed him on probation for 18 months. The Appellate Division affirmed. The court's finding was not against the weight of the evidence. The evidence established that respondent took part in two attempts to rob the victim by, among other things, going through the victim's pockets in each incident.

Matter of Justin W., 134 AD3d 527 (1st Dept 2015)

18 Month Placement in Limited Secure Detention Facility Appropriate after Probation Violation

In an order of disposition dated June 10, 2014, the Family Court adjudicated the respondent a juvenile delinquent upon his admission that he committed acts which, if committed by an adult, would have constituted the crime of robbery in the second degree and placed him on probation. The court subsequently determined that the respondent violated the terms and conditions of his probation, upon the respondent's admission that he committed acts which, if committed by an adult, would have constituted the crime of grand larceny in the fourth degree. As a result, the Family Court vacated the order of disposition dated June 10, 2014, and entered a new order of disposition dated March 11, 2015, placing the respondent in a limited secure detention facility for a period of up to 18 months. The respondent appealed. Upon reviewing the record, the Appellate Division found that the Family Court providently exercised its discretion in directing the respondent's placement in a limited secure detention facility for a period of up to 18 months. The disposition was the least restrictive

alternative consistent with the needs and best interests of the respondent and the need for protection of the community in light of, inter alia, the recommendation of the probation report, the findings in the mental health services report, the seriousness of the underlying acts, a finding that he committed similar violent acts which constituted a statutory violation of his probation (*see* FCA § 352.2 [4]), and other violations of the terms and conditions of his probation.

Matter of Shaka S., 134 AD3d 944 (2d Dept 2015)

Court Did Not Abuse Discretion in Placing Respondent in Nonsecure Detention Facility

Respondent admitted to conduct constituting criminal trespass in the second degree and was adjudicated a juvenile delinquent. After a dispositional hearing, Family Court placed him in the custody of the agency in a nonsecure detention facility for 12 months. Respondent appealed arguing he should have been placed in a less restrictive placement alternative. The Appellate Division affirmed. Here, the court's dispositional order was based on its finding that, among other things, respondent had been involved in serious misconduct and needed supervision and counseling in order to stay out of trouble and improve his behavior. Respondent disregarded the rules of his parents and neither parent was able to effectively supervise him. Additionally, respondent missed school on a regular basis, had gang involvement and used alcohol and drugs. Based on these circumstances, the court did not abuse its discretion in placing him in a nonsecure facility.

Matter of Joshua LL., 132 AD3d 1201 (3d Dept 2015)

Petition Facially Defective

Family Court determined the respondent committed an act, if committed by an adult, would constitute the crime of petit larceny and adjudicated him to be a Juvenile Delinquent. The Appellate Division reversed and dismissed the petition on the grounds that it was facially defective since the petition did not contain a non-hearsay allegation identifying respondent as the perpetrator. Here, respondent was

charged with taking a pair of sunglasses from a Dollar Tree store. In his sworn statement, the store manager asserted that he observed a “youth” take the sunglasses, and that the youth was “later identified as [respondent],” which indicated that some third person had knowledge the detained “youth” was respondent. A dissenting Judge argued that the manager’s direct observation of the incident and face-to-face confrontation with respondent provided a sufficient factual, non-hearsay basis for identifying respondent as the perpetrator, and the “later identified as [respondent]” comment simply provided the name to complement the manager’s direct identification. However, the majority responded in a footnote that the dissenting opinion assumed it was the manager who stopped respondent from leaving with the sunglasses.

Matter of Jonathan YY., 134 AD3d 1344 (3d Dept 2015)

Evidence Sufficient to Establish Respondent Shared Intent With Perpetrator

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 two counts of the crime of assault in the second degree. The Appellate Division affirmed. The showup identification was not unduly suggestive. It was conducted in temporal and geographic proximity to the crime. The fact that respondent was in handcuffs and accompanied by a police officer at the time of the showup did not, by itself, render the procedure unduly suggestive. The evidence was legally sufficient to establish that respondent committed the robbery as a principal and as an accomplice. The evidence established that respondent was one of three perpetrators who forcibly stole property from the victim and then entered the victim’s vehicle and fled the scene. The court’s findings were not against the weight of the evidence.

Matter of Charles P., 133 AD3d 1244 (4th Dept 2015)

PATERNITY

Petitioner's Knowledge He Was Not Biological Father Negates Fraud Claim

Family Court, sua sponte, dismissed respondent's petition to vacate a prior acknowledgment of paternity on the grounds that respondent's pleadings alone were sufficient to equitably estop him from pursuing his application. The Appellate Division affirmed. Here, respondent failed to plead sufficient facts in order to show the acknowledgment of paternity was procured either by material mistake of fact or fraud since he also stated in the petition he knew he was not the child's biological father when he signed the child's birth certificate. Additionally, both respondent and the mother had filed separate petitions for custody of the child.

Matter of Joshua AA. v Jessica BB., 132 AD3d 1107 (3d Dept 2015)

Record Failed to Show Child Would Suffer Harm if Genetic Marker Testing Was Granted

Family Court determined that although petitioner had executed an acknowledgment of paternity under duress 14 years earlier, he could not now ask for a genetic marker test since it would not be in the child's best interests. Although the court did not specifically articulate the doctrine of equitable estoppel, it found that petitioner's course of conduct "effectively precluded any effort to establish that someone else [was the subject child's] father". The Appellate Division reversed finding the record failed to show the child would suffer irreparable loss of status or family image or some other physical or emotional harm were the genetic marker test to go forward. Here, rather than showing preclusive conduct by petitioner, the record showed petitioner had no relationship of any kind with the child, had not seen the child for 12 years and had not communicated with the child for seven years. Additionally, the attorney for the child had informed Family Court the child had no relationship with petitioner and supported vacatur of the paternity acknowledgment. Furthermore, vacatur would not leave the child without support since the mother was now married and the child had a father figure in his step-father.

