
NEW YORK CHILDREN'S LAWYER

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Court of Appeals Recognized New Frontiers in Parenting* **Amy Barash and Kim Susser****

On Sept. 1, 2016, the Court of Appeals rendered a decision on two cases considered together on appeal: *Brooke M.* and *Estrellita X.* These important cases have received a fair amount of understandable attention for the victory the decision represents for gay and lesbian parents. The Court of Appeals decision should, however, be appreciated also as a decision about parenting in its myriad forms. For example, a disproportionately high number of litigated custody and visitation cases involve domestic violence. Under our current system, most abusers, who are biological parents, gain some access to children. Another common scenario is one in which a biological father, who has not had contact with his children since birth, files for custody and/or visitation immediately after being served with a petition for child support.

The *Brooke M.* and *Estrellita X.* decision illustrates that meeting the standard of the best interests of the child need not be exclusively about biology. In fact, the misguided and exclusive focus on biology, as well as adoption and marriage goes contrary to the research. As courts consider other fact patterns going forward, they should allow for the development of a broader standard to determine standing.

Agreement in Place

Both of the present cases involved lesbian couples who had decided together to have and raise a child by having one of the partners bear the child. After their

respective children were born, the parties raised the children together but later separated. The non-biological mothers then sought standing to file for custody/visitation. Under precedent set by *Alison D.*, a seminal case decided by the Court of Appeals in 1991, the lower courts denied standing to the non-biological non-adoptive unmarried parents. In *Brooke M.* and *Estrellita X.* the Court of Appeals overturned *Alison D.*, and with it the "foundational premise of heterosexual parenting and nonrecognition of same-sex couples...."

The court confined its explicit holding to the facts of these two cases, conferring standing on a parent who can prove "by clear and convincing evidence that the parties entered into a preconception agreement to conceive and raise a child as co-parents." However, stating that it would be "premature to consider adopting a test for situations in which there was no preconception agreement," the court simultaneously acknowledges the existence of other family situations its holding does not address, and anticipates that these cases create a foundational first step in the reconsideration of how the courts define parent.

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By stepping away from the traditional litmus tests of biology and/or marriage, the court relied on a growing body of social science that documents the "trauma children suffer when separated from a primary attachment figure...regardless of that figure's biological or adoptive ties to the children."

Contrast the Brooke M. scenario with one in which a biological father who has had no contact with his child since birth seeks access to the child after being served with a petition for child support. Courts generally so appreciate the non-custodial parent showing up at all, that they often grant access in this scenario, without considering that Dad is a practical stranger to the child.

This scenario is particularly common when the father has a history of abusing the mother. These sorts of retaliatory court actions are referred to as "litigation abuse."¹ The unfortunate reality is that batterers get custody and visitation every day, while involved mothers like Brooke could not even request consideration—until this month.

Domestic Violence

The bench's strong preference for considering access for biological parents at all costs (including heretofore absent fathers) downplays any history of violence to the mother (in heterosexual relationships). All of us who have litigated in Family Court have heard judges, and attorneys for children, rationalize that an abusive partner who has never directly hurt the child should be considered on equal parental footing as a non-violent custodial parent. Some domestic violence advocates are therefore understandably concerned that opening the door to more people who are not biologically related to children to seek visitation with them might increase the number of abusers who can access the courts. That concern, however, is based in a mistaken belief that closing the door to some good parents is necessary in order to keep out the bad.

In fact, when domestic violence happens in same-sex couples, the court's biological and marital emphasis often inures to the abuser's benefit. When the biological parent is abusive, it is all too common for the biological parent to use that legally respected relationship to control their partner.² When the law is on their side, the

abuser can accurately threaten his/her partner that if they try to leave, they will never see their child again. In this scenario, it is difficult to see how limiting standing is in the child's best interest.³

A Four-Part Test

Several amici to the Brooke/Estrellita appeal (including the authors here) encouraged the court to consider the creation of a careful four-part test for the determination of standing in these cases. This test, which is strict in its requirements, yet broad in the population it protects, would bring us closer to the goals of achieving the best interests of children in custody litigation.

The Wisconsin Supreme Court developed the H.S.H.-K. test more than 20 years ago. To demonstrate standing, a former partner seeking custody or visitation must establish: (i) that the biological or adoptive parent consented to, and fostered, his or her formation and establishment of a parent-like relationship with the child; (ii) that he or she lived together with the child in the same household; (iii) that he or she assumed the obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing toward the child's support, without expectation of financial compensation; and (iv) that he or she has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship that is parental in nature. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

Scholarly reviews of the application of this standard show that it is workable for the courts and has not resulted in an increase in meritless petitions.⁴ These factors protect against biological parents who engage in abuse gaining standing. An important part of the four-part H.S.H.-K test is that it emphasizes past action over the possibility of future action as in the scenario above. Going forward, this case has made it possible to consider that any parent who wants to be recognized by the law as a parent should act like a parent.

The presumption that parentage can only be based on biology, marriage, or adoption is unnecessarily narrow,

flies in the face of social science research, and prevents many nurturing parents—gay and straight—from being given the opportunity to maintain close relationships with their children when they separate from their partners. We appreciate the invitation the court has offered, and look forward to seeing a continued dialogue about how New York can improve its implementation of the best interests of the child.

Endnotes:

1. See e.g. Mary Przekop, "One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Court," 9 Seattle J. for Soc. Just. 1053 (Spring/Summer, 2011); Leora N. Rosen & Chris S. O'Sullivan, "Outcomes of Custody and Visitation When Fathers Are Restrained by Protection Orders: The Case of the New York Family Courts," 11 VIOLENCE AGAINST WOMEN 1054, 1057, 1073 (Aug. 2005).
2. Joanna Bunker Rohrbaugh, "Domestic Violence in Same-Gender Relationships," 44 Fam. Ct. Rev. 287, 293 (April, 2006).
3. To argue that the solution is that non-biological parents can either marry or adopt is an unfair burden to impose, both to those who cannot afford it and those who choose not to. Even if a non-biological parent wanted to adopt, that course is time-consuming and often prohibitively expensive.
4. Carlos Ball, "Rendering Children Illegitimate In Former Partner Parenting Cases: Hiding Behind the Facade of Certainty," 20 Am. U. J. Gender Soc. Pol'y & L. 623, 651-56 (2012); Josh Gupta-Kagan, "Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents," 12 N.Y.U. J. Legis. & Pub Pol'y 43, 88 (2008).

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

NEWS BRIEFS

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

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

On September 26, 2016, the Appellate Division, Second Judicial Department, and the Office of Attorneys for Children co-sponsored an introduction to the ***Fatherhood Man-Up Program***. The speaker was Ingrid Davis-Austin, Outreach Coordinator, Catholic Charities Neighborhood Services, Inc., Fatherhood Man-Up Program, and Fredericka Bashir, Esq., Attorney in Private Practice, served as moderator. This seminar was held at the Office of Attorneys for Children, Brooklyn, New York.

On November 1, 2016, 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 ***Recent Caselaw and Ethics Decisions***. Emily Gold LaGratta, Esq., Deputy Director, Training and Technical Assistance, Center for Court Innovation, and Kate Wurmfeld, Esq., Senior Staff Attorney of Domestic Violence Programs Center for Court Innovation, co-presented ***Practical Tools for Increasing Access to Justice for Domestic Violence Cases***. This seminar was held at Brooklyn Law School, Brooklyn, New York.

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

On October 28, 2016, 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 ***Caselaw and Legislative Update***; Rodrigo Pizarro, M.D., Psychiatrist, Private Practice, presented ***Personality Disorders and Parenting Capacities***; Lawrence Jay Braunstein, Esq., Braunstein & Zuckerman, Esqs., presented ***The Anatomy of a Child Abuse Case***; and Darren Mitchell, Esq., Consultant, together with, Kate Wurmfeld, Esq., Senior Staff Attorney of Domestic Violence Programs Center for Court Innovation, presented ***A Framework for Identifying and Accounting for Abuse***. This seminar was held at the Westchester County Supreme Court, White Plains, New York.

Tenth Judicial District (Nassau County)

On November 14, 2016, 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 ***Caselaw and Legislative Update***; and Caroline Krauss-Browne, Esq., Partner, Blank Rome LLP, presented ***Thoughts for Moving Forward After the Reversal of Allison D.***

This seminar was held at Hofstra University Law School, Hempstead, New York.

Tenth Judicial District (Suffolk County)

On November 16, 2016, the Appellate Division, Second Judicial Department, and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. The Hon. Andrew Crecca, Supervising Judge of the Matrimonial Parts of the Suffolk County Supreme Court presented ***The Impact of Domestic Violence on Children and the Role of the Attorney for the Child***; the Hon. Caren Loguercio, Suffolk County Family Court, presented ***Uniform Rules for the Engagement of Counsel***, and Margaret A. Burt, Esq., Attorney at Law, presented ***Child Welfare Caselaw Update***. 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 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

Advisory Committee

Hon. Karen K. Peters, Presiding Justice of the Appellate Division, Third Judicial Department, has announced the appointment of Hon. Mark M. Meddaugh, Sullivan County Family Court Judge, as the new Chair of the Appellate Division's Office of Attorneys for Children Advisory Committee, effective September 1, 2016. By Court Rule, the Advisory Committee oversees the operation of the Attorneys for Children Program, which includes over 500 attorneys in the counties within the Appellate Division, Third Judicial Department. Immense gratitude goes to Judge Meddaugh's predecessor, Hon. Vincent J. Reilly, Jr., Justice of the Supreme Court, who has been the Advisory Committee Chair for the past 23 years. We thank Justice Reilly for his devotion to the program, his constant support and profound guidance. Many thanks, as well, to long time committee member, Hon. Marianne O. Mizel, Ulster County Family Court, for her many years of service. Hon. Lisa M. Fisher, Justice of the Supreme Court, and Joanne Trinkle, MSW, of the Center for Adoption Support and Education, have also been appointed to the Advisory Committee, effective September 1, 2016. We welcome our new members and very much look forward to working together to insure the highest quality legal representation by attorneys for children.

Liaison Committees

We are very pleased to announce two new liaison representatives to our office. Max Zacker, Esq. is the new Columbia County Liaison and Monica Kenny-Keff, Esq. is the new Greene County Liaison. Sincere thanks to Bethene Lindstead-Simmons, Esq. who previously served as the Columbia County Liaison and Dale Dorner, Esq. who served for nearly 30 years as the Greene County Liaison. The Liaison Committee provide a means of communication between panel members and the Office of Attorneys for Children. A department-wide Liaison Committee meeting was held on Friday, November 4, 2016 at the Office of Attorneys for Children in Albany and will be held again on Friday, May 4, 2017 at the Crowne Plaza Resort in Lake Placid. If you have any questions about the meetings, or have any issues of concern that you wish to be on the meeting agenda, kindly contact your liaison committee representative, whose name can be found in our Administrative Handbook, pp.18-22 and can be accessed by going to our website: <http://www.nycourts.gov/ad3/oac/>.

Training News

MARK YOUR CALENDERS!

Training dates for Spring and Fall 2017 CLE programs are listed below and agendas for these programs will become available as the CLE date nears. You can find this information on the Third Department OAC web page located at: <http://www.nycourts.gov/ad3/oac/S>

[eminar_Schedule.html](#). We invite you to save the date and encourage you to attend these CLE programs. As you know, training for panel members is provided free of charge. Our ability to provide high quality live training at no cost to the panel is dependent on the numbers of attorneys who attend.

In addition to significant changes that were made to 10-A of the Family Court Act, involving the way permanency hearings are conducted, including the child client's right to participate, there is new legislation that was enacted concerning the right of non-respondent parents to intervene in Article 10 matters. There is an online CLE program featuring Margaret A. Burt, Esq., on this very important change in the law, including written materials. If you have not watched this video, we encourage you to do so as the law went into effect in June. To view this program, go to: <http://www.nycourts.gov/ad3/OAC/cle.html> and link to "Online CLE Programs", then "Know the Law". Follow the indicated steps to obtain the user name and password.

Below are the upcoming training dates:

Spring 2017

Introduction to Effective Representation of Children
Thursday, April 6 & Friday, April 7, 2017
Rochester, NY

Topical Seminar
(Custody/Visitation Focus)
Friday, April 28, 2017
Radisson Hotel, Wolf Road, Albany

Children's Law Update 2017
Friday, May 5, 2017
Crowne Plaza Resort, Lake Placid

Fall 2017

Children's Law Update 2017
Friday, September 15, 2017
Holiday Inn, Binghamton

Introduction to Effective
Representation of Children
Thursday, October 19 & Friday,
October 20, 2017
The Century House, Latham

Children's Law Update 2017
Friday, November 17, 2017
Site TBA – Albany

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, New York State Bar Association Representation Standards, the latest edition of the Administrative Handbook, Administrative Forms, Court Rules, Frequently Asked Questions, seminar schedules and agendas, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The *News Alert* features current information on the program.

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 Dates

Seminars for Prospective Attorneys for Children

April 6-7, 2017

Introduction to Effective Representation of Children – Juvenile Justice Proceedings & Introduction to Effective Representation of Children – Child Protective & Custody Proceedings
East Avenue Inn & Suites
Rochester, NY

Offered in collaboration with the Third Department AFC Program, 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

You will receive agendas (except the agenda for the Ithaca seminar, which is in-progress) 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>.

March 23, 2017

Topical Seminar on Trial Practice
DoubleTree Rochester
Rochester, NY

April 28, 2017

Update
Center for Tomorrow (University of Buffalo)
Buffalo, NY

May 12, 2017

Update
Holiday Inn
Utica, 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, 2017, to remain eligible for panel designation, you should have received a letter to that effect in October 2016. Please remember, however, that it is your responsibility to ensure that your training is up-to-date. Because the video option is available, 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, 2017**. 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. Effective January 1, 2016, attorneys admitted less than two years may receive NYS CLE credit in the areas of Professional Practice and Law Practice Management for viewing

on-line videos. However, attorneys admitted less than two years remain ineligible to receive NYS CLE credit in the areas of Ethics and Skills for viewing online videos. Please retain copies of your affirmations and your CLE certificates. We are unable to tell you what videos you viewed.

Congratulations to New Judges

5th Judicial District

Gregory R. Gilbert, Oswego County Supreme Court

7th Judicial District

Charles Schiano, Jr., Monroe County Supreme Court

Stacey Romeo, Monroe County Family Court

Brian Dennis, Ontario Family and County Court

Jason Cook, Yates County Family and Surrogate

Richard Healy, Wayne County Family and Surrogate

8th Judicial District

Mary L. Slisz, Erie County Supreme Court

Daniel Furlong, Erie County Supreme Court

Michael J. Sullivan, Chautauqua County Family Court

Moses Mark Howden, Cattaraugus County Muti Bench-Family, Surrogate, County

RECENT BOOKS AND ARTICLES

ADOPTION

Priscilla K. Coleman, Ph.D. & Debbie Garratt, R.N., M.Ed., *From Birth Mothers to First Mothers: Toward a Compassionate Understanding of the Life-Long Act of Adoption Placement*, 31 Issues L. & Med. 139 (2016)

Nicole Hertzberg, *Utilizing ADR in Domestic Adoptions for Same-Sex Couples*, 18 Cardozo J. Conflict Resol. 159 (2016)

Jeffrey A. Parness, *Equitable Adoption: Are Kids Parental Property in Illinois?*, 104 Ill. B.J. 36 (2016)

Stacey Steinberg, *Where Did all the Social Workers Go? The Need to Prepare Families for Adoption, Assist Post-Adoptive Families in Crisis, and End Re-Homing*, 67 Fla. L. Rev. F. 280 (2016)

CHILD SUPPORT

Laura Lane-Steele, *Working it Off: Introducing a Service-Based Child Support Model*, 19 U. Pa. J. L. & Soc. Change 163 (2016)

CHILD WELFARE

Astraea Augsberger & Vicki Lens, *"I Didn't Know You Were Fighting So Hard for Me": Attorneys' Perceptions of Youth Participation in Child Dependency Proceedings*, 54 Fam. Ct. Rev. 578 (2016)

Allison E. Korn, *Detoxing the Child Welfare System*, 23 Va. J. Soc. Pol'y & L. 293 (2016)

Brittany Lercara, *The Adoption and Safe Families Act: Proposing a "Best Efforts" Standard to Eliminate the Ultimate Obstacle for Family Reunification*, 54 Fam. Ct. Rev. 657 (2016)

Sarah Wetzel, *Fighting Collateral Sanctions One Statute at a Time: Addressing the Inadequacy of Child Endangerment Statutes and how They Affect the Employment Aspirations of Criminal Offenders*, 49 Akron L. Rev. 587 (2016)

CHILDREN'S RIGHTS

Shawna Benston, *Not of Minor Consequence?: Medical Decision-Making Autonomy and the Mature Minor Doctrine*, 13 Ind. Health L. Rev. 1 (2016)

Allison S. Bohm et. al., *Challenges Facing LGBT Youth*, 17 Geo. J. Gender & L. 125 (2016)

Stephanie A. Ferraiolo, *Justice for Injured Children: A Look Into Possible Criminal Liability of Parents Whose Unvaccinated Children Infect Others*, 19 Quinnipiac Health L. J. 29 (2016)

Dylan Peterson, *Edtech and Student Privacy: California Law as a Model*, 31 Berkeley Tech. L. J. 961 (2016)

Shannon Sorensen, *Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights*, 36 Child. Legal Rts. J. 156 (2016)

CONSTITUTIONAL LAW

Kristen Bradley, *Assisted Reproductive Technology After Roe v. Wade: Does Surrogacy Create Insurmountable Constitutional Conflicts?*, 2016 U. Ill. L. Rev. 1871 (2016)

Jennifer Karinen, *Finding a Free Speech Right to Homeschool: An Emersonian Approach*, 105 Geo. L. J. 191 (2016)

COURTS

Deborah S. Mazer, *Born Breach: The Challenge of Remedies in Surrogacy Contracts*, 28 Yale J. L. & Feminism 211 (2016)

Andrew Michaels, *A Decent Proposal: Exempting Eighteen-to-Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139 (2016)

CUSTODY AND VISITATION

Frank Aiello, *Would've, Could've, Should've:*

Custodial Standing of Non-Biological Same-Sex Parents for Children Born Before Marriage Equality, 24 Am. U. J. Gender Soc. Pol’y & L. 469 (2016)

Lyn R. Greenberg et. al., *Catching Them Before Too Much Damage is Done: Early Intervention With Resistance-Refusal Dynamics*, 54 Fam. Ct. Rev. 548 (2016)

Maritza Karmely, *Presumption Law in Action: Why States Should Not be Seduced Into Adopting a Joint Custody Presumption*, 30 Notre Dame J. L. Ethics & Pub. Pol’y 321 (2016)

Philip M. Stahl, *Critical Issues in Relocation Cases: A Custody Evaluator’s Response to Parkinson and Cashmore (2015) and Thompson (2015)*, 54 Fam. Ct. Rev. 632 (2016)

Kasia Szczerbinski, *I am Whoever You Say I am: How the Custodial Decisions of Parents Can Affect and Limit a Transgender Child’s Freedom and State of Mind*, 36 Child. Legal Rts. J. 177 (2016)

Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 U. Ill. L. Rev. 1535 (2016)

DIVORCE

Margaret F. Brinig, *Religion and Child Custody*, 2016 U. Ill. L. Rev. 1369 (2016)

Jana Douglas et. al., *Marriage and Divorce*, 17 Geo. J. Gender & L. 325 (2016)

Alexa N. Joyce, *High-Conflict Divorce: A Form of Child Neglect*, 54 Fam. Ct. Rev. 642 (2016)

DOMESTIC VIOLENCE

Dania Bardavid et. al., *Domestic Violence*, 17 Geo. J. Gender & L. 211 (2016)

Mary Anne Franks, *Men, Women, and Optimal Violence*, 2016 U. Ill. L. Rev. 929 (2016)

Madison Peak, *The Implications of the U.S. Supreme*

*Court’s Decision in *Elonis v. United States for Victims of Domestic Violence**, 28 J. Am. Acad. Matrim. Law. 587 (2016)

M. Alexandra Verdi, *Strengthening Protections for Survivors of Domestic Violence: The Case of Washington, D.C.*, 64 Buff. L. Rev. 907 (2016)

EDUCATION LAW

Wilson Bao & Jessica Stein Gosney, *Chapter 159: Justice for Sexual Assault Victims or Big Brother in Your Dorm Room? Expanding Surveillance on College Campuses*, 47 U. Pac. L. Rev. 599 (2016)

Amy L. Boler, *Put Them in, Coach! They’re Ready to Play: Providing Students With Intellectual Disabilities the Right to Participate in School Sports*, 69 Ark. L. Rev. 579 (2016)

Antony Barone Kolenc, *Homeschooling and the Perils of Shared Parental Responsibility*, 90-NOV Fla. B. J. 44 (2016)

James G. Dwyer, *Religious Schooling and Homeschooling Before and After Hobby Lobby*, 2016 U. Ill. L. Rev. 1393 (2016)

Jerrad M. Mills, *From the Principal’s Office to Prison: How America’s School Discipline System Defies Brown*, 50 U.S.F. L. Rev. 529 (2016)

FAMILY LAW

Susan Frelich Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 Yale J. L. & Feminism 1 (2016)

Caitlin McCartney, *The Patient Protection and Affordable Care Act and Choice in Childbirth: How the ACA’s Nondiscrimination Provisions May Change the Legal Landscape of Childbirth*, 24 Am. U. J. Gender Soc. Pol’y & L. 337 (2016)

Christine Olson McTigue, *If the (International) Shoe Fits—Jurisdiction Issues in Family Law Cases*, 29 DCBA Brief 16 (2016)

David Pimentel, *Protecting the Free-Range Kid: Recalibrating Parents’ Rights and the Best Interest of*

the Child, 38 *Cardozo L. Rev.* 1 (2016)

Rubeena Sachdev, *How to Protect Pregnancy in the Workplace*, 50 *U.S.F. L. Rev.* 333 (2016)

Anna Stepien-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 *U.S.F. L. Rev.* 75 (2016)

IMMIGRATION LAW

Kelly Burke, *Down the Rabbit Hole: A Story of Unaccompanied Children Being Alone, Confused, and on Trial*, 7 *Ala. C.R. & C.L. L. Rev.* 331 (2016)

Bill Ong Hing, *Contemplating a Rebellious Approach to Representing Unaccompanied Immigrant Children in a Deportation Defense Clinic*, 23 *Clinical L. Rev.* 167 (2016)

Rebecca Phipps, *Starting Over: The Immigration Consequences of Juvenile Delinquency and Rehabilitation*, 40 *N.Y.U. Rev. L. & Soc. Change* 515 (2016)

Megan Smith-Pastrana, *In Search of Refuge: The United States' Domestic and International Obligations to Protect Unaccompanied Immigrant Children*, 26 *Ind. Int'l & Comp. L. Rev.* 251 (2016)

INTERNATIONAL LAW

Breanna Atwood, *Addressing the Problem of Implementing the Hague Abduction Convention on the Civil Aspects of International Child Abduction Between the U.S. and Mexico*, 4 *Penn. St. J. L. & Int'l Aff.* 790 (2016)

Vered Ben-David, *Court Considerations in the Termination of Parental Rights: A Comprehensive Analysis of Israeli Court Decisions*, 54 *Fam. Ct. Rev.* 591 (2016)

JUVENILE DELINQUENCY

Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 *La. L. Rev.* 47 (2016)

Jennifer R. Flynn, *"Here's Looking at you, Kid": The Need for Discretionary Transfer Procedures for All Juvenile Offenders in Connecticut*, 19 *Quinnipiac Health L. J.* 55 (2016)

Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama*, 22 *Psychol. Pub. Pol'y & L.* 235 (2016)

Quincy A. M. Jordan, *The Odd Couple: Reid Interviews & Miranda Custody*, 69 *Ark. L. Rev.* 143 (2016)

Ian M. Kysel, *Banishing Solitary: Litigating an End to the Solitary Confinement of Children in Jails and Prisons*, 40 *N.Y.U. Rev. L. & Soc. Change* 675 (2016)

Lisa A. Rich, *"Cerd-Ain" Reform: Dismantling the School-to-Prison Pipeline Through More Thorough Coordination of the Departments of Justice and Education*, 49 *Loy. L.A. L. Rev.* 119 (2016)

Jacob L. Zerkle, *Rehabilitate the Community by Rehabilitating its Youth—How Cognitive Science, Incarceration, and Jurisprudence Relate to the Criminal Justice System's Treatment of Juveniles*, 36 *Child. Legal Rts. J.* 201 (2016)

Tina M. Zottoli et. al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 *Psychol. Pub. Pol'y & L.* 250 (2016)

FEDERAL COURTS

Government's Motion Granted for Federal Prosecution of Juvenile as Adult

The Government filed a sealed superseding juvenile information charging A.O. with committing five acts of juvenile delinquency stemming from his alleged involvement in a narcotics-trafficking organization and racketeering enterprise in the Bronx, the Taylor Avenue Crew, that sold retail quantities of crack cocaine and defended its narcotics distribution territory with violence and threats of violence. The Government moved under the Juvenile Justice and Delinquency Prevention Act (JJJPA) for an order transferring A.O. to adult status and permitting the Government to proceed against him by criminal indictment. A.O. was charged in a superceding criminal indictment with racketeering and narcotics offenses, and with using or carrying a firearm in connection with those offenses. The Government represented that it charged A.O. in the indictment after obtaining evidence that A.O. persisted in these offenses after his eighteenth birthday. The filing of the indictment mooted the Government's motion to transfer with respects to two counts of the juvenile information. The District Court granted the Government's motion and transferred A.O. for adult criminal prosecution with respect to the three remaining counts. Under the JJJPA, a juvenile who was at least 15 years old, and who had allegedly committed an act that, if committed by an adult, would be a felony that was a crime of violence, could be prosecuted as an adult if the Attorney General moved to transfer the juvenile for adult criminal prosecution, and it was in the interest of justice to grant a transfer. The three offenses remaining in the juvenile information were each a crime of violence that, if committed by an adult, would be a felony. Further, the Attorney General, through her designated agent, certified that the offenses charged were felony crimes of violence, and that there was a substantial federal interest in the case and the offenses to warrant the exercise of federal jurisdiction, due to the defendant's participation in a violent racketeering conspiracy that transacted in interstate commerce, his participation in violent racketeering activity, and his attempted murder and assault of victims with a firearm. The Court considered the six factors set forth in 18 U.S.C. Section 5032: (1) the juvenile's age and social background; (2) the nature of

the offense alleged; (3) the nature and extent of any prior delinquency record; (4) present psychological maturity and intellectual development; (5) the juvenile's response to past treatment efforts and the nature of those efforts; and (6) available programs that were designed to treat the juvenile's behavior problems. The Court noted, among other things, that the juvenile's participation in the Taylor Avenue Crew was concentrated in his later teenage years and the severity of his conduct escalated over time, with the most violent conduct occurring a few months before he turned 18; that he continued to engage in racketeering and narcotics trafficking even after he turned 18; that he was raised in an abusive environment and had experienced other disturbing or traumatic episodes in his life, including the suicide of his cousin and the deaths of several friends, but it was highly unlikely that he would be able to rehabilitate himself in the short period of time before he would have to be released from juvenile custody if he were convicted; that he had prior adjudications which involved conduct that was substantively indistinct from the conduct charged; and that his present psychological maturity and intellectual development weighed against transfer but was far outweighed by other factors favoring transfer, and he had a substantial record of failed treatment efforts.

U.S. v A.O., ___ F.3d ___, 2016 WL 4197597 (SDNY 2016)

IPKCA Required Government to Prove Intent to Violate Lawful Parental Rights in Existence on Date Child Removed From United States

Defendant allegedly removed, or aided and abetted the removal of, IMJ from the United States in September 2009. At that time, Lisa Miller had physical custody of IMJ, and Lisa's ex-partner, Janet Jenkins, had visitation rights. It was not until approximately two months after IMJ was removed from the country that the Vermont family court awarded Janet Jenkins sole physical and legal custody of IMJ. As discussed in a prior decision, *United States v. Zodhiates*, 166 F. Supp.3d 328 (WDNY 2016), defendant was charged in a two-count superceding indictment which alleged (1) that he conspired to violate the International Parental Kidnapping Crime Act (IPKCA), in violation of 18 U.S.C. Section 371; and (2) that he violated, or aided

and abetted a violation of, the IPKCA. The IPKCA made it a crime to remove a child from the United States, or attempt to do so, or retain a child who had been in the United States outside the United States with intent to obstruct the lawful exercise of parental rights. The statute defined the term “parental rights” to mean “the right to physical custody of the child — (A) whether joint or sole (and include[d] visiting rights); and (B) whether arising by operation of law, court order, or legally binding agreement of the parties.” The parties sought pretrial rulings on several issues. The District Court, ruling on the parties’ contentions with respect to jury instruction on intent, agreed with defendant that the statute required the Government to prove intent to violate lawful parental rights that already existed as of the date of the child’s removal from the United States. The Government’s contention was rejected that a person also violated the statute when he or she removed a child in order to obstruct the imminent acquisition of parental rights. Thus, the parental rights at issue in the substantive IPKCA count were the visitation rights Janet Jenkins had in September 2009.

U.S. v. Zodhiates, ___ F.3d ___, 2016 WL 4771007 (WDNY 2016)

Denial of Government’s Motion for Federal Prosecution of Juvenile as Adult

The Government filed a superceding juvenile information against C.F. Brought in conjunction with an indictment bringing racketeering charges against 26 adult members of a Bronx gang, the information charged C.F. with (1) conspiracy to commit racketeering, 18 U.S.C. Section 1962(d); (2) assault and attempted murder in aid of racketeering, 18 U.S.C. Section 1959(a)(3), 1959(a)(5), and 2; and (3) possession, use, and discharge of firearms in furtherance of those crimes of violence, 18 U.S.C. Section 924(c)(1)(A)(iii) and 2. The Government moved to transfer C.F. to adult status under the Juvenile Justice and Delinquency Prevention Act (JJDP A). The District Court denied the Government’s motion. In order to transfer a juvenile to adult status where a juvenile at least 15 years of age was charged with an act defined as a crime of violence, it was necessary for the court to find that a transfer to adult status was in the interests of justice. In making its determination, the

court considered the six factors set forth in 18 U.S.C. Section 5032: (1) the age and social background of the juvenile; (2) the nature of the alleged offense; (3) the extent and nature of the juvenile’s prior delinquency record; (4) the juvenile’s present intellectual development and psychological maturity; (5) the nature of past treatment efforts and the juvenile’s response to such efforts; and (6) the availability of programs designed to treat the juvenile’s behavior problems. The six statutory factors shed light on the juvenile’s potential for rehabilitation, as permeating the transfer decision and the six-factor inquiry was the notion of rehabilitation. The factors were to be balanced in any way that seemed appropriate, and did not need to be given equal weight. In weighing the factors, the nature of the offense and the defendant’s potential for rehabilitation were often properly given special emphasis. The Court noted that it was a close call because of the serious nature of C.F.’s criminal acts. However, the Government did not prove that C.F.’s rehabilitation was not likely. C.F. had a reasonable prospect for rehabilitation if removed from his home environment and treated, over a sustained period, in a juvenile facility. Saddled with severe intellectual deficits and psychological issues, raised in a toxic home and housing-project environment in which his parents neglected him and modeled destructive habits, and personally threatened by gang violence and lacking protection, C.F. lacked the social maturity and practical coping skills to ward off the allure of his older brother’s gang. However, in a 10-month period following placement in an out-of-state juvenile facility, C.F. had made significant strides, behaviorally and academically, and seemingly vindicated his teachers’ view that, if removed from the South Bronx and given structured support and guidance, he would rehabilitate.”

U.S. v. C.F., ___ F.3d ___, 2016 WL 6884918 (SDNY 2016)

COURT OF APPEALS

Non-Biological, Non-Adoptive Parents Had Standing to Seek Custody and Visitation Under Domestic Relations Law §70; *Matter of Alison D.* overruled

Both *Matter of Brooke S.B. v Elizabeth A.C.C.* and its companion case, *Matter of Estrellita A. v Jennifer L.D.*, involved unmarried same-sex couples where a partner, without a biological or adoptive relation to a child, sought custody and/or visitation of that child. Each couple jointly decided to have a child and respondents in both cases became pregnant through artificial insemination. After the children were born, petitioners played active roles in their lives, and when the couples separated, petitioners continued to have contact with the children. In *Brooke S.B.*, respondent terminated petitioner's contact and petitioner made an application for joint custody and visitation. Family Court dismissed the petition for lack of standing, based upon *Alison D. v Virginia M.*, 77 NY2d 651 (1991), which held that, in an unmarried couple, a partner without a biological or adoptive relation to a child was not that child's "parent" for purposes of standing to seek custody or visitation under Domestic Relations Law § 70(a), notwithstanding the partner's established relationship with the child. The Appellate Division affirmed and petitioner appealed. The Court of Appeals reversed, overruled *Alison D.*, and remitted the matter to Family Court for consideration of standing by equitable estoppel. In *Estrellita A.*, respondent filed for child support and while that application was pending, petitioner filed for visitation. Respondent moved to dismiss the visitation petition for lack of standing. Family Court granted respondent's child support petition and denied her motion to dismiss, finding that, although petitioner had no legal standing as a non-parent, the doctrine of judicial estoppel conferred standing on her to seek visitation. The Appellate Division affirmed and respondent appealed. The Court of Appeals affirmed, finding that petitioner had established standing based upon judicial estoppel. In overruling *Alison D.*, the Court concluded that the definition of "parent" established 25 years ago in *Alison D.* had become unworkable when applied to increasingly varied familial relationships. In applying *Alison D.*, courts were forced to permanently sever strong bonds formed between children and adults with

whom they had a parental relationship. Long before *Alison D.*, New York courts invoked their equitable powers to ensure that matters of custody, visitation and support were resolved in a manner that served the best interests of the child. Petitioners in *Brooke S.B.* and *Estrellita A.* alleged that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. These allegations, if proven by clear and convincing evidence, were sufficient to establish standing for the non-biological, non-adoptive parent to petition for custody or visitation under Domestic Relations Law § 70(a). The Court declined to adopt a test that was appropriate for all situations, and did not decide whether an unmarried partner could establish standing where, after conception, a biological or adoptive parent consented to the creation of a parent-like relationship. Only the ability of a person to establish standing as a parent was addressed; the ultimate determination of whether custody or visitation should be granted rested in the sound discretion of the court, which would determine the best interests of the child. The Court noted that in the 25 years since *Alison D.* was decided, there had been significant judicial and legislative developments, such as *Matter of Jacob*, 86 NY2d 651 (1995), which allowed the unmarried partner of a child's biological mother to adopt, and the legalization of same-sex marriage. The Court also cited *Matter of Shondel J. v Mark D.*, 7 NY3d 320 (2006), which held that a man mistakenly representing himself as a child's father could be estopped from denying paternity and required to pay child support, and acknowledged the incongruity of authorizing parentage by estoppel in the child support context (*Shondel J.*) and yet denying it in the custody and visitation context (*Alison D.*).

