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# NEW YORK CHILDREN'S LAWYER

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

December 2014

Volume XXX, Issue III

## **Smile: This Is Oral Argument\***

By Donna Aldea \*\*

Jerry Seinfeld once quipped that "According to most studies, people's number one fear is public speaking. Number two is death. ... This means that to the average person, if you go to a funeral, you're better off in the casket than doing the eulogy." While one might think the joke has limited applicability to attorneys, whose profession is so dependent on public speaking, a trip to the Appellate Division on brisk fall weekday to hear the oral argument calendar often makes me think of the comedian's line. Avoidance of argument seems to be a theme, as does a funerary mood. And both run contrary to my view of oral argument, which I never forgo, and always deliver with a smile.

A good third of the cases on the typical Appellate Division calendar are marked submitted, both parties having decided to forgo the argument altogether at the time that they wrote their briefs. This always struck me as odd, for as appellant, the need for oral argument may not become apparent until after respondent's brief is read; and respondent's need for argument may not become plain until the reply brief counters points of fact, law, or policy. Making the decision in advance of seeing the briefing in its entirety seems premature, and is a loss of a potentially valuable opportunity. It's like buying a lottery ticket and throwing it out before the drawing.

Invariably, another handful of attorneys, who have presumably prepared for argument and have taken the time to make the trip to court, stand up during the calendar call and declare that they will submit. Surely

this is a generous gesture to a busy bench and the other attorneys, who can now cross that case off the calendar and shorten their own wait time. But as I strike through the submitted case in black Sharpie, thinking of the wasted hours of preparation and travel time, I cannot help but wonder if the submission was caused by a certainty of victory or a resignation to defeat, and if such certainty might have been misplaced. For the losing party at least, the argument might have made a difference. Studies show that oral arguments impact the result in as many as 20-30 percent of cases, and are helpful to the court in as many as 75 percent.<sup>1</sup> And even to the winning party, an oral argument might prove useful in convincing the court to write a fuller decision, enunciate a broader or narrower rule of law, and thus provide a more useful precedent for cases to come or a better chance of defending that decision in a subsequent appeal to a higher court. But, more fundamentally, after all the work has been done, and the trip to court made, it seems such a pity to not stand up and argue. It's like packing for a trip to Paris, making the flight, and then turning tail to go home before leaving Charles de Gaulle Airport.

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Then there are those who make their appearance and request their time, only to stand up when their case is called and say, "if there are no questions, I rely on my brief." The court seems to recognize this as the functional equivalent of a submission, as I have never seen this approach elicit a question, even from an otherwise "hot" bench. Doubtless, though I have not seen it, the words do, on occasion, elicit a stray question, just like the "speak now or forever hold your peace" at a wedding. But this is clearly not the common, anticipated, or hoped-for result.

And of those attorneys still left in the courtroom after all the submissions are excused, a good number deliver scripted speeches in such somber or monotonous tones that Seinfeld's funerary comparison is not a far stretch, and one is left to ponder if perhaps the lawyer is the one in the box. Surely, the argument is D.O.A. Even if the attorney follows to the letter all the oft-recited rules—opening with his name and "may it please the court," deferring to the court about whether to provide a brief recitation of facts, always saying versus instead of v., keeping distracting gestures to a minimum, and never speaking over a judge—none of this can revive a bench or resuscitate an argument. But, admittedly, this is still better than those attorneys at the opposite end of the spectrum, who either do not listen to the judges' questions or refuse to answer them, who interrupt judges so as to finish their own points before being burdened with a question, who refuse to even recognize, let alone discuss, any viewpoint different than their own, and who are ultimately tuned out or harshly silenced by an offended court.

But then, every once in a while, an advocate gets up and really *argues*. And when that happens, you not only hear it, but see it and feel it. As soon as such an advocate begins to speak, the confidence of preparation and conviction reverberates in his voice, and it is like a ray of sunlight burning through the dim and foggy room. The opening lines of argument are not a dull recitation of a point heading, but enticing and intriguing, hitting a controversial issue or difficult proposition head-on, inviting—*inciting*—further inquiry, and making the whole courtroom take notice. The other lawyers all look up from their folders and papers simultaneously, as though roused from a slumber, flowers turning toward the sun. The judges sit up straighter, lean forward in their seats, and, then,

invariably, one of them smiles. And in the animated exchange that follows over the next 10 or 20 minutes, and the mutual respect that such exchange engenders, one sees fulfillment of the appellate advocates' standard invocation, "may it please the court"; for however difficult the questioning becomes, however skeptical of the advocate's legal position the court may be, the court is, in fact, pleased.

Stories of such arguments are passed from lawyer to lawyer and judge to judge. After one such argument, a presiding justice was heard to exclaim as he walked towards chambers, "I just heard a symphony!" In another case, a veteran New York City judge remarked in an open courtroom, that while he had not received a raise for many years, if he could hear argument like that every day, he would come to work for free.<sup>2</sup> But what is more striking than the impact of a great oral argument is the rarity of one; for the ability to deliver a great argument is not unique to only a handful of geniuses who like Michelangelo or DaVinci were uniquely capable of sculpting David or painting the Mona Lisa. To the contrary, almost every attorney that I have gotten to know during the course of my career has at one time or another delivered a brilliant argument over a cup of coffee at Starbucks when explaining their latest difficult case to me, and passionately—but congenially—answering my skeptical questions about why they should prevail in the face of contrary authority or competing public policies. If only that conversation could be bottled like a Frappuccino and then opened in the courtroom, it would be David's unflinching strength and Mona Lisa's intriguing smile in one bundle, and it would jolt a sleepy courtroom awake like a double shot of espresso.

So the problem is not a lack of skill among appellate practitioners, nor a lack of conviction for their causes; to the contrary, in my view, appellate attorneys are among the smartest, most talented, most open-minded, and most passionate members of the bar. It is, instead, a problem of time and place. It can be easily solved, I think, if oral argument is moved out of the courtroom and into the corner Starbucks. But, in the event that your next calendar notification does not provide for this alternate forum, all is not lost. A shift in perspective on the part of the advocate can bring the congenial spirit of lively discourse and free exchange of ideas, which has long haunted the local coffee house, flying into the

courtroom like a gust of fresh air, blowing aside the dusty reams of papers and notes, reinvigorating the room, and making everyone smile.

The root of the problem, and the source of the solution, may be found in many attorneys' fundamental misunderstanding of the nature and purpose of an oral argument as an adversarial, or even hostile, exchange with the bench. Indeed, the term "argument" suggests this by definition, and thus undoubtedly contributes to this unfortunate view. As a result, akin to a game of verbal dodge ball, many lawyers believe that the object is to duck the difficult questions being hurled at you by the bench, to try to elicit only easy questions that can readily be caught as the surest route to victory, and to throw back responses that are both surprisingly aggressive and impossible to fully catch or comprehend, so as to catch the bench off guard, confuse it into silence, and thus knock out the opponent. Nothing is further from the truth.

While perhaps counterintuitive, the way to win an argument is not to deliver a pre-prepared speech, harping on the strongest points of your case, which have already been fully briefed and have probably already persuaded the court, but to use every minute of your precious argument time to confront the difficult issues head on. Instead of seeking to duck hard questions, viewing them as distractions from the lawyer's prepared outline, advocates should welcome them and actively seek them out, for these are the questions that will crop up again when the case is conferenced, and they must be answered and dispelled if a victory is to be obtained. Of course, for this strategy to work, the advocate must be very well prepared, and, at a minimum, must have a thorough knowledge of the record and the law and a complete understanding of the adversary's arguments. While not every question can be predicted, preparation through the use of formal or informal moots, policy discussions with colleagues, and practice arguments delivered out-loud, with the advocate "talking to herself" by delivering an argument and simultaneously assuming the role of a questioning court, is very helpful. I have always done this in the car on my way to work, and was very grateful when Bluetooth technology spared me from the worried stares of passengers in other vehicles, who now no longer assume that I am crazy, but naively believe that I am talking on the phone like everyone else. The key is

to practice out loud, as often as possible, not with a memorized script, but with a fluid and ever-changing discourse that helps you understand and effectively confront the weaknesses of your position.

In this regard, it should be noted that every argument has a weakness. If identifying the weak spots in your position is difficult for you, it can be helpful to argue the other side; for there is no surer way to understand the strengths and problems of an adverse position than to be forced to adopt it and try to convince someone of it. So, too, it must be recognized that almost every weakness in an argument, once identified, can be effectively countered through argument. If your problem is adverse case law, it can be distinguished on the facts. If the problem is factual, then strict construction of a case or statute might provide a solution. And when all else fails, public policy can carry the day; for unlike a trial court, which seeks to apply the law, an appellate court has the ability to make, shape, and interpret the law to achieve a just result.

A dodge-ball approach to argument fails not only for seeking easy questions, and evading difficult ones, but also for attempting to stun the bench with overly technical or complex answers. It is well known and often repeated that an answer should plainly start with yes or no. But beyond this, an effective advocate's position should be easy to understand and capable of being expressed in plain language. In this, as in other areas, the principle of Occam's razor controls: The more simple and straightforward the argument, the more likely it is to be correct. So while appellate attorneys are often frustrated by a judge's request that they stop arguing intricate and "very technical" legal principles or citing cases, and just explain the "simple issue" and why the advocate's position "would be fair,"<sup>3</sup> the fact is, this is the fundamental question that shapes our law. And an advocate unable to answer this question in plain English is simply not going to be persuasive. A good test for me when preparing my most difficult cases was whether I could explain the crux of my argument to my grandmother, who was always very interested in my work, but had no legal background whatsoever. If I could make her understand the issues at the heart of a case, the arguments on both sides, and why I should prevail, then I was ready to persuade the most erudite bench. Indeed, in my view, the greatest

compliment after a particularly complex oral argument does not come from a fellow-attorney's marveling at your recitation of every subsection of an arcane statute and your ability to provide the full cite of a case from memory, it comes from the layperson in the audience who tells you that she understood everything you said and believes that you are right.

Thus, in short, instead of being viewed as an aggressive game of dodge ball, an oral argument should be thought of as a partnership to untangle a kite. In briefing, the advocate's argument soars, the strengths are presented, the weaknesses downplayed, and there seem to be no obstacles that impede the advocate's line of reasoning. But during oral argument the judges' questions identify and hone in on the problem areas where the advocate's line of reasoning has gotten stuck. If the advocate listens carefully, he will understand the judge's concerns, and will be able to provide valuable information from the record or the law to help guide the court through the twists and turns of each knot, untangling the argument, clarifying it, straightening it. The knots cannot be ignored, because then the kite will not fly at all. Nor is it effective for the advocate to lose patience, and pull against the court too sharply, for this will only tighten the knot and may snap the line. Rather, like untangling a kite, it is necessary to quietly pay attention while the bench or opposing counsel speaks, to think the solution through, to recognize and deal with each twist and turn, to tease the line of reasoning and work it apart, before it comes out straight and clear, enabling your argument to fly.

The result is dynamic. It is liberating. It is alive. It is beautiful to watch and exhilarating to experience. While dodge ball used to make me cry as a kid, and funerals still do, flying a kite has always made me smile.

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\*\* DONNA ALDEA is a partner at Barket, Marion, Epstein & Kearon, where she is head of appellate and post-conviction litigation.

#### Endnotes:

1. See, e.g., Alicia Hickok, "Oral Argument: Not a Useless Exercise," published in Appellate Issues, [www.ambar.org/AJCCAL](http://www.ambar.org/AJCCAL) (Aug. 2013); see also Myron H. Bright, "The Power of the Spoken Word: In Defense of Oral Argument," 72 Iowa Law Review 35 (1986).
2. Oral Argument of *People v. George Rodriguez*, Queens Co. Ind. No. N10873-06, May 11, 2009.
3. See, e.g., Oral Argument Transcript of *People v. Christopher Brinson and Lawrence Blankymsee*, at pp. 23, New York Court of Appeals, May 30, 2013.

#### New York Children's Lawyer

Jane Schreiber, Esq., 1st Dept.  
Harriet R. Weinberger, Esq., 2d Dept.  
Betsy R. Ruslander, Esq., 3d Dept.  
Tracy M. Hamilton, Esq., 4th Dept.

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

## NEWS BRIEFS

### SECOND DEPARTMENT NEWS

#### Continuing Legal Education Programs

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

On October 20, 2014, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. Gary Solomon, Esq., Legal Aid Society, NYC, Juvenile Rights Practice, presented *Case Law and Legislative Update*. Mark F. Dewan, Esq., Deputy Chief Attorney, Appellate Division, Second Judicial Department, Grievance Committee for the 2<sup>nd</sup>, 11<sup>th</sup> and 13<sup>th</sup> Judicial Districts, and Diana Maxfield Kears, Esq., Chief Attorney, Appellate Division, Second Judicial Department, Grievance Committee for the 2<sup>nd</sup>, 11<sup>th</sup> and 13<sup>th</sup> Judicial Districts, presented *Practicing Family Law and the Rules of Professional Conduct*. This seminar was held at Brooklyn Law School, Brooklyn, New York.

On December 8, 2014, the Appellate Division, Second Judicial Department, and the Attorneys for Children Program co-sponsored *An Alternative to Incarceration in Willfulness Cases: Intensive Supervision Program for Child Support Enforcement*. The presenters were Liberty Aldrich, Esq., Director, Domestic Violence and Family Court Programs, Center for Court Innovation; and Rick

Stein, Esq., Attorney, Private Practice. This seminar was held at the Office of Attorneys for Children, Brooklyn, New York.

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

On October 31, 2014, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. Margaret A. Burt, Esq., Attorney at Law, presented *Child Welfare Law Update*; Ian Harris, Esq., New York Legal Assistance Group, presented *Technological Abuse: Practical Considerations and Evidentiary Issues*; and Miriam Goodman, LMSW, Coordinator of Trafficking Programs, Center for Court Innovation, together with, Katie Crank, Esq., LMSW, Senior Manager, Domestic Violence Program, Center for Court Innovation, presented *Creating Change For Children: Addressing Commercial Sexual Exploitation of Children*. This seminar was held at the Westchester County Supreme Court, White Plains, New York.

#### **Tenth Judicial District (Nassau County)**

On October 23, 2014, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored the Mandatory Annual Fall Seminar. Gary Solomon, Esq., Legal Aid Society, NYC, Juvenile Rights Practice, presented *Case Law and Legislative Update*; Sherill R. Sigalow, Ph.D.,

Psychologist, Private Practice, presented *Avoiding Role Conflicts in Forensic Evaluations*; Susan L. Bender, Esq., Bender Rosenthal, Issacs & Richter, LLP; together with Bernice H. Schaul, Ph.D., Psychologist, Private Practice, and Harriet R. Weinberger, Esq., Director, Attorneys for Children Program, presented *Parental Alienation From the Legal and Clinical Perspectives*. This seminar was held at Hofstra University Law School, Hempstead, New York.

#### **Tenth Judicial District (Suffolk County)**

On November 24, 2014, the Appellate Division, Second Judicial Department, and the Attorneys for Children Advisory Committee co-sponsored the Mandatory Annual Fall Seminar. Margaret A. Burt, Esq., Attorney at Law, presented *Child Welfare Law Update*; John Belmonte, Esq., Children's Law Bureau, presented *How to File Neglect Petitions*; Hon. Theresa Whelan, Judge, Suffolk County Family Court, presented *Court Improvement Project*; and Miriam Goodman, LMSW, Coordinator of Trafficking Programs, Center for Court Innovation, together with, Katie Crank, Esq., LMSW, Senior Manager, Domestic Violence Program, Center for Court Innovation, presented *Creating Change For Children: Addressing Commercial Sexual Exploitation of Children*. This seminar was held at the Suffolk County Supreme Court, Central Islip, New York.

The Mandatory Fall Seminars described above, together with accompanying handouts, can be viewed on the Appellate Division Second Department's website. Please contact Gregory Chickel at [gchickel@nycourts.gov](mailto:gchickel@nycourts.gov) to obtain access to these programs.

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

### **THIRD DEPARTMENT NEWS**

#### **Changes in the Office of Attorneys for Children**

The Office of Attorneys for Children welcomes new staff member, Karen Barakat. Karen is our new administrative assistant and a great addition to our program.

Additionally, the Office of Attorneys for Children is relocating from the Robert Abrams Building for Law and Justice at the Empire State Plaza in downtown Albany to 286 Washington Avenue Extension, Suite 202, Albany, NY 12203, effective January 6, 2015. All staff phone numbers and email will remain the same. Please make a note of this new address and direct all correspondence accordingly. Thank you.

#### **Liaison Committees**

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts met in October. The committees provide a means of communication between panel members and the Office of

Attorneys for Children. The Liaison Committees, whose members are nominated by Family Court judges, meet twice annually and representatives are frequently in contact with the Office of Attorneys for Children on an interim basis. If you would like to know the name of your Liaison Committee Representative, it is listed in the Administrative Handbook or you may contact Betsy Ruslander by telephone or e-mail at [oac3d@nycourts.gov](mailto:oac3d@nycourts.gov). If you have any issues you would like brought to the attention of the Office of Attorneys for Children, please contact your county's Liaison Representative. Our next meeting will be held on Thursday, May 7, 2015 in Lake Placid in conjunction with the Children's Law Update CLE which will be held on Friday, May 8, 2015.

Welcome and congratulations to the new Tioga County Liaison Representative, Alena Van Tull, Esq., and many thanks to her predecessor, David Kapur, Esq.

Congratulates Rose Place, Esq., Warren County panel member and that County's Liaison Representative, on being this year's recipient of the Warren County Bar Association's Bernadette M. Hollis Award, presented on December 11, 2014 in recognition of her many years of excellent service as Attorney for the Child. This award was named in memory of Attorney Bernadette Hollis, who was a Warren County panel member for nearly 20 years until her death in 2010. Rose dedicates a significant part of her practice to the representation of children and is honored for her commitment and

dedication to her child clients. She provides diligent and effective legal representation with compassion and care and serves as a mentor for other Attorneys for Children. She is an example to us all and we congratulate her on this well-deserved honor.

And congratulations to the current liaison representative from Chemung County, Mimi Tarantelli, Esq., who is going to be the next Chemung County Family Court Judge.

#### **Training News**

Training dates are available on the web page at [nycourts.gov/ad3/oac](http://nycourts.gov/ad3/oac), link to CLE. Upcoming training dates include:

*Introduction to Effective Representation of Children* to be held on Thursday and Friday, March 26 - 27, 2015 in Rochester, NY;

The *2015 Topical Seminar* focusing on juvenile justice issues to be held on Friday, April 24, 2015 at the Holiday Inn on Wolf Road in Colonie, NY; and

*Children's Law Update 2015* to be held on Friday, May 8, 2015 at the Crowne Plaza Resort in Lake Placid, NY.

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

#### **Web page**

The Office of Attorneys for Children web page located at

*nycourts.gov/ad3/oac* includes a wide variety of resources, including E-voucher information, online CLE videos and materials, the New York State Bar Association Representation Standards, the latest edition of the Administrative Handbook, forms, rules, frequently asked questions, seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The *News Alert* feature includes recent program and practice developments of note.

## **FOURTH DEPARTMENT NEWS**

### **Re-certification Form**

The Appellate Division, Fourth Department Court Rules require current panel members to submit a Panel Re-Designation Application to the Office of Attorneys for Children annually, in order to be eligible for re-designation on April 1st of each year. A copy of the Panel Re-Designation Application was recently provided to all panel members. The Panel Re-Designation Application was designed to reflect and document your desire to continue serving on the panel, your knowledge of and compliance with the Summary of Responsibilities of the Attorney for the Child and any significant information that our office should be aware of concerning your standing as a panel member.

### **Spring Seminars/Seminar Times**

#### **Seminars for Prospective Attorneys for Children**

### **March 26 - 27, 2015**

*Fundamentals of Attorney for the Child Advocacy I – Juvenile Justice Proceedings*  
*Fundamentals of Attorney for the Child Advocacy II – Child Protective & Custody Proceedings*  
East Avenue Inn & Suites  
Rochester, NY

Fundamentals I and II are basic seminars designed for prospective attorneys for children. The Program requires prospective attorneys for children to attend both seminars. A light breakfast and lunch will be provided to all each day.

#### **Seminars for Attorneys for Children**

**Dates and locations are tentative. You will receive agendas in the semi-annual mailing in January. The agendas also will be available in January under “seminars” at the Attorneys for Children Program link to the Appellate Division, Fourth Department website at <http://nycourts.gov/ad4>.**

### **April 17, 2015**

*Update for Attorneys for Children*  
Center for Tomorrow (University of Buffalo)  
Buffalo, NY

### **May 14, 2015**

*Update for Attorneys for Children*  
Inn at the Lake  
Canandaigua, NY

#### **Your Training Expiration Date**

If you need to attend a training seminar or watch at least 5.5 hours

of approved videos on the AFC website before April 1, 2015, to remain eligible for panel designation, you should have received a letter to that effect in November 2014. Please remember, however, that it is your responsibility to ensure that your training is up-to-date. Because of the new video option, there will be no extensions.

If you are unable or do not want to attend live training you may satisfy your AFC Program training requirement for recertification by watching at least 5.5 hours of CLE video on the Attorneys for Children Program link to the Appellate Division, Fourth Department website at <http://nycourts.gov/ad4>. Once on the AFC page, click on “Training Videos” and then “Continuing Training.” Authority to view the online videos and access training materials is restricted to AFC and is password protected. For both videos and materials, your “User Id” is AFC4 and your “Password” is DVtraining.

You may choose the training segments that most interest you, but the segments you choose must add up to at least 5.5 hours. We are unable to process applications for AFC Program or NYS CLE for less than 5.5 hours credit. If you choose the video option instead of attending a live seminar, you must correctly fill out an affirmation and evaluation for each segment and forward all original forms together to Jennifer Nealon, AFC Program, 50 East Avenue, Rochester, NY 14604 by **March 1, 2015**. Incorrect or incomplete affirmations will be returned.

There are directions on the “Continuing Training” page of the AFC website. Please read the directions carefully before viewing the videos. You are not entitled to video CLE credit if you attended the live program, and you must be admitted at least two years to receive NYS CLE credit. Please retain copies of your affirmations and your CLE certificates. We are unable to tell you what videos you viewed.

### **Congratulations to New Judges**

#### **5<sup>th</sup> Judicial District**

Hon. Julia Brouillette, Family Court, Oneida County  
Hon. Eugene Langone, Jr., Family Court, Jefferson County  
Hon. James Eby, Family Court, Oswego County

#### **8<sup>th</sup> Judicial District**

Hon. Jeffrey Piazza, Family Court, Chautauqua County  
Hon. Dennis Ward, Supreme Court, Erie County  
Hon. Paul Wojtaszek, Supreme Court, Erie County  
Hon. E. Jennette Ogden, Supreme Court, Erie County

## RECENT BOOKS AND ARTICLES

### ADOPTION

Brian H. Stuy, *Open Secret: Cash and Coercion in China's International Adoption Program*, 44 Cumb. L. Rev. 355 (2013-2014)

### ATTORNEY FOR THE CHILD

Rebecca Aviel, *Counsel for the Divorce*, 55 B. C. L. Rev. 1099 (2014)

### CHILD WELFARE

Michael H. Graham, *Admissibility of Children's Statements in Sexual Abuse Prosecutions: Prompt Complaint, Excited Utterance, Medical Diagnosis of Treatment, Child Sexual Abuse Hearsay Exception: Confrontation Clause*, 5 No. 5 Crim. Law Bulletin ART 9 (2014)

Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, 77 Law & Contemp. Probs. 221 (2014)

Stephanie Macgill & Alicia Summers, *Assessing the Relationship Between the Quality of Juvenile Dependency Hearings and Foster Care Placements*, 52 Fam. Ct. Rev. 678 (2014)

Lauren McCormick, *The Internet and Social Media Sites: A Shift in Privacy Norms Resulting in the Exploitation and Abuse of Adolescents and Teens in Dating Relationships*, 7 Alb. Gov't L. Rev. 591 (2014)

### CHILDREN'S RIGHTS

Alyssa M. Barnard, "The Second Chance They Deserve": *Vacating Convictions of Sex Trafficking Victims*, 114 Colum. L. Rev. 1463 (2014)

Suparna Malempati, *The Illusion of Due Process for Children in Dependency Proceedings*, 44 Cumb. L. Rev. 181 (2013-2014)

Christopher Park, *Children and the Duty to Report: The Double Standard of Child Abuse and Anti-Bullying*

*Laws*, 47 Ind. L. Rev. 843 (2014)

### CHILD SUPPORT

Trent Maxwell, *Domestic Asset Protection Trusts: A Threat to Child Support?*, 2014 B.Y.U. L. Rev. 477 (2014)

### CONSTITUTIONAL LAW

Ayriel Bland, *No Child Left Behind: Why Race-Based Achievement Goals Violate the Equal Protection Clause*, 24 Berkeley La Raza L. J. 59 (2014)

Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 Ind. L. Rev. 467 (2014)

William C. Nevin, *In the Weeds With Thomas: Morse, In Loco Parentis, Corporal Punishment, and the Narrowest View of Student Speech Rights*, 2014 B.Y.U. Educ. & L. J. 29 (2014)

### COURTS

Kathleen Adams, *Chemical Endangerment of a Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women's Rights*, 65 Ala. L. Rev. 1353 (2014)

Milfred D. Dale, *Don't Forget the Children: Court Protection From Parental Conflict is in the Best Interests of Children*, 52 Fam. Ct. Rev. 648 (2014)

Stephanie Silvano, *Fighting a Losing Battle to Win the War: Can States Combat Domestic Minor Sex Trafficking Despite CDA Preemption?*, 83 Fordham L. Rev. 375 (2014)

### CUSTODY AND VISITATION

Sarah Abramowicz, *Contractualizing Custody*, 83 Fordham L. Rev. 67 (2014)

Katherine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decision Making*, 77 Law & Contemp. Probs. 29 (2014)

Elizabeth Monachino, *Violent Relationships and the Ensuing Effects on Children: Should New York Adopt a Rebuttable Presumption Against Awarding Custody to Batterers?*, 22 Buff. J. Gender, L. & Soc. Pol'y 121 (2013-2014)

Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 Law & Contemp. Probs. 69 (2014)

## **DIVORCE**

Mervate Mohammad, *The Evolution of Sharia Divorce Law: Its Interpretation and Effect on a Woman's Right to Divorce*, 7 Alb. Gov't L. Rev. 420 (2014)

## **DOMESTIC VIOLENCE**

Jacqueline Clarke, *(In)equitable Relief: How Judicial Misconceptions About Domestic Violence Prevent Victims From Attaining Innocent Spouse Relief Under I.R.C. § 6015 (F)*, 22 Am. U. J. Gender Soc. Pol'y & L. 825 (2014)

Heath Hardman, *When You Stop Keeping Their Secrets, They Start Losing Their Power: Exposing One Abuser's Use of the Legal System as a Weapon*, 7 Alb. Gov't L. Rev. 187 (2014)

Victoria I. Kusel, *Gender Disparity, Domestic Abuse, and the Mail-Order Bride Industry*, 7 Alb. Gov't L. Rev. 166 (2014)

Remla Parthasarathy, *Identifying and Depicting Culture in Intimate Partner Violence Cases*, 22 Buff. J. Gender, L. & Soc. Pol'y 71 (2013-2014)

## **EDUCATION LAW**

Erin M. Heidrich, *Expanding Access to Residential Treatments for Mentally Ill Youth Through the Individuals With Disabilities Act*, 41 N. Ky. L. Rev. 295 (2014)

Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical Analysis of the Case Law*, 47 Akron L. Rev. 299 (2014)

Maria M. Lewis, *School Discipline and the Fundamental Right to Education: The Constitutional Inadequacies of Wisconsin's Expulsion Laws*, 2014 B.Y.U. Educ. & L. J. 41 (2014)

Angelique Palmer, *Room for Me? - An Analysis of Whether Mediation is a Viable Solution to School Bullying*, 16 Cardozo J. Conflict Resol. 221 (2014)

## **FAMILY LAW**

Emily Buss, *An Off-Label Use of Parental Rights? The Unanticipated Doctrinal Antidote for Professor Mnookin's Diagnosis*, 77 Law & Contemp. Probs. 1 (2014)

Julie Sobotta Kane, *Why Applying the Indian Child Welfare Act is Worth the Hassle*, 57-OCT Advocate Idaho 28 (October, 2014)

Solangel Maldonado, *Shared Parenting and Never-Married Families*, 52 Fam. Ct. Rev. 632 (2014)

A. Paige Miller, *The Silence Surrounding Surrogacy: A Call for Reform in Alabama*, 65 Ala. L. Rev. 1375 (2014)

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## **PATERNITY**

Elizabeth J. Levy, *Virgin Fathers: Paternity Law, Assisted Reproductive Technology, and the Legal Bias Against Gay Dads*, 22 Am. U. J. Gender Soc. Pol'y & L. 893 (2014)

## **TERMINATION OF PARENTAL RIGHTS**

Carrie Murray, *An Analysis of Recent Oregon Court of Appeals Decisions Regarding Juvenile Dependency & Their Impact on Parental Constitutional Rights*, 92 Or. L. Rev. 723 (2014)

## FEDERAL COURTS

### **District Court Erred in Permitting Introduction of Social Media Page**

The District Court found defendant guilty of the unlawful transfer of a false identification document. The Second Circuit vacated the conviction and remanded for retrial. The District Court erred in permitting the introduction of a printed copy of a web page that allegedly was defendant's profile page from a Russian social networking site akin to Facebook. The court abused its discretion in admitting the web page because it did so without proper authentication. The government presented insufficient evidence that the page was what the government claimed it was, the defendant's profile page. Although there was information about defendant on the web page, including his name, photograph and some details about his life that were consistent with trial testimony, there was no evidence that defendant himself created the page or was responsible for its content. The information on the page was not so distinctive that it established circumstantially that it came from defendant. The ruling was not harmless error.