Matter of William X. v Linda Y., 132 AD3d 1195 (3d Dept 2015)

Court Properly Applied Doctrine of Equitable Estoppel to Bar Petitioner From Challenging Paternity

Family Court granted the motion of respondent Robert S. to dismiss, based on the doctrine of equitable estoppel, the mother's petition seeking a determination that respondent Kevin M. was the biological father of the subject child. The Appellate Division affirmed. Family Court properly determined that petitioner was equitably estopped from asserting paternity on behalf of Kevin, based on the best interests of the child. The court properly conducted a hearing to determine whether the best interests of the child required the application of that doctrine, and the evidence from that hearing supported the courts' conclusion that Kevin did not have any meaningful bond with the subject child. The evidence supported the court's further conclusion that the child recognized Robert as her father for her entire life until petitioner attempted to remove Robert from the child's life, that petitioner permitted Robert to be the child's primary caregiver and to develop a close and loving bond with Robert during that time, and that it would be detrimental to the child's interests to disrupt her close relationship with Robert. Indeed, Kevin admittedly did not visit the child for the seven months prior to the hearing, despite the fact that petitioner had custody of the child for the majority of that time.

Matter of Joyce S. v Kevin M. and Robert S., 132 AD3d 1419 (4th Dept 2015)

SPECIAL IMMIGRANT JUVENILE STATUS

Parent's Inability to Provide Financial Support Did Not Support Findings Necessary to Petition for Special Immigrant Juvenile Status

The subject juvenile, J. was born in Guatemala and lived with his parents in that country until the age of 17. In March 2012, J. left his family and came to the United States, where he began residing with his cousin, the petitioner C.P., in Queens. In April 2014, when J. was 19 years old, the petitioner filed a petition pursuant to FCA article 6 seeking to be

appointed J.'s guardian. The petitioner subsequently moved for the issuance of an order making the findings necessary to enable J. to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101 (a) (27) (J). The petitioner's motion sought specific findings that J. was under 21 years of age and unmarried, that he was dependent upon the Family Court, that reunification with one or both of his parents was not viable due to parental abuse, neglect, or abandonment, and that it would not be in his best interests to be returned to Guatemala. In an affidavit submitted in support of the motion, J. averred that his family lived in poverty, and that he made the decision to come to the United States both to escape gang violence, and because his parents did not have money to send him to college. After a hearing, the Family Court, in effect, denied that branch of the petitioner's motion which was for a specific finding that reunification with one or both of J.'s parents was not viable due to parental neglect, abuse, or abandonment, concluding that "the inability financially to care for a child does not constitute those things." Here, the Appellate Division found that the record did not support a finding that J.'s reunification with his parents was not viable due to parental abuse, neglect, abandonment, or a similar basis found under State law (*see* FCA § 1012 [f] [i] [A]). Order affirmed.

Matter of C.P., 132 AD3d 876 (2d Dept 2015)

TERMINATION OF PARENTAL RIGHTS

Respondent Mother Permanently Neglected Child

Family Court found that respondent mother permanently neglected the subject child 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 finding was supported by clear and convincing evidence that despite the agency's scheduling of visits, provision of referrals for services, and other diligent efforts to strengthen the parental relationship, the mother failed to maintain regular contact with the child or plan for the child's future. The mother testified that she cancelled approximately fifty percent of the visits that were

scheduled with the child, and that she failed to complete substance abuse and mental health programs within the statutory time frame. The mother's testimony also established that she failed to take responsibility for the child's placement in foster care. A preponderance of the evidence supported the determination that it was in the child's best interests to be freed for adoption. A suspended judgment was not appropriate.

Matter of Heaveah-Nise Stephania Jannah H., 132 AD3d 458 (1st Dept 2015)

Respondent Failed to Demonstrate Reasonable Excuse For Default or Meritorious Defense

Family Court denied mother's motion to vacate an order that found that respondent mother permanently neglected the subject child 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. Respondent failed to meet her burden to demonstrate a reasonable excuse for her default and a meritorious defense to the petition. Respondent did not show that she made any effort to apprise her attorney, the agency, the court, or any other party of her inability to attend the hearings. Although it did not need to do so, if the Appellate Division were to consider the contention that diligent efforts were not made, it would conclude that contention was belied by the record. Petitioner provided respondent with multiple counseling services and scheduled visitation with the child. The agency was relieved of its obligation to make diligent efforts after respondent failed for a period of six months to keep it aware of her location.

Matter of Raymond C. M., 132 AD3d 512 (1st Dept 2015)

Mother Effectively Exhausted Her Right to Counsel

Family Court terminated respondent mother's parental rights upon a determination of permanent neglect and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The

mother failed to preserve her due process arguments and the arguments were unavailing. The mother's attorneys were relieved due to her own misconduct and she effectively exhausted her right to counsel. The court sufficiently advised the mother of the risks of self-representation. The finding of permanent neglect was supported by clear and convincing evidence that the agency made diligent efforts to strengthen respondent's parental relationship with the child, but respondent failed during the relevant time period to plan for the child's future. The agency, among other things, arranged scheduled visitation with the child and provided referrals for required counseling programs, but respondent refused to cooperate. A preponderance of the evidence supported the determination that it was in the child's best interests to terminate respondent's parental rights. The child had bonded with her kinship foster mother and the foster mother's son, with whom she had resided for five years. The foster mother wished to adopt the child and the child had thrived in the foster home.

Matter of Starlayah C., 132 AD3d 556 (1st Dept 2015)

TPR Based Upon Mental Retardation Affirmed

Family Court determined that respondent mother was unable by reason of mental retardation to provide proper and adequate care for the subject child, and transferred custody and guardianship of the child to the care of the NY Foundling Hospital. Petitioner proved the mother's mental retardation by clear and convincing evidence through expert testimony that was consistent with, and supported by, the expert's detailed report, which was the result of interviews and analyses that constituted the kind of material relied upon in mental health evaluations. The mother had an opportunity to cross-examine petitioner's expert, or present other expert testimony, but failed to do so. The court properly drew an adverse inference from the mother's failure to testify and properly concluded that had she testified, that testimony would have corroborated petitioner's expert's conclusions.