Matter of Brooke S.B. v Elizabeth A.C.C., 28 NY3d 1 (2016)

Where Party in Child Support Matter Was Represented By Counsel, 35-day Time Requirement Set Forth in Family Court Act Section 439 (e) Did Not Begin to Run Until Final Order Was Mailed to Counsel

Through counsel, who represented her throughout the relevant proceedings, the mother filed a support petition

in Family Court. Following a hearing, the Support Magistrate entered a support order against the father in the amount of \$236 per week. The father did not make the required payments. The mother filed a violation petition, and the father sought a downward modification of his support obligation. The Support Magistrate determined that the father was in willful violation of the support order and granted a money judgment to the mother in the amount of \$16,940. The Support Magistrate dismissed the father's modification petition. The father paid \$7,000, but subsequently petitioned again for a downward modification. The mother cross-petitioned for a finding that the father was, again, in willful violation of the support order. A different Support Magistrate granted the father's petition and modified the support order by reducing the father's child support obligation to \$25 per month. In accordance with Family Court Act Section 439(e), the Support Magistrate's order contained a notice that "written objections to this order may be filed with this court within 30 days of the date the order was received in court or by personal service, or if the order was received by mail, within 35 days of the mailing of the order." A separate order, with the same date and notice, dismissed the mother's cross petition. On the same day, the Clerk of the court mailed the orders and accompanying findings of fact directly to the father and to the mother. The court did not mail the documents to the father's lawyer or the mother's lawyer, nor did the court have an electronic filing system or other means whereby counsel could learn of developments in the case. It was not until the following month that the mother notified her attorney that she had received court papers pertaining to her case. Forty-one days after the orders were mailed by the court, the mother, through counsel, filed objections. The court denied the mother's objections as untimely, and confirmed and continued the Support Magistrate's orders, without reaching the merits of the mother's contentions. The mother moved to reargue. The court adhered to its prior ruling. The mother appealed from the Support Magistrate's orders and findings of fact, as well as from the court's order denying her objections and its order upon reargument. The Appellate Division affirmed. The Court of Appeals reversed and remitted the matter to Family Court. *Matter of Bianca v Frank*, 43 NY2d 168 (1977), was dispositive. Basic procedural dictates and fundamental policy considerations required that once counsel had appeared in a matter, a statute of

limitations or time requirement could not begin to run unless that counsel was served with the determination or the order or judgment sought to be reviewed. This principle did not apply if a legislative enactment specifically excluded the necessity of serving counsel by stating the legislative intention to depart from the standard practice in unmistakable terms. In the absence of such unambiguous statutory language, any general requirement that notice was to be served upon the party was to be read to require, at least, that notice was to be served upon the attorney the party had chosen to represent him or her. Accordingly, if a party was represented by counsel, the 35-day time requirement set out in Family Court Act Section 439(e) did not begin to run until the final order was mailed to counsel.

Matter of Odunbaku v Odunbaku, __ NY3d ___, 2016 WL 6781215 (2016)

APPELLATE DIVISIONS

ADOPTION

Father's Consent to Children's Adoption Not Required

Family Court, after a hearing, denied respondent father's motion and declared that he was not entitled to notice and his consent was not required for the child's adoption. The Appellate Division affirmed. The court properly determined that because the child was under the age of six months at the time she was placed for adoption, Domestic Relations Law § 111 (1) (b) applied. Respondent did not attempt to meet the statutory criteria and could not have because, among other reasons, it was undisputed that he did not openly live with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption. Respondent failed to establish a constitutional right to develop a relationship with the child because he did not manifest his willingness to be a custodial parent. He did not file the paternity petition until the child was one year old and had been living with the adoptive mother for nearly eight months. He had not seen the child since 2013.

Matter of Nevaeh R., 139 AD3d 602 (1st Dept 2016)

Petitioner Failed to Show Good Cause For Unsealing Adoption Records

Surrogate's Court denied petitioner's petition for access to sealed adoption records. The Appellate Division affirmed. The court properly denied the petition, Although all the parties to the adoption were deceased and notice of the petition was not sent to any known or unknown descendants, the court properly denied the petition because petitioner failed to show "good cause" for unsealing the adoption records.

Matter of Zalkind T., 140 AD3d 675 (1st Dept 2016)

Father's Consent to Children's Adoption Not Required

Family Court found that respondent father's consent to adoption was not required for the adoption of the subject child. The Appellate Division affirmed. The

court's determination was supported by clear and convincing evidence that respondent failed to provide the child with consistent financial support and failed to visit or communicate with the child. Respondent was not excused from paying child support because an agency caseworker allegedly told him not to do so. Respondent's alleged provision of \$1500 worth of clothing for the child did not establish that he was a consistent or reliable source of support and was insufficient to meet his burden of showing that he provided the child with financial assistance that was fair and reasonable given his means.

Matter of Star Natavia B., 141 AD3d 430 (1st Dept 2016)

Father's Consent to Adoption of Children Was Not Required

The order appealed from, after a fact-finding hearing, denied those branches of the petitions which were to terminate the father's parental rights to the children J. and S., on the ground of permanent neglect or, in the alternative, for a determination that his consent to the adoption of those children was not required pursuant to DRL § 111 (1) (d). Contrary to the Family Court's determination, the father had the burden of proving that he satisfied the requirements of DRL § 111 (1) (d), such that his consent to the adoption of the subject children was required. In this case, the record did not support a finding that the father's consent to the adoption of the subject children was required. The father failed to establish that he met the threshold support requirement of making payments toward the support of the subject children of a fair and reasonable sum, according to his means (*see* DRL § 111 [1] [d] [I]). The fact that he was incarcerated did not absolve him of his responsibility to provide financial support, nor did it establish as a matter of law that he did not have the means to provide financial support. Consequently, pursuant to DRL § 111 (1) (d), the father's consent to the adoption of the subject children was not required, and those branches of the petitions relating to the subject children which were for such a determination should have been granted. Order reversed.

Matter of Anthony C.M., 141 AD3d 718 (2d Dept 2016)

Affirmance of Order Determining Best Interests of Child Promoted by Adoption by Foster Parents

Family Court determined that the best interests of the subject child would be promoted by her adoption by petitioners, the child's foster parents. The Appellate Division affirmed. The contention of respondent, a biological father entitled to notice of the adoption, was rejected that the gaps in the hearing transcript attributable to inaudible portions of the audio recording were so significant as to preclude appellate review. The court's bench decision adequately set forth the grounds for its determination. Moreover, the record was sufficient to permit the Court to make its own findings, and the court's determination that adoption by petitioners was in the child's best interests was supported by a preponderance of the evidence.

Matter of the Adoption of Haly S.W., 141 AD3d 1106 (4th Dept 2016)

APPEAL

Appeal of Order Directing Children be Immunized Moot

Family Court granted petitioner ACS's motion for an order directing that the subject children receive immunizations necessary to allow them to attend NYS schools. The Appellate Division dismissed the appeal. Because the children had already been vaccinated, the appeal was moot and the issues presented were not sufficiently substantial or novel to warrant the exception to the mootness doctrine. Were the appellate Division to reach the merits, it would affirm because the mother failed to submit an affidavit, and relied on an affirmation of counsel without any supporting evidence. She therefore failed to demonstrate that her opposition to immunizations stemmed from her sincere religious beliefs.

Matter of Freedom R., 142 AD3d 922 (1st Dept 2016)

ARTICLE 78

Article 78 Proceeding Could Not Be Used To Challenge Contempt Order Since Conduct Giving

Rise to Contempt Occurred Outside the Court's Presence

Supreme Court determined that petitioners, the mother and her counsel, were in contempt of court by willfully violating the order appointing the Attorney for the Child (AFC), and among other things, imposed a 15-day jail sentence against counsel, suspended for 30 days to allow him to make payment. Here, the attorney for the child was appointed to represent the parties' child in a post divorce custody proceeding when she was advised by the mother's attorney, via a letter, that he was representing the mother and the child in a civil matter, and in order to protect the "health and welfare" of the child he was canceling her meeting with the child. Although Supreme Court admonished the mother not to interfere with the AFC appointment order she disregarded the court's directive and the court imposed a 30-day jail sentence, suspended on the condition that she permit contact between the AFC and the child. Additionally, the court found that the mother's counsel had "contumaciously and intentionally" violated the order and had disregarded the rules of civility by interviewing the child without the AFC's knowledge or consent and had made unfounded allegations against the AFC. The court ordered counsel to pay \$5,000 within 60-days to the Lawyers' Fund for Client Protection. After 60-days, the court asked counsel for proof of payment but counsel failed to respond and the matter was set down for a hearing to determine whether counsel had wilfully violated its prior order. Counsel failed to appear at the hearing and the court imposed its sanctions against him. Petitioners commenced an Article 78 proceeding seeking to withdraw the orders of contempt. The Appellate Division dismissed the proceeding and determined that pursuant CPLR §7801 (2), article 78 proceedings could not be used as a means to challenge the contempt order since only actions committed in the presence of the court could be reviewed under this section. Since the record clearly showed that the actions giving rise to the contempt occurred outside of the view of the court, article 78 was not an available remedy in this case and the only way to challenge the order was through direct appeal.

Matter of Hartwich v Chauvin, 140 AD3d 1336 (3d Dept 2016)

CHILD ABUSE AND NEGLECT

Mother Failed to Protect Child From Paramour's Abuse

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence that the mother's paramour, who took care of the child during the day, had inflicted excessive corporal punishment against the child, and that the mother knew or should have known about the punishment but failed to take any steps to protect the child from further physical abuse. The evidence also supported a finding of educational neglect because the child, who was demonstrating significant academic delays in all subject areas, missed an excessive number of days of school to his detriment and his promotion was doubtful.

Matter of Jonathan M., 139 AD3d 438 (1st Dept 2016)

Mother and Father Derivatively Neglected Child

Family Court determined that respondents mother and father derivatively neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence demonstrated that respondents posed an imminent risk of harm to the child. Prior orders found that the father neglected and abused other of his children by inflicting excessive corporal punishment upon them, derivatively neglected another of his children, and that the mother failed to protect the children from the risk posed by the father. The child's brothers' out-of-court statements that the father inflicted excessive corporal punishment upon them and that the mother was aware of it was properly admitted into evidence because the brothers' statements corroborated one another and were further corroborated by the caseworkers' observations of the brothers' injuries in the prior neglect proceeding.

Matter of Nephra P.I., 139 AD3d 485 (1st Dept 2016)

Matter Remanded For Reconstruction Hearing on Medical Records

Family Court found that respondent parents neglected their special needs child and derivatively neglected

their other child. The Appellate Division held the matter in abeyance and remanded to the court for a reconstruction hearing with respect to missing medical records admitted into evidence. The issue on appeal was whether a preponderance of the evidence supported the court's finding that the parents neglected the special needs child by interfering with his medical care and delaying necessary treatment to the point where ACS was granted a medical override of the parents' refusal to consent to surgery and whether the finding of derivative neglect was appropriate inasmuch as the parents' behavior demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in their care. Those issues could not be resolved on the record on appeal because the medical records from the four health facilities that treated the special needs child, received into evidence by the court, were not submitted as part of the original record on appeal. Therefore, the matter was remanded for a reconstruction hearing.

Matter of Gabrielle N., 139 AD3d 504 (1st Dept 2016)

Child in Imminent Danger Due to Mother's Mental Illness

Family Court found that respondent mother neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's mental illness and resistance to treatment. The record showed that the mother exhibited bizarre behavior while caring for the then-infant child, including handling her roughly, failing to support the child's head and neck, failing to attend to her hygienic needs, and leaving her unattended. The mother refused to acknowledge her severe, symptomatic mental illness or to comply with any treatment regime.

Matter of Zoey A., 139 AD3d 528 (1st Dept 2016)

Mother Failed to Protect Child From Sexual Abuse

Family Court determined that respondent mother abused and neglected the subject children. The Appellate Division affirmed. Although New York was not the "home state" of the children, the court had temporary emergency jurisdiction pursuant to Domestic

Relations Law § 76-c (1). The findings that the mother abused and neglected the children was supported by a preponderance of the evidence. The record showed that the mother's husband sexually abused the oldest child for seven years, that one of the other children observed an incident of sexual abuse, and that the mother failed to protect the child from the abuse. The oldest child's out-of-court statements were sufficiently corroborated by, among other things, the criminal convictions of the mother's husband and by his admissions. The mother also failed to protect the children from the husband's excessive drinking and physical abuse. She also failed to provide one of the children with adequate medical care and she failed to provide the children with adequate food, shelter, clothing and educations. The deficiencies were not the result of a lack of financial resources.

Matter of Diana N., 139 AD3d 573 (1st Dept 2016)

Children in Imminent Danger Due to Mother's Transient Lifestyle

Family Court found that respondent mother neglected her children. The Appellate Division affirmed. A preponderance of the evidence established that the children's physical, mental or emotional condition had been impaired or was in imminent risk of becoming impaired as a result of the mother's having her family live in a transient, homeless lifestyle, sleeping in subways, 24-hour restaurants or storage facilities. These arrangements left the children without shelter and relegated them to eating junk food for their meals. The mother's poor decision-making also led to the molestation of her daughter by a felon who stayed in the storage facility. The court properly declined to credit the recantation of the mother and daughter of the details of the abuse. Further, by allowing the children to spend their days with their computers in the library, under the guise of home schooling, she educationally neglected them.

Matter of Rakeem M., 139 AD3d 622 (1st Dept 2016)

Children Neglected by Witnessing Stepfather's Domestic Violence Against Mother

Family Court found that respondents mother and stepfather neglected the subject children. The Appellate

Division affirmed. A preponderance of the evidence demonstrated that the stepfather neglected the children by committing acts of domestic violence against the mother in the children's presence and the mother neglected the children by failing to shield them from the violence. The children's out-of-court statements that they saw the stepfather hit the mother were corroborated by the caseworkers. The autistic daughter's statement that she cried when she saw the stepfather hit the mother demonstrated that her emotional and physical condition was at imminent risk. The autistic son's emotional and physical condition was at imminent risk because the mother told a caseworker that the child did not like it when she and the stepfather argued. The police had responded to respondents' apartment on other occasions due to altercations and the mother continued to live with the stepfather despite her awareness of a pending neglect case against him based upon his acts of domestic violence against his former partner in the presence of his daughter. A preponderance of the evidence also demonstrated that the mother neglected the children by leaving them alone on two occasions, even though the children had a limited ability to communicate and were unable to care for themselves and one child suffered from seizures.

Matter of Tavene H., 139 AD3d 633 (1st Dept 2016)

Mother Medically Neglected Child

Family Court found that respondent mother neglected the subject child. The Appellate Division affirmed. The court's finding of neglect was supported by a preponderance of the evidence, based on the facts that the mother minimized the danger to the child of a vegan diet, which resulted in a diagnosis of failure to thrive, her refusal to allow the child to be vaccinated, and her failure to act promptly to obtain medical assistance and nutritional advice to ameliorate the child's condition.

Matter of Demetrius R., 140 AD3d 573 (1st Dept 2016)

Mother Neglected Child by Misuse of Drugs

Family Court found that respondent mother neglected the subject child. The Appellate Division affirmed. Petitioner agency established by a preponderance of the evidence that the mother neglected the child by her misuse of drugs. The mother had a prior neglect finding

against her with respect to another child based on her misuse of drugs; she was arrested for drug use within nine months of her pregnancy with the subject child; she initially refused to submit herself or the child for drug screening when the child was born, even though she appeared to be under the influence of drugs; she was present in crack houses with the child when the child was 18 days old; and she was arrested for possession of crack cocaine and a crack pipe after a detective observed her at the crack houses. That behavior, and that she left the newborn child in the lobby of one of the crack houses when she saw the detective, evinced a substantial impairment of judgment sufficient to trigger the statutory presumption of neglect, which she failed to rebut.

Matter of Madison M., 140 AD3d 631 (1st Dept 2016)

Respondent Sexually Abused and Neglected Child and Derivatively Abused and Neglected Other Children

Family Court determined that respondent sexually abused one of the subject children and derivatively abused and neglected the other subject children, released the children to the mother, and directed respondent to, among other things, enroll and successfully complete sex offender and batterer's accountability programs. The Appellate Division affirmed. A preponderance of the evidence supported the court's determination that respondent, the biological father of two of the subject children and a person legally responsible for the other subject children, sexually abused the oldest subject child, then 12 years old, in violation of the Penal Law. The child's out-of-court statements were corroborated by respondent's admissions at a child safety conference. The court properly drew a negative inference against him based upon his failure to testify at the fact-finding hearing. Respondent failed to preserve for review his contention that his constitutional rights were violated because petitioner agency prohibited counsel from attending the child safety conference. In any event, the right to counsel did not attach until the first court appearance by respondent, which occurred after the conference. A preponderance of the evidence supported the court's determination that respondent neglected the oldest child by inflicting excessive corporal punishment by use of a belt that left bruises and marks on her body.

Matter of X. McC., 140 AD3d 662 (1st Dept 2016)

Excessive School Absences Support Neglect Finding

Family Court found that respondent mother derivatively neglected her three younger children. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that the excessive amount of school missed by the two older children, as well as their additional tardiness, without adequate excuse, significantly compromised their educational performance and compliance with related services, and therefore, respondent neglected those children and derivatively neglected the three younger children.

Matter of Daniela H., 141 AD3d 410 (1st Dept 2016)

Excessive School Absences and Failure to Provide Proper Supervision Support Neglect Finding

Family Court, upon a fact-finding determination that respondent mother neglected the subject child, released the child to the mother's custody with supervision by petitioner ACS for six months. The Appellate Division affirmed. ACS proved by a preponderance of the evidence that the mother neglected the child by failing to supply the child with an adequate education. The child was absent for 134 out of 139 days during the 2012-13 school year, and the mother presented no evidence to support her claim that, despite her best efforts, she could not control the 15-year-old child. The mother claimed she was attempting to transfer the child to another school, but presented no specific evidence about such efforts, the obstacles encountered, or the amount of time devoted to such efforts. The court also properly based its neglect finding on the mother's failure to provide proper supervision or guardianship. She allowed the child to live for long periods with someone else without determining if the environment was appropriate and safe. The mother also admitted that she was aware the child was missing and elected not to call the police or other authorities.

Matter of Malik S., 141 AD3d 428 (1st Dept 2016)

Father's Narcotics Trafficking Created Imminent Danger to Children

Family Court determined, after a hearing, that respondent father neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the neglect determination. The father was arrested upon exiting the family home while possessing a kilo of heroin. A search of the home uncovered a kilo press in the children's bedroom. Further, one of the children testified that she saw the father counting money with another man in the home. The court was entitled to draw a negative inference against the father for failing to testify at the fact-finding hearing.

Matter of Essleiny A., 142 AD3d 862 (1st Dept 2016)

Respondent Sexually Abused Child

Family Court determined, after a hearing, that respondent father neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the determination that respondent sexually abused the subject child. The child's sworn testimony at the fact-finding hearing was competent evidence that respondent sexually abused her. The court properly credited the child's testimony and any inconsistencies were minor and peripheral to the dispositive issues. The child's testimony was corroborated by her medical records, which included her similar account of the abuse, as well as the caseworker's testimony.

Matter of Fendi B., 142 AD3d 878 (1st Dept 2016)

Mother Failed to Provide a Reasonable Explanation for Child's Injury

The petitioner established a prima facie case of child abuse. The mother failed to provide a reasonable and adequate explanation for the then five-month-old child's injury, an unexplained spiral fracture of the right femur, or establish that the injury took place when the child was in the exclusive care of someone other than herself. Accordingly, the Family Court properly determined that the mother abused the child. Moreover, the Family Court properly determined that

the mother derivatively abused the child's siblings. Order affirmed.

Matter of Davion E., 139 AD3d 944 (2d Dept 2016)

Truancy of One Teenaged Child, Who Resisted Going to School, Did Not Establish Derivative Neglect of Sibling

The order appealed from, made after a fact-finding hearing, found that the father derivatively neglected the child L.S. Under FCA § 1046 (a) (i), proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent. A finding of derivative neglect is warranted where the abuse or neglect of one child demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for other children in the parent's care, even in the absence of direct evidence that the subject child was abused or neglected. Educational neglect of a school-age child may warrant a finding of derivative neglect with respect to a child younger than school age, under the circumstances of the particular case. However, under the circumstances of this case, the truancy of one teenaged child, who resisted going to school, did not establish derivative neglect of L.S., who was not even of school age. Order reversed.

Matter of Ricky S., 139 AD3d 959 (2d Dept 2016)

Father's Inadequate Supervision Created Imminent Risk of Harm to Child

In an amended petition, the petitioner alleged that the father neglected the subject child by leaving the child with the mother in violation of an order of protection that directed the mother to stay away from the child, and by subsequently failing to maintain contact with the child or the foster care agency for several months. After a fact-finding hearing, the Family Court, in an order of fact-finding dated January 23, 2015, found that the father neglected the subject child. Subsequently, in an order of disposition and a permanency hearing order, both dated February 11, 2015, the Family Court placed the subject child in the custody of the Commissioner of Social Services until the completion of the next permanency hearing. Contrary to the contention of the father and the attorney for the child, the Family Court

did not improvidently exercise its discretion in, sua sponte, permitting the petitioner to reopen its case to present additional testimony from a caseworker at the fact-finding hearing. Moreover, the Family Court properly determined that the petitioner established the father's neglect by a preponderance of the evidence (*see* FCA §§ 1012 [f] [i]; 1046 [b] [i]) based on the evidence adduced at the fact-finding hearing and the adverse inference that the Family Court correctly drew based upon the father's failure to testify. The evidence demonstrated that the father's inadequate supervision created an imminent risk of harm to the child when he left the child with the mother, despite his awareness of the mother's violent tendencies and her history of untreated mental illness and in knowing violation of an order of protection. Additionally, after the child was removed from the father's custody and placed in foster care, the father failed to provide the foster care agency with current contact information and failed to communicate with the child for a substantial period of time. Order affirmed.

Matter of Dior Z.J., 139 AD3d 1065 (2d Dept 2016)

Mother's Drug Use in Latter Stages of Her Pregnancy and Her Positive Drug Test Within a Few Months after Child's Birth Demonstrated Neglect

Shortly after the subject child was born, the county's Department of Social Services filed a petition alleging that the mother neglected the child by misusing drugs. Following a fact-finding hearing, at which the mother appeared, and a dispositional hearing, at which the mother failed to appear, the Family Court issued an order of fact-finding and disposition which, inter alia, found that the mother neglected the child. The mother appealed. The Appellate Division affirmed. The Family Court properly determined that the mother's use of heroin and morphine in the latter stages of her pregnancy, her positive drug test within a few months after the child's birth, and her prior, demonstrated inability to adequately care for her children while misusing drugs constituted neglect of the child (*see* FCA §§ 1012 [f] [i] [B]; 1046 [a] [i]; [b] [I]). Order affirmed.

Matter of Angelina K., 140 AD3d 877 (2d Dept 2016)

Supervised Visitation with Father Was in the Best Interests of the Children

In 2011, the Administration for Children's Services (hereinafter ACS) filed neglect and abuse petitions against the father. In the neglect proceedings, upon the father's consent to an entry of fact-finding without admission, the Family Court found, in an order dated November 30, 2012, that the father neglected D., Z., and S. by failing to provide them with adequate educational care and derivatively neglected A. and J. In the abuse proceedings, upon the father's consent to an entry of fact-finding without admission, the court found, in an order also dated November 30, 2012, that the father abused Z. and S. by committing sex offenses against them, and derivatively neglected A., J. and D. The father subsequently pleaded guilty to course of sexual conduct against a child in the first degree and was sentenced to 13 years' imprisonment. In an order of disposition dated July 26, 2013, the court directed the father to complete a sex offender program, and required that any visitation with A., J. and D. be supervised. After a permanency hearing, the Family Court issued an order dated May 4, 2015. The court found no evidence at the hearing that the father had completed a sex offender program, and no basis to vacate the provision of the order of disposition directing that the father complete such a program. The court also found that the best interests of A., J. and D. require that the father's visitation with them be supervised until the father completes a sex offender program, and continued the provisions of the order of disposition dated July 26, 2013, directing the father to complete a sex offender program and requiring that all visitation between the father and A., J. and D. be supervised. Contrary to the father's contentions, when the Family Court permanently discharged the subject children to the mother, it did not lose jurisdiction to continue the provisions of the order of disposition dated July 26, 2013, directing the father to complete a sex offender program, and requiring that all visitation between the father and the children A., J. and D. The Family Court retains continuing jurisdiction, after it has made an order of disposition in a child protective proceeding, to continue and enforce any of its prior orders (*see* 2-33 New York Civil Practice: Family Court Proceedings § 33.01). Indeed, FCA § 1089 (d) (1) specifically provides that the court may terminate placement of a child "with such further orders as the

court deems appropriate.” The Family Court correctly determined that there was no basis upon which to vacate the provision of the order of disposition directing the father to complete a sex offender program. The court also correctly determined that the best interests of A., J. and D. require that all of their visitation with the father be supervised. Order affirmed.

Matter of Zenaida O., 140 AD3d 882 (2d Dept 2016)

Family Court's Bias Against Mother Deprived Her of an Impartial Hearing

Following a hearing, the Family Court granted the application of the attorney for the children, joined by ACS, to direct that the children be immunized over the mother's objection. Public Health Law § 2164, which requires that an adequate dose or doses of an immunizing agent against certain diseases be administered to children at various intervals, does not apply to children whose parent or parents hold genuine and sincere religious beliefs which are contrary to the practices required therein (*see* Public Health Law § 2164 [9]). When a parent seeks to assert a religious objection to immunization under Public Health Law § 2164 (9), he or she must prove, by a preponderance of the evidence, that his or her opposition to immunization stems from genuinely-held religious beliefs. Here, the mother argued that the Family Court was biased against her, depriving her of a fair and impartial hearing. A party claiming court bias must preserve an objection and move for the court to recuse itself. The mother did not move for the Family Court to recuse itself, and thus, her contention that the court was biased against her in the conduct of the hearing was unpreserved for appellate review. Nevertheless, the Appellate Division exercised its power of appellate review in the interest of justice because the Family Court's conduct deprived the mother of a fair hearing. When a claim of bias is raised, the inquiry on appeal is limited to whether the judge's bias, if any, unjustly affected the result to the detriment of the complaining party. Here, the record demonstrated that the Family Court had a predetermined outcome of the case in mind during the hearing. In addition to certain comments made by the court regarding the sincerity of the mother's religious beliefs, the court took an adversarial stance, aggressively cross-examined the mother, continually

interrupted her testimony, mocked her beliefs, and generally demonstrated bias. The Family Court's bias unjustly affected the result of the hearing to the detriment of the mother. Therefore, the Appellate Division reversed the order and remitted the matter to the Family Court for a new hearing and determination on the application, to be held before a different Judge.

Matter of Baby Girl Z., 140 AD3d 893 (2d Dept 2016)

Father's Conclusory Affidavit Was Insufficient to Establish a Potentially Meritorious Defense to Warrant Vacating Neglect Finding Issued upon His Failure to Appear at Hearing

The petitioner commenced the instant proceedings pursuant to Family Court Act article 10 alleging that the respondent neglected the subject children. Following an inquest upon the respondent's failure to appear at a fact-finding hearing, the Family Court issued an order of fact-finding dated May 19, 2014, finding that the respondent neglected the subject children. Thereafter, the respondent moved to vacate the order of fact-finding. The Family Court denied the motion. The Appellate Division affirmed. When, as here, a party seeking to vacate an order entered upon default seeks a discretionary vacatur and raises a jurisdictional objection, the jurisdictional question must be resolved before determining whether it is appropriate to grant a discretionary vacatur. A process server's affidavit of service ordinarily constitutes prima facie evidence of proper service. Although a sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the movant fails to swear to specific facts to rebut the statements in the process server's affidavit. Here, the respondent's bare and unsubstantiated denial of service lacked the factual specificity and detail required to rebut the prima facie proof of proper service. Accordingly, no hearing was required. If the parent or other person legally responsible for the child's care is not present, the court may proceed to hear a petition pursuant to Family Court Act article 10 if the child is represented by counsel (*see* FCA § 1042). However, a timely motion to vacate the resulting fact-finding order shall be granted upon an affidavit showing, inter alia, a potentially meritorious defense to the petition unless

the court finds that the parent or other person legally responsible for the child's care willfully refused to appear at the hearing (*see* FCA § 1042). Here, the respondent's conclusory affidavit, without more, was insufficient to establish a potentially meritorious defense to the petitions alleging that he neglected the subject children. Thus, the Family Court providently exercised its discretion in denying the respondent's motion to vacate the fact-finding order.

Matter of Annata M., 140 AD3d 959 (2d Dept 2016)

Family Court Properly Determined That Father Neglected Children Based on His Abuse of Alcohol; Family Court Properly Permitted Child to Testify from Position Within Courtroom from Which She Could Be Heard but Not Seen

In an order of fact-finding dated July 16, 2015, the Family Court found, after a hearing, that the father neglected the two older children, E. and Y., based on his abuse of alcohol, and derivatively neglected the youngest child, S. In an order of disposition dated July 31, 2015, the Family Court directed the father to have only supervised visitation with the children Y. and S., and to have no visitation with the child E. until her 18th birthday, placed the father under the supervision of the county's Department of Social Services (hereinafter the DSS) for one year, and directed the father to participate in a substance abuse rehabilitation program and parenting skills program, at the direction of DSS. The father appealed. The Appellate Division affirmed. The Family Court did not improvidently exercise its discretion in permitting one of the children who is the subject of the petition to testify from a position within the courtroom from which she could be heard but not seen, while the father and his attorney were both present in the courtroom. In so ruling, the Family Court properly balanced the father's right to due process with the interests of the emotional health of that child witness. DSS established by a preponderance of the evidence (*see* FCA § 1046 [b] [i]) that the father neglected the children E. and Y. based on his abuse of alcohol, which led to emotional and mental impairment of those children or the imminent danger thereof. Accordingly, the Family Court properly found that the father neglected those two children (*see* FCA § 1012 [f]). The Family Court also properly found that the evidence of the father's neglect of the children E. and

Y., as well as the evidence of his fundamental defect in his understanding of the duties of parenthood, established derivative neglect of the child S. (*see* FCA § 1046 [a] [I]).

Matter of Emily R., 140 AD3d 1074 (2d Dept 2016)

Family Court Properly Admitted Hair Follicle Test Reports into Evidence

In April 2015, the county's Department of Social Services (hereinafter DSS) filed petitions against the mother and the father, alleging that both parties had tested positive for illegal narcotics pursuant to hair follicle tests that were administered on March 2015. Based on the positive test results, DSS sought to revoke two orders of the Family Court dated October 15, 2014, and December 2, 2014, respectively, in which the court had suspended its prior judgments sentencing each party to six months of incarceration for violating an order of protection, for as long as the parties complied with all existing court orders. After a hearing, the Family Court, inter alia, revoked the orders of suspended judgment. The mother and the father appealed. Contrary to the contentions of the mother and the father, the Family Court properly admitted their respective hair follicle test reports into evidence. Any hearsay pertaining to the reports did not prevent their admission into evidence at the suspended sentence revocation hearing, as that hearing was not a fact-finding hearing (*see* FCA § 1046 [c]). Moreover, the reports were admissible, as each participant in the chain that produced the record, from the initial declarant to the final entrant, was acting within the course of regular business conduct. Order affirmed.

Matter of Grace J., 140 AD3d 1166 (2d Dept 2016)

Mother's FCA § 1028 Application Granted

On December 2, 2015, the petitioner commenced a proceeding alleging that the mother neglected the subject child by inflicting excessive corporal punishment on the child. The following day, the Family Court issued an order temporarily placing the child in the custody of the petitioner. The mother thereafter made an application pursuant to FCA § 1028 for the return of the child to her custody. After a hearing, the court granted the application. The

petitioner appealed. The Appellate Division affirmed. An application pursuant to FCA § 1028 for the return of a child who has been temporarily removed “shall” be granted unless the court finds that “the return presents an imminent risk to the child's life or health” (*see* FCA § 1028 [a]). In making its determination, the Family Court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. The court must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests. In reviewing a Family Court's determination of an application pursuant to FCA § 1028 (a) for the return of a child who has been temporarily removed, the Court must determine whether a sound and substantial basis in the record supports the Family Court's determination. Upon reviewing the record, the Appellate Division found there was a sound and substantial basis for the Family Court's determination granting the mother's application, as there was insufficient evidence to establish that the child would have been subjected to imminent risk if returned to the mother during the pendency of the proceedings.

