NEW YORK CHILDREN'S LAWYER

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Promoting Post-Secondary Education for Foster Youth*

By Andrew Schepard**

Youth who are raised in and then age out of the foster care system are particularly at risk. According to the Department of Health and Human Services, 27,854 foster youth exited the foster care system in fiscal year 2010 by emancipation.[1] These youth are "more likely to suffer from untreated health and mental health problems, more likely to become homeless, and less likely to graduate from high school or go to college than their peers not in foster care."[2] The "lack of education, combined with a lack of family support and social connections, relegates a foster youth with no job skills to unemployment or minimum wage jobs."[3]

Studies show that 35 percent of foster youth that have been emancipated received some type of welfare assistance in the year after exiting the system.[4] The 2008 Chapin Hall study "interviewing youth who aged out of foster care, found that 77% of males and 54% of females interviewed…had been arrested at least once; 32% of males and 12% of females had been convicted of a crime since turning age eighteen."[5] The study, comparing the statistical outcomes of former foster youth with a national representative sample of similar aged youth who were not in foster care, found that only 10 percent of males and 1 percent of females in the general population had been convicted of a crime.[6]

Foster youth who age out face significant barriers to participation in post-secondary education. Many left the social service system they grew up in without financial support for post-secondary education, a home to stay in while in college or during semester or session breaks, and many other benefits that youth generally enjoy after completion of high school.[7] Out of the 70 percent of youth aging out of foster care that had aspirations to attend college, only 3 to 11 percent graduate with a bachelor's degree (compared to 28 percent in the general population).[8]

The American Bar Association's Youth at Risk Commission is undertaking a review of law and policy to see how legislators, lawyers and educators can better support foster youth who age out of the system to seek post-secondary education with the aim of preparing a report and resolution for the ABA's House of Delegates. In recent years the federal government, acting in a bipartisan manner, has enacted significant legislation to provide more services and financial support to youth who are "aging out of the system."[9] The focus of this column, sparked by the Youth at Risk Commission's review, is to provide some thoughts on how state government and educators can build on that federal legislation to help make post-secondary education more obtainable for foster youth.

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Moral and practical reasons support the policy suggestions that follow. Morally, foster youth are our collective responsibility, as the state is their parent. We want for them the same kind of future opportunities we want for our own sons and daughters. Practically, we have every interest in encouraging post-secondary education for foster youth, as it is a path toward productive citizenship rather than another entry in a dismal statistical picture of their futures.

Relevant Federal Legislation

Federal support for post-secondary education of foster youth has dramatically increased in recent years. In 1986, Title IV-E of the Social Security Act was amended to create the Independent Living Program for older youth and in 1999 the John Chafee Foster Care Independence Program was enacted. This legislation doubled available federal funding to $140 million per year, expanded the age range of foster youth eligible for services, allowed states to use funds for a broader range of purposes (e.g., room and board), and granted states the option of extending Medicaid coverage for youth who age out of foster care until age 21."[10] Post-secondary education opportunities improved for foster youth with the creation of educational training vouchers (or ETVs).

Recognizing more could be done to assist foster youth in their transition to adulthood, Congress passed the Fostering Connections Act which went into effect in October 2010.[11] Most notably, the Fostering Connections Act allows states to utilize federal funds to extend services and provide oversight to foster youth beyond age 18 and up to age 21. The federal law was vague on certain policy areas, allowing for flexibility and an opportunity for policy makers to go beyond the minimum requirements and combine federal dollars with state dollars, while building stronger collaborations among state agencies to make post-secondary education easily accessible and obtainable.

Most recently Congress enacted The Child and Family Services Improvement and Innovation Act[12] effective September 2011. It expanded federal dollars available for experimental or demonstration projects and requires an educational stability case plan for a youth at the time of each placement change. The act also extends funding and expands the Court Improvement Program[13] so that courts and advocates can provide better oversight of Independent Living Plans as youth emancipate.

Assistance in High School

What further steps can concerned stakeholders take to build on the federal legislation? A key need for transitioning foster youth is to plan for post-secondary education while still in foster care. As one foster child put it, "Being discharged shouldn't feel like you are graduating from the unknown. The earlier you begin your transition plan, the more success you'll have with being able to adapt into adulthood."[14]

The Fostering Connections Act mandates that states must provide foster youth a personalized transition plan during the 90-day period before the youth ages out of foster care.[15] New York requires that a caseworker is to start discussing a transition plan 180 days before the tentative discharge date, but must have the transition plan completed 90 days before the scheduled discharge date.[16]

A transition plan that is implemented 90 days before leaving foster care is not sufficient, especially if the foster youth aspires to post-secondary education. States and the court systems monitoring foster youth should consider creating a transition plan that starts no later than the first year of high school and that changes as needed to encourage success in high school and then onto post-secondary education.

Courts should oversee these plans and not just leave them to discretion of caseworkers, the foster family or an independent living center. The foster youth should be fully engaged in their own transition plan. Every court hearing and every court report for foster youth in high school should address and include an inquiry about plans for high school completion and post-secondary education.

Foster youth, those bound for college and those bound for vocational education, need early and constant exposure to post-secondary education opportunities. Foster youth should be encouraged to participate in internships through high school, go on organized visits to technical schools and college campuses, and participate in educational and job fairs tailored to them. Child welfare agencies and case workers need to improve coordinated efforts to make information about post-secondary education opportunities available to youth, guidance counselors, foster parents, and counselors in independent living centers.

Foster youth need to be prepared for applying to and handling the rigorous academic requirements of

college. There are federal programs available to support funding for the SAT/ACT college entrance exam, including tutoring/prep courses and financial assistance to cover the fees associated with taking the exam. There needs to be better coordination with other federal programs such as the benefits related to the College Cost Reduction and Access Act of 2008, TRIO, and GEAR-UP, to name a few.[17]

Tuition Waivers and Support

Post-secondary education is not cheap, and youth who age out of foster care do not have the resources to pay for it. At this time, at least 16 states offer tuition waivers to some or all eligible foster youth. The majority of these programs cover the difference between the student's tuition and fees and the amount of federal and state financial aid the student receives.[18] All states should provide full tuition waivers to eligible foster youth to public post-secondary institutions or equivalent scholarship in that amount for foster youth who opt to attend private institutions.

Financial support is, however, not enough. Educational institutions can provide wrap-around services and support programs for foster youth on campus. Providing a support group made up of foster youth on campus allows foster youth to build a network and a "family" support system that they may not have on account of their status as a foster youth. Other support systems, such as no cost tutoring, care packages, and career counseling should be implemented at post-secondary institutions.

California's Guardian Scholars Program can provide a model for states seeking to implement an on campus support program for foster youth.[19] It provides services to foster youth at many California universities, community colleges, and trade schools. Services generally include financial aid assistance and counseling, year-round on-campus housing, academic and professional mentoring, health and counseling services, peer mentoring and student programming, admission and enrollment help, and employment assistance and career counseling. These wrap-around services have been recognized nationally and aid foster youth in succeeding in post-secondary educational institutions.

As previously mentioned, the Child and Family Services Improvement and Innovation Act expands Title IV-E waivers for experimental or demonstration projects.[20] Policy makers could use these federal dollar opportunities to implement projects to assist foster youth attempting to succeed in post-secondary education. Projects can be undertaken in conjunction with colleges to provide year-round on-campus housing (as foster children may not have a place to stay during school breaks) or educational support programs (to keep youth engaged and allow them to easily build a network of their peers). In addition funds could be used to support case management of foster youth after age 18 to promote post-secondary education success.

Services Beyond Age 21

Former foster youth face serious challenges in completing an educational program within the time limits expected of other youth. They would benefit from either extending the age or eliminating the age limit in which foster youth alumni could take advantage of post-secondary education scholarship programs.

State lawmakers should be encouraged to enact legislation that makes it mandatory to allow former foster youths to remain eligible for financial support for post-secondary education until they attain 23 years of age, as long as they are enrolled in a post-secondary education or training program and are making satisfactory progress toward completion of that program.

Current federal law includes 'may' language on this point; states should feel encouraged to include 'shall' in state legislation. Several states have been proactive in implementing statutes that allow foster youth to continue to receive financial assistance for post-secondary education until age 23, including Connecticut and New Jersey (New York currently allows until age 21). Oklahoma foster alumni are eligible to receive tuition waivers until they earn a baccalaureate degree or program certificate or until age 26, whichever comes first.

Conclusion

The federal government has recognized the need to support foster youth and post-secondary education by enacting innovative legislation. State stakeholders should seize the opportunity the federal government has created. Providing full tuition waivers to vocational, community college, and state colleges and universities for foster youth is a first step. So is providing the necessary supportive services to ensure success once in school. Lawyers, judges, child welfare agency

administrators, legislators, and educational administrators should work together to implement policies and programs to help our collective children succeed as adults.

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Endnotes:

1. U.S. Department of Health and Human Services, Administration for Children and Families, Adoption and Foster Care Analysis and Reporting System (AFCARS) FY 2010 (report updated June 2011).

http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report18.htm (last visited on Jan. 5, 2012).

2. Casey Foundation Supplement Study available at http://www.casey.org/Resources/Publications/pdf/ChafeeETV_Supplement.pdf (last visited Jan. 5, 2012).

3. Michele Benedetto, "An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation," 9 U.C. DAVIS J. JUV. L. & POL'Y 381, 391 (2005).

4. Mark E. Courtney, et al., Chapin Hall Center for Children at the University of Chicago, Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at age 19 (2005), available at http://www.chapinhall.org/sites/default/files/ChapinHallDocument_3.pdf (last visited Jan. 5, 2012).

5. Michele Benedetto, "The Key to Successful Independence: State-Funded Post-Secondary Educational Assistance for Emancipated Foster Youth," 23 St. John's J. Legal Comment. 383, 390 (2008), citing Mark E. Courtney, et al., Executive Summary, Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 21, Chapin Hall Ctr. for Child. at the Univ. of Chi., at 16 (Dec. 2007), available at http://www.chapinhall.org/sites/default/files/ChapinHallDocument_1.pdf (last visited Jan. 5, 2012).

6. Id.

7. Of the 254,000 children and youth exiting foster care in 2010, 11 percent (approximately 28,000) aged out without a permanent family. Casey Family Programs, Child Welfare Fact Sheet available at http://casey.org/Press/MediaKit/pdf/CWFactSheet.pdf (last visited on Jan. 5, 2012).

8. Casey Family Programs, Foster Care by the Numbers, available at http://casey.org/Press/MediaKit/pdf/FosterCareByTheNumbers.pdf. (last visited on Jan. 5, 2012).

9. Mark E. Courtney, et al., Chapin Hall Center for Children at the University of Chicago, Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at age 26 (2011) available at http://www.chapinhall.org/sites/default/files/Midwest Evaluation_Report_12_30_11.pdf (last visited Jan. 5, 2012).

10. Id.

11. Pub. L. No. 110-351, 122 Stat. 3949 (2008).

12. Pub. L. No. 112-34, 125 Stat. 369 (2011).

13. The CIP was created as part of the Omnibus Budget Reconciliation Act of 1993, Public Law 103-66, which among other things, provided federal funds for grants to state court systems to conduct assessments of their foster care and judicial processes and to develop plans for improvements. In subsequent years, funds have been extended and increased to assist state courts to formalize case planning and foster relationships with various stakeholders in foster youths' lives. U.S. Dept. of Health and Human Services, Administration for Children and Families, Court Improvement Program, http://www.ocfs.state.ny.us/main/cfsr/Transition_Plan.shtm (last visited Jan. 5, 2012).

14. Youth in Progress, New York State Foster Care Youth Leadership Advisory Team, Need to Know Series: Planning for Your Transition to Self-Sufficiency. Pub. 5098 (2011), sponsored by the New York State Office of Children and Family Services, available at http://www.ocfs.state.ny.us/main/publications/Pub5098.pdf (last visited Jan. 5, 2012).

15. Pub. L. No. 110-351, 122 Stat. 3949 (2008).

16. New York State Office of Children and Family Services, Child and Family Services Review, Transition Plans, http://www.ocfs.state.ny.us/main/cfsr/Transition_Plan.shtm (last visited Jan. 5, 2012).

17. The College Cost Reduction and Access Act of 2008 expands the definition of an independent student in the Free Application for Federal Student Aid (FAFSA) to include foster youth. TRIO is a federal program that provides financial aid counseling and work-study employment for students, among others, who are foster youth. TRIO includes other beneficial programs, including, but not limited to, counseling on college admission, providing opportunities for academic development, assisting students with basic college requirements, motivating students toward completion of their post-secondary education, and providing support in preparing youth for college entrance and pre-college preparation. GEAR UP is a program for low-income youth, including foster children, to prepare them to enter and succeed in post-secondary education. GEAR UP serves a group of students beginning no later than seventh grade and follows them through high school, providing some participants scholarships for college. See generally Legal Center for Foster Care and Education, a collaboration between Casey Family Programs and the ABA Center on Children and the Law, Blueprint for Change: Education Success for Children in Foster Care, (2d ed. 2008), available at

http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/education/blueprint_second_edition_final.authcheckdam.pdf (last visited Jan. 5, 2012).

18. Legal Center for Foster Care and Education, a collaboration between Casey Family Programs and the ABA Center on Children and the Law, Tuition Waivers for Post-Secondary Education (2008), available at http://www2.americanbar.org/BlueprintForChange/Documents/Tuition Waiver Fnal.pdf (last visited Jan. 5, 2012).

19. Guardian Scholars Program information available at http://www.fosteryouthhelp.ca.gov/pdfs/GuardianScholars.pdf (last visited Jan. 22, 2012).

20. Emilie Stoltzfus, Child Welfare: The Child and Family Services Improvement and Innovation Act (R42027), (U.S. Congressional Research Service Oct. 5, 2011).

NEWS BRIEFS

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

On May 15, 2012, The Appellate Division, First Judicial Department and Second Judicial Department, and the Mental Health Professionals Certification Committee, First and Second Judicial Departments, co-sponsored ***Judicial and Clinical Perspectives on Current Issues in Forensic Evaluations.*** This seminar was held at Brooklyn Law School. The speakers were the Hon. Sidney Gribetz, Bronx County Family Court; Bernice H. Schaul, Ph.D., Psychologist, Private Practice; Marcia Werchol, MD, Director, Family Court Mental Health Services; Richard Mayer, MD, Psychiatrist, Private Practice; and Sherill R. Sigalow, Ph.D., Psychologist, Private Practice. This seminar will be made available online in the Fall of 2012.

On May 17, 2012, the Appellate Division, Second Judicial Department, and the Family Court Liaison Committee co-sponsored ***The Role Of The Attorney For The Child Part One.*** This seminar was held at the Nassau County Family Court. The speakers were Gail Berkowitz, Esq., Attorney, Private Practice and Sandra Stines, Esq, Private Practice.

On May 30, 2012, The Appellate Division, Second Judicial Department, and the Attorneys for Children Advisory Committee co-sponsored ***An Alternative to Incarceration in Willfulness Cases.*** This seminar was held at the Office of Attorneys for Children. This presentation was given by Liberty Aldrich, Esq., Director, Domestic Vilolence, Sexual Assault and Family Court Programs.

On June 13, 2012, the Appellate Division, Second Judicial Department and the NYC Family Court Advisory Council to the Administrative Judge; Committee for Lesbian, Gay, Bisexual & Transgender Matters co-presented ***LGBTQ Youth in Family Court: An Introduction to Basics.*** This seminar took place at the Office of Attorneys for Children. The speakers were Sharon Stapel, Esq., Executive Director of NYC Anti-Violence Project and Kristin Kimmel, Esq., Co-Director LGBTQ Project at Lawyers for Children, Inc.

On June 21, 2012, the Appellate Division, Second Judicial Department, and the Family Court Liaison Committee co-sponsored ***The Role of the Attorney for the Child Part Two.*** This seminar was held at the Nassau County Family Court. The speaker was Sandra Stines, Esq., Attorney, Private Practice.

On June 26, 2012, the Appellate Division, Second Judicial Department and the NYC Family Court Advisory Council to the Administrative Judge; Committee for Lesbian, Gay, Bisexual & Transgender Matters co-presented ***LGBTQ Youth in Family Court: An Introduction to Basics.*** This program was made available in Richmond, Queens and Kings counties. The speakers in Richmond County were Virginia M. Goggin, Esq., LGBT Law Project at NYLAG and Meridith Sopher, Esq., The Legal Aid Society, Director of Child Protective Training. The speakers in Queens County were Richard Saenz, Esq., Queens Legal Services, HIV/LGBT Advocacy Project and Linda M. Diaz, Senior Staff Attorney and Co-Chair of the LGBTQ Project, Lawyers for Children. The Speakers in Kings County were Sharon Stapel, Esq., Executive Director of NYC Anti-Violence Project and Kristin Kimmel, Esq., Co-Director LGBTQ Project at Lawyers for Children, Inc.

The handouts for the above seminars can be obtained by contacting Nancy Guss Matles of the Office of Attorneys for Children at nmatles@courts.state.ny.us

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

THIRD DEPARTMENT NEWS

New Panel Re-designation Application

The Appellate Division, Third Department Court Rules were recently amended, effective November 1, 2011, to require current panel members to submit to the Office of Attorneys for Children annually, a Panel Re-Designation Application in order to be eligible

for re-designation on January 1st of each year. A copy of the amended rule, together with the Panel Re-designation Application was provided to all panel members this past Spring. Included with the application is a waiver authorizing the Committee on Professional Standards for any Judicial Department to share information with the Office of Attorneys for Children.

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. The initial panel designation application was similarly amended. Both applications can be found in the Administrative Handbook located on the Office of Attorneys for Children web page at www.nycourts.gov/ad3/oac and under the link to the Administrative Forms.

In order to be eligible for continued panel membership, you must file the Panel Re-Designation Application by October 1st.

Administrative Handbook

The updated version of the Administrative Handbook (6/12) was provided to all panel members by email with memo in June. Significant changes were made to the Compensation and Reimbursement Policies and Procedures as noted in the memo, including, real time, client contact, travel, interim billing, IDV voucher, Drug and Family Treatment Court vouchers, substitute vouchers and other important billing information. You may access the Handbook on the Office of Attorneys for Children web page at www.nycourts.gov/ad3/oac and under the link to the Administrative Handbook and the memo is located under the News Alerts link.

Statewide Financial System (SFS) and Vendor ID Numbers

As you know, the State of New York has now implemented a new Statewide Financial System (SFS) that requires anyone doing business with the State of New York, including attorneys for children, to have a Vendor ID Number. All vouchers must include that number and any vouchers submitted without the Vendor ID will not be accepted for payment**.** Additionally, it is the responsibility of every vendor to verify and maintain the information in your Vendor Profile that is related to your Vendor ID. To do that, you need to access the New York State Vendor Portal. You can do this by going to the following very important website: **http://www.sfs.ny.gov** If you link to "Vendor Doing Business with NYS" (top, right, yellow box), and then link to "maintain my vendor information", you will be instructed how to proceed. You will also be able to monitor all payment information through the SFS website.

Liaison Committee Meetings

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts met in May and will meet again in October. The committees were developed to provide a means of communication between panel members and the Office of Attorneys for Children and they have been extremely helpful during the recent transitional period with the e-voucher. The Liaison Committees, whose members are nominated by Family Court judges, meet twice annually and representatives are frequently in contact with the Office of Attorneys for Children on an interim basis. If you would like to know the name of your Liaison Committee representative, it is listed in the Administrative Handbook or you may contact Betsy Ruslander by telephone or e-mail at oac3d@nycourts.gov. If you have any issues you would like brought to the attention of the Office of Attorneys for Children, please contact your county's liaison representative.

Training News

The following continuing legal education programs are scheduled for Fall 2012. Registration information will go out by e-mail to all Third Department panel attorneys six to eight weeks prior to the training dates and is available on our web page at www.nycourts.gov/ad3/oac.

Children's Law Update '12-13

Friday, September 7, 2012 in Binghamton

Saturday, November 3, 2012 in Latham

Friday, May 10, 2013 in Lake

Placid

Appellate Practice for Attorneys for Children

Friday, October 12, 2012 Latham, NY

Introduction to Effective Representation of Children (for new panel members)
Friday - Saturday, November 30 - December 1, 2012 Latham

If you would like to save the date for some training in the Spring 2013, the following seminar is also planned:

Annual Topical (Child Welfare) - Hamilton Award presentation
Friday, April 19, 2013 Latham

When available, program additional dates and agendas will be posted on the Office website, www.nycourts.gov/ad3/oac/cle, along with previously taped training programs that are available for online viewing. For any additional information regarding these programs, or general questions concerning the continuing legal education of attorneys for children, please contact Jaya Connors, Assistant Director of the Office of Attorneys for Children in the Third Department, at (518) 471-4850, or by e-mail at jlconnor@courts.state.ny.us

Website

The Office of Attorneys for Children continues to update its web page located at www.nycourts.gov/ad3/oac. Attorneys have access to a wide variety of resources, including E-voucher information, online CLE videos and materials, the New York State Bar Association Representation Standards, the latest edition (6/12) of the Administrative Handbook, forms, rules, frequently asked questions, seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The newest feature is a *News Alert* which will include recent program and practice developments of note.

FOURTH DEPARTMENT NEWS

2011 Honorable Michael F. Dillon Awards

Congratulations to the recipients of the 2011 Hon. Michael F. Dillon Awards. Each year two attorneys from each Judicial District in the Fourth Department are chosen to receive this award for their outstanding advocacy on behalf of children. The 2011 Awards were presented to the recipients by Presiding Justice Henry J. Scudder at a ceremony at the M. Dolores Denman Courthouse on June 19, 2012. The recipients are as follows:

Fifth Judicial District

Susan J. Kraeger, Lewis County
Stuart J. LaRose, Onondaga County

Seventh Judicial District

Marlene A. Attardo, Monroe County
Robert P. Turner, Monroe County

Eighth Judicial District

Dominic P. Candino, Erie County
Charles W. Hart (posthumously), Erie County

Reminder – Video Training Option Now Available

You may now satisfy your AFC Program training requirement by watching at least 5.5 hours of CLE video segments on the Attorneys for Children Program link to the Appellate Division, Fourth Department website at **http://nycourts.gov/ad4.** You may choose the training segments in which you are most interested, but the segments you choose must add up to at least 5.5 hours. If you choose the video option rather than attending a live seminar, you must correctly fill out an affirmation and evaluation for each segment and forward all forms together to Jennifer Nealon, AFC Program, 50 East Avenue, Rochester, NY 14604 or jnealon@courts.state.ny.us before your training requirement expires. You will receive all your CLE certificates within a few weeks. We are unable to process applications for AFC Program or NYS CLE for less that 5.5 hours credit. There are complete directions on the CLE page of the AFC website.

Statewide Financial System (SFS)

For tracking purposes, please record the SFS number on each voucher you submit. This number, which appears on the upper right hand side of the front of the voucher, is the only reference that can be used to check the payment status of submitted vouchers.

Vouchers

New: Attach your order of appointment to Supreme Court vouchers.

Reminders: Do not wait years before submitting vouchers. If you have a case for more than 18 months, please request permission to submit an interim voucher.

Travel to/from other than court: Indicate travel locations, e.g., office to client's home - indicate the town or city to which you traveled - office to client's home in Batavia.

Do not charge for faxing or preparing/copying vouchers

Find Conflicts: When you receive an overlapping warning on your voucher, put the document id number in the FIND CONFLICTS field to resolve the issue.

Seminars

You are not considered registered for a seminar until you have received a confirming e-mail from our office. If you do not receive a confirming e-mail within 3 business days from the date you registered, please call Jennifer Nealon at 585-530-3177.

APPEALS PANEL

AFC on the appeals panel are eligible to be substituted for trial AFC who do not wish to represent clients on appeal. If you are interested in being considered for the appeals panel, the application is at www.nycourts.gov/AD4 under the link to Forms/AFC Forms. Please send it to Christine Constantine, AFC Program, 50 East Avenue, Rochester, NY, 14604, appending examples of your appellate work.