Matter of Starlayjha S., 132 AD3d 571 (1st Dept 2015)

TPR Based Upon Mental Illness Affirmed

Family Court determined that respondent mother was unable presently and for the foreseeable future to care for the subject child because of her mental illness, terminated her parental rights, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The determination was supported by clear and convincing evidence, including petitioner's submission of un rebutted expert testimony by a clinical psychologist that respondent suffered from long-standing schizophrenia, which rendered her unable to care for the child, and the expert's detailed report, which was prepared after several lengthy interviews with respondent and review of respondent's mental health records for more than 10 years.

Matter of Wadell Alexander M., 132 AD3d 580 (1st Dept 2015)

Respondent Mother Permanently Neglected Children

Family Court, upon a fact-finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child jointly to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The findings of permanent neglect were supported by clear and convincing evidence. The agency made diligent efforts to strengthen the parents' relationship with the child by, among other things, referring respondent for various parenting programs and mental health services, as well as scheduling and facilitating visitation with the child. Despite those efforts, respondent failed to visit regularly, follow through with agency referrals, or otherwise plan for the child's return, including obtaining suitable housing, improving the quality of visits, or understanding the child's special needs or attending to his care. It was in the child's best interests to terminate respondent's parental rights and a suspended judgment was not warranted.

Matter of James S., 133 AD3d 446 (1st Dept 2015)

Mother Failed to Plan For Her Child's Future

Family Court, upon a fact-finding determination that respondent mother permanently neglected the subject child and that respondent father's consent to adoption was not required, terminated the mother's parental rights and committed guardianship and custody of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The agency made diligent efforts to strengthen the parents' relationship with the child by, among other things, referring respondent for mental health services, and by scheduling and facilitating visitation with the child. Despite those efforts, the mother failed to plan for the child's future inasmuch as she failed to continue with mental health counseling, obtain suitable housing, improve the quality of visits and understand the child's special needs. A preponderance of the evidence supported the determination that it was in the child's best interests to terminate the mother's parental rights and freeing the child for adoption. Clear and convincing evidence supported the finding that the father's consent to adoption was not required inasmuch as he failed to communicate with the child or agency on at least a monthly basis and he failed to provide support for the child beyond a one-time payment of \$200, though able to do so.

Matter of Davion H., 133 AD3d 489 (1st Dept 2015)

Diligent Efforts Properly Excused

Family Court determined that respondent father permanently neglected the subject children. The Appellate Division affirmed. The court properly determined, after a hearing, that under the egregious circumstances here, diligent efforts to reunite the father and children would be futile. The circumstances included the father's conviction of a felony involving the sexual abuse of a girl, and the court's issuance of orders of protection after finding that the father sexually abused his then eight-year-old daughter and medically neglected his son who had severe special needs. The court also considered the expert testimony of social workers who testified that reunification would be traumatic to the children, who continued to suffer from the abuse and neglect, and the evidence that the father had not participated in

any services or sexual offender programs while incarcerated. Because the record was undisputed that the father failed to maintain contact with the children or plan for their future, the finding of permanent neglect was supported by clear and convincing evidence.

Matter of Edubilio Andre R., 133 AD3d 496 (1st Dept 2015)

Mother Permanently Neglected Her Child

Family Court found that respondent mother 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 Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that, despite the agency's diligent efforts by, among other things, scheduling visitation and providing the mother with referrals for services, the mother failed to plan for the child's future during the relevant time period. Although the mother completed programs in anger management and parenting skills, she behaved disruptively and violently during scheduled visits, and she failed to complete a therapy program, obtain suitable housing, gain insight into the obstacles preventing the return of the child, or benefit from the programs she attended. The court properly relied on past findings of neglect and drew a negative inference from the mother's failure to testify at the fact-finding hearing.

Matter of Isacc A. F., 133 AD3d 515 (1st Dept 2015)

TPR Based Upon Mental Retardation Affirmed

Family Court determined that respondent mother was presently and for the foreseeable future unable to care for the subject children by reason of mental retardation, terminated her parental rights, and committed the children's custody and guardianship to petitioner agency and the Commissioner of Social Services. Clear and convincing evidence supported the court's finding. Although there was evidence of the mother's adaptive skills in certain areas and a parental bond between the mother and children, an expert psychologist opined that the mother's mental

retardation significantly impacted her ability to provide even the most basic care for the children, and that the services she had received and the available interventions would not significantly improve her parenting abilities. Given that evidence and the evidence that the children bonded with their foster mother, who provided for their needs and wanted to adopt them, termination of the mother's parental rights was in the children's best interests.

Matter of Brianna Money J., 133 AD3d 521 (1st Dept 2015)

Respondent Failed to Demonstrate Reasonable Excuse For Default or Meritorious Defense

Family Court denied respondent mother's motion to vacate an order, entered upon her default, terminating her parental rights and freeing the child for adoption. The Appellate Division affirmed. Respondent failed to meet her burden to demonstrate a reasonable excuse for her failure to appear at an adjourned dispositional hearing and she failed to provide a meritorious defense to the petition. Respondent failed to provide any details or documentation to support her claim that she was incarcerated on the date of the hearing or provide any explanation why she did not contact the court until the filing of her motion to vacate, nearly three months after her default. Respondent also failed to show that it was not in the best interests of the child to terminate her parental rights and free the child for adoption by his foster mother, who had long cared for him and wanted to adopt him. Respondent abandoned the child and had four other children removed from her care, and she failed to substantiate her assertions that she completed a drug treatment program, had started a domestic violence program, and had been participating in supervised visitation with the child.