Matter of Ryliegh B., 141 AD3d 579 (2d Dept 2016)

Mother Neglected the Child by Failing to Provide Her with Adequate Shelter

The petitioner commenced a proceeding pursuant alleging that the mother neglected the subject child. After a fact-finding hearing, the Family Court issued an order of fact-finding and disposition, *inter alia*, finding that the mother neglected the child. The mother appealed. The Appellate Division affirmed. The evidence presented at the fact-finding hearing demonstrated, *inter alia*, that the mother had refused to allow the then 13-year-old child to return to her home due to behavioral issues and made no alternative plans for the child. Thus, the Family Court properly found, by a preponderance of the evidence (*see* FCA § 1046 [b] [I]), that the mother neglected the child by failing to provide her with adequate shelter and provisions although financially able to do so (*see* FCA § 1012 [f] [I] [A]). Under those circumstances, the fact that the mother was not offered respite care or an opportunity to voluntarily place the child with a social services agency did not absolve her of her responsibility to make provisions for the child's care.

Matter of Samima I.A.C., 141 AD3d 582 (2d Dept 2016)

Father's FCA § 1028 Application Denied

The Family Court held a combined hearing pursuant to FCA §§ 1027 and 1028 on the father's application to release the children to him during the pendency of the neglect proceedings. During the hearing, the children were placed with the father's aunt and uncle, and the father was directed not to reside in the home with the children, although he was allowed liberal supervised visitation. Following the hearing, in an order dated April 10, 2015, the Family Court denied the father's application and directed that the children were to remain in the care of the aunt and uncle during the pendency of the neglect proceedings, that the father would have liberal supervised visitation with the children, and that the father was to comply with all ACS referrals. The father appealed. The Appellate Division affirmed. There was a sound and substantial basis in the record for the Family Court's determination that the children's lives or health would have been at imminent risk if they were released to the custody of the father during the pendency of the neglect proceedings. The father correctly contended that the court failed to sufficiently weigh whether the imminent risk to the children could have been mitigated by reasonable efforts to avoid removal, as the court simply listed several areas of concern related to mitigation without actually analyzing whether those concerns could, in fact, be mitigated. However, upon the exercise of its factual review power, the Appellate Division found that the risk to the children in this case could not be mitigated, as the evidence demonstrated that the father would not have complied with any order issued in an attempt to mitigate the risk to the children.

Matter of Sara A., 141 AD3d 646 (2d Dept 2016)

Record Supported Finding of Neglect Based upon Excessive Corporal Punishment and Verbally Abusive Behavior

In October 2012, the petitioner commenced a proceeding alleging that the mother neglected her seven-year-old daughter Z. by inflicting or allowing the infliction of excessive corporal punishment on the child, and by engaging in verbally abusive behavior.

After fact-finding and dispositional hearings, the Family Court determined that the mother neglected Z. and placed the child in the custody of the Commissioner of Social Services until the next permanency hearing. The mother appealed. The Appellate Division affirmed. Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect. Contrary to the mother's contention, the finding that she neglected Z. was supported by a preponderance of the evidence, including Z.'s out-of-court statements, which were cross-corroborated by the statements of Z's younger sister, and the caseworker's observations of the mother berating the child and engaging in verbally abusive behavior.

Matter of Z'Naya D.J., 141 AD3d 651 (2d Dept 2016)

Finding That Mother Neglected Child Was Supported by a Preponderance of the Evidence

In October 2012, the petitioner commenced proceedings alleging, inter alia, that the mother neglected her five-year-old daughter K. by inflicting or allowing the infliction of excessive corporal punishment on K., and by engaging in verbally abusive behavior toward K. The petitioner further alleged that as a result of the neglect of K. and an older sibling, Z., the children N. and M. were derivatively neglected. After fact-finding and dispositional hearings, the Family Court determined that the mother neglected K. and derivatively neglected N. and M. The mother appealed. The Appellate Division affirmed. Contrary to the mother's contention, the finding that she neglected K. was supported by a preponderance of the evidence, including K's out-of-court statements regarding an incident in which the mother's boyfriend punched K. in the stomach, which were cross-corroborated by the statements of her older sister Z. and by the caseworker's observations of the mother berating K. and engaging in verbally abusive behavior. The evidence also supported the finding of derivative neglect as to N. and M. (*see* FCA § 1046 [a] [I]).

Matter of Z'Naya D.J., 141 AD3d 652 (2d Dept 2016)

Petitioner Failed to Prove by a Preponderance of the Evidence That Subject Child Was Neglected

The county's Department of Social Services (hereinafter DSS) filed a child neglect petition after the mother was hospitalized for allegedly taking a quantity of baby aspirin. It was undisputed that the mother made arrangements for the care of the subject child during the period that she was hospitalized. After a fact-finding hearing, the Family Court found that the mother had neglected the child. At a fact-finding hearing in a neglect proceeding pursuant to FCA article 10, a petitioner has the burden of proving by a preponderance of the evidence that the subject child was neglected. A parent neglects a child where he or she fails to exercise a minimum degree of care in providing the child with proper supervision or guardianship that results in impairment or imminent danger of impairment to the child's physical, mental or emotional condition (*see* FCA § 1012 [f] [I] [B]). Actual or imminent danger of impairment is a prerequisite to a finding of neglect which ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. Imminent danger must be near or impending, not merely possible. Here, the Family Court's finding of neglect was not supported by a preponderance of the evidence (*see* FCA § 1046 [b] [I]). DSS failed to demonstrate, by a preponderance of the evidence, that the child's physical, mental, or emotional condition was in imminent danger of becoming impaired due to the mother's act of taking baby aspirin or the mother's subsequent hospitalization. Accordingly, the Family Court should have denied the petition and dismissed the proceeding. Order reversed.

Matter of N'Zion H., 142 AD3d 1170 (2d Dept 2016)

Contrary to the Family Court's Determination, a Preponderance of the Evidence Established That Children Were Neglected Due to Father Engaging in Domestic Violence Against the Mother

The order of disposition, upon a decision dated November 17, 2015, made after a fact-finding hearing, denied the petitions alleging that the respondent neglected the subject children and dismissed the proceedings. The petitioner appealed. The Appellate

Division reversed. A preponderance of the evidence established that by, inter alia, engaging in acts of domestic violence against the mother, the respondent neglected all of the subject children, except D., who was born after the respondent committed these acts of domestic violence. The testimony showed that, on one occasion, in the presence of at least one of the children, the respondent threatened that he would kill the mother, and on another occasion, he punched the mother in the face when all of the six older children were in the next room. That blow caused the mother to fall into a bathtub and sustain bruising, which was observed by all of the six older children. During another incident, the respondent threw a set of keys at the mother, and the keys hit one of the children in the face while all of the other older children also were present. The testimony showed that the incidents caused the six older children to be “afraid,” “scared,” and “upset.” Contrary to the Family Court's determination, under these circumstances, a preponderance of the evidence established that all of the six older children were neglected. Contrary to the court's further determination, the evidence supported a finding of derivative neglect with respect to D. Accordingly, the order appealed was reversed, the petitions were reinstated, and the matter was remitted to Family Court for a dispositional hearing and a new determination thereafter.

Matter of Andre K., 142 AD3d 1171 (2d Dept 2016)

Court's Failure to Allow Respondent to Review Therapist's Notes Was Harmless Error

Family Court found respondent had abused one of his two stepdaughters and derivatively neglected the other stepchild and biological child. The Appellate Division affirmed. Here, the 15-year-old subject child told a school administrator that respondent had subjected her to sexual touching. The record included in-court testimony from the subject child, who described two specific incidents of sexual abuse and related when and where it had occurred. Additionally, she testified respondent had begun sexually abusing her since she was nine or 10 years old. The child's therapist and the agency caseworker also offered testimony on behalf of petitioner. Giving due deference to the court's credibility determination, there was sufficient proof to support the court's determination. Furthermore, the

child's testimony corroborated her out-of-court statements. Although the court erred in denying respondent a chance to review the notes of the child's therapist, this error was harmless. Moreover, the derivative neglect findings were supported by the record. Respondent's repeated sexual abuse of the subject child demonstrated such an impaired level of parental judgment that it created substantial harm to any child left in his care.

Matter of Daniel XX., 140 AD3d 1229 (3d Dept 2016)

Respondent's Acts of Domestic Violence Supports Neglect Determination

There was a sound and substantial basis in the record for Family Court's determination that respondent had neglected his children and derivatively neglected his grandchildren. Here, the evidence showed respondent, who had also been arrested on charges of rape in the first degree and incest in the third degree, committed repeated acts of domestic violence against the mother in the presence of the children and also inflicted physical abuse on the children. The agency caseworker testified that one of the subject children she had interviewed reported respondent frequently hit, slapped, smacked and pushed him, causing his teeth to chip. The child had also witnessed respondent striking the mother and burning her with cigarettes, and pushing one of his sisters causing her to wear a brace or cast. The mother testified to countless acts of domestic violence perpetrated against her by respondent in front of the children, including incidents where he burned her with cigarettes, dragged her around the house by her hair and hit her with a baseball bat. She also testified to the physical abuse he inflicted on the children.

Matter of Stephanie RR., 140 AD3d 1237 (3d Dept 2016)

Summary Judgment Appropriate Since No Triable Issues of Fact Existed

Family Court granted petitioner's motion for summary judgment finding that respondent father had derivatively neglected his two biological children. The Appellate Division affirmed. Here, respondent had been convicted of criminal sexual act in the second degree for orally sodomizing his 12-year-old

stepdaughter, and the transcript of the plea colloquy established respondent's admission to this crime and his efforts to pressure her to recant. Although rarely used, summary judgement was appropriate in this case since no triable issues of fact existed and collateral estoppel effect could be given to respondent's conviction since the issues resolved in criminal court were identical to the ones in Family Court. Furthermore, the evidence showed that respondent's sexual abuse of his stepdaughter demonstrated such an impaired level of parental judgment that no child should be left in his care.

Matter of Alexander TT., 141 AD3d 762 (3d Dept 2016)

Respondent's Disregard For Human Life Supports Severe Abuse Determination

The Appellate Division determined that Family Court erred in dismissing the severe abuse and derivative severe abuse petitions against respondent and found there was clear and convincing evidence that respondent mother had acted with such a disregard for human life, that both the subject child and his sibling were severely and derivatively severely abused. Here, the evidence showed respondent had allowed her boyfriend, whom she had dated for a very brief period of time and knew went out at night to buy illegal drugs, to care for her children. She continued to allow him to care for the children and harm them further even after the older child had sustained serious and abnormal degrees of bruising, which she unreasonably said was due to accidental causes and chose to believe her boyfriend's explanations. The older child died as a result of the injuries inflicted on him by the boyfriend. Furthermore, respondent failed to seek professional medical treatment for the child even though she saw he had sustained numerous visible injuries, including a bowel movement that consisted of a blood clot and black fluid in his vomit. She ultimately refused to seek treatment because of her concern that child protective services were actively investigating her in an open case. The younger child also had a severe ear infection that required medical care, in addition to "very inflamed nipples" and a "suction injury or hickey" below the right nipple, which were severe enough to be indicative of trauma and possible sexual abuse.

Matter of Mason F., 141 AD3d 764 (3d Dept 2016)

No Right To Appeal From Consent Order

Family Court adjudicated respondent parents' children to be neglected. The Appellate Division affirmed. Here, the neglect allegations were based on, among other things, illegal drug abuse and domestic violence. Respondents made admissions and thereafter, an order in contemplation of dismissal was issued subject to respondents' compliance with certain conditions for one year. However, respondents failed to comply with all the conditions and stipulated to have the neglect petitions restored, and consented to the findings based on prior admissions. Since the order was entered upon respondents' consent, there was no right to an appeal from such an order.

Matter of Zachary M., 141 AD3d 771 (3d Dept 2016)

Petition Dismissed Where Nonhearsay Evidence Insufficient to Establish That Child's Physical, Mental or Emotional Condition Was Impaired or in Imminent Danger of Being Impaired

Family Court determined that respondent father neglected the subject child, among other things. The Appellate Division reversed and dismissed the petition against respondent. Petitioner failed to meet its burden of establishing neglect by a preponderance of the evidence. At the fact-finding hearing, only competent, material and relevant evidence was admissible. The evidence admitted in support of the petition consisted primarily of the caseworker's testimony regarding the mother's out-of-court statements, as well as portions of a police report containing the mother's statements to the police. The mother's out-of-court statements constituted hearsay, and were not admissible against the father in the absence of a showing that they came within a statutory or common-law exception to the hearsay rule. Petitioner failed to make such a showing. Inasmuch as the nonhearsay evidence in the record was insufficient to establish that the child's physical, mental or emotional condition was impaired or in imminent danger of being impaired as a consequence of the father's conduct, the petition was dismissed.

Matter of Tyler M., 139 AD3d 1401 (4th Dept 2016)

Court Erred in Denying Respondent's Request to Appear By Telephone at Dispositional Hearing

In an order of disposition, Family Court continued the placement of respondent mother's children in the care and custody of petitioner, among other things. The Appellate Division modified by vacating the disposition and remitted the matter for a new dispositional hearing. The order of disposition was properly entered upon the mother's default based on her failure to appear on the date scheduled for the dispositional hearing. The mother's failure to appear constituted a default, where neither her retained attorney, nor the new attorney that the court assigned for the mother, was both willing and authorized to proceed with the hearing in the mother's absence. DSS established by a preponderance of the evidence that the children were neglected as a result of the mother's mental illness. A finding of neglect based on mental illness did not need to be supported by a particular diagnosis or by medical evidence. However, pursuant to Domestic Relations Law Section 75-j, the court should have allowed the mother to appear by telephone at the dispositional hearing. The record established that the mother moved to Florida, with financial assistance from DSS, during the period between the fact-finding hearing and the dispositional hearing. She requested permission to make future appearances by telephone, and the court denied the request, citing "the facts and circumstances of the case" and its preference that the mother be present "as any party of the proceeding should be present." Section 75-j did not require courts to allow testimony by telephone or electronic means in all cases. However, the court abused its discretion in failing to consider the impact of the mother's limited financial resources on her ability to travel to New York.

Matter of Thomas B., 139 AD3d 1402 (4th Dept 2016)

Appeal From Order for Services Dismissed as Moot

Family Court entered an order for services in a neglect proceeding. The Appellate Division dismissed the appeal as moot. The order was superceded by a subsequent order that directed the removal of the subject children. Therefore, any decision concerning the propriety of the order for services would not directly affect the rights and interests of the parties.

Matter of Azaria A., 140 AD3d 1634 (4th Dept 2016)

Finding of Neglect Reversed Where Subject Children Were Entitled to Appointment of Separate Attorneys to Represent Their Conflicting Interests

Family Court determined that respondent mother neglected the subject children, and placed the children in the custody of the petitioner. The Appellate Division reversed and remitted for the appointment of new counsel for the children and a new fact-finding hearing. The children's statements, together with the negative inference drawn from the mother's failure to testify, were sufficient to support the finding of neglect. However, children in a neglect proceeding were entitled to effective assistance of counsel. The appellate AFC for Katie and the appellate AFC for Brian, two of the subject children, contended that Katie and Brian were deprived of effective assistance of counsel by the trial AFC who jointly represented them as well as their sister, Alyssa, during the proceeding. Katie's appellate AFC contended that the trial AFC never met with or spoke to Katie. There was no indication in the record whether the trial AFC consulted with Katie. The contention of Katie's appellate AFC was therefore based on matters outside the record, and was not properly before the Court. However, Brian was deprived of effective assistance of counsel because the trial AFC failed to advocate his position. There was no dispute that the trial AFC took a position contrary to the position of two of the subject children, Brian and Alyssa, both of whom maintained that Katie was lying with respect to her allegations against the mother. Alyssa expressed a strong desire to continue living with the mother, while Brian said that he wanted to live with either the mother or his father, who entered an admission of neglect prior to the hearing and was thus not a custodial option. Nevertheless, when the mother moved to dismiss the petition at the close of petitioner's case based on insufficient evidence of neglect, the trial AFC opposed the motion, stating that, although this was "probably not a very strong case," petitioner had met its burden of proof. Also, during his cross-examination of petitioner's sole witness, the trial AFC asked questions designed to elicit unfavorable testimony regarding the mother, thus undercutting Brian and Alyssa's position. Inasmuch as the trial AFC failed to advocate Brian and Alyssa's position at the fact-finding hearing, he was required to determine that

one of the two exceptions to the Rule of the Chief Judge applied, as well as to inform the court of the children's articulated wishes. The trial AFC did not fulfill either obligation. Indeed, the record established that neither of the two exceptions applied. Because all three children were teenagers at the time of the hearing, there was no basis for the trial AFC to conclude that they lacked the capacity for knowing, voluntary and considered judgment, and there was no evidence in the record that following the children's wishes was likely to result in a substantial risk of imminent, serious harm to the children. According to the trial AFC, the most serious concern he had about the children was that they frequently skipped school which, although certainly not in their long-term best interests, did not pose a substantial risk of *imminent* and serious harm to them (emphasis in the original). Similarly, the fact that the mother may have occasionally used drugs in the house, and was thus unable to care for the children, did not establish a substantial risk of imminent and serious harm to Brian or Alyssa. The fact that the mother, on a single occasion, may have struck Katie on the arm with a belt, leaving a small mark, did not establish a substantial risk of imminent and serious harm to Brian or Alyssa if they continued living with the mother. Although the record did not reveal whether the trial AFC consulted with Katie, it was clear that Katie's position with respect to the neglect proceeding differed from that of her siblings. Under the circumstances, it was impossible for the trial AFC to advocate zealously the children's unharmonious positions. Thus, the children were entitled to appointment of separate attorneys to represent their conflicting interests. The dissent agreed with the majority that petitioner established by a preponderance of the evidence that the children were neglected by the parents. The trial AFC understandably argued in summation that petitioner had proven its case. Although the trial AFC did not set forth the wishes of the children, the dissent noted that the court was aware that Alyssa wanted to live with the mother, that Brian wanted to live with the mother or father, and that Katie wanted to live with an aunt. The dissent concluded that the trial AFC was reasonably of the view, in light of the evidence supporting a finding of neglect, that there was a substantial risk of imminent, serious harm to the children if they remained in the custody of the parents, and was not ineffective for advocating a finding of neglect.

Matter of Brian S., 141 AD3d 1145 (4th Dept 2016)

Mother Neglected Children by Misuse of Alcohol

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. The court properly applied the presumption of neglect where a parent chronically and persistently misuses alcohol and drugs, which substantially impairs judgment while the child is entrusted to the parent's care. The caseworker testified that the mother admitted drinking vodka for days at a time and that she felt guilty because of the effect that her and her husband's drinking had on the children. The children made statements to the caseworker that there were times when the parents were so intoxicated that the eldest son had to cook for his siblings and times when he had to make arrangements for the youngest daughter to go to friends' houses so he could go to work. On at least one occasion, the youngest daughter hid under furniture to avoid the parents, who were drinking and fighting. There was also evidence that the mother was too intoxicated to protect the children from her husband, who became physically abusive towards the children when he was drinking. The mother failed to rebut the presumption of neglect, thus obviating the requirement that petitioner present evidence establishing actual impairment or a risk of impairment.

Matter of Hunter K., 142 AD3d 1307 (4th Dept 2016)

CHILD SUPPORT

Father Obligated to Pay Child's Post-Emancipation Education Costs

Supreme Court rejected a portion of the Special Referee's report finding that plaintiff husband was contractually obligated for the educational expenses of the parties' emancipated daughter, directed that the issue be resubmitted to a different Referee and confirmed the report insofar as it determined the amounts of past amounts expended for education costs. The Appellate Division modified by confirming the finding of the Referee that plaintiff had an unambiguous obligation to pay the parties' daughter's post-emancipation education expenses and vacated that part of the order directing a second Referee. In the absence of an articulated limitation based upon a

particular age, number of consecutive years or course of study, the clear meaning of the parties' divorce stipulation provided that the father would pay "the entire cost of the children's private school and higher education," which obliged the father to pay for the parties' daughter's current college education. Because there was no explicit finding of ambiguity before the initial reference, the Referee's determination was not contrary to the court's reference for a hearing and recommendation regarding whether the parties intended to oblige the father to pay the parties' children's college education only until the children reached 21 or until the completion of undergraduate education. Further, the father had an opportunity to conduct a full inquiry about whether the submitted documents accurately reflected what was due and owing to Columbia University.

Levenglick v Levenglick, 140 AD3d 525 (1st Dept 2016)

Respondent Failed to Show Substantial Change in Circumstances

Family Court denied respondent father's objections to orders of a Support Magistrate. The Appellate Division affirmed. The court properly denied, as untimely and unpreserved, respondent's objections to the Support Magistrate's November 2014 order entered upon respondent's default and a January 2015 order denying respondent's motion to vacate the support order. The court also properly denied respondent's objections to the Support Magistrate's May 2015 order, which dismissed respondent's petition for a downward modification of the November 2014 order. Respondent failed to demonstrate a substantial change in circumstances since he did not submit a financial disclosure affidavit, a job search diary, or any evidence of his income. Further, respondent failed to comply with the Support Magistrate's directive to attend the STEP Program and his attendance at a commercial driving school did not constitute sufficient evidence of a job search.

Matter of Amanda T. v Erick Z., 140 AD3d 529 (1st Dept 2016)

Petitioner Entitled to Payment of Child Care Expenses and Attorneys Fees

Family Court denied petitioner mother's motion for 90% of her interim child care expenses and for attorneys fees. The Appellate Division reversed. Petitioner was incurring child care expenses as a result of working and was therefore entitled to an order directing respondent father to pay his proportionate share of those expense. Because respondent contended that his proportionate share, if any, was 78%, he is responsible for 78%, subject to adjustment at trial. Given the financial circumstances of the parties, including that respondent's income and assets were significantly greater than petitioner's, an award of interim counsel fees of \$25,000 was warranted to preserve parity between the parties and to avoid having petitioner deplete her assets to secure legal representation.

Matter of Anna Y. v Alexander S., 142 AD3d 864 (1st Dept 2016)

Support Magistrate Did Not Act as Advocate

Family Court, upon confirmation of the Support Magistrate's finding of willfulness, sentenced respondent to incarceration of four months with a purge amount of \$20,000. The Appellate Division affirmed. Respondent failed to present credible evidence of his inability to make required support payments for the subject child. The Support Magistrate did not assume the appearance of an advocate for petitioner during the proceedings. Rather, the Magistrate fulfilled a vital role in clarifying confusing testimony and facilitating the orderly and expeditious progress of the trial.

Matter of Ronda E. F. v Leroy M. C., 142 AD3d 868 (1st Dept 2016)

Denial of Petitioner's Objections to Support Order Affirmed

Family Court confirmed the Support Magistrate's denial of petitioner's objection to an order of support. The Appellate Division affirmed. The court properly determined that the Magistrate providently exercised his discretion in declining to impute income to respondent. The document that petitioner contended

established that respondent had additional income concerned a period predating the child's birth, the filing of the child support petition and the time of trial. Although the Magistrate erred in failing to consider the statutory factors for determining whether to award child support based upon parental income above the statutory cap, for establishing each party's obligation to pay a portion of health insurance premiums and unreimbursed medical expenses, and for deviating from the noncustodial parent's pro rata share of childcare expenses, the Appellate Division's application of those factors led to the same result.

Matter of Stefani L. v Eugene B., 142 AD3d 919 (1st Dept 2016)

Court Failed to Articulate Reasons for Capping Combined Parental Income

In a child support proceeding, the Supreme Court, *inter alia*, awarded the plaintiff the sum of \$836.76 per week in child support. Upon reviewing the record, the Appellate Division found that the Supreme Court failed to sufficiently articulate its reasons for capping the combined parental income at \$176,000. The Child Support Standards Act (*see* DRL § 240[1-b]) sets forth a formula for calculating child support by applying a designated statutory percentage, based upon the number of children to be supported, to combined parental income up to the statutory cap that is in effect at the time of the judgment, here, \$136,000 (*see* SSL § 111-i[2][b]). For income exceeding \$136,000, the court has broad discretion to apply the statutory child support percentage, or to apply the factors set forth in DRL § 240(1-b)(f), or to apply both. The court must articulate its reason or reasons for that determination, which should reflect a careful consideration of the stated basis for its exercise of discretion, the parties' circumstances, and its reasoning why there should or should not be a departure from the prescribed percentage. Here, while the Supreme Court stated that it considered some of the relevant factors, including the children's lifestyle during the marriage, the court failed to adequately articulate how these factors applied to the particular circumstances of this case and how it decided that \$176,000, an amount less than the defendant's 2013 base salary of \$181,000, was an appropriate limit on which to base his child support obligation. For instance, the record does not reflect that the court considered or

gave sufficient weight to, among other things, the fact that the twins were not planning to return to college, were financially dependent upon their parents, and would be living at home full-time with the plaintiff. Therefore, the order was modified, and the matter was remitted to the Supreme Court to enable it to further articulate how the factors set forth in DRL § 240(1-b)(f) supported its determination capping the combined parental income for the purpose of calculating child support.

Gillman v. Gillman, 139 AD3d 667 (2d Dept 2016)

Evidentiary Hearing Required

Contrary to the father's contentions, the Family Court properly denied his objections to the Support Magistrate's dismissal of his petition to modify his child support obligation on the ground of constructive emancipation. Here, the Family Court correctly concluded that the father failed to meet his burden of proving that the child was constructively emancipated from him. However, the Family Court erred in granting the mother's petition for child support arrears and directing the entry of a money judgment against the father without first conducting an evidentiary hearing to determine whether the father willfully violated the child support provisions of the parties' judgment of divorce, and if so, to establish the amount owed, which was disputed by the father. Indeed, at one point during the hearing on the father's petition to modify the child support order, the Support Magistrate ruled that the mother's violation petition would be heard subsequently, as the determination of the father's modification petition could directly affect the determination of whether there was a violation of the subject child support provisions. However, no further hearing was conducted with respect to the mother's petition, no testimony concerning the calculation of the father's alleged arrears was produced, and no documentary evidence supporting the mother's claim for child support arrears was admitted into evidence. Accordingly, the order was modified and the matter was remitted to the Family Court for a hearing to determine the mother's petition and the amount, if any, of child support arrears owed by the father.

Matter of Malloy v O'Gorman, 139 AD3d 733 (2d Dept 2016)

Calculation of Arrears Affirmed

In a matrimonial action, in October 2004, the parties entered into a settlement agreement, pursuant to which the defendant agreed to pay child support consisting of two components. The first component required the defendant to pay \$4,400 per month. The second component required the defendant to pay 25% of the income he derived from his ownership of stock in Eifert French & Co. A judgment of divorce was entered in 2005, which incorporated but did not merge the settlement agreement. In August 2013, the plaintiff moved, inter alia, for child support arrears in the sum of \$63,283.25 arising from the second component of the defendant's child support obligation. The plaintiff arrived at this sum by performing calculations based on K-1 statements received by the defendant from Eifert French & Co. In opposition, the defendant contended that the second component of his child support obligation should be calculated based on distribution checks he received from Eifert French & Co, rather than K-1 statements, and that the correct amount of arrears he owed for this component of his child support obligation was the sum of \$21,137.49. The Supreme Court agreed with the defendant, and denied that branch of the plaintiff's motion which was for child support arrears in the sum of \$63,283.25, concluding that the plaintiff's calculation was incorrect and that the arrears should be calculated based on the distribution checks received by the defendant. The court subsequently issued a judgment dated April 7, 2014, in favor of the plaintiff and against the defendant in the principal sum of \$21,137.49. The plaintiff appealed. The Appellate Division affirmed. Contrary to the plaintiff's contention, the record reflected that the Supreme Court properly found that the parties' intent was to calculate the second component of the defendant's child support obligation based on distribution checks issued to him by Eifert French & Co. in February or March of each year. Based upon these calculations, the court correctly determined that the amount of arrears owed by the defendant for the second component of his child support obligation was in the principal sum of \$21,137.49.

Eifert v Eifert, 139 AD3d 791 (2d Dept 2016)

Record Did Not Support Finding of Willful Violation

The Family Court erred in confirming the Support Magistrate's finding of a willful violation of the support order, and in issuing an order of commitment. The mother's undisputed evidence of the father's failure to pay child support as directed constituted prima facie evidence of a willful violation. The burden then shifted to the father to present competent, credible evidence of his financial inability to comply (*see* FCA § 455 [5]). The father met that burden by demonstrating that he was laid off from his job, that he collected unemployment benefits until he was able to secure another job, though at drastically lower pay, and that he was receiving public assistance benefits. Further, the record contained evidence of the father's active, but unsuccessful, pursuit of similar employment, including, his participation in vocational assistance programs. Under these circumstances, the record did not support the Support Magistrate's finding that the father willfully violated the support order. The Family Court also erred in denying the father's objection to so much of the order of disposition as denied his petition for downward modification of his support obligation. To establish entitlement to a downward modification of a child support order entered on consent, a party has the burden of showing that there has been a substantial change in circumstances. Here, the father's evidence regarding his loss of employment and his unsuccessful efforts to obtain comparable employment demonstrated a substantial change of circumstances warranting downward modification of his support obligation. Thus, the order was reversed and the matter was remitted to the Family Court for a hearing and determination of the amount of the father's reduced child support obligation.

Matter of Morgan v Spence, 139 AD3d 859 (2d Dept 2016)

Child's Mere Reluctance to See Parent Is Not Abandonment

Contrary to the plaintiff's contention, the Supreme Court properly determined, without a hearing, that the plaintiff's child support obligation with respect to the parties' son was not terminated on the ground of constructive emancipation. It is fundamental public

policy in New York that parents of minor children are responsible for their children's support until age 21 (*see* FCA § 413). However, under the doctrine of constructive emancipation, a child of employable age who actively abandons the noncustodial parent by refusing all contact and visitation may forfeit any entitlement to support. A child's mere reluctance to see a parent is not abandonment. Here, the plaintiff failed to demonstrate, *prima facie*, that his son refused all contact and visitation. Accordingly, the Supreme Court properly denied that branch of the plaintiff's cross motion without a hearing, and properly directed the plaintiff to pay child support for his son.

O'Rourke v O'Rourke, 139 AD3d 1027 (2d Dept 2016)

Objections Properly Denied

After a hearing on the father's petition for a downward modification of his child support obligation, at which he appeared *pro se*, the Support Magistrate denied the petition for failure to state a cause of action on the ground that the father failed to produce competent medical evidence of an alleged illness that prevented him from working, and dismissed the proceeding. The father thereafter filed objections to the order of dismissal. In an order dated March 20, 2015, the Family Court denied the objections. It was the father's burden to offer competent medical evidence of his alleged illness, which he failed to do. The father was not deprived of the right to counsel. He had no right to assigned counsel in a support modification proceeding (*see* FCA § 262 [a]), and the record established that he was aware that he had a right to retain counsel but chose to proceed *pro se*. Order affirmed.

Matter of Nicotra v Nicotra, 139 AD3d 1070 (2d Dept 1016)

Family Court Lacked Jurisdiction to Modify Swedish Support Order under Interstate Family Support Act

The parties' three children were born in New York. In 2004, the family moved to Sweden. The father is a Swedish citizen, and the mother, who is an American citizen, obtained Swedish citizenship in February 2011. The parties were divorced in June 2011 pursuant to a partial judgment of the Attunda District Court,

Sollentuna, Sweden. In July 2012, the Svea Court of Appeal, Stockholm, Sweden, awarded the parties joint legal custody of the children, with the mother having primary physical custody of the children and the father having visitation. In October 2012, the mother moved to New York with the children. The father remained in Sweden, although he later moved to Singapore in connection with his employment. He retained his Swedish citizenship and remained registered with the Swedish authorities at his home address in Stockholm. In 2013, the parties entered into a child support agreement that was thereafter entered as a judgment by the Attunda District Court on September 23, 2013 (hereinafter the Swedish support order). The father made child support payments to the mother's New York bank account pursuant to that order. In July 2015, the mother commenced a proceeding in the Family Court, Suffolk County, for a *de novo* award of child support or, in the alternative, to modify the Swedish support order. The father moved to dismiss the petition on the ground, *inter alia*, of lack of jurisdiction. In an order dated December 4, 2015, the Support Magistrate denied the motion. In an order dated December 24, 2015, the Family Court denied the father's objections to the Support Magistrate's order. By permission, the father appealed. The Appellate Division reversed. In 2015, New York adopted, as FCA Article 5–B, a new version of the Uniform Interstate Family Support Act (hereinafter the UIFSA), that, among other things, incorporates the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter the Convention), of which Sweden is a member (*see* L 2015, ch 347, § 2). Although the new version became effective January 1, 2016, FCA § 580–903 provides that the new version “shall apply to any action or proceeding filed or order issued on or before the effective date.” The mother argued that, after the father moved to Singapore, he was no longer “a resident of the foreign country where the support order was issued,” and that FCA § 580–711(a) therefore did not apply. However, the father submitted evidence demonstrating that, notwithstanding his move to Singapore, he remained registered as a resident of Stockholm pursuant to the laws of Sweden. It was also clear that the father did not expressly submit to the jurisdiction of the courts of this state, and that he objected to the jurisdiction at the first available opportunity. Furthermore, contrary to the mother's contention, the record did not demonstrate that the

courts of Sweden lack or have refused to exercise jurisdiction to modify the Swedish support order or issue a new support order. Accordingly, the courts of this state do not have jurisdiction to issue a new support order unless there is a reason not to recognize the Swedish support order (*see* FCA § 580–711[b]; 580–708[c]). FCA § 580–708 provides that tribunals of this state shall recognize registered support orders issued by tribunals located in members of the Convention except under certain specified circumstances, including where recognition of the order “is manifestly incompatible with public policy, including the failure of the issuing tribunal to observe minimum standards of due process, which include notice and an opportunity to be heard” (*see* FCA § 580–708[b][1]). Here, contrary to the mother's contention, she has failed to demonstrate that recognition of the Swedish support order is manifestly incompatible with public policy. Accordingly, since the Family Court was without jurisdiction to entertain the mother's petition, the Appellate Division reversed the order dated December 24, 2015, vacated the order dated December 4, 2015, and granted the father's motion to dismiss the petition.