Fall Seminar Schedule

September 7, 2012

Update
Embassy Suites
Syracuse, NY (half day- taped)

October 2, 2012

DV Seminar
RIT Inn & Conference Center
Rochester, NY (half day- taped)
Sponsored with OCA - AFC Panel
Attendees max =50

October 17-18, 2012

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

October 26, 2012

Update
Radisson
Corning, NY (half day - not taped)

RECENT BOOKS AND ARTICLES

ADOPTION

D. Marianne Brower Blair, *Admonitions or Accountability?: U.S. Implementation of the Hague Adoption Convention Requirements for the Collection and Disclosure of Medical and Social History of Transnationally Adopted Children,* 40 Cap. U. L. Rev. 325 (2012)

Kristina V. Foehrkolb, *When the Child's Best Interest Calls for It: Post Adoption Contact by Court Order in Maryland,* 71 Md. L. Rev. 490 (2012)

Joseph A. Gatton, In Re Adoption of Baby E. Z.: *E. Z. Duz It,* 14 J. L. & Fam. Stud. 153 (2012)

Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions,* 40 Cap. U. L. Rev. 437 (2012)

Colin Joseph Troy, *Members Only: The Need for Reform in U.S. Intercountry Adoption Policy,* 35 Seattle U. L. Rev. 1525 (2012)

ATTORNEY FOR THE CHILD

Barbara Glesner Fines, *Fifty Years of Family Law Practice - The Evolving Role of the Family Law Attorney,* 24 Am. Acad. Matrim. Law 391 (2012)

CHILD WELFARE

James G. Dwyer, *Parents' Self-Determination and Children's Custody: A New Analytical Framework for State Structuring of Children's Family Life,* 54 Ariz. L. Rev. 79 (2012)

Anne E. Jbara, *The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programs,* 87 Ind. L. J. 1825 (2012)

Daniel Pollack, *The Need for a Consensus Standard of Care in Screening Prospective Adoptive, Foster, and Kinship Placements,* 40 Cap. U. L. Rev. 397 (2012)

Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries,* 52 Santa Clara L. Rev. 47 (2012)

CHILD SUPPORT

Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families,* 15 J. Gender Race & Just. 617 (2012)

Anna Stepien-Sporek & Margaret Ryznar, *Child Support for Adult Children,* 30 Quinnipiac L. Rev. 359 (2012)

CHILDREN'S RIGHTS

Kendra Huard Fershee, *A Parent is a Parent, no Matter How Small,* 18 Wm. & Mary J. Women & L. 425 (2012)

Caroline Knoepffler, *Someone Call 911,* Crawford *is Dying in New York Court of Appeals,* 28 Touro L. Rev. 979 (2012)

Dale Margolin, *Every Adolescent Deserves a Parent,* 40 Cap. U. L. Rev. 417 (2012)

Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America,* 15 J. Gender Race & Just. 281 (2012)

Deborah Paruch, *Silencing the Victims in Child Sexual Abuse Prosecutions: The Confrontation Clause and Children's Hearsay Statements Before and After* Michigan v. Bryant, 28 Touro L. Rev. 85 (2012)

CONSTITUTIONAL LAW

Scott J. Bent, *"If you Want to Speak Spanish, Go Back to Mexico"?: A First Amendment Analysis of English-Only Rules in Public Schools,* 73 Ohio St. L. J. 343 (2012)

Elizabeth Burke, *Only as Strong as the Missing Link: The Un-Steady Constitutionality of the Adam Walsh Act,* 45 Suffolk U. L. Rev. 427 (2012)

Denise Cohen, *Childhood Obesity: Balancing the Nation's Interest With a Parent's Constitutional Right to Privacy,* 10 Cardozo Pub. L. Pol'y & Ethics J. 357 (2012)

Pamela K. Terry, E Pluribus Unum? *The Full Faith and Credit Clause and Meaningful Recognition of Out-of-State Adoptions,* 80 Fordham L. Rev. 3093 (2012)

Jamie Wolf, *The Playground Bully Has Gone Digital: The Dangers of Cyberbullying, the First Amendment Implications, and the Necessary Responses,* 10 Cardozo Pub. L. Pol'y & Ethics J. 575 (2012)

COURTS

Joe Dryden, *It's a Matter of Life and Death: Judicial Support for School Authority Over Off-Campus Student Cyber Bullying and Harassment,* 33 U. La Verne L. Rev. 171 (2012)

Genevieve M. Kelly, *A Short-Lived Benchmark: How the Supreme Court Debilitated* Brown v. Board of Education *Long Before* Parents Involved, 19 Geo. Mason L. Rev. 813 (2012)

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Brooke D. Coleman, Lassiter v. Department of Social Services: *Why is it Such a Lousy Case?,* 12 Nev. L. J. 591 (2012)

COURT OF APPEALS

Vehicle Was Public Place Within Meaning of Fifth Degree Marijuana Possession Charge

Defendant was stopped for a traffic infraction while operating his vehicle on a public street. When the officer approached defendant's vehicle, she smelled a strong odor of marijuana and saw defendant holding a zip lock bag of marijuana in his hand. In connection with the incident, defendant pled guilty to criminal possession of a controlled substance in the fifth degree. Defendant appealed his conviction, asserting that the accusatory instrument failed to include sufficient nonconclusory factual allegations relating to two elements of the charged offense, i.e, that the possession of the marijuana be in a "public place" and that the marijuana must be "open to public view." The Appellate Division affirmed defendant's conviction as did the Court of Appeals. Defendant was in a public place because even though he was in his personal vehicle, he was on a highway when seen in possession of marijuana. The allegations in the accusatory instrument that the officer smelled a strong odor of marijuana emanating from inside defendant's vehicle; that the officer observed the defendant holding a quantity of marijuana in his hand, open to public view; and that the contraband was in a zip lock bag, were sufficient on the element of "public view." The dissent would have affirmed on the grounds that defendant was not in a public place and that the allegations in the accusatory instrument were insufficient with respect to the element of "public view."

People v. Jackson, 18 NY3d 738 (2012)

No Reasonable View of Evidence That Defendant Possessed Weapon Without Intent to Use it Unlawfully

Although defendant did not testify at his trial, he made several statements that were admitted into evidence. In the statements he said that he was told by a third person that Anthony Baker wanted defendant dead and that Baker was going to shoot defendant, defendant's mother, his sister and his child's mother. Defendant sought out Baker and Baker admitted making the threats, but refused to repeat them. During the conversation Baker "came close" to defendant and defendant "kept pushin (sic) him away." Defendant "grabbed him" and they started "to tussle." Defendant then "grabbed the gun and pulled it out to scare him so he would back up off me." Baker "kept swinging" at defendant and the gun went off by accident. The jury acquitted defendant of murder and manslaughter charges, but convicted him of criminally negligent homicide and criminal possession of a weapon in the second degree. Defendant had unsuccessfully asked for a lesser included offense – criminal possession of a weapon in the third degree. At the time, criminal possession of a weapon in the third degree required intent to use the weapon unlawfully against another, while the third degree possession charge did not. The Appellate Division vacated defendant's conviction of second degree weapon possession and ordered a new trial on that count. The Court of Appeals reversed. There was no reasonable view of the evidence on which defendant did not, while possessing a firearm, at least intend to commit the crime of menacing. His statements amount to a confession to that crime. Defendant could not have successfully asserted a justification defense. Frightening a man with a gun is not a justified "emergency measure" for ending a "tussle."

People v Perry, 19 NY3d 70 (2012)

Court Erred in Failing to Hold a Hearing on Equitable Estoppel

Family Court adjudged respondent to be the father of the subject child and directed him to pay child support. The Appellate Division dismissed respondent's appeal on the ground that respondent's contentions regarding the best interests of the child and equitable estoppel were raised by him and determined by the Appellate Division in a prior appeal. The Appellate Division also determined that Family Court had subject matter jurisdiction to issue an order directing respondent to pay child support because no order had been previously issued establishing that obligation. The Court of Appeals reversed and remitted the case to Family Court for a hearing and determination addressing respondent's equitable estoppel claim. Family Court erred by failing to hold a hearing on equitable estoppel after genetic testing was conducted.

Matter of O. v M., 19 NY3d 828 (2012)

Insufficient Evidence of Parents' Neglect of Their Children

Family Court adjudicated respondent parents' children to be neglected. The Appellate Division affirmed determining that a preponderance of the evidence established that the mother neglected her children by attempting to drive a motor vehicle in an intoxicated condition with the children in the vehicle and determined that the record supported Family Court's determination that the father deliberately failed to take anti-seizure medication so that he could consume alcohol and that he was aware that he was likely to become violent when he had a seizure and that he had two seizures on the day in question. The Court of Appeals reversed, holding that the determinations of neglect were not supported by legally sufficient evidence.

Matter of Damian G., 19 NY3d 841 (2012)

Court Lacks Authority to Direct Post-Termination Contact With Child After Parental Rights Terminated

Supreme Court terminated respondent father's parental rights with respect to his daughter and denied his request for continuing visitation with the child. The Appellate Division affirmed. The Court of Appeals affirmed. The evidence backed up the court's findings that DSS exercised diligent efforts and that for a period of more than one year the father failed to plan for his daughter's future in a realistic and feasible way. A court may order post-adoption visitation when a termination results from a voluntary surrender pursuant to Social Services Law § 383-c, but may not order such visitation in an adversarial proceeding pursuant to Social Services Law § 383-b. Absent legislative warrant, the court was not authorized to include any such condition in a dispositional order pursuant to Social Services Law § 383-b. The dissent would have reversed on the ground that there was no support in the record for a finding that diligent efforts were made. The dissent also agreed with Appellate Division precedent that the court had the discretionary authority to order post-termination visitation with a parent whose rights had been terminated pursuant to Social Services Law § 383-b.

Matter of Hailey ZZ., __ NY3d __ (2012)

APPELLATE DIVISIONS

ADOPTION

Relatives Have No Preemptive Statutory or Constitutional Right to Children Over Non-Relatives

Family Court dismissed great-aunt's custody petition. The Appellate Division affirmed. It was in children's best interest to be adopted by their foster parents who had provided a stable and loving home for the special needs children for the majority of their lives. The great-aunt did not have "preemptive statutory or constitutional right to custody," as opposed to non-relatives. Petitioner continued to live with the biological father whose parental rights had been terminated for failure to comply with mental health referrals and for his violent acts. Additionally great-aunt had limited contact with children and failed to appropriately plan for children's future.

Matter of Azmara N.G. v Jesse Stephanie S., 93 AD3d 404 (1st Dept 2012)

Father's Consent to Adoption Unnecessary

Surrogate Court granted summary judgment determining father's consent was not necessary for child to be adopted. The Appellate Division affirmed. The father failed to provide any support for child and failed to show that the court mishandled proceeding or showed any bias. The father's argument that sister and mother had failed to inform him of support obligation was not a valid excuse.

Matter of Katharine, 93 AD3d 503 (1st Dept 2012)

Father Failed to Maintain Substantial and Continuous or Repeated Contact With Child

Family Court determined that father's right to consent to adoption of one child was not needed, that the father permanently neglected and abandoned his other child, and committed the custody and guardianship of the children to ACS for the purpose of adoption. The Appellate Division affirmed. The father acknowledged that he had not had contact with or provided financial support for his son since 2007 and, therefore, had not maintained "substantial and continuous or repeated contact" with the child. The father's incarceration was not a valid excuse. Additionally, ACS showed by clear and convincing evidence that father had permanently neglected his other son, who had special needs. The father acknowledged that he knew son was up for adoption, but he failed to contact ACS or to inform ACS of his whereabouts or agree to become a resource for child. Therefore, ACS was relieved of its "due diligence" obligation. It was in both children's best interests for father's rights to be terminated.

Matter of Harold Ali D.-E., 94 AD3d 449 (1st Dept 2012)

Father's Consent Not Required

Unmarried biological father appealed determination that his consent was not required prior to the adoption of his son by the husband of the biological mother. Family Court found that the father's consent was not required because he had failed to maintain sufficient contact with child. The Appellate Division affirmed holding that consent by the father is not required unless father can show that he has "maintained a substantial and continuous or repeated relationship with child by means of financial support and either monthly visitation, when physically and financially able to do so, or regular communication with the child or the child's caregiver". Although the father lived with the child shortly after the child's birth and spent some time with the child during one summer, he never financially supported the child and sent only one card to the child. Despite his three year incarceration, his last contact with the child was five months prior his incarceration, and despite prison phone privileges, he failed to put the mother's number on the approved phone list. The Appellate Division held that being incarcerated did not excuse the father from providing some financial support or maintaining some contact.

Matter of Dakiem M., 94 AD3d 1362 (3d Dept 2012)

Petitioner's Revocation of Extrajudicial Consent Not Given Effect

Family Court determined that it was in the subject child's best interests to award custody to the respondent adoptive parents and that petitioner biological mother's revocation of extrajudicial consent to adoption would not be given legal effect. The Appellate Division

affirmed. On the day after the child's birth, petitioner signed an extrajudicial consent to allow respondents to adopt the child. Less than 24 hours later, but after respondents had taken the child home, petitioner executed a revocation of extrajudicial adoption. Respondents timely filed a notice of opposition to the revocation. After a best interests hearing, the court determined that although petitioner had potential to become a good parent, respondents had proven to be exceptional parents. Where the adoptive parents oppose the revocation, the biological parent has no right to custody of the child superior to the adoptive parents and custody must be awarded solely on the basis of the best interests of the child. There was overt manifestation by petitioner that her consent would become operative by allowing respondents to take physical custody of the child the day after he was born. The determination that it was in the best interests of the child to be adopted by respondents was entitled to great deference and would not be disturbed because it was based upon a weighing of the relevant factors.

Matter of Collin, 92 AD3d 1283 (4th Dept 2012)

CHILD ABUSE AND NEGLECT

Father Posed Imminent Danger of Harm to His Child

Family Court determined that respondent father neglected his child Giovanni and derivatively neglected his other child Andre, placed Giovanni in the custody of the Commissioner of Social Services and placed Andre in the custody of his mother. The Appellate Division affirmed. A hospital clerk testified that respondent forcefully shook two-week-old Giovanni, that respondent told her he had been feeding the infant bananas, and that respondent called the infant the devil. The mother also testified that respondent fed the infant bananas and called him the devil child. Respondent's conduct reflected so flawed an understanding of the duty to protect his child from harm that he presented a substantial risk of harm to any child in his care.

Matter of Andre B., 91 AD3d 411 (1st Dept 2012)

Father Neglected Children by Misusing Drugs

Family Court determined that respondent father neglected his children by misusing drugs and not participating in any rehabilitation program. The Appellate Division affirmed. Respondent's testimony that he regularly smokes marijuana was prima facie evidence of neglect and he failed to rebut the presumption by establishing that he was voluntarily and regularly participating in a recognized rehabilitation program. Respondent was a person legally responsible for his nonbiological children's care. The record established that respondent was the long-term boyfriend of the children's mother, the biological father of the mother's other children, and a regular visitor in the mother's home. Further, respondent testified that he watched the children at times, helped them with their homework and took them to doctor's appointments.

Matter of Keoni Daquan A., 91 AD3d 414 (1st Dept 2012)

Mother's Unable to Care Adequately For Her Infant Children

Family Court determined that respondent mother neglected her children. The Appellate Division affirmed. The record established that respondent was unable to care for her infant children because of her documented history of mental retardation, mental illness, poor impulse control, impaired judgment, depression, medication noncompliance and repeated psychiatric hospital admissions and treatments. Her problems had resulted in missing medical appointments for one of the children and his hospitalization for dehydration and weight loss.

Matter of Briana S., 91 AD3d 447 (1st Dept 2012)

Finding of Neglect Against Father Reversed: **No Evidence Children Were Present During Domestic Violence Incident**

Upon a fact-finding determination, Family Court held that father neglected his children and placed the children with their mother under supervision by the agency, and issued an order of protection against the father until he entered a domestic violence program. The Appellate Division reversed. Although the court found that the incident of domestic violence occurred in the presence of the children, there was no admissible evidence to support that finding. The court improperly relied upon hearsay statements from a police officer in an oral report transmittal (ORT). The police officer stated in the ORT that there was a history of domestic violence between the mother and respondent in the

presence of the children but the ORT did not explain or identify the source of the officer's statement that the children were present previously during domestic violence incidents. Further, the ORT did not specify that the children were present for this incident. There was no way to know if the officer obtained the information from someone who had a duty to report it. Thus, the statement was inadmissible hearsay.

Matter of Imani O., 91 AD3d 466 (1st Dept 2012)

Father Neglected Children Due to Untreated Mental Illness

Family Court determined that respondent father neglected his children due to untreated mental illness. The Appellate Division affirmed. The record established that there was a substantial probability that the father's untreated mental condition would place the children at imminent risk of harm if released to him. Respondent had a history of hospitalizations for unstable moods and aggressive behavior; there was testimony by the mother and foster mother that respondent did not take his medication and admitted to mental illness and was erratic and threatening; medical records showed that respondent needed treatment to prevent a rapid re-emergence of his disorders and the explosive outbursts or gross lapses in impulse control that could accompany such re-emergence; and the children were 2 ½ years old and 4 months old and therefore unable to defend themselves or report any mistreatment.

Matter of Cerenithy Ecksthine B., 92 AD3d 417 (1st Dept 2012)

Acts or Omissions of Parents Result in Abuse Determination

Family Court found, by a preponderance of evidence, that six-month-old child had been abused and neglected by her father, who was her primary caregiver when the child's injuries occurred, based on medical evidence showing child had sustained three leg fractures, a subdural hematoma and cut to her mouth. The parents offered no explanation for the injuries and evidence showed a pattern of injuries would not have occurred absent acts or omissions of the parents. The Appellate Division affirmed.

Matter of Autumn P., 93 AD3d 457 (1st Dept 2012)

Adverse Inference Drawn Against Mother for Failure to Testify

Family Court found mother of two children and her boyfriend to have neglected younger child and derivatively neglected older child. The Appellate Division affirmed. Petitioner established, by preponderance of the evidence, that younger child, who was autistic, suffered injuries including multiple bruises to body and bruised lip that would not ordinarily occur absent acts or omissions of caregivers. Respondent's explanation that child suffered injuries in school was not supported by the evidence and court was permitted to draw negative inference against mother based on her failure to testify. Because the boyfriend resided with mother and children during relevant period and was an active participant in children's lives, he was a person legally responsible for children.

Matter of Joel O., 93 AD3d 491 (1st Dept 2012)

Neglect Finding Reversed -- Test is Minimum Not Maximum Degree of Care

Two children, ages 16 and 9 lived with mother and maternal aunt. Father had regular visitation and became concerned mother was using drugs based on her past drug use and fact that she was not working and sleeping a lot during the day. The father made hotline call to ACS, and after investigation, including 16 year old's statement to caseworker that she suspected mother might be using drugs, ACS advised mother to undergo drug test. The father alerted ACS that mother was taking 16-year-old with her for drug test, suspecting she might use daughter to give urine sample. Mother tested positive for cocaine. A neglect petition was filed against father and Family Court found father neglected children. The Appellate Division reversed, determining that the finding of neglect was not supported by a preponderance of the evidence. The instant case was not an " instance where the parent took no steps to protect the children and elected to turn a blind eye," and while father could have acted sooner the "statutory test is minimum degree of care-not maximum, not best, not ideal." Additionally, the father was in a "Catch -22" situation, either facing neglect by notifying ACS or not notifying ACS to the detriment of his children.

Matter of Jessica L., 93 AD3d 522 (1st Dept 2012)

Finding of Abuse and Neglect Supported by a Preponderance of the Evidence

Family Court found father had sexually abused and neglected his step-daughter and derivatively abused and neglected his two biological children and released the children to the custody of the mother, with supervision by ACS. The Appellate Division affirmed. A preponderance of the evidence supported courts decision. The court did not err in crediting stepdaughter's testimony that "amply corroborated" her out- of-court statements regarding the abuse, although there were "peripheral inconsistencies." Additionally, the derivative neglect findings against respondent were supported by the record because respondent's parental judgment and impulse control were so defective that he posed a substantial risk of harm to any child left in his care.

Matter of Kylani R., 93 AD3d 556 (1st Dept 2012)

Determination of Neglect Affirmed

Family Court determined, by a preponderance of the evidence, that mother neglected her child. The Appellate Division affirmed The mother was diagnosed with bipolar disorder and engaged in inappropriate conduct at the hospital during and after birth of child and in the bathroom of building where her parenting classes were held. The mother was not denied effective assistance of
counsel. She was appointed counsel after she was able to inform the court of her financial circumstances and she had representation during the fact-finding hearing.

Matter of Jane Aubrey P., 94 AD3d 497 (1st Dept 2012)

Failure to Provide Proper Supervision

Family Court found that mother neglected her children. The Appellate Division affirmed The mother left children in care of both grandmother who had history of drug abuse and grandmother's boyfriend, who was on parole for drug possession and also had history of drug abuse and domestic violence. Additionally, mother was a drug user and although she was enrolled in drug treatment program, the record showed that she tested positive for drugs when attending program and that she failed to continue treatment for mental illness, although she had suicidal ideation.

Matter of Messiah T., 94 AD3d 566 (1st Dept 2012)

Children's Failure to Thrive and Receive Proper Medical Care Results in Neglect Finding

Family Court determined that father neglected his two children and derivatively neglected a third child. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. The children were not properly fed, leading to a diagnosis of "failure to thrive" and father had failed to provide proper medical care for children, deferring responsibility of taking care of children's complex medical needs to mother, who had already been found to have neglected children's medical needs. The evidence that showed that one child, who was hospitalized for injury, gained significant amount of weight during hospitalization, clearly indicated that he was not receiving proper nourishment at home. The father's acts showed an impairment of parental judgment sufficient to support the derivative neglect finding.

Matter of Justin A., 94 AD3d 575 (1st Dept 2012)

Proof of the Mother's Mental Illness Did Not Alone Support Finding of Neglect

The mother appealed from an order of fact-finding of the Family Court which, after a hearing, found that she had neglected her children. Upon reviewing the record, the Appellate Division found that the Family court improperly based its finding of neglect on evidence that the mother's children were at risk of harm as a result of the mother's mental illness. The standard that should have been applied is that the mother's mental illness rendered her incapable of a minimum degree of care, thus, placing the children's physical, mental, or emotional condition in imminent danger of becoming impaired. Proof of the mother's mental illness did not alone support a finding of neglect. The evidence must establish a causal connection between the parent's condition, and actual or potential harm to the children. The record showed no evidence that the mother's mental illness or delusional beliefs placed the children in imminent danger. Both children consistently did well in school, had near-perfect attendance records, were up-to-date on their immunizations, and were healthy. Additionally, while it was established that the children had told the caseworker that they were sometimes left unattended for lengthy periods of time

while the mother was at work, the vague and contradictory evidence on the subject did not establish that a lack of supervision created an imminent danger to the children's health, safety, or mental or emotional condition. Accordingly, the order was reversed, the petitions were denied, the order of disposition subsequently entered upon the order of fact-finding was vacated, and the proceedings were dismissed. The Appellate Division also took note that the fact-finding in this matter took over two and a half years to complete, during which time, the children remained in foster care.

Matter of Joseph A., 91 AD3d 638 (2d Dept 2012)

Record Did Not Support Finding That Mother Sexually Abused Child

The Appellate Division found that a preponderance of the evidence did not support a finding that the mother had sexually abused the older child and derivatively neglected the younger children. The record revealed the following: the caseworker had testified that the mother was loving and nurturing to children, the father's testimony regarding the mother's alleged sexual abuse of the older child had been internally inconsistent and conflicted with the evidence in the record, and the father had related three different versions of the mother's alleged abuse of the older child.

In re Adelia V., 91 A.D.3d 659 (2d Dept 2102)

Excessive Corporal Punishment Inflicted by Non-Parent Respondent; Respondent Mother Derivatively Neglected All Subject Children

In six related child protective proceedings, the petitioner, Administration for Children's Services (ACS), appealed from an order of fact-finding and disposition of the Family Court, which, after a hearing, dismissed the petitions. Upon reviewing the record, the Appellate Division found that the petitioner showed by a preponderance of the evidence that the respondent, Christopher S., neglected the child Alissa A.,by inflicting excessive corporal punishment upon her, specifically by hitting her with a broom, which injured and scarred her leg, and by pinching her on her back hard enough to leave a raised mark. The petitioner also showed by a preponderance of the evidence that the respondent mother, neglected all of the subject children because she knew or should have known that Christopher S., who was frequently in the children's presence as their babysitter, verbally abused her in the presence of the children and inflicted excessive corporal punishment on Alissa A., and because the mother failed to prevent further contact between Christopher S. and Alissa A. once she became or should have become aware that Christopher S. had inflicted excessive corporal punishment on Alissa A. (see FCA § 1012[f][i][B]). Moreover, in light of the mother's failure to exercise a minimum degree of care in providing Alissa A. with proper supervision or guardianship, the petitioner also proved by a preponderance of the evidence that the mother derivatively neglected all of the subject children, who were also frequently in the presence of Christopher S. Accordingly, the order of fact-finding and disposition was reversed, the petitions were reinstated, and it was found that the respondents neglected the subject children, and the matter was remitted to the Family Court for a dispositional hearing.

Matter of Alanna S., 92 A.D.3d 787 (2d Dept 2012)

Record Supported Finding of Neglect Based on Evidence of Corporal Punishment

The Family Court's finding that the mother neglected her child based on the mother's use of excessive corporal punishment was supported by a preponderance of the evidence, where evidence demonstrated that the mother struck the five-year-old child with a belt six times, causing a mark or laceration to her forehead which required medical attention. Also, the evidence, was sufficient to support the Family Court's determination that the two other subject children were derivatively neglected.

Matter of Delehia J., 93 A.D.3d 668 (2d Dept 2012)

Hearsay Not Permitted in Fact-finding Hearing

The petitioner, Administration for Children's Services (ACS), failed to establish a prima facie case on the issue of neglect with respect to the subject children (see FCA § 1012 [f] [I]). In support of its petitions, ACS included the evidence submitted at a hearing held pursuant to FCA § 1028 (§ 1028 hearing). The evidence submitted at the § 1028 hearing failed to establish that the father neglected his children. Moreover, most of the evidence submitted by ACS at the § 1028 hearing was hearsay. Although hearsay

evidence is permitted in a § 1028 hearing, it is not permitted in a fact-finding hearing (see FCA § 1046 [b] [iii]; [c]). Consequently, hearsay evidence cannot be the basis for granting summary judgment in lieu of a fact-finding hearing. Under the facts of this case, the Appellate Division found that the father was not given the opportunity to prepare his case. Accordingly, the Family Court erred in granting ACS's motion for summary judgment on the issue of neglect, and the matter was remitted to the Family Court for further proceedings on the petitions.