Matter of Barack Darnell B., 133 AD3d 529 (1st Dept 2015)

Reasonable Efforts by Respondent No Longer Required

Family Court, upon a fact-finding determination that respondent mother permanently neglected the subject

child, terminated the mother's parental rights and committed guardianship and custody of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The court properly found that reasonable efforts by petitioner to return the child to respondent's home were no longer required. Respondent's parental rights to three of the child's older siblings had been involuntarily terminated and respondent failed to show that providing reasonable efforts would have been in the child's best interests, not contrary to the child's health and safety, and would have likely resulted in reunification in the foreseeable future. The determination of permanent neglect was supported by clear and convincing evidence that respondent failed to plan for the child's future. Respondent demonstrated a complete lack of insight into her parenting deficiencies and her inability to provide the child with a safe and appropriate home. Further, she failed to take steps to correct the conditions that led to the child's removal, including failing to complete her individual counseling program and missing visitation with the child.

Matter of Nevaeh Karen B., 134 AD3d 438 (1st Dept 2015)

Mother Failed to Address Problems Leading to Child's Placement

Family Court, upon a finding that respondent mother permanently neglected the subject child, terminated her parental rights and committed guardianship and custody of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The agency made diligent efforts to strengthen the mother's relationship with the child by referring respondent to parenting skills training and a drug treatment program and by scheduling regular supervised visitation. Although respondent completed a few of these referrals, she failed to meaningfully address the problems leading to the child's placement, in particular her addiction to prescription painkillers. Respondent also failed to visit the child regularly. A preponderance of the evidence supported the finding that it was in the child's best interests to terminate respondent's parental rights in order to facilitate the child's

adoption by her foster mother, with whom the child had lived since the age of two and where her needs were met.

Matter of Alexis Alexandra G., 134 AD3d 547 (1st Dept 2015)

TPR Based Upon Mental Retardation Affirmed

Family Court determined that respondent mother was unable by reason of mental retardation to provide proper and adequate care for the subject children, terminated her parental rights, and transferred custody and guardianship of them to petitioners for the purpose of adoption. Clear and convincing evidence, including expert testimony from the psychologist who examined the mother and received all her available medical and agency records, supported the determination that respondent was and for the foreseeable future would be unable to provide proper and adequate care to the children because of her mental retardation. The evidence showed that even though the mother cooperated with required services, her adaptive skills and ability to care for her two special needs children were not sufficient to insure their safety while in her care.

Matter of Shamiyah P., 134 AD3d 571 (1st Dept 2015)

Mother Failed to Comply With Services

Family Court, after a fact-finding hearing, found that respondent mother permanently neglected the subject children and in another order denied the mother's motion to vacate the orders of disposition terminating her parental rights. The Appellate Division affirmed. The agency demonstrated by clear and convincing evidence that it made requisite diligent efforts and respondent failed to show that she complied with required mental health treatment and services, visited the children consistently, obtained safe and secure housing, or otherwise addressed the issues that led to the child's placement. The court properly exercised its discretion in denying respondent's motion to vacate the dispositional orders on her default inasmuch as she failed to demonstrate a reasonable excuse for her failure to appear and a potentially meritorious defense. Her contention that she

experienced unexpected subway delays and long security lines at the courthouse, and was unable to contact her attorney during the trip, did not constitute a reasonable excuse, especially in light of her repeated tardiness and absences during the proceedings, as well as a lack of evidence in support of her excuse. Respondent also failed to provide evidence in support of a meritorious defense other than her conclusory statement that, were the hearing to be reopened, she would testify that she was ready, willing, and able to care for the children. The court properly credited the caseworker's testimony that it was in the children's best interests to be adopted by their long-term foster care mother, who had provided a loving and stable home for both children for most of their lives, and with whom they were thriving.

Matter of Arianna-Samantha Lady Melissa S., 134 AD3d 582 (1st Dept 2015)

Record Demonstrated That Father Planned for Child's Future

The petitioner appealed from an order, after a hearing, which determined that the father's consent to the adoption of the subject child was required pursuant to DRL § 111, denied the petition and dismissed the proceeding. Upon reviewing the record, the Appellate Division found that the Family Court properly denied the petition to terminate the father's parental rights, since the petitioner failed to establish, by clear and convincing evidence, that, during the relevant period of time, the father failed to maintain contact with or plan for the future of the child. The record revealed the existence of a strong and loving bond between the father and child and that the father maintained regular contact with the child through visitation. The record further demonstrated that the father planned for the child's future by participating in drug treatment programs, attending meetings, staying in regular contact with the designated caseworker, and maintaining gainful employment. The evidence adduced at the hearing also established that, prior to the commencement of this proceeding, the father completed parenting skills, anger management, and drug treatment programs. Although the father relapsed on several occasions, and failed to complete an additional drug treatment program after testing positive for cocaine, it could not

be said, on this record, that the father failed to plan for the return of the child. Accordingly, the Family Court properly denied the petition and dismissed the proceeding (*see* SSL § 384-b).

Matter of Endoran E.H., 132 AD3d 762 (2d Dept 2015)

Motion for Summary Judgment Properly Granted Based upon Determination That Child Was Severely Abused

Upon reviewing the record, the Appellate Division found that the Family Court properly granted the motion of the County's Department of Social Services (hereinafter DSS) for summary judgment on its petition, determining that the child was a severely abused child under SSL § 384-b (8), terminating the father's parental rights, and freeing the child for adoption. The record established that DSS made a prima facie showing warranting summary judgment in its favor, and the father failed to raise a triable issue of fact in opposition. SSL § 384-b (8) (a) (iii) (A) provides, in relevant part, that a child is severely abused by his or her parent if the parent of such child has been convicted of murder in the second degree as defined in PL § 125.25 and the victim of such crime was the other parent of the child. Here, the father's severe abuse of the child was established by evidence of his conviction of murder in the second degree for killing the child's mother and subsequent imprisonment. Thus, 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).