Matter of Ardell v Ardell, 140 AD3d 863 (2d Dept 2016)

Mother’s Allegations in Petition Were Not Sufficient to Warrant a Modification of the Father's Child Support Obligation; Petition Dismissed

In an order dated December 11, 2014, a Support Magistrate directed the dismissal of the mother's petition on the ground that it failed to state a cause of action and denied that branch of the mother's motion which was to disqualify the father's attorney. The mother then filed objections to those portions of the Support Magistrate's order. In an order dated February 10, 2015, the Family Court denied the mother's objections. The mother appealed. The Appellate Division affirmed. The parties' stipulation of settlement, which was incorporated but not merged into the parties' judgment of divorce, set forth the father's child support obligation, and was executed before the effective date of the 2010 amendments to FCA § 451 (*see* L 2010, ch 182, § 13). Therefore, in order to establish her entitlement to an upward modification of the father's child support obligation, the mother had the

burden of establishing an unanticipated and unreasonable change in circumstances resulting in a concomitant need, or that the agreement was not fair and equitable when entered into. Here, the allegations in the mother's petition, read in conjunction with the stipulation of settlement and judgment of divorce annexed thereto, were not sufficient to warrant a modification of the father's child support obligation, as the cessation of the father's maintenance obligation on October 1, 2014, was not an unanticipated circumstance. Consequently, the Family Court properly denied the mother's objections to so much of the Support Magistrate's order as directed the dismissal of her petition for an upward modification of the father's child support obligation. Further, where there are no issues of fact, a court may dismiss a petition without conducting a hearing or enforcing the right to compulsory disclosure under FCA § 424-a. The Family Court also properly denied the mother's objections to so much of the Support Magistrate's order as denied that branch of her motion which was to disqualify the father's attorney. Absent actual prejudice or a substantial risk thereof, the appearance of impropriety alone is not sufficient to require disqualification of an attorney. A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion. Here, given that the proceeding was capable of being resolved by a simple reading of the petition and stipulation, there was no actual prejudice or substantial risk thereof to the mother since none of the information purportedly obtained by the father's counsel through her representation of the mother's current husband was at issue.

Matte of Nenninger v Kelly, 140 AD3d 961 (2d Dept 2016)

Support Magistrate Improperly Precluded Mother from Introducing Evidence

The parties are divorced and have two children. Pursuant to a Family Court order dated October 28, 2013, the father was directed to pay child support in the sum of \$447 bi-weekly, as well as 50% of the children's child care expenses and unreimbursed medical expenses. In January 2015, the mother filed a violation

petition alleging, inter alia, that the father had failed to pay his pro rata share of the children's unreimbursed medical expenses. At the ensuing hearing, the mother testified that she had incurred \$980 in medical expenses for the children, and she attempted to offer into evidence copies of medical bills and proof of payment. The Support Magistrate, however, refused to admit the medical invoices into evidence on the ground that the medical invoices were hearsay, and were not admissible through the mother's testimony. In the findings of fact, the Support Magistrate concluded that the mother failed to demonstrate the amounts of each individual medical expense or when they were incurred and, therefore, dismissed that branch of her petition which sought reimbursement from the father for his pro rata share of the children's unreimbursed medical expenses. The mother filed objections, which were denied by the Family Court. The mother appealed. The Appellate Division reversed. The Support Magistrate improperly precluded the mother from introducing evidence to support that branch of her petition which sought payment from the father for his pro rata share of the children's unreimbursed medical expenses. Contrary to the Support Magistrate's determination, the mother's testimony provided a sufficient foundation for the admission of the medical bills and her proof of payment of those bills, as she had personal knowledge of their contents. Consequently, the mother should have been permitted to meet her initial burden of presenting prima facie evidence of the father's nonpayment through the submission of the medical bills and her sworn testimony. As a result of the Support Magistrate's erroneous preclusion of evidence, the mother was not afforded the opportunity to meet her initial burden of presenting prima facie evidence as to the father's nonpayment of his pro rata share of the children's unreimbursed medical expenses. Accordingly, the Appellate Division granted the mother's objections and remitted the matter to the Family Court for a hearing on that branch of the mother's petition which alleged that the father violated the prior order directing him to pay his pro rata share of the children's unreimbursed medical expenses, and a new determination of that branch of the petition thereafter.

Matter of Schiero v Perrotta, 140 AD3d 970 (2d Dept 2016)

Father Established Entitlement to Downward Modification

At a hearing, the father established a substantial change in circumstances by demonstrating that his loss of employment was involuntary and through no fault of his own, and that he made diligent, good faith efforts to obtain new employment that was commensurate with his experience and qualifications (*see* FCA § 451 [3]). Accordingly, the Support Magistrate's determination that he failed to establish entitlement to a downward modification of his child support obligation was not supported by the record, and the Family Court should have granted his objection to the denial of that branch of his petition which sought such relief. However, the Family Court properly denied the father's objection to the Support Magistrate's denial of that branch of his petition which sought a credit for overpayments of child support in view of the strong public policy against restitution or recoupment of child support overpayments. Thus, the order was modified and the matter was remitted to the Family Court for a hearing and determination of the amount of the father's reduced child support obligation.

Matter of Holmes v Holmes, 140 AD3d 1066 (2d Dept 2016)

Support Magistrate Properly Imputed Income to Father

A support magistrate need not rely upon a party's account of his or her own finances, but may impute income based upon the party's past income or demonstrated earning potential. The support magistrate may impute income to a party based on his or her employment history, future earning capacity, educational background, or "money, goods, or services provided by relatives and friends" (*see* FCA § 413 [1] [b] [5] [iv]). A support magistrate is afforded considerable discretion in determining whether to impute income to a parent. Here, the Support Magistrate properly imputed income to the father based upon his prior income, his training, his choice to pursue only part-time employment, and his current living arrangement, in which he did not pay rent (*see* FCA § 413 [1] [b] [5] [iv]). Order affirmed.

Matter of Napoli v Koller, 140 AD3d 1070 (2d Dept 2016)

Record Did Not Support Family Court’s Denial of Mother’s Objections

The Family Court should have granted the mother's objections to the Support Magistrate's order granting the father's petition for a downward modification of his child support obligation. A party seeking modification of an order of child support has the burden of establishing the existence of a substantial change in circumstances warranting the modification. Here, although the loss of employment can constitute such a change in circumstances, the father failed to establish that the termination of his employment did not involve his own fault, and he did not present competent proof at the hearing that, after he lost his job, he made a diligent effort to obtain new employment commensurate with his qualifications and experience. It was also noted that the father failed to submit evidence such as résumés sent to potential employers, or proof that he had been on any interviews in search of employment. Order reversed.

Matter of Ealy v Levy-Hill, 140 AD3d 1164 (2d Dept 2016)

Mother Waived Her Right to a Seventy Percent Contribution to Tuition

The Family Court should have granted the father's objection to an order on the ground that the mother waived her right to a 70% contribution to tuition from the 2001/2002 school year until the filing of her enforcement petition. A waiver, which does not require consideration, constitutes no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable. It may arise by either an express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage. Here, the mother acknowledged at the hearing that she had affirmatively requested that the father pay half of the children's tuition bills, including making the notation “your half” or similar direction, on some, though not all, of the tuition statements she sent to the father. This evidence, coupled with the mother's acceptance of the 50% payments for nine years, demonstrated that she

intentionally abandoned her right to a 70% contribution prior to the filing of her enforcement petition. Accordingly, in calculating the father's arrears for educational expenses, the Support Magistrate should not have included the difference between 50% and 70% of the children's tuition for the years preceding the filing of the enforcement petition. Accordingly, the father's objections to so much of the Support Magistrate's order as fixed the father's arrears for educational expenses in the sum of \$21,698.72, should have been granted, and because the record was sufficiently developed to permit recalculation of the arrears, the Appellate Division determined that the father owed arrears for educational expenses in the sum of \$12,340.72. Order modified.

Matter of Murphy v Murphy, 140 AD3d 1168 (2d Dept 2016)

Mother’s Objections Properly Denied

The stipulation of settlement set forth the parties' child support obligations and was executed prior to the effective date of the 2010 amendments to FCA § 451 (*see* L 2010, ch 182, § 13). Therefore, to the extent the parties did not contract otherwise, in order to establish her entitlement to an upward modification of the father's child support obligation, the mother had the burden of establishing a substantial and unanticipated change in circumstances resulting in a concomitant need, or that the needs of the children were not being met. The mother failed to meet that burden. The mother's contention that the parties contracted in the stipulation of settlement to apply the lesser standard of a “change in circumstances” to the father's income over \$105,000 was not supported by the language of the subject provision, and the mother's remaining contentions were without merit. Accordingly, the Family Court properly denied the mother’s objections. Order affirmed.

Matter of Calandra v Macaione, 141 AD3d 519 (2d Dept 2016)

Father Deprived of Opportunity to Rebut Mother's Affidavits and Exhibits

The Family Court properly denied the father's objections to so much of the Support Magistrate's order

as denied his petition for a downward modification of his child support obligation. Here, the father failed to demonstrate that a substantial change in circumstances had occurred and that he had diligently searched for comparable employment. The father also failed to demonstrate that the subject child had been constructively emancipated. However, the father's objections to so much of the Support Magistrate's order as granted the mother's petition to enforce the college expenses provisions of the parties' stipulation of settlement should have been granted. When the hearing on the petition was shortened due to time constraints, the Support Magistrate permitted the parties to submit two-page closing arguments in writing. The mother submitted three lengthy affidavits and numerous exhibits not presented at the hearing, which the Support Magistrate evidently considered and partially relied upon in granting the mother's petition. The father had no opportunity to cross-examine the mother regarding her post-hearing statements, or to object to her exhibits. FCA § 433 (a) requires that a respondent "shall be given opportunity to be heard and to present witnesses." A hearing must consist of an adducement of proof coupled with an opportunity to rebut it. The Support Magistrate erred in considering the mother's affidavits and unverified financial information, rather than testimony supported by appropriate documentary evidence, in determining the mother's petition. Therefore, as the father was deprived of the opportunity to rebut the mother's affidavits and exhibits, the matter was remitted to the Family Court for a new hearing and determination on the mother's petition.

Matter of Hezi v Hezi, 141 AD3d 587 (2d Dept 2016)

Amendment to Father's Petition to Modify Mother's Child Support Obligation Warranted

In November 2013, the father commenced a proceeding to modify the mother's child support obligation, as set forth in the parties' judgment of divorce entered August 5, 2013, and stipulation of settlement dated April 25, 2013, alleging a change in circumstances in that the parties' daughter had begun exclusively residing with him. While the father's petition was pending, an amended judgment of divorce was entered on April 29, 2014, which did not alter the mother's child support obligation. Both the original judgment of divorce and the amended judgment of divorce incorporated, but did

not merge, the terms of the parties' stipulation of settlement. In an order dated May 20, 2015, the Support Magistrate granted the mother's motion to dismiss the father's petition on the ground that the amended judgment of divorce had been entered and, therefore, the father's petition seeking modification of the prior judgment of divorce could not be maintained. In an order dated July 24, 2015, the Family Court denied the father's objections to the order dated May 20, 2015. A pleading may be amended to conform to the proof at any time, unless the amendment would prejudice the opposing party (*see* CPLR 3025 [c]). Under the particular circumstances of this case, the Family Court should have amended the father's petition so as to seek modification of the mother's child support obligation as set forth in the amended judgment of divorce entered April 29, 2014. The mother was aware of the amended judgment of divorce, which did not change her child support obligation, and she would not have been prejudiced by the amendment. Therefore, the Family Court should have granted the father's objections to the order dated May 20, 2015, and should have amended the petition to conform to the proof. Order reversed.

Matter of Maag v Lichtneger, 141 AD3d 593 (2d Dept 2016)

Father Failed to Present Evidence Showing That His Medical Condition Prevented Him from Working in Some Capacity

The father moved pursuant to FCA § 413 (1) (g) to cap child support arrears at \$500 for the period of June 2, 2011 through July 16, 2012, claiming that, on June 2, 2011, he suffered a heart attack, which rendered him disabled, and that after that date, his income fell below the poverty level. The motion was denied, and the father appealed to the Appellate Division, which reversed and remitted the matter to the Family Court, for a hearing on the father's financial circumstances during the relevant period and a new determination of his motion thereafter. After conducting a hearing upon remittal, the Support Magistrate denied the father's motion on the ground that he failed to show an inability to work during the relevant period. Thereafter, the father's objections were granted in an order dated July 29, 2015. The mother appealed. The Appellate Division reversed. Contrary to the father's contention,

at a hearing to determine if arrears should be capped, the Family Court may properly consider a parent's credibility and his or her ability to work. Here, the father failed to present evidence to show that his medical condition at the relevant time prevented him from working in some capacity. Accordingly, the Support Magistrate properly denied the father's motion to cap arrears at \$500 for the period of June 2, 2011 through July 16, 2012, and his objection to the corrected order should have been denied.

Matter of Briggs v McKinney-Mays, 141 AD3d 648 (2d Dept 2016)

Mother's Objections Properly Denied

The Family Court properly denied the mother's objections to the Support Magistrate's denial, without a hearing, of her petition to modify the father's support obligation so as to require him to pay a portion of the children's health insurance premiums. The mother's previous petition seeking that relief was denied by the Support Magistrate in an order dated October 20, 2014, and her objections to that order were denied. The court properly determined that the mother failed to establish, prima facie, any change in circumstances warranting a hearing since the denial of her previous request for the same relief (*see* FCA § 451 [3] [a]). The Family Court also properly denied the mother's objections to the dismissal of her violation petition, since the petition did not contain any supporting allegations, and since it was submitted in violation of the order to submit claims for accounting relief to a third-party mediator or arbitrator. The court properly refused to consider the emails the mother submitted with her objections since new evidence may not be submitted in support of objections.

Matter of Loveless v Goldbloom, 141 AD3d 662 (2d Dept 2016)

Order of Commitment Affirmed

Following a hearing, the Support Magistrate found that the father was in willful violation of the order of support and issued an order of disposition recommending that the court consider a period of incarceration. The Family Court, in effect, confirmed the Support Magistrate's findings of fact, granted the mother's petition, and issued an order of commitment,

committing the father to the custody of a correctional facility for a period of six months unless he paid the purge amount of \$112,342.80. The father appealed. Under FCA § 454 (3) (a), which relates to "willful" failures to obey support orders, a failure to pay support as ordered itself constitutes prima facie evidence of a willful violation (*see* FCA § 454 [3] [a]). This means that proof that respondent has failed to pay support as ordered alone establishes petitioner's direct case of willful violation, shifting to respondent the burden of going forward. Here, the mother presented proof that the father failed to pay child support as ordered. The burden of going forward then shifted to the father to offer competent, credible evidence of his inability to make the required payments. The father failed to sustain his burden. The Support Magistrate found the father to be less than credible. Even assuming the truth of the father's contention that he had been unemployed in his chosen field since he lost his license to trade stocks and that he could not perform physical labor due to his heart condition, he failed to present any evidence that he had made a reasonable and diligent effort to secure employment. Thus, the father failed to meet his burden of presenting competent, credible evidence that he was unable to make payments as directed. Moreover, the father did not regularly pay child support between 2001, when the first order directing that he pay child support was entered, and 2014, when the hearing was held on the mother's petition. The father failed to provide proof that he applied for and was denied Social Security disability benefits even though directed to do so by the Support Magistrate. In addition, the Support Magistrate properly found that the father lacked credibility in his testimony that he had no income or assets from other sources. Accordingly, the Family Court properly, in effect, confirmed the determination of the Support Magistrate that the father willfully violated the order of support. Order affirmed.

Matter of Stradford v Blake, 141 AD3d 725 (2d Dept 2016)

Plaintiff to Pay 51% of the Children's Private School Expenses

The parties are the parents of two minor children, who were enrolled by their parents in a certain parochial school during the marriage. In 2013, the plaintiff commenced this action for a divorce and ancillary

relief. As relevant to this appeal, pursuant to an order of custody and visitation on consent dated June 20, 2014 (hereinafter the order of custody and visitation), the parties expressly agreed that it was “their desire that the minor children shall attend parochial school.” However, in the order of custody and visitation, the parties also expressly noted that “the expression of this intention is on a without prejudice basis to the [plaintiff] and said intention is not an agreement on behalf of the [plaintiff] to be responsible for the cost of said parochial school education.” The parties thereafter entered into a stipulation of settlement dated December 9, 2014, resolving almost all of the issues regarding, inter alia, custody, child support, and equitable distribution. In their stipulation of settlement, the parties expressly agreed to submit to the Supreme Court the issue of whether the plaintiff would be required to contribute any money toward the children's private school expenses and, if so, what amount he would be required to pay. Thereafter, the parties each submitted to the court an affidavit and a memorandum of law on the issue. In an order dated March 3, 2015, the court determined that, considering the best interests of the children and the requirements of justice, the children should remain enrolled in the subject parochial school, and directed the plaintiff to pay 51% of the children's private school expenses. The judgment of divorce dated August 18, 2015 was entered upon the March 31, 2015, order. The plaintiff appealed. The Appellate Division affirmed. Pursuant to DRL § 240 (1-b) © (7), the court may direct a parent to contribute to a child's education, even in the absence of special circumstances or a voluntary agreement of the parties, as long as the court's discretion is not improvidently exercised in that regard. In determining whether to award educational expenses, the court must consider the circumstances of the case, the circumstances of the respective parties, the best interests of the children, and the requirements of justice. On this record, the Appellate Division found, that given the circumstances of this case and these parties, the Supreme Court did not improvidently exercise its discretion in directing the plaintiff to pay 51% of the children's private school expenses. During the marriage, the parties agreed to enroll the children in the subject parochial school, the children had, in fact, been enrolled in the school during the marriage, and the parties stipulated during the divorce action that they desired that the children “shall” attend parochial school. The record supported the court's determination

that the children are flourishing at the school, both socially and academically. The record also supported the court's conclusion that the plaintiff failed to show that paying 51% of the private school expenses would prevent him from supporting himself and maintaining a separate household.

Corkery v. Corkery, 142 AD3d 576 (2d Dept 2016)

Downward Modification of Child Support Was Appropriate; Court Did Not Abuse its Discretion in Denying Mother's Motion to Dismiss Petition

The parties were divorced by judgment dated February 23, 2011. Pursuant to the judgment of divorce, the parties had joint legal custody of their three children, and the defendant was awarded physical custody of the children. The plaintiff moved, by order to show cause, to modify the child support provisions of the judgment of divorce and to allocate educational expenses between the parties, asserting that the parties' oldest child now resided with him. The plaintiff requested that the defendant pay child support to the plaintiff for the oldest child, that his child support obligation for that child be terminated, and that his obligation as to the parties' two younger children be reduced. In addition, the plaintiff requested that the Supreme Court direct that both parties would be responsible for the oldest child's college expenses, and that the court determine their pro rata responsibility for those expenses. The defendant moved, inter alia, to “dismiss the Plaintiff's . . . Order to Show Cause” for failure to provide a statement of net worth, and for an attorney's fee pursuant to DRL § 237. The Supreme Court, after a hearing, decided the motions in an order dated April 21, 2014. The court stated that it was satisfied that the oldest child resided with the plaintiff and decided that it was appropriate to modify child support and add-on educational expenses. Calculating each party's support obligation pursuant to the Child Support Standards Act, the court allocated educational expenses between the parties 75% to the plaintiff and 25% to the defendant. The court determined that the plaintiff was entitled to a credit for overpayments of child support, as well as a portion of his out-of-pocket expenses for the oldest child's college expenses, and that the defendant was entitled to a credit against her support obligation for the oldest child in the amount of her contributions to that child's room and board at college. The court granted

that branch of the defendant's motion which was for an attorney's fee only to the extent of awarding her an attorney's fee in the sum of \$1,500. The court also, in effect, denied that branch of the defendant's motion which was to "dismiss the Plaintiff's . . . Order to Show Cause." The defendant appealed. The Appellate Division affirmed. The Supreme Court did not err in granting the plaintiff's motion for a modification of child support. The plaintiff established that there was a change in circumstances warranting a modification by showing that there had been a change in the oldest child's residence. Absent a voluntary agreement, whether a parent is obligated to contribute to a child's college education is dependent upon the exercise of the court's discretion in accordance with DRL § 240 (1-b) © (7), and an award will be made only as justice requires. Under the circumstances of this case, the Supreme Court providently exercised its discretion in its apportionment of the college expenses incurred prior to the oldest child reaching 21 years of age. The Supreme Court did not err in denying that branch of the defendant's motion which was to "dismiss the Plaintiff's . . . Order to Show Cause," given the plaintiff's clear entitlement to a downward modification of his support obligation, the parties' submission of other relevant financial data, and the court's consideration of the parties' relative financial circumstances at the hearing. The award of a reasonable attorney's fee is a matter in the trial court's sound discretion, and the court may consider, inter alia, a party's tactics that unnecessarily prolonged the litigation. While the plaintiff here was the monied spouse, the Supreme Court's award reflects consideration of the relevant factors, including that the defendant's conduct resulted in unnecessary litigation. Thus, the Supreme Court did not err in granting that branch of the defendant's motion which was for an attorney's fee only to the extent of awarding her an attorney's fee in the sum of \$1,500.

Frates v. Frates, 142 AD3d 582 (2d Dept 2016)

Father's Self-Help Measures Results in Wilful Violation Determination

In a prior decision, the Appellate Division determined that Family Court should not have dismissed the pro se father's objections to a wilful violation finding. The matter was remitted and after reviewing the merits, Family Court once more dismissed the father's

objections. The Appellate Division affirmed. There was uncontroverted proof that the father failed to pay childcare expenses as ordered and this showed a wilful violation of the prior order. The father's contention the reason for nonpayment was his belief that the mother's child care receipts were not legitimate was unavailing. This "self-help" measure did not help the father. Rather, he should have sought to modify his support obligation.

Matter of Fifield v Whiting, 139 AD3d 1128 (3d Dept 2016)

No Change in Circumstances to Warrant Termination of Child Support

The parties stipulated to an order of joint legal and physical custody, with each parent enjoying equal parenting time with the child, but for purposes of school, the father's home was deemed the primary residence. The father was also directed to pay child support. One month later, the father filed to modify his support obligation arguing the child resided primarily with him and the Support Magistrate terminated his support obligation. The mother filed objections and Family Court determined the father had not shown a change in circumstances and reinstated his support obligation. The Appellate Division affirmed. The record showed that while the child stopped by the father's house after school and slept their four or five nights per week, he continued to divide his time between the parties on an equal basis. The father agreed this was so and since there was no proof of a change in parenting time, there was no basis to warrant termination of child support.

Matter of Kosinski v Parker, 139 ADd3d 1156 (3d Dept 2016)

Mother Wilfully Violated Support Order

The Support Magistrate determined the mother had wilfully violated a prior support order and after a confirmation hearing, Family Court sentenced her to a term of incarceration, suspended on the condition that she make regular support payments and payments toward the arrears. The Appellate Division affirmed. Here, an employee from SCU provided uncontradicted testimony that the mother had not complied with the

support order and owed more than \$13,000 in arrears. The mother failed to rebut the willful violation determination and offered no testimony to show she was financially incapable of supporting the children.

Matter of Leder v Leder, 140 AD3d 1228 (3d Dept 2016)

Calculation of Husband's Income Did Not Comply With CSSA

Supreme Court erred in determining the husband's support obligation by failing to explain, as required by the CSSA, the basis for calculating his pro rata share of the basic child support obligation and his share of the children's health care expenses not covered by insurance. While the court set forth an "adjusted gross income" of \$133,720.05 as the husband's income, no explanation was offered as to how the court arrived at such a number and it was unclear from the record whether the amount complied with the definition of "income" pursuant to DRL §240 (1-b)(b)(5).

Roma v Roma, 140 AD3d 1242 (3d Dept 2016)

Off the Books Income Should Have Been Imputed to Husband's Support Obligation

The Appellate Division determined Supreme Court failed to include "off the books" income in calculating the husband's child support obligation although it had imputed this amount in calculating the husband's maintenance award. Even though the wife did not specifically request that such income be included in making a child support determination, the husband acknowledged he had earned some amount of unreported income. Thus, the Appellate Division exercised its discretion and determined at least an additional \$1,440 should have been imputed to the husband's annual income and modified the support award.

Kelly v Kelly, 140 AD3d 1436 (3d Dept 2016)

No Right To Appeal Directly From Support Magistrate's Order

The Support Magistrate issued an award of child support and maintenance on behalf of the wife. The

husband failed to file written objections and instead appealed the order, which was dismissed. His argument that he erroneously relied on the Support Magistrate's directive, which was contained in the order and which stated that he had a right to file a notice of appeal with the clerk of Family Court from which the appeal is taken did not confer jurisdiction upon the Appellate Division.

Moore v Moore, 141 AD3d 756 (3d Dept 2016)

Court Erred in Denying Father's Objections to Support Magistrate's Orders

Family Court denied petitioner father's objections to two orders of the Support Magistrate finding a violation of a prior support order and modifying the prior support order by, among other things, requiring respondent mother to pay child support to the father based on the subject child's change of residence to that of the father and by imputing income to the father. The Appellate Division reversed and remitted to Family Court for further proceedings on both petitions. The court erred in denying the father's objections to the Support Magistrate's orders because he was not properly advised of his right to an attorney on the violation petition brought by the mother, and the Support Magistrate erred in failing to conduct a proper hearing on the father's modification petition. While a hearing on a petition for modification of a support obligation did not need to follow any particular format, the hearing was inherently flawed. The father was not offered an opportunity to testify, nor was he permitted to present the sworn testimony of any other witnesses. The cursory handling of this matter by the Support Magistrate did not provide a substitute for the meaningful hearing to which the father was entitled.

Matter of Gerhardt v Baker, 140 AD3d 1635 (4th Dept 2016)

Affirmance of Order Directing Each Party to Contribute Equally to College Expenses

In a post-divorce proceeding, Supreme Court determined that each party should contribute equally to the college expenses of their eldest daughter. The Appellate Division affirmed. Pursuant to their "Child Support Agreement" (the "Agreement"), the parties

contemplated that their children would attend college, and they agreed that the costs would be divided “between the parties as they shall then agree or as shall then be determined by a Court of competent jurisdiction.” The parties further agreed that, “in the event a child shall attend Nichols [School], the respective contributions of the parties to the cost of said schooling shall be a factor in determining the contribution of each party to said child’s college expenses.” The court’s statement in its decision concerning the mother’s willingness to pay a greater share of the costs of the children’s education at Nichols School was supported by the record, including the terms of the Agreement. Inasmuch as the parties’ respective contributions to those costs was but one factor to consider in determining their obligations to pay college expenses, the court also properly considered the circumstances of the case, the circumstances of the respective parties, and the best interests of the child. The mother’s contention was rejected that the order was inconsistent with the court’s prior order directing the father to pay 60% and the mother to pay 40% of the eldest son’s college expenses. The prior order was based upon different evidence, and it explicitly contemplated a need for modifications of the parties’ obligation to contribute toward college as the younger children [including the eldest daughter] matriculate.

Marshall v Hobika, 140 AD3d 1690 (4th Dept 2016)

Court Erred in Applying CSSA to Combined Parental Income in Excess of Statutory Cap

Supreme Court directed plaintiff mother to pay defendant father child support in the amount of \$441 per week, plus 57% of whatever bonus income she might receive from her employment, minus credits for the costs of airline travel to Texas for her and the parties’ children. The Appellate Division modified. The court failed to articulate a proper basis for applying the Child Support Standards Act [CSSA] to the combined parental income in excess of the statutory cap. Furthermore, the record afforded no support for the court’s determination to apply the child support percentage to the total combined parental income exceeding the \$141,000 per year cap. The court made no factual finding that the children had financial needs that would not be met unless child support were

ordered to be paid out of parental income in excess of \$141,000. Even if the court made such a finding, there was no evidence in the record to support it. The court’s finding that the mother had CSSA income of \$96,428 was adopted, as was the court’s finding that the mother, in her current job, had no history of bonuses upon which any additional income could be imputed to her beyond her base salary. The father’s CSSA income was found to be \$74,664. The combined parental CSSA income was \$171,092. Thus, the mother’s pro rata share of the combined parental income was 56.36%. That multiplier, as well as the CSSA percentage of 25% for two unemancipated children, was applied to the \$141,000 cap amount. Thus, the mother’s basic child support obligation was \$19,726 per year, or \$378.84 per week.

Bandyopadhyay v Bandyopadhyay, 141 AD3d 1099 (4th Dept 2016)

CUSTODY AND VISITATION

Denial of Overnight Visitation Affirmed

Family Court denied the father’s petition for overnight visitation with the parties child. The Appellate Division affirmed. The court’s determination that overnight visitation with the father was not in the child’s best interests had a sound and substantial basis in the record. The court properly considered the testimony of the court-appointed expert and the court-appointed visitation supervisor concerning the father’s resistance to participation in a batterer’s program, despite his history of domestic violence with respondent mother, and of his failure to fully accept responsibility for his actions. Although the father started individual therapy shortly before the hearing, ample evidence supported the court’s concern that the child might be exposed to violence during overnight visits based on recent incidents of aggressive behavior by the father with third parties and his admitted continued use of alcohol, which was a factor in the domestic violence.

Matter of Myles M. v Pei-Fong K., 139 AD3d 466 (1st Dept 2016)

Father Failed to Establish Changed Circumstances

Family Court denied the father's petition to modify the parties' custody order. The Appellate Division affirmed. Petitioner failed to establish that there had been a change in circumstances warranting modification of the custody order. That the order was entered on consent did not relieve petitioner of the burden of proof on that issue. Petitioner failed to substantiate any ill effects on the children due to respondent's move, any deficiencies in respondent's provision of medical care for the child, or any disruption of the child's midweek communication with petitioner. The move was within the area permitted by the custody order. Although the requisite change in circumstances was not established, the Appellate Division noted that the best interests of the child supported the determination that the child should remain with respondent. The child's expressed preference to live with petitioner was but one factor to be considered by the court. Further, the child had thereafter expressed a preference to refrain from taking a position.

Matter of Daniel L. v Joy N., 139 AD3d 469 (1st Dept 2016)

Visitation With Biological Mother Not in Children's Best Interests

Family Court denied petitioner mother's motions and petitions for visitation and other contact with her children. The Appellate Division affirmed. The court's determination that visitation or any contact with the mother was not in the children's best interests had a sound and substantial basis in the record. The mother exhibited irrational, unstable and often violent behavior. As the court found, visitation, or even limited contact with the mother would likely have an adverse impact on the children's relationship with their adoptive families. This was particularly true in light of the mother's admitted hostility toward the children's adoptive parents and her inability to appreciate the significance or finality of the surrender agreements she entered into.

Matter of Shaquana Michelle M.-L v Leake & Watts, 139 AD3d 513 (1st Dept 2016)

Father's Medical Child Abuse Warranted Therapeutic Supervised Visitation

Supreme Court awarded plaintiff mother physical and legal custody of the parties' children and ordered defendant father have supervised therapeutic access time with the children. The Appellate Division affirmed. There was a sound and substantial evidentiary basis for the court's custody determination. Sufficient evidence supported the court's determination that defendant, a physician, committed medical child abuse by exaggerating the children's symptoms and repeatedly subjecting them to unnecessary and sometimes invasive medical treatment. The court-appointed psychiatrists, specialists in medical child abuse, and the children's pediatrician, testified that defendant relentlessly pursued diagnostic medical treatments, took the children to unnecessary specialists, and took them to appointments against the advice of, and without telling, the pediatrician. The court's determination was also supported by reports from Comprehensive Family Services of defendant's supervised visits with the children, which describe his fixation with their health, his desire to photograph their numerous purported injuries, and his desire to seek medical treatment. Even if defendant's conduct fell short of medical child abuse, other factors warranted awarding custody to plaintiff mother, including the father's impaired mental health, his false accusations of abuse, neglect and alienation against the mother, and his inferior parenting capabilities. For the same reasons and because of defendant's conduct during visits, supervised visitation was in the children's best interests.

Braverman v Braverman, 140 AD3d 413 (1st Dept 2016)

No Extraordinary Circumstances Warranting Award of Custody to Grandmother

Family Court dismissed petitioner grandmother's petition for custody of the subject children and granted sole legal and residential custody to respondent mother. The Appellate Division affirmed. The court's conclusion that there were no extraordinary circumstances warranting an award of custody to petitioner was based mainly on credibility determinations, which were entitled to great weight.

The children were in the care of petitioner, the grandmother of one of the children, with the consent of respondent, for a period of 16 months. It was uncontested that respondent and petitioner agreed that petitioner would care for the children while respondent was pursuing a year-long course of studies in Puerto Rico and would return the children to respondent at the end of that period.

Matter of Lisette R. v Coral T.C., 140 AD3d 434 (1st Dept 2016)

Sole Legal and Physical Custody to Father in Child's Best Interests

Family Court awarded petitioner father sole legal and residential custody of the parties' child, with parenting time to respondent mother. The Appellate Division affirmed. The record supported the court's determination that it was in the child's best interests to award legal and physical custody of the child to the father. The father's testimony demonstrated that he was better able to provide a consistent and stable home environment for the child, and that the child would be living with his biological sibling. The record also showed that the mother was unstable in many ways and oblivious to the harmful effects of her actions on the child, including her efforts to eliminate the father from the child's life.