In re Ethan Z., 93 A.D.3d 733 (2d Dept 2012)

Mother Could Not Explain Child's Injuries

In a child protective proceeding, the petitioner agency established a prima facie case of neglect against the mother by introducing evidence demonstrating that, while the subject child was under her care, he sustained injuries which ordinarily would not occur absent an act or omission of the appellant. In response, the mother failed to rebut the presumption of culpability with a credible and reasonable explanation of how the child sustained the injuries. Accordingly, the finding of neglect was supported by a preponderance of the evidence. Also, contrary to the mother's contention, the Family Court did not violate her right to due process by allowing the case worker for the petitioner agency to testify regarding statements the mother made after the petition was filed regarding material facts which occurred prior to its filing, as the mother's admissions constituted competent evidence against her.

Matter of Daughtry A., 94 AD3d 878 (2d Dept 2012)

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

Contrary to the appellants' contentions, the Family Court's finding that the father neglected the child (M.), by inflicting excessive corporal punishment upon her was supported by a preponderance of the evidence (see FCA § 1046[b][i]). Here, M.'s out-of-court statements that the father struck her in the face with a belt were sufficiently corroborated by the caseworker's observation of M.'s facial injuries and the statements by M.'s siblings to the caseworker that they saw the father hit M. in the face with a belt. The finding that the mother neglected M. was supported by a preponderance of the evidence showing that she knew or should have known that M.'s father was inflicting excessive corporal punishment on M., yet failed to take any steps to protect her. The findings of derivative neglect as to the parents' remaining children were supported by a preponderance of the evidence indicating the parents' lack of understanding of their parental responsibility.

Matter of Iouke H., 94 A.D.3d 889 (2d Dept 2012)

Petitioner Established Educational Neglect

The mother appealed from a fact-finding order, which found that she neglected the subject children by failing to supply them with an adequate education (see FCA § 1012 [f] [i] [A]). Here, the petitioner met its burden of establishing educational neglect by submitting evidence that, for several school years, each of the three subject children suffered excessive school absences and tardiness for which the mother failed to offer a reasonable justification.

Matter of Khalil M., 94 AD3d 1003 (2d Dept 2012)

Father Drove Vehicle While Intoxicated with Child as Passenger

Contrary to the father's contention, the Family Court's finding of neglect as to one child based on his use of alcohol while driving a car in which she was a passenger and failing to put her into a child seat or restraint, was supported by a preponderance of the evidence (see FCA § 1012 [f] [i] [B]; § 1046 [b] [I]). The evidence also supported a finding of neglect with respect to the other child based on the father having allowed that child to ride in a car driven by a friend when he knew or should have known that the friend was intoxicated.

Matter of Bianca P., 94 A.D.3d 1126 (2d Dept 2012)

Children's Presence During a Single Physical Altercation Between Mother and Father Was Insufficient to Find Neglect

The petitioner filed neglect petitions against the mother and father, alleging that they neglected the children when they perpetrated acts of physical abuse against each other. In subsequent interviews with a caseworker, the mother initially stated that the children were not present during the argument, but later stated that they

were. The father admitted that he and the mother had argued, but did not provide further details to the caseworker. At the fact-finding hearing, the petitioner elicited the above evidence by presenting the testimony of the police officer who responded to the home after the incident and the caseworker who had interviewed the mother and father. No evidence was provided detailing the altercation or regarding the impairment of the children's physical, mental, or emotional condition. The mother and father did not testify. At the conclusion of the hearing, the Family Court entered a neglect finding against both parents. The Family Court subsequently issued a dispositional order, inter alia, that upon releasing the children to the mother's custody, directed that she be supervised by the petitioner for a period of six months and that the father be supervised by the petitioner for a period of 12 months, complete an anger management course, and attend individual therapy. The Appellate Division held that under the facts of this case, the petitioner failed to establish by a preponderance of the evidence that the children's physical, mental, or emotional conditions had been impaired or were in imminent danger of becoming impaired as a result of the incident of domestic violence between the parents. Order reversed.

Matter of Chaim R., 94 A.D.3d 1127 (2d Dept 2012)

Prior Neglect Finding Relevant to Instant Proceeding

Family Court held that the respondent mother had neglected her newborn based on her failure to take medication for her mental illness, failure to provide the baby with adequate shelter and clothing, and her ongoing relationship with the violent, putative father. The court also considered the fact that mother had failed to engage in any parenting or other counseling despite her prior neglect adjudication which was based on her failure to protect her first child, one-month-old at the time, from her boyfriend who had broken the child's femur. The mother argued that court should not have considered previous findings in the current determination. The Appellate Division affirmed holding that the mother's continuation in and minimization of her current abusive relationship showed a continuing pattern of impaired judgment that placed the newborn at a serious and imminent risk of harm.

Matter of Anton AA., 91 AD3d 1064 (3d Dept 2012)

Father's Repeated Acts of Domestic Violence Against Mother Constitutes Neglect

The Appellate Division affirmed a neglect finding against the respondent father based on repeated acts of domestic violence against the mother, many of which the parties' five children had witnessed. The father argued that he was not a risk to the children since he had been living away from the mother and children since the disposition of the Family Court matter. However, the court found that the father was still visiting the children and had failed to take any steps "to remedy the problems upon which the neglect proceeding was based." The Appellate Division agreed and also rejected the father's argument that court should have granted his motion to dismiss petition at the end of petitioner's case upon DSS's failure to make a *prima facie* showing of neglect. The court noted that the record contained many instances of domestic violence which had been witnessed by the children and had caused the children to fear for both their safety and the safety of their mother. Additionally, the father had allowed a babysitter to continue caring for children even though he knew babysitter brought illegal drugs into the home and smoked marihuana while caring for children.

Matter of Imena V., 91 AD3d 1067 (3d Dept 2012)

Children's Best Interests Supports Placement With DSS

Family Court found that both the mother and father had neglected two of their three children based on lack of adequate supervision and dirty house. The children were placed with DSS. The court noted several instances where children were significantly harmed because they were not properly supervised including one time when the older child fell and hit his head on a concrete slab when he was left unattended. That child had also been left alone in room when he burned his arm by coming into contact with exposed baseboard heating and sustained severe bites from his younger brother when they were both left alone. The children were permitted to eat food off the floor and the youngest child hit his head on sidewalk and was allowed to lick puddles on the ground. The Appellate Division held that there was ample evidence to find neglect and the best interests of children supported placement.

Matter of Alexis AA., 91 AD3d 1073 (3d Dept 2012)

Parents' Mental Retardation Coupled With Other Factors Supports Neglect Finding

The Appellate Division deferred to Family Court's credibility assessments and held it had sound and substantial basis in the record to determine that parents of young special needs child had neglected him based on parents' "cognitive impairment coupled with their lack of judgement and poor impulse control, domestic abuse issues and self destructive behaviors" which placed child in imminent danger of harm. The court found that mother's mild mental retardation made it difficult for her to follow through with routine tasks such as feeding her child or properly supervising him. Mother also neglected her own hygiene and engaged in self-mutilation. Father's mild mental retardation, epilepsy, cerebral palsy with hemiparesis and depression, personality disorder and anger issues which resulted in numerous acts of domestic violence against mother, made it difficult for him to be primary caregiver of child without assistance. Parents' home was in a state of squalor and both were decreasing their involvement with service providers. Their failure to testify also allowed court to take negative inference against them.

Matter of Joseph MM., 91 AD3d 1077 (3d Dept 2012)

Only Final Orders Allow Appellate Review of Prior Orders

Pursuant to a fact-finding order, respondent was found to have derivatively neglected his newborn based on a previous finding of severe abuse and derivative abuse of his two older children. On dispo, Family Court held that a psychological or psychiatric examination of respondent and child would be necessary before it could address the issue of visitation. Respondent argued on appeal that the derivative neglect finding made against him was not supported by the record. The Appellate Division dismissed his appeal holding that only an appeal from a final order brings up for review a prior order issued in the proceeding. Respondent could have appealed the fact-finding order but did not and the dispositional order was not a final order.

Matter of Christian NN., 91 AD3d 1148 (3d Dept 2012)

Family Court Improperly Delegated Authority to Determine Child's Best Interest

Parents stipulated to an order of joint legal custody with primary physical custody to father and visitation to mother and maternal grandmother. Three years later, the father was arrested for endangering the welfare of child as a result of excessive corporal punishment. The child went to live with his aunt who then filed for custody. An order was issued, stipulated in part, providing custody to the aunt, supervised visits between father and child at such time as child's counselor recommended, and incorporating an order of protection which directed no unsupervised contact between father and child until the child was 18. On appeal the Appellate Division held that Family Court had improperly delegated its authority regarding father's supervised visitation access to the mental health provider, and as father had never consented to visitation as it was set forth in record, that part of the order needed to be remitted to Family Court for proper determination. The court vacated the order of protection as the father had never consented to its terms.

Matter of Holland v Holland, 92 AD3d 1096 (3d Dept 2012)

Relatively Low Degree of Corroboration Necessary

DSS filed neglect petitions against mother and father of one of mother's three children. All three children were eventually placed in foster care and an order of protection was issued allowing mother unsupervised visits but directing that there be no contact between children and the father or the mother's boyfriend. Thereafter, DSS filed a violation petition against the mother when one of the children told the caseworker that the mother's boyfriend had made pancakes for him and mother had told boyfriend to hide in closet when another caseworker had visited the home. At fact-finding, the caseworker who had visited the home testified that she had seen child eating pancakes in his room and there were men's shoes in mother's home and mother had identified shoes as belonging to her boyfriend. The child also testified in camera that the boyfriend made him pancakes. Family Court found that the mother had violated the order, restricted her visitation with children to supervised and sentenced her to two days in jail to be suspended pending her compliance with all future orders regarding neglect matter. The mother appealed arguing that the child's

out-of-court statements were not sufficiently corroborated. The Appellate Division affirmed holding that the degree of corroboration is relatively low and was satisfied by the testimony of the caseworker and child's in-camera testimony. Despite the fact that the child's testimony was contradictory to previous statements he had made, viewing record as a whole and giving due deference to credibility determinations by Family Court, the Appellate Division held that DSS satisfied its burden of proving by clear and convincing evidence that mother had violated order.

Matter of Columbia County DSS v Kristin M., 92 AD3d 1101 (3d Dept 2012)

Neglect of One Child Insufficient to Make Derivative Neglect Finding

Father of three boys struck the oldest child in the eye after that child struck the youngest child. DSS filed a neglect petition against the father on behalf of oldest child and derivative neglect petitions on behalf of other two children. After a fact-finding hearing, which included oldest child's medical records, supporting deposition, photographs of child's injured eye and testimony from two hospital personnel who had spoken with child at the hospital the day after the incident, Family Court found that the father had neglected the oldest son and derivatively neglected the younger two. On the father's appeal, the Appellate Division affirmed the neglect finding but reversed the derivative finding. The court held that the evidence of neglect of one child is not enough alone to make derivative neglect finding on behalf of other children unless the nature of the neglect, "notably its duration and the circumstances surrounding its commission, evidences fundamental flaws in the respondent's understanding of the duties of parenthood." In this case, the oldest child had a history of conflict with the father while the other two did not, and there was no pattern of neglect by father of oldest son.

Matter of Benjamin VV., 92 AD3d 1107 (3d Dept 2012)

Parents Failure to Address Educational Needs Results in Neglect

DSS filed educational neglect petitions against parents of two sons. After a fact-finding hearing, Family Court held that DSS had met its burden by proving by preponderance of the evidence that the parents' failure to provide the children with adequate education had resulted in their physical, mental or emotional condition being impaired or at imminent risk of being impaired. DSS's evidence included testimony from teacher whose records showed that the younger son had been absent 37 times and tardy 72 times and whose testimony showed that the child's low grades were due to excessive absences. Evidence also showed that the parents had refused to have the Committee on Special Education test their son to determine if he had any special needs and failed to respond to any attempts made by teacher to address children's needs. School guidance counselor testified that the older child was absent more than 30 days and late 30 more days, and during the time that the child was suspended from school due to misbehavior, the parents failed to pick up homework or accept tutorial services. The child was repeating the same grade for the second time and failing six subjects. While the parents took the children to psychologists, they failed to inform him of the educational issues. The children were promoted to a higher grade but only due to the court's temporary order of protection requiring parents to ensure attendance. The Appellate Division affirmed noting that the record lacked evidence that parents made any voluntary efforts to address sons' absenteeism and its "related effects on their education."

Matter of Santino B., 93 AD3d 1086 (3d Dept 2012)

Neglect Finding Based on Domestic Violence

DSS moved for summary judgment on neglect petition filed against father of three-month-old child, putting forth evidence of, among other things, the father's continuous pattern of domestic violence. Those actions had resulted in a prior neglect finding against him regarding his other children. Father committed acts of domestic violence against the mother which involved the subject child when he tackled her when she was seven months pregnant with the child, placed her in a headlock, punched her in the stomach and caused injuries which required her to seek medical care. Multiple criminal charges were filed against the father based on this incident and the his guilty plea resulted in his incarceration. The attorney for the child joined in DSS's motion for summary judgment and the father's response was a brief affirmation from his counsel stating that DSS had failed to produce adequate proof. Family Court granted summary judgment finding neglect. On appeal the Appellate Division affirmed

holding there was sufficient proof in the record to establish neglect.

Matter of Jadalynn HH., 93 AD3d 1112 (3d Dept 2012)

Neglect Finding Requires Imminent Risk of Harm and Not Actual Injury

Father asked DSS for a voluntary placement of his seven-year-old son because he intended to relocate to Connecticut to live with his girlfriend but he did not want to take his son with as the child was "too much to handle". He informed DSS that the child began to do poorly in school, was acting out and seemed depressed, not eating as usual and often sat and stared out the window. He also tried to have the child returned to the mother, who had lost custody of her other children and who was only permitted supervised visits with child; or alternatively, to be placed with the upstairs neighbor whose last name he did not know. DSS removed child and filed a neglect petition against the father. Following a fact-finding hearing, the court found neglect and after the dispositional hearing, continued placement of the child in foster care. On appeal the Appellate Division affirmed stating that a neglect finding does not require actual injury but rather "an imminent threat that such injury or impairment may result". In this case, the father's wish to voluntarily place the child with DSS because he was unwilling, not unable, to care for child and his suggestion of inadequate caregivers for his child reflected his "clear intention to abdicate his parental obligations," placing the child at risk.

Matter of Lamarcus E., 94 AD3d 1255 (3d Dept 2012)

Petitioner Failed to Submit Sufficient Evidence of Derivative Neglect

Family Court adjudged that respondent father abused his stepdaughter and derivatively abused his two biological daughters. The Appellate Division modified by reversing the adjudication of derivative neglect with respect to respondent's biological daughters. The attorney for the child's contention that the appeal should be dismissed insofar as the stepdaughter was concerned because the father failed to serve her with the notice of appeal was rejected. Because the attorney for the child filed a brief and participated in oral argument the defect in service was excused. Petitioner agency correctly conceded at oral argument on the appeal that it failed to submit sufficient evidence of derivative neglect with respect to the biological children. The court properly adjudicated the stepdaughter abused in light of the father's conviction of rape in the third degree with respect to her. Although petitioner did not submit nonhearsay evidence, the judge who decided the instant motion was the same judge who presided over the criminal case and thus was able to take judicial notice of the conviction.

Matter of Miranda F., 91 AD3d 1303 (4th Dept 2012)

Mother's Violation of Order of Protection And Knowingly Leaving Children With Abusive Father Constituted Neglect

Family Court adjudged that respondent mother neglected her three daughters and placed the mother under the supervision of petitioner agency. The Appellate Division affirmed. The findings of neglect were based on, among other things, the mother's violation of an order of protection requiring respondent father to stay away from the mother and prohibited him from visiting the children. The record established that the mother left at least one of the children at her home in the care of the father, despite her awareness of his violent tendencies and the order of protection.

Matter of Claudina E. P., 91 AD3d 1324 (4th Dept 2012)

Dismissal of Neglect Petition Reversed

Family Court dismissed the article 10 petition against respondent. The Appellate Division reversed and granted the petition. The court erred in determining that petitioner failed to establish that the children were neglected based upon acts of domestic violence between respondent and the children's mother. Petitioner established by a preponderance of the evidence that the children were in imminent danger of emotional impairment based upon the alleged acts of domestic violence. In a separate neglect proceeding the mother admitted that she and respondent had several disagreements and that sometimes the children were afraid. Respondent did not attend the fact-finding hearing and she did not testify. The court's determination that the five-year-old child's statements were not corroborated did not have a sound and substantial basis in the record. Because the attorneys for the children did not take an appeal from the order,

contentions in their briefs not raised by petitioner were not considered.

Matter of Jayden B., 91 AD3d 1344 (4th Dept 2012)

Father's Prior Sexual Abuse of Stepsister And Reckless Behavior Constituted Neglect

Family Court adjudged that respondent father neglected his child. The Appellate Division affirmed. Petitioner met its burden to prove that the child's condition was in imminent danger of impairment based on respondent's failure to exercise a minimum degree of parental care in providing supervision. Petitioner presented evidence that respondent was convicted of attempted sodomy in the first degree and that he was a level two sex offender. Respondent admitted that his conviction arose out of an incident when he was 21 years old and sexually abused his 12-year-old mentally challenged stepsister while he was babysitting her. After he was released from prison in 2009 he did not voluntarily engage in or complete sex offender treatment, despite being notified that he needed to do so. Additionally, petitioner demonstrated that after his release from prison respondent was convicted of assault in the third degree for allegedly biting, pinching and threatening to kill respondent mother and two other convictions arising from an incident where he drove a van in excess of 80 miles per hour while fleeing the police with the mother in the vehicle. There were also several orders of protection issued against the father in favor of the mother, respondent's mother and the foster parents.

Matter of Makayla L. P., 92 AD3d 1248 (4th Dept 2012)

Neglect Adjudication Against Father Reversed

Family Court adjudged that respondent father neglected his child. The Appellate Division reversed. The only evidence of domestic violence presented by petitioner agency was that the father struck the child's mother on one occasion when the child was eight months old. The father testified that the altercation took place outside the presence of the child. Thus, petitioner did not prove by a preponderance of the evidence that the physical, mental or emotional condition of the child was placed in danger of impairment as a result of the father's conduct. There was no evidence that the domestic violence that occurred was anything other than an isolated incident with no negative repercussions on the child's well-being.

Matter of Ilona H., 93 AD3d 1165 (4th Dept 2012)

Children's Statements Sufficiently Corroborated

Family Court adjudged that respondent father abused his children. The Appellate Division affirmed. The out-of-court statements of the children were sufficiently corroborated by other evidence tending to support their reliability. The cross-corroborating accounts of the children with respect to the nature and progression of the sexual abuse gave sufficient indicia of reliability to each child's out-of-court statements. The allegations of sexual abuse were further corroborated by the children's age- inappropriate knowledge of sexual matters.

Matter of Janiece B., 93 AD3d 1335 (4th Dept 2012)

Sufficient Evidence of Neglect and Derivative Neglect

Family Court adjudged that respondent mother abused and neglected her two-month-old child and derivatively abused and neglected her two-year-old child. The Appellate Division affirmed. Petitioner presented evidence, including the testimony of a physician, that the younger child sustained fractures of his left humerus, right humerus, left tibia and several ribs, and that the injuries were inflicted at different times. The mother failed to rebut the presumption of parental responsibility for the injuries. Petitioner also proved that the older child was derivatively neglected. The abuse and neglect of the younger child demonstrated such an impaired level of judgment by the mother to create a substantial risk of harm for any child in her care.

Matter of Wyquanza J., 93 AD3d 1360 (4th Dept 2012)

Sufficient Evidence of Sexual Abuse of Daughter and Derivative Neglect of Son

Family Court determined that respondent father sexually abused his daughter and derivatively neglected his son. The Appellate Division affirmed. The finding of sexual abuse of the daughter by the father was supported by a preponderance of the evidence. The daughter's out-of-court statements were sufficiently corroborated by the testimony of petitioner's expert,

who found the daughter's consistent accounts of the abuse to be reliable and opined that her statements paralleled those normally made by abuse victims. Petitioner also proved that the son was derivatively neglected. The sexual abuse of the daughter demonstrated a fundamental flaw in his understanding of parenthood.

Matter of Leeann S., 94 AD3d 1455 (4th Dept 2012)

Mother's Challenge to Provisions in Order of Protection in Article 10 Case Moot

Family Court adjudged that respondent mother neglected her child, placed her under the supervision of DSS and directed the mother to abide by certain conditions, including those set forth in an order of protection. The Appellate Division dismissed the mother's appeal as moot. The challenged order of protection had expired by its own terms and the exception to the mootness doctrine did not apply.

Matter of Romeo M., 94 AD3d 1464 (4th Dept 2012)

CHILD SUPPORT

Petition For Downward Modification Properly Dismissed

Family Court denied petitioner father's objections to an order dismissing his petition for a downward modification of his child support obligation. The Appellate Division affirmed. Petitioner failed to meet his burden to show a substantial and unanticipated change in circumstances. His income appeared to be substantially similar to the amount he claimed to be earning when he agreed to the stipulated child support amount and he did not demonstrate that he diligently sought to obtain employment commensurate with his earning capacity.

Matter of Christina M. v Kevin S. M., 91 AD3d 437 (1st Dept 2012)

Motion For Order Declaring Father to be Custodial Parent For Support Purposes Properly Denied

Supreme Court denied petitioner father's motion for an order declaring him to be the primary custodial parent for purposes of child support, directed a downward modification of defendant's child support obligation, granted plaintiff wife's motion fo an upward modification of maintenance and denied plaintiff's motion for legal fees. The Appellate Division affirmed. Although the children spent much of their time with defendant , their feelings toward plaintiff were influenced and fostered by defendant's expressed hostility toward plaintiff and by acquiring plaintiff's share of the marital home which induced them to stay with him rather than plaintiff. The court's reduction in child support, rather than terminating it altogether was appropriate. Plaintiff showed a substantial change in circumstances warranting an upward modification in maintenance. Re-establishing her business drained plaintiff's resources and it generated a loss. The discretionary denial of plaintiff's counsel fees was not disturbed.

Herschorn v Herschorn., 92 AD3d 500 (1st Dept 2012)

Father Guilty of Contempt For Failing to Pay Child Support

Supreme Court adjudged plaintiff father guilty of contempt for willfully disobeying the parties' settlement agreement by failing to pay basic child support and additional expenses in the amount of $143,705 and ordered plaintiff incarcerated unless he made an initial payment of $80,00 to defendant wife within 30 days and that he pay $10,000 per month until the balance was paid. The Appellate Division modified by lowering the arrears amount. Plaintiff failed to show his inability to pay the basic child support he owed. He did not show that he had a diminution in his lifestyle or that he made reasonable efforts to obtain gainful employment. Calculating plaintiff's basic child support obligation based upon his actual income, pursuant to the settlement agreement, the amount due defendant was $99,955. The pay-off schedule was reasonable.

Dublin v Drescher, 92 AD3d 558 (1st Dept 2012)

Needs Based Determination of Child Support Affirmed

Family Court denied father's objection to order of support. The Appellate Division affirmed. The court was not required to rely on father's contradictory testimony concerning his income because he failed to complete his financial disclosure affidavit and provided conflicting tax returns. The court's reliance on the needs of child in determining support amount was

appropriate.

Matter of Sowe-Stevenson v Touray, 93 AD3d 559 (1st Dept 2012)

No Substantial Change in Circumstances

Family Court, upon parties' objections to the order of the Support Magistrate, dismissed father's downward modification petition, vacated the order and reinstated the prior support order. The Appellate Division affirmed. Petitioner failed to show a substantial change in circumstances warranting a downward modification because he neither provided documentation nor information about job search for work commensurate with his training and experience.

Matter of Robert V.C. v Polly V. H., 94 AD3d 583 (1st Dept 2012)

SUNY Cap Must Be Determined on Case by Case Basis

Supreme Court directed defendant father to pay 40% of the cost of the parties' older child's college education. The Appellate Division affirmed. The father's contention that his court ordered support payment directing that he pay of 40% of child's college tuition should be based on the cost of education at a SUNY school was rejected. Whether to impose a " SUNY cap" should be determined on a case-by- case basis and here, considering the parties' means and child's educational needs, which showed child had attended an "elite public high school," both parties had attended private colleges and law schools, and both parties had resources to pay for private tuition, father's contention was unpersuasive.

Tishman v Bogatin, 94 AD3d 621 (1st Dept 2012)

Father's Objections Properly Denied

Family Court properly denied the father's objections to the Support Magistrate's dismissal of his petition, in which he sought to suspend his child support obligation on the ground that the mother interfered with his visitation. Here, the Support Magistrate did not have the authority to hear the visitation issue raised by the father (see FCA § 439 [a]). Moreover, the father's contentions with respect to the mother's alleged interference with his visitation had been raised and determined by a Judicial Hearing Officer after a hearing. Accordingly, under the circumstances, the dismissal of the petition was warranted, rather than a transfer to a Family Court Judge.

Matter of Tornheim v Rube, 90 AD3d 1059 (2d Dept 2012)

Father Only Required to Maintain Health Insurance for Son as Provided by Father's Employer

Contrary to the mother's contention, the evidence presented at the hearing did not establish that the father failed to comply with an order of the Family Court which required him to maintain health insurance for the parties' son. The son, who had not been attending college full time, was not eligible for health insurance through the father's employer at that time. Moreover, the order did not require the father to maintain health insurance beyond his employer's health insurance. The mother's sole contention on appeal with respect to the issue of college expenses was that she was not given an opportunity to be heard on that issue, as the Support Magistrate failed to conduct a proper hearing on that issue. Here, both parties were sworn and examined regarding the father's obligation toward the son's college expenses, as well as the son's failure to continuously attend college, and findings of fact were made on the issue. Thus, contrary to the mother's contention, she was not deprived of an opportunity to be heard on the issue of college expenses.