*U.S. v Vayner*, 769 F.3d 125 (2d Cir. 2014)

### **SRO's Ruling That DOE Met Burden of Showing IEP Provided FAPE Supported by Preponderance of Evidence**

Plaintiffs P.S. and K.S., individually and on behalf of their autistic child, brought an action against the New York City Department of Education (DOE) pursuant to the Individuals with Disabilities Education Act (IDEA). Plaintiffs sought review of a decision of the New York State Review Officer (SRO) reversing a decision of the Impartial Hearing Officer (IHO), which found that the DOE failed to provide a free and appropriate education (FAPE) to their child during the 2011-2012 school year. The parties cross-moved for summary judgment. The District Court denied plaintiffs' motion and granted the DOE's motion. The SRO's decision that the DOE met its burden of showing that the IEP provided a FAPE to the child was supported by a preponderance of the evidence. The record established that the Committee on Special Education (CSE) considered the child's interfering behaviors and strategies to address those behaviors,

despite the fact that it did not conduct a formal FBA or specifically identify the child's behaviors as self-injurious. Moreover, the failure to provide for parent counseling and training did not rise to the level of a FAPE deprivation. Failure to provide parent counseling may constitute a procedural violation, but ordinarily did not result in a FAPE denial or warrant tuition reimbursement. The lack of a 1:1 teacher in the IEP did not rise to the level of a FAPE denial. The CSE was fully cognizant of the child's substantial management needs and the IEP was designed to meet those needs, in particular by adding a 1:1 paraprofessional who could redirect the child's attention when necessary. Additionally, the failure to consider or require Applied Behavior Analysis (ABA) methodology in the child's IEP did not contribute to a FAPE denial. It is well established that once an IEP satisfies the requirements of the Act, questions of educational methodology may be left to the State to resolve. Further, the record did not establish that the child could only make progress when instructed using ABA. Plaintiffs' contention could not be considered that the assigned school did not meet the child's needs. A challenge to the DOE's choice of school, rather than the IEP itself, was appropriate only in a later proceeding to show that the child was denied a free and appropriate education because necessary services included in the IEP were not provided in practice. Plaintiffs' claim was rejected that the failure to provide home-based services resulted in a FAPE denial. The evidence did not suggest that the child required home-based programming in order to avoid regression, make progress during the in-school portion of his program, or to enable the child to receive educational benefits.

*P.S. v New York City Dept. of Educ.*, \_\_\_ F3d \_\_\_, 2014 WL 3673603 (SDNY 2014)

### **Search Warrant Granted Directing Delivery of All Emails**

As part of an investigation into possible unlawful money remitting, conspiracy to commit unlawful money remitting and conspiracy to commit money laundering, the District Court was presented with an application for a search warrant to obtain emails and other information from a Gmail account, and to permit

a search of those emails for certain specific categories of evidence. The Court granted the application. Citing several decisions to the contrary with which it disagreed, the Court held that a search warrant directing production of Gmail records may require that Google deliver all emails in the account to the government for the purpose of allowing the government to search the emails for items within the categories specified in the warrant, even though there was no probable cause to believe that the email account consisted exclusively of emails that were within the categories of items to be seized. Case law concerning searches of hard drives and other storage media supported the government's ability to access an entire email account in order to conduct a search for emails within the limited categories contained in the warrant. The Court did not place any limits on the manner or time frame in which the emails could be searched or retained. Court processes available following execution of a warrant, such as a suppression motion, provided the appropriate mechanisms for an individual to challenge the government's execution of a warrant, and provided strong incentives for the government to treat the electronic information in a manner that complied with the Fourth Amendment.

*Matter of a Warrant For All Content and Other Information Associated with the Email Account xxxxxx@Gmail.com Maintained At Premises Controlled By Google, Inc.*, \_\_\_ F3d \_\_\_, 2014 WL 3583529 (SDNY 2014)

### **Section 1983 Action Based on Text Message Conversation Dismissed**

Plaintiffs, the parents of a high school student, filed a §1983 action against defendants school district and superintendent, alleging that defendants wrongfully suspended their son and retained findings in school records that their son had violated the school code of conduct, based upon a text message conversation he had with another student regarding a third student while outside school. The text message conversation occurred days after an extremely serious assault against a student at the same high school, and included a reference to the assaulted student as well as a reference to a gun. The Court granted defendants' motion to dismiss. With respect to plaintiffs' First Amendment claim, there was a reasonably foreseeable risk that the

speech would come to the attention of school officials, especially given that the student to whom the text-message was forwarded was a friend of the third student and regularly shared his cell phone with the third student during lunch period at school, where school officials could see the third student if she were to become upset. There also was a reasonably foreseeable risk that the text-message conversation would materially and substantially disrupt the work and discipline of the school. Plaintiffs' contention was rejected that defendants' denied their due process rights under the Fourteenth Amendment.

*Bradford v. Norwich City School Dist.*, \_\_\_ F. Supp. 3d \_\_\_, 2014 WL 4715638 (NDNY 2014)

## COURT OF APPEALS

### **Overbroad and Facially Invalid Cyberbullying Law Unconstitutional**

In 2010, the Albany County Legislature adopted the offense of cyberbullying, which was defined as “any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.” The provision outlawed cyberbullying against “any minor or person” situated in the county. Knowingly engaging in this activity was deemed to be a misdemeanor offense punishable by up to one year in jail and a \$1,000 fine. Defendant, a 16-year-old high school student, used Facebook to create a page bearing the pseudonym “Cohoes Flame.” He anonymously posted photographs of high school classmates and other adolescents, with detailed descriptions of their alleged sexual practices and predilections and sexual partners, and other types of personal information. The descriptive captions, which were vulgar and offensive, prompted responsive electronic messages that threatened the creator of the website with physical harm. After he was charged with cyberbullying, defendant moved to dismiss, arguing that the statute violated his right to free speech under the First Amendment. City Court denied defendant’s motion and defendant plead guilty to one count of cyberbullying. County Court affirmed, having concluded that the local law was constitutional to the extent it outlawed such activities directed at minors, and held that the application of the provision to defendant’s Facebook posts did not contravene his First Amendment rights. The Court of Appeals reversed and dismissed the accusatory instrument. The Court held that the law was overbroad and facially invalid under the Free Speech Clause of the First Amendment. Albany County created a criminal prohibition of alarming breadth. The language of the local law prohibited types of protected speech far beyond the

cyberbullying of children. On its face, the law covered communications aimed at adults, and fictitious or corporate entities, even though the county legislature justified passage of the provision based on the detrimental effects that cyberbullying had on school-aged children. The law included every conceivable form of electronic communication. Moreover, it appeared that the law would criminalize a broad spectrum of speech outside the popular understanding of cyberbullying. The Court refused to sever the offending portions and declare that the remainder of the law survived strict scrutiny. The Court would need to significantly modify the law, and result would bear little resemblance to the actual language of the law. Such a judicial rewrite encroached on the authority of the legislative body that crafted the provision and would enter the realm of vagueness because any person who read it would lack fair notice of what was legal and what constituted a crime. The dissent would have severed the provisions of the law that Albany County conceded were invalid, in order to render the law constitutionally valid.

*People v Marquan M.*, 24 NY3d 1 (2014)

## APPELLATE DIVISIONS

### ADOPTION

#### **Mother Sufficiently Established That She Was under Duress When She Executed Surrender Agreement**

The mother appealed from an order of the Family Court, which, without a hearing, denied her petition to revoke a surrender agreement. The mother commenced this proceeding to revoke an agreement surrendering her two children to their great aunt and uncle. The mother alleged, inter alia, that at the time she executed the surrender agreement she was 17 years old, under the influence of drugs, and unrepresented by counsel. Having accepted the allegations in the petition as true, and having afforded her the benefit of every possible favorable inference, The Appellate Division found that the mother sufficiently alleged that she was under duress at the time she executed the surrender agreement (*see* SSL § 383 [6] [d]). Accordingly, the Family Court should not have summarily denied the petition. The matter was remitted to the Family Court for further proceedings on the petition.

*Matter of Morant v Rogers*, 118 AD3d 703 (2d Dept 2014)

#### **Mother's Consent to Adoption Not Required**

Family Court granted the father's spouse's application to adopt the subject child and determined that the mother's consent was not required. The Appellate Division affirmed. Consent to adoption is not required of a parent who evinces an intent to forego his or her parental rights, shown by his or her lack of contact with the child although able to do so. Here, due to the mother's drug and alcohol abuse issues, she had very little contact with the child after the child's first birthday. When the child turned three-years-old, she consented to the father, who was living with his spouse, having sole legal custody of the child. She further agreed to a two-year no contact order of protection on behalf of both the father and the child. However, the order did allow the mother to apply for visitation once she obtained a psychological evaluation, an alcohol and substance abuse evaluation and complied with the

recommended treatment. The mother rejected the offer for treatment, continued to abuse drugs and alcohol and did not seek any treatment until nearly a year after the order of custody had been issued. Additionally, the mother made no effort to find out about the child from the maternal grandmother, who did have contact with the child. Due to the mother's lack of contact with the child for over six months and her own actions and lack of effort, which were the basis for absence of contact, the court's decision was upheld.

*Matter of Lori QQ. v Jason OO.*, 118 AD3d 1084 (3d Dept 2014)

#### **Family Court Properly Terminated Post-Adoption Visits But Erred by Failing to Direct That Annual Progress Reports and Photographs be Provided to Petitioner**

Family Court terminated post-adoption contact between petitioner and the subject child. The Appellate Division modified by granting the petition in part and directing respondent to comply with that part of the agreement that required her to provide petitioner with annual progress reports and photographs in the event that petitioner provided respondent with annual notice of her address. Petitioner, the biological mother of the subject child, entered into an agreement with respondent, the adoptive mother of the child, which provided for biannual visits with the child as a condition of her judicial surrender of her parental rights. The agreement provided, among other things, that petitioner was entitled to visit the child for a period of two hours in the months of July and December, and that petitioner was obligated to contact respondent by the first Monday of July and the first Monday of December to arrange visits. The parties orally modified the agreement to provide for visitation on the day after Thanksgiving, rather than in December. It was undisputed that petitioner failed to contact respondent in July 2012, and that in November 2012, she did not contact respondent until November 15, rather than on November 5, which was the first Monday of November. Respondent refused to schedule the visit in November 2012. The court properly determined that, although petitioner was ready, willing, and able to visit with the

child in November 2012, she breached the agreement based upon her failure to contact respondent for a visit in July and her failure to provide timely notice of the visit in November. Moreover, the court was entitled to credit respondent's testimony regarding the special needs of the child and respondent's opinion that continued visits with petitioner were not in the best interests of the child based upon the child's needs and petitioner's periodic inattention to the child during the two-hour visits. Nevertheless, the court erred by failing to grant the petition to the extent that it sought to enforce that part of the agreement that provided that in the event that visitation was terminated, respondent was required to provide annual progress reports and photographs to petitioner.

*Matter of Sapphire W.*, 120 AD3d 1584 (4th Dept 2013)

#### **ATTORNEYS FEES - AFC**

##### **Supreme Court Erred in Failing to Appoint AFC Pursuant to 22 NYCRR Part 36**

Supreme Court denied the Attorney for the Children's motion for an award of attorney's fees from defendant. The Appellate Division modified by granting the motion in part, appointing the AFC nunc pro tunc pursuant to 22 NYCRR part 36, directing defendant to pay attorney's fees to the Administrator of the estate of the AFC, and remitted the matter to determine the amount of those fees. There was good cause to appoint the AFC pursuant to 22 NYCRR part 36, which governs the appointments of attorneys for children who are not paid from public funds. Therefore, Supreme Court erred in failing to do so. The court described the case as one of the most contentious and protracted proceedings it had ever presided over. The case included two years of litigation, 32 court appearances, a lengthy trial, and two significant motions before the Appellate Division. Given the unusual and complex nature of the litigation, it was essential that the AFC continue his work on behalf of the children. Thus, the AFC should have been appointed pursuant to 22 NYCRR part 36 nunc pro tunc. Furthermore, the court should have ordered defendant, the monied spouse, to pay the AFC's fees. The dissent concluded that the AFC failed to establish that there was good cause to appoint him as a private pay AFC instead of permitting

him to continue representing the children as a state pay AFC, and further failed to submit any reason why such an order should be entered nunc pro tunc despite defendant's lack of record notice that he would be required to pay for the AFC's services.

*Stefaniak v Zulkharnain*, 119 AD3d 1418 (4th Dept 2014)

#### **CHILD ABUSE AND NEGLECT**

##### **Petition Alleging Derivative Neglect Reinstated**

Family Court, upon a fact-finding determination that respondent sexually abused the subject child Tatianna, released the child to her mother under ACS supervision for one year. In a second order, the court found that respondent derivatively neglected the subject child Tiffany and dismissed the petition on the ground that the aid of the court was no longer needed. The Appellate Division affirmed the first order but reversed the second, reinstating the neglect finding and remitting the matter for a dispositional hearing. The testimony of Tatianna at the fact-finding hearing provided competent evidence that respondent sexually abused her and the absence of physical injury or medical corroboration did not require a different result. The determination was supported by a preponderance of the evidence that respondent, by sexually abusing Tatianna, a person for whom he was legally responsible, derivatively neglected Tiffany, his biological daughter. In light of the serious nature of respondent's action and his continued proximity and contact with Tiffany, the court erred in dismissing the petition on the ground that the aid of the court was no longer necessary to protect Tiffany from harm.

*Matter of Tiffany H.*, 117 AD3d 419 (1st Dept 2014)

##### **No Excuse For Respondent's Default**

Family Court denied respondent father's motion to vacate the order of fact-finding and disposition. The Appellate Division affirmed. The record showed that respondent willfully failed to appear at the fact-finding and dispositional hearings. He did not deny receiving notice of the hearings, but instead claimed that he did not have an attorney assigned to follow up about the dates; did not know that he was required to attend the

hearings; and that if he had been informed, he forgot. Further, respondent's several prior unexplained absences from court also supported a finding of willful neglect. While respondent's willful default alone warranted denial of the motion, it was noted that respondent also failed to establish a meritorious defense to the allegations of neglect based upon the children's exposure to domestic violence between the parents.

*Matter of Yeclyne P.-H.*, 117 AD3d 438 (1st Dept 2014)

### **Court Should Have Reviewed Child's Medical Records In Camera**

Family Court, after a fact-finding hearing, determined that respondent father abused his eldest son and derivatively neglected his younger son. The Appellate Division held the case in abeyance pending an in camera review by the court of the eldest son's medical records. The father moved to subpoena the eldest child's mental health treatment records. The court erred by denying the motion without conducting an in camera review of the requested records. Pursuant to Family Court Act §1038 the court was required to conduct a balancing test by weighing the need for discovery to assist in case preparation with potential harm to the child arising from the discovery. The record contained no physical evidence of the alleged abuse and thus the case relied almost entirely on the credibility of the child. Respondent asserted that the child was angry with him for hitting the mother in the past and that the allegations were raised in retaliation. Respondent also asserted that the mother might be coaching the child, pointing out that the allegations were not raised until after respondent cross-petitioned for custody of the child. Further, the significant delay in reporting the alleged abuse and no testimony that the abuse was witnessed by anyone other than respondent and the child placed additional importance on the child's credibility. Although the child's therapists objected to disclosure of the records, they did not address whether the records should be reviewed in camera. On remittal, the court must conduct an in camera review of the records to determine if there was any information to support respondent's claims about possible coaching and mental health issues affecting the child's truth telling capacity and whether the potential harm arising from discovery would outweigh respondent's needs for

the record. Contrary to respondent's contention, the child did not put his mental state in issue. Although his mental health state may be relevant to assess whether the abuse occurred, the child's mental health was not in controversy.

*Matter of Dean T.*, 117 AD3d 492 (1st Dept 2014)

### **Respondent Neglected Child By Committing Acts of Domestic Violence in Child's Presence**

Family Court found that respondent mother neglected the child and released the child to the custody of her father with six months' supervision by the agency. The Appellate Division affirmed. The finding that respondent neglected her infant daughter was supported by a preponderance of the evidence, which established that respondent engaged in acts of violence against the child's father in his apartment in the child's presence and that she left the child alone in a shelter while she engaged in a verbal altercation with another shelter resident.

*Matter of Imani W.*, 117 AD3d 621 (1st Dept 2014)

### **Respondent Sexually Abused Two Children and Derivatively Neglected Four Others**

Family Court, upon a fact-finding determination that respondent sexually abused his daughter and another child for whom he was legally responsible and derivatively neglected four other subject children, released the children to their respective mothers, ordered respondent to be in a sex offender program, and ordered a one-year order of protection against him on behalf of the children. The Appellate Division affirmed. The determination of sexual abuse and derivative neglect were supported by a preponderance of the evidence. The out-of-court statements of sexual abuse made by the daughter were corroborated by medical evidence and testimony of her counselor. Also, each daughter's statement detailing the abuse served to corroborate the other sister's. The court properly struck the testimony of one of the daughters after she failed to return to complete it and in declining to admit an alleged CD of the daughter.

*Matter of David L.*, 118 AD3d 468 (1st Dept 2014)

### **Fracture and Burn Supported Finding of Respondent's Abuse of Child**

Family Court, upon a fact-finding that respondent father abused and neglected his son and derivatively neglected his daughter, ordered that respondent continue to have supervised visitation with the children. The Appellate Division affirmed. Petitioner made a prima facie showing that a traverse fracture of the femur, such as the one sustained by the 16-month-old son, would ordinarily not be sustained except as a result of a caretaker's acts or omissions and that respondent was the child's caretaker at the time the injury occurred. The medical expert also testified that the child suffered a burn to the cheek, which was indicative of neglect. Respondent failed to present a credible explanation concerning how the child suffered the fracture. Respondent explained that the burn occurred after the child fell asleep on a frozen package of meat given to him by respondent to treat a bruise. Respondent thus failed to exercise a minimum degree of care in allowing the burn to occur, and then failing to seek medical attention for the child. The son's injuries arising from respondent's abuse and neglect were so severe as to support the finding that the daughter, who was approximately the same age as the son and in the care of respondent at the time of the son's injuries, was derivatively neglected by respondent.

*Matter of Ni'Kia C.*, 118 AD3d 515 (1st Dept 2014)

### **Finding of Sexual Abuse Affirmed**

Family Court determined that respondent father sexually abused his daughters. The Appellate Division affirmed. The finding that respondent sexually abused his daughters was supported by a preponderance of the evidence, including the daughters' sworn testimony. The record showed that respondent presented no credible evidence to explain his conduct, except his claim that he was never alone with his daughters. That testimony was contradicted by his own testimony and that of his wife. The record also demonstrated by a preponderance of the evidence that respondent inappropriately touched his daughters for the purpose of gratifying his sexual desire. The court properly drew a negative inference against him regarding this issue because gratification may be inferred from the totality of the circumstances and respondent failed to offer an

innocent explanation for his actions.

*Matter of Daniela R.*, 118 AD3d 637 (1st Dept 2014)

### **Neglect Determination Affirmed based Upon Mother's Mental Illness**

Family Court determined that respondent mother neglected the subject child because of the mother's mental illness, and released the child to the custody of her father. The Appellate Division affirmed. The finding that respondent neglected the child was supported by a preponderance of the evidence because the child was harmed and at imminent risk of harm due to the mother's mental condition. Although experts provided a variety of diagnoses, the lack of a definitive diagnosis did not preclude the neglect finding. It was undisputed that the mother had an extensive history of psychiatric hospitalizations, before and after the child's removal, and that she continued to engage in irrational behavior, such as pushing the child down the steps of a fire escape, leaving bizarre messages for the father, caseworker, and personnel at the child's school, and making unfounded accusations of misconduct against the father and school personnel. It was in the child's best interests to award custody of the child to the father, who had provided a stable and loving home and where the child was thriving and happy.

*Matter of Devin M.*, 119 AD3d 435 (1st Dept 2014)

### **Petition Alleging Neglect Properly Dismissed**

Family Court dismissed the petition alleging that respondent mother neglected her child. The Appellate Division affirmed. The court's determination that petitioner failed to demonstrate that the mother's mental condition placed the child in actual or imminent danger had a sound and substantial basis in the record. Although the mother may have had some problems and was in denial about the extent of her son's misdeeds, there was support for the court's conclusion that the mother's behavior did not rise to the level required to support a neglect finding. The court properly exercised its discretion in denying the AFC's application during the hearing for a mental health evaluation of the mother. There was no explanation why the application was not made sooner by the AFC or petitioner and, on appeal, petitioner did not request that the case be

remanded for an evaluation.

*Matter of Trevor McK.*, 120 AD3d 416 (1st Dept 2014)

### **Father's Motion to Vacate Order of Fact-Finding Denied**

Here, in light of the failure of the father's attorney to offer any explanation for the father's absence, other than vague and unsubstantiated speculation, the Family Court providently exercised its discretion in denying the application for an adjournment of the fact-finding hearing. Likewise, the Family Court providently exercised its discretion in denying the father's motion to vacate the order of fact-finding which was made upon his default in appearing on October 12, 2011. While the Family Court's finding of willful refusal to appear at the hearing was not supported by the record, it was clear that the father lacked a potentially meritorious defense. The father had not denied the facts elicited at the hearing, including his failure to contact the police when the then 15-year-old child ran away in February of 2010. Moreover, he did not deny that he had made a statement to the caseworker that, while he had previously filed petitions with the Probation Department seeking adjudication of the child as a person in need of supervision (PINS), this time he was "tired" and did not wish to contact Protective Services, which would have become involved upon the filing of a PINS petition. This was sufficient to establish, by a preponderance of the evidence (*see* FCA § 1046 [b] [i]), that the child's physical, mental, and emotional condition was impaired, or was in danger of being further impaired, as a consequence of her father's failure to exercise a minimum degree of care in providing the child with proper supervision and guardianship.

*Matter of Evelyn R.*, 117 AD3d 957 (2d Dept 2014)

### **Grandmother's Boyfriend Abused Child in Grandmother's Presence**

The respondents, Henrietta W. and Reginald M., were the subject child's paternal grandmother and her boyfriend, respectively. Reginald M. allegedly hit the child on the forehead, cheek, and back with an extension cord for having stayed out late one night, and Henrietta W. allegedly allowed Reginald M. to do so in

her presence. Here, the petitioner, the Administration for Children's Services (ACS) established a prima facie case of abuse against Reginald M. and neglect against Henrietta W. The ACS caseworker testified that the subject child reported being beaten by Reginald M. with an extension cord while Henrietta W. was present and did not intervene. The caseworker observed lacerations and welts on the subject child's forehead, cheek, and back, as well as bruising on his ear, which comported with the child's claim of being hit with an extension cord. Photographs documenting the injuries were also admitted as evidence. This evidence sufficiently corroborated the subject child's out-of-court statements alleging abuse by Reginald M. and neglect by Henrietta W.

*Matter of Eddie Z.B.*, 117 AD3d 1041 (2d Dept 2014)

### **Clear and Convincing Evidence Established That Mother Acted Recklessly and Evincing a Depraved Indifference to Child's Life**

The petitioner appealed from an order of the Family Court, which, after a fact-finding hearing, dismissed that branch of the petition which alleged that the mother derivatively severely abused one of her two children. Upon reviewing the record, the Appellate Division found that clear and convincing evidence established that the mother acted recklessly, under circumstances evincing a depraved indifference to her child's life, causing the child's death. Thus, the mother derivatively severely abused the child's sibling. On two separate occasions prior to child's death, significant force intentionally applied by an adult caused the child to suffer rib fractures and a jaw fracture. These injuries would have caused the child to noticeably display significant pain and inability to chew. On the morning of the child's death, the mother failed to immediately summon emergency medical assistance despite the child's obviously grave injuries. The mother waited two hours before taking a taxi to the hospital, bypassed several closer hospitals, provided false information concerning the child's injuries, and instructed the child's sibling to lie. Notwithstanding the mother's insistence that she did not administer or witness the infliction of any of the child's injuries, and that the fatal injuries were inflicted by the mother's boyfriend while the mother was away, the evidence against the mother established her reckless conduct under

circumstances evincing her depraved indifference to the child's life (*see* SSL § 384-b(8) (a) (I), and FCA § 1051(e)). When the fact-finding hearing was held in this case, the Family Court Act did not permit a finding of severe abuse solely on the element of the mother's conduct (*see* SSL § 384-b [8] [a] [i]), but also required a finding as to ACS's "diligent efforts" or excuse from exercising "diligent efforts" (*see* SSL § 384-b [8] [a] [iv]). During the pendency of this appeal, however, the legislature amended FCA § 1051 (e), so that a "diligent efforts" finding is no longer a required element of a finding of severe abuse in the context of a Family Court Act Article 10 proceeding (*see* L 2013, ch 430, § 1; cf. SSL § 384-b [8]). The Appellate Division applied the statutory amendment retroactively in light of the nature and purpose of the amendment, the legislature's expression of urgency in its application, and the absence of any due process violation to the mother in retroactive application.

*Matter of Amirah L.*, 118 AD3d 792 (2d Dept 2014)

#### **Mother Failed to Provide a Reasonable and Adequate Explanation for Injuries Which Led to Child's Death**

Contrary to the mother's contention, the Family Court's finding that she derivatively abused the subject child was supported by a preponderance of the evidence adduced at the fact-finding hearing (*see* FCA § 1046 [b] [I]). The mother's own medical expert opined that the injuries suffered by subject child's sister, A., were intentionally inflicted on three different occasions while she was in the mother's care. Thus, the petitioner established a prima facie case of child abuse, and the burden shifted to the mother to rebut the evidence of her culpability (*see* FCA § 1046 [a] [ii]). As she conceded on appeal, the mother failed to provide a reasonable and adequate explanation for A.'s injuries. Accordingly, the Family Court properly concluded that the mother abused A. The nature of the abuse, which led to A.'s death, and the circumstances in which it was committed, demonstrated that the mother's judgment and understanding of her parental duties relating to the care of children were so defective as to create a substantial risk of harm to any child in her care. Accordingly, the Family Court properly found that the mother derivatively abused the subject child (*see* FCA §§ 1012 [e] [ii]; 1046 [a] [I]).

*Matter of Amirah L.*, 118 AD3d 795 (2d Dept 2014)

#### **Child's Testimony Found Credible**

Contrary to the father's contentions, the Family Court's findings of fact were supported by a preponderance of the evidence (*see* FCA § 1046 [b] [i]). The testimony of the child, I., was found to be credible. I. testified as to instances of sexual abuse by her father that had occurred when they lived in Ecuador. Contrary to the father's contentions, the child, I.'s sworn, in-court testimony, along with the out-of-court statement of I.'s brother, A., sufficiently corroborated her out-of-court statements of abuse (*see* FCA § 1046 [a] [vi]). Any inconsistencies in I.'s testimony were insufficient to render the whole of her testimony unworthy of belief. The finding of derivative abuse as to A. was also proper. Contrary to the father's contentions, the credible evidence at the hearing was sufficient to demonstrate the imminent risk of harm to all four children by virtue of the father's use of excessive corporal punishment on numerous occasions (*see* FCA § 1012 [f] [i] [B]). The statements of three of the children cross-corroborated each other as to the father having hit them with a belt and with an open hand. I. testified to an instance in which the father hit her with a belt and left a mark on her leg, and an instance in which the father hit her sibling, R., with a belt and cut his head. The father's conduct constituted excessive corporal punishment. Therefore, the finding of neglect as to all four children was proper.

*Matter of Amparo B.T.*, 118 AD3d 809 (2d Dept 2014)

#### **Record Did Not Support Finding of Abuse**

The father and the paternal grandmother separately appealed from an order of fact-finding of the Family Court, which, after a hearing, found that they abused one child and derivatively neglected two other children, and from an order of disposition of the same court, which, upon the fact-finding order, and after a dispositional hearing, released the three subject children to the custody of the nonrespondent mother. The evidence presented by the petitioner did not establish a prima facie case of abuse against the respondents. The petitioner's expert medical witness, a physician at the hospital where the child, J.P., was admitted, testified that J. P. was diagnosed with a

millimeter-sized subdural hematoma and “encephalo hematoma” caused by blunt force trauma. However, he opined that the child's injury could have been caused by a fall of a couple feet onto a hard surface. Moreover, he testified that there was no discoloration with the swelling, that the child was not in any pain, and that aside from the swelling, the child was asymptomatic. He also testified that when he examined the child, she looked “great,” and was smiling and happy. Under the particular circumstances of this case, the petitioner failed to establish by a preponderance of the evidence that the respondents abused J.P. and derivatively neglected two other children. Accordingly, the order of disposition was reversed, the order of fact-finding was vacated, the petitions were denied, and the proceedings were dismissed.