Matter of Parrish P. v Camile G., 140 AD3d 586 (1st Dept 2016)

Respondent May Enroll Child with Clinician of Her Choice; Suspension of Petitioner's Overnight Visitation Reversed

Family Court granted respondent custodial parent's motion to vacate an order temporarily suspending the commencement of therapy for the parties' child, allowed respondent to enroll the child in therapy with a clinician of her choice, and suspended petitioner's Wednesday overnight visit. The Appellate Division modified by vacating that part of the order that suspended the Wednesday overnight visits. Pursuant to the custody order, respondent had sole legal and primary residential custody and provided that she shall "consult" and "seek out the opinions" of the petitioner with regard to nonemergency major decisions about the

child, but respondent had the right to make the final decision in the event of a disagreement. Respondent took the child to see a psychiatrist without consulting petitioner. After petitioner learned this, she filed a petition to transfer sole custody to her and to direct respondent not to make any nonemergency medical decisions without consulting her. After further petitions and cross petitions were filed, among other things, petitioner consented to, and agreed to participate in, the assessment of the psychiatrist respondent had chosen to evaluate the child. Thereafter, the psychiatrist sent his assessment and recommendations to the parties, including a recommendation that the child be enrolled in behavior therapy and that weeknight overnights with petitioner be eliminated to facilitate treatment. Shortly thereafter, the AFC obtained an ex parte TRO prohibiting the parties from enrolling the child in therapy. The court properly determined that respondent acted appropriately and within the bounds of her authority under the custody order and in the child's best interests, in seeking psychiatric assessment for the child who was in severe emotional distress. Respondent's decision to promptly engage the child in therapy was consistent with the recommendations of the psychiatrist who conducted an extensive diagnostic assessment of the child, which petitioner consented to and participated in. The order suspending petitioner's overnight visitation with the child was not temporary because the court set no limitation on the duration of the order and canceled the next court date without scheduling future court appearances. Modification of visitation, even on a temporary basis, required a hearing, absent a showing of an emergency. While it was clear that the child's need for treatment was urgent, there was no showing that immediate modification of the parenting schedule was necessary. Thus, that part of the order suspending the overnight visitation was vacated. Any subsequent hearing must include an opportunity for both parties and the child's AFC to present their cases and the factual underpinning of any temporary order must be made clear on the record.

Matter of Shoshanah B. v Lela G., 140 AD3d 603 (1st Dept 2016)

Sole Custody to Mother in Children’s Best Interests

Family Court denied the father’s petition for modification of an order of custody to award the parties joint physical custody of their children and granted respondent’s amended petition to modify the order to grant her sole legal custody. The Appellate Division affirmed. Although petitioner established a change in circumstances that would have supported a modification of custody by demonstrating that he was employed and had an apartment, he failed to establish that joint physical custody would be in the children’s best interests. The children had resided with respondent their entire lives and she cared for and provided for them while petitioner was getting himself established. There had been a complete breakdown in communication between the parties, who were unable to reach agreement on any issues involving the children.

Matter of Johnny Eugenie P. v Michelle K.P., 140 AD3d 624 (1st Dept 2016)

Hearing on Father’s Petition for Modification Warranted

The Supreme Court providently exercised its discretion in granting the mother's motion which was to remove a custody proceeding, which was brought by the father in Family Court, to the Supreme Court and consolidate it with a matrimonial action. Common questions of law and fact existed between the mother's postjudgment motion to modify the custody provisions of the parties' judgment of divorce and the issues raised in the custody proceeding, and the father failed to make a showing of prejudice (see CPLR 602 [b]). However, upon granting consolidation, the Supreme Court erred in, sua sponte, dismissing the father’s petition in the custody proceeding without a hearing. In determining whether a custody agreement that was incorporated into a judgment of divorce should be modified, the paramount issue before the court is whether, under the totality of the circumstances, a modification of custody is in the best interests of the child. A party seeking such a modification is not automatically entitled to a hearing, but must make an evidentiary showing sufficient to warrant a hearing. Here, the father offered sufficient proof to warrant a hearing on his petition for modification of the parties' joint custody arrangement

with regard to the subject child. The father made specific allegations that the mother failed to cooperate with the social worker appointed by the court to monitor her decisions regarding the child's medical treatment, that the parties' ability to cooperate with each other with respect to the child had deteriorated so seriously that a change in the parties' joint custody arrangement was warranted, and that the child, who is now a teenager, had expressed a desire to live with him instead of the mother. Thus, the Appellate Division reinstated the petition in the custody proceeding and remitted the matters to the Supreme Court for the appointment of an attorney to represent the interests of the subject child, and thereafter for a hearing and a determination of the petition in the custody proceeding and the father's motion for additional visitation with the subject child. The Appellate Division also vacated two orders issued by the Family Court after the Supreme Court removed the custody proceeding, since there was no basis for the Family Court to issue any further orders after the proceeding had been removed.

Giasemis v Giasemis, 139 AD3d 794 (2d Dept 2016)

Record Supported Equal Sharing of Cost and Fees of Parenting Coordinator

In an order dated October 6, 2014, the Supreme Court, inter alia, denied the father's motion to modify the judgment of divorce so as to award him physical custody. However, the court concluded that the appointment of a parenting coordinator would be in the child's best interests because, among other reasons, the mother's attitude and behavior created a “very negative climate,” which hindered visitation. The court directed that the parties share equally the costs of the parenting coordinator to ensure that they both took “responsibility for their conduct” and were “equally vested in the outcome.” In an order dated October 28, 2014, the court appointed a licensed clinical social worker as the parties' parenting coordinator, to help them implement the custody and visitation provisions of the judgment of divorce and to reduce conflict and detrimental impact upon the child. Approximately two weeks after the Supreme Court appointed the parenting coordinator, the mother moved, in effect, to vacate so much of the orders dated October 6, 2014, and October 28, 2014, as directed her to share equally in the costs of the parenting coordinator, based upon her financial

circumstances. The mother did not take issue with the court's reasons for appointing a parenting coordinator. She merely argued that the cost of the coordinator was prohibitively expensive. The father opposed the motion. The court denied the mother's motion. The mother appealed. The Appellate Division affirmed. In the absence of any clear indication that one party was more culpable than the other, the parties should share equally in paying the fees of the parenting coordinator. Since the record contained no indication that the mother was the less culpable party, the Supreme Court correctly determined that the parties should share equally the costs of the parenting coordinator. Additionally, the Appellate Division agreed with the Supreme Court that equally sharing these costs will help ensure that the parties take responsibility for their conduct and are equally vested in the outcome. Further, contrary to the mother's contention, nothing in the record demonstrated that the court failed to consider the parties' financial situations in reaching this determination, or that this outcome was inequitable.

Headley v Headley, 139 AD3d 855 (2d Dept 2016)

Mother Established Change in Circumstances

The Supreme Court properly granted the mother's motion which was for a modification, as the mother established that there had been a change in circumstances such that modification was necessary to ensure the continued best interests of the children. The continued deterioration of the parties' relationship was a change in circumstances warranting a change in the parties' joint custody arrangement. The mother's desire to relocate also constituted a change in circumstances, requiring the mother to demonstrate that relocation was in the children's best interests. In determining a parent's relocation request, a court is free to consider and give appropriate weight to all of the factors that may be relevant to the determination, including, but not limited to, each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and each parent, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's lives may be enhanced economically, emotionally, and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through

suitable visitation arrangements. In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests. Here, the mother established by a preponderance of the evidence that relocation was in the children's best interests, having taken into account all of the relevant factors.

Martin v Martin, 139 AD3d 916 (2d Dept 2016)

Best Interests Analysis Properly Applied in Making Initial Custody Determination

Contrary to the mother's contention, the Family Court properly applied the best interests analysis applicable to an initial custody determination, rather than a change of circumstances analysis applicable to modification of a prior custody order, and considered the award of temporary custody to the father before the hearing as but one factor to be considered in awarding permanent custody.

Matter of McPherson v McPherson, 139 AD3d 953 (2d Dept 2016)

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

In December 2008, the Supreme Court, on the consent of the parties, awarded sole legal and physical custody of the subject child to the mother, and awarded the father, inter alia, biweekly supervised visits with the child. In January 2011, the father commenced a proceeding seeking to modify the visitation provisions of the prior order so as to provide him with unsupervised visits. During the course of the proceeding, the mother filed an order to show cause seeking an order of protection against the father. In an order dated August 26, 2014, the Supreme Court modified the prior order by limiting all future visits between the father and the child to therapeutic supervised visits. On the same date, the court also entered a five-year order of protection against the father and in favor of the mother and the child. The father appealed. The Appellate Division affirmed. The determination of whether visitation should be supervised is a matter left to the trial court's sound discretion, and its findings will not be disturbed on

appeal unless they lack a sound and substantial basis in the record. The Appellate Division found that the Supreme Court's determination that supervised therapeutic visitation was in the best interests of the child had a sound and substantial basis in the record. Further, the Supreme Court did not improvidently exercise its discretion in entering an order of protection against the father and in favor of the mother and the child for a period of five years (*see* FCA § 656).

Mikell v Bermejo, 139 AD3d 954 (2d Dept 2016)

Relocation to Florida Was in the Child's Best Interests

The parties have one child together. By order dated January 25, 2007, the mother was awarded custody of the child, and the father was awarded visitation. The mother filed a petition in August of 2014 to modify that order to permit her to relocate with the child to Florida, where her family resides, and to modify the father's visitation schedule to accommodate the relocation. After a hearing, the Family Court granted the mother's petition, and set forth a liberal visitation schedule to the father. The father appealed. The Appellate Division affirmed. The Family Court properly granted the mother's petition as she established by a preponderance of the evidence that the relocation to Florida was in the child's best interests. The mother demonstrated that the relocation was economically necessary, that the child's life would be enhanced emotionally by the move, and that it was feasible to preserve the relationship between the father and the child through suitable visitation arrangements. Although the relocation would have an impact on the father's ability to spend time with the child, the liberal visitation schedule, including extended visits during summer vacations, would allow for the continuation of a meaningful relationship between the father and the child. Accordingly, the Family Court's determination had a sound and substantial basis in the record.

Matter of Packer v Ferrante, 139 AD3d 957 (2d Dept 2016)

Father's Petition to Modify Visitation Provisions Denied

The parties, divorced, are the parents of a son, born in

November 2004. A Family Court order dated March 16, 2010, embodied the parties' agreement concerning custody and visitation, which provided that the parties were to have joint legal custody of the child, the mother was to have primary physical custody, and the father was to have visitation, which included alternating weekends, with the child to be dropped off and picked up inside the Warwick police station. In his modification petition, the father asserted that he had moved 90 miles away from Warwick, New York, to Edison, New Jersey, to obtain employment, and sought to require the mother to drop off and pick up the child in Edison every other time that he had visitation, or for the exchange of the child to occur somewhere halfway between the locations where each of the parties reside. Modification of a court-approved agreement setting forth terms of visitation is permissible upon a showing that there has been a substantial change in circumstances such that modification is necessary to ensure the best interests and welfare of the child. Here, although the father established that there was a change in circumstances, he failed to establish that the modification of the parties' agreement concerning the visitation he requested was in the best interests of the child. Therefore, the Family Court's determination denying the petition had a sound and substantial basis in the record.

Matter of Hao Liu v Yuwei Xu, 139 AD3d 1064 (2d Dept 2016)

Father Granted Sole Legal and Physical Custody of Child

The mother and the father were married in February 2002 and have one child, born in August 2009. In February 2012, shortly after the mother moved out of the marital home, the father filed a petition seeking custody of the child. He also filed a family offense petition against the mother on behalf of the child, alleging that she presented a physical threat to the child. The Family Court issued a temporary order of protection against the mother prohibiting her from having unsupervised contact with the child. The mother filed a petition for custody. In April 2012, upon the father's consent, the court granted the mother unsupervised visitation with the child. In July 2012, the father withdrew the family offense petition. After a hearing, the court granted the father's custody petition

and awarded him sole legal and physical custody of the child, with visitation to the mother. The court also, in effect, denied the mother's custody petition. The mother appealed. The Appellate Division affirmed. Here, the Family Court, after hearing the testimony of the parties, the child's pediatrician, and the child's babysitter, determined that the child's best interests would be served by awarding sole custody to the father and visitation to the mother. The evidence at the hearing established that both parents loved the child, maintained suitable homes, and could adequately care for the child. While the father had, in the past, behaved in a manner that interfered with the mother's relationship with the child, that issue was resolved and did not preclude an award of custody to the father. The testimony reflected that the father, with whom the child had always lived and who had served as the child's primary caregiver for more than two years, could offer the child greater stability, and was better equipped to provide for the child's needs. In addition, the court found that the father would foster the child's relationship with the mother. The mother's contentions that the Family Court erred by failing to sua sponte appoint an attorney for the child or order a forensic evaluation were unpreserved for appellate review and, in any event, without merit. While appointment of an attorney for the child in a contested custody matter remains the strongly preferred practice, such appointment is discretionary, not mandatory. Under the circumstances of this case, including the young age of the child and the absence of any demonstrable prejudice to the child's interests, the court providently exercised its discretion in not appointing an attorney. Similarly, the record did not indicate that a forensic evaluation was necessary to enable the court to reach its determination.

Matter of Quinones v Quinones, 139 AD3d 1072 (2d Dept 2016)

Visitation Between the Grandmother and the Children Was in the Children's Best Interests

The Family Court providently exercised its discretion in determining that the grandmother had standing to petition for visitation pursuant to DRL § 72 (1). The grandmother's testimony and the in camera testimony of the subject children established that the parents and the subject children lived with the grandmother for at least

three to four years and that there was regular contact between the children and the grandmother before a dispute between the grandmother and the father led to an estrangement in the family. The Family Court also properly determined that visitation between the grandmother and the children was in the children's best interests. Animosity alone is insufficient to deny visitation. In cases where grandparents must use legal procedures to obtain visitation rights, some degree of animosity exists between them and the party having custody of the grandchildren. Were it otherwise, visitation could be achieved by agreement. Here, the estrangement between the grandmother and the children resulted principally from the animosity between the father and the grandmother, and given the grandmother's willingness to consent to a period of therapy with the children, the court providently exercised its discretion in determining that it was in the best interests of the children to grant the grandmother's petition for visitation.

Matter of Seddio v Artura, 139 AD3d 1075 (2d Dept 2016)

Record Was No Longer Sufficient to Determine Best Interests of the Child

The mother petitioned for sole custody of the child. The father separately petitioned for, inter alia, sole custody of the child. In an order dated June 6, 2014, the Family Court, inter alia, awarded the mother sole legal and physical custody of the child. The father appealed. Here, new developments had arisen since the date the order appealed from was issued, which were brought to the attention of the Appellate Division by the attorney for the child. These developments included the mother's denial of court-ordered visitation and contact between the father and the child since entry of the order appealed from. As the Court of Appeals has recognized, changed circumstances may have particular significance in child custody matters and may render the record on appeal insufficient to review whether the Family Court's determinations are still in the best interests of the children. In light of these serious allegations, the record was no longer sufficient to determine whether awarding the mother sole legal and physical custody of the child was in the best interests of the child. Accordingly, the Appellate Division reversed the order and remitted the matter to

the Family Court for a new hearing and a new determination on the petitions thereafter.

Matter of Baptiste v Gregoire, 140 AD3d 746 (2d Dept 2016)

Equitable Considerations Did Not Warrant Judicial Intervention for Grandparent Seeking Visitation

When a grandparent seeks visitation pursuant to DRL § 72(1), the court must make a two-part inquiry. First, it must find that the grandparent has standing, based on, inter alia, equitable considerations. If it concludes that the grandparent has established standing to petition for visitation, then the court must determine if visitation is in the best interests of the child. Under the circumstances of this case, equitable considerations did not warrant judicial intervention for the visitation sought by the grandmother. Accordingly, it would not have been equitable to confer standing upon the grandmother, and the petition was properly dismissed without a hearing (*see* DRL § 72[1]).

Matter of Broomfield v Evans, 140 AD3d 748 (2d Dept 2016)

Record Supported Determination That Aunt Demonstrated Extraordinary Circumstances

Contrary to the father's contention, the Family Court properly determined that the maternal aunt sustained her burden of demonstrating extraordinary circumstances. The court was presented with evidence that the father, among other things, had a highly unstable, unsanitary, and unsafe living situation and failed to address the medical and nutritional needs of the subject child. Moreover, the Family Court's determination that an award of guardianship to the maternal aunt was in the best interests of the subject child was supported by a sound and substantial basis in the record. The Appellate Division rejected the father's contention that he was prejudiced by the Family Court's denial of his request for a peer review of the forensic evaluator's report pursuant to § 722-c of the County Law. The father did not make the requisite showing that the appointment of a second clinical psychologist to perform such a peer review was necessary.

Matter of Rochelle C. v Bridget C., 140 AD3d 749 (2d

Dept 2016)

Record Did Not Support Determination to Deny Father Visitation with Children; Family Court Erred in Imposing Conditions on Future Visitation

The Family Court's determination, made after a hearing, to grant the mother permission to relocate to Florida with the parties' children was supported by a sound and substantial basis in the record. However, the Family Court's determination to deny the father visitation with the parties' children was not supported by a sound and substantial basis in the record. Visitation is a joint right of the noncustodial parent and of the child. As a general rule, some form of visitation by the noncustodial parent is always appropriate, absent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent in some manner has forfeited his or her right to such access. Here, the Family Court improperly based its determination to deny the father parental access upon the father's in-court demeanor, including his inability "to control his temper in open Court" and an instance in which he called the mother "a liar" as she testified. However, no correlation was made between the father's in-court demeanor and any detrimental effect on the children. According to the supervised visitation reports prepared in connection with the father's therapeutic supervised visitation, the children appeared happy to see the father during each visit and were at ease with him throughout their time together. While the father did make some inappropriate comments to the children during the first visit regarding his desire for the family to remain together, the most recent report indicated that the father was "largely appropriate" with the children. Under those circumstances, the Family Court should have awarded the father supervised visitation with the children. The Family Court also erred in directing the father to submit to random drug and alcohol screens, test negative, and undergo a comprehensive mental health evaluation as conditions of future visitation. A court hearing a pending proceeding or action involving issues of custody or visitation may properly order a mental health evaluation of a parent, if warranted, prior to making a custody or visitation determination (*see* FCA § 251 [a]). A court may also direct a party to submit to counseling or treatment as a component of a visitation or custody order. A court may not, however, order that

a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights. Thus, the court improperly directed the father to submit to random drug and alcohol screens, test negative, and undergo a comprehensive mental health evaluation as conditions of future visitation.

Matter of Gonzalez v Ross, 140 AD3d 869 (2d Dept 2016)

Mother's Due Process Rights Were Violated When Court Instructed Her Not to Consult with Her Attorney During Recesses from Hearing

The parties are the parents of one child born in December 2008. The mother and father each filed petitions for sole legal and physical custody of the child, and the Family Court conducted a hearing on the issue of custody. As relevant to this appeal, the mother's hearing testimony spanned several court dates and took place over a period of months. At the end of four hearing dates, while the mother's testimony was continuing, the Family Court instructed the mother not to discuss her testimony with her attorney during the recess. One of these recesses was overnight, two recesses were for approximately one week, and one recess was, because of adjournments, for more than three months. At the conclusion of the hearing, the Family Court granted the father's petition for sole legal and physical custody and, in effect, denied the mother's petition. The mother appealed. The Appellate Division reversed. The Family Court violated the mother's fundamental due process rights when it instructed her not to consult with her attorney during recesses, which resulted in her being unable speak to her attorney over extended periods of time. Accordingly, the matter was remitted to the Family Court for a new hearing on the parties' petitions for sole legal and physical custody of the subject child, and new determinations thereafter.

Matter of Turner v Valdespino, 140 AD3d 974 (2d Dept 2016)

Record Supported Conclusion That Visitation, Even If Supervised and Therapeutic, Would Have Been Detrimental to Child

Contrary to the Family Court's determination, there was substantial evidence that the court-imposed visitation,

although supervised and therapeutic, would have been detrimental to the child. Among other things, the court-appointed forensic evaluator opined that visitation with the father would have been detrimental to the child and counterproductive to fostering a relationship between them in the future, and recommended the suspension of all such visitation, the attorney for the child opposed visitation at the time as both detrimental to the child and contrary to the child's wishes, and the father failed to work with the child's therapist to address issues which contributed to the detrimental impact of visitation upon the child. Accordingly, the Family Court should have granted the mother's petition to modify the stipulation so as to suspend the father's visitation with the child.

Matter of Markovits v Markovits, 140 AD3d 1061 (2d Dept 2016)

Maternal Grandmother's Petition for Custody Denied

The subject child was born in February 2010 and was placed with foster parents six days after her birth. In May 2011, the maternal grandmother filed a petition for custody of the child. In August 2012, a proceeding to terminate the mother's parental rights to the child was commenced. On April 17, 2013, the Family Court found that the mother permanently neglected the child. Thereafter, the court granted the grandmother's application to consolidate her custody petition with the dispositional hearing in the termination of parental rights proceeding. Following the consolidated hearing, in an order dated January 5, 2015, the court found that it was in the child's best interests that she be freed for adoption by her foster parents and denied the grandmother's custody petition. The grandmother appealed. The Appellate Division affirmed. Here, the evidence adduced at the hearing demonstrated that the foster parents had provided good care and a stable home for the child. The evidence also showed that the foster parents, who took custody of the child only six days after her birth, were the only parents she had ever known and that the child was bonded to the foster parents. Thus, the Family Court providently exercised its discretion in denying the grandmother's petition for custody and in freeing the child for adoption by the foster parents. The grandmother's argument that the Indian Child Welfare Act of 1978 (*see* 25 USC § 1901

et seq. [hereinafter the ICWA]) deprived the Family Court of jurisdiction was without merit. The grandmother, as the party asserting the applicability of the ICWA, failed to meet her burden of providing sufficient information to at least put the court on notice that the child might have been an “Indian child” within the meaning of the ICWA (*see* 25 USC § 1903 [4]).

Matter of Jade D.S.M.A.S., 140 AD3d 1077 (2d Dept 2016)

Hearing on Mother’s Amended Petition to Modify Prior Custody Order Warranted

The Family Court erred in granting, without a hearing, the father's motion to dismiss the mother's amended petition to modify the prior custody order dated April 1, 2013. A party seeking modification of an existing custody or visitation order must demonstrate that there has been a change in circumstances such that modification is required to protect the best interests of the child. The best interests of the child are determined by a review of the totality of the circumstances. A parent seeking a change of custody is not automatically entitled to a hearing but must make some evidentiary showing of a change in circumstances sufficient to warrant a hearing. Here, the mother presented sufficient evidence of a change of circumstances, including the father's alleged interference with her visitation rights, so as to warrant a hearing. Willful interference with a noncustodial parent's right to visitation is so inconsistent with the best interests of the children as to, per se, raise a strong probability that the offending party is unfit to act as a custodial parent. A hearing was further warranted to ascertain whether the father knowingly left the children alone with the maternal grandfather, or with someone who would leave the children alone with the maternal grandfather, in light of child sexual abuse allegations against the maternal grandfather, as well as a previous warning from the Family Court to avoid leaving the children in the maternal grandfather's sole care. If true, such conduct may evince such poor judgment on the father's part and disregard for the potential danger to the children that it would be highly relevant to the question of custody.

Matter of Williams v Norfleet, 140 AD3d 1078 (2d Dept 2016)

Family Court Properly Determined That it Did Not Have Jurisdiction

Contrary to the mother's contentions, the Family Court properly determined that it did not have jurisdiction to entertain the mother's family offense petition because there was a child custody proceeding pending in New Jersey (*see* DRL § 76-b). The mother's family offense petition in New York gave rise to a “child custody proceeding” within the meaning of the Uniform Child Custody Jurisdiction and Enforcement Act, article 5-A of the Domestic Relations Law (*see* DRL § 75-a [4]), as the order of protection sought by the mother against the father would have necessarily affected the parties' custody and visitation rights. Accordingly, the Family Court properly dismissed the mother's petition.

Matter of Alintoff v Alintoff, 141 AD3d 518 (2d Dept 2016)

Paternal Grandmother Failed to Establish Extraordinary Circumstances

In an order dated January 23, 2015, the Family Court, inter alia, awarded legal and physical custody of the child to the mother, with specified visitation to the other parties. The court made certain findings of fact, including that the mother had been attempting to regain custody of the child since these proceedings were commenced, and the disruption of her custody was almost entirely for reasons outside of her control, including the fact that the paternal grandmother had made repeated complaints against her to the police department and Child Protective Services. Despite these obstacles, the mother had appeared at each court hearing and conference, completed parenting classes, obtained permanent housing, and engaged in regular visitation with the child. The court held that there were no extraordinary circumstances present which would support depriving the mother of custody of her daughter. The father, paternal grandmother, and the subject child appealed. On appeal, all three argued that the court should have denied the mother's petition for custody and granted the paternal grandmother's petition for custody. Here, the Family Court properly concluded that the paternal grandmother failed to demonstrate the existence of extraordinary circumstances. The hearing evidence established that the mother intended for the child to reside with the

father and paternal grandmother only temporarily, the mother had regular contact and visitation with the child, and she attempted to regain custody of the child almost immediately upon the paternal grandmother's filing of the petition for custody. The petitioners put great weight on the fact that the child had resided with the paternal grandmother for nearly five years at the time the order appealed from was entered. However, the child had lived with the paternal grandmother for only one week when she filed the petition. Where, as here, virtually all of the separation between parent and child occurred during the parent's attempts to regain custody, the separation does not amount to an extraordinary circumstance. Indeed, the courts may not deny the natural parent's persistent demands for custody simply because it took so long. The petitioners also pointed to allegations of excessive corporal punishment by the mother and violent outbursts by the mother in the presence of the child as evidence of the mother's unfitness. The Family Court, however, found that the allegations made by the paternal grandmother were unproven. The Appellate Division found that the court's credibility determinations had a sound and substantial basis in the record. Furthermore, there was no evidence that Child Protective Services ever substantiated allegations of neglect or abuse against the mother. Order affirmed.

Matter of Jamison v Britton, 141 AD3d 522 (2d Dept 2016)

Nonrelative Established Extraordinary Circumstances

The subject child was born in June 2005, and is autistic. His mother died shortly after his birth, and paternity was never established. Initially, the child's maternal great-grandmother had custody. In August 2005, the petitioner, who has no family relationship to the child, moved in with the great-grandmother to help care for the child shortly after the child's birth. In November 2006, the petitioner moved out of the great-grandmother's home back to her own residence, with the child. In 2008, the great-grandmother transferred custody to the child's maternal grandfather, the respondent D.R. After the grandfather was imprisoned in June 2009, his wife, the child's step-grandmother, the respondent T.R., was awarded joint legal custody and residential custody with him in an order dated October

20, 2009. The petitioner continued to keep the child overnight at her residence even after the grandfather and step-grandmother (hereinafter together the respondents) obtained custody. Before the child started school, the step-grandmother's aunt watched the child during the day while the petitioner was at work. Once the child started kindergarten, the step-grandmother put the child on the bus in the morning and met the bus in the afternoon, and her aunt would watch the child until the petitioner returned from work. The step-grandmother testified that she saw the child for two hours a day during the week, one hour in the morning, and one hour after school, and every other weekend. The respondents gave the petitioner the money they received from the child's Social Security benefits. The petitioner used this money to pay the aunt to watch the child. This arrangement continued until April 2012, when the step-grandmother decided that the petitioner's services were no longer necessary. The petitioner then sought custody of the child. The Family Court held a hearing to determine whether extraordinary circumstances existed to confer standing upon the petitioner. The grandfather remained in prison throughout the course of the hearing. After the hearing, the court issued an order finding that extraordinary circumstances did not exist, and dismissed the petition for lack of standing. The petitioner appealed. The Appellate Division reversed. Although an individual who is unrelated to a child has no statutory right to seek custody, a nonrelative may nevertheless be afforded standing to seek custody upon a showing of extraordinary factual circumstances. The Appellate Division concluded that, contrary to the determination of the Family Court, the evidence presented at the hearing compelled a finding of extraordinary circumstances. The petitioner sustained her burden of demonstrating extraordinary circumstances based upon, inter alia, the prolonged separation of the grandfather and the step-grandmother from the subject child, their lack of significant involvement in the child's life for a period of time, their failure to contribute to the child's financial support, and the strong emotional bond between the child and the petitioner. Therefore, the order was reversed, and the matter was remitted to the Family Court for a dispositional hearing to be held before a different judge, to determine a custody award based upon the best interests of the subject child.

Matter of Cade v Roberts, 141 AD3d 583 (2d Dept

2016)

Record Supported Determination That Award of Custody to Grandmother Was in the Best Interests of the Child

Here, the Family Court properly determined that the petitioner, the child's paternal grandmother, sustained her burden of proving extraordinary circumstances by presenting evidence of the mother's persisting neglect and unfitness. The evidence adduced at the hearing showed that the mother, who lives in Ohio, failed to play a significant role in the child's life since bringing him to live with his late father in 2008. Since that time, the mother missed most of her regularly scheduled visits with the child, attended only one of the child's school conferences, and did not provide financial support for the child. The evidence further demonstrated that, during the child's most recent visit to Ohio in 2013, the mother failed to ensure that the child took his prescription medication, locked the child out of her house with his 9- and 12-year-old cousins, left the child and his cousins alone at a Wendy's restaurant while she went to work, threatened one of the child's cousins with a gun, and returned the child to New York in dirty clothes and women's shoes. The mother also failed to undergo a court-ordered mental health evaluation during the pendency of the custody proceeding despite four scheduled appointments for her to do so, and did not provide emotional support for the child following the unexpected death of the child's father. Moreover, the court's determination that awarding custody to the paternal grandmother was in the best interests of the child had a sound and substantial basis in the record.

Matter of Geter v Gray, 141 AD3d 586 (2d Dept 2016)

Record Supported Family Court's Determination That it Was in Child's Best Interests for Mother to Be Awarded Sole Custody

In a stipulation of settlement which was incorporated but not merged into the parties' judgment of divorce entered March 24, 2011, the parties agreed to joint legal custody of their child, with shared residential custody. In September 2014, the father petitioned to modify the custody provisions of the stipulation so as to award him sole legal and physical custody of the child. The

mother filed a petition for the same relief as to her. In an order dated August 21, 2015, the Family Court denied the father's petition, granted the mother's petition, and awarded certain visitation to the father. The father appealed. The Appellate Division affirmed. The record revealed a sound and substantial basis for the Family Court's determination that it was in the child's best interests for the mother to be awarded sole custody. Particularly relevant in this case was the clearly stated preference of the child, especially considering her age and maturity, the home environment provided by the mother and the quality of the relationship between the mother and the child, as compared with the relationship between the father and the child. In addition, given the demonstrated poor relationship between the child and the father's wife, the Family Court did not improvidently exercise its discretion in directing that, during the periods of the father's visitation with the child, he should provide appropriate supervision of the child either personally or by a suitable adult relative other than his wife.

Matter of Brownell v Manemeit, 142 AD3d 499 (2d Dept 500 (2d Dept 2016)

A Hearing Was Required to Determine Whether Grandmother Had Standing to Petition for Visitation

In a proceeding pursuant to FCA article 6 for grandparent visitation with the subject child, the Family Court dismissed the maternal grandmother's petition for visitation, without a hearing, on the basis that she lacked standing to seek visitation as a result of a previous termination of the mother's parental rights. This was error. A biological grandparent may seek visitation with a child even after parental rights have been terminated or the child has been freed for adoption. In any event, the dispositional portions of the orders terminating the mother's parental rights had been vacated on the mother's related appeal. Where a grandparent seeks visitation pursuant to DRL § 72 (1), the court must undertake a two-part inquiry. First, the court must determine whether the grandparent has standing to petition for visitation based on the death of a parent or equitable circumstances (*see* DRL § 72 [1]). Where the court concludes that the grandparent has established standing, the court must then determine whether visitation with the grandparent is in the best

interests of the child (*see* DRL § 72 [1]). In determining whether equitable circumstances confer standing, the court must examine all relevant facts. An essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship, including whether the grandparent has a meaningful relationship with the child. Here, the grandmother's petition alleged the existence of a sufficient relationship with the child to confer standing upon her to seek visitation. Further, the information before the Family Court was insufficient to enable it to undertake a comprehensive independent review of the standing issue, without a hearing. Accordingly, the Family Court improperly dismissed the grandmother's visitation petition without first conducting a hearing on the issue of her standing and, thereafter, if warranted, a hearing to determine whether visitation with the grandmother would have been in the child's best interests.