Matter of Turi v Rosen, 90 AD3d 1060 (2d Dept 2012)

Mother Granted Upward Modification

The Appellate Division found that the Family Court properly granted the mother's petition for an upward modification and denied the father's cross petition for a downward modification, based on the father's prior representation that he received no government benefits, and on the evidence that he began receiving $2,745 per month in benefits immediately after his support obligation was set at only $100 per month. The Appellate Division further found that contrary to the father's contention, the Family Court correctly declined to credit social security disability benefits paid directly to the child against his child support obligation.

Matter of Bouie v Joseph, 91 AD3D 641 (2d Dept 2012)

Father's Motion to Have Child Support Held in Escrow Granted

Pursuant to a prior order of the Appellate Division, the father paid one half of his child support obligation to the mother and one half to the mother's attorney, to be held in an escrow account until the mother could certify, to the satisfaction of the Supreme Court, her compliance with the visitation provisions of an order of the Supreme Court, dated April 28, 2006, and the absence of her interference with the father's visitation rights. In February 2010 the father moved, inter alia, for leave to pay, to the mother's attorney for deposit into the escrow account, the one half of his child support obligation which he had been paying directly to the mother. In light of the father's showing to the Supreme Court that the mother continued to deliberately interfere with his visitation rights, the Supreme Court providently exercised its discretion in granting that branch of the father's motion.

Matter of Lew v Sobel, 91 AD3d 648 (2d Dept 2012)

Child's Permanent Residence Remained with Mother

The record revealed that the parties' separation agreement provided that the father's child support obligation would terminate if the child ceased to permanently reside with the custodial parent/mother, however, a residence away from the mother's home, which the child maintained in conjunction with his or her residence at a boarding school would not terminate the father's child support obligations. The Support Magistrate's determination that the subject facility was, in essence, a boarding school, was amply supported by the record before her. Accordingly, the father did not carry his burden of demonstrating that the child had permanently ceased to reside with the mother. Morever, it was noted by the Appellate Division, notwithstanding the terms of the parties' separation agreement, that the Family Court would have retained the power to set the father's support obligation in the child's best interest.

Matter of Moss v Moss, 91 AD3d 783 (2d Dept 2012)

Mother Awarded Attorney's Fee

Upon considering all of the circumstances of this case, including that the protracted nature of this dispute and the extent of the services required to deal with it were attributable to the actions and inactions of the father and his former counsel, the Appellate Division found that the attorney's fee awarded to the mother was not an improvident exercise of discretion. See FCA § 438[a] and DRL § 237 (b).

Burris v Burris, 91 AD3d 866 (2d Dept 2012)

Motion for Downward Modification Denied

The Supreme Court properly denied, without a hearing, the defendant's motion for a downward modification of his child support and maintenance obligations set forth in a settlement agreement which was incorporated but not merged into the judgment of divorce. The defendant failed to make a prima facie showing that his loss of employment constituted the substantial, unanticipated, and unreasonable change in circumstances necessary to warrant a downward modification of his child support obligation because he did not demonstrate that he diligently sought re-employment commensurate with his earning capacity. Moreover, the defendant's statement of net worth indicated that despite his loss of employment, he had sufficient means to provide child support at the level set by the parties in their settlement agreement. The defendant also failed to make a prima facie showing that continued enforcement of his maintenance obligation would result in the extreme hardship necessary to warrant a downward modification.

Schwaber v Schwaber, 91 AD3d 939 (2d Dept 2012)

Ex-wife Entitled to Ex-husband's Income Tax Returns and W–2 Statements

The parties entered into a stipulation of settlement (the Stipulation) dated October 21, 1994, and were divorced pursuant to a judgment entered June 19, 1995. Pursuant to the Stipulation, which survived and did not merge into the judgment, the parties agreed, inter alia, to pay the costs of tuition, room and board, and books, as well as related fees for the college education of their children "on a pro rata basis in accordance with their income and assets." Beginning in August 2004, the parties' oldest child began attending college, and the younger child started college in August 2008. The defendant took charge of calculating the parties' pro rata share, and determined the parties' respective incomes and assets by deducting the amount of child

support payments he made from his income and adding that amount to the plaintiff's income. From 2004 until 2009, the plaintiff paid to the defendant her alleged pro rata share which was based on his calculations. In May 2010, the plaintiff moved for leave to enter a money judgment for amounts she allegedly overpaid towards the children's college expenses, and to compel production of the defendant's W–2 statements and tax returns for the years 2003 through 2009. The Supreme Court determined that the plaintiff's payments were "voluntary" and that she could not seek any reimbursement. The plaintiff appealed and the Appellate Division reversed, holding that the ex-wife was entitled to the production of the ex-husband's income tax returns and W–2 statements. It was clearly evident that the parties did not intend for child support payments to be included as part of "income and assets." There was no language in the Stipulation which supported the defendant's determination that child support payments should have been added to the plaintiff's income and deducted from his income. Nor could the plaintiff's alleged overpayments be deemed voluntary based upon the record before the Court.

Ayers v Ayers, 92 AD3d 623 (2d Dept 2012)

Plaintiff Entitled to Arrears and Counsel Fees

The Supreme Court properly granted that branch of the plaintiff's amended cross motion which was for an award of arrears. Contrary to the defendant's contentions, the plaintiff's testimony, which was credited by a Judicial Hearing Officer, coupled with her submission of receipts, were sufficient to establish the amounts of the payments she made for the cost of child care necessitated by her employment. The Supreme Court also properly granted that branch of the plaintiff's amended cross motion which was for an award of counsel fees. In light of the defendant's refusal to comply with the judgment of divorce, thereby compelling the plaintiff to move for enforcement relief, the Supreme Court's award of counsel fees was a proper exercise of discretion. In any event, the plaintiff was entitled to reimbursement for counsel fees pursuant to the default provision in the parties' stipulation of settlement.

Martin v Martin, 92 AD3d 646 (2d Dept 2012)

Mother Demonstrated Substantial Change in Circumstances

In light of the testimony and documentary evidence which demonstrated the increased cost of clothing, food, and heating oil, as well as the increased expenses related to the son's special education needs and the children's involvement in activities such as music lessons, karate lessons, soccer, and girl scouts, the mother demonstrated a substantial change in circumstances sufficient to warrant the modification of the father's child support obligation.

Matter of Anderson v Anderson, 92 AD3d 779 (2d Dept 2012)

Imputation of Father's Income Was Supported by the Record

Imputing income to father in the sum of $100,000 per year for the purpose of calculating his child support and child care obligations was a provident exercise of discretion, considering, among other things, the father's educational background, his lack of credibility, his monthly expenses, and the resources available to him. The father's testimony about his income was vague and contradictory, he had access to, and received, financial support from his family, and he had a degree in electrical engineering as well as a masters in business administration (MBA). See FCA § 413(1)(b)(5)(iv).

Rohme v. Burns, 92 AD3d 946 (2d Dept 2012)

Father Not Entitled to Downward Modification

The father filed the subject petition for a downward modification of his child support obligation, alleging that there had been a change in circumstances in that the subject child was "living away at college." At a hearing on the petition, the father stated that he was paying his "half share" of the subject child's college expenses and that the mother did not have to pay certain expenses when the child received room and board at the college. By order dated March 5, 2010, the Support Magistrate found that the father's contribution toward the child's college room and board expenses was duplicative of the child support, and therefore directed that his child support obligation be modified accordingly. The mother filed objections, contending, among other things, that the parties were contributing equally toward the child's college expenses, rather than proportionately to their respective incomes, and that the agreement expressly provided that child support would continue when the subject child was at college. The

Family Court denied the mother's objections, she appealed, and the Appellate Division reversed. Here, pursuant to the clear terms of the agreement, the father's obligation to pay child support continued while the child was away at college, and was not diminished by any amount he contributed towards college expenses. Since the father did not establish that the agreement was not fair and equitable when entered into, or that there was an unanticipated and unreasonable change in circumstances, he was not entitled to a downward modification of his child support obligation, and the mother's objections should have been granted.

Matter of Trester v Trester, 92 AD3d 949 (2d Dept 2012)

Resort to Remedy of Contempt Was Proper

Pursuant to DRL § 245, where a spouse fails to make payments of money pursuant to an order or judgment entered in a matrimonial action, the aggrieved spouse may apply to the court to punish the defaulting spouse for contempt, but only if "it appears presumptively, to the satisfaction of the court," that payment cannot be enforced by other means such as enforcement of a money judgment or an income execution order. In order to punish the defaulting spouse for contempt, the aggrieved spouse is not required to exhaust all alternative remedies; proof that alternative remedies would be ineffectual is sufficient. Here, the plaintiff satisfied that burden. Accordingly, resort to the remedy of contempt was proper.

Moore v Moore, 93 AD3d 827 (2d Dept 2012)

Record Supported Award of Child Support

The trial court's application of the child support percentage to the first $150,000 of father's annual income, and the amount of child support awarded, was supported by evidence which showed that during the marriage, the child enjoyed a "middle-class" lifestyle, and her needs were met by the pendente lite child support award. See DRL § 240(1–b)(c)(2); SSL § 111–i(2)(b).

Lago v. Adrion, 93 AD3d 697 (2d Dept 2012)

Supreme Court Properly Denied Plaintiff's Motion to Compel Defendant to Pay One Half of Cost of Children's College Expenses

The plaintiff moved, among other things, to compel the defendant to pay one half of the cost of the children's college expenses. Neither party provided any financial disclosure (see DRL § 240 [1-b] [c] [7]; 22 NYCRR 202.16 [k]). A hearing was held on the plaintiff's motion, but the plaintiff failed to present any evidence as to the defendant's current financial situation. Based on the absence of any such evidence, the Supreme Court, in effect, denied that branch of the plaintiff's motion which was to compel the defendant to pay one half of the cost of the children's college expenses. Pursuant to DRL § 240 (1-b) (c) (7), a court may direct a parent to contribute to a child's private education, even in the absence of special circumstances or a voluntary agreement of the parties. In determining whether to do so, however, "a court must give due regard to the circumstances of the case and the respective parties, as well as both the best interests of the child and the requirements of justice". Here, in light of the plaintiff's failure to adduce any evidence as to the defendant's then current financial situation, the Supreme Court did not improvidently exercise its discretion in denying that branch of the plaintiff's motion.

Romeo v Young, 93 AD3d 836 (2d Dept 2012)

Father Failed to Establish That He Was Financially Unable to Pay for Child's College Tuition

The Family court did not improvidently exercise its discretion in granting the mother's petition for an award of college tuition expenses for the parties' child and apportioning 50% of those expenses to the father, where the father failed to establish, in accordance with the terms of the parties' stipulation of settlement of divorce, that he was financially unable to pay for the child's college tuition or that the mother did not comply with her obligation to encourage the child's use of financial aid, scholarships, and available student loans.

Filosa v. Donnelly, 94 AD3d 760 (2d Dept 2012)

Father's Testimony Regarding Income Was Not Credible

The father testified at a hearing that he owned and operated a taxi cab, earned $300 per week, and worked three days a week for around 12 hours a day. The Support Magistrate imputed income to the father of $500 per week for the purpose of his child support

obligation based on, inter alia, a finding that the father's testimony regarding his income was not credible, and based on statements in the father's financial disclosure affidavit (hereinafter FDA) that he had earned $31,000 in 2009. The Support Magistrate's determination regarding credibility is supported by the record. While the father testified at the hearing that he earned $300 per week, he also testified that he made "$35,800 a year," which was consistent with the statement in his FDA that his total gross income in 2009 was $31,000. Moreover, the father did not submit a paycheck and failed to explain how, on a salary of only $300 per week and his wife's disability payments of $600 per month, he could support himself, his wife, and their three children, and pay a mortgage in excess of $3,000 per month. Based on this record, the Family Court properly denied the father's objection to so much of an order of support as, upon imputing income to him in the sum of $500 per week, granted the mother's petition for an award of child support to the extent of directing him to pay child support in the sum of $319 per month.

Matter of Oshodi v Olouwo, 94 AD3d 896 (2d Dept 2012)

Father Directed to Pay His Pro Rata Share of the Child's Private School Expenses

The Support Magistrate improvidently exercised her discretion in denying the mother's request to direct the father to pay his pro rata share of the child's private school expenses. In this case, the child was enrolled in the private school with the father's approval, and performed well in that school, circumstances which warrant a finding that it is in the child's best interest to remain at that school, rather than having his academic and social life disrupted by a transfer to a different school Additionally, there was no evidence that the father's ability to support himself and maintain his own household would be impaired if he were directed to pay his pro rata share of the child's private school expenses. Accordingly, the Support Magistrate improvidently exercised her discretion in refusing to direct the father to pay his pro rata share of the child's private school expenses. Since the record contained no evidence regarding the child's private school expenses, this matter was remitted to the Family Court for a determination of the amount owed by the father for the child's private school expenses.

Matter of Amos-Richburg v Richburg, 94 AD3d 1112 (2d Dept 2012)

Father's Serious Injuries Support Showing of Change in Circumstances

Divorced mother of four children was awarded sole custody and the father was ordered to pay child support. After he was seriously injured in a car crash, he successfully obtained a downward modification. His support obligation was modified based on the CSSA. On appeal the mother argued that the father could have pursued some other form of veterinary practice but she failed to contradict the father's proof of limited ability. The Appellate Division affirmed, giving deference to the court's credibility determinations and supporting the lower court's conclusion that the father had shown a significant change in circumstances warranting a modification of his support obligation.

Smith v Smith, 91 AD3d 1083 (3d Dept 2012)

Failure to Follow Parent's Reasonable and Legitimate Rules Results in Constructive Emancipation

Eighteen-year-old daughter was living with her father after the parents divorced and left his home to live with her boyfriend against the father's wishes. The mother filed to terminate her support obligation and then filed a modification petition against the father requesting child support as she was now supporting the child. The Support Magistrate dismissed the mother's petition finding that the child had constructively emancipated herself as she had left father's home of her own free will and was not entitled to support. The mother filed objections and Family Court reversed finding that the child was not emancipated as she was being financially supported by mother. On the father's appeal the Appellate Division found the daughter was constructively emancipated as the father's unrefuted testimony showed that the daughter refused to follow his reasonable and legitimate household rules, and had left his home without his knowledge or permission resulting in his filing a missing persons report with the police. When tdaughter was found and returned to him, she left again and moved in with her boyfriend.
She would sneak her boyfriend into her bedroom when no one was at home, skipped school, failed to follow curfew and was arrested, all in defiance of his rules. The court held that a parent's obligation to support a child until he or she reaches age 21 may be suspended

when the child, who may not be financially self-sufficient, abandons a parent's home "without sufficient cause and withdraws from that parent's control, refusing to comply with reasonable parental demands," under the doctrine of constructive emancipation.

Matter of Jacobi v Lewis, 92 AD3d 1100 (3d Dept 2012)

Support Magistrate Order Should be Reviewed By Family Court Before Appeal Taken

Supreme Court issued a judgment of divorce which ordered the father to pay temporary child support and referred the mother's support application to the Support Magistrate. After a fact-finding hearing, the Support Magistrate issued an order of support and the father filed objections. Family Court dismissed the father's objections stating that he should have taken a direct appeal from Support Magistrate to the Appellate Division. On appeal the Appellate Division agreed with father and held that the matter should be remitted to Family Court. The Appellate Division held that FCA § 439 (e) requires Family Court to review any order made by a Support Magistrate before an appeal is taken, and it makes no difference if matter is referred to Family Court by Supreme Court or if matter is initiated in Family Court.

Reynolds v Reynolds, 92 AD3d 1109 (3d Dept 2012)

Mother Failed to Meet Burden of Proof of Non-payment

Pursuant to divorce, the father was ordered to pay child support and daycare expenses. In 2010, the mother filed a violation petition alleging that the father had failed to make payments from 2002 to 2008 in wilful violation of court order. After a hearing, the Support Magistrate dismissed the petition finding that the mother's inconsistent testimony undermined her credibility and that she had failed to establish non-payment. The mother filed objections and Family Court affirmed. Mother appealed arguing Family Court denied her objections based on procedural grounds that she had not personally served father with written objections. The Appellate Division noted that although the father was not personally served, the Support Magistrate made a determination on the merits and it's findings of credibility did not need to be disturbed. Likewise, the court held that mother had failed to meet her burden of proving father had failed to make payments and affirmed.

Matter of Nemcek v Connors, 92 AD3d 1117 (3d Dept 2012)

No Error in Determination That Father Could Not Pay Private School Tuition

Parties entered into a separation agreement which was incorporated but not merged into the judgment of divorce. The father was required to pay private school tuition if he was "able to do so". This provision was included in subsequent modification of support. Thereafter, the father claimed he could not afford to pay and the mother filed for modification alleging that there was newly discovered evidence to show that the father had hidden assets, namely ownership in real property and requested support modification order be vacated. After a fact-finding hearing, the Support Magistrate vacated the prior order and ordered father to continue to pay tuition. The father filed objections and Family Court modified the order in part, vacating father's obligation to pay tuition. On the mother's appeal, the Appellate Division affirmed holding that the evidence showed that father had inherited $400,000 of which $220,000 went to mother pursuant to divorce terms and the father loaned $117,000 to friend to purchase a commercial building. When the friend failed to repay the money, the property went into foreclosure and the father had to borrow more money to salvage his investment. He earned no income from corporation, no money remained from his inheritance, he was unable to repay money he had borrowed and his sole income was from his employment and pension, and taking into consideration father's child support obligation, there was no error in court's determination that father could not pay child's tuition.

Matter of Stewart v Stewart, 93 AD3d 907 (3d Dept 2012)

Support Magistrate Has No Authority to Enforce Independent Contract Between Parties

Parents of two children entered into a separation agreement which, among other things, required the father to pay 96% of all child-care expenses. The agreement was merged but not incorporated into the terms of the divorce judgment. Thereafter, the mother

wrote to the father proposing a reduction of his obligation to 75% of child-care expenses. Although father did not sign letter he made two full reimbursed payments and several partial payments. The mother later commenced this action to enforce the child support provisions and the father argued that the mother's letter modified his obligation. Following a hearing, the Support Magistrate found that the letter constituted a valid modification, reduced the father's obligation to 75% and ordered arrears. The mother filed objections and Family Court held that the Support Magistrate had no authority to enforce the terms of a purported agreement as terms contained in the divorce judgment were controlling. On appeal the Appellate Division affirmed holding that , as Family Court is a court of limited jurisdiction, it can only enforce or modify provisions of an order or judgment. Even if the letter was a valid modification, Family Court had no subject matter jurisdiction to "enforce the amended agreement which stands as an independent contract between the parties".

Matter of Hirsch v Schwartz, 93 AD3d 1114 (3d Dept 2012)

Good Time Allowance Not Relevant in Court Order Directing Incarceration

Family Court incarcerated father for six months for failing to make weekly child support payments of $25 to mother. The father continued to not pay and he was found to be in wilful violation from the time he was released from jail to the onset of his stated medical problems and ordered incarcerated for 150 days or until such time as he made arrears payment of $800. The father appealed, arguing that the court should have considered "good time allowance" pursuant to Correction Law § 804-a(1). The Appellate Division affirmed holding that the good time issue was not raised before court, such issue would not arise until after he was incarcerated, such matter would be determined by sheriff, superintendent or person in charge of institution where he would be incarcerated and an appeal from such administrative determination should be made pursuant to proceeding like CPLR Article 78 .

Matter of Madison County Commr. of Social Servs. v Felker, 94 AD3d 1373 (3d Dept 2012)

Family Court Had No Record Upon Which to Base its Determination

Support Magistrate found support obligation under the CSSA would be $813.30 per month but determined amount would be unjust or inappropriate as petitioner mother received $1008 in monthly social security benefits o/b/o child due to father's social security retirement and lowered support amount. The mother filed to modify arguing that the father was not receiving the child's social security benefits. Without taking sworn testimony or receiving documents into evidence, the Support Magistrate modified the father's obligation to $1300 per month. Family Court denied the father's objections. On appeal the Appellate Division reversed and remitted pursuant to FCA § 424-a[a], as there needs to be financial disclosure in support modification proceedings and the court is not required to dismiss for lack thereof, but should have adjourned matter to allow parties to file financial information. As no documents were admitted and no testimony was taken, the record lacked any reliable information upon which court could make its determination. In a footnote, the Appellate Division noted that the financial disclosure requirement is not waivable by the parties or the court.

Matter of Malcolm v Trupiano, 94 AD3d 1380 (3d Dept 2012)

Respondent Willfully Violated Child Support Order

Family Court determined that respondent father willfully violated a prior child support order and sentenced him to a term of six months in jail. The Appellate Division affirmed. Petitioner mother established that the father willfully violated a prior order by demonstrating that the father had not made the required child support payments. The father failed to meet his burden to present sufficient evidence of his inability to pay inasmuch as he failed to offer competent medical evidence to substantiate his claim.

Matter of Yamonaco v Fey, 91 AD3d 1322 (4th Dept 2012)

Reduction in Child Support Affirmed

Family Court denied the objections of petitioner mother to the order of the Support Magistrate modifying a prior order reducing petitioner father's child support obligation and his share of child care and unreimbursed medical expenses. The Appellate Division affirmed. Petitioner presented evidence that his income from employment decreased as a result of an involuntary

reduction in his overtime hours and the determination that the loss of income was sufficiently substantial to warrant a downward modification was entitled to great weight.

Matter of Shields v Towery, 91 AD3d 1343 (4th Dept 2012)

Defendant Entitled to Pay Taxes on Marital Home and Deduct Amount From Child Support Obligation

Supreme Court denied plaintiff wife's motion seeking an order finding defendant husband in contempt and attorneys' fees and denied defendant's cross motion for a downward modification of child support. The Appellate Division modified by granting that part of defendant's motion seeking permission to pay property taxes on the marital home and deduct that amount from his child support payments unless plaintiff showed proof of payment of taxes and granted that part of plaintiff's motion seeking attorneys' fees in the amount of $1,405. The court properly awarded child support on income exceeding the $130,00 statutory cap, given that plaintiff had no discernable income, defendant's considerable assets, and the standard of living that the children would have had if the marriage had not ended. The court properly refused to force a sale of the marital residence. At least one child under the age of 18 resided in the marital residence, plaintiff could not obtain comparable housing at a lower cost, and defendant, with his considerable assets, failed to establish that he needed his share of the sale proceeds. Even though on appeal defendant abandoned his request for permission to pay property taxes on the marital residence and deduct that amount from child support payments, the Appellate Division granted permission. Plaintiff was entitled to attorneys' fees associated with the motion at issue in the appeal. There was a rebuttable presumption that attorneys' fees be awarded to the less monied spouse and the motion at issue was predicated upon defendant's failure to pay the full amount of child support.

Juhasz v Juhasz, 92 AD3d 1209 (4th Dept 2012)

Father Not Entitled to Downward Modification

The Support Magistrate granted the father's amended petition in part by reducing his child support obligation. Family Court denied the objections of the father and modified the order by denying the amended petition in its entirety and increasing the father's support obligation. The Appellate Division affirmed. The father's contention that the Support Magistrate did not have jurisdiction to determine this proceeding because the father alleged that he was now the custodial parent was rejected. The Support Magistrate properly considered the current custodial arrangement in determining which parent was the custodial parent. The court properly imputed income to the father and denied his amended petition in its entirety. The father was not entitled to a downward modification of his child support obligation on the ground that he was no longer employed full-time because he presented no evidence that he diligently sought re-employment commensurate with his prior employment. Because the father did not have right to counsel in the child support proceeding and there were no extraordinary circumstances, his contention that he was denied effective assistance of counsel was not considered.

Matter of Leonardo v Leonardo, 94 AD3d 1452 (4th Dept 2012)

Court Had Personal Jurisdiction Over Respondents

In a July 2012 order, upon non-resident respondents parents' default, father was directed to pay $775 per week in child support effective from the date the children were placed in foster care in New York and the stepmother was directed to notify the support unit of any change in employment status and health insurance benefits. The parents did not file objections to the July 2010 order. In October 2010, respondents moved to vacate the support orders and to dismiss the proceedings on the ground of lack of personal jurisdiction. In November, Family Court dismissed respondents' motion to vacate. Respondents filed objections to the November orders and the court dismissed those objections and affirmed the November order. The Appellate Division affirmed. Respondents' contention that the court erred in failing to review their challenge to the July orders in the context of the their objections to the November orders was rejected. Respondents moved to vacate the July orders on the basis of alleged lack of personal jurisdiction, not on the ground of excusable default. Respondents' contention that the court's jurisdictional determination was not based upon competent evidence also was rejected. The Support Magistrate was not required to hold a hearing on the issue of personal jurisdiction before issuing the

July orders. Respondents waived any right to a hearing on jurisdiction by submitting their motion on papers only. Respondents failed to preserve their contention that the jurisdictional findings were not based upon competent evidence because they did not challenge the competence of the evidence in their motion to vacate the July orders. The court properly determined that it had personal jurisdiction over respondents because the children began residing in New York as a result of acts or directives of respondents. The assertion of personal jurisdiction did not violate respondents' right to due process.