*Matter of Jaylin C.*, 118 AD3d 872 (2d Dept 2014)

#### **Child’s Out-of-Court Statements Regarding Injuries Were Sufficiently Corroborated**

Contrary to the respondent’s contention, the Family Court's finding of neglect with respect to the child T.J., based on excessive corporal punishment, was supported by a preponderance of the evidence (*see* FCA § 1012 [f] [i] [B]). T.J.’s out-of-court statements that the respondent choked and scratched his neck were sufficiently corroborated by testimony from a caseworker regarding her observations of T.J.’s injuries, as well as by photographs of the injuries to his neck. The evidence also supported the derivative finding of neglect as to two other children (*see* FCA § 1046 [a] [I]). Order affirmed.

*Matter of Jallah J.*, 118 AD3d 1000 (2d Dept 2014)

#### **Family Court Improperly Granted Parents Permission to Move Out-of-State with Children Without an Approved Interstate Compact on the Placement of Children**

On December 9, 2011, the Administration for Children's Services (ACS) filed abuse and neglect petitions against the respondent parents alleging, in part, that the mother abused one of the subject six children by beating her with an electric extension cord. Although the children were immediately removed from the custody of the parents, approximately one year

later, on November 26, 2012, the Family Court released the children to the father pursuant to FCA § 1028, with certain conditions. Thereafter, at a fact-finding hearing, the parents entered admissions. Following a dispositional hearing during which the issue of the parents' intention to move to Virginia was raised by ACS, the Family Court issued an order of fact finding and disposition. Based on a favorable “Investigation and Report,” the Family Court released the children to both parents “with supervision of a child protective agency.” The court also granted the parents' applications for a suspended judgment, suspending judgment until September 24, 2014, under certain conditions, including that, for the next six months, the parents continue to cooperate with the supervision. Lastly, the Family Court, over ACS's objection, also granted the parents permission to move with the children to Virginia, where they were to continue to cooperate with ACS supervision by, among other things, bringing the children to New York once each month for the following six months to meet with a caseworker. The Appellate Division agreed with ACS's arguments that, under the facts of this case, the best interests of the children warranted the utilization of an Interstate Compact for Placement of Children to ensure that the family was supervised by a child protective agency after the family's relocation to Virginia (*see* SSL § 374-a), and that a suspended judgment was not in the children's best interests. Accordingly, the Appellate Division reversed the order of fact-finding and disposition, and remitted the matter to the Family Court for further dispositional proceedings.

*Matter of Roosevelt Mc.*, 118 AD3d 1006 (2d Dept 2014)

#### **Mother Refused to Pick up Child from Hospital or Respite Placement**

The Family Court's determination that the mother neglected the subject child was supported by a preponderance of the evidence. The evidence demonstrated that the mother refused to pick up the child after the child was discharged from the hospital, where the child received psychiatric treatment, and after the child was discharged from subsequent respite placement. The mother also did not cooperate in arranging for the appropriate care of the child. The mother's argument that the Family Court erred in

making the neglect finding because she was not offered an opportunity to voluntarily place the child with a social services agency upon the child's discharge from the hospital and respite was without merit. Order affirmed.

*Matter of Ariel R.*, 118 AD3d 1010 (2d Dept 2014)

### **Family Court Erred in Excluding Evidence at the Fact-finding Hearing**

The petitions alleged that the mother neglected the child, J.H., by beating her with a belt, and that the mother derivatively neglected the child, G.J. At the fact-finding hearing, the Family Court erred in excluding from evidence Investigation Progress notes indicating that a police officer had informed a caseworker that the officer had visited J.H. shortly after the alleged neglect took place and observed, *inter alia*, that the bruises on her right arm were “not serious”. These notes were admissible under the business records exception to the hearsay rule since the caseworker was under a duty to maintain a comprehensive case record for J.H., and the officer had a duty to report his or her observations of her condition. The Family Court also erred in precluding the mother from calling four particular witnesses to testify. Those witnesses would have given testimony pertaining to J.H.'s motivation to lie. Similarly, the court should not have excluded from evidence Family Service Progress notes containing statements by J.H.'s foster parents relevant to her motivation to lie. Under the circumstances of this case, the aforementioned errors deprived the mother of her right to present a defense and her right to a fair fact-finding hearing. Accordingly, a new fact-finding hearing was warranted. It was noted that with regard to the the new fact-finding hearing, the Family Court should not summarily deny an application for J.H. to testify.

*Matter of Grayson J.*, 119 ad3d 575 (2d Dept 2014)

### **Respondent and Mother of Children Engaged in Acts of Domestic Violence**

Contrary to the respondent's contention, the Family Court's determination that he neglected the subject children was supported by a preponderance of the evidence (*see* FCA §§ 1012 [f] [i]; 1046 [b] [i]). The

credible evidence adduced at the hearing established, *inter alia*, that the respondent and the mother of the subject children engaged in acts of domestic violence against each other while the children were nearby, and that the children were frightened by the altercations. Under these circumstances, the Family Court correctly determined that the subject children's physical, mental, or emotional condition was in imminent danger of becoming impaired as a result of the respondent's failure to exercise a minimum degree of care. Order affirmed.

*Matter of Celeste O.*, 119 AD3d 586 (2d Dept 2014)

### **Child's Out-of-Court Statements Were Sufficiently Corroborated to Support Finding of Sexual Abuse**

The Family Court's determination that the father sexually abused his daughter S.P. was supported by a preponderance of the evidence (*see* FCA § 1046 [b]). Here, where S.P.'s out-of-court statements were corroborated by the out-of-court statements of another child victim of the father (*see* FCA § 1046 [a] [vi]), the child's statements were sufficiently corroborated to support the finding of sexual abuse. This evidence, together with the negative inference drawn from the father's failure to testify, was sufficient to support the Family Court's finding. Order affirmed.

*Matter of Sinclair P.*, 119 AD3d 587 (2d Dept 2014)

### **Placement with Grandmother Was in the Child's Best Interests**

The subject child was removed from her mother's care pursuant to a neglect petition filed by the petitioner, Department of Social Services (DSS). The child was temporarily placed in the care of her maternal grandmother, who resided in Florida but was staying in New York at the time of placement. However, the grandmother had to return to Florida and, because she could not take the child with her, the child was placed in non-kinship foster care pursuant to a placement order. Nonetheless, the Family Court ordered a home study pursuant to the Interstate Compact on the Placement of Children (*see* SSL § 374-a [hereinafter ICPC]) on the grandmother's residence in Florida. The ICPC home study report was favorable for the grandmother. Consequently, DSS filed a petition to

modify the placement order to place the child with the grandmother. The grandmother expressed her desire to care for the child on a long-term basis, and the mother consented to this arrangement. However, the Family Court denied the DSS's petition, finding that it was in the best interests of the child that she remain with the foster parents for stability. The Appellate Division could find no basis in the record to deny the DSS's petition to modify the placement order. The grandmother was clearly a suitable relative with whom to place the child, and she received a favorable ICPC home study report approving placement. She was gainfully employed, lived in a stable home environment, and could provide for the child's physical and emotional needs. The Family Court placed undue weight on the fact that the grandmother returned to Florida without sufficiently taking into account that she had to return to her job, and was not permitted to take the child with her at that time. Under these circumstances, the record did not support the Family Court's determination. The Appellate Division concluded that it was in the child's best interests to be placed with the grandmother pursuant to Family Court Act § 1017. Order reversed and petition granted.

*Matter of Paige G.*, 119 AD3d 683 (2d Dept 2014)

#### **Father Engaged in Acts of Domestic Violence against Children's Step-Mother in the Children's Presence**

Contrary to the father's contention, a preponderance of the evidence established that he neglected the subject children D.S. and I.S. by, inter alia, beating their stepmother with a stick, causing bruises to her abdomen, arm, thighs, and buttocks in their presence. The father's acts of domestic violence against the stepmother in the children's presence impaired, or created an imminent danger of impairing, their physical, mental, or emotional condition. The out-of-court statements by these children were corroborated by, inter alia, medical evidence. Order affirmed.

*Matter of Kaleb B.*, 119 AD3d 780 (2d Dept 2014)

#### **Expert's Testimony Sufficiently Corroborated Child's Out-of-Court Statements**

Contrary to the respondent's contention, at the fact-finding hearing, the petitioner established by a preponderance of the evidence that the respondent sexually abused the child, A.C. (*see* FCA §§ 1012 [e] [iii]; 1046 [b]). The testimony of the petitioner's expert witness, who was an expert in the field of child sexual abuse, provided sufficient corroboration to support the reliability of A.C.'s out-of-court statements regarding the respondent's sexual abuse of him (*see* FCA § 1046 [a] [vi]). The respondent's contention that the expert's testimony was insufficient because the expert failed to consider the effect of A.C.'s developmental disability on the reliability of his statements was without merit. The Family Court has considerable discretion in deciding whether a child's out-of-court statements have been reliably corroborated. The expert clearly stated the reasons for her conclusions, and the Family Court acted well within its discretion in concluding that the expert's testimony was adequate to establish the reliability of A.C.'s out-of-court statements. Additionally, the Family Court properly drew a negative inference against the respondent upon his failure to testify at the fact-finding hearing. The Family Court also properly found that the respondent's abuse of A.C. evinced a flawed understanding of his duties as a parent and impaired his parental judgment sufficiently to support a finding that the respondent derivatively neglected J.C. and K.C. Order affirmed.

*Matter of Anthony M.C.*, 119 ad3d 781 (2d Dept 2014)

#### **Mother's Recent Boyfriend Properly Found to Be Person Legally Responsible for Child**

Contrary to the respondent's contention, the Family Court properly found him to be a person legally responsible for the child I.L. within the meaning of the Family Court Act (*see* Family Ct Act § 1012 [g]). Although I.L. and the mother had only moved from California into the respondent's New York apartment about one month prior to the filing of the petition, and although the mother had only met the respondent through online dating several months prior thereto, the respondent nonetheless assumed parental responsibilities during that month, including purchasing food and feeding the child, sleeping in the same bed as

the child and the mother, and even representing himself to caseworkers as the child's parent. During the relevant period, the respondent was a regular member of the child's household, acting as the functional equivalent of a parent. The determination of the Family Court that the respondent neglected I.L. was supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). The totality of the evidence, including the child's precipitous weight loss when in the respondent's care, the remarkable improvement in his weight during hospitalization, and the respondent's failure to take action when he twice saw the mother angrily shake the child, established that the respondent neglected I.L. by failing to exercise a minimum degree of care in providing the child with adequate food and proper supervision or guardianship (*see* Family Ct Act § 1012 [f] [i] [A], [B]). Orders affirmed.

*Matter of Isaiah L.*, 119 AD3d 797 (2d Dept 2014)

#### **Stepfather Engaged in Acts of Domestic Violence Against the Mother in Child's Presence**

The mother and step-father appealed from an order of the Family Court, which, after a fact-finding hearing, found that each of them had neglected the subject child. The mother testified that her relationship with the stepfather had been characterized by a pattern of domestic violence, and that the stepfather had engaged in acts of physical abuse against her on several occasions in the child's presence. A caseworker testified that the child told her that he had witnessed the stepfather engage in domestic violence against the mother on multiple occasions, and that he was scared by these incidents and afraid for the mother. The child's therapist also testified that the child had made such statements to her and had exhibited symptoms of trauma and fear in discussing the stepfather's presence in the home. Based on this evidence, the Family Court properly concluded that the child's mental and/or emotional condition had been harmed or had been at imminent risk of harm as a consequence of his exposure to the domestic violence between the mother and stepfather (*see* FCA § 1012 [f] [i] [B]). Contrary to the mother's contention, the evidence that she had continued to reside with the stepfather despite the recurring pattern of his violence against her in the child's presence and without regard for the impact of the violence on the child, and had even rejected shelter

and domestic violence services made available to her, established that she had neglected the child by failing to exercise a minimum degree of care in preventing him from being mentally or emotionally harmed (*see* FCA § 1012 [f] [i]). Order affirmed.

*Matter of David M.*, 119 AD3d 800 (2d Dept 2014)

#### **Open-Handed Spanking Did Not Constitute Excessive Corporal Punishment**

The petitioner commenced a proceeding pursuant to Family Court Act § 1012 against the father, alleging that he had neglected the subject child, L.P., who was then eight years old, by inflicting excessive corporal punishment. The father allegedly spanked the child with an open hand as punishment for cursing while they were attending a party at a friend's home. Further, it was alleged that after the father and the child returned home from the party, the father repeatedly struck the child with a belt on the buttocks, legs, and arms. At the fact-finding hearing, the father testified that while he spanked the child at the party after hearing him curse at an adult, he did not strike the child with a belt when they returned home. The Family Court's finding of neglect was not supported by a preponderance of the credible evidence (*see* Family Ct Act § 1012 [f] [i] [B]). The father's open-handed spanking of the child as a form of discipline after he heard the child curse at an adult was a reasonable use of force and, and under these circumstances did not constitute excessive corporal punishment. Regarding the allegation that the father struck the child with a belt after they returned home from the party, the evidence adduced at the fact-finding hearing was insufficient to prove that allegation by a preponderance of the evidence, and thus, was insufficient to support a finding of neglect on that basis. Order reversed.

*Matter of Laequise P.*, 119 AD3d 801 (2d Dept 2014)

#### **Prior Adjudications of Neglect Were Too Remote to Sustain Findings of Derivative Neglect**

The mother appealed from an amended order of fact-finding and disposition of the Family Court, which granted the petitioner's motion for summary judgment on the issue of derivative neglect, determined that the mother derivatively neglected the subject children, and

placed the subject children in the custody of the Commissioner of Social Services of the City of New York until completion of the next permanency hearing. The mother argued, and the attorney for the children and the petitioner conceded, that the Family Court incorrectly granted the petitioner's motion for summary judgment on the issue of derivative neglect, based upon prior adjudications of neglect against the mother that were made with respect to several of the mother's other children who were not the subject of the proceedings, and which were rendered more than 10 years prior to the entry of the order appealed from. Under these circumstances, the prior adjudications of neglect were too remote in time to sustain findings of derivative neglect. Accordingly, the petitioner's motion for summary judgment on the issue of derivative neglect should not have been granted. The amended order was reversed and the matter was remitted to the Family Court for a fact-finding hearing on the issue of derivative neglect.

*Matter of Jamakie B.*, 119 AD3d 939 (2d Dept 2014)

#### **Record Supported Findings That Mother Subjected Child to Emotional and Medical Neglect**

The mother appealed from an order of disposition of the Family Court, which, upon an order of fact-finding made after a hearing, found that she neglected the subject child, and upon her failure to appear at the dispositional hearing, released the subject child to the custody of the father, with supervised visitation to her, and, from a final order of custody of the same court which awarded the father custody of the subject child. As the orders appealed were made upon the mother's default, the Appellate Division's review was limited to matters which were the subject of contest below. Thus, review was limited to the finding that the mother neglected the subject child and the denial of the mother's application for an adjournment, which was made by her attorney. In light of the failure of the mother's attorney to offer any explanation for her absence at the combined dispositional hearing and hearing to determine the best interests of the child, the Family Court providently exercised its discretion in denying the application for an adjournment. While the credible testimony before the Family Court did not support a finding that the mother neglected the child by failing to provide adequate shelter, the Family Court's

findings that the mother subjected the child to emotional neglect and medical neglect were supported by a preponderance of the credible evidence. Orders affirmed.

*Matter of Lucinda A.*, 120 AD3d 492 (2d Dept 2014)

#### **Family Court Did Not Find Credible Respondent's Testimony Regarding Allegations That He Abused Nonsubject Child**

Contrary to the respondent's contention, the allegations that he abused or neglected a child who was not the subject of the proceedings may form the basis of a finding that he derivatively neglected the children who were the subject of the proceedings (*see* FCA § 1012 [f] [i]). Further, the Family Court's determination to accept as credible the testimony of the nonsubject child that, in July 2010, the respondent had inappropriate sexual contact with her, and to reject as not credible the respondent's testimony that he did not engage in inappropriate sexual contact with the nonsubject child, was entitled to deference and was accorded great weight. The respondent's conduct toward the nonsubject child, as well as his regular drug use, was sufficiently proximate in time to the birth of the two subject children to have demonstrated, by a preponderance of the evidence (*see* FCA § 1046 [b] [i]), that the respondent derivatively neglected the two subject children (*see* FCA § 1012 [f] [i]). Order affirmed.

*Matter of Jamel T.*, 120 AD3d 504 (2d Dept 2014)

#### **No Basis for Derivative Neglect Finding**

The mother, who was found to have neglected the parties' two older children, stopped at the father's apartment to borrow some money while their oldest child was visiting the father. While the mother was there, a home invasion occurred and an intruder appeared with a gun. The father picked up the child, who was in his playpen crying, and while he held the child the intruder shot the father in the arm. Both parents were indicated but no neglect petitions were filed against the parties. One month later, the father's apartment was searched by police and the father admitted to using cocaine and marijuana and to selling small amounts of both. Following these events, the

mother became pregnant with the parties' subject child and shortly after the child's birth, the agency filed derivative neglect petitions against both parents based on their conduct with regard to their oldest child when the home invasion occurred. Family Court determined respondent parents had derivatively neglected the infant child. The father appealed and the Appellate Division reversed. Although the father admitted to smoking marihuana, there was no evidence he sold drugs when any of his children were in his care since he never had custody of his children. Even though the parents had been told to stay away from each other due to domestic violence, there was no order prohibiting contact between them. Additionally, since the father had never been adjudicated to have neglected any of his other children, there could be no basis to adjudicate him as derivatively neglecting the infant.

*Matter of Brad I.*, 117 AD3d 1242 (3d Dept 2014)

#### **Respondent Grandmother Placed Child in Imminent Danger By Allowing Mother Unsupervised Access to Child**

Family Court determined that respondent maternal grandmother neglected the subject child. The Appellate Division affirmed. Here, the respondent obtained sole custody of the child due to the mother's drug problems and emotional instability and the mother was granted visits with the child only if supervised by respondent. Two months thereafter, respondent allowed the mother to move in with her and the child at a time when respondent was holding down a 40-hour-per-week job and respondent pressured the mother to provide daycare. When respondent lost her apartment, she turned the child over to the mother for a two-week-period. Given the mother's ongoing struggle with drug addiction and respondent's awareness of the problem, the court had a sound and substantial basis in the record to find that respondent's conduct in allowing the mother to have unsupervised custody of the child placed his well-being in imminent danger.

*Matter of Wyatt YY.*, 118 AD3d 1061 (3d Dept 2014)

#### **Neglect Determination Reversed**

Family Court determined that respondent boyfriend neglected the mother's child from a previous

relationship and derivatively neglected the parties' biological child. The Appellate Division reversed. Here, the neglect petition against respondent was filed nearly two-years after the subject child disclosed to the paternal grandmother that respondent had pinched her genital area and "went into her hole" during the time when the mother was at the hospital giving birth to the parties' child. The child did not testify and the only evidence was testimony from the grandmother, the social worker and the detective who had interviewed the child two-years earlier. While out-of-court statements by the child are admissible, they must be corroborated in order to be sufficient to make a neglect determination. Family Court's finding that the child's prior statement alone was sufficient to make such a determination, without expert testimony as to the child's truthfulness, was misplaced. Additionally, the child's repetition of consistent accounts of abuse did not corroborate the child's prior account. The lack of proof "validating the child's account or relating any of her past or present conduct...to the alleged sexual abuse", supported reversal since the out-of-court statements were not sufficiently corroborated.

*Matter of Katrina CC.*, 118 AD3d 1064 (3d Dept 2014)

#### **No Need to Disturb Court's Neglect Determination**

Family Court determined that respondent parents neglected their biological child and the mother's child from a prior relationship. The Appellate Division affirmed. Respondent father had plead guilty and been convicted in 1996 of the crime of indecent liberties resulting from his action in placing his penis in the mouth of his two-year-old daughter from another relationship. He had also been charged with raping his girlfriend's 18-month-old daughter, for which he took an Alford plea. The father had never completed sex offender treatment which he had been ordered to undergo after his first conviction and he did not participate in any sex offender treatment while in prison for his second conviction. The father failed to offer proof of completion of any such treatment program and the expert in sex offender risk assessment, who interviewed the father, concluded he should not be allowed to see the children unsupervised. The mother failed to acknowledge the threat posed by the father and testified she was comfortable leaving the children unsupervised with him. In view of these facts, there

was no need to disturb the court's determination.

*Matter of Lillian S.*, 118 AD3d 1079 (3d Dept 2014)

**Respondent Was Not Deprived of His Fundamental Rights by Court's Failure to Immediately Appoint Counsel at FCA §1022 Hearing**

Family Court failed to advise respondent father of his right to counsel immediately after he appeared at a FCA §1022 temporary removal hearing. Thereafter, a neglect proceeding was held and the court determined respondent had neglected the children. Respondent's argument that the neglect determination should be reversed due to the court's failure to advise him of his right to counsel immediately upon his appearance at the temporary removal, was not a deprivation of respondent's fundamental right requiring reversal, since the adjudication did not result from the evidence gathered at the temporary removal hearing. While the court's actions were not condoned, the resulting neglect adjudication was based solely upon evidence from the neglect fact-finding hearing and no testimony from the FCA §1022 hearing was introduced. Moreover, following assignment of counsel, respondent did not avail himself of the opportunity to apply for the children's return pursuant to FCA §1028. Instead he participated at the neglect hearing and consented to the terms of the dispositional order.

*Matter of Elijah ZZ.*, 118 AD3d 1172 (3d Dept 2104)

**Mother Cannot Appeal From Consent Order**

Respondent mother appealed from Family Court's determination that respondent parents had neglected the children. The Appellate Division affirmed and dismissed the mother's appeal. The neglect adjudications were made upon certain admissions by respondents and with their consent. Family Court advised both parties in great detail the rights they were forfeiting as well as the consequences that would flow from the neglect order. Each respondent, with counsel present, knowingly, voluntarily and intelligently made admissions. Since the order was issued upon consent, there was no right to an appeal.

*Matter of Jacob EE.*, 118 AD3d 1179 (3d Dept 2014)

**Order Entered Upon Consent Not Appealable**

Family Court determined respondent father had neglected the child. The Appellate Division affirmed and dismissed the appeal. Respondent consented to the neglect finding, without admission, and he was advised by the court of the terms of disposition that would be issued based upon the neglect finding. Thereafter, respondent neither moved to vacate the neglect finding nor withdrew his consent.

*Matter of Na'sir RR.*, 118 AD3d 1180 (3d Dept 2014)

**Agency Established Prima Facie Case for Summary Judgment Adjudicating Subject Child to be Derivatively Neglected**

Family Court determined, in a previous order, that respondent had neglected, abused and severely abused his girlfriend's child by having sexual intercourse with the child several times when she had been eight-years-old and younger, and as a result determined respondent had derivatively neglected his biological children from prior relationships, and his step-child. The Appellate Division affirmed. Thereafter, respondent and his girlfriend had a child. The court granted the agency's motion for summary judgment adjudicating the subject child to be derivatively neglected. The Appellate Division affirmed. The agency established a prima facie case for summary judgment. Respondent's earlier acts against his girlfriend's child, who had been left in his care, showed a fundamental defect in his understanding of parental duties. Additionally, respondent had failed to complete preventive services, including sex offender treatment. Given the nature of respondent's earlier acts together with the fact that he had not successfully completed sex offender treatment, his argument that the court erred in granting summary judgment was not persuasive.

*Matter of Ilonni I.*, 119 AD3d 997 (3d Dept 2014)

**Evidence Supported Neglect Determination**

The agency filed neglect petitions against the father and mother. The father admitted he had engaged in a physical altercation with the mother and received an ACOD. However, respondent mother denied the allegations and after a fact-finding hearing, she was

found to have neglected the child. During the dispositional phase of the proceeding, both parents agreed to have the child continue in the custody of the maternal grandmother for one year. Thereafter, respondent mother appealed and the Appellate Division affirmed. Contrary to the mother's argument that she was not a proper respondent in this proceeding, since the maternal grandmother had always had custody of the child, she met FCA §1012(a) definition of a "parent or other person legally responsible for a child's care". Additionally, the evidence showed respondent's home was a mess and unsafe due to, among other things, numerous cigarette butts lying around, animal feces near the child's toys and multiple spoons covered with a "chalky, white substance". The father testified he had a longstanding history of drug and alcohol abuse. There was ongoing, constant domestic violence in the house including two altercations when the child had been present. Respondent had been injured by the father previously but refused to leave him and told the grandmother she wasn't always the victim and was "giving it back to [the father]". Furthermore, the court properly drew a strong, adverse inference against the mother based on her failure to testify. Viewed cumulatively, the evidence supported the court's finding of neglect.

*Matter of Heyden Y.*, 119 AD3d 1012 (3d Dept 2014)

### **Sound and Substantial Basis in the Record to Find Grandmother Neglected Child**

Family Court determined that respondent paternal grandmother had neglected the subject child, granted the father's petition to modify custody and transferred sole custody of the child from respondent to the father. The Appellate Division affirmed. There was sound and substantial basis in the record for the neglect determination. Among other things, the record showed that respondent would intentionally make the child cry then take pictures of him. She falsely accused her daughter, who had petitioned for visitation with the child, of mistreating and abusing the child and thereafter filed three petitions to stop all visitation between the aunt and child based on false allegations. Additionally, respondent told the child to say the father was sexually and/or physically abusing him and threatened to "chop..off" his legs and put him "in a wheelchair" if he failed to do so. An agency

caseworker testified she had investigated the father eight times based on reports initiated by respondent. Furthermore, respondent brought the child to the emergency room 14 times over a nine-month period in order to substantiate her claims of sexual abuse of the child by the father. The court appointed forensic psychologist testified that respondent had an "obsessional, compulsive personality disorder". It was in the child's best interests for the father to have sole custody. The father was employed full-time and lived in a three-bedroom apartment with his girlfriend and their child and her twin sons from a prior relationship. He was involved in the child's education, counseling and extra-curricular activities and agreed to adhere to any court-ordered visitation between the child and respondent. Additionally, since residing with the father, the forensic psychologist testified the child was more lively, referred to his father as "daddy" and was doing well in school.

*Matter of Diane C. v Richard B.*, 119 AD3d 1091 (3d Dept 2014)

### **No Basis to Disturb Court's Assessment of Expert Testimony**

Family Court determined that respondent father neglected his child. The Appellate Division affirmed. The court's finding of derivative neglect was supported by a preponderance of the evidence. The father's contention was rejected that the court accorded too much weight to a psychological evaluation conducted several years prior to the hearing. The record supported the court's determination that the testimony of petitioner's expert, which was based on an older, but more thorough, evaluation, was more credible than the testimony provided by the father's expert, which was based entirely on the father's self-reported history. Therefore, there was no basis to disturb the court's assessment of the expert testimony.

*Matter of Burke H.*, 117 AD3d 1455 (4th Dept 2014)

### **Petitioner Entitled to Seek Removal of Child By Way of Revocation of Order of Supervision**

Family Court placed the older of the subject children with petitioner following a period of trial placement with the father. The Appellate Division affirmed. The

father's contention was rejected that the court abridged his fundamental parental rights and violated his right to equal protection by removing the child from placement with him without requiring petitioner to commence a neglect proceeding pursuant to Family Court Act article 10. By its order to show cause, petitioner sought modification of the placement based upon the father's violation of the additional conditions to which he was bound, which included providing proof of income sufficient to prove that he had the means to care for the child, obtaining his own residence, prohibiting the child from being left in the care of a certain woman with a criminal history, placing the child in daycare when he worked, allowing petitioner access to his home, and terminating any relationship with a person involved in the "prostitution industry." The father was subject to the supervision of petitioner and, when he violated the supervision order as modified by the additional conditions, petitioner was entitled to seek removal of the child by way of revocation of the order of supervision. Petitioner established by a preponderance of the evidence that the father violated those additional conditions to which he stipulated to be bound and that his violation was willful.

*Matter of Dashaun G.*, 117 AD3d 1526 (4th Dept 2014)

#### **Finding that Father Sexually Abused Five Year Old Child Upheld**

Family Court adjudged that respondent father had abused one of his children and derivatively neglected his other two children. The Appellate Division affirmed. The finding of abuse was supported by the requisite preponderance of the evidence. Although the father was correct that the court failed to comply with Family Court Act Section 1051 (e) by specifying the particular sex offense perpetrated upon the child as defined in Penal Law article 130, the error was technical in nature and harmless. In light of the fact that the child was five years old at the time of the contact, the specific offense could only be sexual abuse in the first degree. The court was permitted to infer the sexual gratification element from the conduct itself if that conduct involved the deviate touching of the child's genitalia, which was the case in this matter. The finding of derivative neglect with respect to the other two children was supported by a preponderance of the evidence.

*Matter of Eden S.*, 117 AD3d 1562 (4th Dept 2014)

#### **Finding of Derivative Neglect Affirmed**

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. The court's finding of derivative neglect was supported by a preponderance of the evidence. Petitioner established that the neglect of the child's older siblings was so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still existed, and that the mother failed to address the problems that led to the neglect findings with respect to her other children. The court properly credited the psychologist's report and opinion, which were based upon numerous visits with the mother and an extensive review of documentation.