Matter of Noah E.P., 132 AD3d 875 (2d Dept 2015)

Petition Properly Granted Based upon Abandonment

The record revealed that the subject child was born in September of 2012, as a result of a single sexual encounter between the father and the mother. The father admitted that, sometime in August 2013, he was advised by the mother that he might be the father. Although the father had sufficient reason to believe that he might be the father, he failed to take any

prompt action to assert or determine paternity, including registering as the putative father, requesting DNA testing, visiting the child, or paying support. The father's subsequent incarceration did not relieve him of his responsibility to maintain contact or communicate with the subject child or agency. Accordingly, the Family Court properly granted the petition to terminate the father's parental rights on the ground of abandonment.

Matter of Jake W. E., 132 AD3d 990 (2d Dept 2015)

Father's Incarceration Did Not Obviate His Obligation to Develop Feasible Plan for Children's Future

A parent's incarceration does not obviate the obligation to develop a "realistic and feasible" plan for the children's future (*see* SSL § 384-b [7] [c]). A plan for children to remain in foster care throughout a parent's incarceration and for a period of time thereafter as necessary to establish suitable living arrangements for the children is not a viable plan to secure permanency for the children. Here, the father failed to provide any feasible plan for the subject children other than continued foster care until after he was released from prison and had time to "get on [his] feet." Accordingly, despite the petitioner's diligent efforts to encourage and strengthen the parental relationship, the father failed to adequately plan for the children's future, and the Family Court's finding of permanent neglect was supported by clear and convincing evidence (*see* SSL § 384-b [7] [a]). Further, the Family Court properly determined that the best interests of the subject children were best served by terminating the father's parental rights and freeing the children for adoption by the foster parents (*see* FCA § 631).

Matter of Jenna K., 132 AD3d 995 (2d Dept 2015)

Both Parents Were Unable by Reason of Mental Illness to Provide Proper and Adequate Care for Their Children

Terminating parental rights on the ground of mental illness requires the petitioning agency to show by clear and convincing evidence that the parent is presently, and will continue for the foreseeable future

to be, unable to provide proper and adequate care for the child by reason of the parent's mental illness (*see* SSL § 384–b[4][c]). Here, a court-appointed psychologist, who interviewed the mother and reviewed relevant records, including medical records, testified that the mother had a long history of psychiatric problems and suffered from schizoaffective bipolar disorder. Another court-appointed psychologist interviewed the father, reviewed extensive medical records, and diagnosed the father with paranoid schizophrenic mental illness and low mental functioning. The psychologists opined that the subject children were at risk of being neglected if they were returned to the parents' care due to the nature of the parents' mental illnesses. Contrary to the parents' contentions, the Family Court properly found that there was clear and convincing evidence that each of them was then and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject children, and terminated their parental rights (*see* SSL § 384–b[4][c]).

Matter of Divinity I.H., 133 AD3d 601 (2d Dept 2015)

Petitioner Not Required to Make Diligent Efforts to Reunite Father and Child Pursuant to FCA § 1039-b

The Family Court properly determined that the petitioner established, by clear and convincing evidence, that the father permanently neglected the subject child (*see* SSL § 384-b [7] [a]). With respect to the threshold determination of whether the petitioner made diligent efforts to reunite the subject child and the father, pursuant to FCA § 1039-b, the father's convictions for murder in the second degree and assault in the second degree relieved the petitioner from any requirement to make diligent efforts to reunite the father and child. Contrary to the father's contention, neither the issuance of an order of protection barring the father from contact with the subject child nor the father's incarceration exempted the father from his obligation to plan for the subject child. The petitioner established, by clear and convincing evidence, *inter alia*, that the father failed for a period of more than one year following the subject child's placement with the petitioner to

substantially plan for the child's future (*see* SSL § 384-b [7] [a]).

Matter of Hezekiah L.J., 133 AD3d 754 (2d Dept 2015)

Father's Partial Compliance with Court-Ordered Programs Was Insufficient to Preclude Finding of Permanent Neglect

The petitioner established, by clear and convincing evidence, that it exercised diligent efforts to encourage and strengthen the parent-child relationship by, *inter alia*, scheduling visits between the father and the subject children, providing referrals for court-ordered programs, and advising the father of the importance of complying with the court's directives. Despite these efforts, the father failed to plan for the return of the subject children by failing to attend a substance abuse treatment program for at least one year following the children's entrance into foster care. Although the father completed a parenting course, submitted to a forensic health evaluation and visited with the subject children, he did not adequately address his substance abuse issues. Partial compliance with the court-ordered programs is insufficient to preclude a finding of permanent neglect. Accordingly, the Family Court properly determined that the father had permanently neglected the subject children.

Matter of James T. L., 133 AD3d 759 (2d Dept 2015)

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

The petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the subject children (*see* SSL § 384-b [7]). These efforts included facilitating visitation; repeatedly providing the mother with referrals for therapy appointments and parenting classes, reminders to attend those appointments and classes, and the necessary transportation to insure her attendance; attempting to maintain contact with her by numerous telephone calls and frequent correspondence; and assisting her in applying for Section 8 and Social Security disability insurance benefits. Despite these

efforts, the mother failed to plan for the children's future (*see* SSL § 384-b [7] [c]). Accordingly, the Family Court properly determined that the mother had permanently neglected the children, and that it was in the children's best interests to terminate the mother's parental rights. The mother's contention that the Family Court erred in failing to suppress certain evidence which she alleged was obtained illegally was without merit. The application of the exclusionary rule to prevent the court from considering evidence of permanent neglect, pertaining here to the condition of the mother's home, would have had a detrimental impact upon the fact-finding process and the State's interest in protecting the welfare of children, which outweighed the deterrent effect of applying the exclusionary rule.