Matter of Chautauqua County Dept. of Social Servs. v Rita M.S., 94 AD3d 1509 (4th Dept 2012)

CRIMES

Counsel's Failure to Move to Reopen Wade Hearing Did Not Deprive Defendant of Meaningful Representation

At a pretrial *Wade* hearing, a detective testified that the complainant viewed a lineup which included the defendant. To conceal the defendant's hairstyle as a characteristic that would distinguish him from the fillers, all lineup participants wore baseball caps. The participants were also seated to conceal differences in height. Most of the participants wore dark or blue sweatshirts, although one of the fillers wore a white T-shirt. The defendant was wearing blue shorts and a red T-shirt which had been turned inside-out to hide a distinguishing design. The complainant identified the defendant as one of the people who attacked him on the subway train. The Supreme Court denied the defendant's motion to suppress the lineup identification, finding that the lineup was not unduly suggestive. At trial, the complainant testified that he had mentioned to the investigating detective that the defendant was wearing a red T-shirt during the robbery. This testimony had not been adduced at the *Wade* hearing. The defendant was convicted of robbery in the second degree. Contrary to the defendant's contention, he was not deprived of the effective assistance of counsel by his trial counsel's decision not to move to reopen the *Wade* hearing upon hearing the complainant's testimony about the defendant's red shirt. Although the defendant wore a red shirt during the robbery and during the subsequent police lineup, this did not render the lineup unduly suggestive, because the shirt was not so distinctive as to draw attention to the defendant, the four fillers otherwise resembled the defendant, and the witness testified that he focused on the defendant's face, not his clothes. Accordingly, the defendant was not deprived of meaningful representation by defense counsel's decision not to move to reopen the *Wade* hearing. However, the Supreme Court improvidently exercised its discretion in allowing the People to introduce testimony that a small razor blade was found in the defendant's pocket when he was arrested. Contrary to the People's contention, the razor blade was not probative of the issue of whether the defendant was acting in concert with others, and it was not necessary to complete the narrative. Nevertheless, under all of the circumstances, such error was found to be harmless, as there was overwhelming evidence of the defendant's guilt, and no significant probability that the error contributed to his conviction. In particular, the police officers who recovered the razor blade testified that they disposed of it because it was not big enough to charge the defendant with a crime, thus minimizing any possible prejudice.

People v. Mack, 91 A.D.3d 794 (2d Dept 2102)

Motion to Suppress Properly Denied

Contrary to the defendant's contention, the photographic array was not unduly suggestive. There is no requirement that the photograph of a defendant shown as part of a photo array be surrounded by photographs of individuals nearly identical in appearance. Here, the alleged variations in appearance between the photographs of other persons depicted in the photo array and that of the defendant were not so substantial as to render the photo array impermissibly suggestive. Accordingly, that branch of the defendant's omnibus motion which was to suppress identification testimony was properly denied. The hearing court also properly denied that branch of the defendant's omnibus motion which was to suppress physical evidence seized after his arrest on January 7, 2010, on the basis that the police lacked probable cause to arrest him. The evidence adduced at the hearing established that the defendant's grandmother, who lived in the apartment with her two grandsons, gave consent for the police to enter. The evidence further established that the grandmother's consent was voluntarily given and was not the product of coercion. Given the grandmother's valid consent, it was unnecessary to produce evidence establishing that the police had probable cause to enter her apartment. Once inside the apartment, the police

had probable cause to arrest the defendant. He matched the description of the perpetrator, and was holding a cell phone which matched the color and brand of the stolen phone given by one of the victims. Prior to the defendant's arrest, a detective called the phone number associated with the stolen phone, and the phone in the defendant's possession rang.

People v Starks, 91 AD3d 975 (2d Dept 2012)

CUSTODY AND VISITATION

Order of Custody Reversed

Family Court denied respondent mother's motion to vacate an order of custody entered on default. The Appellate Division reversed. Respondent's excuse for not appearing -- that she was not served with the custody petition and petitioner misrepresented that she need not appear on her family offense petition against him because they would resolve it out of court – was reasonable. Respondent also demonstrated a meritorious defense. The custody order stated that respondent had taken the child out of the country without petitioner's permission, but respondent submitted evidence that petitioner had given his consent in writing.

Matter of Jose L. v Yamely H., 91 AD3d 544 (1st Dept 2012)

Eleven- Year Old's Preference Regarding Custody Not Dispositive

Family Court awarded custody of the parties' daughter to her father and stepmother. The Appellate Division affirmed. The court's decision had a sound and substantial basis in the record. Although respondent mother had made progress, she failed to demonstrate that she had overcome the problems that led to the removal of the child from her home. Neither respondent's therapist or the court-ordered expert recommended that the child be returned to respondent. The 11-year-old child's preference to live with respondent, although a factor to be considered, was not dispositive.

Matter of Bianca R., 91 AD3d 560 (1st Dept 2012)

Custody to Father Had Sound And Substantial Basis

Family Court determined that it was in the child's best interests to remain in the custody of his father. The Appellate Division affirmed. The court's decision had a sound and substantial basis in the record.
The child thrived in his father's custody, received regular medical care, participated successfully in his school's gifted and talented program and had extensive bonds with his paternal relatives in New York. While not dispositive, the child preferred to stay in New York with extensive visitation with his mother in Jamaica.

Matter of Ricardo S. v Carron C., 91 AD3d 556 (1st Dept 2012)

Mother Did Not Willfully Violate Visitation Order

Family Court dismissed father's petition for sanctions against respondent mother for violating a court order of visitation. The Appellate Division affirmed. The mother did not willfully violate the order of visitation by refusing to drop off the child for two weeks of summer visitation with the father commencing on August 15, 2010. The mother sent a letter on March 3, 2010 informing the father that she was taking the child on vacation from August 21 through September 5, 2010, and the father acted unreasonably when he notified the mother on April 26, 2010 that he wished to exercise his two-week summer visitation at a time that he knew would overlap with the mother's previously-scheduled plans.

Claudio M. v Janet R., 92 AD3d 459 (1st Dept 2012)

Insufficient Allegations of Extraordinary Circumstances Did Not Warrant Hearing

Family Court dismissed petitioner's custody petition. The Appellate Division affirmed. The allegations of extraordinary circumstances in the petition were not sufficient to warrant a full evidentiary hearing. Although petitioner contended that the child's parents suffered from mental illnesses and the father had anger management issues, the record showed that an ACS caseworker had been actively monitoring the parents' situation and had referred them for preventative services, including mental health counseling. The caseworker confirmed that the child's safety was not at issue.

Matter of Evangeline R. v Jonathan R., 92 AD3d 482 (1st Dept 2012)

Relocation Properly Denied

Supreme Court denied plaintiff mother's application to relocate to Luxembourg and determined plaintiff's visitation schedule with the parties' children. The Appellate Division affirmed. Plaintiff failed to demonstrate that the denial of her application to relocate lacked a sound and substantial basis in the record or that the relocation was in the children's best interests. She failed to demonstrate that the relocation was warranted based upon economic necessity or that she would receive increased support from her extended family because of the move. Defendant father had a stable job and had for the past four years maintained a stable home for the children in the community where they had always lived. The children were happy and successful in their current school. The court considered seriously and addressed the court-appointed evaluator's concerns about defendant's alcoholism and his failure to communicate appropriately with plaintiff. The court placed strict restrictions on defendant's continued custody of the children, including that he maintain sobriety and continue intensive treatment, attend thrice-weekly therapy sessions, submit to mandatory testing, and install an Interlock breathalyzer ignition system in his car. The court also ordered defendant to maintain open communication with plaintiff about the care and education of the children. Plaintiff's visitation schedule was reasonable.

Matter of Anne S. v Peter S., 92 AD3d 483 (1st Dept 2012)

Child's Aunt Failed to Establish Extraordinary Circumstances

Family Court awarded custody of the child to petitioner father and vacated an order of guardianship to respondent paternal aunt. The Appellate Division affirmed. Respondent had been adjudicated the child's guardian on consent of the parents and had custody of the child for three years before petitioner filed a petition to vacate the guardianship order and sought custody of the child. In opposing the petition, respondent failed to establish extraordinary circumstances. Although the child lived with respondent for six years, petitioner maintained contact with the child except when prevented from doing so by respondent, visited the child on a regular basis and provided material support for the child. Respondent's contention that she was prejudiced by the court's refusal to consider the opinion of the forensic evaluator was unpreserved and in any event the report was unreliable because respondent concealed from the evaluator repeated instances of domestic violence in respondent's home.

Matter of Hezekiah L. v Pamela A. L., 92 AD3d 506 (1st Dept 2012)

Enrollment in Pre-Kindergarten in NJ in Child's Best Interests

Supreme Court granted plaintiff mother's application to enroll the parties' child in a pre-kindergarten in New Jersey and denied defendant father's application to modify the parties' parental access schedule. The Appellate Division affirmed. The court's decision regarding the child's enrollment in a pre-kindergarten in New Jersey was a proper exercise of discretion and the record supported the conclusion that the arrangement was in the best interests of the child. The court properly exercised its discretion in declining to disturb the parental access schedule, which had been in effect for nearly two years. There was no showing of a change in circumstances.

Strauss v Saadatmand, 92 AD3d 508 (1st Dept 2012)

Court Erred in Failing to Hold Hearing on Changed Circumstances

Family Court suspended petitioner mother's visitation until she could provide evidence of counseling to address her inability to communicate with respondent father without hostility. The Appellate Division reversed. The court erred in modifying the prior order of visitation without conducting a full evidentiary hearing to determine whether there had been a change in circumstances and whether modification was in the child's best interests. The court also lacked authority to condition the mother's visitation upon her undergoing therapy.

Matter of Sandra C. v Enrique M., 92 AD3d 577 (1st Dept 2012)

Custody to Mother Had Sound And Substantial Basis

Family Court determined that it was in the child's best interests to grant custody to respondent mother. The

Appellate Division affirmed. The court's decision had a sound and substantial basis in the record.
Petitioner father attempted and intended to thwart any relationship between the mother and the child, while the mother was willing to ensure that the father had frequent contact with the child. The mother was the child's primary care-giver before the father gained de facto custody after a weekend visit. The father failed to attend to the child's educational needs and was not involved in the child's upbringing. The father abused the mother, sometimes in the presence of the child.

Matter of Angel M. v Nereida M., 92 AD3d 583 (1st Dept 2012)

Change From Joint Custody to Sole Custody to Mother Had Sound And Substantial Basis

Family Court awarded respondent mother sole legal and physical custody of the parties' child with visitation to petitioner father. The Appellate Division affirmed. The court's decision had a sound and substantial basis in the record. Following entry of the parties' divorce, which incorporated a stipulation for joint custody, there was a complete breakdown in communication between the parties and an incident of domestic violence in the child's presence. Also, petitioner violated the parties' stipulation by prohibiting respondent from contacting the child when he was with petitioner and twice refused to alert respondent to the fact that the child had been hospitalized. The court also properly determined that relocation to respondent's home in New Jersey, which was allowed under the stipulation, and modification of petitioner's visitation, was in the child's best interests.

Matter of West v Vanderhorst, 92 AD3d 615 (1st Dept 2012)

Extraordinary Circumstances Established – Custody Granted to Non-Parent

Family Court granted paternal grandmother's petition for custody of the subject child with visitation to respondent mother. The Appellate Division affirmed. The court properly found that extraordinary circumstances existed and that it was in the child's best interests to grant custody to petitioner. The record established that the child had lived with petitioner for most of her life and had thrived in her care. In contrast, there was a finding of neglect against respondent based on her mental illness, which had persisted and prevented the child from developing a trusting and loving relationship with respondent.

Matter of Jessica W., 93 AD3d 438 (1st Dept 2012)

Plenary Evidentiary Hearing Unnecessary in Determining Father's Right to Unsupervised Visits

Family Court awarded father unsupervised visitation with his child without holding a full hearing. The Appellate Division affirmed. The court took judicial notice of the parties' many appearances during the past year, the five year order of protection it had issued against father on behalf of mother, and testimony from forensic social worker who had observed some 80 supervised visits between father and child during past year, which were overwhelmingly positive. The Court determined that the child was at risk only when parties were in relationship and the child was exposed to domestic violence committed by father against mother. However, because there had not been any violent incidents this past year during child exchanges at the agency's office and exchanges were made without contact between the parties, there was no risk to child.

Matter of Myles M. v Pei-Fong K., 93 AD3d 474 (1st Dept 2012)

Child's Best Interest To Grant Sole Custody to Mother

After a fact-finding hearing, Family Court set aside parties' parenting agreement and awarded mother sole legal custody of the parties' child and modified father's parenting schedule. The Appellate Division affirmed. Sole custody was appropriate because parents' relationship was "characterized by acrimony and mistrust." It was in child's best interest under totality of circumstances for mother to have custody because she was better able to meet the child's emotional and intellectual needs. The father bullied the mother, spoke negatively about her to child and repeatedly failed to foster relationship between child and mother. The mother's decision to seek mental health treatment showed she was taking appropriate steps to deal with her depression and there was no showing that this affected her parenting ability. Finally, the court did not have to appoint an attorney for children because there was no indication that child's interests were prejudiced in any way.

Matter of Sendor v Sendor, 93 AD3d 586 (1st Dept 2012)

Father's Custody Petition Denied and Dismissed Without Hearing

petitioner father filed to modify custody order awarding custody to maternal grandmother. Family Court dismissed father's petition without a hearing. The Appellate Division affirmed. There was no showing of changed circumstances. Although the father alleged that grandmother was facing criminal charges for theft, the criminal charge had been pending for five years and were based upon allegations made by father against grandmother while he was incarcerated,

Whitter v Ramroop, 93 AD3d 604 (1st Dept 2012)

In Child's Best Interest to Award Custody to Father

After a fact-finding hearing, Family Court awarded custody of parties' child to father and granted visitation to mother. The Appellate Division affirmed. The court properly determined that it was in child's best interest for father to have custody because he provided a healthy, stable home for child, was able to provide for child emotionally and financially, and was actively participating in child's educational and special needs. The mother suffered from emotional issues and put her needs before child's needs, showed poor judgment in disciplining child, was not involved with child's educational needs, and was evasive about her financial resources.

Matter of Adriano D., 94 AD3d 448 (1st Dept 2012)

Substantial Change in Circumstances

Family Court modified a prior custody order, awarding sole physical and legal custody of the parties' children to father, with liberal visitation to mother. The Appellate Division affirmed. The prior order awarded primary physical custody to mother and allowed her to relocate to North Carolina. There was a significant change in circumstances based upon mother's unilateral decision to home-school children despite being unqualified to do so; her failure to keep father apprised of children's address and living conditions; and her habit of leaving children in care of church members who inflicted corporal punishment on the children. It was in children's best interest for custody to be with father because, among other factors, they were negatively affected by mother's behavior, their social and educational development was delayed, and they were thriving in father's care.

Matter of Blerim M. v Raquel M., 94 AD3d 562 (1st Dept 2012)

More Frequent Overnight Visits Between Child and Mother Not in Child's Best Interests

Upon reviewing the record, the Appellate Division found that the Family Court's determination to limit overnight weekend visits to once per month, rather than twice, was supported by a sound and substantial basis in the record. More frequent overnight visits between the child and the mother would have resulted in the child spending less time with her half-brother, with whom the child had a very close relationship. In addition, the subject child, who was nine years old, had expressed her clear preference to have only one overnight weekend visit with the mother per month. Accordingly, the Family Court properly, in effect, granted the mother's petition to modify the prior order of custody and visitation only to the extent of having directed her to have one overnight weekend visit and three day visits with the child per month.

Matter of Crowder v Austin, 90 AD3d 753 (2d Dept 2012)

Evidence of Mother's Interference with Father's Visitation and Her Uncooperative Behavior Was Not Sufficient to Justify Change of Custody

Although there was evidence that the custodial mother had interfered with the father's visitation, her uncooperative behavior was not sufficient to justify a change of custody, rather, the evidence indicated that it was in the best interests of the child, who had been with the mother for eight years, since the age of four, to remain with the mother, who was not an unfit parent; the child was well cared for and thriving under her mother's care, and she preferred not to be uprooted from her current home, school, friends and activities. As to the issue of visitation, there was substantial evidence that unsupervised visitation with the father in a nontherapeutic setting would be detrimental to the child. Moreover, the child herself clearly expressed to the court that she would not agree to visitation except in a supervised setting. Under these circumstances, the

Supreme Court's determination that visitation supervised by a therapist would be in the best interests of the child had a sound and substantial basis in the record.

Cervera v Bresler, 90 AD3d 803 (2d Dept 2012)

Remittal Was Necessary for a Hearing as to Whether Mother's Visitation with Child in Mother's Home Was in Child's Best Interests

In a custody and visitation proceeding, the attorney for the child appealed from an order of the Family Court, which granted, without a hearing, the mother's petition for unsupervised visitation with the child in the mother's home. Upon reviewng the record, the Appellate Division found that the Family Court improvidently exercised its discretion in granting the mother's petition without conducting a full evidentiary hearing as to whether the mother's visitation with the child in the mother's home was in the child's best interests. Accordingly, the matter was remitted to the Family Court for a full evidentiary hearing as to whether the mother's visitation with the subject child in the mother's home was in the child's best interests, the completion of a full forensic evaluation of the mother and a home study, and thereafter, for a new determination.

Matter of James v Jeffries, 90 AD3d 929 (2d Dept 2012)

Mother Established Sufficient Change in Circumstances

The mother's greater sensitivity to emotional and psychological needs of her 13 and 15 year-old children, coupled with children's strong preference to reside with mother, constituted sufficient change in circumstances warranting modification of existing child custody arrangement so as to award mother sole physical custody of children. See FCA § 652. Consequently, the Family Court improvidently exercised its discretion in denying the mother's petition. The case was remitted, however, to the Family Court to establish an appropriate visitation schedule for the father.

Dorsa v. Dorsa, 90 A.D.3d 1046 (2d Dept 2012)

Mother Directed to Ensure Children Abide by by Rules of Religious Community During Visitation

The Family Court's determination that it was in the children's best interests to direct the mother to ensure that, during visitation, the children abided by the rules of their respective Satmar Hasidic community schools whenever possible had a sound and substantial basis in the record, which included a stipulation entered into by the parties.

Matter of Indig v Indig, 90 AD3d 1050 (2d Dept 2012)

Evidence Did Not Support Granting Attorney for the Child's Motion to Prohibit Mother from Communicating with the Media

In related family offense and custody and visitation proceedings, the mother appealed from an order of the Family Court which granted the father's motion to dismiss the mother's family offense petition, modified a prior order of visitation of the same court so as to require that the mother's visitation with the subject child be supervised, and granted the the motion of the attorney for the child which was to prohibit the mother from engaging in any communications with the media about this case, about the respondent, or about the subject child, and to prohibit her from providing any personal information relating to the subject child to any website or Internet location. A review of the record revealed that the Family Court was presented with sharply conflicting testimony as to whether the father harassed the mother. The Family Court's determination that the mother failed to establish that a family offense was committed was based upon its assessment of the credibility of the parties, and was supported by the record. Furthermore, contrary to the mother's contention, the Family Court did not err in modifying a prior order of visitation so as to require that her visitation with the child be supervised without conducting a hearing on that issue. Here, in light of, inter alia, the parties' numerous court appearances and submissions, and the Family Court's near-constant supervision of this matter, the Family Court possessed sufficient information to render an informed determination consistent with the best interests of the child. Furthermore, the record supported a finding that modification of the prior visitation order so as to require that the mother's visitation with the child be supervised was not an improvident exercise of discretion. However, the Family Court erred in granting the motion of the attorney for the child which was to prohibit the mother from engaging in any communications with the media about this case, about

the respondent or about the subject child, and to prohibit her from providing any personal information relating to the subject child to any website or Internet location. Although communications or disclosures made by the mother which were inconsistent with the best interests of the child would have served to support the additional curtailment of the mother's parental rights or the issuance of an order limiting her communications, the Appellate Division's review of the record indicated that the attorney for the child failed to adduce sufficient evidence to justify such relief at that time.

Matter of Sepulveda v Perez, 90 A.D.3d 1057 (2d Dept 2012)

Father's Request for Midweek Visitation Denied

Contrary to the father's contention, there was a sound and substantial basis in the record for the Family Court's denial of his request for additional midweek visitation. Moreover, the father was awarded liberal visitation which afforded him a meaningful opportunity to maintain a close relationship with the child.

Matter of Grusz v Simonetti, 91 AD3d 645 (2d Dept 2012)

Order Transferring Custody of Child from Commissioner to Father Who Lived in Virginia Violated ICPC

The mother appealed from an order of disposition which terminated the custody and supervision of the subject child by the Commissioner of Social Services, and temporarily awarded custody to the father, who lived in Virginia. The mother, inter alia, argued that she should be have been permitted to withdraw her consent to the jurisdiction of the Family Court with respect to the finding of neglect, since her consent was not validly entered into (see FCA § 1051[a]). However, the mother did not ever request that relief before the Family Court (see FCA §1051[f]). Consequently, that contention was not properly before the Appellate Division. However, it was undisputed that the relevant authorities in Virginia did not approve the proposed placement of the subject child pursuant to the Interstate Compact on the Placement of Children (ICPC). Therefore, the order was held to be improper and the child was remanded to the supervision of the Commissioner of Social Services pending a new dispositional hearing (see FCA § 1027[b] and § 1073).

Matter of Alexus M. v Jenelle F., 91 A.D.3d 648 (2d Dept 2012)

Error to Grant Application Without Conducting a Full Evidentiary Hearing

In October 2010 the father filed a petition to modify a prior order of visitation dated January 14, 2010. In opposing the father's petition, the attorney for the child, based on the father's submissions, requested that the Court limit the father's parenting time to periods of "short duration and in a specific location." In an order dated December 7, 2010, the Family Court, without a hearing, in effect, denied the father's petition and granted the application of the attorney for the child to modify the prior order of visitation dated January 14, 2010, so as to limit the father's parenting time to brief visits at public places. The father appealed. Contrary to the father's contention, the Family Court had the authority to grant the relief requested by the attorney for the child in her opposition to his petition. However, under the circumstances of this case, the Family Court erred by, in effect, denying the father's petition and granting the application of the attorney for the child without conducting a full evidentiary hearing. Here, the Family Court did not possess adequate relevant information to determine that the limitation of the father's parenting time to brief visits at public places was in the best interests of the child. To the extent that the Family Court relied on the detailed accounts provided by the attorney for the child concerning her conversations with the child, it is inappropriate for an attorney for the child to present " 'reports containing facts which are not part of the record' ". Accordingly, the matter was remitted to the Family Court for a hearing on the father's petition and the application of the attorney for the child, including an in camera interview with the child, and thereafter a new determination of the father's petition and the application of the attorney for the child. Further, the Appellate Division directed, in light of certain remarks made by the Family Court Judge, that the proceeding be held before a different Judge.

Matter of New v Sharma, 91 AD3d 652 (2d Dept 2012)

Relocation Not in Child's Best Interests

The Family Court's determination that it was not in the

child's best interests to relocate to Alabama had a sound and substantial basis in the record. The mother established that she had the opportunity to live rent-free in Alabama, in a home owned by her mother and stepfather, who live nearby. However, she did not have a job awaiting her in Alabama, and her evidence allegedly showing that the school which the child might have been able to attend in Alabama was better than the school he attended in New York, was conclusory. The father established that he consistently exercised his right to visitation with the child, and desired to spend more time with him, and that the mother made minimal effort to foster the relationship between him and the child. Under the totality of the circumstances, the Appellate Division agreed with the Family Court that the purported benefits of the proposed relocation did not justify the drastic reduction in visitation with the father which would have occurred, and thus, the proposed relocation was not in the best interests of the child.

Matter of McBryde v Bodden, 91 AD3d 781 (2d Dept 2012)

Parents Willfully Refused to Allow Grandmother to Visit with Children

In a prior decision, dated August 10, 2010, the Appellate Division concluded that, contrary to the Family Court's determination, it was in the grandchildren's best interests to have monthly supervised visitation with the petitioner grandmother. The petitioner's sister was appointed to supervise the visitation. Thereafter, the petitioner filed two petitions which were the subject of this appeal, one to modify the prior order of visitation, dated September 5, 2007, by substituting the YWCA for her sister as the entity designated to supervise visitation, as her sister no longer wished to serve in this capacity and was unavailable to supervise future visitation. In the other petition, the grandmother sought to enforce the decision and order of the Appellate Division dated August 10, 2010. In the orders appealed from, the Family Court dismissed both petitions, determining that, as to each petition, the grandmother failed to establish a prima facie case. Contrary to the Family Court's determination, the grandmother established, prima facie, that there had been a sufficient change in circumstances such that modification of the prior order to substitute the YWCA for her sister as the entity designated to supervise visitation was warranted to further the grandchildren's best interests. Similarly, based on the evidence before the Family Court, as well as the background and history of the case with which the Family Court was fully familiar based on prior proceedings, the grandmother satisfied her prima facie burden with regard to the petition, in effect, to enforce the decision and order of the Appellate Division dated August 10, 2010. The record established, prima facie, that the parents, in willful violation of prior court orders, refused to allow the grandmother to visit with the children. Accordingly, the Appellate Division remitted the matter to the Family Court for a new hearing on the grandmother's petitions and a new determination thereafter. Under the circumstances of this case, the Appellate Division directed that the hearing be held before a different Judge.