*Matter of Burke H.*, 117 AD3d 1568 (4th Dept 2014)

#### **Neglect Finding Affirmed Where Family's Apartment Unsafe and Unsanitary**

Family Court determined that respondent father neglected the subject children. The Appellate Division dismissed the appeal insofar as it concerned the placement of the children in the custody of their maternal grandmother, upon the father's consent thereto, and affirmed. Family Court's determination that the father neglected his children was supported by a preponderance of the evidence. Where issues of credibility were presented, the hearing court's determination must be afforded great deference. Petitioner presented evidence establishing, among other things, that the family's apartment was unsafe and unsanitary, because of the neglect of the parents. Thus, the court properly determined that the children's health was in imminent danger of impairment because of the father's actions and inaction.

*Matter of Holly B.*, 117 AD3d 1592 (4th Dept 2014)

#### **Mother Failed to Preserve Challenge to Voluntariness of Admission**

Family Court placed the subject child in the custody of petitioner. The Appellate Division affirmed. The mother's contention was rejected that her admission of neglect was involuntarily entered because she stated

during the colloquy that she would do or say anything to get her child back. Because the mother did not move to vacate or withdraw her admission in Family Court, she failed to preserve for review her challenge to the voluntariness of her admission. In any event, before accepting the mother's admission, the court made clear that it did not want her to admit to something that was not true. Thereafter, the mother admitted to the facts underlying the neglect petition.

*Matter of Joseph E.K.*, 118 AD3d 1324 (4th Dept 2014)

### **Neglect Finding Affirmed Where Mother Failed to Provide Adequate Supervision**

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. One of the mother's children severely burned herself with a lighter while the mother's 15-year-old daughter babysat seven of the younger children. The mother testified that she left a lighter in her purse and that she placed the purse in a "purse bucket" in her bedroom, a container that anyone could open. The mother also testified that she believed that her 15-year-old daughter was mature and responsible enough to be left in charge of her siblings. Although she initially testified that she left the 15-year-old with five children on the date of the incident, the mother subsequently testified that her daughter was in fact left in charge of seven children, all under the age of seven. The 15-year-old child admitted to being asleep on the couch when the incident occurred. Furthermore, even after the subject incident, a caseworker arrived at the mother's house and found a 14-year-old child left in charge of the younger siblings. Moreover, as part of the investigation leading up to the instant neglect petition, it was reported that four of the children were seen playing unsupervised near a busy city street for at least five hours. Thus, the mother neglected the children based upon her failure to provide adequate supervision for all of the subject children. Additionally, the court properly found that petitioner established educational neglect for three of the subject children.

*Matter of Airionna C.*, 118 AD3d 1430 (4th Dept 2014)

### **Neglect Finding Affirmed Where Mother Failed to Provide Adequate Shelter**

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division affirmed. There was no fact-finding hearing, and the parties agreed that Family Court's determination would be based solely upon a stipulation that, among other things, the mother had been diagnosed with dysthymic disorder, generalized anxiety disorder, posttraumatic stress disorder, and effective psychosis borderline personality disorder NOS, and the mother was unable to maintain stable housing between June and December 2011. Petitioner failed to establish by a preponderance of the evidence that the child was in imminent danger of becoming impaired as a consequence of the mother's mental condition. However, the finding of neglect based on the mother's failure to provide adequate shelter was supported by a preponderance of the evidence and was, by itself, sufficient to support the finding of neglect.

*Matter of Jesus M.*, 118 AD3d 1436 (4th Dept 2014)

### **Derivative Neglect Finding Affirmed Where Only Allegation of Misconduct Occurred More Than Two Years Prior to Birth of Subject Child**

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division affirmed. The mother's contention was rejected that the evidence was insufficient to support the finding of derivative neglect because the only allegation of misconduct occurred more than two years prior to the subject child's birth and was limited to the abuse of the mother's eldest child by respondent father, the subject child's father. Inasmuch as the paramount purpose of Family Court Act article 10 was the protection of the physical, mental, and emotional well-being of children, and mindful of the particular vulnerability attendant to newborn infants such as the subject child, Family Court's finding of derivative neglect was justified on the record.

*Matter of Tristyn R.*, 118 AD3d 1468 (4th Dept 2014)

## **CHILD SUPPORT**

### **Father Willfully Violated Child Support Order**

Family Court denied respondent's objections to a support magistrate's order finding that respondent willfully violated a child support order, awarded petitioner a money judgment for arrears, and directed a good faith payment of \$20,000. The Appellate Division affirmed. Respondent's failure to pay child support constituted prima facie evidence of a willful violation. Respondent failed to rebut that evidence with competent, credible evidence of his inability to make the required payments. Although respondent asserted that his business failed due to the economic downturn, he failed to provide evidence of diminished income or show that he made reasonable efforts to obtain employment commensurate with his qualifications and experience.

*Matter of Aimee E.-H. v Alexander H.*, 118 AD3d 458 (1st Dept 2014)

### **Record Supported Supreme Court's Refusal to Impute Income to the Defendant**

The parties were married in 1997, and have two children. Prior to the marriage, the parties entered into a prenuptial agreement wherein they agreed that Florida law would apply with regard to, inter alia, the dissolution of their marriage, maintenance, and child support. Following a nonjury trial, the Supreme Court awarded to the plaintiff maintenance in the sum of only \$25 per week for a period of three years, and child support in the sum of only \$73.09 per week until the expiration of the defendant's maintenance obligation, at which time the defendant would be required to pay the sum of \$155.50 per week in child support. On appeal, the plaintiff argued, inter alia, that the Supreme Court erred in failing to impute income to the defendant for purposes of awarding maintenance and child support. Upon reviewing the record, the Appellate Division could discern no error in the Supreme Court's refusal to impute income to the defendant. Pursuant to Florida law, income "shall be imputed to an unemployed or underemployed parent if such unemployment or underemployment is found by the court to be voluntary on that parent's part, absent a finding of fact by the court of physical or mental incapacity or other

circumstances over which the parent has no control" (Fla Stat § 61.30 [2] [b]). Here, the Supreme Court expressly found that the defendant testified in "a credible and forthright manner," while the plaintiff was "not a credible witness." Among other determinations, the Supreme Court concluded that the defendant's unemployment or underemployment status was involuntary in that he was not terminated from his prior employment for cause. It also determined that the defendant was currently unemployed despite his best efforts to find employment. The Supreme Court further found that it was satisfied that the defendant had made diligent efforts to find employment and would continue to do so.

*Davis v Davis*, 117 AD3d 672 (2d Dept 2014)

### **Supreme Court Should Have Imputed an Additional \$100,000 in Income to Defendant**

The plaintiff appealed from stated portions of a judgment of the Supreme Court which included an award of child support in the sum of \$548.38 per week. The record revealed that the defendant's expenses, as outlined in his statement of net worth, exceeded his claimed income by more than \$100,000, that he operated a cash business, determined his own salary, and did not take any distributions from his business. Thus, the Supreme Court should have imputed an additional \$100,000 in income to him. However, the court properly imputed an annual income of \$20,000 to the plaintiff, which represented her past demonstrated earning capacity. As a result, taking into account the \$72,000 award of maintenance, the parties' combined income was \$210,195. An application of the statutory rate of 25% for the parties' two children resulted in a basic child support obligation of \$52,548.75, and the defendant's pro rata share was \$914.55 per week. Since the parties' eldest child had since turned 21 during the pendency of the appeal, this amount was reduced to \$621.89 (*see* DRL § 240 [1-b] [b] [3] [i], [ii]).

*Turco v Turco*, 117 AD3d 719 (2d Dept 2014)

### **Mother Failed to Provide Required Notice to Husband Regarding Her Application for Judgment Directing Payment of Child Support Arrears**

The Supreme Court did not err in failing to award the

mother arrears for pendente lite child support. A party to a matrimonial action may make an application for a judgment directing payment of child support arrears at any time prior to or subsequent to the entry of a judgment of divorce (*see* DRL § 244). However, an application for a judgment directing the payment of child support arrears must be made “upon such notice to the spouse or other person as the court may direct” (DRL § 244). Here, the plaintiff’s application was not made in accordance with that requirement. Accordingly, the application was not proper.

*McCoy v McCoy*, 117 AD3d 806 (2d Dept 2014)

### **Defendant Properly Directed to Maintain a Life Insurance Policy**

Contrary to the defendant’s contention, the Supreme Court did not improvidently exercise its discretion in imputing his 2008 reported income to him for the purpose of determining his child support obligation, as that amount was reflective of his past income and demonstrated earning potential. Further, in the absence of any evidence at trial that the defendant was uninsurable due to a preexisting medical condition, the Supreme Court providently exercised its discretion in directing the defendant to maintain a life insurance policy to secure his maintenance and child support obligations. However, the defendant’s life insurance obligation shall terminate upon the termination of his maintenance and child support obligations. Accordingly, the order modified.

*Hainsworth v Hainsworth*, 118 AD3d 747 (2d Dept 2014).

### **Directive Compelling Plaintiff to Pay for Daughter’s College Expenses Was Premature**

The Appellate Division agreed with the plaintiff’s contention that the Supreme Court erred in directing him to pay college expenses for the parties’ daughter, who was only 15 years old at the time of trial. While the court may direct a parent to contribute to a child’s college education pursuant to DRL § 240 (1-b) (c) (7), under the circumstances of this case, based upon the child’s age, and the lack of evidence presented as to her interest in and possible choice of college, the directive compelling the plaintiff to pay for those expenses was

premature and not supported by the evidence.

*Lewis v Lewis*, 118 AD3d 958 (2d Dept 2014)

### **Appropriate to Impute Income to Father Based on Earning Capacity**

The father argued that the Support Magistrate erred in basing his support obligation for the couple’s child on an annual income of \$54,342, as reflected in his 2011 tax returns arising out of his former occupation as a Traffic Device Maintainer, rather than on his annual income of \$31,756.40, as reflected in his most recent pay stub arising out of his current occupation as an Emergency Medical Technician. The father’s contention was without merit. Under the circumstances of this case, it was appropriate to impute income as the father voluntarily left his employment. The Support Magistrate providently exercised his discretion in imputing income to the father based on his earning capacity. Accordingly, the Family Court properly denied his objections to the order dated August 28, 2012, which granted the mother’s petition for an upward modification of his child support obligation. Order affirmed.

*Matter of Bustamante v Donawa*, 119 AD3d 559 (2d Dept 2014)

### **Mother Not Obligated to Pay Pro Rata Share of Children’s Online College Tuition**

The father is the custodial parent of the parties’ seven children. In an order dated November 4, 2010, entered on the consent of the parties, the Family Court directed the mother to pay bi-weekly child support and to maintain health insurance coverage for the children, and directed the father to pay 100% of unreimbursed medical expenses for the children. This order made no provision for the division of college expenses for the children. Less than two years later, the father filed a petition seeking an upward modification of child support so as to obligate the mother to pay a pro rata share of the children’s college tuition and orthodontic expenses. After a hearing, the Support Magistrate dismissed the petition. The Family Court subsequently denied the father’s objections to that order. The father testified at the hearing that one of the children was enrolled in a private online college, and

that a second child intended to enroll at that college. However, he offered no evidence that attending a private online college rather than a public college would be in the best interests of the children. The father also failed to establish that he had paid any tuition expenses to that college on behalf of either child, what the actual cost of tuition would be, or whether the children were eligible for or had received any financial aid. Moreover, the record supported the Support Magistrate's determination that the parties earned similar incomes which were barely sufficient to satisfy their basic living expenses. The father also failed to sustain his burden of establishing that the anticipated cost of orthodontic treatment for three of the children constituted a substantial change in circumstances warranting an upward modification of child support (*see* FCA § 451 [2] [a]). The record supported the Support Magistrate's finding that the father failed to establish that the proposed orthodontic treatment was medically necessary. Further, documentary evidence submitted by the father indicated that a portion of the proposed orthodontic treatment was covered by the children's health insurance, which was maintained by the mother. Order affirmed.

*Matter of Hamilton v Richards*, 119 AD3d 573 (2d Dept 2014)

#### **Father Not Entitled to Credit Against Arrears Based upon Prior Voluntary Overpayments**

Upon reviewing the record, the Appellate Division found that the father demonstrated that his loss of employment and obtainment of new employment at a lesser salary constituted a substantial and unanticipated change in circumstances, and that he made a good faith effort to obtain new employment which was commensurate with his qualifications and experience. Thus, the Support Magistrate's determination was supported by the evidence. Accordingly, the mother's objection to so much of the Support Magistrate's order which granted the father's petition for a downward modification of his child support obligation should have been denied by the Family Court. In light of the circumstances of this case and the strong public policy against restitution or recoupment of support overpayments, the Family Court did not improvidently exercise its discretion in sustaining the mother's objection to the Support Magistrate's determination that

the father was entitled to a credit against his child support arrears based on his prior voluntary overpayments (*see* FCA §§ 451 [1]; 460 [1]). Order modified.

*Matter of Jaffie v Wickline*, 119 AD3d 578 (2d Dept 2014)

#### **Father Failed to Present Credible Evidence That His Illness Prevented Him from Working**

The father failed to establish a substantial change in circumstances warranting a downward modification of his child support obligation. He testified that he was unable to work because he suffered from gout and depression. However, he failed to present credible evidence at the hearing to show that his symptoms or conditions at the time of the petition and hearing prevented him from working. Evidence that the father was receiving Social Security disability benefits did not, by itself, demonstrate the father's inability to work. Furthermore, the father failed to provide competent evidence with respect to his finances. Accordingly, the Family Court properly denied the father's objection to the order denying his petition for a downward modification of his child support obligation. Order affirmed.

*Matter of Mikhlin v Giuffrida*, 119 AD3d 692 (2d Dept 2014)

#### **Father's Share of College Expense Properly Determined**

The parties were divorced in 2001 and have two children. The parties entered into a separation agreement that was incorporated but not merged into their judgment of divorce. The agreement, *inter alia*, limited the parties' obligation to pay for college to the cost of a SUNY school. The judgment of divorce, in relevant part, stated that the parties "shall contribute to the expenses of the college education of each child in a share proportionate to their respective net taxable income." The agreement also provided that the parties should encourage the use of financial aid, grants, loans, and scholarships to "assist in defraying the immediate cost of the college tuition to the parties." After the parties' oldest child's first semester at a private university, the father failed to contribute to the tuition,

and the mother filed a petition seeking to enforce the judgment of divorce and the agreement's provisions regarding college expenses. During the hearing before the Support Magistrate, the parties stipulated, inter alia, that for 2011, the father's income was \$80,000, and the mother's income was \$89,400. The parties also stipulated to the following: they were using SUNY Potsdam's yearly tuition of \$20,365 as a cap; their eldest child's college expenses for the fall 2012 semester totaled \$21,340; the balance of the tuition owed for the fall semester after subtracting scholarships, grants, and loans was \$12,117; the tuition for the spring 2013 semester was \$20,990; and the balance owed for the spring semester, after subtracting scholarships, grants, and loans, was \$11,767. After the hearing, the Support Magistrate fixed the father's college expense arrears at \$9,571.55 for the 2012-2013 academic year. The Family Court denied the father's objections to the Support Magistrate's order. Contrary to the father's contentions, under the circumstances of this case, the Family Court correctly determined that he must contribute the sum of \$9,571.55 toward the parties' oldest child's college expenses for the 2012-2013 academic year. Order affirmed.

*Gorski v Hone*, 119 AD3d 863 (2d Dept 2014)

#### **Father Was Entitled to a Hearing Pursuant to FCA § 454**

The father appealed from an order of the Family Court, which, without a hearing, revoked an order of the same court, suspending his commitment and placing him on probation, and directed that he be incarcerated. While the Family Court had the discretion to revoke the suspension of the jail sentence it had previously imposed upon finding that the father had willfully failed to obey a lawful order of support (*see* FCA § 454 [3] [a]), the court erred in doing so without first affording the father a hearing (*see* FCA § 433 [a]). Accordingly, the order was reversed, and the matter was remitted to the Family Court for a hearing on the petition pursuant to FCA § 433.

*Matter of Putnam County Probation Dept. v Dimichele*, 120 AD3d 820 (2d Dept 2014)

#### **Husband's Challenge to Child Support Stipulation Barred by Res Judicata**

Parties entered into a stipulation of child support which was incorporated but not merged into their divorce decree. Thereafter, the husband unsuccessfully sought to have the stipulation vacated on the grounds that it did not comply with the CSSA. The wife then moved for an order directing the husband to pay the child support arrears and in response, the husband again sought to have the stipulation vacated and argued once more that it was in violation of the CSSA. Supreme Court determined the husband had no viable defense to the wife's motion for arrears and, among other things, directed the wife to submit a judgment for the arrears owed and denied the husband's motion to vacate the stipulation on the grounds of res judicata. The Appellate Division affirmed. The court did not err by granting the wife's motion for arrears without a hearing since the husband did not submit any evidentiary proof either disputing the amount of the arrears, or supporting his claim that the eldest child was emancipated. Additionally, the court correctly found that res judicata barred the husband's challenge to the validity of the stipulation since the husband had a full and fair opportunity to dispute the stipulation in his previous unsuccessful motion.

*Matter of Severing v Severing*, 117 AD3d 1129 (3d Dept 2014)

#### **Dismissing Objections on Purely Procedural Grounds Results in Reversal**

The Support Magistrate issued an order finding that respondent father had wilfully violated a previous order which directed him to pay child-care expenses, and also granted the mother counsel fees. Thereafter, the Support Magistrate issued an amended order specifying the amount of counsel fees to be paid by the father. Before the amended order was issued, both respondent father's attorney and respondent father, who was dissatisfied with his attorney's legal representation, filed objections. Family Court dismissed the objections. Although no appeal lies from an order that has been amended, the amendment in this case was immaterial since it only amended the amount of counsel fees to be paid by the father. After consideration, the

Appellate Division reversed and remitted the matter. It was not an abuse of discretion for the court to dismiss the objections filed by respondent's attorney. Counsel failed to provide proof of service of the objections upon the opposing party and although Family Court had discretion to overlook this lapse, the court's adherence to statutory requirements was proper. However, the court improperly dismissed the father's objections by relying on 22 NYCRR § 130-1.1a, which requires every paper served on the court to be signed by the attorney or the pro se party. Here, although the father's attorney did not sign the father's objections, the father should have been allowed to correct this error. The court's decision should have been made after reviewing the merits of the case instead of dismissing the appeal on purely procedural grounds.

*Matter of Fifield v Whiting*, 118 AD3d 1072 (3d Dept 2014)

#### **Respondent Failed to Preserve His Argument for Review by Appellate Division**

Family Court denied respondent father's objections to an order issued by the Support Magistrate. Respondent appealed stating the award of child support should have been based on his income rather than upon the children's needs since he had provided the Support Magistrate with adequate proof of income. However, since this issue had not been included in the objections he had filed from the Support Magistrate's order, it was not preserved and the appeal was dismissed without the merits of his argument being addressed.

*Matter of Bray v Bray*, 118 AD3d 1074 (3d Dept 2014)

#### **Family Court Had No Jurisdiction to Enforce Parties' Written Contract**

Parents' oral support stipulation, which stated the amount of child support to be paid by the father but was silent as to the parties' responsibility for cost of the children's educational expenses, was incorporated but not merged into their judgment of divorce. Thereafter, because the subject child was having problems in public school, the mother asked for the father's consent to send him to a private Catholic school. The father agreed on the ground the mother would be solely responsible for the cost of private school and this

understanding was memorialized through a written, notarized statement. After the child's enrollment in private school, the mother filed to modify child support, seeking to have the father pay his pro-rata share of the child's educational expenses. After a hearing, Family Court ordered the father to pay 71% of the child's school expenses. The Appellate Division affirmed. The father's reliance on a written agreement was misplaced as Family Court had no authority to enforce independent contracts.

Although the father felt the public school satisfactorily met the child's needs, it was in the child's best interests to attend private school. The child suffered from health related issues, including ADHD, auditory processing disorder, anxiety and depression. He was having problems completing school work for which he was sent to detention. He also resisted going to school. The child's emotional health significantly improved once he began to attend private school and both parents agreed the child was doing well socially and academically at the new school.

*Matter of Kristina P. v Joseph Q.*, 118 AD3d 1089 (3d Dept 2014)

#### **Amount of Father's Annual Income and Amount of Child Support Vacated**

Family Court denied the mother's written objections to an order of the Support Magistrate on her petition to modify a prior child support order. The Appellate Division modified by vacating the amount of respondent father's annual income and the amount of child support awarded and remitted to Family Court for further proceedings. It did not appear that the father's 2011 rental income was included in his gross income, and the record was insufficient to determine this amount. On remittal, both rental income and rental losses were to be considered by the court in determining the proper amount of the father's income for purposes of recalculating his child support obligation.

*Matter of Bow v Bow*, 117 AD3d 1542 (4th Dept 2014)

#### **Defendant Entitled to Claim Children as Dependents for Tax Purposes**

Supreme Court directed defendant to pay maintenance

to plaintiff, among other things. The Appellate Division modified by ordering that defendant was entitled to claim the parties' children as dependants for tax purposes, provided that he remained current in his child support and maintenance obligations. There was a vast discrepancy in the incomes of the parties, with plaintiff's sole source of income consisting of Social Security Disability payments.

*Myers v Myers*, 118 AD3d 1315 (4th Dept 2014)

### **Parties' Obligation to Maintain Life Insurance Ceased Upon Termination of Their Respective Child Support Obligations**

Supreme Court directed plaintiff to cooperate with defendant regarding a life insurance policy on plaintiff's life and ordered both parties to name their children as beneficiaries on their existing life insurance policies. The Appellate Division modified by providing that the parties' obligation to maintain life insurance naming the children as beneficiaries ceased upon the termination of their respective child support obligations.

The decision whether to direct the maintenance of a life insurance policy pursuant to Domestic Relations Law Section 236 (B) (8) (a) was within the discretion of the court. The court properly required both parties to name the children as beneficiaries on their individual life insurance policies in order to secure their respective child support obligations. However, the life insurance obligation ceased upon termination of the child support obligation.

*Gay v Gay*, 118 AD3d 1331 (4th Dept 2014)

### **Fugitive Disentitlement Doctrine Properly Applied**

Family Court applied the fugitive disentitlement doctrine and dismissed respondent's petition to vacate various court orders. The Appellate Division dismissed and granted leave to move to reinstate the appeal upon the posting of an undertaking with Family Court in the amount of \$25,000 within 60 days of service of a copy of the order of the Court with notice of entry. Family Court properly determined that the fugitive disentitlement theory applied to respondent's application to vacate an order of the court, entered upon respondent's default, which determined that respondent

was in willful violation of a prior support order, and a further order committing respondent to six months of incarceration. Furthermore, the fugitive disentitlement theory also applied to the appeal. Respondent, a California resident, was the subject of an arrest warrant in this State issued by the court. Respondent refused to return to this State. By respondent's default and absence, he was evading the very orders from which he sought appellate relief and had willfully made himself unavailable to obey the mandate of the court in the event of an affirmance. The amount of the required undertaking, \$25,000, constituted the amount of child support that respondent owed at the time the court determined that he willfully violated the prior support order.

*Matter of Shehatou v Louka*, 118 AD3d 1357 (4th Dept 2014)

### **Judgment of Divorce Modified by Increasing Amount of Plaintiff's Child Support Obligation Based on Court's FICA Errors**

Supreme Court entered an amended judgment of divorce that, among other things, distributed the marital property. The Appellate Division modified and remitted for further proceedings. Defendant's contentions were rejected that the court abused its discretion in either failing to impute income to plaintiff for the first six months after he was terminated by his company, or in thereafter imputing income to plaintiff of only \$140,000 per year. The record supported the court's determination that plaintiff's termination was not his fault, and thus it was reasonable to thereby allow him six months in which to find other employment. Moreover, when considering plaintiff's education, experience and long-term earning history, it could not be said that the court abused its discretion by refusing to impute income to plaintiff that was greater than \$140,000 per year. However, the court erred in its FICA calculation for 2011 because, after the court imputed income of \$140,000 to plaintiff, it calculated plaintiff's FICA deduction as if he would have paid the social security portion of FICA on the full amount of his imputed income, which was considerably higher than the social security wage limit in 2011. The court also erred in deducting FICA from plaintiff's Canadian income before calculating child support given that those taxes were not paid on the income he earned in

Canada. Therefore, the amended judgment was further modified by increasing the amount of plaintiff's child support obligation based on the court's FICA errors, in a sum to be determined upon remittal to Supreme Court.

*Belkhir v Amrane-Belkhir*, 118 AD3d 1396 (4th Dept 2014)

### **Defendant Properly Challenged by Motion Child Support Provisions That Merged With Judgment of Divorce**

Supreme Court denied defendant's motion to vacate the judgment of divorce. The Appellate Division modified and remitted for further proceedings. Supreme Court erred in denying that part of defendant's motion seeking vacatur of the child support provisions of the judgment of divorce without conducting a hearing. The judgment of divorce specifically provided that the child support provisions of the parties' 2009 Property Settlement and Separation Agreement (Agreement) merged with the judgment of divorce. Although in his motion defendant sought vacatur of the judgment of divorce in its entirety and a determination that the Agreement was unenforceable, defendant conceded at oral argument before the Court that he was seeking to challenge only the child support provisions of the judgment. Inasmuch as the child support provisions of the Agreement merged into the judgment of divorce, those provisions of the Agreement ceased to exist as a separately enforceable contract. Therefore, defendant was not required to commence a plenary action to challenge those provisions but, rather, properly challenged those provisions of the judgment by motion.

*Bryant v. Carty*, 118 AD3d 1459 (4th Dept 2014)

### **Amended Judgment Modified by Reducing Amount of Life Insurance to Secure Child Support Obligations**

Supreme Court entered an amended judgment of divorce that, among other things, directed defendant to pay maintenance and child support. The Appellate Division modified. Defendant's contention was rejected that the court improperly required him to maintain policies of life insurance to secure his child support and maintenance obligations. However, the

amount of life insurance the court required defendant to maintain with respect to his child support obligations was excessive. Therefore, the amended judgment was modified by reducing the amount of that life insurance from \$500,000 to \$300,000. Inasmuch as defendant's continuing child support obligation will decline as each of the children of the marriage either becomes emancipated or reaches the age of 21, the amended judgment was further modified by providing that the amount of life insurance defendant was required to obtain to secure his child support obligation may have a declining term that would permit defendant to reduce the amount of life insurance by the amount of child support actually paid, provided that at all times the amount of life insurance was not less than the amount of child support remaining unpaid. The amended judgment was also modified by striking therefrom the provision requiring defendant to name each child of the marriage as irrevocable beneficiary on life insurance and death benefits available to defendant through his employer until each child was emancipated.

*Marfone v Marfone*, 118 AD3d 1488 (4th Dept 2014)

## **CUSTODY AND VISITATION**

### **Sole Custody to Mother Reversed**

Supreme Court, among other things, awarded plaintiff mother sole physical and legal custody of the parties' children Tallulah and Scarlet and allowed the child Pascal to continue to live with defendant father, with the parties having joint decision-making over Pascal's education and serious medical care and the mother having final authority in the event of a conflict, and granted the mother authority to change the children's therapists. The Appellate Division modified by vacating the award of custody to the mother and awarding sole legal and physical custody of Scarlet to the father, remitting to the court for determining visitation, vacating the grant of authority to the mother to change the children's therapists and final authority over Pascal's serious medical issues and education, and awarding sole legal and physical custody of Pascal with the father. The parties were married in 1990. Ten years later the mother left the marital home and moved in with her lover, taking the child Tallulah with her. Pascal and Scarlet continued to live with the father and they expressed a strong preference to remain with him,

which decision the neutral evaluation and attorney for Pascal and Scarlet supported. The court erred in finding that the best interests of Scarlet would be served by awarding sole custody to her mother and forbidding her from having any contact with her brother and father for six weeks. In addition to disregarding Scarlet's wishes and the importance of maintaining stability in her life, the court placed undue emphasis on the father's alleged alienation of Pascal and Scarlet from their mother. Although the father should have been more restrained in the comments he made about the mother in Pascal and Scarlet's presence, his conduct did not rise to the level of interfering with the parental rights of the mother sufficient to raise serious doubts about his custodial fitness. Moreover, the court failed to give sufficient weight to the mother's role in alienating Pascal and Scarlet's affections and to accept responsibility for the deterioration of her relationship with them. The only disinterested witness who interviewed both parents and the children, the neutral evaluator, testified that there was no evidence that either Pascal or Scarlet were subject to parental alienation. Insofar as the court found that the mother was virtually the exclusive caregiver for the children, Pascal and Scarlet were now mature teenagers who had lived with the father for four years and had a very strong relationship with him.

*Melissa C.D. v Rene I.D.*, 117 AD3d 407 (1st Dept 2014)

### **Award of Custody to Mother Had Sound, Substantial Basis**

Supreme Court awarded plaintiff mother custody of the parties' child with visitation to defendant father. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination that the child's best interests were served by awarding custody to the mother. Despite the history of animosity between the parties, the mother showed that she had no unbridled anger towards the father that would render her incapable of nurturing a relationship between the father and child. Since their separation, the mother kept the father informed of various aspects of the child's life, such as toilet training progress, pediatric appointments and schools and summer camps she had considered for the child.