Matter of Giavanna M., 133 AD3d 760 (2d Dept 2015)

Both Parents Failed to Plan for Their Child's Future Despite Petitioner's Diligent Efforts

The Family Court properly found that the mother permanently neglected the subject child, who had been in the petitioner's care for seven years. The petitioner demonstrated, by clear and convincing evidence, that during the relevant period of time, despite its diligent efforts to strengthen and encourage the parent-child relationship, the mother failed to plan for the child's future. In addition, the Family Court properly determined that, under the circumstances, the best interests of the child were served by terminating the mother's parental rights and freeing the child for adoption by her foster mother. The Family Court also properly found that the father permanently neglected the subject child. The petitioner demonstrated, by clear and convincing evidence, that during the relevant period of time, despite its diligent efforts to strengthen and encourage the parent-child relationship, the father, who did not appear in court, failed to substantially and continuously maintain contact with the child, as he had not visited the child for almost a year. Further, the father failed to plan for the return of the child by failing to comply with his service plan. During the two-year period when the petitioner exercised diligent efforts to help the father, he failed to consistently attend casework counseling sessions,

never went for a substance abuse evaluation, and did not participate in family therapy, offering as his only excuse that the therapy sessions conflicted with his work schedule. Further, the Family Court properly determined that the best interests of the child were served by also terminating the father's parental rights and freeing the child for adoption by her foster mother.

Matter of Amanda P.S., 133 AD3d 861 (2d Dept 2015)

Best Interests Hearing Not Required

The Family Court may revoke a suspended judgment after a hearing if it finds, upon a preponderance of the evidence, that the parent failed to comply with one or more of its conditions. Here, the Family Court properly found, by a preponderance of the evidence, that the mother failed to comply with at least one of the conditions of the suspended judgment issued in this matter during the one-year term of the suspended judgment. Any error in admitting the mother's probation report into evidence was harmless, as the finding that she failed to comply with the conditions of the suspended judgment was supported by admissible evidence, including her own testimony. Further, the Family Court properly determined that it was in the best interests of the subject child to terminate the mother's parental rights and free the child for adoption (*see* FCA § 631). The mother's contention that the matter should have been remitted to the Family Court for a separate best interests hearing was without merit. Here, the court conducted numerous permanency hearings on behalf of the child, conducted a full fact-finding hearing on the permanent neglect petition against the mother, and was well aware of the child's circumstances, issues, and needs. Accordingly, an additional hearing was not required.

Matter of Jeremiah J. W., 134 AD3d 848 (2d Dept 2015)

Agency Failed to Establish Diligent Efforts

In 2010, the subject child, M., was placed in the care of the Commissioner of Social Services and the Little Flower Children and Family Services of New York

(hereinafter Little Flower) following a finding that the mother had derivatively neglected her. At that time, the permanency goal for the child was to return to the mother. Little Flower was working with the mother to accomplish that goal and, in May 2011, was prepared to begin unsupervised visits between the mother and the child and her sister. At that time, the child and her sister were transferred to the care and custody of another agency, New Alternatives for Children (hereinafter the Agency), and such unsupervised visits never occurred. Although the permanency goal for the child was to be returned to the mother, the Agency immediately focused its efforts on changing the goal to adoption. The first time a social worker for the Agency went to the mother's home, the social worker addressed the topic of adoption, rather than unsupervised visits, with the mother. Thereafter, in September 2011, just three months after it became involved with the case, the Agency formally advised the mother of its decision to change the permanency goal to adoption at a "goal change" conference, over the mother's objection. In January 2012, the Agency filed a petition seeking, inter alia, to terminate the mother's parental rights on the ground of permanent neglect. At the fact-finding hearing on the petition, after eliciting the testimony of a witness to authenticate certain documents, the Agency offered only documentary evidence, consisting primarily of its progress notes, to establish its burden of proof. The mother did not appear or testify, but the Agency did not ask the Family Court to draw an adverse inference from her failure to testify. After the hearing, the Family Court determined, inter alia, that the Agency had failed to establish permanent neglect because it did not establish that it had made diligent efforts to encourage and strengthen the parental relationship between the mother and the child. In the order appealed from, the Family Court dismissed the petition, finding no rationale for the change in the permanency goal. The subject child appealed. Here, the Family Court determined that the Agency failed in its statutory obligation and that it instead directed its efforts toward "subverting and undermining" the parental-child relationship, with a view toward terminating it. The Family Court determined that evidence at the hearing, the progress notes of the Agency, showed that the Agency failed to encourage and strengthen the parental relationship between the

mother and the child. The Family Court also noted that the progress notes revealed that the mother completed all of the services demanded of her, and was consistent with her visits and attempted to plan for the child. The Appellate Division could find no basis to disturb the Family Court's determination that the Agency failed to make an initial showing, by clear and convincing evidence, that it made diligent efforts to strengthen and encourage the parental relationship between the mother and the child. Accordingly, the dismissal of that branch of the petition which sought to terminate the mother's parental rights to the child on the ground of permanent neglect was proper.

Matter of Morgan A. H.P., 134 AD3d 712 (2d Dept 2015)

Mother Failed to Complete Any Court-Ordered Services or Plan for the Children's Future

In 2010, the petitioner removed the three subject children from the home of their mother and thereafter placed the children in foster care. In an order of fact-finding and disposition entered December 4, 2012, the Family Court found that the mother had neglected the children and directed her to complete certain services. In April 2013, the petitioner commenced proceedings to terminate the mother's parental rights to each of the children. After fact-finding and dispositional hearings, in an order of fact-finding and disposition entered August 19, 2014, the Family Court, inter alia, found that the mother had permanently neglected the children and terminated her parental rights. The mother appealed. Upon reviewing the record, the Appellate Division found that the petitioner agency established by clear and convincing evidence that it exercised diligent efforts to strengthen the relationship between the mother and the subject children (*see* SSL § 384-b [7] [f] [3]), but that the mother failed to complete any court-ordered services or plan for the children's future (*see* SSL § 384-b [7] [a]). Accordingly, the Family Court properly made a finding of permanent neglect. The paramount concern at a dispositional hearing is the best interests of the children (*see* FCA § 631). Here, the Family Court properly determined based on the evidence at the hearing that the best interests of the subject children were served by terminating the mother's parental rights and freeing the children for

adoption.