Matter of Weiss v. Orange Cty. Dep't of Soc. Servs., 142 AD3d 505 (2d Dept 2016)

Family Court Should Have Resolved Grandmother's Custody Petition Prior to Freeing Child for Adoption

The maternal grandmother commenced a proceeding pursuant to FCA article 6 for custody of the subject child two months before the county's Department of Social Services commenced proceedings against the mother pursuant to SSL § 384-b, seeking to terminate her parental rights and free the child for adoption (hereinafter the termination proceedings). At the first appearance on the grandmother's petition, the Family Court noted the anticipated termination proceedings and determined that it would defer the grandmother's custody petition until after those proceedings were concluded. In an order dated June 17, 2014, the Family Court denied the grandmother's application for an immediate trial on her custody petition prior to any proceedings being conducted in the termination proceedings. The court thereafter held a fact-finding hearing in the termination proceedings. When the mother failed to appear for the continued hearing, the Family Court proceeded with an inquest, then entered orders of fact-finding and disposition, upon the mother's default, terminating her parental rights on the grounds of mental illness and permanent neglect, and freeing the child for adoption. In the order appealed

from, the Family Court dismissed the grandmother's custody petition, without a hearing, on the ground that she lacked standing. A grandparent has standing to seek custody of a child pursuant to FCA article 6 when the child is in foster care, and is generally entitled to a hearing (*see* DRL § 72 [2] [a]). While the grandmother was not entitled to an immediate hearing on her custody petition prior to the determination made at the conclusion of the fact-finding hearing in the termination proceedings against the mother, the proper procedural course would have been for the Family Court to consider her custody petition in the context of a dispositional hearing in the underlying termination proceedings, wherein the court would determine the best interests of the child. The grandmother did not testify at the fact-finding hearing or any of the permanency hearings held in relation to the termination proceedings against the mother, and was therefore never afforded the right to be heard on the issues. Accordingly, the Family Court erred in failing to resolve the custody petition before freeing the child for adoption. Since the dispositional portions of the orders of fact-finding and disposition terminating the mother's parental rights had been vacated on the mother's related appeal, the Appellate Division reversed the order dismissing the grandmother's custody petition, reinstated her petition, and remitted the matter to the Family Court for a hearing on her custody petition, to be conducted in the context of the dispositional hearing in the termination proceeding against the mother.

Matter of Weiss v. Weiss, 142 AD3d 507 (2d Dept 2016)

Father Demonstrated Sufficient Change in Circumstances

Here, the father demonstrated a sufficient change in circumstances to warrant modification of the custody provisions of the settlement agreement so as to award him residential custody of one of the parties' children, J. The record supported the Supreme Court's determination that J.'s relationship with the mother had deteriorated since the prior custody arrangement was agreed to, and that the father exhibited a greater sensitivity to his emotional and psychological needs, particularly with respect to the environment in J.'s new school. Additionally, the attorney for the children advocated for residential custody to be awarded to the

father, since J., who was 12 years old when the father's petition was filed, communicated a preference to reside with him. While the express wishes of a child are not controlling, the child's wishes should be considered and are entitled to great weight, where, as here, the child's age and maturity would make his input particularly meaningful. Accordingly, the court's determination to modify the custody provisions of the settlement agreement so as to award the father residential custody of J. had a sound and substantial basis in the record. However, the Supreme Court's determination that the evidence did not demonstrate a sufficient change in circumstances warranting modification of the custody provisions of the settlement agreement so as to award the father residential custody of the parties' other child M. was not supported by a sound and substantial basis in the record. It has long been recognized that it is often in the child's best interests to continue to live with his or her siblings, and the courts will not disrupt sibling relationships unless there is an overwhelming need to do so. It was undisputed that J. and M. have a close relationship, and, based upon the recommendations of the children's therapist that they should not be separated, the position of the attorney for the children that they should remain with the same custodial parent, and evidence that the father demonstrated more of an ability and willingness to assure meaningful contact between the children and the mother, and to foster a healthier relationship between the children and the mother, than the mother would have fostered between the children and the father, the court should have awarded residential custody of M. to the father. The Supreme Court also erred in granting that branch of the father's motion which was to hold the mother in civil contempt, as the evidence did not establish that the mother's actions with respect to the father's telephone communication with the children violated an unequivocal mandate contained in the settlement agreement or the so-ordered stipulation of settlement.

Cook v. Cook, 142 AD3d 530 (2d Dept 2016)

Mother Failed to Show a Change in Circumstances Warranting a Modification of Custody

The parties are the parents of a daughter born in August 2004. In an order dated June 23, 2014, the Family Court, Suffolk County, awarded joint legal custody of

the child to the parties, with residential custody to the father. In March 2015, the mother filed a petition in the Family Court to modify the order dated June 23, 2014, so as to award her physical custody of the child. In an order dated September 21, 2015, after a fact-finding hearing and an in-camera interview with the child, in effect, denied the mother's petition on the ground that she failed to establish a change in circumstances. The Attorney for the Child appealed on behalf of the child. The Appellate Division affirmed. Modification of an existing custody or visitation order is permissible only upon a showing that there has been a change in circumstances such that a modification is necessary to ensure the continued best interests and welfare of the child. The best interests of the child are determined by a review of the totality of the circumstances. Since the Family Court's determination with respect to custody and visitation depends to a great extent upon its assessment of the credibility of the witnesses and upon the character, temperament, and sincerity of the parties, its findings are generally accorded great deference and will not be disturbed unless they lack a sound and substantial basis in the record. Here, contrary to the contention of the attorney for the child, the Family Court's determination that the mother failed to show that there was a change in circumstances warranting a modification of custody in the subject child's best interests was supported by a sound and substantial basis in the record. Accordingly, the Appellate Division was unwilling to disturb the court's determination. Order affirmed.

Matter of Lamarche v. Rooks, 142 AD3d 707 (2d Dept 2016)

Slight Modification of Joint Physical Custody Order in Children's Best Interests

Family Court properly found there was a change in circumstances since the issuance of the prior joint legal and physical custody order as the children, who were one and three-years-old when the prior order had been issued, were now school age, and the slight modification of the parenting time was in their best interests. However, the court misunderstood the mother's request, unopposed by the father, for modification of her pick up time of the children from the father's home on weekdays, and the Appellate Division modified the order accordingly.

Matter of Schmitz v Schmitz, 139 AD3d 1103 (3d Dept 2016)

Sound and Substantial Basis for Court's Order

Family Court awarded primary physical custody of the three-year-old subject child to the father and visitation to the mother. The Appellate Division affirmed. Here, the record showed the mother's home was "messy to the point of being unsanitary." An agency caseworker testified that when she had visited the mother's home, the subject child was wearing a diaper soaked with urine and feces. Additionally, the mother had told the caseworker that the brown and orange stains on the child's bed were the result of the child finding a can in the garbage and cutting himself. Another witness testified to the uncleanliness of the child's bottles and had observed the mother feeding the child formula that had gone bad. Evidence showed the mother referred to the child as a "whine-ass" and placed her boyfriend's needs over the child. The mother admitted her home was very dirty. She was unemployed and tried to make the father pay \$500 in order to visit the child. On the other hand, the father was gainfully employed, was concerned about the child's needs and sought to ensure that his needs were being met. Furthermore, within the first three weeks of the father receiving temporary custody, the child had gained more than three pounds. Given the evidence, there was a sound and substantial basis for the court's determination that custody to the father was in the child's best interests.

Matter of Edick v Gagnon, 139 AD3d 1126 (3d Dept 2016)

Substantial Proof That Visitation Would Be Harmful to Child

Family Court dismissed incarcerated father's application for visitation with the 11-year-old subject child, via correspondence and telephonic communication. The Appellate Division affirmed. Here, the father was an "untreated sex offender with a history of physical and sexual abuse against victims that include[d] children." He testified he had never met the subject child, had only spoken to her one time, and had never sent her cards or gifts. At the time of the child's birth, the father had been imprisoned for charges involving aggravated assault on an unborn child and

had later been convicted of attacking the mother while she was pregnant. The father had also been convicted of statutory rape based on his sexual intercourse with a 15-year-old child. Additionally, he had sought to deny paternity of the subject child. Based on the evidence, there was substantial proof that visitation would be harmful to the child.

Matter of Isaiah CC. v Roselyn DD., 139 AD3d 1129 (3d Dept 2016)

Court Erred in Modifying Joint Legal Custody Order

Family Court modified a prior order of joint legal and physical custody by awarding the mother sole legal custody but continued the parties' parenting schedule. The Appellate Division reversed the determination of sole legal custody and modified the parenting schedule in an effort to equalize each parent's time with the children. Family Court erred in awarding the mother sole legal custody. Although the record showed the parties had consented to the forensic psychologist's report being considered by the court in making its best interests determination, the court had failed to do so. It neither addressed the psychologist's concerns nor offered an explanation as to why it failed to take the report into consideration. The psychologist opined the mother marginalized the father's role in the children's lives and the mother's fiancé supported her efforts to minimize the father's role in the children's lives. She opined the father was traumatized and angered by the mother's efforts to categorize him as a neglectful father. Family Court chose to focus on the father's perceived shortcomings by dwelling on events that had occurred years before the children were born. Even if the father were the source of the parties' discord, there was no evidence to show his past relationship with the mother affected his current ability to parent the children. Moreover, the psychologist determined the parents, whom she categorized as highly capable of parenting the children, had created a joint custody schedule that had worked effectively for many years. Given the evidence, the Appellate Division determined there was a "modicum of communication and cooperation" between the parties which made joint legal custody feasible and in the children's best interests. Moreover, there was substantial evidence that the father was devoted to the children and a loving parent. The

mother's concern about the children's homework having suffered while in their father's care was not corroborated by the children's teachers.

Matter of Stephen G. v Lara H., 139 AD3d 1131 (3d Dept 2016)

Sound and Substantial Basis to Modify Joint Legal Custody Order to Sole Legal Custody

Family Court properly modified a prior order of joint legal custody and awarded the mother sole legal and physical custody of the subject child and granted the father parenting time for a few hours each week. Here, the evidence showed the child suffered an injury to her vaginal area due to the actions of her half sisters at her father's home. The father refused to believe that any of his children would ever "touch each other's privates in any way whatsoever" and refused to acknowledge the child had been harmed in this manner by her half sisters. Additionally, the record showed the father had lost his job due to sexual harassment and he relied solely on public assistance to support his family, which included six children and 11 pets. The mother was better able to meet the child's needs and the court's determination was supported by a sound and substantial basis in the record.

Matter of Tara AA. v Matthew BB., 139 AD3d 1136 (3d Dept 2016)

Separation of Children Was Not Against Precedent or Public Policy

After a fact-finding and Lincoln hearing, Family Court dismissed the father's custody modification petition. The Appellate Division affirmed. Here, the parties' prior order included a provision which stated either party could move to modify without a showing of changed circumstance, therefore the only issue before the court was whether the modification was in the best interests of the children. Based on the evidence and giving due deference to the court's credibility determination, the court's order did not lack a sound and substantial basis in the record. Although the father argued the prior order was contrary to precedent and against public policy because it resulted in a visitation order which gave him parenting time with each child on different days and as such resulted in separating the

children, in this case physical custody of both children resided with the mother and the children were only separated from each other a few nights each week and this was not the type of sibling separation discouraged by the courts. Furthermore, the evidence showed the father failed to appreciate the older child's medical and mental health needs and was less aware than the mother of the children's educational needs.

Matter of Edward II. v Renee II., 139 AD3d 1140 (3d Dept 2016)

Child's Best Interest to Award Primary Physical Custody to Father

Family Court awarded the parties joint legal custody of the subject child with primary, physical custody to the father. The Appellate Division affirmed. Here, although the court was presented with generally fit and loving parents who had been able to cooperate with each other to maintain an informal parenting schedule for some time, the record showed the father to be a more stable and financially able parent. The father was a self-employed dairy farmer, and the child spent most of his time before and after school at the farm, which was located near the father's five bedroom home. The father shared the home with his girlfriend and at times, their children from other relationships. The father had a daily routine established for the child, and made efforts to address the child's dental and speech therapy needs. Additionally, he supported the mother's role in the child's life. On the other hand, the mother, who had a history of driving while intoxicated, was on probation for three years, did not have a driver's licence and was required to wear an ankle monitor designed to detect alcohol in her system. She was taking college classes, lived in subsidized housing and relied primarily on food stamps and the money she received from her mother's death, to support herself. Even though she indicated she was participating in counseling at the time of the hearing, it was not clear whether such participation was voluntary or mandated due to her diagnosis of being alcohol dependant, and she indicated she needed counseling for "reasons other than alcohol." While the father was wrong to have withheld the child from his mother when he found out about the mother's alcohol-related history, his decision to do so was based on his concern for the child's welfare. Moreover, since the parents lived in two different school districts, it was not

practical to have the child alternate between them.

Matter of Fritts v Snyder, 139 AD3d 1143 (3d Dept 2016)

Child's Exposure to Domestic Violence at Mother's Home and Mother's Excess Alcohol Abuse Supports Sole Legal Custody to Father

Family Court modified a prior joint custody order and issued an order of sole legal custody to the father and limited parenting time to the mother. The court also directed, among other things, that the mother's husband be prohibited from being the child's sole caretaker and prohibited the mother from consuming alcohol eight hours before visitation and directed that she not permit any third party to consume alcohol or drugs eight hours before her parenting time. The Appellate Division affirmed all the provisions of the order except for the provision regarding third-party alcohol consumption, finding it overly broad. Here, the evidence showed the change of circumstances resulted from the child's exposure to domestic violence in the mother's home as well as the mother's excess alcohol consumption. Furthermore, the evidence showed the mother was unable to communicate effectively with the father regarding the child's needs and it fell to the father's wife to act as liaison between the father and the mother. Additionally, the mother took away the child's cell phone on a regular basis to prevent the child from communicating with the father. It was in the child's best interest to reside with the father. The mother's home was chaotic with repeated instances of domestic violence between her and her husband, a convicted felon and alcoholic who admitted to drinking alcohol. In contrast, the father had a stable home and was able to properly care for the child.

Matter of David J. v Leeann K., 140 AD3d 1209 (3d Dept 2016)

Visitation With Non-Custodial Parent Not in Child's Best Interest

There was a sound and substantial basis in the record for Family Court's dismissal of incarcerated father's visitation modification and violation petitions, and denial of in-person visitation with the 8-year-old subject child. The father, who was convicted of

sexually abusing three young girls when the subject child was one-years-old, had a release date of 2021. He had visited with the child previously pursuant to a prior order, but by the time the current proceeding was commenced, his visitation rights had been impeded by both the mother and the paternal grandmother. While visitation with the non-custodial parent is presumed to be in the child's best interest, such presumption was rebutted in this case since the evidence showed it was harmful to the child. The record showed the child had been diagnosed with several mood and behavioral disorders and had been in therapy for two years and on medication for one year. The father's stepchild testified she had been molested by the father on a weekly basis over a three-year period. The mother testified that following in-person visitations with the father, the child acted out aggressively, punched, kicked, screamed and seemed distraught and angry. After telephone conversations with the father, the child would become "mean and very temperamental." The grandmother testified that the child was becoming more "fragile" and "volatile." Additionally the child had not expressed a desire to see her father in more than two years. The father was the only one who testified that he and the child had a good relationship. Moreover, the father admitted he had not been to any sex offender therapy. Based on the evidence, there was a sound and substantial basis in the record for the court's determination.

Matter of Joshua C. v Yolanda C., 140 AD3d 1213 (3d Dept 2016)

Sound and Substantial Basis in the Record for Joint Legal and Physical Custody

Upon the father's incarceration, the parents of two children modified the existing joint legal and shared physical custody order, to primary, physical custody to the mother. The father was subsequently found not guilty and released from incarceration, and he filed for sole custody of the children. After fact-finding and Lincoln hearings, Family Court restored the prior joint legal and physical custody order. The Appellate Division affirmed. Here, although the court did not articulate the facts to support a finding of a change in circumstances, the fact that the father was released from incarceration and lived in a house which was located near the children's school as well as the

preferences of the children, justified an inquiry as to whether modification of the current order would be in the children's best interests. The evidence showed both parties were good parents, the children were happy in both homes and they wished to spend an equal amount of time with them. Given these facts, there was a sound and substantial basis in the record for the court's determination.

Matter of Normile v Stalker, 140 AD3d 1233 (3d Dept 2016)

Order Did Not Direct Father to Encourage Visitation Between Mother and Child

Family Court did not abuse its discretion in dismissing the mother's willful violation petition against the father. Here, the mother had been awarded alternate weekend visitation with the 16-year-old subject child. There was no dispute that the mother was entitled to such visitation and she was in regular contact with the father to help facilitate such visits. The father admitted he left it up to the child to decide whether or not to contact the mother. While the father made no effort to encourage the visits, the child denied the father discouraged the visits. Additionally, there was no evidence to show the father failed to comply with the court order since the order did not explicitly direct him to encourage the visits.

Matter of Prefario v Gladhill, 140 AD3d 1235 (3d Dept 2016)

Change in Custody Would Disrupt Children's Lives

Family Court modified a prior order by awarding the father primary, physical custody of the children with specified parenting time to the mother, but maintained the joint legal custody provisions. The Appellate Division affirmed. Here, the deterioration of the mother's mental health supported the court's finding of a change in circumstances. Although the mother's mental health had stabilized and she did not present a risk of harming herself or the children, it was in the children's best interest to award physical custody to the father. There was no evidence the mother could resume her responsibility as primary care giver, and the father was able to provide a stable home environment. Furthermore, another change in custody would disrupt

the children's lives.

Matter of Andrew L. v Michelle M., 140 AD3d 1240 (3d Dept 2016)

Mother's Uninhabitable Home and Child's Preference Results in Custody to Father

Family Court properly modified a prior custody order and awarded primary, physical custody of the 14-year-old child to the father and parenting time to the mother. Here, the mother who had previously had physical custody of the child, had allowed her home to deteriorate to the point that it became uninhabitable. There were plumbing issues which resulted in water shut off, broken smoke detectors, clutter in the home and no electricity in parts of the house. While some of these issues were later fixed, the mother and child had to move in with the mother's aunt. Furthermore, the child's hygiene and her mental health had worsened necessitating weekly counseling. The mother also admitted the child wanted to live with her father. These factors supported a change in circumstances. Although the mother was more involved than the father in the child's activities, education and medical needs, he was able to provide a more stable home for the child and the child had a very close relationship with her paternal grandmother, with whom she attended church.

Matter of Coleman v Millington, 140 AD3d 1245 (3d Dept 2016)

Mother's Over-Medication of Child Support Custody to Father

Family Court properly modified an order of custody and awarded primary, physical custody to the father. Here, the mother had physical custody of the subject child until the father observed him to be in a "zombie-like" state and it was discovered the mother was over-medicating the child on Benadryl to help him fall asleep. The evidence showed the mother had problems controlling the child's rebellious behavior and she admitted to giving him two or three times more than the recommended dosage of Benadryl because of his sleep issues. Thereafter, an Article 10 petition was filed against the mother and upon her admission, an order of neglect was issued against her. The neglect determination was sufficient to find a change in

circumstances and it was in the child's best interest to have custody granted to the father. Although the mother had been the primary care giver, the father had been consistently involved in the child's life. While both parents had suitable homes and were involved in the child's schooling, the mother's actions showed a flawed understanding of her parental role. Even though the mother stated she only wanted to control the child's unmanageable behavior, she should have consulted a physician for the child's sleep issues instead of medicating him for no medical purpose and in excess of the recommended dosage, for over a period of months. However, the mother should have been awarded more parenting time with the child given her "consistent and significant presence in the child's life" and Family Court's order was modified to provide her with increased parenting time.

Matter of Dale UU. v Lisa UU., 140 AD3d 1249 (3d Dept 2016)

Willful Violation of Order Supported Contempt Finding and Imposition of Fees

Family Court did not abuse its discretion in finding the father to be in contempt based on his willful violation of a temporary custody and visitation order issued earlier by the court. Although the father argued he was confused by the order, the mother was able to establish, by clear and convincing evidence, that the father's actions were knowing and willful. However, the court erred in awarding the mother \$3,100 counsel fees. Where, as here, the mother failed to show actual loss or injury, Judiciary Law § 773 allowed the imposition of a fine, not to exceed the actual costs and expenses plus an additional amount of \$250 pursuant to FCA § 156. Here, the record showed counsel performed and documented six hours of work and with the additional \$250 added to the amount, the fine imposed should have totaled \$2,050. Anticipated counsel fees did not constitute proof of costs and expenses incurred.

Matter of Khan v Khan, 140 AD3d 1252 (3d Dept 2016)

Mother's Secretive Removal of Child Supports Court's Award of Physical Custody to Father

There was a sound and substantial basis in the record

for Family Court's award of primary physical custody of the nine-year-old child to the father. Here, the parties were able to cooperatively raise the child and jointly care for her until she was eight-years-old, at which time the mother secretly relocated with the child to another county. The mother's action in removing the child from her father and the only school she had ever attended was of the greatest concern in this case. The evidence showed the mother's allegations of the father's unfitness were not credible, since her concerns had not prevented her from agreeing to their prior arrangement of shared custody. While the father occasionally demonstrated a lack of proper parental judgment, on the whole he was able to provide greater stability for the child and was willing to foster a relationship between the mother and the child. However, the court erred in awarding the father sole legal custody since the record showed the parents had consistently been able to cooperate with one another on matters related to the child's custody and care.

Matter of Finkle v Scholl, 140 AD3d 1290 (3d Dept 2016)

Court Erred in Dismissing Mother' Modification Petition Without Conducting a Hearing

Family Court erred by dismissing the mother's custody modification petition without first conducting a hearing. Here, the prior order awarded the father sole legal and physical custody of the children. The mother's petition alleged, among other things, that the father had been charged with reckless endangerment, vehicular assault and DWI after he had crashed a car. She also alleged he had tried to alienate the children against her and that her work schedule had become more flexible. The mother's application sought joint legal and primary physical custody of the children, but was dismissed because she failed to allege she and the father could cooperate for the sake of the children. The mother's request to orally amend the petition to include sole legal custody was denied. Such allegations, which placed both legal and physical custody at issue and if proven after a hearing, would have provided the requisite showing of a change in circumstances sufficient to warrant a best interest determination. The mother's failure to request sole legal custody in her petition did not relieve the court of its responsibility to determine a custodial schedule that was in the

children's best interests.

Matter of Engelhart v Bowman, 140 AD3d 1293 (3d Dept 2016)

Appeal Rendered Moot

After a hearing, Supreme Court granted the attorney for the child's petition to suspend the mother's parenting time with the child. The court determined that the mother had violated the prior court order by failing to comply with substance abuse treatment recommendations and failing to undergo a mental health counseling. The mother appealed but during the pendency of the appeal, subsequent proceedings ensued and further orders were issued by the court, rendering the appeal moot.

Matter of Attorney for the Child v Cole, 140 AD3d 1335 (3d Dept 2016)

Mother's Alienating Behavior Supports Limitation of Her Visitation With Child

The mother, who lived in Michigan and the father, who resided in New York, shared joint legal custody with sole physical custody to the father and extensive parenting time to the mother. The mother failed to return the 13-year-old child to the father at the end of her visitation period, alleging the father had abused the child. Ultimately the mother returned the child and appeared in New York for the hearing. Family Court modified the prior order and awarded the father sole legal and physical custody. Additionally, the court reduced the mother's parenting time and directed that all visits between the mother and child occur near the father's domicile. The Appellate Division affirmed. The mother's only contention on appeal was that Family Court abused its discretion by reducing her parenting time with the child and restricting the location of such visitation. However, the psychologist who had completed a forensic evaluation of the parties, testified that the mother had alienated the daughter from the father and had "encouraged, manipulated and brainwashed" the child into turning against the father. Furthermore, the evidence showed the mother's abuse allegations against the father had been deemed unfounded by both CPS and the State Police. Although the child wished to live with the mother, the court

properly gave her wishes little weight, given the mother's alienating behavior. Giving due deference to the court's discretion in "crafting [an]... appropriate visitation schedule," there was a sound and substantial basis in the record to support the order.

Matter of Burnett v Andrews-Dyke, 140 AD3d 1346 (3d Dept 2016)

Appeal Moot Since Subject Child Turned 18

Family Court modified a prior order of custody. By the time the appeal was heard, the child had turned 18. Contrary to the mother's assertion, the exception to the mootness doctrine did not apply in this case. Family Court's limited jurisdiction under FCA §651 (a)(b), gave it authority to only adjudicate custody and visitation of minors who hadn't yet "attained the age of 18 years".

Matter of Troy SS. v Judy UU., 140 AD3d 1348 (3d Dept 2016)

Court's Award of Primary, Physical Custody to Mother Supported By a Sound and Substantial Basis in the Record

Family Court had a sound and substantial basis in the record to award the parties' joint legal custody, roughly equal parenting time but primary, physical custody of the two subject children to the mother. While both parties were fit and loving parents, each had shortcomings. The father was unemployed and relied on his mother, girlfriend and unemployment benefits to support and care for the children while he attended school part-time. Additionally, the evidence showed the father often failed to consult the mother before making important decisions regarding the children, such as their medical care and often failed to notify the mother about their upcoming school events. On the other hand the mother's driver's license was suspended, she admitted to dating a felon for a short time before he returned to prison and had failed to see the children for a three-week period due to financial and transportation difficulties. However, many of the mother's issues had been resolved. Her license had been reinstated, she had a steady job and was no longer dating the felon. Furthermore, even while she was dating the felon, she had not exposed the children to him. Despite the

father's attempts to alienate her from the children's lives and not provide her with their educational progress, she made efforts to get information directly from the school. She also encouraged the children to spend time with their father and never spoke negatively about him in their presence. Given the evidence, the court's order was supported by a sound and substantial basis in the record.

Matter of Greenough v Imrie, 140 AD3d 1365 (3d Dept 2016)

Minor Modifications To Order in Child's Best Interests

Family Court made minor modifications to a prior order by, among other things, requiring each party to complete a child custody stress prevention course and slightly expanding the father's parenting time. The Appellate Division affirmed. Here, the parents of the nine-year-old child had filed 23 petitions during the child's life and efforts to resolve the issues proved unsuccessful.

Although the mother claimed there had been no change in circumstances, the parties' history and the child's psychological evaluation showed that their escalating and ongoing disagreements were having a negative impact on the child, which constituted a change in circumstances. Modification of the prior order tightened the provisions and was aimed at reducing parental conflict, which was clearly in the child's best interests.

Matter of Ward v Feulner, 140 AD3d 1480 (3d Dept 2016)

Child's Best Interests To Expand Father's Parenting Time

Family Court awarded joint legal custody of the minor child to the parents with primary, physical custody to the mother and weekend and other parenting time to the father. The Appellate Division affirmed the award of joint legal custody but determined it was in the child's best interests to expand the father's parenting time. Here, the record showed both parties were financially and emotionally capable of caring for the child. The father was very involved in the child's life but the mother had a more flexible work schedule and she had

been the child's primary care giver. Since the Appellate Division's authority in custody and visitation matters was as broad as that of Family Court, the father's parenting time was expanded.

Matter of Gentile v Warner, 140 AD3d 1481 (3d Dept 2016)

Sole Legal and Physical Custody to Mother in Child's Best Interests

Supreme Court awarded the mother sole legal and primary custody of the parties' child with parenting time to the father. The Appellate Division affirmed. While both parents loved the child and were able to provide an adequate home for him, evidence showed the mother had a more flexible work schedule, and had always been the primary care giver responsible for the child's health care and educational needs. Additionally, since their separation, the parents had rarely been able to communicate effectively regarding the child's needs or what was in his best interests. Moreover, although the child's teachers recommended counseling for him, the father failed to consent to this and stated the child did not need counseling since he spent hours talking to and "analyzing" him, which the Court found unsettling. The father discussed inappropriate issues with the child including the parties' separation and disparaged the mother. The forensic psychologist, who had interviewed the parties and the child, reported that the child made several "adult-like negative comments" about the mother. She opined the father showed bad judgment by treating the child as his "buddy," allowed him to play inappropriate video games and access the internet without supervision. In contrast, she described the mother as a very able parent who was able to provide structure for the child and the mother also encouraged the relationship between the child and his father.

Funaro v Funaro, 141 AD3d 512 (3d Dept 2016)

Grandparents Able To Provide More Guidance, Stability and Support For Children

Family Court determined the grandparents had proven extraordinary circumstances and after a best interests analysis, awarded joint legal custody of the two children between the parents and grandparents with

primary physical custody to the grandparents. The mother appealed and the Appellate Division affirmed. Here, neither child had resided with their mother for many years and the younger child had lived with the grandparents for more than five years. The older child had been with them for a year and a half and prior to that, had lived with an aunt. The record showed the children's medical, financial and educational needs had been provided by the grandparents with little to no involvement by the mother. Additionally, the mother repeatedly missed parenting time as well as scheduled phone calls with the children. Although the grandparents had, on one occasion, improperly disciplined the younger child, they admitted their error and agreed not to use such methods again. Moreover, the mother had been found to have neglected the children due to "extremely unsanitary" conditions in her home and had lost custody of the older child when she had left her unsupervised by a risk level I sex offender who had molested the child. The children had a deep bond with the grandparents and the grandparents had provided them with a safe, stable and nurturing home. Based on these facts, there was a sound and substantial basis in the record for finding extraordinary circumstances. Although the mother had taken some steps to address some of her problems, her life was not stable. The older child had not lived with the mother for more than eight years and the grandparents could provide much more guidance, stability and support for the children.

Matter of Peters v Dugan, 141 AD3d 751 (3d Dept 2016)

Supervised Parenting Time With Father in Therapeutic Setting Not Detrimental to Child

Family Court awarded sole legal custody of the two subject children to the mother with supervised visitation to the father in a therapeutic setting. The mother appealed. By the time the appeal was heard a subsequent order relating to the older child had been issued by Family Court, rendering the appeal, as it applied to the older child, moot. As to the younger child, the father continued to be inappropriate toward the mother and although an addiction specialist testified the father had maintained sobriety for a year, the court was not convinced. The father continued to use marijuana every day, which he stated helped with sleep

and alleviating back pain. However, a family counselor testified she would help with joint counseling sessions between the father and the younger child. While not condoning the father's abusive conduct, based on the testimony and the Lincoln hearing, providing the father with limited, supervised visitation would not be detrimental to the younger child.

Matter of Charles EE. v Hanna FF., 141 AD3d 754 (3d Dept 2016)

Relocation Was in Children's Best Interests

Family Court granted the mother's petition to relocate with the children to Monroe County, which was 115 miles from the father's home, and modified the order to increase the father's parenting time. The Appellate Division affirmed. Here, the reason for relocation was the mother's engagement to a man whom she later married during the pendency of this case. Additionally, the mother, who had been unemployed, had obtained gainful employment in Monroe County. Although she had enrolled the children in the new school district without informing the father, there was sufficient evidence to show that she and her husband would facilitate a relationship between the children and the father. Furthermore, the lives of the mother and the children would be significantly improved by the move. The husband could provide financial security for the mother and the children, and the new school district outperformed the children's current school district. Moreover, the father's wife and the wife's child had a strained relationship with the subject children and the children wished to relocate. While the move would have a negative impact on the father's ability to attend the children's activities, the increase in visitation, with transportation provided by the mother, minimally affected his current visitation schedule.

Matter of Perestam v Perestam, 141 AD3d 757 (3d Dept 2016)

Court Erred in Dismissing Mother's Petition

Family Court determined the mother had failed to prove a change in circumstances and dismissed her custody modification petition. The Appellate Division reversed. Here, the parties had joint legal custody of the four subject children, ages seven to ten, with primary,

physical custody to the father and parenting time to the mother. The mother alleged the father had used inappropriate physical discipline and sought primary physical custody. To support her allegations, the mother submitted several photographs of the children showing some bruises allegedly caused by the father and testified to statements made by the children regarding the photographs. There was also testimony from the mother's husband and maternal grandmother who stated they had observed the father grabbing and shoving the children. Additionally, the mother stated she had left her abusive relationship and had developed supportive relationships and had a stable household. The attorney for the child, who did not file a notice of appeal and who did not object to the dismissal of the mother's petition, supported the mother's position on appeal and argued Family Court's failure to hold the scheduled Lincoln hearing deprived him from advocating for his clients. Viewed as a whole, the mother satisfied her initial burden of showing a change in circumstances and the court erred in dismissing her petition without further inquiry as to whether modification of the order was in the children's best interests.

Matter of Mary BB. v George CC., 141 AD3d 759 (3d Dept 2016)

No Error in Limiting Mother's Parenting Time With Child

After a series of petitions were filed by both parents, Family Court awarded custody of the subject child to the father, reduced the mother's parenting time and ordered overnight visits with the mother to be under the supervision of the paternal grandparents. The Appellate Division affirmed. Here, the then eight-year-old subject child drew an sexually explicit "stick-figure drawing and gave it to the father's girlfriend. The father contacted the police and after an investigation, the mother's boyfriend was arrested on felony sex abuse charges. Although the court failed to specifically find a change in circumstances, it did find the father had established that mother's boyfriend had been "indicated" for sexual abuse by social services and noted the mother was financially unable to reside on her own. Based on this and the boyfriend's arrest, there was sufficient support to find a change in circumstances. Additionally, it was in the child's best

interests to modify custody. The father, his girlfriend and a family friend testified about the negative changes and physical manifestations of anxiety in the child prior to her visits with the mother. These circumstances, along with the Lincoln hearing information supported the court's decision to limit the mother's parenting time with the child.

Matter of Jacob R. v Nadine Q., 141 AD3d 772 (3d Dept 2016)

Prison Visits With Father Not in Child's Best Interests

Family Court properly determined that prison visits with the father would not be in the child's best interests and limited the father's contact to written correspondence with the child, and allowed him to receive photographs of the child as well as her final report cards. The father was convicted of the murder in the second degree of the paternal grandmother and sentenced to a prison term of 25 years to life. While visitation with the noncustodial parent is presumed to be in the child's best interest, it can be rebutted upon a showing that such visitation would be harmful to the child. Here, the evidence showed that the paternal grandmother had regularly cared for the child and the child had developed a bond with her. Additionally, the child knew the reason for the father's incarceration and was engaged in grief counseling. Under these circumstances and taking into consideration the emotional well-being of the child, her age and the father's lengthy prison sentence, there was a sound and substantial basis in the record for the court's decision.