*Seborovski v Kirschtein*, 117 AD3d 627 (1st Dept 2014)

### **Extraordinary Circumstances Warranted Custody of Child to Nonparent**

Family Court dismissed the father's petition for custody of the subject child and committed custody and guardianship of the child to petitioner agency and ACS for the purpose of adoption. The Appellate Division affirmed. The court properly found extraordinary circumstances warranted the denial of the father's custody petition. He failed to assume a primary parental role during most of the child's life, and had a persistent pattern of criminal conduct resulting in many convictions and long periods of incarceration. The father admitted that although he lived with the child until she was three months old, he visited her only once during the time she was in foster care and waited until the child was over three years old to file a custody petition. It was in the child's best interests to commit custody and guardianship to the agency and ACS for the purpose of adoption by her foster mother who loved and cared for her and where she was thriving in the foster home.

*Matter of Jessica Marie C.*, 118 AD3d 601 (1st Dept 2014)

### **Mother Failed to Provide Appropriate Medical Attention to Children**

The mother appealed from an order of the Family Court, which, after a hearing, granted the father's petition to modify a prior custody order so as to award him sole custody of the subject children. The evidence adduced at the hearing established that the mother's apartment had become a "harried and chaotic environment" that did not provide the subject children with the focused attention and structure they needed for success in school and intellectual development. Further, the evidence established that the mother had failed to provide appropriate medical attention to the children, who apparently suffered from seizure disorders and asthma. Accordingly, the record demonstrated that a change in circumstances had occurred, and the evidence supported the Family Court's determination that awarding sole custody of the subject children to the father was in their best interests.

*Matter of Graziani C.A.*, 117 AD3d 729 (2d Dept 2014)

### **Child’s Wishes Regarding Visitation with Mother Properly Considered**

Contrary to the mother's contention, the Supreme Court's determination that therapeutic supervised visitation with the parties' daughter was not in the best interests of the child had a sound and substantial basis in the record. The Supreme Court properly considered the wishes of the child, who was nearly 14 years old at the time of the hearing and mature enough to express her wishes. Accordingly, the Supreme Court did not improvidently exercise its discretion in denying the mother any visitation with the daughter.

*Iacono v Iacono*, 117 AD3d 988 (2d Dept 2014)

### **Family Court Retained Jurisdiction under UCCJEA; Error to Dismiss Petition Pursuant to Hague Convention**

On November 23, 2011, the father filed a petition for custody in the Family Court alleging that, on October 2, 2011, the mother took the parties' child to the Dominican Republic without his permission. The Family Court held the matter in abeyance pending a determination in the Dominican Republic with regard to the father's application there for a return of the child pursuant to the Convention on the Civil Aspects of International Child Abduction (the Convention). On October 5, 2011, the Civil Chamber of the Court of Children and Adolescents of the Judicial District of Santo Domingo rejected the father's request for a return of the child, and directed that the child remain in the company of the mother in the Dominican Republic, finding that if the child were returned to the United States she would be exposed to a violation of her fundamental rights due to issues of domestic violence. In the order appealed from, the Family Court dismissed the father's petition for custody, concluding that it was bound to do so pursuant to the order issued by the court in the Dominican Republic. The Convention, “done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights” (42 USC § 11601[a][4]). The Convention provides that a child abducted in violation of rights of custody must be

returned to his or her country of habitual residence, unless certain exceptions apply. For example, return of the child is not required if the abducting parent can establish that there is a grave risk that the child's return would expose him or her “to physical or psychological harm or otherwise place the child in an intolerable situation”. A decision under the Convention is not a determination on the merits of any custody issue, but leaves custodial decisions to the courts of the country of habitual residence. Here, it was undisputed that the United States was the child's country of habitual residence, and that, at the time the petition was filed, New York was the child's “home state.” Thus, the Family Court had jurisdiction to determine the father's petition for custody pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). See DRL § 76[1][a]. Moreover, the denial, by the court in the Dominican Republic, of the father's application for a return of the child pursuant to the Convention, did not preempt his custody proceeding. Accordingly, the Family Court erred in dismissing the father's petition. The order was reversed, the petition was reinstated, and the matter was remitted to the Family Court for a hearing and determination of the petition thereafter.

*Katz v Katz*, 117 AD3d 1054 (2d Dept 2014)

### **Although North Carolina Was the Appropriate and Convenient Forum, Family Court Erred in Dismissing Petition**

The Family Court properly determined that North Carolina was the more appropriate and convenient forum. The subject child had been living in North Carolina since at least October 2012, and any evidence as to his care, well-being, and personal relationships was more readily available in North Carolina. The other statutory factors listed in DRL § 76-f (2) (Uniform Custody Jurisdiction Enforcement Act) were also considered by the Family Court, and the court correctly concluded that, based on all of the information in the record, the factors weighed in favor of North Carolina as the more convenient forum. However, DRL § 76-f (3) specifies that “[i]f a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state.” Accordingly, the Family

Court erred in dismissing the petition. The matter was remitted to the Family Court for further proceedings pursuant to DRL § 76-f (3), including the entry of an order staying all proceedings on the condition that a child custody proceeding is promptly commenced in North Carolina.

*Matter of McCarthy v Brittingham-Bank*, 117 AD3d 1060 (2d Dept 2014)

### **No Evidence That Mother Posed Any Threat to Remove Child from the Country Without Court Approval**

In October 2010, the Supreme Court awarded the mother custody of the subject child, with visitation to the father. In August 2012, the mother filed a petition to modify the provisions of the order of custody and visitation, among other things, so as to grant the father only supervised visitation with the subject child. The father filed a cross petition seeking expanded visitation. The Supreme Court directed that neither parent could leave the country with the subject child absent a court order, that the father was not to obtain an Egyptian passport for the child, and that the mother was to deliver the child's passport to the court. The mother appealed. Under the circumstances of this case, the Supreme Court erred in directing the mother to deliver the subject child's passport to the court. There was no evidence in the record that the mother posed any threat to remove the subject child from the country without court approval and, therefore, there was no basis for the Supreme Court's directive that she deliver the child's passport to the court.

*Matter of Hamad v Rizika*, 117 AD3d 736 (2d Dept 2014)

### **Record Supported Denial of Father's Petition for Increased Communication with Children and Further Restrictions upon Him**

The Family Court did not err in denying that branch of the father's petition which was for increased communication with the children and in further restricting the father's communication with the children. The record established that the father was incarcerated pursuant to a conviction, upon his plea of guilty, of criminal sexual act in the second degree, and that the

charges related to acts with the minor friend of one of his daughters. Additionally, the Family Court previously found that the father had sexually abused and neglected his daughters, and had derivatively neglected his son. Further, during his testimony at the hearing on his petition, the father admitted that he sent inappropriate written communications to the children in violation of a prior order of protection. Under these circumstances, the Family Court providently exercised its discretion in directing the father not to contact the children unless they initiate such contact and to not contact the mother regarding the children.

*Matter of Madden v Ruskiewicz*, 117 AD3d 827 (2d Dept 2014)

### **Maternal Grandfather Established Requisite Standing; Error to Dismiss Petition Without Holding a Best Interests Hearing**

The maternal grandfather appealed from an order of the Family Court, which, without a hearing, denied his petition for visitation and dismissed the proceeding. Given the nature and extent of the relationship between the maternal grandfather and the child, and the grandfather's efforts to maintain that relationship, the grandfather established the requisite standing to seek visitation pursuant to the equitable circumstances clause of DRL § 72 (1). Under the circumstances presented here, the Family Court improvidently exercised its discretion in dismissing the petition without holding a best interests hearing. The record was devoid of any indication as to the nature and basis of the respondent mother's objection to visitation. To the extent that the Family Court dismissed the petition based on the grandfather's admission that the mother harbored animosity toward him and, for some reason, did not want him to have any contact with the child, such determination was error. Although animosity coupled with family dysfunction may provide a basis for denying visitation rights, the existence of animosity between the parties alone cannot provide such a basis. Accordingly, the order was reversed and the matter was remitted to the Family Court for a hearing to determine whether an award of visitation rights to the maternal grandfather was in the best interests of the child.

*Matter of Feldman v Torres*, 117 AD3d 1048 (2d Dept 2014)

### **Relocation to Ohio Not in Child's Best Interests**

The mother appealed from an order of the Family Court, which, after a hearing, denied the mother's petition for permission to relocate to Ohio with the subject child. The Family Court's determination that relocation was not in the child's best interests was supported by a sound and substantial basis in the record. The mother's employment situation in Ohio was not permanent despite the fact that she had already been living there for almost eight months, the father's visitation with the child would be dramatically reduced by the relocation, and the mother failed to demonstrate by a preponderance of the evidence that the proposed move would enhance the child's life economically, emotionally, and educationally. Order affirmed.

*Matter of Ross v Hodges*, 118 AD3d 710 (2d Dept 2014)

### **Relocation to Michigan Was in Child's Best Interests**

The Family Court's determination that it was in the child's best interests to grant the mother's petition to relocate to Michigan had a sound and substantial basis in the record. The mother testified that she and the child were living in temporary housing provided by their church and that they were at risk of ending up in a shelter. They had been living in a two-bedroom apartment in a "pleasant" neighborhood in Rockville Centre, but could no longer afford that apartment because, among other things, they were not receiving any consistent or meaningful support from the father, who had recently been released from incarceration. In Michigan, the mother could afford a clean, modern, and spacious two-bedroom apartment, near public transportation, on her disability benefits alone. She had researched the school district the child would attend and the medical providers he would see, and testified to the assistance of a network of friends who had already demonstrated their willingness to provide her and the child with much needed support and stability. Although the father was no longer incarcerated, he had not been fully exercising his visitation rights and was not intimately involved in the child's daily life. Moreover, although he had obtained employment several months before the instant petition was filed, the father only revealed this employment and began

offering meaningful financial support after the mother proposed the move. In any event, the liberal visitation schedule, which included extended visits during summer and school vacations, would allow for the continuation of a meaningful relationship between the father and the child. In addition, the position of the attorney for the child was that relocation was in the child's best interests, and that position, since it was not contradicted by the record, was entitled to some weight. Order affirmed.

*Matter of Ortiz v Ortiz*, 118 AD3d 800 (2d Dept 2014)

### **Relocation to Georgia Was in Child's Best Interests**

The Family Court erred in denying the mother's modification petition so as to allow her to relocate to Georgia with the subject child. The mother proved by a preponderance of the evidence that moving to Georgia was in the child's best interests. Thus, the Family Court's denial of the mother's petition was not supported by a sound and substantial basis in the record. The mother had been the child's primary caregiver since his birth, while the father had been substantially less involved in the child's life, and was inconsistent in exercising visitation. Further, the record showed that the move would not have had an adverse impact on the father's relationship with the child, and that the move would have had multiple benefits for the child, emotionally, economically, and educationally. During the in camera interview, the child expressed his desire to move to Georgia. While a child's expressed preference in a custody proceeding is not determinative, it is some indication of what is in the child's best interests, particularly where the attorney for the child recommended that the child's wishes be given weight, and where the interview demonstrates the child's level of maturity and ability to articulate his preferences. Here, the attorney for the child supported relocation as being in the child's best interests, and that determination was not contradicted by the record, and was entitled to some weight.

*Hall v Hall*, 118 AD3d 879 (2d Dept 2014)

### **Father Not Entitled to Substitution of Counsel and Adjournment of Custody Proceedings on Day of Trial**

The father appealed from so much of an order of the Family Court, which, after a trial, granted the mother's petition which was to award the father only supervised visitation with the subject child, limited to four hours on alternate Saturdays. Contrary to the father's contentions, the Family Court did not improvidently exercise its discretion in denying the father's request for a substitution of counsel and an adjournment of the child custody proceedings on the day of trial. The Family Court properly determined that there was no good cause shown in view of the timing of the father's request, the effect of such timing on the progress of the case, and the statements of father's counsel that there had been disagreements over trial strategy between client and counsel. Further, the Family Court was not obligated to make even a minimal inquiry into the father's request to substitute counsel since his request was based on a conclusory statement that he could not continue with his present counsel for medical reasons and reflected only a delaying tactic.

*Matter of Wiley v. Musabyemariya*, 118 AD3d 898 (2d Dept 2014)

### **Award of Sole Legal and Physical Custody to Father Was Not in the Children's Best Interests**

The Family Court's award of sole legal and physical custody to the father lacked a sound and substantial basis in the record. In awarding the father custody, the court gave undue weight to particular instances of conflict between the parties, the majority of which occurred after the parties cross-petitioned for custody and while they were still living together during the pendency of these proceedings. The record contained no evidence to support a finding of parental alienation against the mother. The court also gave undue weight to a single letter from the mother to the oldest child's school indicating, incorrectly, that the child suffered from hypoglycemia so that the child could have special food privileges in class if she had a headache. Furthermore, the court failed to give sufficient weight to the fact that the mother had been the primary caregiver for the subject children for their entire lives, and the father had a limited involvement with the children until the pendency of the custody proceedings. Finally, it was the position of the attorney for the children that the mother have custody of the children. The position of the attorney for the children is not

determinative, but is a factor to be considered and entitled to some weight. Under the totality of the circumstances, the best interests of the children would have been better served by awarding the mother sole legal and physical custody. However, the record contained a sound and substantial basis for the court's denial of the mother's petition to relocate to Jefferson, New York, with the parties' children. The mother failed to demonstrate by a preponderance of the evidence that such a relocation was in the best interests of the children. Order modified.

*Matter of Fallo v Tallon*, 118 AD3d 991 (2d Dept 2014)

### **Improper to Dismiss Visitation Petition for Lack of Standing Without First Conducting a Hearing**

The maternal grandparents appealed from a decision of the Family Court, and an order of the same court, which, upon the decision, granted the parents' motion to dismiss the visitation petition for lack of standing and dismissed the proceeding. Contrary to the Family Court's determination, the allegations in the petition, the evidence submitted by the parents in support of their motion to dismiss the petition on the ground of lack of standing, and the evidence submitted by the maternal grandparents in opposition to the parents' motion gave rise to factual issues which must be resolved at a hearing, including, inter alia, the nature and extent of the grandparent-grandchildren relationship, the maternal grandparents' efforts to establish and maintain a relationship with the grandchildren, and the parents' alleged attempts to frustrate the grandparent-grandchildren relationship. Accordingly, the Family Court improperly granted the parents' motion to dismiss the petition for lack of standing without first conducting a hearing.

*Matter of Brancato v Federico*, 118 Ad3d 986 (2d Dept 2014)

### **Father's Petition Improperly Dismissed for Lack of Jurisdiction**

The father appealed from an order of the Family Court, which, sua sponte, dismissed his petition for visitation with the subject child on the ground of lack of jurisdiction. The Family Court erred in determining

that it lacked jurisdiction based on its brief inquiry of the mother, which was conducted when the father, who was incarcerated, was not present in court. Although a letter from the mother to the Family Court indicated that there may have been a divorce proceeding in which she was granted sole custody of the child, it made no inquiry to determine whether a New York court had in fact made a prior custody determination, which would provide a predicate for the exercise of jurisdiction (*see* DRL § 76-a [1]). Further, even if no prior custody determination had been made, the mother's open-court statement that she had moved to Pennsylvania in June 2011 conflicted with the sworn allegation in the father's January 2012 petition that the mother and child resided in New York. This raised an issue that should have caused the court to examine the parties under oath as to the details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case (*see* DRL § 76-h [3]), before reaching a determination as to whether New York was the child's home state on the date the petition was filed. Moreover, since "even an incarcerated parent has a right to be heard on matters concerning [his or] her child, where there is neither a willful refusal to appear nor a waiver of appearance", the Family Court should not have determined the issue of jurisdiction and dismissed the petition in the absence of the father, who had not been produced in accordance with the court's previous directive. Accordingly, the order was reversed, the petition was reinstated, and the matter was remitted.

*Matter of Locklear v Andrews*, 118 AD3d 1001 (2d Dept 2014)

### **Family Court Should Have Held Hearing on Issue of Whether Child Was in Imminent Risk of Harm If He Were Returned to Father While Petition Was Pending**

The mother brought a petition to modify a custody provision of a Florida state court order to award her sole custody of the child based on allegations that the father abused the child and dealt drugs in the child's presence. The Family Court awarded temporary physical custody to the mother, but transferred the petition to the Florida state court to determine whether the child was in imminent risk of harm if he were to be returned to the father while the petition was pending.

The attorney for the child appealed on behalf of the child. It was noted that since the issuance of the order appealed from, no proceedings had taken place on the petition in the State of Florida. Under the circumstances of this case, the Appellate Division agreed with the child that the Family Court itself should have held the hearing on the issue of imminent harm and made a determination on that issue (*see* DRL § 76-c). Accordingly, the Appellate Division reversed the Family Court's order, vacated the provision of that order transferring the petition to the State of Florida, and remitted the matter to the Family Court for a hearing and determination on the issue of whether the child was at imminent risk of harm if he was returned to the father while the petition was pending. Temporary physical custody of the child remained with the mother until further order of the Family Court.

*Matter of Rodriguez v Rodriguez*, 118 AD3d 1011 (2d Dept 2014)

### **Record Did Not Support Family Court's Award of Custody to the Mother**

The Family Court's award of custody of the subject child to the mother lacked a sound and substantial basis in the record. In awarding the mother custody, the court failed to give sufficient weight to the mother's past acts that undermined her ability to provide appropriate parental guidance and to place the subject child's interests before her own. The record revealed that the mother forced her older daughter to take inappropriate photographs of the mother. The subject child had excessive school absences while in the mother's care, and despite a court order directing that the subject child be enrolled in therapy, the mother did not enroll the subject child in therapy for over a year. The court-appointed forensic psychologist testified that while he would have liked to have interviewed the mother further, she failed to show up for her follow-up appointments. Although this hampered the forensic psychologist's ability to state unequivocally whether either parent was more responsible, his ultimate recommendation was that the father should be granted custody of the subject child. Thus, the evidence demonstrated that the father had showed a greater ability and willingness than the mother to place the subject child's interests above his own and to both anticipate and provide for her physical, emotional,

social, and intellectual needs. In addition, the Family Court failed to give sufficient weight to the fact that awarding the mother custody of the subject child would have unavoidably separate her from her older sister. The order was reversed, and the matter was referred to the Family Court to establish a visitation schedule for the mother, and to issue a permanent order of visitation. Under the totality of these and other circumstances, awarding custody to the father was in the child's best interests.

*Matter of Soto v Cruz*, 119 AD3d 592 (2d Dept 2014)

### **Father Awarded Limited Unsupervised Visitation with Son Subject to His Continued Participation in Therapy**

The defendant appealed from stated portions of a judgment of the Supreme Court, which, awarded sole legal and physical custody of the parties' child to the plaintiff with certain visitation to the defendant conditioned upon his continued participation in therapy. There was a sound and substantial basis for the Supreme Court's determination that it was in the best interests of the parties' child that sole legal and physical custody be awarded to the mother. This included, inter alia, the unrefuted evidence that the mother's living situation and employment were considerably more stable than the father's living situation and employment, and the high level of antagonism between the parties that made it impossible for them to cooperate with each other. Contrary to the father's contention, the Supreme Court providently exercised its discretion in awarding him overnight visits with the child for one night, every other weekend, plus midweek visits. At the time that the court made its determination as to visitation, the child was four years old and had never experienced unsupervised visitation with the father. At trial, the court-appointed forensic evaluator testified, inter alia, that the father suffered from a psychiatric disorder and was unable to place the needs of the child before his own needs. Consequently, it was in the child's best interests to initially have limited unsupervised visitation with the father. Moreover, it was not an improvident exercise of discretion to condition overnight visitation upon the father's continued participation in therapy. Judgment affirmed.

*Kramer v Griffith*, 119 AD3d 655 (2d Dept 2014)

### **Family Court Failed to Accord Sufficient Weight to Child's Educational Performance While in Father's Care**

The father appealed from an order of the Family Court, which, after a hearing, denied his petition to modify an order of custody and visitation of the same court, awarding custody of the subject child to the mother and visitation to him, so as to award him sole custody of the subject child. The Family Court's determination was not supported by a sound and substantial basis in the record. The Family Court failed to accord sufficient weight to the child's educational performance while in the father's care, as compared to the child's performance while in the mother's care. While in the mother's care, the child missed 67 days of school during the 2010-2011 school year, after which he was not promoted to the next grade. In an order of the Family Court dated May 23, 2011, the father was awarded temporary custody. In the beginning of the 2011-2012 school year, the child was "well below" grade level in reading, spelling, and mathematics, and he was "struggling academically." While in the father's care, which commenced during the 2011-2012 school year, the child regularly attended school, and his academic performance improved. The Family Court failed to consider the hearing testimony of the child's school teacher for the 2011-2012 school year. The teacher testified that, while the child was in the father's care, he improved from well below grade level to above grade level in reading, spelling, and mathematics. Moreover, the Family Court failed to accord sufficient weight to the child's need for stability, to the impact that uprooting him from the place he had lived and the school he had attended since May 2011 would have had upon his development, and to the child's preference, expressed through his attorney, to have remained with the father. Additionally, the Family Court failed to consider that the home environment provided by the father was more suitable for the child than that provided by the mother. The child had his own bedroom in the father's home, whereas the child would have shared a one-bedroom apartment with the mother, her boyfriend, and their newborn baby. The order was reversed, the petition was granted, and the matter was remitted to the Family Court for a determination of the issue of the mother's visitation.

*Matter of Reyes v Gill*, 119 AD3d 804 (2d Dept 2014)

### **Hearing Required Pursuant to DRL § 76**

The father appealed from an order of the Family Court which dismissed the petition on the ground of lack of jurisdiction. The Family Court improvidently exercised its discretion in summarily determining, without a hearing, that it lacked jurisdiction on the basis that its prior order awarding guardianship of the subject child to the child's maternal aunt was "too old." In order to determine whether it lacked exclusive, continuing jurisdiction pursuant to DRL § 76-a (1), the Family Court should have given the parties an opportunity to present evidence as to whether the child had maintained a significant connection with New York, and whether substantial evidence was available in New York concerning the child's "care, protection, training, and personal relationships" (*see* DRL § 76-a [1] [a]). Accordingly, the order was reversed and the matter was remitted to the Family Court.

*Matter of Williams v Davis*, 119 AD3d 950 (2d Dept 2014)

### **Change to Father's Visitation Schedule Was in the Child's Best Interests**

The father appealed from an order of the Family Court, which, after a hearing, *inter alia*, granted the mother's petition to modify a prior order of the same court, entered on consent of the parties, so as to change the father's visitation with the subject child. The mother established that the father's unwillingness to communicate appropriately with the mother about the subject child's health and welfare, and the unchecked and persistent denigration of the mother in the child's presence by the paternal grandparents with whom the father resided, and the father's failure to discourage such conduct as well as his participation in such conduct, constituted a change in circumstances warranted a modification of the existing visitation order. Accordingly, the Family Court properly determined that it was in the child's best interests to change the father's visitation schedule.

*Matter of Weiss v Rosenthal*, 120 AD3d 505 (2d Dept 2014)

### **Father Not Entitled to a Hearing**

A parent who seeks a change of custody is not automatically entitled to a hearing, but must make an evidentiary showing sufficient to warrant a hearing. The father failed to show that there had been a change in circumstances which could support a finding that it was in the children's best interest to change residential custody to himself and, thus, failed to meet his threshold burden. He made his motion only two weeks after the issuance of the judgment of divorce, which incorporated the terms of the parties' separation agreement. Accordingly, the Supreme Court providently exercised its discretion in denying the father's motion without a hearing.

*Macchio v Macchio*, 120 AD3d 560 (2d Dept 2014)

### **Award of Custody to the Father Was in the Children's Best Interests**

The courts may consider religion as one of the factors in determining the best interests of a child, but religion alone may not be the determinative factor. New York courts will consider religion in a custody dispute when a child has developed actual religious ties to a specific religion and those needs can be served better by one parent than the other. Contrary to the mother's contentions, the Family Court did not rely solely on religion and the mother's decision to leave the Hasidic Jewish community in making the determination to award the father custody of the parties' children. The Family Court expressly stated that it passed no judgment on either parent's religious beliefs and practices. The children's need for stability, and the potential impact of uprooting them from the only lifestyle which had known, were important factors considered by the Family Court. The Family Court also found the mother's repeated allegations of sexual abuse of the children by the father to be unfounded, which subjected the children to numerous interviews and examinations, casting doubt upon her fitness to be the custodial parent. Although the children expressed a preference to reside with the mother, and the attorney for the children advocated awarding custody to the mother, the children's preference and the recommendation of the attorney for the children were not determinative. Considering the totality of the circumstances, there was a sound and substantial basis

in the record for the Family Court's determination that it was in the best interests of the children to award custody to the father, with certain visitation to the mother.

*Matter of Gribeluk v Gribeluk*, 120 AD3d 579 (2d Dept 2014)

### **Modification of Custody Was Necessary to Ensure the Best Interests of the Child**

The maternal grandmother appealed from an order of the Family Court, which, after a hearing, granted the father's petition to modify a prior order of custody so as to award him sole legal and residential custody of the subject child. The nonparent has the burden of establishing extraordinary circumstances even where, as in this case, there is a prior order awarding physical custody of a child to the nonparent that had been issued on the consent of the parties. Upon reviewing the record, the Appellate Division found that the Family Court's determination that the maternal grandmother failed to sustain her burden of demonstrating extraordinary circumstances was not supported by a sound and substantial basis in the record (*see* DRL § 72 [2] [b]). However, notwithstanding the existence of extraordinary circumstances, the father established a change in circumstances requiring modification of custody to ensure the best interests of the child, and the totality of the circumstances warranted the conclusion that it was in the subject child's best interest to award sole legal and residential custody of the child to the father.

*Matter of Weinberger v Monroe*, 120 AD3d 583 (2d Dept 2014)

### **Relocation with Mother to Georgia Was in the Child's Best Interests**

The Family Court's award of sole physical custody of the child to the father was not supported by a sound and substantial basis in the record. While the Family Court found that the home atmosphere provided by the father was warm and congenial, with relatives residing within the home and nearby, the living conditions provided by the father raised a significant concern since the child shared a bedroom with the grandmother in a one-bedroom apartment, and lived with her father and

two adult uncles. The child had her own bedroom in her mother's three-bedroom house which the child shared only with her mother and mother's husband. As to the child having lived with the father since 2008, the mother immediately filed a petition for sole physical custody in 2008. Thus, the fact that the child has been residing with the father and not the mother since that time was not a factor which weighed in favor of awarding custody to the father. The mother, who did not have custody during that time period, visited with the child in New York, and the child spent the summer of 2012 in Georgia with the mother. The mother also mailed the child packages of clothing, school supplies, and toys. Furthermore, while the recommendation of a court-appointed evaluator is not determinative, it is a factor to be considered and is entitled to some weight. Thus, the Family Court should have given more than minimal weight to the report and testimony of the forensic evaluator who interviewed the parties and the child, and conducted psychological testing. The forensic evaluator found that the child was at ease with her mother despite their separation, and concluded that the mother was the more appropriate custodial parent because she was in a stable relationship, employed, had gone to great lengths to regain custody, and would provide a stable home for the child. Significantly, the psychologist expressed detailed concerns about the father's psychological state, and the impact of his psychological state upon his parenting abilities, and noted that he minimized past incidents of domestic violence between the parties. Further, in the forensic report, which was admitted in evidence, there were statements that, at the last minute, the father would cancel activities that the mother had planned in advance for the child. This evidence called into question the father's ability to continue to foster the child's relationship with the mother. Moreover, the parties entered into a "Custody Agreement" whereby they agreed, *inter alia*, that the child would live in Georgia during the school year. The father acknowledged that he executed this agreement. It did not appear that the Family Court gave any consideration to this agreement. In addition, the father's testimony as to why he did not abide by the agreement raised additional concerns as to the father's ability to assure that there will continue to be meaningful contact between the mother and the child. Finally, the mother established by a preponderance of the evidence that moving to Georgia was in the child's best interests. In addition to being

able to provide superior living conditions, the mother had already chosen a school and a medical care provider for the child, and she testified that she would promote liberal visitation with the father over almost all of the school breaks. Accordingly, the Family Court should have granted the mother's petitions for sole physical custody of the child and for permission to relocate to Georgia with the child, and should have denied the father's petition for sole physical custody of the child. The order was reversed, the mother's petitions were granted, the father's petition was denied, and the matter was remitted to the Family Court for a hearing to establish an appropriate post-relocation visitation schedule for the father.