Matter of Peralta v Irrizary, 91 ad3d 788 (2d Dept 2012)

Relocation to Virginia with Father Permitted

Upon reviewing the record, the Appellate Division found that the father established that the relocation to Virginia was economically necessary, that the child's life would be enhanced emotionally and educationally by the move, that the move would not have a negative impact on the quality of the child's future contact with the mother, and that it would be feasible to preserve the relationship between the mother and child through suitable visitation arrangements. The father established by a preponderance of the evidence that the relocation to Virginia was in the subject child's best interests. It was noted that the Family Court's determination to allow the father to relocate to Virginia with the child was in accordance with both the child's stated preference and the position of the attorney for the child.

Matter of Shaw v Shaw, 91 AD3d 879 (2d Dept 2012)

Mother's Petition to Relocate with Child to Colorado Denied

Upon reviewing the record, the Appellate Division found a sound and substantial basis for the Family Court's denial of the mother's petition which was for permission to relocate from Brooklyn to Colorado with the subject child. The testimony at the hearing revealed that, although the mother has been the primary custodial parent, both parents had a close and loving relationship with the child and had taken an active role

in his upbringing and well-being. It was undisputed that, since the parties' separation, the father had regular and frequent visitation, often for substantial periods of time at his home in Pennsylvania. During this time, the child developed a strong and loving relationship not only with his father, but also with various members of the father's extended family. Accordingly, the mother failed to demonstrate by a preponderance of the evidence that the proposed relocation would have been in the child's best interests.

Matter of Retamozzo v Moyer, 91 AD3d 957 (2d Dept 2012)

Relocation with Mother Was in Children's Best Interests

Contrary to the father's contention, the Family Court's determination did not lack a sound and substantial basis in the record. The mother established by a preponderance of the evidence that there was a change in circumstances and that her relocation with the children to Southampton, New York, 55 miles from their current residence in Huntington, New York, was in the children's best interests.

Matter of Sweetser v Willis, 91 AD3d 963 (2d Dept 2012)

New York Court Failed to Confer with Florida Court When Custody Proceedings Were Pending in Both States

In November 2009, the mother sought to modify the custody and visitation provisions of a 2008 Florida judgment of divorce, entered upon the parties' stipulation, which, among other things, awarded the father primary residential custody of the subject child. Before any determination could be made in this proceeding, the father relocated with the subject child to Florida. Thereafter, on December 22, 2009, the Family Court issued a determination, in effect, dismissing the petition for lack of jurisdiction, and it advised the mother to seek relief in Florida. However, when the mother subsequently commenced a custody proceeding with respect to the subject child in Florida, the Florida court determined that Florida was an inconvenient forum and that New York was the more appropriate forum, and it stayed the custody proceeding commenced in the Florida court. The mother then moved in the Family Court in New York, inter alia, to vacate the Family Court's determination dated December 22, 2009. Without consulting with the Florida court, the Family Court denied the motion in an order dated March 2, 2011. A review of the record showed that at the time the mother commenced the modification proceeding in November 2009, New York had jurisdiction to modify the custody and visitation provisions of the parties' Florida judgment of divorce. Nonetheless, the courts of New York and Florida should have conferred with each other pursuant to DRL § 76–e since custody proceedings were pending in both states. Since the Family Court had made its initial determination, in effect, having dismissed the petition in the modification proceeding, the father and the subject child had since resided in Florida. In view of these circumstances, the Appellate Division remitted the matter to the Family Court and directed the court to contact the Florida court so that the courts of the two states could confer with each other and determine which state was the more appropriate forum for the proceeding at that juncture.

Matter of Guzman v Guzman, 92 AD3d 679 (2d Dept 2012)

Family Court Erred When it Conditioned Future Applications by the Mother for Additional Visitation upon Approval of Attorney for the Child

Contrary to the mother's contention, the Family Court's determination that it would not have been in the best interests of the children for it to modify a prior order awarding the father sole custody of the parties' children so as to award her sole custody, had a sound and substantial basis in the record. Although, as a general rule, determinations regarding custody and related matters should be made after a full evidentiary hearing, here, the mother consented to the Family Court's so-called "mini-hearing" procedure, thus waiving her right to a full evidentiary hearing. In any event, a full evidentiary hearing was not necessary, since the Family Court possessed sufficient information to render an informed decision consistent with the best interests of the children. The Appellate Division did agree, however, with the mother's contention that the Family Court erred in directing that "[n]o petition requesting additional visitation by the mother shall be accepted by the court until the [attorney for the children] has approved of such a request". The Court noted that the alternatives to that provision proposed by the father and the attorney for the children in their respective briefs

also would have been improper.

Aquino v. Antongiorgi, 92 A.D.3d 780 (2d Dept 2012)

Supreme Court Properly Admitted Forensic Evaluator's Testimony and Report

Contrary to the father's contention, the Supreme Court did not err in admitting the report and testimony of the forensic evaluator because it was based, in part, on hearsay. Although the collateral witnesses did not testify at trial, the forensic evaluator testified at trial that her conclusions were based on her interviews with the parties and the children. Moreover, some of the evidence referred to by the collateral witnesses was eventually admitted at trial through other witnesses. Under these circumstances, and in light of the sharply conflicting testimony regarding the conduct of the parties, and evidence suggesting that the children were exhibiting behavioral problems, the Supreme Court properly admitted the forensic evaluator's testimony and report.

Ashmore v. Ashmore, 92 A.D.3d 817 (2d Dept 2012)

Family Court Improvidently Exercised its Discretion by Prohibiting Father from Filing Another Petition for Visitation for a Period of Three Years

Upon reviewing the record, the Appellate Division found that there was a sound and substantial basis in the record to have established that, under the circumstances, including the logistical difficulties and expense in arranging for the children to travel the significant distance to visit the father in person, the parties' relative lack of resources, and the incarcerated father's refusal to seek a transfer to a facility closer to the children, visitation with the father in person was not in the children's best interests unless the father contributed toward the cost of such visitation. Furthermore, the Family Court's determination that the father should have only monthly telephone contact with the children was supported by a substantial basis in the record. However, the Family Court improvidently exercised its discretion by prohibiting the father from filing another petition for visitation for a period of three years. Since transportation was the primary obstacle to visitation in person between the children and the father, its removal as an obstacle, were the father to be transferred to a correctional facility closer to the children, might constitute changed circumstances justifying modification. Thus, the Family Court's determination that the father could not file another visitation petition for a period of three years was not in the best interests of the children.

Matter of Smith v Smith, 92 AD3d 791 (2d Dept 2012)

Appellant Not Entitled to Further Adjournment to Retain Counsel

The appellant's contention that he was deprived of his right to counsel at a custody hearing was without merit. After five days of the seven-day hearing, the Family Court granted the application by the appellant's counsel to be relieved. Subsequently, the appellant appeared before the Family Court and was afforded an opportunity to apply for assigned counsel, but he refused to answer questions regarding his financial status. The Family Court adjourned the matter for four months so that the appellant could seek new counsel. T he appellant failed to do so. On the next day of the hearing, the appellant disclosed his financial information, but his request for assigned counsel was denied. The appellant indicated that he was not willing to retain an attorney, and he proceeded pro se for the final two days of the hearing. Since the appellant did not qualify for assigned counsel, and was unwilling to retain counsel, the Family Court properly declined to grant a further adjournment.

Matter of Garner v Garner, 94 AD3d 761 (2d Dept 2012)

Termination of Mother's Visitation in the Child's Best Interests

In an order dated October 6, 2008, entered on the consent of the parties, the mother was awarded, inter alia, supervised visitation with the subject child twice per month for three hours, with the supervision to have been conducted by an individual who was mutually agreeable to the parties. In a petition dated June 4, 2009, the father sought to modify the visitation provisions of that order on the ground, inter alia, that the mother verbally abused the children during the supervised visits, causing a negative emotional impact on the subject child. After a hearing, the Family Court denied the petition on the ground that the father failed to show a change in circumstances. Here, although the abuse alleged in the petition took place prior to the

entry of the order dated October 6, 2008, and although there was evidence that the mother had acted inappropriately around the child during supervised visits that took place prior to the entry of that order, there was also evidence that the supervised visits that took place after the entry of that order were increasingly disruptive and caused the child to suffer increasing amounts of stress. Thus, the father made a sufficient showing of a subsequent change of circumstances. Under the circumstances of the case, including the child's vehement opposition to any form of visitation with the mother and the recommendation of the court-appointed forensic examiner that the mother's visitation be terminated, the Appellate Division agreed with the father and the attorney for the child that the child's best interests would be served by the termination of the mother's visitation with that child.

Matter of Krasner v Krasner, 94 AD3d 763 (2d Dept 2012)

Family Court Was Required to Determine Whether Visitation Was in Child's Best Interests

In 2009 the petitioner agency commenced a proceeding alleging that Gaston Y. had engaged in sexual contact with the daughter of his former paramour, and sought to limit his contact with the subject child, the daughter of his new paramour. In an order of fact-finding and disposition dated April 28, 2010, the Family Court, inter alia, found that Gaston Y. had neglected the subject child, and placed Gaston Y. under the petitioner's supervision for a period of one year (*see* Family Ct Act § 1052 [a] [v]; § 1057). The supervision was extended in an order dated April 11, 2011. The terms of Gaston Y.'s supervision included a condition that Gaston Y. have no contact with the subject child. Gaston Y. and the subject child's mother subsequently married. In August 2011, Gaston Y. moved to modify the order dated April 11, 2011, so as to be permitted visitation with the subject child. The petitioner consented to supervised contact between Gaston Y. and the subject child, but the attorney for the child opposed it. In an order dated October 4, 2011, the Family Court, without a hearing, granted Gaston Y.'s motion to the extent of permitting two hours of visitation per week between Gaston Y. and the subject child. Under the circumstances of this case, the Appellate Division agreed with the attorney for the child that the Family Court should have conducted a full evidentiary hearing before determining whether Gaston Y. demonstrated "good cause" for modification of the prior order of supervision FCA § 1061), and whether modification of the prior order would be in the best interests of the subject child. Accordingly, the matter was remitted to the Family Court for a hearing and new determination.

Matter of Natasha M., 94 AD3d 765 (2d Dept 2012)

Modification of Joint Custody Agreement Warranted

A review of the record indicated that the relationship between the parties had become so antagonistic that they were unable to cooperate on decisions regarding their child. Therefore, the best interests of the child warranted a modification of a stipulated joint custody arrangement, to one with the mother having sole custody of child, and visitation to the father every other weekend and one overnight weekday per week.

Solovay v. Solovay, 94 AD3d 898 (2d Dept 2012)

Evidence Sufficiently Demonstrated Change in Circumstances

A review of the record indicated that the evidence was sufficient to demonstrate a change in circumstances which warranted a modification of the prior order of custody to protect the best interests of the child. The father presented evidence at a hearing which established that the child had developed recurring infections while in the mother's care, and the mother failed to treat the infections as prescribed by the doctor. In addition, the father's evidence showed that the child had numerous absences and was late to school on many occasions when she was in the mother's care. The child was thriving in the father's care, and her previously recurring medical issues had resolved. Moreover, the father actively participated in the child's educational process and fostered the relationship between the child and the noncustodial parent.

Matter of Farran v Fenner, 94 AD3d 1116 (2d Dept 2012)

Deterioration of Parties' Relationship Constitutes Sufficient Change in Circumstances

Unmarried parents of one child agreed to temporary order granting mother custody and father parenting

time. Thereafter, the mother sought to suspend the father's visits, alleging his sexual abuse of the child. Upon the parties' consent, the court issued joint legal custody and the parents agreed to a forensic evaluation. After the evaluation was completed, the court issued a shared custody order and directed the mother to withdraw her sexual abuse allegations based on lack of evidence and obtain counseling due to issues raised in the evaluation. Thereafter, the father filed for sole custody alleging that the mother was continuing to make false allegations of sexual abuse and the mother filed for sole custody alleging father was disparaging her to the child. After a fact-finding hearing, the court awarded sole custody to the father and dismissed the mother's petition. On the mother's appeal, the Appellate Division affirmed holding that although the court did not actually make a finding of change in circumstances, evidence of deterioration of the parties relationship, which included mother's continued allegations of sexual abuse, her hostility to the father, her failure to understand the consequences of her negative behavior to father and effects on child, supported the Family Court's order. Additionally, the father was more willing than mother to foster relationship between child and non-custodial parent.

Matter of Anthony MM. v Jacquelyn NN., 91 AD3d 1036 (3d Dept 2012)

Failure To Communicate Sufficient Basis To Modify Joint Custody To Sole

Mother of two children and boyfriend were investigated by DSS for inadequate guardianship of children and mother placed children in care of maternal grandfather with whom the children had lived for several months. The father and grandfather filed for custody. After a hearing, the court granted sole custody to the grandfather with supervised visits to the father. The father argued on appeal that the grandfather failed to prove extraordinary circumstances. The Appellate Division affirmed finding a sound and substantial basis in the record. The evidence showed that the father continued to abuse alcohol and drugs, the caseworker observed unlocked pellet guns left on father's living room shelf, the father failed to maintain consistent contact with children, was inattentive to them, allowed older child to engage in risky behavior and showed little interest in caring for the younger child and father's frequent job and housing changes showed unstable work history and living arrangement.

Matter of Golden v Golden, 91 AD3d 1042 (3d Dept 2012)

Concerns of Drug Use Insufficient to Warrant Change in Circumstances Determination

Mother and father of one child agreed to consent order of joint custody with primary, physical custody to father and parenting time to mother. The mother filed a modification petition alleging, among other things, that father was using drugs. Another consent order was entered, the only change being set supervised parenting times for mother. The mother again filed to modify alleging father had violated terms of probation by failing a drug test. She amended the petition to allege that the child had school absences. After a fact-finding hearing, Family Court dismissed the mother's petition. On appeal mother's sole contention was that the court erred in stating that the father's drug use was not a sufficient change in circumstances to warrant modification. The Appellate Division affirmed holding that the mother had failed to show a real need for change of the order as the evidence showed that the father was engaged in services and the last time he tested positive for drugs was before prior consent order was issued. Court noted attorney for child's position was supportive of court's decision.

Matter of Owens v O'Brien, 91 AD3d 1049 (3d Dept 2012)

Insufficient Evidence of Extraordinary Circumstances

When their relationship ended, the parents of three children filed various custody proceedings. While the litigation was pending, the father left the children with the mother for a month and had no contact with the children. Unaware of this, when the mother failed to appear for a hearing, Family Court awarded custody to the father and visitation to the mother. The father resumed custody of the children and the mother sought to modify based on his prior relinquishment of custody. When he did it again, the parties agreed to custody with the mother. However, when she was arrested, the father withdrew his petition and resumed custody. Thereafter, maternal grandmother filed for custody and after a fact-finding hearing, Family Court granted custody to the grandmother in the children's best interests, finding she had established extraordinary

circumstances based on the mother's pending criminal charges, the father's twice leaving the children for extended periods of time without contact, the fact that the father had destroyed the grandmother's motorcycle and had committed acts of domestic violence against mother. On the father's appeal, the Appellate Division reversed stating that while great deference should be accorded the court, in this case the evidence failed to show extraordinary circumstances as the acts of domestic violence had not resulted in any court order or intervention by DSS. Additionally, the court found mitigating factors with regard to the two times father had left the children. While the parents "have shortcomings"... none rise to the level of unfitness sufficient to permit custody award to grandmother even if she might do a better job of raising the children.

Matter of Aylward v Bailey, 91 AD3d 1135 (3d Dept 2012)

Father Allowed to Relocate to Philadelphia

Parents entered into consent order providing for joint legal custody with primary physical custody to mother and parenting time to father. A year later, both parties filed petitions and after a hearing, Family Court issued an order giving father sole legal custody and visitation to mother. The Appellate Division modified sole to joint legal custody with primary physical custody to father as the father had only sought physical custody and mother had not been on notice that legal custody was at issue. Thereafter, the father filed a modification petition seeking a change in the visitation schedule as he was relocating to Philadelphia due to military orders. Parties filed several petitions, each seeking sole custody. After a hearing, Family Court awarded sole custody to the father and parenting time to the mother. On the mother's appeal the Appellate Division stated that while Family Court should have analyzed this case as a relocation case, not a modification case, it did not err in granting custody to the father. Due to their inability to cooperate and communicate regarding the child, joint custody was not proper. Here, the father was in the Marines and needed to relocate 5 hours away from mother, while currently he lived only 2 hours away. The move would not disrupt the mother's parenting time, which was one or two weekends per month and father could provide a stable home and had stable employment. Additionally, mother and maternal grandmother had repeatedly made false claims that father had sexually abused child, the maternal grandmother impeded father's relationship with both child and mother, and mother did not oppose grandmother's actions. Father was more likely than mother to foster relationship between child and non-custodial parent.

Matter of Adams v Bracci, 91 AD3d 1046 (3d Dept 2012)

Sexual Abuse in the Second Degree Constitutes Change in Circumstances

Parents of two children divorced and pursuant to terms of separation agreement, agreed to joint legal custody with primary physical custody to mother and visitation to father. Eight years later, the father plead guilty to sexual abuse in the second degree of his live-in girlfriend's eight-year-old daughter, and was sentenced to 60 days in jail. Mother filed modification petition seeking sole legal custody and supervised visits for father. After a hearing, Family Court granted mother's petition and the father appealed. The Appellate Division affirmed holding that the father's abuse, his attempts to minimize his relationship with the victim, his lack of insight as to the impact that his conduct and conviction had on both the victim and his biological children, evidenced there had been a "subsequent change in circumstances". As to visitation, the Appellate Division gave deference to Family Court's discretion and refused to disturb it as long as there was sound and substantial basis in the record. The children were impacted by his behavior and despite father's testimony that he accepted responsibility for his actions, as of hearing date, he still had not entered a treatment program.

Matter of Knight v Knight, 92 AD3d 1090 (3d Dept 2012)

Failure of Offer Excuse for Nonappearance Justifies Dismissal

Parents entered into consent order of joint custody with primary physical custody to the mother and visitation to the father. A year later, the father sought modification seeking sole custody. The father's assigned counsel sought an adjournment of the trial, contrary to father's wishes. He sought and obtained new counsel who twice sought, unsuccessfully, to adjourn the court date. Despite the upcoming trial, the father left for Florida and from there went to Louisiana, allegedly for "health

reasons". On the day of trial, the father failed to appear and declined Family Court's offer for him to testify electronically, claiming that he had not had sufficient time to confer with his attorney. Family Court granted the mother's motion to dismiss the father's petition and he appealed. The Appellate Division affirmed holding that the father chose to leave the state and not meet with his counsel, provided no medical evidence to support his claimed infirmity and offered no explanation for his failure to testify electronically.

Matter of Derek P. v Doris Q., 92 AD3d 1103 (3d Dept 2012)

Children's Best Interest to Modify Joint to Sole

Parents stipulation to joint custody with parenting time to each was incorporated into judgment of divorce. On the day following entry of the divorce, the father filed to modify custody alleging that the mother had interfered with his scheduled visits and denied him phone contact with children. Numerous family offense and violation petitions followed. After a fact-finding and two *Lincoln* hearings, Family Court awarded sole custody to the father with visitation to the mother and two orders of protection against mother on behalf of father and his girlfriend. On the mother's appeal, the Appellate Division affirmed holding that to set aside a joint custodial agreement, the petitioner must show a sufficient change in circumstances since the prior order and that a modification is in children's best interests. Here, the father had met his burden of showing change in circumstances through evidence of, among other factors, mother's interference with his visitation schedule which at times had been caused by mother forcing the children to hide in her house, refusal to allow the paternal grandmother to pick up the children in direct violation of agreement, prevention of phone contact, refusal to allow daughter to take schoolwork with her when visiting father which caused daughter's grades to drop, cancellation of son's after school activities when she learned father and his family would be attending the event. The Appellate Division found ample support that it was in children's best interest to modify the order as record showed that the mother admitted to sending the father harassing text messages, e-mails and phone messages, she cancelled mental health and dental appointments for children that were scheduled during father's parenting time, refused to share the children's medical, educational and other important information with father, allowed the daughter to read disturbing text she sent to father's girlfriend, reprimanded the children for discussing father and his girlfriend in her presence, told the children to speak negatively about father and his girlfriend to others, and had a physical altercation with daughter to prevent her from taking her backpack to fathers home.

Matter of Timothy N. v Gwendolyn N., 92 AD3d 1155 (3d Dept 2012)

Custody to Mother in Children's Best Interests

After trial, Supreme Court granted divorce based on cruel and inhuman treatment by husband and awarded parties joint legal custody with primary physical custody to the mother. On the father's appeal, the Appellate Division affirmed finding found no abuse of discretion and a sound and substantial basis in the record. Factors to consider in determining best interests include the parents' ability to provide a stable home environment for the child, the child's wishes, the parents' past performance, relative fitness, ability to guide and provide for the child's overall well-being, and willingness to foster a relationship between child and the other parent. In this case, the mother had been the primary caregiver, she was actively involved in the children's education, saw to their medical care, had a work schedule that allowed her to care for children after school and she encouraged relationship between children and father. The father, however, did not have stable work history, worked till 8:00 p.m. most days, did not interact much with the children when they were with him, did not know names of children's teachers, did not attend parent-teacher conferences and made little effort to attend their extra curricular activities.

Helm v Helm, 92 AD3d 1164 (3d Dept 2012)

Sound and Substantial Basis in the Record

On cross-petitions for custody, Family Court issued a temporary order of physical custody to father and after fact-finding hearing, awarded joint legal custody with primary physical custody to mother and visitation to father. On the father's appeal, the Appellate Division held that in determining initial custody, the court has to consider what is in the child's best interest by taking into consideration the parents' ability to provide a stable home environment for the child, the child's wishes, the parents' past performance, the relative fitness, ability to guide and provide for child's overall

well-being and the willingness to foster relationship between child and non-custodial parent. In this case, despite the fact that the child had lived with the father pursuant to terms of temporary order and had close relationship with him, he had history of drug abuse and as recently as 2010, had abused crack cocaine and tested positive for opiates, had failed to complete counseling or treatment programs, had history of intermittent employment and a criminal history. In contrast, the mother was gainfully employed and received health benefits for both herself and child and was able to provide a suitable home environment for child. Therefore, Family Court's decision had sound and substantial basis in the record.

Matter of Raynore v Raynore, 92 AD3d 1167 (3d Dept 2012)

Father Not Deprived of Meaningful Assistance of Counsel

Mother was awarded sole custody of the parties' three children and the father was entitled to supervised visits. The father filed custody violation and modification petitions requesting joint legal custody and asking that his visits be supervised by his girlfriend. After combined fact-finding hearing where only the mother and father testified, Family Court dismissed both petitions. The father argued on appeal that he was denied effective assistance of counsel as his attorney had failed to call his girlfriend as a witness. The Appellate Division affirmed holding no deprivation of meaningful assistance of counsel as the father's attorney had conducted competent direct and cross-examination, had discussed with the father whether to call the girlfriend as witness but it was father who had decided he did not want her to testify, and record showed that her testimony would not necessarily have been in father's favor. Additionally, Family Court's decision was based on variety of factors including, among other things, the children's position that they did not want additional contact with father.

Matter of Heater v Peppin, 92 AD3d 1169 (3d Dept 2012)

Court Cannot Issue Order of Custody Absent Request for Such Relief

Parents shared joint legal custody with primary physical custody to mother. DSS filed neglect petitions against both parents and each admitted to neglect. The children were placed in the custody of the paternal grandparents. The mother successfully completed all the required programs and DSS revised its permanency plan to joint legal custody of children with parents, primary physical custody to mother. Supreme Court determined, upon consent of the father, mother and DSS that it was in children's best interests to terminate custody of children with DSS and return the children to the mother. The court also, *sua sponte,* entered an order of sole custody to the mother stating it would be in the best interests of the children. The Appellate Division agreed with the father on appeal that Family Court erred in modifying custody absent a specific request for such relief. Lack of notice and opportunity to be heard was a deprivation of the father's due process rights.

Matter of Alexis AA., 93 AD3d 1090 (3d Dept 2012)

Sound and Substantial Basis to Award Sole Custody to Mother

After divorce trial, Supreme Court awarded sole custody to mother and parenting time to father. The father claimed ineffective assistance of counsel on appeal. He stated that he had attempted to hire the mother's attorney and had a phone conversation with him and that during the trial he felt uncomfortable answering certain questions posed to him by the mother's attorney which he felt had been discussed in that phone call. The Appellate Division dismissed the appeal finding that the record showed that while the father stated he felt "strange" about answering counsel's questions, he also stated he did not have any problems answering the questions and did not want mother's counsel disqualified. Giving deference to the court's credibility determinations, the Appellate Division found there was sound and substantial basis in the record to award sole custody to mother. The parties' relationship with one another was hostile and they were unable to make joint decisions regarding the children. The father spoke to the children about his child support payments telling them mother took all his money to spend on herself. The daughter was able to manipulate the father and he was very permissive with the children, behaving more like a friend than a parent. The father allowed the daughter to wear make up and age inappropriate clothing, allowed her to have Facebook page against mother's wishes, allowed the son to drive an adult sized four-wheeler without direct

supervision and engaged in "bullying behavior".

Fiacco v Fiacco, 93 AD3d 1095 (3d Dept 2012)

Failure to Show Sufficient Change in Circumstances

Parents of six children, three of whom are the subject of these proceedings, stipulated to a custody agreement of sole legal custody to mother and visitation to father. This stipulation was incorporated into custody order and later, a judgment of divorce. Approximately three years later, the father filed a modification petition seeking joint legal custody with primary physical custody of younger daughter and shared custody of the son based upon allegations that two of the children wanted to spend more time with him, that the mother was verbally and physically abusive and failed to bring the younger daughter to an out-of-state awards ceremony. After a fact-finding hearing, Family Court dismissed the petition for failure to establish sufficient change in circumstances. The Appellate Division affirmed deferring to Family Court's credibility determinations and findings that abuse allegations were unsubstantiated. The father's argument that the court's failure to allow him to make closing statement requires reversal was dismissed as mother's closing was in writing and father neither responded to this nor requested a court appearance to make closing statement.