Matter of China E.C., 134 AD3d 1107 (2d Dept 2015)

Record Supported Termination of Parental Rights Based upon Abandonment

The petitioner, the County's Department of Social Services (hereinafter DSS), filed a petition pursuant to SSL § 384-b to terminate the father's parental rights on the ground of abandonment. After a fact-finding hearing, the Family Court found that the father abandoned the subject child, terminated his parental rights, and transferred guardianship and custody of the subject child to DSS for the purpose of adoption. To demonstrate that the father abandoned the subject child, DSS was required to establish by clear and convincing evidence that he evinced an intent to forego his parental rights and obligations by failing to visit or communicate with the child or petitioner during the six-month period before the petition was filed (*see* SSL § 384-b [5] [a]). Here, DSS met this burden. The father, who was incarcerated, acknowledged receiving letters and notices from DSS but failed to respond at any time during the requisite six-month period. He also never met the child, did not contact her, and never sent her any gifts or attempted to provide support. In response to DSS's showing, the father failed to demonstrate that any hardship permeated his life to such an extent that contact was not feasible. Furthermore, the father's incarceration did not relieve him of his responsibility to maintain contact or communicate with the subject child or DSS. Accordingly, the Family Court properly granted the petition to terminate the father's parental rights on the ground of abandonment.

Matter of Samantha L.S., 134 AD3d 1128 (2d Dept 2015)

Mother Failed to Substantially Plan for the Child's Future

Family Court found respondent mother had derivatively neglected her youngest child, who was months old when he was removed from her care, and thereafter, on the basis of permanent neglect, terminated her parental rights. The Appellate

Division affirmed. Here, the court took judicial notice of a prior order, issued two-years earlier, where respondent was adjudged to have neglected her two older children due to violently shaking the oldest child and failing to seek medical attention. The injured child sustained a subdural hematoma. As a result of this injury, she continues to suffer from extreme cognitive delays and other complications. The older children were still in foster care and given the level of respondent's parental impairment, the gap in time between the prior and current finding of neglect were proximate enough to support a derivative finding. Additionally, evidence showed respondent had failed to address the earlier identified deficiencies in her parenting and still had not progressed to unsupervised parenting time with the older children. Testimony from many individuals showed the relationship between respondent and the children's father was still unhealthy and both parents were physically and verbally abusive towards each other and both had orders of protection. Although respondent acknowledged the relationship was unhealthy, she continued to be in a relationship with the father prior to the subject child's birth. Family Court properly determined the agency proved by clear and convincing evidence that diligent efforts were made to reunify respondent and children but despite the many efforts, respondent failed to take meaningful steps to correct the conditions that led to the child's removal. Specifically, respondent failed to take responsibility for the injuries she caused the oldest child. Although she participated in a number of services made available to her, she failed to benefit from them and as such, failed to substantially plan for the child's future. Furthermore, respondent continued to be involved with men who were not safe to be around the children. Moreover, the court properly determined not to grant a suspended judgment since termination was in the child's best interests. The subject child had been in foster care since he was two months old, had developed a strong and loving relationship with his foster family, who had a safe and stable environment.

Matter of Landon U., 132 AD3d 1081(3d Dept 2015)

Respondent Should Have Moved to Vacate Default Order

Family Court found respondent mother had permanently neglected the subject child and after a default hearing, properly terminated her parental rights. Here, respondent, who was represented by counsel, failed to appear at the fact-finding hearing despite being informed of the hearing date. Additionally, respondent's attorney failed to offer any explanation for her absence, took no part in the proceeding and expressly declined to take a position in order to preserve respondent's right to reopen the default. Moreover, since it was a default order, the proper procedure would have been for respondent to move to vacate.

Matter of Myasia QQ., 133 ADd3d 1055 (3d Dept 2015)

Mere Rote Participation in Services Insufficient

Family Court properly granted petitioner agency's request to revoke two suspended judgments and terminated respondent's parental rights. There was a sound and substantial basis for the court's determination. Here, the record showed that although respondent attended the required psychotherapy, she did not make any meaningful efforts in the sessions relating to the issues that resulted in the permanent neglect finding. " A parent's mere rote participation in directed services is not enough, rather the parent must demonstrate that progress has been made to overcome the specific problems" which led to the children's removal. The respondent's mental health counselor testified that respondent had not actively participated in the court ordered treatment and had failed to make progress despite the counselor's attempts. Among other things, respondent refused to acknowledge her underlying problems, would not discuss the issues that led to the removal of her children, and spent considerable time during the sessions complaining about petitioner agency. Furthermore, respondent's visitation with the children had not progressed and concerns still remained regarding her association with sex offenders and her willingness to open her home to them. With regard to disposition, while the attorney for the older child argued against termination, the record was devoid of input from the children.

However, the older child had turned 18 during the course of the appeal and the issues with regard to her were now moot.

Matter of Hazel OO., 133 AD3d 1126 (3d Dept 2015)

TPR Based on Permanent Neglect Affirmed

Family Court terminated respondent mother's parental rights with respect to the two subject children, and freed the children for adoption. The Appellate Division affirmed. Family Court's determination that the mother permanently neglected the children was supported by clear and convincing evidence. The mother failed to obtain required mental health evaluations and to obtain a suitable and stable housing situation. Because she failed to make any progress in overcoming the problems that initially endangered the children and continued to prevent their safe return, the court properly found that the mother was unable to make an adequate plan for her children's future. There was no reason to disturb the court's determination that it was in the children's best interests to be adopted by the foster parents with whom they had lived for most of their lives.