*Matter of Doyle v Debe*, 120 AD3d 676 (2d Dept 2014)

### **Family Court Improperly Determined That it Lacked Jurisdiction**

The Family Court erred in determining that it lacked exclusive, continuing jurisdiction over the matter, and in granting the father's motion to dismiss the petition for lack of subject matter jurisdiction (*see* DRL § 76-a). While the subject child moved to Connecticut to live with her father approximately eight months before the mother petitioned to modify a prior order of custody so as to award her sole custody of the child, the record revealed that the child retained a significant connection to New York, which included her attendance at school and having had frequent visitation with her mother in New York, and that substantial evidence was available in New York concerning her then present and future welfare. The child's significant connection to Connecticut did not diminish her significant connection to New York as well. After the Family Court improperly determined that it lacked exclusive, continuing jurisdiction over the matter, it determined that, even if it had such jurisdiction, it would decline to exercise it. A court of this State that has jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act may decline to exercise it if it finds that New York is an inconvenient forum and that a court of another state is a more appropriate forum (*see* DRL § 76-f [1]). However, the court is required to consider the factors set forth in DRL § 76-f (2) (a)-(h) before determining that New York is an inconvenient forum. The Family Court failed to do so here. Upon reviewing the record, the Appellate Division found that

the relevant statutory factors, which included the nature and location of relevant evidence, and the Family Court's greater familiarity than the courts of Connecticut with the facts and issues underlying the mother's modification petition, supported a conclusion that New York was not an inconvenient forum. Accordingly, the order was reversed, the father's motion to dismiss the mother's petition, for lack of subject matter jurisdiction, was denied, and the matter was remitted to the Family Court for a hearing and determination on the mother's petition.

*Matter of Mojica v Denson*, 120 AD3d 691 (2d Dept 2014)

### **Record Supported the Family Court's Determination to Transfer Custody from the Mother to the Father**

The Family Court's determination that there had been sufficient changes in circumstances requiring a change in custody from mother to father to protect best interests of the child was supported by a sound and substantial basis in the record. The evidence indicated that the mother and child lacked quality time together due to work and school schedules, that the child did not socialize with other children who resided in the mother's community, that the child expressed a desire to live with the father and was well-integrated into the father's community, and that the mother displayed a lack of attunement to the child's emotional needs. The dissenting opinion emphasized, *inter alia*, that the then twelve-year-old child had lived with her mother from the time she was born.

*Matter of Cisse v Graham*, 120 AD3d 801 (2d Dept 2014)

### **Petition to Relocate to Michigan Properly Denied**

The mother appealed from an order of the Family Court, which, denied her petitions to relocate to Michigan with the parties' two minor children. In making its determination, the Family Court, which had presided over several past petitions between the parties, considered the submissions of the parties and their sworn testimony concerning the mother's relocation request. The father had been intimately involved in the children's lives since their birth and was their exclusive

caregiver during the mother's temporary move to Michigan. By remaining in New York, the children could remain in their schools and maintain the relationships they had formed with their friends and community. Although the parties agreed, in a stipulation that was incorporated but not merged into the judgment of divorce, that the mother could relocate outside the Town of East Hampton if the father's child support payments were lowered to under \$500 per week, such an agreement was not dispositive. In her sworn testimony, the mother admitted that she had not spoken to the children about moving to Michigan, and further failed to demonstrate that their lives would be enhanced economically, emotionally, or educationally by the proposed move to Michigan. The Family Court's determination that the proposed relocation would have had a negative impact on the children's relationship with the father, and would not have been in their best interests, had a sound and substantial basis in the record. Order affirmed.

*Matter of Gravel v Makrianes*, 120 AD3d 815 (2d Dept 2014)

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

The Family Court's determination that a modification of the parties' child custody arrangement to award the father sole legal and physical custody of the subject child was in the child's best interests was not supported by a sound and substantial basis in the record. Under the circumstances of this case, the father's relocation closer to both the child's school and the mother's home was not a change in circumstances sufficient to warrant a change in the parties' custody arrangement. Further, although there was some evidence that the mother had interfered with the father's relationship with the parties' child in an attempt to marginalize rather than foster the parent-child bond, her behavior was not sufficient to warrant a change of custody at that time. Moreover, the Family Court failed to accord sufficient weight to the child's need for stability and the impact of uprooting her from the mother's residence. Rather, the evidence demonstrated that it was in the best interests of the child who was at the time seven-years-old, and who had been in the primary physical custody of the mother since she was approximately 2 1/2 years old, to remain with the mother. Accordingly, the order was reversed

and the father's petition was denied.

*Matter of Lombardi v Valenti*, 120 AD3d 817 (2d Dept 2014)

### **Grant of Sole Custody to Father Affirmed**

Family Court granted the father sole custody of the subject child. The Appellate Division affirmed. The court's determination that sole custody was in the child's best interests was supported by a sound and substantial basis in the record. There was evidence the mother used excessive corporal punishment by "whipping" the child's bare buttocks with a belt and the child feared the mother, often crying when it was time to return to the mother's home. The mother frequently used profanity towards the child, she exercised poor judgment and engaged in inappropriate and bizarre behavior. Additionally, the mother actively interfered with the father's relationship with the child by, among other things, prohibiting the child from speaking with the father for nearly two-months and blocked the father from accessing the child's academic and medical records. Although the mother had been the primary caretaker of the child since birth, there was nothing in the record to indicate the father was not capable of providing for the child's needs. Evidence showed the father could provide a stable home for the child and he demonstrated a willingness to foster a relationship between the mother and the child.

*Matter of Jarren S. v Shaming T.*, 117 AD3d 1109 (3d Dept 2014)

### **Insufficient Evidence to Find a Change in Circumstances**

Family Court dismissed the mother's custody modification petition and continued custody of the child with the maternal great-grandparents. The Appellate Division affirmed. There was a sound and substantial basis in the record to support the court's determination there was insufficient evidence to show there had been a change in circumstances. The mother's argument that the court failed to properly recognize her as a parent deserving of a preferred status was not valid since there had been a prior determination of extraordinary circumstances, which included a finding that she was "partially unfit". The mother's

allegations that she had been consistently exercising parenting time was not supported by the evidence. Additionally, she had an ongoing history of lack of stable housing, had been without a driver's license for more than two years since a prior unpaid ticket prevented her from renewing it, and there were questions about the character of her unemployed, live-in boyfriend who did not testify at the hearing.

*Matter of Ray v Eastman*, 117 AD3d 1114 (3d Dept 2014)

### **Proper to Limit Contact Between Children and Incarcerated Father**

Family Court granted the mother's petition to modify a custody/visitation order and changed the incarcerated father's contact with his children from periodic phone contact to periodic, monitored written communication. The Appellate Division affirmed. There was a sound and substantial basis in the record to support the court's determination that there had been a change in circumstances warranting modification of the order. The evidence, including testimony taken at the Lincoln hearing, demonstrated that speaking with the father caused the children severe distress. They began to resist visiting the paternal grandmother because it was during such visits the phone calls to the father were made. Additionally, the stress experienced by the children as a result of phone conversations with their father manifested itself in disruptive behavior at school and bed-wetting. Such symptoms disappeared once the phone calls stopped. Given the detrimental impact the telephone conversations were having upon the emotional well-being of the children, monitored written contact with their father was in the children's best interests.

*Matter of Clary v McIntosh*, 117 AD3d 1285 (3d Dept 2014)

### **Sound and Substantial Basis in the Record to Modify Custody**

Family Court granted the father's petition to modify custody and awarded him sole custody of the parties' minor child. The Appellate Division affirmed. There was a sound and substantial basis in the record to support the court's determination that it was in the

child's best interests to transfer sole legal and physical custody of the child to the father. The mother consistently disrupted the father's scheduled visits with the child, resisted all efforts by the father to make up for missed visits or schedule additional visits. She insisted upon a police escort when transporting the child to the father's house for visitation and examined and photographed the child before and after visits with the father, which created an antagonistic environment and was impacting negatively on the child. Additionally, the mother disparaged the father in front of the child and falsely accused him of molesting and poisoning the child. The father testified that when the child came to see him during the father's parenting time, the child wore ill-fitting clothes and needed to be bathed and groomed. Furthermore, there was no error in the court's determination that the mother had wilfully violated the court's prior order of a psychological evaluation of the parties and the child. The mother's own testimony established that although she was aware of the court's order, she failed to schedule, cooperate or complete the court-ordered psychological evaluation. She also failed to produce the child for such evaluation.

*Matter of Paul A. v Shaundell LL.*, 117 AD3d 1346 (3d Dept 2014)

### **Relocation Would Not Enhance the Child's Economic, Emotional or Educational Well-Being**

Family Court denied the mother's petition to relocate with the subject child to Florida. The Appellate Division affirmed. The testimony established both parents were committed to the child and had a strong emotional bond with the child. While the mother's reason for the move was to create economic opportunity for herself, at the time of the hearing, she was earning little more than minimum wage as a hotel desk agent in Florida. The record as a whole failed to establish that relocation would substantially enhance the child's economic, emotional or educational well-being. Additionally, evidence showed the relocation would have a negative impact on the quality and quantity of the child's future contact with the father, especially in light of the parties' limited resources. Despite the mother's assurances she would try to provide the father with the same amount of time with the child as he currently enjoyed, there was no doubt he

would be deprived of "regular and meaningful" access to his child and the child would no longer benefit from his consistent presence in her life.

*Matter of Jones v Soriano*, 117 AD3d 1350 (3d Dept 2014)

### **Sound and Substantial Basis to Modify Custody From Joint to Sole**

Family Court modified an order of joint legal custody with primary physical custody to the father, to sole legal custody to the father. The Appellate Division affirmed. There was ample evidence of a change in circumstances. The mother coached the child to make false allegations against the paternal grandfather and she attempted to alienate the child from the father. She was involved in a domestic violence incident with her boyfriend which involved threats with a rifle and the police found a loaded rifle in the mother's home. She ultimately married her boyfriend. During the time the hearing was pending, the mother tested positive for the use of marihuana. She had also been in the car with her boyfriend when he was arrested with 10 pounds of marihuana. Additionally, the mother was uncooperative with the local social services agency. There was a sound and substantial basis in the record that modification of the order was in the child's best interest. The mother's argument that she was denied effective assistance of counsel was dismissed since the evidence showed she had knowingly, intelligently and voluntarily waived her right to counsel. Finally, the court did not abuse its discretion in drawing a negative inference from the mother's failure to call her husband as a witness, since he was available and had knowledge of the relevant facts .

*Matter of Joshua UU. v Martha VV.*, 118 AD3d 1051 (3d Dept 2014)

### **Change in Custody Was in Child's Best Interests**

Family Court modified a consent order of custody, which provided for sole custody of the subject child to the mother and supervised visits to the father, and transferred sole custody of the child to the father. The Appellate Division affirmed. Although the court did not expressly make a finding of a change in circumstances, such a conclusion was proper based on a

review of the record. The mother had frequently violated the previous custody order by denying the father access to the child and the mother's fitness to care for the child had deteriorated. While both parties had children from previous relationships, the father had a stable home, he saw his other child every weekend, he and his live-in girlfriend were gainfully employed and the girlfriend, who also had children, had an active support system. On the other hand, the mother was unemployed, claimed to have a physical disability but had not applied for disability benefits and had a suspended driver's licence. She frequently used or allowed vulgar and racist language and denigrated the father in the children's presence. Family Court described the mother's home as "deplorable, sloppy and chaotic" and the mother, who had participated in damaging her home, was being evicted from the home. Additionally, the mother was indicated for educational neglect by allowing her other child to miss school and the subject child to miss considerable time from kindergarten. Although change in custody would result in the separation of the subject child from his half-sister, the court considered this factor and properly determined the other factors outweighed the impact of the separation. Based on all the factors and giving due deference to the court's credibility determinations, there was a substantial basis in the record to determine that change in custody was in the child's best interests.

*Matter of Joseph WW. v Michelle WW.*, 118 AD3d 1054 (3d Dept 2014)

### **Child's Best Interest to Grant Mother Primary Physical Custody**

Divorced parents agreed to joint legal custody of the child, with the child residing two weeks in Canada with the mother and two weeks in New York with the father. When the child reached school age, the father filed to modify custody seeking primary, physical custody and the mother cross-petitioned for same. After a hearing, Family Court ordered that the parties would alternate physical custody of the child on a yearly basis. The Appellate Division reversed. Both parties agreed there had been a change in circumstances based on the child attaining school age, and the parties' inability to agree on a plan. Based on the totality of the circumstances, it was in the child's best interest to award primary,

physical custody to the mother. While both parents had a loving and close bond with the child, communicated with each other effectively and were willing to foster a relationship between the child and the other parent, the mother had been the primary care-giver during the first three years of the child's life and the father agreed the mother was the more nurturing parent. Additionally, the child needed greater stability during the school year. The mother was in touch with the child's teachers and medical providers in both Canada and New York. Furthermore, the mother's home was within walking distance from the school. She lived with her parents, a child from a prior relationship and the subject child and had a close relationship with all of them.

*Matter of Nelson v Perea*, 118 AD3d 1057 (3d Dept 2014)

### **Sound and Substantial Basis in the Record to Award Father Primary, Physical Custody**

Family Court issued an order of joint legal custody with primary, physical custody to the father. The Appellate Division affirmed. Based on the totality of circumstances and giving due deference to the court's credibility determinations, there was sound and substantial basis in the record to find that it was in the child's best interests to grant physical custody to the father. The parties were the only ones to testify at the hearing. The evidence showed that after the parties separated, the mother had moved five times, four times within the county and the fifth time to another county, 67 miles from the parties' previous home. The mother's work schedule as a home health aide require her to work three 12 hour shifts per week, her hours changing depending on the health of the patient. On the other hand, the father lived in the same home he had lived in for nine years, had adjusted his work schedule to be more regular and predictable in order to spend more time with his family. He had also enrolled the child in a Head Start program. While both parties had children from prior relationships who resided with them, the extended families of both parents lived in the county where the father resided and the father's aunt and uncle often provided day-care services for the child. The father testified he encouraged the child's relationship with the mother and wanted the mother involved in the child's life, while the mother testified the father could see the child "if he want[ed] to come and get him".

*Matter of Holland v Klingbell*, 118 AD3d 1077 (3d Dept 2014)

### **Modification of Order After Appeal Filed Makes Appeal Moot**

The Appellate Division affirmed an order of Family Court granting joint legal custody of the subject children to the parents. Thereafter, further proceedings resulted in Family Court and the court awarded the father more parenting time. The mother appealed but during the pendency of the appeal, the parties entered into a consent order modifying the order from which the mother appealed. Since the issues appealed from were based on the father's parenting time and since this issue was addressed before issuance of the consent order, the appeal was deemed moot.

*Matter of Cole v Cole*, 118 AD3d 1171 (3d Dept 2014)

### **Ample Support For Court's Award of Sole Custody to the Mother**

Family Court awarded sole legal custody of the subject child to the mother and parenting time to the father. The Appellate Division affirmed. There was ample support for the court's determination that joint custody was not feasible. The parties separated due to allegations that the father had confronted the mother in the shower, holding a lighter in one hand and lighter fluid in the other, and thereafter choked her. The parties' relationship and history showed they were unable to work or communicate with each other. It was in the child's best interests to grant sole legal custody to the mother. The father, who lived with his girlfriend, was unemployed and his sole source of income was unemployment insurance benefits. The girlfriend had two children from a prior relationship and when the subject child's visits with the father coincided with the girlfriend's visits with her children, the child had to share a bunk bed with one of the girlfriend's children. Although the mother lived with her boyfriend, who had a child from a previous relationship, the subject child had her own bed in the mother's home. Additionally, the mother was employed full-time and was actively pursuing a nursing degree. The mother was able to provide the child with a more stable life, and although the mother had bouts with depression, she was the party more likely to foster a relationship between the child

and the other parent.

*Matter of DeMele v Hosie*, 118 AD3d 1176 (3d Dept 2014)

### **Court Improperly Relied on Attorney for the Child and Father Did Not Receive Meaningful Representation**

Maternal grandparents obtained custody of two children while the father was incarcerated. Later, the grandparents obtained custody of the third child and during this period of time, in anticipation of his forthcoming release, the father petitioned for custody of the third child. At subsequent appearances, Family Court continued custody of the children with the grandparents and granted the father supervised visitation. Thereafter, without holding a hearing, the court determined the father was an untreated sex offender, modified the visitation schedule and stated that future custody modification petitions filed by the father would not be considered until he completed sex offender treatment. The father appealed arguing he was denied effective assistance of counsel. The Appellate Division agreed and reversed. The court's belief that the father was an untreated sex offender was based on information from the attorney for the child, obtained outside the record, and its accuracy was challenged by the father. There was no evidence that the lack of treatment would be detrimental to the children. Additionally, the court improperly relied upon the attorney for the child as both an investigative arm of the court and as an advisor, referring to her as the court's "quarterback" and deferring to her recommendations. The father's attorney's failure to object to the improper use of the attorney for the child, or to request a fact-finding hearing made the attorney's representation less than meaningful.

*Matter of William O. v Michelle A.* 119 AD3d 990 (3d Dept 2014)

### **Family Court Erred in Failing to Conduct a Fact-Finding Hearing**

Family Court issued an order of sole custody to the father and visitation to the mother. Thereafter, the mother filed a modification petition and the father filed two violation and one modification petition. After

allowing the parties to speak about their petitions and allowing the attorney for the child to discuss the children's situation, Family Court asked the parties' to swear to the truth of their statements, dismissed all petitions except the father's modification petition and modified the mother's parenting time. The Appellate Division reversed. Family Court erred in failing to conduct a fact-finding hearing. The matter had been set down for a hearing and the parties should have been afforded a full and fair opportunity to be heard. They had no opportunity to make opening or closing statements, present other evidence or conduct cross-examination. Additionally, the court did not make any findings of fact to support its decision and it failed to indicate whether it conducted the mandatory review of decisions addressing child abuse and neglect, reports of statewide registry and sex offender reports.

*Matter of McCullough v Harris*, 119 AD3d 992 (3d Dept 2014)

### **Due Deference Given to Family Court's Credibility Determinations**

Family Court dismissed both parties' custody modification petitions as well as the mother's several violation petitions. The Appellate Division affirmed. Two of the three children had reached the age of 18 by the time the appeal was heard, so the issues with regard to them were moot. With regard to the third child, much of the proof turned on credibility issues and the court found that both parties lacked credibility. According due deference to Family Court credibility determinations, its finding there had not been a change in circumstances warranting modification was supported by a sound and substantial basis in the record. Likewise, resolving the mother's violation petitions rested primarily upon the assessment of her testimony. Giving due deference to the court's credibility determinations, there was no error in its determination that the violation petitions should be dismissed.

*Matter of Cobane v Cobane*, 119 AD3d 995 (3d Dept 2014)

### **Sound and Substantial Basis in the Record to Award the Mother Physical Custody**

Family Court awarded the parties' joint legal custody with physical custody to the mother and visitation to the father. The Appellate Division affirmed. There were several factors to consider in determining what was in the child's best interests. These included, but were not limited to, the child's age and wishes, the parents' relative fitness, stability and previous performance, their relative home environments and whether the custodial parent would encourage a relationship between the child and the other parent. Here, the mother had been the child's primary caregiver and assumed responsibility for his medical needs. Although she suffered from prescription drug dependency and other maladies, she was willing to engage in treatment, and though she was disabled and unable to work, she was financially stable and had an appropriate home. Additionally, she encouraged a relationship between the child and his father. On the other hand, the father, who lived in Florida, only had sporadic contact with the child, was financially dependant upon his parents and owed \$25,000 in child support arrears. He also had a criminal history and refused to relocate to New York where the child had developed significant emotional contacts. Based on this evidence, there was a sound and substantial basis in the record for the court's determination.

*Matter of Windom v Pemberton*, 119 AD3d 999 (3d Dept 2014)

### **Sufficient Basis to Issue Order of Protection Against Grandmother and Modify Her Visits With Grandchild**

Family Court modified the maternal grandmother's visitation with her grand-daughter to supervised visits, delegated the frequency of such visits to the child's biological father who was also the supervisor, and granted the mother a two-year no-contact order of protection against the grandmother. The Appellate Division determined the court's decision was appropriate except for the provision regarding the frequency of the supervised visits, as this was an improper delegation to the biological father, and remitted this issue to the court. Although Family Court did not specify which family offense the grandmother

committed, an independent review of the record showed she committed the crime of harassment in the second degree. Here, the grandmother and mother became engaged in a verbal altercation over the grand-daughter and the confrontation became a physical tug-of-war over the child. The grandmother shoved the mother out of her home, causing her to fall back and strike her head on the door. When the mother tried to take the child, the grandmother punched her in the face. The mother had seven children, although only two resided with her and were the subject of this proceeding, and this incident was witnessed by all the children. Based on this evidence and the mother's longstanding discord with the grandmother, and giving due deference to the court's credibility assessments, there was sufficient basis to establish a family offense. Additionally, even though the court did not make a determination as to whether there had been a change in circumstances reflecting a genuine need for modification, an independent review of the record showed that the deterioration in the parties' relationship was sufficient to make such a finding. Although the grandmother and the granddaughter had a close relationship, modification of the order was necessary. The grandmother kept filing police and child protective reports against the mother, openly favored this child over the other grandchildren and there was intense animosity between the two women. The grandmother's inability to respect the mother's role as the parent in a manner consistent with the child's interests reflected that supervised visits were in the child's best interests.

*Matter of Christina KK.v Kathleen LL.*, 119 AD3d 1000 (3d Dept 2014)

### **Sound and Substantial Basis in the Record to Modify Custody**

Family Court modified an order of sole legal custody to the father to joint legal custody with primary, physical custody of the parties' children to the mother. The Appellate Division affirmed. There had been a CPS investigation of the father and the report was indicated for child maltreatment due to the father and step-mother's substance/alcohol abuse and domestic violence. Although the mother had a history of substance abuse, there were no current safety concerns. Additionally, the mother had remarried and now lived in the children's school district and she and her husband

seemed committed to providing the children with a stable home. This evidence showed a sufficient change in circumstances reflecting a real need for modification to ensure the children's best interests. Factors to consider in determining whether modification would be in the children's best interests included, among other things, the parent's ability to provide a stable environment, the children's wishes, the parent's past performance, ability to provide for the children's well-being and the willingness to foster a relationship between the children and the other parent. Considering all the circumstances and deferring to the court's credibility determinations, there was sound and substantial basis in the record to support the court's determination.

*Matter of Lawrence v Kowatch*, 119 AD3d 1004 (3d Dept 2014)

#### **Mother's Conduct in Alienating Older Child From Father Supported Award of Sole Legal Custody of Younger Child to Father**

Supreme Court awarded sole legal custody of the parties' younger child to the father and joint legal custody of the older child with primary, physical custody to the mother. The Appellate Division affirmed. Since the older child had turned 18 by the time the appeal was heard, any issues with regard to the child were deemed moot. Here, testimony from the court appointed forensic psychologist showed the mother's conduct had resulted in severe alienation between the older child and the father and if the younger child remained with the mother, the same result would occur. While the mother's conduct may not have been intentional, it was clear she failed to recognize the children were entitled to a meaningful relationship with their father and evidence of her interference with this relationship raised a strong probability that she was unfit to act as the custodial parent. Additionally, the younger child was anxious and guarded with the mother but appeared comfortable and open when she was with the father and his family. While the father was rigid about contact between the child and the mother, this was due to directions he had received from mental health professionals and legal counsel. Although separating siblings was not generally desirable, such a result was outweighed where the record showed that doing so would be in the

children's best interests. Furthermore, giving due deference to the court's credibility determinations, there was a sound and substantial basis in the record for the court's decision.

*Robert B. v Linda B.*, 119 AD3d 1006 (3d Dept 2014)

#### **Sound and Substantial Basis in the Record to Award Physical Custody to the Father**

Family Court awarded the father custody with reasonable parenting time to the mother. The Appellate Division affirmed. While the court's order did not make it clear what type of custody was awarded to the father, based on the record it was reasonable to conclude the father had been granted physical custody with the parties still maintaining joint legal custody. There was sound and substantial basis for the court's determination. While both parties seemed to be capable and caring, the father had a stable home, was employed full-time and had a support system. On the other hand, the mother had resided in three different places during the first year of the child's life, was unemployed and dependant on public assistance for support. Furthermore, the mother did not have a reliable support network and was involved in a relationship where she was subjected to domestic violence. Finally, the court's order of visitation to the mother was appropriate. While the order provided the mother could have "reasonable visitation...as the parties may arrange", such flexible provisions were not inflexible and due deference should be given to the trial court's credibility determinations.

*Matter of Alleyne v Cochran*, 119 AD3d 1100 (3d Dept 2014)

#### **Sound and Substantial Basis in the Record to Deny Grandparent's Relocation Petition**

Family Court denied custodian grandfather's application to relocate with the subject child and modified the mother's visitation, granting her overnight weekend visits every weekend. Family Court had a sound and substantial basis in the record to deny the grandfather's relocation petition. The grandfather failed to establish the move would improve his financial situation and his contention that the move would provide more winter sports activity for the child, at the

cost of having less time with his mother, was misguided. Additionally, the move would have a significant negative impact on the mother's access to the child. However, while there was no reason to disturb the court's determination that it was in the child's best interest to modify the mother's visitation and set a visitation schedule, the schedule severely limited the child's opportunities for recreation with his school friends or have free time with his grandfather. Furthermore, the court's decision failed to state whether the child's wishes were known or considered by the court. Therefore, the matter was remitted for the court to consider the child's wishes.

*Matter of Seeley v Seeley*, 119 AD3d 1164 (3d Dept 2014)

### **Award of Custody to Grandmothers Affirmed**

In each of two appeals, Family Court granted the parties joint legal custody of the subject child, with primary physical custody to petitioner. The Appellate Division dismissed the appeals insofar as they concerned the best interests of the child, and affirmed. In appeal No. 1, respondent mother appealed from an order determining that her three-year-old son's paternal grandmother, the petitioner therein, established extraordinary circumstances in seeking custody of him. In appeal No. 2, the mother appealed from an amended order determining that her one-year-old daughter's maternal grandmother, the petitioner therein, established extraordinary circumstances based upon the testimony of the paternal grandmother with respect to her petition in appeal No. 1. Following Family Court's finding in each case of extraordinary circumstances, the mother consented to findings that it was in the best interests of each child that the mother and the respective grandmother share joint custody of the child at issue and that the physical placement of the child shall be with the respective grandmother. In light of the mother's consent, the best interests portions of the order were not appealable. However, the mother's consent to the custody disposition did not eviscerate the right to contest the finding of extraordinary circumstances. With respect to the petition of the maternal grandmother in appeal No. 2, Family Court was not required to hold a hearing on the issue of extraordinary circumstances because it possessed sufficient information to render an informed

determination on that issue based upon the evidence presented at the hearing in connection with the paternal grandmother's petition in appeal No.1. The paternal grandmother testified that, during the period from January 2011 to September 2011, the mother moved with the children six times after being evicted from her apartment. The mother lived with friends and in motels during that period, and the paternal grandmother observed extremely dirty living conditions in the various locations. Furthermore, the paternal grandmother testified that, at one location, the mother's friends threw the mother's and grandson's belongings into the street, and that the mother failed to obtain necessary medical care for the grandson. Moreover, the grandmother observed a negative change in her grandson's demeanor and behavior. Therefore, Family Court properly determined that the paternal grandmother in appeal No. 1 and the maternal grandmother in appeal No. 2 established that the mother's unstable and unsanitary living conditions rendered her unfit, and thus established that extraordinary circumstances existed to warrant a hearing to determine the best interests of the children.

*Matter of Braun v Decicco*, 117 AD3d 1453 (4th Dept 2014)

### **Family Court Properly Awarded Physical Residency to Mother Notwithstanding Mother's Relocation With Children to Maine Without Father's Permission**

Family Court awarded the parties joint custody of their children, with physical residency to respondent mother. The Appellate Division affirmed. Inasmuch as the case involved an initial custody determination, it was not properly characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* need be strictly applied, notwithstanding the mother's relocation to Maine with the children without the father's consent. The court's determination to award the mother primary residency of the children had a sound and substantial basis in the record. The mother had been the children's primary caretaker since their birth and was more involved in the children's lives than the father. Although the children's relocation arguably had a negative impact on the children's relationship with the father, relocation was not a proper basis upon which to award primary physical custody to the father

inasmuch as the children would need to travel between the parties' two residences regardless of which parent was awarded primary physical residency.

*Matter of Quistorf v Levesque*, 117 AD3d 1456 (4th Dept 2014)

### **Grant of Custody to Nonparent Reversed**

Family Court granted sole custody of the subject children to petitioner, a nonparent. The Appellate Division reversed. Family Court deprived a biological parent of custody of her children without the requisite evidentiary hearing on the issues of extraordinary circumstances and best interests. Instead of conducting the hearing on the date it was to begin, the court asked the parents what witnesses would be called on their behalf. When the parents responded that they would be testifying but that they had no other witnesses, the court stated that it found no triable issues of fact and granted the nonparent's petition for custody. Thus, the court failed to place the burden of proof on the nonparent to prove that extraordinary circumstances exist. Additionally, the home study on which the court relied was potentially out of date when the court granted the petition.

*Matter of Griffin v Griffin*, 117 AD3d 1570 (4th Dept 2014)

### **Appeal Mooted by New Information Submitted by AFC**

Family Court dismissed three petitions that the mother filed against the father with respect to the mother's visitation with the parties' daughter. The Appellate Division affirmed, noting that although the mother filed a notice of appeal with respect to all three orders, the only issues raised in her brief concerned the visitation order in appeal No. 2. Accordingly, the mother was deemed to have abandoned any issues concerning the orders in appeals Nos. 1 and 3. With respect to appeal No. 2, the Attorney for the Child submitted new information obtained during the pendency of the appeal, indicating that the order of visitation had been superseded by a subsequent order. Therefore, the mother's challenge to the order in appeal No. 2 was rendered moot, and an exception to the mootness doctrine did not apply.

*Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575 (4th Dept 2014)

### **Denial of Request to Appoint Separate AFC Affirmed**

Family Court awarded petitioner father sole custody of the parties' two children, with liberal visitation to respondent mother. The Appellate Division affirmed. The mother's contention was rejected that Family Court erred in failing to appoint separate attorneys for the children when, during the trial, the parties' son expressed a desire to reside with the mother, which was not consistent with the daughter's expressed wishes. Both children had previously informed the AFC that they wanted to continue to reside with the father, who had been granted temporary custody. However, during the trial, the AFC advised the court that the son, age nine, wanted to live with his mother because, at her house, "he can stay up late and he doesn't get into trouble." The AFC further stated that, in his view, the son's position was "immature and thus not controlling" upon the AFC. Following a *Lincoln* hearing, the court denied the mother's request to appoint a new AFC for her son. At the conclusion of the trial, the court awarded custody of both children to the father, as advocate by the AFC. Based upon the Appellate Division's review of the transcript of the *Lincoln* hearing, during which the court interviewed the son at length, the court properly denied the mother's request to appoint separate counsel for the son. Although the reasons could not be stated given the confidential nature of the *Lincoln* hearing, the AFC on appeal asked the Appellate Division to affirm, thereby indicating that the son did not object to the court's failure to appoint separate counsel on his behalf. Additionally, there was a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award sole custody to the father, and thus, the determination was not disturbed.

*Matter of Shaw v Bice*, 117 AD3d 1576 (4th Dept 2014)

### **Family Court Properly Determined that Factors Set Forth in Domestic Relations Law Section 76-f (2) Favored New York Retaining Jurisdiction**

Family Court awarded sole legal custody of the parties' children to respondent father. The Appellate Division

affirmed. In October 2011, the parties agreed to a stipulated order that, among other things, gave them joint legal custody of their children, with the father having primary physical custody and the mother having liberal visitation. At the time, the father lived in North Carolina and the mother was in the process of relocating to North Carolina. However, the mother returned to New York and filed a petition in January 2012 seeking to enforce the stipulated order, and a subsequent petition seeking primary physical custody of the children. After a hearing, the court granted the father sole legal and primary physical custody of the children and granted the mother liberal visitation. The father's contentions were rejected that the stipulated order vested jurisdiction in the North Carolina courts. The stipulated order merely allowed either party to petition a North Carolina court to modify visitation; it did not require a party to do so. Moreover, the parties could not, by agreement, confer jurisdiction on either state. The court did not err in denying the father's motion to stay the mother's enforcement petition and to transfer the proceeding to North Carolina on the ground that New York was an inconvenient forum. The record supported the court's determination that the factors set forth in Domestic Relations Law Section 76-f (2) favored New York retaining jurisdiction. In particular, the record established that the children had not resided in North Carolina for very long; the father had more financial resources than the mother to enable him to travel to New York for court proceedings; and the New York courts have had prior involvement with the parties. Moreover, the court allowed the father to present the testimony of several witnesses via telephone. The court's custody determination had a sound and substantial basis in the record.

*Matter of Abbott v Merritt*, 118 AD3d 1309 (4th Dept 2014)

### **Denial of Modification Petition Affirmed**

Following a hearing, Family Court denied father's petition to modify a prior custody order that granted sole custody of the parties' daughter to respondent mother. The Appellate Division affirmed. Family Court did not specifically address whether the father established a change in circumstances. However, its determination that the father failed to establish that sole custody should be granted to him, rather than to the

mother, was the product of careful weighing of the appropriate factors, and had a sound and substantial basis in the record.

*Matter of Gugino v Tsvasman*, 118 AD3d 1341 (4th Dept 2014)

### **Seven-Year-Old with Down Syndrome Lacked Capacity for Knowing, Voluntary and Considered Judgment**

Family Court modified the parties' judgment of divorce by transferring primary physical custody of the parties' child from respondent mother to petitioner father. The Appellate Division affirmed. There was a sufficient change in circumstances to warrant a modification of the existing custody arrangement; specifically, the mother moved several times, including one move three hours away from the father. The court's determination to award primary physical custody to the father was in the child's best interests and supported by a sound and substantial basis in the record. The mother's various relocations were made to further her own interests, rather than to benefit the child. There was testimony that the child, who had Down syndrome, would benefit from a stable home environment, which the father could better provide. Although unrepresented for review, the mother's contention lacked merit that the Attorney for the Child improperly substituted her judgment for that of the child. The record supported the finding that the child, who was seven years old at the conclusion of the hearing and functioned at a kindergarten level, lacked the capacity for knowing, voluntary and considered judgment.

*Matter of Eastman v Eastman*, 118 AD3d 1342 (4th Dept 2014)

### **Record Established Change in Circumstances**

Family Court awarded petitioner father primary residential custody of the parties' child, among other things. The Appellate Division affirmed. The father established the requisite change in circumstances. The record established that respondent mother repeatedly took away the child's cell phone, thereby preventing the father from communicating with the child by telephone, and that, on one such occasion, the mother made a video recording of the child's tearful response. The

record also supported the court's determination that, although the child had been outgoing in nature with a sunny disposition, she became withdrawn, sad and subject to emotional outbursts after the mother moved in with her current boyfriend and his three children. In addition, while not dispositive, the court properly considered the preference of the child to alter the existing custody arrangement in determining whether there had been a change in circumstances.

*Matter of Cheney v Cheney*, 118 AD3d 1358 (4th Dept 2014)

### **Split Custody in Children's Best Interests**

Family Court awarded the parties joint physical custody of their younger son, awarded respondent father sole physical custody of the older son, and established a visitation schedule. The Appellate Division affirmed. Split custody was warranted in the best interests of each son, and the visitation schedule afforded the siblings substantial time together. The parties were able to share physical custody of their younger son because he was not yet enrolled in school, and thus alternating weekly residency was in his best interests. The award of sole physical custody of the older son to the father permitted that son to remain in school where he was enrolled and performing well.

*Matter of Miller v Jantzi*, 118 AD3d 1363 (4th Dept 2014)

### **Family Court Properly Terminated Father's Visitation**

Family Court terminated respondent father's visitation with the subject child until further order of the court. The Appellate Division affirmed. The father's contention was rejected that petitioner mother failed to establish a change in circumstances sufficient to justify modification of the prior custody order, which granted supervised visitation to the father. Among other things, the mother established that the father allowed a man he met in jail to have sexual intercourse on multiple occasions with his older daughter, who was then 16 years old, in return for drugs. The mother also established that the father, a two-time convicted felon, smoked crack cocaine in the presence of his older daughter. Although the father's conduct in this regard

occurred before the prior custody order was entered, the mother asserted without contradiction that the father's conduct was not known by her or the court when the prior order was entered upon stipulation. The mother's newfound awareness of the father's prior conduct constituted a sufficient change in circumstances to modify the father's visitation rights. Moreover, the mother established a change in circumstances that arose after entry of the prior order inasmuch as, since the prior order was entered, the father experienced visual and auditory hallucinations and paranoia. Thus, there existed compelling reasons and substantial evidence showing that continued visitation with the father would be detrimental to the child, and that the court's determination was in the child's best interests.

*Matter of Frisbie v Stone*, 118 AD3d 1471 (4th Dept 2014)

### **Order Reversed Where Petitioner Denied Right to Counsel**

Family Court awarded petitioner father sole custody of the subject child. The Appellate Division reversed and remitted for a new hearing. Respondent mother was denied her right to counsel. The mother was entitled to representation based upon her status as a respondent in a Family Court Act article 6 proceeding and a person alleged to be in willful violation of a court order. Family Court's inquiry concerning her decision to proceed pro se was insufficient to enable the court to determine whether she knowingly, intelligently and voluntarily waived her right to counsel.

*Matter of Seifert v Pastwick*, 118 AD3d 1503 (4th Dept 2014)

### **Order Reversed Where Mother Made Sufficient Evidentiary Showing to Warrant Hearing**

Family Court dismissed the mother's custody modification petition. The Appellate Division reversed, reinstated the petition and remitted the matter. Family Court erred in dismissing the petition without conducting a hearing. The mother made a sufficient evidentiary showing of a change in circumstances to warrant a hearing. The mother's allegations that the father imposed excessive and inappropriate discipline on the subject children, including corporal punishment,

were sufficient to warrant a hearing, as were the mother's allegations that the father had refused to permit her to exercise visitation with the subject children for four weeks.

*Matter of Isler v. Johnson*, 118 AD3d 1504 (4th Dept 2014)

### **Reduction in Father's Weekend Access to Children Affirmed**

Family Court awarded respondent mother sole legal and physical custody of the parties' children and reduced petitioner father's weekend access to the children. The Appellate Division affirmed. The father failed to demonstrate a change in circumstances sufficient to modify the existing custody order. The mother made a sufficient showing of changed circumstances for the purpose of adjusting the visitation schedule based on, among other things, the parties' inability to reach an agreement regarding certain aspects of the visitation schedule, the mother's work schedule, the fact that the mother's former boyfriend was no longer providing childcare for the children in her home where Friday afternoon exchanges occurred, and the extra time required to get the children prepared for an upcoming week of school on Sunday evening. The adjusted visitation schedule was in the best interests of the children.

*Matter of Jones v Laird*, 119 AD3d 1434 (4th Dept 2014)

### **Mother Could Not Raise Issue That Judge Should Have Recused Himself After Consenting That Judge Hear Case**

Family Court dismissed the mother's amended petition for a modification of custody. The Appellate Division affirmed. The mother's contention was rejected that the Family Court Judge presiding over the case should have recused himself. The Judge informed the parties that he and respondent father had a mutual friend and that he had met the father one or two times prior to the proceeding. The Judge further stated that he was not a friend of the father and that he did not believe there was any reason to recuse himself. The mother was given the opportunity to discuss the matter with her attorney, and the mother's attorney, after conferring with her

client, waived any objection. Therefore, the mother could not raise the issue on appeal after consenting that the Judge hear the case. The court properly dismissed the amended petition. The mother's contention was rejected that she made a showing of the requisite change in circumstances with evidence of a change in her work schedule. At the hearing on the amended petition, the mother admitted that her new work hours did not reduce the amount of time she could spend with the children during her scheduled visitation period.

*Matter of Gross v Gross*, 119 AD3d 1453 (4th Dept 2014)

### **Court Erred in Failing to Hold Hearing on Mother's Relocation Motion**

Supreme Court, among other things, denied defendant mother's motion to relocate outside the Lewiston School District. The Appellate Division modified and remitted to the court for a hearing. In this divorce action, the mother sought permission to relocate with the parties' children from Lewiston to Grand Island, a distance of about 17 miles. The court erred in failing to consider whether the relocation was in the children's best interests. Defendant's submissions in support of her motion, including her sworn statements that she was unable to find appropriate, affordable housing or a suitable teaching position in the high-priced Lewiston area, established the need for a hearing. Further, although plaintiff disputed some of defendant's factual assertions, he did not assert that the relocation would be detrimental to the children or to his relationship with the children. There was no indication in the record that the quality of education in Grand Island was inferior to the education available in Lewiston. Contrary to the contention of defendant, however, plaintiff made a sufficient evidentiary showing of a change in circumstances to require a hearing on whether the existing custody order should be modified. Plaintiff asserted that there had been a complete breakdown in communication between the parties, defendant had him arrested on baseless grounds, filed a false child protective services report against him, and failed to discuss important decisions concerning the children's health, education, and counseling.

*Lauzonis v Lauzonis*, 120 AD3d 922 (4th Dept 2014)

**Petition for Modification of Stipulated Order Awarding Custody to Grandparents Properly Dismissed**

Family Court dismissed the father’s amended petition for modification of custody. The Appellate Division affirmed. Pursuant to a stipulated order, respondents, the children’s maternal grandparents, had joint legal custody of the children with the father and respondent mother, and the grandparents had primary physical residence of the children with visitation to the father. The court erred in failing to conduct the threshold inquiry whether extraordinary circumstances existed to warrant the continuation of primary physical residence with the grandparents. The nonparent had the burden of establishing that extraordinary circumstances existed even where, as in the instant case, the prior order granting custody of the child to the nonparent was made upon consent of the parties. However, the record was adequate to conduct the threshold inquiry. The requisite extraordinary circumstances were found based on the father’s history of domestic violence, including an incident that occurred in the presence of one of the children and resulted in at least three orders of protection and incarceration, the father’s history of substance abuse, and his sporadic contact with the children. Nevertheless, the father failed to demonstrate a change in circumstances to warrant an inquiry into the best interests of the children on the issue of custody because the record did not support his contention that there was a deterioration in the parties’ relationships and that the grandparents interfered with his scheduled visitation or telephone access. Moreover, the father’s contention was rejected that the court erred in refusing to retain jurisdiction over a subsequent modification petition. There was a sound and substantial basis in the record to support the court’s determination that Vermont was the more appropriate forum.

*Matter of McNeil v Deering*, 120 AD3d 1581 (4th Dept 2014)

**FAMILY OFFENSE**

**Respondent Committed Multiple Family Offenses**

Family Court, upon a fact-finding determination that respondent committed acts constituting menacing in the third degree, disorderly conduct, harassment in the

second degree and stalking in the fourth degree, entered a two-year order of protection against him on behalf of petitioner and her children. The Appellate Division affirmed. The finding that respondent committed the family offenses was supported by a preponderance of the evidence. Respondent failed to preserve his contention that the court should not have admitted petitioner’s son’s testimony that he listened in on telephone conversations between respondent and petitioner and the Appellate Division declined to review it in the interests of justice. In any event, any error was harmless. Respondent also failed to preserve his contention that the harassment charges as applied to him violated his constitutional right to free speech and the Appellate Division declined to review it in the interests of justice. Alternatively, the applicable statutes did not prohibit free speech, but rather prohibited only illegitimate communication.

*Matter of Gracie C. v Nelson C.*, 118 AD3d 417 (1st Dept 2014)

**Petitioner Entitled to Hearing on Violation Petition**

After a fact-finding hearing, the Family Court properly determined that the petitioner failed to establish, by a preponderance of the evidence, that the respondent committed a family offense (*see* FCA §§ 812, 832). However, the Family Court erred in summarily dismissing the petition alleging that the respondent, among other things, communicated with the petitioner in violation of a temporary order of protection. The Family Court should have afforded the petitioner the opportunity to be heard with respect to those allegations. The violation petition sufficiently alleged that the respondent wilfully violated the temporary order of protection and, thus, the petitioner was entitled to a hearing on that petition. Accordingly, the matter was remitted to the Family Court for a hearing and a new determination thereafter of the violation petition.

*Matter of Tyler v Wright*, 119 AD3d 595 (2d Dept 2014)

**Court Erred in Granting Husband's Motion to Dismiss Wife's Application for Order of Protection**

Supreme Court granted the husband's motion to dismiss the wife's application for an order of protection. The

Appellate Division reversed and remitted the matter. Here, the wife commenced a divorce action seeking, among other things, exclusive use and occupancy of the marital home and a stay away order of protection. Although she did not specify a particular family offense, the proof adduced at the hearing, which was solely based on the wife's testimony, was sufficient to make out a prima facie case of harassment in the second degree. Instead of asking the husband if he intended to offer any proof, the court granted his motion to dismiss. In evaluating the husband's motion, the court was required to view the facts in the light most favorable to the wife and rather than granting the motion, the court should have continued the hearing and made a credibility assessment based upon all the proof.

*Matter of Jennifer JJ. v Scott KK.*, 117 AD3d 1158 (3d Dept 2014)

#### **Error to Grant Summary Judgment Motion**

Family Court issued a temporary order of protection on behalf of petitioner and his child against respondent. Thereafter, petitioner alleged respondent had violated the temporary order of protection and although the matter was scheduled for a hearing, the court granted the petitioner's oral request for summary judgment on the violation petition. The Appellate Division reversed. Contrary to respondent's argument that the family offense petition did not sufficiently state a cause of action, upon liberally construing the petition and giving petitioner the benefit of every favorable inference, the allegations contained were sufficient to state the crime of harassment in the second degree and both parties admitted to being in an intimate relationship. However, questions of fact did exist with regard to whether respondent's violation of the temporary order was willful and it was error to grant the motion for summary judgment.

*Matter of Craig O. v Barbara P.*, 118 AD3d 1068 (3d Dept 2014)

#### **JUVENILE DELINQUENCY**

##### **Respondent's JD Finding And Dispositional Order Reversed**

Respondent was adjudicated a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would have constituted the crime of menacing in the third degree and placed her on probation for 12 months. The Appellate Division reversed and dismissed the petition. This was respondent's first offense. She admitted the allegations of the petition but asserted, as did her mother, that the incident resulted from being bullied by the complainant, with no corrective action taken by respondent's school. While respondent had truancy issues at school, at the time of the disposition she was employed, was being treated for depression, and was generally making progress. Thus, there was no reason to believe that respondent needed more supervision than that which could be provided under an ACD. The dissent would have affirmed because the court based the delinquency determination upon the violent nature of the act and respondent's total lack of remorse.

*Matter of Clarissa V.*, 117 AD3d 494 (1st Dept 2014)

##### **Court Properly Declined to Adjudicate Respondent a PINS**

Respondent was adjudicated a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of petit larceny and placed her with ACS for 12 months in nonsecure detention. The Appellate Division affirmed. Although the underlying offense was not serious, respondent was in need of a residential, nonsecure placement. The court properly declined to adjudicate respondent a PINS, particularly because she had demonstrated following a prior proceeding brought by her mother that a PINS disposition would not control her behavior.

*Matter of Amari D.*, 117 AD3d 522 (1st Dept 2014)

##### **Fact-finding Was Against the Weight of the Evidence; Credibility of Police Officer's Testimony Called into Question**

The defendant was adjudicated a juvenile delinquent on the basis of the Family Court's finding that he committed acts which, if committed by an adult, would have constituted the crimes of criminal possession of a weapon in the second degree (*see* PL § 265.03 [3]) and

criminal possession of a weapon in the fourth degree (*see* PL § 265.01 [1]). The defendant argued that the fact-finding was against the weight of the evidence. The Appellate Division agreed. Two police officers testified at the fact-finding hearing that they observed the defendant remove a firearm from his waistband, toss it on the ground, and flee the scene. However, the credibility of one of those officers, Police Officer Michael Burbridge, was seriously called into question by his testimony on cross-examination. On cross-examination, Officer Burbridge admitted that a jury in a federal civil lawsuit found him liable for, *inter alia*, false arrest and malicious prosecution. That case was commenced against Officer Burbridge in connection with an arrest he made in 2008, where Officer Burbridge claimed that he observed the man remove a gun from his waistband and throw it into the street. The man contended that Officer Burbridge and the other officer involved were lying, and that it was his companion who discarded the gun. The defendant's counsel also elicited testimony from Officer Burbridge detailing his Internal Affairs Bureau complaint history. In addition, the defendant presented evidence at the fact-finding hearing indicating that another individual, rather than the defendant, threw the weapon recovered by Officer Burbridge. This evidence included the defendant's own testimony and a radio run that corroborated the defendant's version of events. Moreover, the evidence demonstrated that both police officers who testified on behalf of the presentment agency only observed the individual who possessed the firearm for a few moments before that individual fled the scene. Based on the foregoing, the Appellate Division found that the Family Court's fact-finding was against the weight of the evidence. Accordingly, the order of disposition was reversed, the fact-finding order was vacated, the petition was dismissed, and the matter was remitted to the Family Court, for further proceedings pursuant to FCA § 375.1.

*Matter of Shamik M.*, 117 AD3d 1056 (2d Dept 2014)

### **Showup Procedure Was Reasonable; No Evidence of Undue Suggestiveness**

Contrary to the respondent's contentions, the showup procedure by which the complainant identified him was reasonable under the circumstances, having been conducted in close spatial and temporal proximity to

the incident. Furthermore, there was no evidence of undue suggestiveness. Accordingly, the Family Court properly denied suppression of the identification testimony. Viewed in the light most favorable to the presentment agency, the evidence was legally sufficient to establish beyond a reasonable doubt the respondent's identity and that he committed acts which, if committed by an adult, would have constituted the crimes of burglary in the second degree, petit larceny, and criminal possession of stolen property in the fifth degree. Moreover, the Appellate Division concluded that the Family Court's determination was not against the weight of the evidence (*see* FCA § 342.2 [2]).

*Matter of Russell F.*, 118 AD3d 874 (2d Dept 2014)

### **Complainant's In-Court Identification Permitted**

Contrary to the respondent's contention, the Family Court properly denied his motion to preclude the complainant from making an in-court identification. Pursuant to FCA § 330.2 (2), the presentment agency provided adequate notice of its intention to offer, at the fact-finding hearing, the identification testimony of the complainant, who had identified the respondent out of court (*see* CPL 710.30 [1] [b]). Contrary to the respondent's further contention, the presentment agency met its burden of demonstrating that the identification procedure was reasonable and not unduly suggestive. The Appellate Division concluded that the Family Court's fact-finding determination that the respondent committed acts which, if committed by an adult, would have constituted the crimes of attempted assault in the third degree, grand larceny in the fourth degree, robbery in the third degree, and criminal possession of stolen property in the fifth degree, was not against the weight of the evidence (*see* FCA § 342.2 [2]).

*Matter of Wallace P.*, 118 AD3d 888 (2d Dept 2014)

### **Warrantless Search of Book Bag Was Proper**

The Family Court properly denied the defendant's motion to suppress physical evidence. Contrary to the defendant's contention, the arresting officer's testimony at the suppression hearing that he observed the defendant smoking marijuana in public, from a distance of approximately two car lengths, was not incredible as a matter of law. Moreover, the hearing testimony does

not support the defendant's contention that the officer's testimony was a fabrication tailored to nullify constitutional objections. Thus, crediting the officer's testimony, the police had probable cause to arrest the defendant for possession of marijuana in public (*see* Penal Law § 221.10 [1]). The petitioner also met its burden of demonstrating that the warrantless search of the defendant's book bag, incident to the lawful arrest, was proper. The evidence adduced at the suppression hearing showed that, while the arresting officer was placing the defendant up against a wall in order to effectuate a lawful arrest, the officer felt the "slide" of a gun when he placed his hand on the book bag which was on the defendant's back. Under the circumstances presented here, the officer properly searched the bag, which was within the defendant's reach, and recovered a gun.

*Matter of Tonay C.*, 119 AD3d 560 (2d Dept 2014)

### **Respondent Waived His Right to a Speedy Trial**

Family Court adjudicated respondent to be a juvenile delinquent upon his admission to a misdemeanor charge of sexual abuse in the second degree and imposed a conditional discharge for a period of one year. The Appellate Division affirmed. Although by the time the appeal was heard the period of respondent's conditional discharge had expired, the proceeding was not rendered moot since delinquency determinations implicate "possible collateral legal consequences". However, contrary to respondent's argument that he was denied the right to a speedy trial, the record showed it was respondent's counsel's requests for adjournments to file motions which delayed the trial and extended the proceeding past the statutory speedy trial limit. Therefore, respondent waived his right to a speedy trial.

*Matter of Ryan LL.*, 119 AD3d 994 (3d Dept 2014)

### **Court Did Not Abuse Discretion by Failing to Order Least Restrictive Placement Available**

Respondent was placed with his mother on a 12-month period of probation after having been adjudicated a juvenile delinquent. Thereafter, respondent admitted to certain probation violations and at the close of the dispositional hearing, the court concluded residential

placement for one-year was warranted. However, instead of immediately placing respondent in the facility, the court gave him the opportunity to live at home during that period of time until an adequate facility was found. However, respondent continued to violate the terms of probation and the court issued two orders, one placing him in residential placement and the other placing him in non-secure detention until a residential placement could be obtained. The Appellate Division affirmed. Family Court did not abuse its discretion by failing to order the least restrictive placement available. It is well settled that a less restrictive option does not have to be utilized unsuccessfully before a more restrictive option is imposed. Here, respondent was initially placed on probation and upon violating the terms of probation, he was once again given a chance to comply with the terms of probation. His repeated noncompliance and failure to change his course of action resulted in the court's order of disposition, which was proper in light of the totality of circumstances.

*Matter of Trevor MM.*, 119 AD3d 1112 (3d Dept 2014)

## **ORDER OF PROTECTION**

### **Grandmother's Motion to Vacate Two-Year Order of Protection Properly Denied**

Family Court denied respondent grandmother's motion to vacate a two-year order of protection for the benefit of the subject children and petitioner mother. The Appellate Division affirmed. Although the order of protection expired, the appeal was not moot because the respondent continued to suffer a permanent stigma from the order and underlying findings. Collateral estoppel did not bar the claim because the consequences of the order of protection were not a significant part of respondent's argument before the AD on her direct appeal from the order of protection. The court properly denied respondent's motion to vacate its prior order and for a new hearing based upon alleged ineffective assistance of counsel. Respondent's attorney actively advocated for the grandmother at the hearing, presented testimony, and cross-examined witnesses. The evidence the attorney declined to offer at the hearing would not have changed the result and was mostly unfavorable to respondent.

*Matter of Marisela N. v Lacy M. S.*, 118 AD3d 449 (1st Dept 2014)

### **Willful Violation of Order of Protection Affirmed**

Family Court determined that respondent father violated an order of protection. The Appellate Division affirmed. Petitioner mother established by clear and convincing evidence that respondent willfully violated the terms of the order of protection directing him to stay away from the mother and the parties' child except during scheduled visitation. The father's challenge to his commitment to jail for a term of six months was moot inasmuch as it had expired by its own terms.

*Matter of Ferrusi v James*, 119 AD3d 1379 (4th Dept 2014)

### **PATERNITY**

#### **Mother Failed to Demonstrate Meritorious Defense to Respondent's Motion to Vacate Paternity Petition**

Family Court granted respondent's motion to dismiss the mother's paternity petition, which alleged respondent was the biological father of one of her three children, upon the grounds of collateral estoppel. The mother did not respond to respondent's motion but thereafter moved, pursuant to CPLR §5015 (a), to vacate the order of dismissal, which Family Court dismissed. The Appellate Division determined the court should not have dismissed her motion without addressing the merits since her sole remedy was to move to vacate the order entered upon her default. However, in the interests of judicial economy and since the record was sufficient to resolve the mother's motion on the merits, the Appellate Division determined it would address the issues. Here, the mother failed to demonstrate a meritorious defense to respondent's motion to vacate her paternity petition. There was no question that the issue of the subject child's paternity was decided in a previous divorce judgment when specific findings were made that the mother's husband, to whom she was married when the child was born, was the child's father. He was listed on the child's birth certificate as her father and he was ordered to pay child support. Although respondent was not a party in the earlier divorce proceeding, he was nevertheless entitled to assert collateral estoppel since "mutuality is not

required". Finally, the mother was represented by counsel in the divorce proceeding and had a full and fair opportunity to litigate the issue.

*Matter of Susan UU. v Scott VV.*, 119 AD3d 1117 (3d Dept 2014)

### **TERMINATION OF PARENTAL RIGHTS**

#### **TPR Petition Reinstated**

Family Court dismissed the petition seeking to terminate respondents' parental rights to the subject child for failure to plan. The Appellate Division reversed, reinstated the petition, made a finding of permanent neglect against both respondents, and remitted for further proceedings. There was clear and convincing evidence that despite the agency's diligent efforts, neither parent showed sufficient planning for the child's future during the relevant statutory period. The child had not lived with the mother since 2000 when he was nine months old. When a finding of neglect was entered against the mother in 2005, she was directed to undertake mental health treatment, and the child was placed in the custody of the father. In 2006, a neglect petition was filed against both parents. The child reported that he had been a passenger in a car driven by his father, who had been drinking beer, and that the car swerved. On another occasion, the father left the child unsupervised in the mother's care, even though she had not received any mental health services. The child was placed in foster care and then a kinship foster home. After findings of neglect were made against respondents in 2009, the father was arrested again for DWI and the child reported that the father, while intoxicated, punched him in the stomach after the child failed to properly carry out a request. Further, the court did not address the then 13-year-old child's desire not to return to his parents' care, with one of the reasons being that on many occasions the father drank when the child was visiting overnight. Despite the two DWI's and his required attendance in alcohol abuse programs, the father referred to his drinking as "a little problem." The father did not have insight into how his alcohol abuse undermined his ability to create and maintain an adequate, stable home, or that it made him a less than fit parent. Despite the mother's contention to the contrary, she failed to obtain mental health services. That failure constituted permanent neglect.

*Matter of Selvin Adolph F.*, 117 AD3d 495 (1st Dept 2014)

### **Best Interests of Male Children Served by Terminating Mother's Parental Rights**

Family Court terminated respondent mother's parental rights and transferred custody and guardianship of the male children to petitioner agency and the Commissioner of DSS for the purpose of adoption. The finding that termination of respondent's parental rights so the children could be adopted by their foster mother, with whom they had bonded with and thrived, was in the male children's best interests was supported by a preponderance of the evidence. Although respondent was issued a suspended judgment on consent with regard to her daughter, that disposition was not warranted with respect to the male children, who, unlike the daughter, had been living in a stable home since placement. Respondent failed to comply with her service plan and it was not in the male children's best interests to wait any longer for the mother to fulfill her parental obligations.