Matter of Bond v Bond, 93 AD3d 1100 (3d Dept 2012)

Sound and Substantial Basis

Parents consented to order of joint legal custody with physical custody to mother. Several modification petitions were filed by both parties and Family Ccourt granted the father temporary physical custody. After a fact-finding and *Lincoln* hearing, Family Court granted sole legal custody to the father and visitation to the mother. Mother appealed and the parties thereafter resolved all outstanding issues by stipulation in a divorce action. The mother was assured that the stipulation would not effect her right to appeal the prior order. The father sought to dismiss the appeal as moot but the Appellate Division held that mother's right to appeal custody order was not mooted despite subsequent stipulation as the prior custody order was left "intact in relevant part". However, the court held that Family Court had a sound and substantial basis in the record to modify custody. The factors showing change of circumstances included several hospitalizations of the mother and treatments for escalating alcohol abuse and suicidal ideation; she had also cut her wrists and overdosed on painkillers. While both parents had a loving relationship with the child, it was in child's best interests for the father to have sole custody as parents were unable to communicate effectively regarding the child, father had a more stable home, he demonstrated willingness to discuss child's issues with mother and promote relationship between mother and child. The mother, however, repeatedly failed to relay important information about the child to the father, involved the child in the custody dispute and referred to the father as " an evil person with nothing but bad intentions".

Matter of Poremba v Poremba, 93 AD3d 1115 (3d Dept 2012)

Change in Visitation Needs Showing of Change in Circumstances

Parents entered into consent order of joint custody with primary physical custody to the father and supervised visitation to the mother, with third party supervisor to be agreed upon by parties. Thereafter, the father's live-in-girlfriend began supervising visits. The mother asked the father to change the supervisor and venue because the child would be brought to supervised visits at fast food places and playgrounds where the girlfriend's other friends would also attend with their children and the mother found this environment to be hectic and distracting. Her request was denied so she filed a modification and violation petition and the parties then cross-petitioned for custody. After a fact-finding hearing, Family Court granted the mother's visitation modification petition but dismissed the rest. The father appealed and the Appellate Division held that, as with custody, change in circumstances needed to be shown to modify visitation. Although Family Court failed to make such a finding, the Appellate Division held independent review and affirmed. The chaotic nature of visits where the child was often forced to choose between mother and girlfriend who child saw as parent figure, and child's conflict in deciding whether to spend time with mother or girlfriend, established necessity for change. Additionally, the change was in the child's best interest as the child's counselor's pointed out it was a potential conflict of interest with girlfriend as supervisor as it only served to create greater distance between mother and child.

Matter of D'Angelo v Lopez, 94 AD3d 1261 (3d Dept 2012)

Cumulative Efforts To Interfere With Relationship Between Father and Children Outweighed Mother's Positive Attributes

Mother relocated with the children from Ulster to Suffolk County and commenced family offense proceeding, which was later dismissed, and divorce proceedings against father. The father commenced a custody proceeding in Ulster County which was dismissed due to the pending Suffolk County divorce. He then brought a habeas corpus proceeding in Suffolk County which was resolved through stipulation allowing him visitation. The divorce was transferred to Ulster County and both parties moved for temporary custody and mother also sought child support. The parties agreed to accept the court's determination as a final custody determination and after a hearing, Supreme Court awarded sole custody to the father and ordered the mother to pay child support. On appeal the Appellate Division held that an initial custody determination is based on what is in the children's best interests. Factors to consider include but are not limited to, stability of parent's home environment, child's wishes, parent's past performance, fitness, ability to guide and provide for child's overall well-being and willingness to foster relationship between child and other parent. In this case, the court had sound and substantial basis in the record to award sole custody to father. While both parents were fit and loving and although mother had been primary caregiver, her positive qualities were outweighed by her "cumulative efforts" to interfere with relationship between father and children. She sought multiple orders of protection against father which were all dismissed, cancelled agreed upon visitation between father and children, made unsubstantiated negative allegations that father was a violent substance abuser and had sexually abused the child. She "coached" the child to claim that the father had abused her, relocated to another county to put distance between father and children so she could parent them as she wished. While the father had shown some poor judgement, such as having unsecured guns in his home, he was willing to improve his parenting skills and showed greater willingness to foster relationship between mother and children. Giving due deference to the lower court's credibility assessment, the Appellate Division agreed that parties' hostility and inability to communicate would not make joint custody feasible. Issue of retroactive support owed by mother was remitted.

Jeannemarie O. v Richard P., 94 AD3d 1346 (3d Dept 2012)

Default Order of Sole Custody With No Visitation Affirmed

Mother filed for sole custody of her two children. The father failed to appear at fact-finding and Family Court awarded mother sole custody by default, issuing a bench decision. The father appeared in court one hour later seeking modification. After fact-finding, the court found no change in circumstances and dismissed his petition. On appeal the father argued that his petition should have been treated as a cross- petition for initial custody and not modification. The Appellate Division disagreed holding that Family Court had properly looked at the petition as a modification and though the court found there was no change in circumstances, it had considered what was in children's best interest. Additionally, the Appellate Division held no abuse of discretion in denying the father visitation. His petition stated that he wanted to see and be with "[HIS] FAMILY & KIDS OR NOTHING. ALL TOGETHER". The court also found that the father had serious mental health issues, was in "serious need" of anger management counseling, had committed acts of domestic violence against mother in children's presence some of which had led to criminal conviction and incarceration, and had little insight into how his actions were affecting his children. In a footnote the court noted that the proper procedure in this case would have been for father to vacate the custody determination although father's excuse for missing hearing was not credible.

Matter of Ildefonso v Brooker, 94 AD3d 1344 (3d Dept 2012)

Relocation Not in Children's Best Interests

Mother relocated with children from Sullivan to Monroe County in order to live with her paramour. Six months later, parties stipulated to an order that was later merged into divorce judgment, providing for joint legal custody with primary physical to the father and visitation to the mother. The order also provided that if the mother returned to Sullivan County, the parents would alternate physical custody on a weekly basis.

Five months later, the mother and her paramour returned to Sullivan County and the parties shared physical custody for more than a year. When she again relocated with the children and her paramour to Monroe County, she filed a modification petition seeking physical custody of children and permission to relocate as she was unable to find job in Sullivan County. After a fact-finding and *Lincoln* hearing, Family Court dismissed the petition, awarded joint legal custody with primary physical to father and visitation to mother, holding that the mother had not shown, by preponderance of the evidence, that relocation was in the children's best interests. Factors considered by court included but were not limited to, motivation for seeking or opposing move, impact of move on children's relationship with non-custodial parent, feasibility of visitation and degree to which move will enhance children's lives. In this case, Family Court found that the mother had made little effort to obtain a job in Sullivan County, focusing her efforts instead on getting a job in Monroe County. Mother's argument that the father was not a fit parent due to a DWI conviction was mitigated by the father's substantial efforts to deal with the issue, including obtaining interlock device for monitoring his vehicle, getting counseling and other measures. The Appellate Division held that based on totality of circumstances, including the mother's admission that the father was a capable and nurturing parent and current school provided children with stability, the court had a sound and substantial basis in the record for denying mother's petition to relocate.

Matter of Pizzo v Pizzo, 94 AD3d 1351 (3d Dept 2012)

Family Court Must Set Forth Essential Facts Supporting its Best Interests Determination

Parents cross-filed custody petitions. Family Court issued a temporary order of joint custody with primary physical custody to the mother and visitation to the father. That order was later made permanent. Seven years later, the father filed a modification petition seeking sole custody, alleging as a change in circumstances excessive alcohol consumption by the mother and domestic violence between the mother and her boyfriend. The Appellate Division held that although Family Court failed to explicitly state it was determining whether there was change in circumstances, upon independent review of record, domestic violence between mother and boyfriend and mother's excessive drinking was "ample evidence ... necessitating reconsideration of the child's best interests." However, as Family Court did not "set forth the essential facts of its best interest determination", the matter was remitted for such determination.

Matter of Martin v Mills, 94 AD3d 1364 (3d Dept 2012)

Father's Unfitness Results in Custody to Third Party

Five weeks after birth of twins, DSS caseworker visited the parent's residence and discovered it was "deplorable, unsanitary and unsafe". At the caseworker's request, the mother's uncle and girlfriend took the twins and the mother into their home. The children remained although the mother returned to the father. Thereafter, the father, maternal uncle and mother filed custody petitions. After a fact-finding hearing, Family Court awarded custody to uncle and his girlfriend with supervised visits to the mother and father. On the father's appeal the Appellate Division affirmed, holding that a biological parent's right to custody is superior to that of all others in the absence of surrender, abandonment, persistent neglect, unfitness, disruption of custody over an extended period of time or other extraordinary circumstance. In this case, the father was an unfit parent as he had allowed the children to live in unfit home and had exposed them to domestic violence. He only saw his children briefly three times in more than a year since. Additionally, the father's intended plan to "get to know [the children]...better and then obtain custody maybe a year, year and a half down the road", was not an appropriate plan. It was in the children's best interests for custody to be awarded to the uncle.

Matter of Carpenter v Puglese, 94 AD3d 1367 (3d Dept 2012)

Mother Showed Change in Circumstances But Child's Best Interests Was to Stay with Father

Following a stipulation of custody to the father, the mother filed a modification petition seeking custody of the middle child alleging that the child had behavioral issues, was doing poorly in school, that the father was not complying with child's mental health treatment and that the child wished to live with her. After a fact-finding and *Lincoln* hearing, Family Court dismissed

the mother's petition finding she had failed to prove substantial change in circumstance. On appeal the Appellate Division searched the record and agreed with the mother and the attorney for the child that there was a substantial change in circumstances. However, it affirmed holding that it was in the child's best interests to remain in the father's custody. Taking into consideration best interests factors such as parent's home environment, child's wishes, length of time present custody arrangement has been in place, each parent's past performance, relative fitness and providing for child's development, it found that the father had full-time job, provided a stable and supportive home environment for the child for many years, and had actively addressed the child's academics with school and mental health professionals. He had stopped the child's medication due to concerns about dangerous side effects and he agreed it was wrong to unilaterally discontinue treatment and had re-enrolled child in counseling. While the child's wishes should be given great weight, they are not dispositive. The mother was unemployed, living with her mother, struggling with substance abuse issues, had infrequent contact with children, had difficulty disciplining them, had stressful relationship with child, had not engaged in family counseling to resolve issues, had not been involved in addressing child's educational issues and was unaware of supportive programs for child in her community.

Matter of Miller v Miller, 94 AD3d 1369 (3d Dept 2012)

Order Granting Father Sole Custody in Children's Best Interests

Family Court denied mother's petition for sole custody of the parties' child and granted the father's cross petition for sole custody. The Appellate Division affirmed. The court properly concluded that there was a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified. The deterioration of the parties' relationship and their inability to co-parent rendered the existing custody arrangement unworkable. The record included testimony from three psychologists that the mother interfered with the father's relationship with the child. The expert testimony uniformly supported the court's conclusion that the mother engaged in a pattern of conduct to exclude the father from the child's life, which was so inimical to the best interests of the child as to, per se, raise a strong possibility that the interfering parent was unfit to act as custodial parent. There was ample support in the record for the court's conclusion that, as between the two parents, the father is less likely than the mother to interfere with the other parent's relationship with the child.

Matter of Orzech v Nikiel, 91 AD3d 1305 (4th Dept 2012)

Order Granting Father Sole Custody in Children's Best Interests

Family Court granted father's petition for sole custody of the parties' child. The Appellate Division affirmed. The court's determinations that the father had a strong bond with the child and was better suited to provide a stable home for the child and that neither the mother or the maternal grandmother were credible witnesses, was entitled to great weight. There was a sound and substantial basis in the record for the court's determination that an award of sole custody to the father was in the child's best interests.

Matter of Smith v Ince, 91 AD3d 1323 (4th Dept 2012)

Petition Requesting Permission to Relocate Properly Denied

On a prior appeal, the Appellate Division remitted this case to Family Court for further proceedings after concluding that the mother established a prima facie case that relocation was in the children's best interests. After continuing the hearing, the court determined that the relationship between the father and children and other relatives would be adversely affected by the proposed relocation and it would not be in the children's best interests to relocate. The Appellate Division affirmed.

Matter of Ramirez v Velazquez, 91 AD3d 1346 (4th Dept 2012)

Award of Joint Physical And Legal Custody And Divided Decision-making Authority Affirmed

Family Court awarded the parties joint physical and legal custody of their children and divided their decision-making authority, granting mother sole decision-making with respect to the children's medical

and religious interests and sole decision-making to the father with respect to the children's educational and extracurricular activities. The Appellate Division affirmed. Contrary to the mother's contention, the court properly refused to award her primary physical custody. Moreover, given the acrimony between the parties the court properly determined that it was appropriate to divide decision-making authority.

Matter of Delgado v Frias, 92 AD3d 1245 (4th Dept 2012)

Order Granting Father Sole Custody in Children's Best Interests

Family Court granted custody of the parties' children to petitioner mother with visitation to the father. The Appellate Division affirmed. There was a sufficient evidentiary basis for the determination of custody. The mother testified without contradiction that the father physically and verbally abused her, that he had physically abused one of the children, and that he had threatened her life shortly before the hearing. The court found the mother's testimony to be credible. Evidence of domestic violence demonstrated that the father possessed a character that was ill suited to the difficult task of providing his children with moral and intellectual guidance. The court had jurisdiction over the proceeding pursuant to Domestic Relations Law § 76-c based upon evidence that the father committed acts of physical violence against the mother and one of the children. Although emergency jurisdiction is generally temporary, the court was authorized to make a permanent custody award because no other custody proceeding had been commenced in another competing forum and New York had become the children's home state following commencement of the instant proceeding.

Matter of Tin Tin v Kyi, 92 AD3d 1293 (4th Dept 2012)

Petition For Visitation Barred by Res Judicata

Family Court dismissed biological father's petition seeking visitation with respondents' daughter. The Appellate Division affirmed. The court had dismissed petitioner's prior petition seeking to establish paternity of the child. The court found that respondents were married at the time of the child's birth and it was not in the child's best interests to disrupt her legitimate paternal relationship with respondent father. Petitioner discontinued his appeal from that order when respondents agreed to DNA testing, which revealed a 99.99% probability that petitioner was the child's biological father, and also that petitioner could visit the child. The child subsequently began to receive Social Security benefits as petitioner's biological child. Thereafter, respondents refused to allow petitioner to visit the child and petitioner filed the instant petition. The court properly determined that it was prohibited by the doctrine of res judicata from considering petitioner's biological parental status as a basis for determining his standing to seek visitation.

Matter of Weaver v Durfey, 93 AD3d 1185 (4th Dept 2012)

Father Failed to Show Change in Circumstances

Family Court denied father's amended petition to modify a prior visitation order. The Appellate Division affirmed. The father failed to demonstrate a change in circumstances. The Referee properly directed that visitation be therapeutically supervised. The father failed to establish that he had fully complied with the preconditions to visitation that were set forth in the prior order to which he stipulated. The Referee did not err in reiterating a condition to visitation in the prior order that the father undergo a further evaluation by a psychologist who had previously evaluated him.

Matter of Harder v Phetteplace, 93 AD3d 1199 (4th Dept 2012)

Order Granting Father Primary Physical Custody in Child's Best Interests

Family Court denied mother's petition to modify a prior order of custody and visitation and granted father's cross petition by awarding him primary physical custody of the parties' child. The Appellate Division affirmed. The court properly concluded that there was a sufficient evidentiary showing of a change in circumstances based, among other things, upon the parties' inability to reach an agreement regarding certain aspects of the child's visitation schedule, and upon the changes in the child's school schedule since the prior order. Although both parties appeared to be fit and loving parents, the evidence established that the father was better able to provide for the child's educational and medical needs.

Matter of Stilson v Stilson, 93 AD3d 1222 (4th Dept 2012)

Court Erred in Suspending Mother's Visitation

Family Court granted sole legal and physical custody of the parties' child to petitioner father and suspended respondent mother's visitation with the child. The Appellate Division modified by vacating the directive suspending the mother's visitation. The father showed changed circumstances. Since the entry of a prior consent order, the mother failed to comply with court-ordered psychiatric treatment, failed to return the child from visitation on one occasion, filed unfounded child abuse claims against the father, and engaged in alienating behavior. The court erred in suspending visitation. The record lacked substantial evidence that visitation with the mother was detrimental to the child's welfare. The child wished to continue visitation, the father testified that he did not observe odd behavior when the child returned from visitation, and the father acknowledged that the child was generally happy to visit with her mother. Further, the psychologist acknowledged that the mother loves the child and the child was functioning well.

Matter of Fox v Fox, 93 AD3d 1223 (4th Dept 2012)

Hearing Warranted on Custody Modification

Family Court sua sponte dismissed mother's petition seeking modification of a prior custody order without conducting a hearing. The Appellate Division reversed. The petition alleged that modification of the prior order was warranted because the mother and her current husband had completed counseling and had a stable home and the mother's bill of particulars added the allegation that the father was not involved in the children's schooling and refused to obtain counseling for the children to enable them to address their adjustment and coping issues. That was a sufficient evidentiary showing of changed circumstances to warrant a hearing.

Matter of DiPaolo v Avery, 93 AD3d 1240 (4th Dept 2012)

Father Not Entitled to Custody

Family Court adjudicated father's child to be neglected by the mother, but dismissed the petition insofar as it alleged the father derivatively neglected the children. Thereafter, the father moved for summary judgment seeking to vacate the order of placement of the child in petitioner agency's care and to award him immediate custody. The court denied the motion, determining that the father failed to allege any facts demonstrating a present ability to care for the child, and then conducted a hearing. After the hearing, the court determined that extraordinary circumstances did not exist to continue placement with petitioner, released the child to the father's custody under the supervision of petitioner, and ordered the father to comply with random drug and alcohol testing. When the father failed to comply with drug testing, the court determined that it was in the child's best interests to remain in the custody of petitioner agency. The Appellate Division affirmed. The court did not err in denying the father's motion for summary judgment. Considering that the child had been in foster care for nine months prior to the motion, the court properly held a hearing to determine if the father was entitled to custody. The court had jurisdiction to impose conditions on his behavior as a prerequisite to returning the child to his care and custody. Family Court Act § 1054 (a) provides that the court may place the person to whose custody the child is released under supervision.

Matter of Cleophus B., 93 AD3d 1241 (4th Dept 2012)

Award of Physical Custody to Father Reversed

Family Court awarded the parties joint custody of their child and primary physical custody of the child to petitioner father. The Appellate Division modified by awarding primary physical custody of the child to respondent mother. Because the case was an initial custody determination, it was not a relocation case and the mother's relocation to Brooklyn was only one factor to be considered. The court erred in requiring the mother to establish by a preponderance of the evidence that her move to Brooklyn was in the child's best interests. Moreover, the court's best interests determination lacked a sound and substantial basis in the record. Prior to the commencement of this action, when the child was 14 months old, the mother was the primary caretaker. Both parties had suitable homes. The mother demonstrated the greater ability to provide for the child's intellectual and emotional development. The court erred in concluding that the father was better able to provide financially for the child. He earned $10,000 a year as a real estate agent and was dependant upon his

parents for his standard of living. The court erred in admitting the father's journal into evidence and the error was not harmless because the journal had prejudicial "notes" concerning the mother and the court referred to the journal in its decision. The dissent would have affirmed and deferred to the court's assessment of credibility.

Matter of Saperston v Holdaway, 93 AD3d 1271 (4th Dept 2012)

Child's Wishes While Not Controlling Entitled to Great Weight

Family Court denied that part of father's petition seeking to modify the prior custody determination with respect to the parties' daughter. The Appellate Division affirmed. At the hearing on the petition, after the father rested, the mother moved for a directed verdict on the ground that the father failed to establish changed circumstances. The attorney for the child joined in the motion, stating that the child strongly preferred to live with the mother. Even assuming that the father established changed circumstances, a change in custody would not be in the daughter's best interests. Although both parties had problems, the mother was taking active steps to deal with her problems and, more importantly, the daughter was doing very well under the mother's care. Further, while not controlling, the wishes of the 15-year-old daughter was entitled to great weight.

Matter of Dingeldey v Dingelday, 93 AD3d 1325 (4th Dept 2012)

Custody of Child with Grandparents Not in Child's Best Interests

DSS commenced a neglect proceeding against the child's parents. The father agreed to the termination of his parental rights and the mother consented to the temporary removal of the child from the home where the child had been living with the mother and the mother's parents. The mother later stipulated to an order awarding custody of the child to DSS and DSS placed the child with a foster family. The child's grandparents filed a petition for custody of the child. Family Court continued placement of the child with DSS. The Appellate Division affirmed. The court properly determined that it was not in the child's best interests to award custody to the grandparents. The evidence established that the grandparents were already overwhelmed by the demands of raising four of their other grandchildren and that several of those children were troubled and difficult to control. Additionally, there was a pending child protective investigation of the grandparents and the grandmother was dealing with mental challenges of her own.

Matter of Angellynn S. H. W., 93 AD3d 1349 (4th Dept 2012)

Father Failed to Show Change in Circumstances

Family Court dismissed the petition of the father for increased visitation. The Appellate Division affirmed. Once the father's parental rights were terminated he no longer had standing to commence a proceeding for increased visitation. Contrary to the contention of the father and the attorney for children, the matter should not have been remitted for a dispositional hearing because the standing issue would have had to have been decided in the father's favor before the issue of the children's best interests could be considered.

Matter of Maria F., 93 AD3d 1351 (4th Dept 2012)

Order Not Entered Upon Father's Default

Family Court granted petitioner mother custody of the parties' child. The Appellate Division modified. The order was not entered upon respondent father's default. Although the order was denominated an "Order of Custody and Visitation on Default" the court repeatedly stated during the proceeding that the father was not in default and where an order and decision conflict, the decision controls. In any event, the father's attorney appeared at the proceeding and the order was modified accordingly. The court properly awarded sole custody to the mother. The bench decision demonstrated that the court carefully weighed the appropriate factors and its determination had a sound and substantial basis in the record.

Matter of Triplett v Scott, 94 AD3d 1421 (4th Dept 2012)

Matter Remitted: Insufficient Record For Appellate Review

Family Court granted petitioner supervised visitation with the parties' children and denied father's amended petition to modify a prior visitation order. The

Appellate Division reversed. Because the record was insufficient for the Appellate Division to make the requisite findings of fact, the matter was remitted for a new hearing, including a new in-camera hearing with the children. The court did not improperly delegate the issue whether unsupervised visitation should resume and, if so, when, to the attorney for the children.

Matter of Fontaine v Fontaine, 94 AD3d 1430 (4th Dept 2012)

Court Properly Denied Mother Permission to Relocate

Family Court denied mother's amended petition to seeking to modify a prior custody and visitation order by granting her permission to relocate with the parties' children to Michigan. The Appellate Division affirmed. The mother failed to establish that her children's lives would be enhanced economically, emotionally or educationally. The court also properly determined that the children's relationship with respondent father would be adversely affected by the proposed relocation.

Matter of Barlow v Smith, 94 AD3d 1437 (4th Dept 2012)

Father Failed to Show Change in Circumstances

Family Court granted father's petition seeking to modify a prior order of custody and visitation by, among other things, awarding him joint custody of the parties' children. The Appellate Division modified. The father failed to demonstrate a change in circumstances. Father's new employment, which allowed him more free time to spend with the children, and his purchase of a new home, were insufficient to constitute changed circumstances. The court abused its discretion in setting a revised visitation schedule. The mother conceded that an increase in the father's visitation was in the children's best interests. The record was sufficient for the Appellate Division to fashion a visitation schedule that reflected a reasonable balance between the excessive visitation granted by the court and the limited prior visitation schedule.

Matter of Mathewson v Sessler, 94 AD3d 1487 (4th Dept 2012)

AFC Did Not Have "Veto" Power Over Parent's Stipulation

Family Court granted the parties joint custody of their children, with mother having primary physical residence. The attorney for the children appealed. The Appellate Division affirmed. Where the court in a custody matter appoints an attorney for the children, the attorney has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determined that the settlement was in the children's best interests.

Matter of McDermott v Bale, 94 AD3d 1542 (4th Dept 2012)

Mother Failed to Establish Change in Circumstances

Family Court denied mother's petition to modify a prior custody and visitation order. The Appellate Division affirmed. The mother failed to establish a change in circumstances sufficient to warrant a modification of custody. The court did not err in failing to sanction the father for violations of the prior order.

Matter of Mason-Crimi v Crimi, 94 AD3d 1574 (4th Dept 2012)

FAMILY OFFENSE

Appeal of Order of Protection Dismissed as Moot

Respondent father appealed from order of protection issued by Family Court, which directed that he stay away from and not communicate with his children, except for agency supervised visits. The order of protection was made in conjunction with Family Court's determination that father had sexually abused his step-granddaughter and derivatively abused and neglected his children. The Appellate Division dismissed the appeal because the order of protection had expired and the issue was moot. Because father did not appeal from the order of disposition, those matters were not before the Court. In any event, were the Court to reach the merits, the court's findings would have been affirmed. The step-granddaughter's out-of-court statements made to caseworker and contained in medical records that were admitted into evidence without objection, along with out-of-court statements from biological child who had witnessed the abuse, and other evidence, supported the determination.