Matter of Dibble v Valachovic, 141 AD3d 774 (3d Dept 2016)

Court Erred in Dismissing Mother's Pro Se Custody Modification Petition

Without conducting a hearing, Family Court, sua sponte, dismissed the mother's petition to modify an order of sole legal and physical custody to the father with supervised parenting time to the mother, finding she had failed to plead a sufficient change of circumstances in her pro se petition. The Appellate Division reversed. Here, the basis for the existing order was due to the mother's intoxication and the threat to

hurt herself in the presence of the then 12-year-old child. The mother alleged that she was now living with the maternal grandmother, was a full-time student and attending alcohol counseling. Since the mother's alcohol abuse was a primary factor in the court's earlier custody determination, the petition, if liberally construed and established after a hearing, could have afforded a basis for increasing the mother's parenting time. Additionally, the court should have appointed an attorney for the child, which although not required, is the "strongly preferred practice" in contested custody matters.

Matter of Miller v Bush, 141 AD3d 776 (3d Dept 2016)

Court Properly Dismissed Father's Pro Se Custody Modification Petition

Family Court properly dismissed the father's pro se petition for sole legal custody, which sought to modify a prior order of sole legal to the mother with parenting time to the father, and a provision that the father have access to the children's educational and medical information and directed the mother to sign the necessary release forms. Here, the father's petition alleged that the mother had provided inaccurate or incomplete information on a medicaid recertification application, had changed the children's pick-up site on three occasions and cancelled a co-parenting session. Even if the pleadings were liberally construed, the allegations in the petition failed to show sufficient facts, which if established at a hearing, would afford a basis for the relief being sought.

Matter of Belrose v Belrose, 141 AD3d 780 (3d Dept 2016)

Mother's Parenting Time in Summer Should Be Increased Since Long Separation From Mother Not in Child's Best Interests

There was a sound and substantial basis for Family Court's award of sole legal and primary physical custody of the then two-year-old child to the mother. The parents' contentious relationship supported the award of sole custody to the mother. The child had primarily lived with the mother and the evidence showed the father had acted in a manner which was harmful to the child. The father's actions had also

exacerbated the conflict between the parties. However, given the child's very young age, the court's award of two months of summer visitation to the father with only alternating weekend access to the mother was not in the child's best interests and the Appellate Division modified the order to include weekday access to the mother during such months.

Matter of Rockhill v Kunzman, 141 AD3d 783 (3d Dept 2016)

Insufficient Evidence to Support Change in Circumstances Since Child's Allegation of Sexual Abuse Not Corroborated

Family Court determined the father had sexually abused the child, issued a two-year order of protection on behalf of the child and the mother, modified a prior custody order and terminated the father's visitation rights. The Appellate Division reversed. Contrary to the father's claim, the order of protection was not entered on default and the father could have appealed from the order had he wished to do so. As for the custody order, the mother failed to demonstrate a change in circumstances. The child's abuse allegations resulted from her out-of-court statements, and the evidentiary standards of Article 10 were applicable in this case. The record showed that corroboration of the child's out of court statements were no more than the "repetition of an accusation". The mother and the child's therapist testified about the child's statements that the father had touched her. However, the therapist testified the child had failed to provide her with details of the incident and did not provide an opinion as to the child's truthfulness or whether the child's behavior was indicative of someone who was sexually abused. While the issue of corroboration in such cases was generally entrusted to the trial court, there was nothing in the record to permit such a finding in this case.

Matter of Leighann W. v Thomas X., 141 AD3d 876 (3d Dept 2016)

Court Erred By Using The Wrong Legal Standard in Making its Determination

After learning that the subject child, who had special needs, had been temporarily removed from the father's care by social services, the mother filed to modify the

prior custody order seeking to have the child live with her. Two years earlier, the mother and her two children from a marriage, had moved two and a half hours away from the subject child's home but the mother continued to exercise regular parenting time with the child until the father stopped all contact between them. Social services placed the child with the paternal grandparents, who also filed for custody. After a hearing, Family Court granted the father's motion to dismiss the mother's custody modification petition finding that she had failed to make a "prima facie case" for relocating and awarded joint custody of the minor child to the paternal grandparents and the father with primary physical custody to the grandparents. The Appellate Division reversed and remitted the matter. Family Court applied the wrong legal standard in making its determination. The mother's burden was to show a change in circumstances, which she had done based on the father's actions in preventing her from having access to the child for nine months, along with the involvement of social services and the child's placement in the grandparents' home. Instead of proceeding to a best interests determination, the court viewed this case as a relocation matter governed by *Tropea v Tropea*, 87 NY2d 727 (1996). However, the mother was not the custodial parent at time of her relocation. Additionally, the grandparent's petition would be influenced by the mother's application since a parent has a superior right to custody over third parties unless there has been a finding of extraordinary circumstances.

Matter of Fletcher v Fletcher, 141 AD3d 879 (3d Dept 2016)

Mother was Provided With Competent and Meaningful Legal Representation

Family Court determined the mother's relocation constituted a change in circumstances, continued joint legal custody between the parents and awarded primary, physical custody to the father and parenting time to the mother. The mother appealed arguing ineffective assistance of counsel. The Appellate Division affirmed. A finding of ineffective assistance of counsel requires a showing that the mother "was deprived of reasonably competent and ...meaningful representation". Here, the mother's argument that her counsel failed to amend or file certain pleadings was

found unpersuasive. The record showed that counsel entered a general denial to the allegations in the father's petition and upon the court's urging to expedite the proceedings and "use [their] judgment" with regard to filing more petitions, counsel indicated he was prepared to proceed with the fact-finding hearing. Although the mother alleged counsel should have subpoenaed certain child protective records, his decision not to do so may have been tactical since the mother had also been under the supervision of the local social services agency. Furthermore, contrary to the mother's assertions that counsel was unprepared for the hearing, the record showed he conducted a vigorous cross-examination of the father, raised appropriate objections and made a convincing presentation of the mother's request for relocation.

Matter of Bennett v Abbey, 141 AD3d 882 (3d Dept 2016)

Court Properly Dismissed Mother's Modification Petition Without Holding a Hearing

Family Court properly dismissed the mother's pro se petition to modify custody, which was filed only three months after the order had been issued. Here, the father had been awarded sole legal and physical custody of the three children and the mother's parenting time had been suspended for six months due to her alienating behavior. The mother alleged the children were experiencing short-term trauma. However, in issuing its decision, the court had noted that the children might experience short-term trauma due to separation from their mother but determined the result of the mother's alienating behavior would be even more damaging to them in the long term. Even according the mother's petition every favorable inference, the court did not err in dismissing her application without a hearing.

Matter of Gerber v Gerber, 141 AD3d 901 (3d Dept 2016)

Relocation Not in Children's Best Interests

Family Court denied the mother's petition to modify the father's parenting time and to relocate to Scranton, which was 60 miles from her current residence. The Appellate Division affirmed finding there was a sound and substantial basis in the record to support the order.

Here, the children had a good relationship with both parents and the father exercised regular weekday and weekend parenting time. The mother sought to relocate in order to live with her fiancé and accept a job with better hours and health benefits than her current employment. Although she had no relatives in Scranton, the father did and the mother indicated the children would be able to visit their relatives and also visit the father on Thursday evenings when he worked at the family store in Scranton. However, evidence showed the mother's current employer provided her with a flexible work schedule and her boyfriend's apartment in Scranton only had one bedroom. While the mother indicated she would be getting a larger residence, she had not yet selected one. Additionally, the mother was willing to transport the children to see their father only on weekends and it was unclear what transportation resources the father had. Moreover, the children were doing "great" at their current school and there was no evidence that the school in Scranton was superior to their current one. The father wanted to maintain his weekly visits with the children and did not want them removed from the school and community they had lived in for their entire lives.

Matter of Southammavong v Sisen, 141 AD3d 905 (3d Dept 2016)

Sound and Substantial Basis for Court's Decision

Family Court awarded joint legal custody of the child to the parties, with primary physical custody to the mother and parenting time to the father. The Appellate Division affirmed. While both parents had certain strengths and weaknesses and both were able to care for child, the mother had strong family support and steady employment history and had always been the child's primary care giver. Here, the mother lived with her grandmother and her 15-year-old daughter, who had a strong bond with the subject child. Although the mother was unemployed at the time of the hearing, she had been working steadily since the child's birth and regularly gave the father money for his living expenses. The father lived with his son, whom the mother stated was aggressive towards the subject child. Although the father denied this, he testified the older child had been abused by an older sibling. Giving due deference to the court's credibility determinations, there was a sound and substantial basis in the record to support its

determination.

Matter of Basden v Faison, 141 AD3d 910 (3d Dept 2016)

Father's Challenge to Court's Determination With Respect to Extraordinary Circumstances Not Moot

Family Court granted custody of the subject child to petitioner stepmother, with supervised visitation to the father. The Appellate Division dismissed the appeal insofar as it concerned visitation, and reversed and dismissed the petition. The appeal was not mooted in its entirety by the subsequent entry of an order upon agreement of the parties regarding custody and visitation. The court erred in finding the existence of extraordinary circumstances to warrant consideration of the best interests of the child. As between a parent and a nonparent, the parent had a superior right to custody that could not be denied unless the nonparent established that the parent had relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances. Once the preferred status of the birth parent under *Matter of Bennett v Jeffreys*, 40 NY2d 543, had been lost by a judicial determination of extraordinary circumstances, that issue could not be revisited in a subsequent proceeding seeking to modify custody. Thus, such a finding could have enduring consequences for the parties.

Matter of Green v Green, 139 AD3d 1384 (4th Dept 2016)

Petitioner Not Required to Prove Substantial Change in Circumstances

Family Court awarded petitioner father sole custody of the subject child. The Appellate Division affirmed. The proceeding involved an initial court determination with respect to custody and, although the parties' informal arrangement was a factor to be considered, the father was not required to prove a substantial change in circumstances in order to warrant a modification thereof. The court's determination that the best interests of the child would be best served by awarding custody to the father had a sound and substantial basis in the record. The court did not abuse its discretion in denying respondent mother's motion pursuant to CPLR

4404 (b) and 5015 (a) to vacate the order appealed from.

Matter of Walker v Carroll, 140 AD3d 1669 (4th Dept 2016)

Court's Findings Demonstrated That It Made a Best Interests Determination

Family Court granted the mother's petition in part and modified a prior order of custody by requiring that the father's visitation with the subject children be supervised. Although the court did not state that it was in the best interests of the children to modify the prior order of custody, the court's findings demonstrated that it made such a determination. The court's determination that unsupervised visitation would be detrimental to the children had a sound and substantial basis in the record.

Matter of Grant v Habalou, 140 AD3d 1677 (4th Dept 2016)

Family Court Did Not Abuse Its Discretion in Granting Motion to Dismiss Father's Petition to Modify Visitation

The father, who was serving a term of imprisonment, filed a petition seeking to modify a prior court order permitting him to communicate with the parties' daughter by letter. Family Court dismissed the petition. The Appellate Division affirmed. Family Court did not abuse its discretion in granting the mother's motion to dismiss the petition without first conducting a hearing. To survive a motion to dismiss, a petition seeking to modify a prior order of visitation was required to contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child. The petition contained only the father's speculation that the mother had interfered with the child's ability to communicate with him. The record established that the AFC presented the child's position to the court, i.e., that she wanted to hear from the father on occasion but did not want any other contact. The father's further contention was rejected that the mother's failure to inform him of the child's well-being constituted a change in circumstances, inasmuch as the mother was not required to do so.

Matter of Nicholson v Nicholson, 140 AD3d 1689 (4th Dept 2016)

Court Properly Admitted Into Evidence Audio Recordings and Sworn Statement Given to Police

Family Court awarded sole custody of the parties' child to petitioner father. The Appellate Division affirmed. The mother's contention was unpreserved for review that the court erred in admitting in evidence at the custody hearing an audio recording of a telephone conversation between the parties that the father secretly recorded. Although the mother's counsel initially objected to the recording being admitted, counsel withdrew the objection after the court adjourned the matter so that counsel could research the issue. The mother also failed to preserve her further contention that the court erred in admitting in evidence an audio recording of a telephone call the father made to 911, during which the father told the 911 dispatcher that the mother was trying to take the child without his permission. When the father's counsel offered the recording in evidence, the mother's counsel stated, "I have no objection, Your Honor." The Attorney for the Child also had no objection to the second audio recording. Accordingly, the court properly admitted both recordings. The mother's further contention was rejected that the court erred in admitting in evidence a sworn statement given to the police by her adult daughter concerning an incident that occurred between the parties at the daughter's house. Although the mother correctly conceded that the daughter's testimony at the hearing was inconsistent with parts of her sworn statement, she contended that the statement should not have been admitted because the daughter acknowledged that she gave the statement to the police and testified that everything in the statement was true. Even assuming, arguendo, that the court erred in admitting the written statement, such error was harmless considering that the inconsistent statements were explored by the father's counsel during his cross-examination of the daughter, and the evidence was not particularly prejudicial to the mother. Moreover, there was ample other evidence in the record supporting the court's custody determination.

Matter of Clark v Hawkins, 140 AD3d 1753 (4th Dept 2016)

Order Modified to Conform to Decision

In a memorandum decision, Family Court dismissed the mother's two modification petitions. The court's order, however, referenced only the dismissal of the second petition. The Appellate Division modified by granting respondent father's motion and dismissing the first petition. Where there was a conflict between the decision and the order, the decision controlled, and the order was modified to conform to the decision. The mother did not address the second petition on appeal. Thus, she had abandoned any contentions related thereto. The court properly granted the father's motion to dismiss the first petition without a hearing. The mother failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing.

Matter of Esposito v Magill, 140 AD3d 1772 (4th Dept 2016)

Mother's Interference With Father's Visitation Sufficient to Establish Requisite Change in Circumstances; Placement in Primary Physical Custody of Father in Best Interests of Two Youngest Children

Family Court denied respondent father's cross petition for modification of a prior consent order and ordered that the parties' five minor children remain in the sole custody of petitioner mother. The Appellate Division modified by awarding primary physical custody of the two youngest children to the father, with visitation to the mother, and remitted to fashion an appropriate visitation schedule for those children and to determine the best interests of the second and third eldest children. The court erred in determining that the father did not meet his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a change in custody was in the best interests of the children. The evidence that the mother was interfering with the father's visitation with the children was sufficient to establish the requisite change in circumstances. Further, it was in the best interests of the two youngest children to be placed in the primary physical custody of the father. The mother's acts of hostility toward the father included instructing the children to be uncooperative and disrespectful when in the father's care, and to refuse to recognize him as their father. Additionally, on multiple occasions, the mother

refused to allow the children to leave for the father's visitation until the father called the police. The mother also made derogatory comments about the father and his wife in front of the children, and refused to communicate with the father about the children, even failing to inform the father that one of the children underwent surgery for appendicitis. The AFC for the three older children informed the Court at oral argument that, in a subsequent proceeding commenced after the appeal was perfected, the court awarded the father temporary custody of the second and third eldest children. The eldest child remained with the mother and would be 18 years old in July. The Court took notice of new facts to the extent they indicated that the record before it was no longer sufficient for determining the best interests of the second and third eldest children.

Matter of Amrane v Belkhir, 141 AD3d 1074 (4th Dept 2016)

Court Properly Allowed Father to Take Child to Montana During Summer Visitation; Issue Raised by AFC Beyond Appellate Review

Family Court modified a prior custody order by allowing petitioner father to take the child to a family reunion in Montana during his summer visitation. The Appellate Division affirmed. The issue raised by the Attorney for the Child (AFC), i.e., that the father failed to establish a change in circumstances, was beyond appellate review, inasmuch as the AFC did not file a notice of appeal. Although respondent mother appeared to have adopted the AFC's contention, that issue was not properly before the Court because it was raised for the first time in the mother's reply brief. There was a sound and substantial basis in the record for the court's determination that the child would benefit from visiting her relatives in Montana, and the court did not abuse its discretion in allowing the father to take her there during his summer visitation.

Matter of Carroll v Chugg, 141 AD3d 1106 (4th Dept 2016)

Court Erred in Granting Mother's Motion to Dismiss Father's Custody Modification Application With Prejudice at Close of His Proof

Defendant father sought, by order to show cause, to modify the judgment of divorce, which incorporated but did not merge the parties' agreement providing for joint custody of their two children, with physical placement with the father and extensive visitation with plaintiff mother. Supreme Court granted the father temporary custody of the parties' children, with supervised visitation to plaintiff mother, and referred the matter to a judicial hearing officer (JHO) to hear and determine, among other things, the father's application to modify the judgment of divorce. The JHO granted the mother's motion to dismiss the father's application with prejudice at the close of his proof, and the court thereafter vacated the temporary order and "fully restored" the provisions of the prior agreement as incorporated but not merged in the judgment of divorce. The Appellate Division granted the motion of the AFC to stay the order pending appeal, reversed, reinstated defendant's application and the temporary order, and remitted for further proceedings. Accepting the father's proof as true, the father established, among other things, that the older child called 911 at the mother's suggestion, allegedly because he did not want to go to the father's house, and was taken by emergency personnel for a mental health assessment and released to the father's custody. In addition, the mother told a neighbor on several occasions that the father had physically and/or sexually abused the children; the mother discussed the court proceedings with the children; and the court-appointed psychologist determined that the mother's mental health issues affected her ability to co-parent and that the stress caused by the older child's behavior affected the mother's ability to parent the children effectively. Accordingly, the father met his burden of demonstrating a sufficient change in circumstances to require consideration of the welfare of the children. Moreover, the JHO erred in refusing to admit in evidence the report of the court-appointed psychologist on the ground that the report was not the "best evidence" because the psychologist was available to testify. The oft-mentioned and much misunderstood best evidence rule simply required the production of an original writing where its contents were in dispute and were sought to be proven. Thus, that rule was not applicable. The contention of the AFC was rejected that the court erred in requiring the admission in evidence of three cellular telephones as the best evidence of the content of text messages between,

among other things, the parties, particularly in view of the father's failure to offer in evidence an authenticated copy-and-paste document of the text message conversations.

Miller v Miller, 141 AD3d 1117 (4th Dept 2016)

Dismissal of Father's Visitation Petition Reversed

Family Court granted the motion of respondent mother to dismiss the father's petition. The Appellate Division reversed and reinstated the petition. The court erred in summarily dismissing the father's petition to expand his visitation with the child from 10 hours each week to one overnight visit every two weeks. The father adequately alleged a change in circumstances warranting a modification of the existing consent order with respect to visitation in the best interests of the child inasmuch as the mother had, since the parties' agreement to the consent order, repeatedly reneged on her promises, made before and since the agreement to the consent order, to allow the father to have overnight visitation with the child.

Matter of Machado v Tanoury, 142 AD3d 1322 (4th Dept 2016)

Petitioner Non-Parents Established Extraordinary Circumstances

Family Court awarded custody of respondent father's eldest child to petitioner Roseman and custody of respondent's other two children to petitioner Carroll. The Appellate Division modified by vacating that part of the order determining respondent's visitation and remitted. The record supported the court's determination that petitioners met their burden of establishing extraordinary circumstances. They presented evidence of the father's long and serious history of alcohol abuse and the highly unstable and unsafe living conditions the abuse created for the children. The evidence also showed that the father failed to attend to the medical needs of the two youngest daughters. There was a sound and substantial basis in the record for the court's determination that the best interests of the children was served by the respective awards of custody to petitioners. The court properly refused to recuse itself inasmuch as the record did not show that the court was biased against the

father. The father received effective assistance of counsel. The court erred, however, in denying contact of any kind with the father's eldest daughter. While the evidence established that the father's relationship with the daughter was strained, it did not establish that visitation would be detrimental to her welfare. The court also erred in limiting the contact with his two other daughters via Skype, supervised by Carroll, because the record failed to establish that visitation with the father would harm them. Thus, the case was remitted for a determination of visitation with each of the children. The court also erred in suspending the father's visitation until he, among other things, completed a drug and alcohol evaluation and all recommended treatment. Thus, that part of the order was vacated.

Matter of Roseman v Sierant, 142 AD3d 1323 (4th Dept 2016)

Determination of Sole Custody to Father, Supervised Visitation With Mother Affirmed

Family Court granted custody of the subject child to respondent father and supervised visitation to petitioner mother. The Appellate Division affirmed. The mother's contention that the court erred in ruling that the mother was estopped from contending that respondent was not the biological father of the child was rejected. The estoppel issue was decided in respondent's favor by an order that was affirmed on a prior appeal. The court did not err in awarding the father custody of the subject child. The record established that the court's determination was the product of a careful weighing of the appropriate factors and that it had a sound and substantial basis in the record. The court's determination to impose supervised visitation was also supported by a sound and substantial basis in the record, especially considering the mother's continued attempts to undermine the father's ability to maintain a relationship with the child.

Matter of Joyce S. v Robert W. S. 142 AD3d 1343 (4th Dept 2016)

Grandmother Established Extraordinary Circumstances

Family Court granted sole custody of the subject child

to petitioner grandmother. The Appellate Division affirmed. The court properly determined that the grandmother met her burden of proving extraordinary circumstances and that she therefore had standing to seek custody of the child. The court, upon carefully weighing the appropriate factors, properly determined that modifying the prior order by awarding the grandmother sole custody and primary physical residence was in the best interests of the child. The court did not improperly delegate its authority to schedule visitation between the child and mother to the grandmother. If the mother was unable to obtain "access with the child as the parties can agree and arrange" pursuant to the court's order, the mother could file a petition seeking to enforce or modify the order.

Matter of Thomas v Small, 142 AD3d 1345 (4th Dept 2016)

Deterioration of Parties' Relationship Constituted Changed Circumstances

Supreme Court modified the parties' Separation and Property Settlement and "Opting Out" Agreement, by awarding sole custody of the parties' child to defendant father with visitation to plaintiff mother. The Appellate Division affirmed. The record supported the court's determination that the continued deterioration of the parties' relationship and their inability to co-parent constituted a change in circumstances. The court's decision properly set forth the grounds for its determination. The record supported the court's conclusion that the mother interfered with the father's relationship with the child and that the mother's unfounded allegations of domestic violence against the father, some of which were made in the presence of the child, rendered her unfit to be a custodial parent. The court's delay in making a determination was unreasonable, but reversal or remittal was not required inasmuch as the court's decision was supported by the record.

Werner v Kenney, 142 AD3d 1351 (4th Dept 2016)

Court Erred in Denying Mother's Request For an Adjournment

Supreme Court awarded primary physical custody of the parties' child to plaintiff father. The Appellate Division reversed and remitted for a new custody

hearing. On the morning of trial defendant mother's counsel withdrew from representation for nonpayment of legal fees and defendant requested an adjournment to obtain new counsel and the testimony of witnesses. The court denied the request and defendant was forced to proceed pro se. The court abused its discretion in denying the adjournment. The record established that the request was not a delay tactic and did not result from defendant's lack of diligence. The court's refusal to grant the adjournment to obtain new counsel resulted in the absence of a full and complete record upon which the court could render an adequate and informed decision.

Zhu v Cheng, 142 AD3d 1365 (4th Dept 2016)

Mother's Contention AFC Was Biased Without Merit

Family Court modified a prior consent order by awarding respondent father primary physical custody of the parties' child with visitation to petitioner mother. The Appellate Division affirmed. The father met his burden of establishing changed circumstances and there was a sound and substantial basis in the record to support the determination that it was in the child's best interests to award the father primary residential custody. The mother's contentions that the AFC was biased against her and failed to provide meaningful representation and act in the child's best interests were not preserved for review and, in any event, were without merit. The mother was provided with meaningful representation.

Matter of Elniski v Junker, 142 AD3d 1392 (4th Dept 2016)

FAMILY OFFENSE

Respondent Committed Family Offenses of Attempted Assault and Disorderly Conduct

Family Court found that respondent committed the family offenses of attempted assault in the third degree and disorderly conduct and directed her to, among other things, stay away from petitioner for two years. The Appellate Division affirmed. The court properly determined that it had subject matter jurisdiction based upon the intimate, familial relationship between the

parties. Petitioner was the foster mother of respondent's child and the sister of the child's father and the parties had frequent communication over the years. A fair preponderance of the evidence established that respondent committed the family offenses of attempted assault in the third degree and disorderly conduct. Petitioner testified that respondent lunged at her and threw a punch in her direction from less than a foot away during a supervised visit with the child and that respondent threatened petitioner the following day. Although respondent denied that she intended to hit petitioner, she admitted that she was very angry and that they directed obscene language at each other and that she was escorted from the premises by the police. The court's credibility determinations were entitled to deference.

Matter of Erica R. v LaQueenia S., 139 AD3d 422 (1st Dept 2016)

Respondent Committed Family Offense of Menacing

Family Court, upon a fact-finding determination that respondent committed the family offense of menacing in the third degree, granted an order of protection. The Appellate Division affirmed. The allegations that respondent forced petitioner to have sex with him did not divest the court of jurisdiction because the court was authorized to consider whether the conduct in question amounted to any sexual offense enumerated in the Family Court Act § 812 (1). There was support in the record for the court's determination that the parties were involved in an intimate relationship. Petitioner testified that they were involved for many years and her testimony was corroborated somewhat by her daughter, who lived with petitioner when respondent visited. A fair preponderance of the evidence established that respondent committed the family offense of menacing in the third degree. Petitioner testified that while they were on the street, respondent stated that he was going to kill her, and gestured with his finger across his neck. Respondent was not denied his right to a fair trial by the court's ruling limiting the evidence regarding conduct of which petitioner was acquitted after a criminal trial. Insofar as respondent contended that the evidence was relevant to petitioner's violent or aggressive conduct and to prove petitioner filed this petition to retaliate for her criminal prosecution, that

evidence was presented.

Matter of Sonia S. v Pedro Antonio S., 139 AD3d 546 (1st Dept 2016)

Petitioner Failed to Establish That Respondent Committed Family Offense

Family Court dismissed the petition for an order of protection against respondent. The Appellate Division affirmed. Petitioner failed to establish by a preponderance of the evidence that respondent, the father of her two children, committed any of the family offenses alleged in the petition. Although petitioner's testimony and evidence about photographs posted on respondent's Facebook page met the definition of harassment, it did not sufficiently demonstrate that respondent committed acts that would constitute harassment in the second degree.

Matter of Aly T. v Francisco B., 139 AD3d 597 (1st Dept 2016)

Respondent Committed Family Offenses of Harassment and Menacing

Family Court granted an order of protection. The Appellate Division affirmed. While the court credited petitioner's testimony regarding the frightening history of violence and harassment to which respondent subjected her, it did not make an express finding that respondent committed any of the family offenses asserted in the petition. However, a fair preponderance of the evidence supported the conclusion that respondent committed harassment in the second degree and menacing in the second degree. The court found credible petitioner's testimony that, in violation of prior orders of protection, respondent followed her wherever she went, including on the train and popping out of bushes; tracked her down through Facebook, causing her to relocate to a shelter to hide from him out of fear for her safety and that of her children; and harassed her by photographing her and her son during a court appearance.

Matter of Jasmine E.C., 140 AD3d 440 (1st Dept 2016)

Determination That Respondent Daughter Committed Family Offense Reversed

Family Court, upon a fact-finding determination that respondent daughter committed the family offense of harassment in the second degree, granted petitioner mother a two-year order of protection. The Appellate Division reversed. The evidence failed to establish that respondent committed the family offense of harassment in the second degree. The petition alleged, among other things, that in August 2015, the building superintendent told petitioner that he broke the lock on the door of her apartment to allow respondent access after she summoned the police. Although at the fact-finding hearing petitioner briefly testified that she had to pay for a lock to be repaired, she did not testify regarding the date the lock was broken, that respondent broke it, or that the lock secured her apartment door. Petitioner's testimony during the dispositional hearing about the August incident and her submission of a photograph purporting to show the broken lock was unavailing because the evidence was not submitted at the fact-finding hearing.

Matter of Kim Yvette W. v Leola Patricia W., 140 AD3d 495 (1st Dept 2016)

Family Court Erred in Placing Conditions on Father's Right to Modify

Family Court properly found the father had committed the family offense of aggravated harassment in the second degree against the mother and issued a two-year stay away order of protection on behalf of the mother and children. The evidence showed the incarcerated father had sent the mother a series of threatening letters, telling her she belonged to him and that he would kill her and no one could stop him. He had also sent letters to the children as a means to threaten and demean the mother. The father's intent to harass the mother could be readily inferred by his conduct and surrounding circumstances. While the court's award of sole legal custody to the mother was appropriate, the court erred in requiring the father to successfully complete mental health and anger management treatment before seeking to modify custody or visitation. The court did not have the authority to compel the father to complete treatment or therapy as a condition to any future application for modification.

Matter of Maureen H. v Byron I., 140 AD3d 1408 (3d Dept 2016)

One Incident Sufficient to Find Harassment in the Second Degree

Family Court determined the father, who had a history of criminal convictions, had committed the crime of harassment in the second degree, made a finding of aggravating circumstances and issued a five-year no-contact order of protection to the mother and all her children including the subject child. The Appellate Division affirmed. Here, the mother testified that when she left her place of employment, the father, who had recently been released from jail, was standing across the street and began following her, her demanding to see his daughter. When the mother told him the order directed supervised visitation, he got "right in the mother's face" and told her neither she nor the courts had the right to tell him when to see the child, and stated "I don't know who the hell you think you are..who the hell the courts think they are..", screamed at her and threatened to kill her. The father followed her and her teenage son, who was accompanying her, for a couple of blocks, threatening her the whole time, telling her he would "get her". The mother stated she was a "nervous wreck" and "very scared" during this whole time and tried to stay in a populated area. This incident alone was sufficient to find the father had committed the crime of harassment in the second degree. Additionally, the court did not err in allowing testimony about the father's violent behavior towards other women since it was not offered for the truth of the matter asserted but rather went to the mother's state of mind. Moreover, based on the record, the court did not abuse its discretion in finding aggravating circumstances.

Matter of Dawn DD. v James EE., 140 AD3d 1225 (3d Dept 2016)

Intent to Commit Criminal Mischief Could Be Inferred From Respondent's Conduct

Family Court determined respondent had committed the family offense of criminal mischief in the fourth degree and issued a two-year order of protection. The Appellate Division affirmed. Here, testimony from the parties and a police officer showed that respondent came to the parties' former marital home to pick up of the parties' daughter and retrieve his personal belongings. He found the door locked and began to

bang and pound on the door and hurl insults at petitioner, causing damage to the door frame, lock and screen door. Petitioner called the police. Although respondent denied intending to do damage to the door, intent could be inferred from the act itself, as well as his conduct.

Matter of Romena Q. v Edwin Q., 140 AD3d 1232 (3d Dept 2016)

Court Erred in Disposing of Matter on Basis of Respondent's Purported Default; Brief Colloquy Between Court and Petitioner Insufficient to Establish Respondent's Commission of Family Offense

Family Court issued an order of protection requiring respondent to refrain from offensive conduct toward petitioner, and granting petitioner temporary custody of the parties' three children, subject to defined visitation by respondent. The Appellate Division reversed and dismissed the family offense petition. The court erred in disposing of the matter on the basis of respondent's purported default. A respondent who failed to appear personally in a matter but nonetheless was represented by counsel who was present when the case was called, was not in default in that matter. Moreover, petitioner failed to establish by a fair preponderance of the evidence that respondent committed the family offense of harassment in the second degree. In this non-default posture, the brief colloquy between the court and petitioner, who merely "re-verified" the allegations of the petition, was insufficient to establish respondent's commission of the family offense. The hearing record contained no evidence concerning the content of the telephone calls made and the texts sent by respondent in the context of the parties' custody/ visitation dispute, and thus there was no evidentiary basis for a finding that respondent engaged in a course of conduct that was intended to alarm or seriously annoy petitioner and lacked any legitimate purpose. Nor was evidence presented at the hearing sufficient to support a finding that respondent attempted or threatened to strike, shove or kick petitioner or otherwise subject her to physical contact.

Matter of Daniels v Davis, 140 AD3d 1688 (4th Dept 2016)

Order of Protection Affirmed; Family Offense of Disorderly Conduct Did Not Have to Take Place in Public, Provided Respondent Recklessly Created Risk of Public Disturbance

Family Court issued an order of protection upon a determination that respondent committed acts constituting various family offenses, including reckless endangerment in the second degree. The Appellate Division affirmed. Although the court found that respondent committed various family offenses and sufficiently stated the facts it deemed essential to its decision, it did not specify the subsections of the criminal statutes upon which it based its findings that respondent committed the family offenses of forcible touching, harassment in the second degree, and disorderly conduct. The Appellate Division exercised its independent review power. The proof was sufficient to establish, by a preponderance of the evidence, that respondent committed the family offenses of forcible touching under Penal Law Section 130.52 (1), disorderly conduct under section 240.20 (1), and harassment in the second degree under section 240.26 (1). Respondent's contention was rejected that the evidence did not support the finding that he committed the family offense of disorderly conduct because he did not intend to create a public disturbance. The conduct did not have to take place in public, so long as the person recklessly created a risk of a public disturbance. The testimony at the fact-finding hearing established that respondent, in the parties' home, threw petitioner against a wall, forced his fingers in her mouth and caused bleeding, slapped her face, punched her legs, forcibly touched her vagina, and grabbed her by the hair when she tried to get away, all of which ultimately resulted in petitioner leaving the home with her three children, thereby sufficiently establishing a risk of public disturbance. The testimony also supported, by a preponderance of the evidence, the court's conclusion that respondent committed the family offenses of reckless endangerment in the second degree, forcible touching, and harassment in the second degree.

Matter of Telles v Dewind, 140 AD3d 1701 (4th Dept 2016)

JUVENILE DELINQUENCY

Record Supported Family Court's Determination

Family Court adjudicated the respondent a juvenile delinquent upon determining that he had committed an act which, if committed by an adult, would have constituted the crime of sexual abuse in the first degree, placed him on probation for a period of 24 months, and directed him to comply with an order of protection which directed him, inter alia, to stay away from the complainant until and including June 2, 2017. The respondent appealed. The Appellate Division affirmed. Upon reviewing the record, the Appellate Division found that the evidence was legally sufficient to establish, beyond a reasonable doubt (*see* FCA § 342.2 [2]), that the respondent committed an act which, if committed by an adult, would have constituted the crime of sexual abuse in the first degree against the complainant (*see* PL §§ 130.00 [3], [8] [a]; 130.65 [1]). The Court was satisfied that the Family Court's fact-finding determination was not against the weight of the evidence (*see* FCA § 342.2 [2]).