*Matter of Male R.*, 117 AD3d 510 (1st Dept 2014)

### **Respondent's Incarceration No Excuse For No Contact With Child**

Family Court terminated respondent father's parental rights after a fact-finding determination of abandonment and committed the child's custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that respondent abandoned his daughter within the meaning of the Social Services Law. Respondent admitted that he did not contact his daughter or the agency during the relevant statutory period. His incarceration did not excuse him from establishing and maintaining contact with his daughter because he failed to show that such contact was infeasible. The agency was not required to show diligent efforts because it proceeded on the ground of abandonment. Given respondent's admission that he had no contact with his daughter during the relevant statutory period, he could not have been prejudiced by any failing on the part of his trial counsel.

*Matter of Asia Sabrina N.*, 117 AD3d 543 (1st Dept 2014)

### **Respondent Violated Terms of Suspended Judgment**

Family Court granted petitioner agency's motion to revoke respondent's suspended judgment, and terminated respondent's parental rights. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that respondent violated the terms of the suspended judgment. While respondent made efforts to comply with some of the terms of the suspended judgment, she failed to visit the child regularly, obtain suitable housing, and submit to therapy and random drug testing. A preponderance of the evidence supported the court's finding that it was in the child's best interests to be freed for adoption by her foster mother, who had cared for her and her sibling for years.

*Matter of Serenity A.*, 117 AD3d 600 (1st Dept 2014)

### **Respondents Permanently Neglected Their Children**

Family Court, upon a fact-finding determination that respondents permanently neglected the subject children, terminated their parental rights, 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 agency established, by clear and convincing evidence, that it made diligent efforts to strengthen the parent-child relationship by scheduling regular visitation, providing the mother with a visitation coach to improve her interactions with her son, counseling the mother to complete the drug program where she was enrolled, and referring both parents to multiple court-ordered programs, including parenting skills and anger management classes, domestic violence counseling and therapy. However, both parents failed to comply with the agency's referrals and failed to gain insight into the reasons the children had been placed in foster care. The father also failed to attend a required sex offender program. Termination of respondents' parental rights was in the children's best interests. Both children, who were placed in foster care at very young ages had bonded with their respective foster families, where they were well cared for and wished to remain. Respondents' son, who is autistic, was well cared for in

his foster care, whereas respondents lacked understanding of his diagnosis and needs.

*Matter of Emily Jane Star R.*, 117 AD3d 646 (1st Dept 2014)

### **Mother Permanently Neglected Child; Father's Consent Not Required For Adoption**

Family Court, upon a finding that respondent father's consent was not required for the adoption of the subject child and that respondent mother permanently neglected the child, terminated the mother's parental rights and committed the child's custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding that the mother permanently neglected the child was supported by clear and convincing evidence. The agency made diligent efforts by, among other things, scheduling regular visitation and referring the mother to multiple programs. The mother failed to comply with the agency's referrals, attend mental health therapy regularly, and gain insight into the reasons for the child's placement in foster care. Also, the mother refused to separate from the father, notwithstanding her awareness of his drug abuse. She also failed to maintain suitable housing and was often tardy or absent for supervised visitation. It was in the child's best interests to terminate the mother's parental rights. The child was placed in foster care shortly after birth and had never resided with the mother or father. The child has bonded with the foster mother and was doing well in her care. The father's consent to the adoption was not required because the record showed that he did not provide any financial support for the child, although he was able to purchase drugs.

*Matter of Tiara J.*, 118 AD3d 545 (1st Dept 2014)

### **TPR Affirmed**

Family Court, upon a fact-finding determination that respondent mother permanently neglected the subject child, terminated respondent's parental rights, and committed the child's custody and guardianship 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 of the mother's failure to maintain contact with the child or plan for her future, notwithstanding the agency's diligent efforts. Although the agency arranged for regular visitation, the mother's visitation was inconsistent and there were periods where the mother did not visit. The mother also failed to comply with all random drug tests, complete required mental health evaluations, and complete a substance abuse treatment program during the relevant time period. It was in the child's best interests to terminate mother's parental rights. The child had been living with her maternal grandmother since 2007 and the grandmother intended to adopt her. The grandmother had provided loving care to the child and attended to her emotional needs.

*Matter of Jenna Nicole B.*, 118 AD3d 628 (1st Dept 2014)

### **Mother Failed to Comply with Service Plan Which Included a Mental Health Evaluation**

The Family Court properly determined that there was clear and convincing evidence that the mother permanently neglected the subject child by failing, for one year following the child's placement into foster care, to plan for his return. The record established that the petitioner made diligent efforts to help the mother comply with her service plan, which required her to submit to a mental health evaluation, to complete psychotherapy, to complete a parenting skills training program, and to maintain regular visits with the child. At the time the petition was filed, the mother still had not completed psychotherapy and had not maintained regular visitation with the child. The court properly determined that termination of the mother's parental rights was in the child's best interest.

*Matter of Travis G.*, 117 AD3d 1049 (2d Dept 2014)

### **Father Suggested Only Unrealistic and Unsuitable Alternatives to Foster Care for the Duration of the Term of Imprisonment**

Since the father was properly held in default, to vacate the order entered upon his default in this proceeding for the termination of his parental rights, he was obligated to establish that there was a reasonable excuse for the default and a potentially meritorious defense to the

relief sought in the petition (*see* CPLR 5015 [a] [1]). Here, the father presented neither a reasonable excuse for his failure to appear at the fact-finding and dispositional hearings, nor a potentially meritorious defense to the allegation of permanent neglect. The father was serving an indeterminate term of imprisonment in connection with his conviction of a felony. The father suggested only unrealistic and unsuitable alternatives to foster care for the duration of the term of imprisonment, and those suggestions did not amount to planning for the child's future.

*Matter of Latisha T'Keyah J.*, 117 AD3d 1051 (2d Dept 2014)

### **Mother's Partial Compliance with Service Plan Was Insufficient**

The petitioning agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the subject children by meeting with the mother to review her service plan, discussing the importance of compliance, providing referrals for drug treatment, and scheduling visitation between the mother and the subject children. Despite these efforts, the mother failed to assume a measure of initiative and responsibility and plan for the future of her children by taking steps to correct the conditions that led to the removal of the children from her home (*see* SSL§ 384-b [7] [c]). The mother's belated partial compliance with the service plan was insufficient to preclude a finding of permanent neglect. Accordingly, the Family Court properly granted the petitions and terminated the mother's parental rights.

*Matter of Elasia A.D.B.*, 118 AD3d 778 (2d Dept 2014)

### **Mother and Father Failed to Plan for Children's Return Despite Diligent Efforts**

Contrary to the contentions of the mother and the father, the Family Court properly determined that there was clear and convincing evidence that the mother and the father each permanently neglected the subject children, who had been in foster care for seven years, by failing to plan for their return. The record established that the petitioner made diligent efforts to help each parent comply with his or her respective plan

for reunification with the subject children. With respect to the mother, despite individual therapy, parenting classes that included lessons in the appropriate methods of discipline, and regular visits, the mother still had not mastered the skills taught in the parenting skills classes, and had difficulty appropriately interacting with the subject children and properly disciplining them. The mother's contention that the petitioner failed to tailor its diligent efforts to address her mental disability was without merit. The petitioner facilitated supervised visits between the mother and the subject children in a home-like setting in which the supervisor provided feedback to the mother with respect to her interaction with the children and made recommendations as to proper parenting. The petitioner also ensured that the mother completed additional parenting classes. With respect to the father, the petitioner established that it also made diligent efforts to help him comply with his service plan for reunification with the subject children. Pursuant to that plan, the father was required, *inter alia*, to complete group therapy and parenting classes, and to attend sex offender treatment sessions. Moreover, the same caseworker who supervised the visits for the mother also supervised the father's visits, and her background included the study of pedophilia and cognitive processes in abnormal psychology. Despite these services, the father had not completed group therapy at the time the petition was filed, and still demonstrated inappropriate sexual proclivities that put the children at risk. The father's contention that the petitioner failed to tailor its parenting class requirements to address his "developmental disabilities" was without merit, because the petitioner did not dispute that the father successfully completed the required parenting class, and did not raise any issues in connection with parenting classes as grounds for relief. Finally, the petitioner also established that the termination of the parental rights of each parent and the freeing of the children for adoption was in the best interests of the subject children. Orders affirmed.

*Matter of Jeremy J.M.*, 118 AD3d 796 (2d Dept 2014)

### **Family Court Erred in Suspending Judgment, Rather than Terminating Mother's Parental Rights**

Having found that the mother permanently neglected her children, the Family Court erred in suspending judgment, rather than terminating the mother's parental

rights, in light of the mother's decision to relocate to Florida after the children were removed from her care and custody, which impeded regular and meaningful visitation, her failure to gain insight into her problems, and her failure to complete services over a period of years (*see* FCA §§ 631, 633(b)). Further, in view of the mother's failure to acknowledge and address the problems which led to the children's removal in the first instance, and given the adverse effect that removal from the foster parent was likely to have on the children, the court should have terminated the mother's parental rights and freed the children for adoption. The orders were affirmed in part and reversed in part to the extent that the mother permanently neglected her children, the mother's parental rights were terminated, and the children were freed for adoption. A dissenting opinion concurred that the mother permanently neglected her children, however, in view of the mother's recent compliance with the minimal requirements of the suspended judgment, argued that the matter should have been remitted for a new dispositional hearing so as to determine the best interests of the children.

*In re Chanel C.*, 118 AD3d 826 (2d Dept 2014)

#### **Parents Failed to Plan for Children's Future**

The Family Court properly found that the petitioner agency established by clear and convincing evidence that the parents permanently neglected the subject children (*see* SSL § 384-b [7]). The agency presented evidence that it exercised diligent efforts to encourage and strengthen the parental relationship by, among other things, referring the parents to parenting classes and counseling, advising them of the need to attend and complete such programs, and facilitating regular visitation with the children until visitation was suspended due to the mother's continued drug use. Moreover, the agency referred the mother to a drug abuse treatment program, monitored her progress in that program, and explored the possibility of having the mother's brother care for the children. Despite these efforts, the parents failed for a period of more than one year following the date that the children came into the agency's care to plan for the children's future, although physically and financially able to do so (*see* SSL § 384-b [7] [a], [c]). The Family Court also properly determined that termination of parental rights, rather than the entry of a suspended judgment, was in the

children's best interests (*see* FCA § 631).

*Matter of Gianni D.M.*, 118 AD3d 1003 (2d Dept 2014)

#### **Mother's Own Testimony Was Sufficient to Support Finding of Permanent Neglect**

The Family Court properly found that the mother permanently neglected the subject children. The petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [7]). These efforts included facilitating visitation, providing the mother with referrals to drug treatment and counseling programs, and advising the mother of the need for her to attend and complete such programs. Despite these efforts, the mother failed to plan for the children's future. Contrary to the mother's contention, most of the progress notes in the petitioner's case file that were offered into evidence were properly admitted under the business record exception to the hearsay rule (*see* CPLR 4518 [a]). In any event, even if some of the progress notes were improperly admitted, the mother's own testimony was sufficient to support a finding of permanent neglect. Furthermore, based on the evidence adduced at the dispositional hearing, the Family Court properly determined that it was in the best interests of the children to terminate the mother's parental rights. Orders affirmed.

*Matter of Melisha M.H.*, 119 AD3d 788 (2d Dept 2014)

#### **Mother Did Not Cooperate with Service Plan Which Included Providing Caseworkers with Access to Her Home**

The finding of permanent neglect with respect to the mother was supported by evidence that the petitioner made diligent efforts to strengthen the bond between her and the subject children, and that the mother failed to plan for the children's future (*see* Social Services Law § 384-b [7]). These efforts included facilitating visitation, providing her with referrals, and holding numerous meetings to review her service plan. Despite these efforts, the mother failed to complete the service plan, thereby failing to plan for the children's future. Moreover, the Family Court properly determined that it was in the best interests of the children to be freed for adoption. In light of evidence that the mother, inter

alia, was not cooperating with the service plan, was not allowing caseworkers access to her home, and was not consenting to special education evaluations for two of the subject children, the Family Court's determination not to suspend judgment was a provident exercise of discretion. Orders affirmed.

*Matter of Devon M.*, 119 AD3d 864 (2d Dept 2014)

### **Mother's Parental Rights Properly Terminated**

Family Court terminated respondent mother's parental rights upon a fact-finding determination that she permanently neglected her children. The Appellate Division affirmed. The agency made diligent efforts to reunite respondent and her children by, among other things, preparing a service plan, scheduling visits between respondent and her children, offering her assistance to obtain appropriate housing and referring her for mental health services. The agency was not required to offer or obtain a sex offender evaluation of the mother's boyfriend since its duty was to encourage the parental relationship and this did not include a duty to the paramour. Nor did the agency have to provide respondent information about her boyfriend's history of sexual abuse since the mother did not ask for details and chose to believe her boyfriend's version.

Respondent did not substantially plan for the children's future. Although respondent completed a parenting and anger management class, she did not obtain suitable housing and she failed to understand that her boyfriend posed a danger to her children. She lied to the agency about her relationship with her boyfriend and although respondent was prohibited from allowing the children any contact with her boyfriend until the youngest child turned 18-years of age, she brought him to an event with the children and posted a picture of him with the children on her Facebook page. She married the boyfriend after the children were removed even though she was told she needed to end her relationship with him in order to regain custody of her children. Given her lack of suitable housing and her refusal to address the potential danger posed to her children by her relationship with a sex offender, the court's determination that she failed to adequately plan for her children's future was not error.

*Matter of Alister UU.*, 117 AD3d 1137 (3d Dept 2014)

### **No Exceptional Circumstances Existed to Warrant an Extension of the Suspended Sentence**

Family Court revoked a suspended judgment and terminated respondent mother's parental rights to her infant child. The Appellate Division affirmed. The court's decision to revoke respondent's suspended sentence was supported by a fair preponderance of the record. Here, respondent had consented to a finding of permanent neglect therefore there was no need for the agency to make diligent efforts to strengthen and encourage the parent-child relationship. Additionally, respondent failed to comply with the terms of the suspended judgment. She missed mental health appointments, was unsuccessfully discharged from a substance abuse treatment program, failed to submit to random drug screening and admitted to abusing illegal substances. Respondent's noncompliance of the terms of the suspended sentence constituted strong evidence that it was in the child's best interest to terminate respondent's parental rights. No exceptional circumstances existed warranting an extension of the suspended sentence. Respondent had failed to respond to the numerous efforts made to help her overcome her substance abuse issues and the child, who had been in foster care since he was two-months-old, had a strong bond with his foster parents who were providing him with a stable home.

*Matter of Jason H.*, 118 AD3d 1066 (3d Dept 2014)

### **Children's Best Interests To Terminate Respondent's Parental Rights**

Family Court revoked respondent mother's suspended judgment and terminated her parental rights to her five children based on permanent neglect. The Appellate Division affirmed. Family Court did not err in failing to grant respondent's request for an adjournment of her revocation hearing. Respondent was given both written and verbal notice of the continuation of the hearing date and her failure to appear for the hearing resulted as a failure on her part to exercise due diligence. Although termination of parental rights was not required based on respondent's failure to comply with the conditions of the suspended judgment, her failure was strong evidence that termination was in the best interests of the children. Here, respondent consistently arrived late for her parenting skills program and when the same test

of parenting skills was given after she completed the program, she scored lower on the test than she did before she began the program. While respondent finally completed an anger management program, she did not enroll in the program until after the petition to revoke her suspended judgment had been filed. There was sound and substantial basis in the record to support the court's finding that it was in the children's best interests to terminate parental rights. The respondent only maintained sporadic contact with her three older children, who were living with the maternal grandparents. Although the grandparents, who lived three hours away from respondent, regularly brought the children to visit respondent, respondent never made the effort to visit her children. The children were doing well in their grandparents' care and wished to remain with them. The younger two children were in pre-adoptive foster homes and were doing well. The foster parents were actively addressing the needs of one of the two children, who had fetal alcohol syndrome. Moreover, two months prior to the issuance of Family Court's order terminating respondent's maternal rights, respondent had another child. She did not tell her children about her pregnancy and they learned about it through her social media posting.

*Matter of Jayden T.*, 118 AD3d 1075 (3d Dept 2014)

### **Clear and Convincing Evidence of Mental Retardation and Mental Illness to Support TPR**

Family Court terminated respondent father's parental rights to the subject child on the grounds of mental retardation and mental illness. The Appellate Division affirmed. To support termination on these grounds, the agency must show by clear and convincing evidence that respondent is presently, and will continue for the foreseeable future to be, unable to provide proper and adequate care for the child based on his mental retardation or mental illness. Here, the psychologist who interviewed and tested respondent testified that respondent was mentally retarded within the meaning of the statute. The psychologist also testified that respondent suffered from mental illness, specifically impulse control disorder and antisocial personality disorder, and concluded that based upon his findings respondent was unable at present and for the foreseeable future to parent the child. Additionally, respondent's inability to comply with treatment showed

little likelihood that he would benefit from medication or therapy. Furthermore, the foster-care homemaker who had been working with respondent testified that during the 20-months that she had been working with him, she saw no improvement in his parenting ability and he continued to struggle with anger problems.

*Matter of Logan Q.*, 119 AD3d 1010 (3d Dept 2014)

### **Agency Failed to Establish Mother Permanently Neglected Children**

Family Court determined the agency had failed to prove, by a preponderance of the evidence, that respondent mother had permanently neglected her children. The attorney for the children appealed and the Appellate Division affirmed. There was sound and substantial basis in the record to support the court's decision. The agency made diligent efforts to strengthen the parent-child relationship and respondent mother took meaningful steps to correct the problems that led to the children's placement in foster care. The record showed that while respondent initially had some difficulty adjusting to the agency's supervision, she attended all of the visits with her children, came to all the permanency meetings and participated in the recommended counseling and treatment. Additionally, during the two-year period prior to the fact-finding hearing, respondent stayed employed at the same job and had found an apartment. Furthermore, treatment providers for both the children and respondent testified that over time, respondent would be able to acknowledge the role she played in allowing the children to be abused. Finally, the court did not improperly rely on the court ordered mental health evaluation of respondent in arriving at its decision. Although the agency had initially and alternatively alleged that respondent was unable to care for her children by reason of mental health or illness, this allegation was later withdrawn and the court expressly noted that the psychologist's opinion would not be "useful...with regard to the issues of permanent neglect".

*Matter of Marissa O.*, 119 AD3d 1097 (3d Dept 2014)

### **Mother's Failure To Timely Engage in Services Supports Permanent Neglect Finding**

Respondent mother's paramour admitted to violently shaking the younger of the two subject children, who was eleven-months-old at the time, which resulted in the child being admitted to the hospital in critical condition with bilateral subdural hematomas, retinal hemorrhaging and other injuries. She was later diagnosed with traumatic brain injury and continues to suffer from one-sided paralysis, and other negative consequences. The agency filed an abuse petition against respondent on the grounds that she had failed to protect the children or seek immediate medical attention for the assaulted child. Respondent later consented to an abuse adjudication and respondent and her paramour were criminally convicted. Thereafter, Family Court determined respondent had permanently neglected her children and terminated her parental rights. There was no error in the court's decision that the agency exercised the requisite diligent efforts to encourage and strengthen the parental relationship. Despite respondent's claim that the services were not goal specific, the record showed the agency was unable to do so since respondent refused, for over a year, to undergo a recommended psychological evaluation and family assessment on the ground that her criminal attorney had advised her not to do so until the criminal matter was resolved. The agency caseworker testified that such an assessment would have identified any mental health issues that might have contributed to respondent's failure to seek immediate medical treatment for the child and her alleged failure to recognize the severity of the child's condition and accept responsibility for her role in causing the injuries. Although respondent did finally undergo the assessment, she was thereafter immediately incarcerated and the agency was not required to provide rehabilitative services while respondent was incarcerated. There was clear and convincing evidence that respondent failed to plan for the children's future. While respondent continued to maintain an affectionate bond with both children, her refusal to participate in the assessment for such a long period of time delayed the proceedings for the children whose welfare required a timely resolution. Additionally, the psychologist who finally conducted the assessment testified that the purpose of such inquiries was to assess the need for services, not to determine culpability. Even though

respondent's reason for the delay was that she was exercising her privilege against self-incrimination, Family Court properly drew the strongest negative inference against her and determined that respondent's actions showed that she placed her own needs ahead of the children. Additionally, respondent continued to deny she had failed to seek timely medical attention for her child and she minimized the seriousness of the child's condition. Evidence showed that after respondent was advised that the child's condition was serious and could only be tube-fed, respondent gave the child a hard cookie and chips. It was in the younger child's best interests to terminate respondent's parental rights. There were concerns with respondent's judgment regarding this child and her ability to meet the child's many and complex needs. The younger child's foster mother, who had cared for the child for several years, excelled in caring for the child. The child and the foster mother had a strong, loving bond and the foster mother intended to adopt her. However, with regard to the older child, there was very little evidence to show that termination of the mother's rights as opposed to a suspended judgment was in the child's best interests. The older child saw the mother almost daily and the mother and child had a close and loving relationship. There was no evidence to show the child would be better cared for by the grandparent than the mother. Therefore, this issue was reversed and remitted.

*Matter of Asianna NN.*, 119 AD3d 1243 (3d Dept 2014)

### **Court Did Not Abuse Discretion in Refusing to Extend Suspended Judgment**

Family Court refused to extend the suspended judgment and terminated the parental rights of respondent father. The Appellate Division affirmed. The father's contention was rejected that Family Court should have extended the suspended judgment for another year, notwithstanding the fact that it was not disputed that the father violated the terms and conditions of the suspended judgment. The father failed to demonstrate that exceptional circumstances required extension of the suspended judgment. Thus, the court did not abuse its discretion in refusing to extend the suspended judgment.

*Matter of Cornelius L.N.*, 117 AD3d 1487 (4th Dept 2014)

**Father Knowingly, Voluntarily and Intelligently Agreed to Finding of Permanent Neglect**

Family Court revoked the suspended judgment and terminated the parental rights of respondent father on the ground of permanent neglect. The Appellate Division affirmed. The father failed to preserve for review his contention that his consent to the entry of the finding of permanent neglect was not given knowingly, voluntarily and intelligently. In any event, the contention was without merit. Although the record reflected that the father initially hesitated and indicated that he did not wish to admit any wrongdoing, he relented and agreed to permit the court to make a finding of permanent neglect and to enter a suspended judgment based on that finding. The proof did not show that the consent was given under compulsion or threat, or against the father's free will, or based upon fraudulent statements. Indeed, the record established that the father was represented by counsel at the time of his admission, and the father stated that he understood all the proceedings because they were translated into Spanish, his native language. Thus, the father knowingly, voluntarily and intelligently agreed to the entry of a finding of permanent neglect.

*Matter of Xavier O.V.*, 117 AD3d 1567 (4th Dept 2014)

**Termination of Parental Rights on Ground of Permanent Neglect Affirmed**

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Although the father participated in the services offered by petitioner, he did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return. The court properly denied the father's request for a suspended judgment.

*Matter of Makayla S.*, 118 AD3d 1312 (4th Dept 2014)

**Parental Rights Properly Terminated on Ground of Abandonment**

Family Court terminated the parental rights of respondent father on the ground of abandonment. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that the father abandoned his child. Petitioner's caseworker testified that the father was required to contact her prior to any visitation with the child. The visitation was to be supervised by the child's grandfather. The father contacted the caseworker before visits that took place commencing in October 2011, but last contacted her concerning a visit in May 2012. The father did not contact the caseworker again before petitioner filed the abandonment petition in December 2012. In addition, the father failed to appear at court proceedings with respect to the child during the relevant time period, although he had notice of those proceedings. The father's testimony that he visited with the child during the relevant time period and that he believed that only the grandfather was required to contact the caseworker concerning the visits merely raised a credibility issue that Family Court was entitled to resolve against the father.

*Matter of Noah G.*, 118 AD3d 1355 (4th Dept 2014)

**Termination of Parental Rights Proper Where Respondents Abandoned Children**

Family Court granted petitions filed in April 2011 and June 2011, which terminated respondents' parental rights on the ground of abandonment. The Appellate Division modified by dismissing the petitions filed in April 2011. Family Court properly granted the June 2011 petitions and terminated the parental rights of respondents upon determining that petitioner established by clear and convincing evidence that respondents abandoned their children. Although respondents were prohibited from contacting their children during the six months prior to the filing of the June 2011 abandonment petitions based on an order of protection, it was well settled that the parent who has been prohibited from direct contact with the child, in the child's best interests, continued to have an obligation to maintain contact with the person having legal custody of the child. During the six-month period

prior to the June 2011 petitions, respondents' sole contact with petitioner was at a uniform case review meeting that was arranged by petitioner. However, the court erred in granting the petitions filed in April 2011. The record established that respondents contacted petitioner about the children numerous times during October and November 2010. Therefore, petitioner failed to establish that respondents evinced an intent to forego their parental rights and obligations during the six-month period immediately prior to the filing of the April 2011 petitions.

*Matter of Miranda J.*, 118 AD3d 1469 (4th Dept 2014)

### **Termination of Parental Rights Affirmed**

In the first of two orders from which respondent mother appealed, Family Court terminated her parental rights with respect to her daughter on the ground of permanent neglect. In the second order, Family Court revoked a suspended judgment and terminated the mother's parental rights to her son. The Appellate Division affirmed both orders. The Attorney for the Children's contention was rejected that the appeals must be dismissed because the orders were entered upon the mother's default. Inasmuch as the mother's attorney appeared at and participated in the hearing until the mother left the courtroom, there was no default. Family Court properly determined that the daughter was a permanently neglected child and properly terminated the mother's parental rights. Although the mother participated in the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return. The court properly determined that petitioner established by a preponderance of the evidence that she violated a condition of the suspended judgment by failing to attend scheduled visits with her son and that it was in her son's best interests to terminate her parental rights.

*Matter of Savanna G.*, 118 AD3d 1482 (4th Dept 2014)

### **Parental Rights Properly Terminated on Ground of Abandonment**

Family Court terminated the parental rights of respondent father on the ground of abandonment. The

Appellate Division affirmed. The father's contention was rejected that Family Court applied an incorrect standard in determining that he abandoned his daughter. As the court properly determined, petitioner established by clear and convincing evidence that the father abandoned his child by failing to visit or to communicate with her or petitioner, although able to do so, during the six-month period immediately preceding the filing of the petition. The father then failed to rebut the presumption, inasmuch as he failed to establish that he was unable to maintain contact with his daughter, or that he was prevented or discouraged from doing so by petitioner. A court order required the father to pay child support in the amount of \$25 per month, but the order suspended that obligation during the father's incarceration. Although the father testified that "twenty percent" had been deducted from his inmate account to pay child support, petitioner presented evidence that it never received any payment of child support from the father or the correctional facility where he was incarcerated. Assuming, arguendo, that child support was deducted from the father's inmate account, under the circumstances of the case, the deduction of such funds did not constitute communication with the child or petitioner sufficient to defeat an otherwise viable claim of abandonment.

*Matter of Melerina M.*, 118 AD3d 1505 (4th Dept 2014)

### **Parental Rights Properly Terminated on Ground of Mental Illness**

Family Court terminated the parental rights of respondent father on the ground of mental illness. The Appellate Division affirmed. Petitioner presented clear and convincing evidence establishing that the father was presently suffering from a mental illness that was manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if the child was placed in the custody of the father, the child would be in danger of becoming a neglected child. The father's contention was rejected that petitioner undermined his relationship with the child by limiting his visitation time and thus failed to establish that it made diligent efforts to strengthen and encourage his relationship with his child. Unlike a case where parental rights were terminated due to permanent neglect, no such showing was required when the ground

for termination is mental illness.

*People v Malcolm*, 118 AD3d 447 (1st Dept 2014)

*Matter of Zachary R.*, 118 AD3d 1479 (4th Dept 2014)

### **Termination of Parental Rights Reversed Where Child Was Neither Destitute Nor Dependant**

Family Court terminated respondent father's parental rights, and committed guardianship and custody of the child to petitioner mother, and authorized the mother to consent to the adoption of the child without the consent of, or further notice to, the father. The Appellate Division reversed and granted the father's motion to dismiss the petition. It was undisputed that the subject child was neither a destitute nor a dependent child. Social Services Law Section 384-b was thus inapplicable to the child and could not be invoked by either the mother or DSS as a means to terminate the father's parental rights. The Court's determination did not leave the mother without a remedy. She could seek to dispense with the father's consent to adoption pursuant to Domestic Relations Law Section 111 (2) (a).

*Matter of Anastasia I.*, 118 AD3d 1480 (4th Dept 2014)

### **YOUTHFUL OFFENDER**

#### **Defendant Sentence Vacated - Remand For Youthful Offender Determination**

Supreme Court convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree and sentenced him to a term of one year. The Appellate Division modified by vacating the sentence and remanding for resentencing. The court did not actually consider youthful offender status, but ruled it out on the ground that it had been waived as part of defendant's negotiated plea. Because pursuant to *People v Rudolph*, 21 NY3d 474, there must be a youthful offender determination in every case where the defendant is eligible, even where defendant fails to request it, or agrees to forgo it as part of a pleas bargain, defendant must be resentenced. Even though defendant pled guilty to an armed felony, he was potentially eligible for youthful offender status and was therefore entitled to a determination. This issue survived defendant's waiver of his right to appeal.