Matter of Sophia M.G.K., 132 AD3d 1377 (4th Dept 2015)

TPR Based on Mental Illness Affirmed

Family Court terminated respondent mother's parental rights with respect to the subject child. The Appellate Division affirmed. The mother's contention that her rights were violated by admission of the testimony of the court-appointed psychologist because the psychological evaluation was conducted in English and without the benefit of a Spanish Interpreter, was not preserved for review. In any event, the record established that the mother advised the psychologist that she was comfortable proceeding with the evaluation in English and two prior psychological evaluations had been conducted in English. The court properly determined that petitioner met its burden of demonstrating by clear and convincing evidence that respondent was presently and for the foreseeable future unable to provide adequate care for the child by reason of mental illness, particularly severe cognitive deficits and

certain personality traits, none of which was treatable.

Matter of Nadya S., 133 AD3d 1243 (4th Dept 2015)

Mother's Refusal to Appear Constituted Default

Family Court terminated respondent mother's parental rights and freed her child for adoption. The Appellate Division dismissed. The mother refused to appear at the dispositional hearing and her attorney, although present, elected not to participate in the mother's absence. Under those circumstances, the mother's refusal to appear constituted a default.

Matter of Makia S., 134 AD3d 1445 (4th Dept 2015)

Parents Permanently Neglected their Three Older Children

Family Court terminated the parental rights of respondents mother and father on the ground of permanent neglect with respect to their three older children. The Appellate Division affirmed. Petitioner established by the requisite clear and convincing evidence that it fulfilled its duty to exercise diligent efforts to encourage and strengthen the parents' relationships with the subject children during the relevant time period. Further, when the mother stopped attending mental health counseling, the caseworker suggested other facilities for the mother to attend and encouraged her to apply for Medicaid to obtain coverage for the counseling, and when the father had trouble paying for his counseling sessions, the caseworker referred him to another, less expensive agency. The caseworker also encouraged the parents to comply with the stay-away orders of protection that had been put in place because of the volatile and violent nature of their relationship, and explained to the parents that continuing to violate the orders of protection would jeopardize their ability to have their children returned to their care. However, although the mother participated in some of the services offered by petitioner, she did not successfully gain insight into the problems that led to removal of the children. The mother, although warned of the consequences of violating the orders of protection against the father, repeatedly violated the orders -- the parents conceived another child while the instant neglect proceedings were pending and

were living together at the time of the fact-finding hearing. Termination of the parents' parental rights was in the children's best interests. Although the children had bonded with the parents' younger child, the older children had been living in foster care before the younger child's birth and continued to do so. The older children's foster parent was an appropriate pre-adoptive resource who bonded with the children and provided a structured environment. A suspended judgment was not warranted with respect to the father.

Matter of Burke H., 134 AD3d 1499 (4th Dept 2015)

Suspended Judgment Not in Child's Best Interests

Family Court terminated the parental rights of respondents mother and father on the ground of permanent neglect with respect to their child and in another order terminated the mother's parental rights with respect to another child. The Appellate Division affirmed. Respondents admitted that they permanently neglected their respective children and the record supported the determination that it was in the children's best interests to terminate their parental rights and free the children for adoption. The record supported the court's determination that granting the mother a suspended judgment would not be in the children's best interests. The mother's negligible progress in addressing the issues that resulted in the children's removal was not sufficient to prolong the children's unsettled familial status. Because the father failed to make a motion for removal of the children's AFC on the ground that the AFC had a conflict, his contention with respect to that issue was not preserved.

Matter of Aaliyan H., 134 AD3d 1547 (4th Dept 2015)

Mother Failed to Accept Responsibility For Events That Led to Child's Removal

Family Court terminated the parental rights of the mother on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. The Appellate Division affirmed. The child was removed from the mother's custody after he

suffered a broken femur. In 2010, the mother pled guilty to third degree assault in connection with that injury. In 2011, the child suffered further injuries during an overnight unsupervised visit with the mother, and in 2012 the mother was convicted of third degree assault and endangering the welfare of a child. As part of the second assault conviction, a no-contact order of protection was issued in favor of the child through 2014. Petitioner established, by clear and convincing evidence, that it engaged in diligent efforts by, among other things, arranging for a psychological evaluation of the mother, facilitating visitation, providing parenting classes, referring the mother to counseling, inviting the mother to service plan reviews, and contacting potential guardians whom the mother had identified. Despite those efforts, the mother failed to plan for the child's future. She failed to accept responsibility for the events that led to the child's removal and the order of protection against her, and failed to attend recommended counseling aimed at dealing with her mental health issues. Further, the mother failed to identify a meaningful plan for the child while the order of protection was in place, and that failure, like the failure of an incarcerated parent to plan, supported the finding of permanent neglect.

Matter of Jerikkoh W., 134 AD3d 1550 (4th Dept 2015)

Court Properly Revoked Suspended Judgment

Family Court revoked a suspended judgment and terminated the parental rights of respondent mother on the ground of permanent neglect. The Appellate Division affirmed. Upon the mother's admission that she permanently neglected her child, the court placed the child in foster care and issued an order of supervision, directing terms and conditions of a suspended judgment. Thereafter, the court ordered the child returned to the mother's care, but directed that the suspended judgment and order of supervision continue. Thereafter, the court granted petitioner's motion to revoke the suspended judgment and terminated the mother's parental rights. There was no merit to the mother's contention that by returning the child to her custody, the court also terminated the suspended judgment, which divested the court of jurisdiction over the petition to terminate her parental

rights. The applicable statute provided that after placing a child in foster care the court shall maintain jurisdiction over the case until, among other things, all orders regarding supervision expired. Here, the order of supervision had not expired. Further, the record reflected that when the court released the child to the mother's care, it unequivocally stated that the order would continue and that the suspended judgment would run through November and that the mother would need to comply with the terms and conditions of the order. The court properly revoked the suspended judgment and terminated the mother's parental rights.

Matter of Ramel H., 134 AD3d 1590 (4th Dept 2015)