Matter of Jalen C., 139 AD3d 940 (2d Dept 2016)

Respondent Interfered with Authorized Arrest of His Friend

Family Court adjudicated the respondent a juvenile delinquent, upon determining that he committed acts which, if committed by an adult, would have constituted the crimes of obstructing governmental administration in the second degree and resisting arrest, and conditionally discharged him for a period of 12 months. The respondent appealed. The Appellate Division affirmed. Contrary to the respondent's contention, the testimony adduced at the fact-finding hearing was legally sufficient to establish that the police were engaged in authorized conduct when they arrested his friend, as there was probable cause to arrest his friend for criminal possession of marijuana in the fifth degree (*see* PL § 221.10 [1]), and that the respondent interfered with that authorized arrest (*see* PL § 195.05). With respect to resisting arrest, the evidence was legally sufficient to establish that the arrest of the respondent was lawful, and that he resisted that lawful arrest (*see* PL § 205.30).

Matter of Marlon C., 139 AD3d 941 (2d Dept 2016)

Appeal Deemed Moot

Family Court adjudicated respondent to be a juvenile delinquent and released him, pending disposition, into the custody of his mother, with whom respondent had been living for two years. Prior to the completion of the dispositional hearing, the mother became ill and respondent was released into the supervision of his father. Thereafter, it was discovered that earlier, the father had been awarded primary physical custody, and the court issued a dispositional order placing respondent on probation for 12 months under the supervision of his father. The mother appealed and the Appellate Division dismissed her application deeming it moot since there was no challenge to the underlying merits of the order and also, the order had expired. Moreover, the Court noted that while the appeal had been pending, the mother had unsuccessfully petitioned to obtain custody of respondent.

Matter of Ako LL., 139 AD3d 1130 (3d Dept 2016)

Appeal Dismissed Since Respondent Failed to Move for Leave to Appeal Temporary Order

At arraignment, Family Court placed respondent in the agency's custody and directed that she undergo a mental health evaluation. After the completion of the evaluation, the Juvenile Delinquency petition was withdrawn and the parties agreed to file a PINS petition in its place. After admitting to the allegations, respondent was placed in a residential treatment facility pursuant to a temporary order and pending a final dispositional order. Respondent appealed but the appeal was dismissed since the order was temporary and not appealable as of right and respondent had failed to move for leave to appeal.

Matter of Mickayla WW., 139 AD3d 1150 (3d Dept 2016)

Prior Inconsistent Statements Made by Victim Did Not Render Her Testimony Incredible

Family Court adjudicated 15-years-old respondent to be a juvenile delinquent based on acts, if committed by an adult, would constitute the crime of forcible touching.

The Appellate Division affirmed. Here, although prior statements given by the 14-year-old victim were inconsistent, these unspecified inconsistencies did not render her hearing testimony incredible as a matter of law, and counsel for respondent made no effort to establish the nature of the inconsistencies or cross-examine the victim regarding such inconsistencies. Furthermore, contrary to respondent's argument, the court was not required to develop the record since its function was to protect and not make the record. Upon review of the record and giving due deference to the court's credibility determination, there was no error in finding the victim's testimony to be credible.

Matter of Skylar H., 140 AD3d 1262 (3d Dept 2016)

Good Cause Established to Support Untimely Filing of Extension Petition

Family Court adjudicated respondent to be a juvenile delinquent and placed him in a nonsecure residential facility. Thereafter, petitioner sought to extend respondent's placement. Family Court denied respondent's motion to dismiss the extension petition as untimely, determined petitioner had demonstrated good cause for failing to file the petition 60 days prior to placement expiration as required by FCA §355.3(1), and after a hearing on the merits, granted the petition. The Appellate Division affirmed. Here, the evidence showed the agency assumed respondent would be returning home at the end of his placement. However, within one month of his discharge, respondent's behavior significantly worsened. He was sent home for six days to see how he would do but respondent requested to be returned early to the facility, and he was found with marihuana on his person. Additionally, two weeks before his discharge, his father became concerned about his readiness to return home. Moreover, prior to his anticipated discharge, respondent pushed one of his peers down a flight of stairs and assaulted a staff member when he tried to intervene.

Matter of Joshua LL., 140 AD3d 1279 (3d Dept 2016)

Court Incorrectly Applied the Doctrine of Res Judicata

Family Court incorrectly applied the doctrine of res

judicata in precluding petitioner from challenging the validity of an acknowledgment of paternity. Here, when the subject child was three-years-old, petitioner completed a private DNA test which revealed he, and not the individual who signed the acknowledgment of paternity, was the child's biological father. His subsequent paternity petition was dismissed by the court under FCA §516-a. Family Court found he had no right to challenge paternity since he was not a signatory on the acknowledgment of paternity, and determined the issue of equitable estoppel could not be reached in this case. Petitioner filed a second paternity petition and it was dismissed on the grounds of res judicata. Although petitioner did not have standing to sue under FCA§ 516-a, he did have standing under FCA §522 to challenge paternity. The defense of equitable estoppel could also be used to preclude him from asserting paternity if proven he acquiesced in the establishment of a strong parent-child bond between the child and another man. However, since there was no valid final judgment deciding the merits of the case, the doctrine of res judicata could not apply.

Matter of Stephen N. v Amanda O., 140 AD3d 1223 (3d Dept 2016)

ORDER OF PROTECTION

Court Properly Denied Petition For Extension of Order of Protection

Family Court denied petitioner's application for an extension of an order of protection against respondent. The Appellate Division affirmed. Petitioner failed to demonstrate good cause to show that an extension of the order of protection was necessary to prevent a reoccurrence of domestic violence. Respondent had complied with the initial order of protection and there had been no more incidents or violations claimed by petitioner and no specific claims of fears of domestic violence. When respondent picked up the parties' child, it was done at petitioner's residence and not at a police precinct.

Matter of Ironelys A. v Jose A., 140 AD3d 473 (1st Dept 2016)

PERMANENCY

Pursuant to FCA § 1035 (f) Right of Intervention Not Limited to Fact-Finding and Dispositional Hearings

Family Court erred in denying the maternal uncle's motion seeking permission to intervene in a permanency hearing, pursuant to FCA § 1035(f). The uncle sought Article 6 custody of the children. Here, the court determined the uncle was not entitled to intervene because the fact-finding and dispositional hearings had already been held. However, pursuant to FCA §1035(f), the right of intervention is not limited just to only the fact-finding and dispositional hearings but broadly permits a qualified relative seeking temporary or permanent custody of the child to participate "in all phases of dispositional proceedings," including permanency hearings, which is dispositional in nature and thus constitutes a "phase" of dispositional proceedings for purposes of § 1035(f).

Matter of Demetria FF., 140 AD3d 1388 (3d Dept 2016)

RIGHT TO COUNSEL

Mother's Waiver of Her Right to Counsel Was Knowingly, Voluntarily, and Intelligently Made

FCA § 262 provides certain parties to particular Family Court proceedings with a statutory right to counsel. A party, however, may waive the right to counsel and opt for self-representation, provided that he or she does so knowingly, intelligently, and voluntarily. In order to determine whether a party is validly waiving the right to counsel, the court must conduct a searching inquiry of the party who wishes to waive that right and thus proceed pro se. While there is no rigid formula to the court's inquiry, there must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel. Generally, a litigant will be deemed competent to proceed pro se if that person is competent to proceed to trial. Upon reviewing the record, the Appellate Division found that the Family Court conducted a sufficiently searching inquiry to ensure that the mother's waiver of her right to counsel was knowingly, voluntarily, and intelligently made. Further, the mother was sufficiently competent to waive

her right to counsel.

Matter of Graham v Rawley, 140 AD3d 765 (2d Dept 2016)

SIJS

Denial of Motion for Issuance of Order Making Finding to Enable Child to Petition for SIJS Warranted

In May 2014, the petitioner filed a petition to be appointed guardian of his cousin, A. (hereinafter the child), for the purpose of obtaining an order declaring that the child was dependent on the Family Court and making specific findings that he was unmarried and under 21 years of age, that reunification with one or both of his parents was not viable due to parental abuse, neglect, abandonment, or a similar basis found under State law, and that it was not in his best interests to be returned to Guatemala, his native country and country of last habitual residence, so as to enable him to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101 (a) (27) (J). Thereafter, the child moved for the issuance of an order making the requisite declaration and specific findings so as to enable him to petition for SIJS. Following a hearing, the Family Court denied the motion. The petitioner appealed. The Appellate Division affirmed. Pursuant to 8 USC § 1101 (a) (27) (J) (as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub L 110-457, 122 US Stat 5044) and 8 CFR 204.11, a “special immigrant” is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law (*see* 8 USC § 1101 [a] [27] [J] [i]), and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence (*see* 8 USC § 1101 [a] [27] [J] [ii]; 8 CFR 204.11 [c] [6]). The record established that the child's father was deceased, and therefore, reunification was not possible. Since the

statutory reunification requirement may be satisfied upon a finding that reunification is not viable with just one parent, it was not necessary to address the child's contention that the record supported the conclusion that reunification with his mother was not a viable option. However, the record did not support a finding that it was not in the child's best interests to be returned to his native country and country of last habitual residence, where his mother lives. Accordingly, the Family Court properly denied the child's motion for the issuance of an order, inter alia, making specific findings so as to enable him to petition for SIJS.

Matter of Victor C.G. v Santos C.T., 140 AD3d 951 (2d Dept 2016)

TERMINATION OF PARENTAL RIGHTS

TPR Based Upon Permanent Neglect Affirmed

Family Court determined that respondent mother permanently neglected the subject children. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that, during the relevant period, despite the agencies diligent efforts, the mother failed to address meaningfully the problems leading to the children's placement, and therefore failed to plan for their future. Petitioner's referrals to counseling programs and parenting classes, arranging for visitation, and directing random drug tests constituted required diligent efforts. The finding of neglect was also supported by clear and convincing evidence that despite petitioner's diligent efforts, the mother failed to maintain regular contact with the children. Petitioner worked with respondent to include individual therapy in her service plan, and, although petitioner reminded the mother to keep her appointments, the mother failed to attend them.

Matter of Essence T.W., 139 AD3d 403 (1st Dept 2016)

TPR Based Upon Permanent Neglect Affirmed

Family Court determined that respondent mother permanently neglected the subject children, terminated her 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 record

demonstrated that the agency's diligent efforts, including formulating a service plan, meeting with the mother to discuss the plan, making referrals and monitoring compliance. The determination was supported by clear and convincing evidence, including the testimony of the caseworker, and the agency's progress notes. The mother failed to visit the children for a seven-month time period and was noncompliant with services, including mental health treatment. A preponderance of the evidence supported termination of the mother's parental rights based upon her failure to complete the service plan and lack of insight into her mental health issues after three years. A suspended judgment was not warranted.

Matter of Zhane A.F., 139 AD3d 458 (1st Dept 2016)

TPR Based Upon Permanent Neglect Affirmed

Family Court determined that respondent mother permanently neglected the subject children, terminated her 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 determination of permanent neglect was supported by clear and convincing evidence. Petitioner engaged in diligent efforts to encourage and strengthen the mother's relationship with the children by referring her to domestic violence counseling, mental health services, parenting classes, and by scheduling regular visitation. Despite these efforts, the mother continued to deny responsibility for the conditions necessitating the children's removal, failed to complete or to benefit from the parenting skills programs, and failed to demonstrate that she had adequate parenting skills to meet the children's needs. She acted disruptively during visitations, failed to visit the children consistently, and failed to appreciate why the children had been placed in foster care. A preponderance of the evidence supported the court's determination that termination of the mother's parental rights was in the children's best interests. They had been in a stable foster home for a large portion of their lives, did not want to be removed from the home, and the foster mother wished to adopt them.

Matter of Cameron W., 139 AD3d 494 (1st Dept 2016)

Permanent Neglect Petition Properly Dismissed

Family Court granted respondent mother's motion to dismiss the permanent neglect petition against her for petitioner's failure to make out a prima facie case. The Appellate Division affirmed. The agency failed to establish a prima facie showing of permanent neglect with clear and convincing evidence. The mother was undergoing drug treatment and was engaged at Odyssey House. The mother has been involved with drug treatment programs and completed multiple courses. She kept in contact with the agency and she completed a parenting skills course. She also spoke with the agency about her concerns about the children and was receptive to advice. Even when she was incarcerated, the mother called the children most nights and asked them about their day and had some visits with them at the jail facility. When she was released, she attended her visits with the children and the children were happy to see her. The record showed that the mother was a "present parent" and she was engaged in services. Although the agency focused on the absence of proof that the mother completed a domestic violence program, the testimony was insufficient to show that the mother did not complete the program.

Matter of Tylynn M.A., 139 AD3d 569 (1st Dept 2016)

Denial of Mother's Motion to Vacate Default Affirmed

Family Court denied respondent mother's motion to vacate the default judgment against her terminating her parental rights to the subject children upon findings of permanent neglect. The Appellate Division affirmed. Even if respondent set forth a reasonable excuse for her default in appearance, the court properly denied the motion to vacate because respondent failed to set forth a meritorious defense to the petition by submitting detailed information or documentation to substantiate her claim that she completed the services required to have the children returned to her home. A preponderance of the evidence supported the court's determination that termination of the mother's parental rights was in the children's best interests. The children were thriving in the foster parents' care, the foster parents wanted to adopt them, and respondent failed to engage in services even though the children had been in foster care from their respective births.

Matter of Noah Martin Benjamin., 139 AD3d 593 (1st Dept 2016)

TPR Based Upon Mental Illness Affirmed

Family Court, upon a fact-finding determination that respondent mother suffered from mental illness, terminated her parental rights, and committed custody and guardianship of the child to petitioners for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence established that the mother was then and for the foreseeable future unable to provide proper and adequate care for her child by reason of mental illness and that the child would be in danger of becoming a neglected child if placed in the mother's care. Petitioner submitted, among other things, un rebutted expert testimony that the mother suffered from long-standing schizoaffective disorder that rendered her unable to care for the special needs child, as well as the expert's detailed report, which was prepared after an interview with the mother and a review of her mental health records. The expert noted that the mother had limited insight into her condition, a long-standing pattern of intermittent compliance with medication and treatment, and recurrent hospitalizations.

Matter of Akiko Miami-Lyn A., 139 AD3d 617 (1st Dept 2016)

TPR Based Upon Permanent Neglect Affirmed

Family Court, upon a finding that respondent mother permanently neglected the subject child, terminated her parental rights, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The agency exercised diligent efforts to encourage and strengthen the mother's relationship with the child by referring her to drug treatment programs and by scheduling regular supervised visitation, but the mother failed to meaningfully address the problems that led to the child's placement and she failed to visit the child regularly. A preponderance of the evidence supported the court's finding that termination of the mother's parental rights was in the child's best interests. The

child had been living in the custodial home since she was nine months old, was thriving in the home, and there was no evidence that respondent has planned for the child's future.

Matter of Lihanna A., 140 AD3d 404 (1st Dept 2016)

TPR Based Upon Permanent Neglect Affirmed

Family Court determined that respondent mother permanently neglected the subject children, terminated her 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. Clear and convincing evidence showed that the agency made diligent efforts to strengthen the mother's relationship with the children by scheduling visitation and referring her to therapy to address the conditions that led to the children's removal. After a failed trial discharge, the mother failed to attend a family team conference, failed to regularly attend her counseling sessions, failed to attend the beginning of a special needs parenting course, and refused to attend another parenting program. In the year preceding the petition to terminate her parental rights, the mother missed several visits with the children and often failed to engage with them during the visits she did attend. A suspended judgment was not appropriate. A preponderance of the evidence showed that termination of the mother's parental rights was in the children's best interests. The children were thriving in their foster care home, had been appropriately provided for by the foster parents for more than four years, and had developed strong bonds with the foster parents.

Matter of Amarnee T.T., 140 AD3d 452 (1st Dept 2016)

Dismissal of Agency's TPR Petition Reversed

Family Court dismissed the agency's petitions to terminate respondent mother's parental rights on the ground of permanent neglect. The Appellate Division reversed. The record established that the agency fulfilled its obligation to exert diligent efforts in the face of a lack of cooperation from the mother and supported the findings of permanent neglect with clear and convincing evidence. The mother did not express an interest in planning for the children's return

independent of the children's maternal grandfather until five months prior to the filing of the petition. When the mother expressed a willingness to plan for the children's return, the agency diligently attempted to assist her in efforts to obtain suitable housing, but she repeatedly failed to cooperate by, among other things, refusing offers of services from the agency and refusing to consent to the disclosure of records from mental health providers. The agency remained in regular contact with the mother and her therapist, arranged regular visitation with the children, and kept the mother apprised of the children's health, special needs, and educational progress.

Matter of Hope Linda P., 140 AD3d 477 (1st Dept 2016)

Record Supported Family Court's Finding That Mother Failed to Comply with Conditions of Suspended Judgment

The petitioner commenced a proceeding to terminate the mother's parental rights on the ground that she had permanently neglected the subject child. In October 2010, the mother admitted that she had permanently neglected the child, and a suspended judgment for a period of one year was entered. In July 2011, the petitioner moved to revoke the suspended judgment on the ground that the mother had failed to comply with its terms and conditions. Following a hearing, the Family Court found that the mother had failed to comply with the terms and conditions of the suspended judgment, revoked the suspended judgment, and terminated the mother's parental rights. The mother appealed. The Appellate Division affirmed. The Family Court may revoke a suspended judgment after a violation hearing if it finds, upon a preponderance of the evidence, that the parent failed to comply with one or more of its conditions. Here, the petitioner established, by a preponderance of the evidence, that the mother failed to comply with all of the conditions of the suspended judgment. When determining compliance with a suspended judgment, it is the parent's obligation to demonstrate that progress has been made to overcome the specific problems which led to the removal of the child. A parent's attempt to comply with the literal provisions of the suspended judgment is not enough. Although the mother accepted the services offered to her, including individual and family therapy and

domestic violence group counseling, she failed to gain insight into the problems that were preventing the child's return to her care. The mother also failed to develop effective communication and parenting skills, as expressly required by the suspended judgment. Furthermore, there was evidence that the mother allowed the child to have contact with the father of another of her children, despite a provision in the suspended judgment expressly forbidding such contact. Contrary to the mother's contention, the child's out-of-court statements regarding her contact with this individual were admissible evidence on this issue. Inasmuch as a hearing on an alleged violation of a suspended judgment is part of the dispositional phase of a permanent neglect proceeding, hearsay testimony is admissible where, as here, it was material and relevant. There also was evidence that the mother failed to comply with the provisions of the suspended judgment requiring her to obtain a residence that was reasonably satisfactory to the petitioner, and to maintain an adequate source of income to provide for the return of the child. The petitioner was not required to prove that it had exercised diligent efforts to strengthen the parental relationship and reunify the mother and child, as the mother had previously admitted that she had permanently neglected the child. Additionally, the evidence supported the Family Court's determination that it was in the best interests of the child to terminate the mother's parental rights and free the child for adoption. Accordingly, the Family Court did not err in finding that the mother had violated the terms of a suspended judgment, terminating her parental rights, and freeing the subject child for adoption.

Matter of Selena L., 140 AD3d 769 (2d Dept 2016)

Record No Longer Sufficient to Review Whether Family Court's Determinations Were in Child's Best Interests

In January 2014, the petitioner, Catholic Guardian Services, filed a petition to terminate the mother's parental rights, alleging that the mother had permanently neglected the subject child from the time of the child's placement into foster care in April 2012. Following fact-finding and dispositional hearings, the Family Court determined that the petitioner proved the allegations of permanent neglect by clear and convincing evidence, terminated the mother's parental

rights, and transferred guardianship and custody of the child to the Commissioner of Social Services of the City of New York and the petitioner for the purpose of adoption. Based on all the testimony at the fact-finding hearing, the petitioner met its burden of establishing, by clear and convincing evidence, that, despite its diligent efforts to encourage and strengthen the parental relationship, the mother permanently neglected the child by failing substantially and continuously to maintain contact with the child or plan for the child's future although she was financially able to do so (*see* SSL § 384-b [7] [a]). However, based on post-hearing facts and allegations, of which the Appellate Division could properly take notice to the extent they indicated that the record before it was no longer sufficient to review whether the Family Court's determinations were in the child's best interests, it was not clear that termination of the mother's parental rights was in the child's best interests. Accordingly, the Appellate Division remitted the matter to the Family Court for a new dispositional hearing to determine the child's best interests and for a new disposition thereafter.

Matter of Zahrada S.M.R., 140 AD3d 969 (2d Dept 2016)

Mother Failed to Successfully Deal with the Issues That Prevented Reunification

The Family Court properly found that the agency established by clear and convincing evidence that it made diligent efforts to reunite the mother with the child by providing an array of services, including therapy, parenting skills classes, domestic violence counseling, and visitation, but that the mother failed to successfully deal with the issues that prevented reunification (*see* SSL § 384-b [7] [a]). Moreover, the court properly determined that termination of the mother's parental rights, rather than entry of a suspended judgment, was in the child's best interests.

Matter of Himallay M.F.G., 141 AD3d 521 (2d Dept 2016)

Caseworker's Hearsay Testimony Regarding Father's Drug Test Results Properly Admitted

Contrary to the father's contention, the petitioner satisfied its burden of proving, by a preponderance of

the evidence, that the father violated one of the terms and conditions of a suspended judgment by failing to refrain from using illegal drugs (*see* FCA § 624). Although the testimony of a caseworker regarding the father's drug test results constituted hearsay, hearsay evidence which is material and relevant may be admitted at a hearing on an alleged violation of a suspended judgment because it is part of the dispositional phase of a permanent neglect proceeding (*see* FCA § 624). Here, the caseworker's testimony regarding the father's drug test results was properly admitted as it was material and relevant to the issue of whether the father violated the terms and conditions of the suspended judgment. Further, the evidence adduced at the hearing supported the Family Court's determination that it was in the best interests of the children to terminate the father's parental rights and free the children for adoption (*see* FCA § 633 [f]).

Matter of Blake T.L., 141 AD3d 525 (2d Dept 2016)

Mother Entitled to Vacatur of Dispositional Portions of Orders of Fact-Finding and Disposition in the Interest of Justice

In proceedings pursuant to SSL § 384-b and FCA article 6 to terminate the mother's parental rights, the mother failed to appear at a continued fact-finding hearing on December 9, 2014. The Family Court completed the hearing on that date as an inquest and made factual findings, upon the mother's default, that the petitions were established. The court determined that a dispositional hearing was unwarranted and immediately made dispositions, upon the mother's default, terminating the mother's parental rights and freeing the child for adoption. Orders of fact-finding and disposition dated January 12, 2015, were entered, determining that the mother permanently neglected the subject child and that she was a mentally ill parent as defined in SSL § 384-b (6) (a), terminating her parental rights and transferring custody and guardianship of the subject child to the county's Department of Social Services for the purpose of adoption. The mother thereafter moved pursuant to CPLR 5015 (a) (1) to vacate the orders of fact-finding and disposition. The Family Court denied the motion, and the mother appealed. The determination of whether to relieve a party of a default is within the sound discretion of the Family Court. A parent seeking, pursuant to CPLR

5015 (a) (1), to vacate an order entered upon his or her default in a termination of parental rights proceeding must 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 Family Court did not improvidently exercise its discretion in determining that the mother failed to meet her burden on that branch of her motion which was to vacate the fact-finding portions of the orders of fact-finding and disposition. However, the Family Court improvidently exercised its discretion in denying that branch of the mother's motion which was to vacate the dispositional portions of the orders of fact-finding and disposition. Although, in the context of a proceeding pursuant to SSL § 384-b to terminate parental rights based on mental illness, a separate dispositional hearing is not necessarily required in every case, the circumstances of this case were not such that a separate dispositional hearing was unwarranted. Furthermore, in the case of permanent neglect, the Family Court may not dispense with a dispositional hearing in the absence of the consent of the parties (*see* FCA §§ 631, 625 [a]). Consequently, the mother was entitled to vacatur of the dispositional portions of the orders of fact-finding and disposition in the interest of justice. Accordingly, the Appellate Division granted that branch of the mother's motion which was to vacate the dispositional portions of the orders of fact-finding and disposition and remitted the matter to the Family Court for a dispositional hearing and new dispositions thereafter.

Matter of Isabella R. W., 142 AD3d 503 (2d Dept 2016)

Psychologist Could Offer Opinion Based on Prior Evaluation Since Respondents Failed to Attend Scheduled Court-Ordered Evaluation

Family Court properly terminated the parental rights of mentally ill parents. The agency met its burden and was able to show, by clear and convincing evidence, that the parents were presently and would be for the foreseeable future, unable to provide proper care for the child based on their mental illness. Although the parents had failed to attend the court-ordered evaluation, the psychologist testified his opinions were based on his prior evaluation of the parents, completed one year earlier with regard to respondents' older child. His opinion was also based upon records obtained from

collateral sources, such as prior health care providers and social workers. The psychologist reviewed the respondents' current and various mental health disorders and expressed his concerns about their parenting abilities given their specific disorders. While the mother's illness was treatable with medication, she had failed to follow through with treatment or medication. Although respondents argued that the psychologist's testimony was unfair since it was based on a dated evaluation, it was their decision not to attend the evaluation and thus the psychologist was entitled to rely on available records to reach his conclusions. Furthermore, his testimony regarding the longstanding nature of the father's condition as well as both parents' failure to seek and complete treatment was uncontradicted.

Matter of Summer SS., 139 AD3d 1118 (3d Dept 2016)

No Basis for Appointment of Guardian Ad Litem

Family Court terminated respondent's parental rights on the basis of mental illness. The Appellate Division affirmed. The court did not err in failing to appoint a guardian ad litem for respondent since neither respondent nor her attorney requested such an appointment. Even if they had made such a request, there was no error since the record failed to show that respondent was unable to understand the proceeding or defend her rights or assist her counsel. She was able to testify coherently, understood the severity of her mental illness and the importance of taking medication.

Matter of Marie ZZ., 140 AD3d 1216 (3d Dept 2016)

Respondent's Sporadic, Infrequent and Insubstantial Contacts With Child Supports Abandonment Determination

Family Court properly determined the child had been abandoned by respondent father and terminated his parental rights, based on his sporadic, infrequent and insubstantial contacts with the child. Here, the agency established that during the six month period prior to filing the petition, respondent had visited the child twice, had attended a permanency hearing once, twice applied for custody and visitation unsuccessfully because he was incarcerated at the time of filing or was incarcerated after filing the petition, and had left one

telephone message asking for contact with the child. Although respondent was incarcerated, the agency caseworker had visited him and advised him he could send letters to the child through her or another caseworker but he failed to do so. The caseworker had twice attempted to return respondent's phone calls and had written him several letters. However, respondent did not notify the caseworker when he was released from jail, failed to keep her apprised of his address and never followed up on his phone call. Respondent's incarceration did not excuse him his lack of contact with the child. Even though the caseworker informed him the child did not want to visit him in jail, this was not to discourage respondent since respondent had declined jail visits with the child prior to hearing of this. Aside from leaving one phone message for the caseworker and filing a custody petition, he make no meaningful attempt to maintain contact with the child during the relevant two months he was released from jail. Additionally, Family Court properly precluded respondent from introducing evidence of contact outside the relevant six month period, and did not abuse its discretion by failing to hold a dispositional hearing, which was not required in these proceedings.

Matter of Colby II., 140 AD3d 1484 (3d Dept 2016)

Respondent's Failure to Visit or Communicate With Child Supports Abandonment Finding

Family Court determined respondent mother had abandoned the subject child and terminated her parental rights. The Appellate Division affirmed. The evidence showed during the relevant six month period, respondent had not visited the child, requested visits with the child or communicated with the agency regarding the child. Additionally, the agency had not impeded or discouraged contact between respondent and the child. Although the visitation schedule had been changed to a weekend time to accommodate respondent, she had not attended any of the scheduled visits. Respondent admitted she had not made any attempt to visit the child during the first three months of the relevant period because she alleged there was an outstanding warrant for her arrest. Even though she visited her other children during the weekdays, she stated she was able to visit them because her friend was able to provide transportation for her on the weekdays and acknowledged she had not requested that visits

with the subject child also be moved to weekdays. Furthermore, she failed to explain why she did not take the bus to visit the child since she lived within walking distance from the bus stop and she could have requested assistance with bus fare.

Matter of Dimitris J., 141 AD3d 768 (3d Dept 2016)

Respondent's Failure to Challenge Permanent Neglect Finding Renders Appeal Moot

Family Court adjudicated the subject children to be permanently neglected and terminated respondent father's parental rights. During the pendency of the proceedings, the children were adopted which rendered respondent's appeal from the dispositional order moot. The Appellate Division noted the subsequent adoption would not have rendered moot a challenge to the finding of permanent neglect. However, respondent abandoned such a challenge by failing to address that issue in his brief.

Matter of Iyanna KK., 141 AD3d 885 (3d Dept 2016)

More Than Literal Compliance With Terms and Conditions Needed To Shown

Family Court revoked a suspended sentence and terminated respondent father's parental rights. The Appellate Division affirmed. Here, respondent argued that he could not have violated the condition of the suspended judgment requiring him to "maintain a safe and stable home if released during [the] [s]uspended [j]udgment period" because he was incarcerated for that entire period of time. However, the record showed that prior to the issuance of the suspended judgment, respondent indicated to the court that he would be released during the pendency of the suspended judgment, which made it reasonable for the court to assume that respondent would have an opportunity to comply with its terms and conditions. Nevertheless, the Appellate Division stated literal compliance is not sufficient by itself and evidence that progress has been made to overcome the specific problems which led to the removal of the children needed to be shown. While respondent arguably made a good faith effort, he failed to present a realistic and feasible permanency plan. Moreover, it was unlikely respondent would have been granted an early release since he had been in prison

twice before, had received parole both times but had also violated parole both times.

Matter of Maykayla FF., 141 AD3d 898 (3d Dept 2016)

Sound and Substantial Basis in Record To Revoke Suspended Sentence and Terminate Parental Rights

Family Court revoked a suspended sentence and terminated respondent mother's parental rights. The Appellate Division affirmed. Here, the suspended judgment required respondent to, among other things, participate in mental health counseling, substance abuse treatment, refrain from alcohol and illegal drug use and keep petitioner apprised of her phone number and address. However, the evidence showed respondent failed to complete mental health counseling, was removed from the substance abuse program due to her frequent absences and she tested positive for alcohol and marijuana during random screening. She also failed to provide contact information to petitioner, repeatedly missed scheduled visits with the subject children and had not had any contact with them for the two months prior to the filing of petitioner's motion to revoke the suspended judgment. Based on these circumstances, there was a sound and substantial basis in the record to support the court's order.

Matter of Donte LL., 141 AD3d 907 (3d Dept 2016)

Respondent Not Denied Effective Assistance of Counsel

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. The mother's contention was rejected that she was denied effective assistance of counsel inasmuch as she did not demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings. Ineffectiveness was not to be inferred merely because the attorney counseled the mother to admit the allegations in the petition.

Matter of Joey J., 140 AD3d 1687 (4th Dept 2016)

Mother's Contention Unpreserved for Review That Court Should Have Awarded Custody to Maternal Grandmother

Family Court terminated respondent mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The record supported the court's determination that the mother made only minimal progress in addressing the issues that resulted in the children's removal from her custody, which was not sufficient to warrant any further prolongation of the children's unsettled familial status. Consequently, a suspended judgment would not serve the best interests of the children. The mother failed to preserve for review her further contention that the court should have awarded custody of the subject children to the maternal grandmother, because the mother did not seek that result at the dispositional hearing.

Matter of Alexis R.L., 140 AD3d 1699 (4th Dept 2016)

Affirmance of Termination of Parental Rights on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the children, taking into consideration the particular problems facing the father and tailoring its efforts to assist him in overcoming those problems. Petitioner, among other things, scheduled regular visitation and referred the father to services designed to address his needs regarding his mental health, anger management, alleged substance abuse, and parenting skills. The father's contention was rejected that petitioner could not engage in diligent efforts to reunite him with his children while simultaneously planning for the children's potential adoption. Although the father took advantage of some of the services offered by the petitioner, petitioner demonstrated that, among other things, the father inconsistently applied the knowledge and benefits he obtained from the services provided, continued to act inappropriately in the children's presence, and on occasion failed to cooperate with representatives of petitioner despite a prior order directing that he do so. Therefore, petitioner demonstrated by clear and convincing evidence that the father failed to address successfully the problems that led to the removal of the children and continued to prevent the children's safe

return.

Matter of Joshua T.N., 140 AD3d 1763 (4th Dept 2016)

Termination of Mother's Parental Rights on Ground of Abandonment Affirmed

Family Court terminated respondent mother's parental rights on the ground of abandonment. The Appellate Division affirmed. The mother's contention was rejected that she had sufficient significant, meaningful communications with petitioner to demonstrate that she did not abandon the subject children. A child was deemed abandoned where, for the period six months immediately prior to the filing of the petition for abandonment, a parent evinced an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or petitioner, although able to do so and not prevented or discouraged from doing so by petitioner. The mother conceded that she had no contact with the subject children during the relevant six-month period despite opportunities for visitation. Contrary to the mother's contention, her minimal, sporadic and insubstantial contacts with petitioner during that six-month period were insufficient to preclude a finding of abandonment.

Matter of Azaleayanna S.G.-B., 141 AD3d 1105 (4th Dept 2016)