Matter of Brandon M., 94 AD3d 520 (1st Dept 2012)

Aggravating Circumstances Allows Court to Include Child in Protective Provisions

Family Court issued a five year order of protection against father on behalf of mother and child. The Appellate Division affirmed. Father's repeated acts of violence against mother allowed finding of aggravating circumstances pursuant to FCA § 827(a)(vii), which broadened those protected under the order to include members of mother's family. Further, some of father's violent acts against mother occurred in the presence of child, and father still had contact with child through court ordered visitation.

Matter of Pei-Fong K. v Myles M., 94 AD3d 675 (1st Dept 2012)

Mother Failed to Establish That Father Committed Family Offense

In a family offense proceeding, the Family Court was presented with sharply conflicting testimony as to whether the father harassed the mother. The Appellate Division found that the Family Court's determination that the mother failed to establish that a family offense was committed was based upon its assessment of the credibility of the parties, and was supported by the record. Furthermore, contrary to the mother's contention, the Family Court did not err in modifying a prior order of visitation so as to require that her visitation with the child be supervised without conducting a hearing on that issue. The Appellate Division found that the Family Court possessed sufficient information to render an informed determination consistent with the child's best interests.

Matter of Sepulveda v Perez, 90 AD3d 1057 (2d Dept 2011)

Evidence Did Not Support Restrictive Order of Protection

While the Family Court is permitted, upon sufficient proof that a family offense has been committed, to issue an order of protection (see FCA § 841 [d]) and may require a petitioner or a respondent, inter alia, to "observe such other conditions as are necessary to further the purposes of protection" (FCA § 842 [j]), here, the Family Court erred in prohibiting the father, in the order of protection, from leaving the parties' child under the supervision of his wife without him being present and in requiring him to be with the child at all times. There was no evidence that such a restriction was necessary to further the purposes of protection and, in fact, there was no testimony adduced, nor did the Family Court find, that the provision prohibiting supervision of the child by the wife was " 'reasonably necessary to protect' " the child from future family offenses (see FCA § 827 [a] [vii]). Moreover, the Family Court failed to set forth, as required by FCA § 842, the required finding of aggravating circumstances and, thus, the duration of the order of protection may not exceed a period of two years. Accordingly, the order of protection was modified to remain in effect until and including July 18, 2013.

Matter of Brito v Vasquez, 93 AD3d 842 (2d Dept 2012)

Failure to Hold Dispositional Hearing Did Not Prejudice Father's Rights

Mother's family offense petition alleged that the father had committed acts of harassment, disorderly conduct and stalking against her. Following a fact-finding hearing, Family Court issued a two-year order of protection on behalf of mother and four children, two of which were the parties' children. The order directed the father to stay away from the mother her two children and to refrain from harassing the parties' children. The father appealed arguing that Family Court erred by failing to hold a dispositional hearing. The Appellate Division affirmed finding father had never requested such a hearing, his rights were in no way prejudiced and children's best interests were not an issue as order of protection did not affect his visitation rights.

Matter of Kristina K. v Timothy K., 91 AD3d 1045 (3d Dept 2012)

On Motion to Dismiss, Pleading Should be Afforded Liberal Construction

Family Court dismissed three family offense petitions and a custody modification petition filed by a divorced mother of twins against father, for failure to state a cause of action. The mother appealed and all but one family offense petition was deemed not abandoned for appeal purposes. The Appellate Division reversed

holding that pursuant to CPLR § 3211, a pleading should be afforded a liberal construction and "a court may freely consider affidavits submitted by the petitioner to remedy any defects in the petition". Additionally, the criterion "is whether the proponent of the pleading has a cause of action, not whether he or she has stated one". In this case, the Appellate Division held that Family Court should have waded through the myriad allegations stated in the affidavit filed by mother, as there were adequate allegations that the father had engaged in a course of conduct to support stalking in fourth degree and harassment in second degree. Although Family Court stated that some of mother's allegations pertained to issues that were already resolved, the father did not move to dismiss the mother's claims on grounds of res judicata or collateral estoppel. Finally, the Appellate Division held that Family Court has discretion to appoint an attorney for the child, an argument raised for the fist time on appeal, and to make such appointment and in this case, as some of the domestic violence allegedly occurred in presence of children so they themselves could have initiated action. Matter remitted for further proceedings.

Matter of Pamela N. v Neil N., 93 AD3d 1107 (3d Dept 2012)

Respondent Committed the Family Offense of Disorderly Conduct

Family Court found that respondent committed acts constituting disorderly conduct. The Appellate Division affirmed. By requesting that the court limit the proof to events occurring within two years prior to the filing of the petition, respondent waived his contention that he was denied due process based upon the court's consideration of alleged instances of disorderly conduct that occurred during that time period and that the proceeding was barred by latches or the statute of limitations. A preponderance of the evidence established that respondent engaged in acts constituting disorderly conduct.

Matter of Marquardt v Marquardt, 94 AD3d 1436 (4th Dept 2012)

JUVENILE DELINQUENCY

Respondent's Statements to Police Admissible

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted the crimes of sexual abuse in the second degree, incest in the third degree, and sexual misconduct. The Appellate Division affirmed. The court properly denied respondent's motion to suppress his statement to police. The totality of the circumstances established that the statement was voluntary. Because respondent turned 16 between the incident and the interrogation, the special statutory procedures for juvenile interrogations were not required.

Matter of Eduardo E., 91 AD3d 505 (1st Dept 2012)

Juvenile Delinquency Adjudication Reversed

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed him with OCFS for a period of 12 months. The Appellate Division reversed. The court's finding was against the weight of the evidence. The complainant's testimony did not incriminate respondent. The only evidence that respondent punched the complainant was the probable cause testimony of another youth from the group that set upon the complainant. This testimony was admitted into evidence because the youth asserted his Fifth Amendment privilege at the fact-finding hearing. Thus, the youth was not cross-examined at the fact-finding hearing and that was relevant to the weight to be accorded to the youth's testimony at the probable cause hearing. Further, the youth's testimony was materially inconsistent with the complainant's testimony. Even according due deference to the court's credibility determinations, under the unusual circumstances here the finding was against the weight of the evidence.

Matter of Tayquan T., 91 AD3d 518 (1st Dept 2012)

Petition Dismissed - Period of Conditional Discharge Expired

Family Court adjudicated respondent to be a juvenile delinquent based upon his admission that he committed an act that, if committed by an adult, would constitute the crime of menacing in the third degree and imposed a conditional discharge for a period of 12 months. The Appellate Division reversed and dismissed the petition. An adjournment in contemplation of dismissal would

have been the least restrictive alternative. Respondent came from a stable home environment; the incident was his first contact with the juvenile justice system; and his misconduct did not involve weapons, violence, or injury. There was no indication that he ever used drugs or alcohol or was affiliated with a gang. He accepted full responsibility for his offense and demonstrated sincere remorse and insight into his misconduct. Monitoring with regard to attendance at school and academic performance could have been provided for in the terms and conditions of an ACD. Because the period of the conditional discharge had expired, the Court dismissed the petition.

Matter of Hakeem F., 92 AD3d 403 (1st Dept 2012)

Family Court Erred in Suppressing Complainant's Potential In-Court Identification

Family Court granted respondent's motion to suppress evidence and in another order dismissed the petition for failure to prosecute. The Appellate Division modified by denying the motion to suppress any in-court identification evidence because the court found that "the two minutes the complainant saw his assailants, at close range, was an adequate amount of time for him to make an independent source identification." In reversing the second order and reinstating the petition, the Appellate Division found that petitioner's objections to the hearing court's rulings were sufficiently specific to preserve the issues raised on appeal.

Matter of Daquon W., 92 AD3d 422 (1st Dept 2012)

False Statements Are Evidence of Consciousness of Guilt

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of second degree trespass. The Appellate Division affirmed. Circumstantial evidence offered at respondent's hearing was sufficient to sustain the finding that respondent was in the building without permission. Police officers, while doing routing patrol, found respondent coming out of an elevator with a companion. The officers smelled marihuana in the elevator, saw what looked to be a lit cigarette thrown to the floor by respondent's companion, and respondent admitted he had been smoking marihuana. Respondent gave false statement to police stating he was in building to visit someone who it turned out did not live there. Family Court found evidence established respondent had entered residential building without requisite license or privilege. The presentment agency was not required to call all tenants in the building as witnesses to establish crime of trespass. Respondent's false statements to police was evidence of his consciousness of guilt.

Matter of Lonique M., 93 AD3d 203 (1st Dept 2012)

Placement was Least Restrictive Alternative Given Respondent's Escalating Criminal Conduct

Family Court adjudicated respondent to be juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of robbery in the second degree and placed him with the Office of Children and Family Services for 18 months. The Appellate Division affirmed. The court properly exercised its discretion in determining placement. The placement was the least restrictive alternative because, among other things, respondent continued to commit new offenses while awaiting trial.

Matter of James S., 93 AD3d 461 (1st Dept 2012)

Respondent's Actions Not Horseplay

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in second degree, criminal possession of a weapon in the fourth degree and menacing in the second degree and placed him on enhanced supervision probation for 18 months. The Appellate Division affirmed. Contrary to respondent's claim that his actions were "horseplay," respondent tried to stab another with pencil and when victim tried to shield his face, respondent stabbed him in hand, causing a painful wound that needed medical attention from school nurse. The pencil was a dangerous instrument, respondent intended to cause physical injury, injury occurred, and his actions placed victim in reasonable fear of physical injury.

Matter of Markquel S., 93 AD3d 505 (1st Dept 2012)

Reasonable and Substantial Effort To Notify Parent

Family Court adjudicated respondent a juvenile delinquent based upon his admission that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree an placed him on probation for 12 months. The Appellate Division reversed. As the presentment agency conceded, it did not make "reasonable and substantial effort" to notify respondent's mother pursuant to FCA §§ 320.3, 341.2[3]. Because respondent's placement had expired, the petition was dismissed. **This case was recalled and vacated in Matter of Ali, 94 AD3d 614.**

Matter of Ali C., 93 AD3d 561 (1st Dept 2012)

12 Month Probation Not Least Restrictive Available Alternative

Family Court adjudicated respondent a juvenile delinquent based upon his admission that he committed an act that, if committed by an adult, would constitute the crime of possession of an imitation firearm, and placed him on probation for 12 months. The Appellate Division reversed in the interests of justice, vacated the dispositional order of probation, and remanded to the court with a directive that respondent needed no more supervision than a six month ACD. A juvenile delinquency adjudication with placement was not the least restrictive alternative. Respondent was 14 years old when he was charged with being in possession of toy revolver. This was his first offense and he had not used the revolver in an unlawful or threatening manner. The court had agreed that it would grant reaspondent an ACD if he did not commit further offenses or engage in further negative conduct. The record showed that since the time of offense, respondent had moved from an unstable home to a stable foster home, that he posed no behavioral problems, and that he was attending school without further disciplinary problems.

Matter of Jonnevin B., 93 AD3d 572 (1st Dept 2012)

Insufficient Evidence to Establish Menacing in Third Degree

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in third degree and menacing in third degree and placed him on enhanced supervised probation for 12 months. The Appellate Division modified by vacating the menacing finding. While the evidence established that respondent, with another individual, caused injury to the victim, there was no evidence of threatening behavior separate from the assault. The court found enhanced probation was the least restrictive alternative consistent with both respondent's needs and needs of the community.

Matter of Angel C., 93 AD3d 602 (1st Dept 2012)

Finding of Juvenile Delinquency Legally Sufficient and Not Against Weight of Evidence

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he had committed an act that, if committed by an adult, would constitute the crime of menacing in the third degree. The Appellate Division affirmed. The evidence established that respondent was waving a knife, making threatening gestures before a crowd of people standing at bus stop, and he intended to place those present, including a complaining witness who was standing in close proximity to him, in fear of physical harm. The petition was legally sufficient even if it did not state that respondent was the person waving the knife, because the allegations supported the inference he was "at least as criminally liable as an accessory." Respondent's motion to suppress identification testimony was properly denied. The showup identification was constitutionally permissible and not unduly suggestive even though the victim may have been aware that respondent was a suspect because police officers were guarding him.

Matter of Shaquille M., 94 AD3d 445 (1st Dept 2012)

Juvenile Delinquency Determination and Probation Placement Reversed

Family Court adjudicated respondent a juvenile delinquent based upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree and placed him on probation for 12 months. The Appellate Division reversed in the interests of justice, vacated the dispositional order of probation, and remanded to the court with a directive that respondent receive a six month ACD. The 12-year-old respondent accepted responsibility for nonviolent theft of property, had no prior record, no background of serious trouble at home, school or community, and there was no indication of alcohol or drug use or

affiliation with a gang.

Matter of Osriel L., 94 AD3d 523 (1st Dept 2012)

Probation Was Least Restrictive Alternative

Family Court adjudicated respondent a juvenile delinquent based upon her admission that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the second degree and placed her on probation for 12 months. The Appellate Division affirmed. Probation, rather than a conditional discharge, was the least restrictive alternative in light of the facts that respondent's violent assault with a metal cane was unprovoked, the victim was injured, and respondent had disciplinary and attendance issues at school.

Matter of Tiana N., 94 AD3d 585 (1st Dept 2012)

Community's Need for Protection Supported Probation as Least Restrictive Alternative

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the second degree and menacing in the third degree and placed her on probation for 12 months. The Appellate Division affirmed. Family Court properly denied respondent's request for an ACD because her violent and disruptive behavior that culminated in her attack of a teacher and her poor school record and need for counseling, made probation the least restrictive alternative consistent with respondent's needs and safety of community.

Matter of Savannah D., 94 AD3d 675 (1st Dept 2012)

Petition Alleging Unlawful Possession of Weapon Dismissed

In a juvenile delinquency proceeding, the presentment agency appealed from an order of the Family Court which dismissed the petition. Count one of the petition alleged that the respondent committed acts which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the fourth degree, in violation of Penal Law § 265.01 (2). Count two of the petition alleged that the respondent committed the offense of unlawful possession of weapons by persons under 16, in violation of Penal Law § 265.05. Contrary to the Presentment Agency's contention, the circumstances under which the respondent allegedly possessed the kitchen knife were insufficient to demonstrate that he considered it a weapon. In a supporting affidavit, the arresting officer averred that at approximately 2:45 a.m., on a public street, he observed the handle of a kitchen knife which he described as a machete protruding from the respondent's backpack, and thereafter removed the object, discovering that it measured approximately 14 inches in length, with a 9-inch blade which was wrapped in a plastic bag.

Matter of Edwin O., 91 AD3d 654 (2d Dept 2012)

Amount of Restitution Was Fair and Reasonable

Respondent admitted to entering premises without permission and causing damage by breaking a window and smashing a cash register, agreeing that cost of such damage exceeded $250. Family Court found that the respondent had committed an act, that if committed by an adult, would constitute the crime of criminal mischief in the third degree and found him to be a juvenile delinquent. After the dispositional hearing, respondent was placed on probation for period of one year and ordered to pay restitution of $1500. Respondent appealed the restitution amount arguing that there was no evidence to show how much damage he had actually caused. The Appellate Division affirmed stating that restitution must be based on a "fair and reasonable cost" not to exceed $1500. In this case, the report from an insurance adjuster, which was properly admitted into evidence, found that replacing a window similar to the one respondent admitted to breaking, would cost well in excess of $1500.

Matter of Michael V., 92 AD3d 1115 (3d Dept 2012)

Family Court Should Have Set Forth Reasons for Dismissing Petition

JD petition against respondent alleged that he had committed acts that, if committed by an adult, would constitute the crime of grand larceny in the third degree. Respondent filed a motion to dismiss stating that the petition was fatally insufficient on its face. County faxed a letter to court and respondent's counsel, stating it would "like to withdraw the pending petition". Family Court issued an order deeming the petition and respondent's motion as dismissed without prejudice. Respondent's counsel refused to consent to the

dismissal of his motion unless the petition was dismissed with prejudice. Family Court issued an amended order by denying respondent's motion as moot. Respondent appealed. The Appellate Division held that the county's letter should have been viewed as a motion for voluntary discontinuance pursuant to CPLR § 3217 (b) and, in the absence of proper service, the court was without jurisdiction to grant the relief. In this case, although the county faxed the letter to opposing counsel and the court, respondent's counsel did not accept such service and the county did not also mail the letter as required by CPLR § 2103[b][5]. Additionally, Family Court failed to state its reason for dismissing the petition as required by statute and in any event, such dismissal would be considered as being in respondent's favor. The Appellate Division reversed and remitted matter for further proceedings not inconsistent with order.

Matter of Lydia DD., 94 AD3d 1385 (3d Dept 2012)

Evidence of Physical Injury Insufficient

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed an act which, if committed by an adult, would constitute the crime of assault in the third degree. The Appellate Division modified by substituting a provision adjudicating respondent a juvenile delinquent based upon a finding that he committed an act which, if committed by an adult would constitute the crime of attempted assault in the third degree. The evidence was legally insufficient to establish the victim sustained physical injury, i.e., impairment of physical condition or substantial pain. Respondent and another individual hit the victim several times in the face and the back of the head, causing minor cuts on the victim's face, swelling on his nose and behind his ear and a red bruise on his neck. The acts proved constituted the lesser included offense of attempted assault in the third degree. Respondent's intent to cause physical injury could be inferred from the act of repeatedly punching the victim in the head with a closed fist.

Matter of Shawn D.R. -S., 94 AD3d 1541 (4th Dept 2012)

Evidence Sufficient That Respondent Was Not Licensed or Privileged to be in Premises

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed an act which, if committed by an adult, would constitute the crime of criminal trespass in the second degree. The Appellate Division affirmed. The evidence, viewed in the light most favorable to the presentment agency, was legally sufficient to establish that respondent was not licensed or privileged to be in or upon the premises. The testimony of the three residents of the home established that respondent entered the home through a locked back door, that respondent was located on the second floor of the home and that none of the residents gave him permission to enter or remain in the house.

Matter of Shawn D.R. -S., 94 AD3d 1544 (4th Dept 2012)

PATERNITY

Family Court Properly Estopped Petitioner From Filing Paternity Petition

Family Court found that it was in child's best interest to estop petitioner from claiming paternity. The Appellate Division affirmed. The record showed that petitioner waited eight years to claim paternity and never supported the child. The child believed another man, whose name was on her birth certificate, to be her father. Petitioner failed to demonstrate that it would be in child's best interest to order a DNA test. The court had sufficient information to make a determination regarding the child's best interests and therefore there was no need to hold a hearing.

Matter of David G. v Maribel G., 93 AD3d 526 (1st Dept 2012)

Order of Filiation Reversed

In an order of filiation, Family Court declared respondent to be the father of the subject child. The Appellate Division reversed and remanded for further proceedings, including the performance of a paternity test. Petitioner agency failed to establish by clear and convincing evidence that respondent acted as the child's father to such an extent to give rise to equitable estoppel barring him from denying paternity and rendering a paternity test inappropriate. There was no evidence that respondent played a significant role in raising, nurturing or caring for the child, much less that he had an operative parent-child relationship with her. The dissent would have affirmed, deferring to the

court's assessment of credibility and on the ground that controlling law dictated that the best interests of the child was the exclusive consideration in determining whether equitable estoppel applied.

Matter of Commissioner of Social Servs. v Julio J., 94 AD3d 606 (1st Dept 2012)

Petition Properly Granted on Ground of Equitable Estoppel

In two paternity proceedings, the mother and nonparty appellant appealed from an order of the Family Court which granted the cross motion of the attorney for the children which sought to equitably estop the mother from denying that the petitioner was the father of the subject children, denied their motion to suspend or modify the petitioner's visitation with the subject children, granted the petition, and adjudicated the petitioner to be the father of the subject children. In 1998, the petitioner and the appellant (hereinafter the mother), who was married to the nonparty-appellant, were engaged in a sexual relationship. The record revealed that in May 1999, the mother gave birth to twins. From the time the twins were born to approximately 2007 or 2008, the mother permitted the petitioner to hold himself out as the children's biological father and permitted them to develop a parent-child relationship. She also allowed the children to develop a relationship with the paternal grandmother. In May 2008, after the mother began to keep the children away from the petitioner, the petitioner commenced two paternity proceedings (one as to each child). The Family Court applied the doctrine of equitable estoppel in adjudicating that the petitioner was the father of the children. The Appellate Division found that sufficient information was available to the Family Court to make a determination as to the subject children's best interest and, without a hearing, properly granted the petition on the ground of equitable estoppel, and rendered an informed visitation determination. Order affirmed.

Matter of Seth P. v Margaret D., 90 AD3d 1053 (2d Dept 2011)

Order Denying Determination That Respondent Is Father And Liable For Child Support Affirmed

On a prior appeal the Appellate Division affirmed Family Court's denial of respondent father's objections to the order of the Support Magistrate. The Court of Appeals reversed, holding that under the circumstances of this case, where a father figure is present in the child's life, the biological father may assert a claim of equitable estoppel. On remittal and after a hearing on the merit's of respondent's claim of equitable estoppel and the best interests of the child, Family Court denied the petition seeking a determination that respondent was the father of the child and for child support. The Appellate Division affirmed. The attorney for the child waived her contention that the court erred in holding a *Lincoln* hearing and in relying upon statements the child made at the hearing because the hearing was held at the request of the attorney for the child. In any event, the court did not abuse its discretion in conducting the *Lincoln* hearing or in considering the child's statements at the hearing in determining best interests.

Matter of Aikens v Nell, 91 AD3d 1308 (4th Dept 2012)

PERSONS IN NEED OF SUPERVISION

Placement with DSS Affirmed

Family Court adjudicated respondent as a PINS based on excessive school absences and dangerous behaviors and placed her in DSS custody. Respondent appealed the placement determination. The Appellate Division affirmed finding that Family Court did not abuse its discretion in ordering respondent into care of DSS as her behavior, including unprotected sex, setting fire to her bedroom closet, attempting to jump from a moving vehicle and parents admissions that they were not able to control her, supported such determination, as it was in best interest of respondent and community.

Matter of Jessie EE., 91 AD3d 1142 (3d Dept 2012)

Failure to Advise of Right to Remain Silent Makes Allocution Inadequate as Matter of Law

Respondent was adjudicated a PINS and placed on probation. Thereafter, the County charged him with numerous violations and respondent, who appeared before a JHO, admitted to violating terms of order by not complying with school rules. Family Court judge extended probationary period by six months. Respondent appealed arguing that the court committed error by failing to advise him of his right to remain silent. The Appellate Division agreed and reversed finding appeal was not moot despite fact that term of

probation had expired, as admission "carries collateral legal consequences that extend beyond the order of disposition," and failure to advise respondent of his right to remain silent, "not only at the initial appearance but also at the commencement of any hearing under Family Court Act article 7" makes his allocution inadequate as a matter of law.

Matter of Corey WW., 93 AD3d 1130 (3d Dept 2012)

Respondent Waived Contentions Regarding Substitution of PINS Petition for JD Petition

Family Court adjudged that respondent was a person in need of supervision, and directed her to abide by certain conditions, including an order of protection. The Appellate Division affirmed. The court could substitute a petition alleging that respondent was a person in need of supervision for a petition alleging she was a juvenile delinquent. Here, respondent not only agreed to such substitution, she moved for the substitution. Respondent thus waived her contentions about the substitution. The non-hearsay allegations of the factual part of the petition or of any supporting depositions established, if true, every element of each of the crimes charged and respondent's commission of such crimes, specifically there were sufficient allegations that the victim suffered an impairment of physical condition or substantial pain.

Matter of Sarah C. B., 91 AD3d 1282 (4th Dept 2012)

PINS Adjudication Reversed

Family Court adjudicated respondent to be a person in need of supervision and placed him on probation for 12 months. The Appellate Division reversed and dismissed the petition. The court erred in failing to dismiss the petition because the petition failed to specify what diversion services were offered prior to the filing of the petition as required by Family Court Act § 735. The petition also failed to demonstrate that petitioner made documented diligent attempts to avoid the necessity of filing a petition. The failure to comply with such substantive statutory requirements constituted a nonwaivable jurisdictional defect requiring dismissal.

Matter of Nicholas R. Y., 91 AD3d 1321 (4th Dept 2012)

TERMINATION OF PARENTAL RIGHTS

TPR Based Upon Mental Illness And Permanent Neglect Affirmed

Family Court, upon fact-findings of mental illness and permanent neglect, terminated respondent mother's parental rights to the subject children. The Appellate Division affirmed. The finding that the mother suffered from a mental illness was supported by clear and convincing evidence. The expert and documentary evidence demonstrated that the mother was afflicted with schizotypal personality traits that together with her borderline mental retardation caused her to fail to appreciate the impact of her behavior on her children. Moreover, the mother failed to plan for her children's future despite the diligent efforts of petitioner. A preponderance of the evidence demonstrated that it was in the children's best interests to terminate mother's parental rights and free the children for adoption by their respective foster homes.

Matter of Victor B., 91 AD3d 458 (1st Dept 2012)

Mother Abandoned Child

Family Court determined mother abandoned her child and terminated her parental rights. The Appellate Division affirmed. Petitioner made diligent efforts to strengthen and encourage the parent-child relationship by formulating a service plan, scheduling visits with the child, and referring respondent to parenting training, mental health services, family therapy and individual counseling but respondent failed to stay in contact with petitioner and comply with its plan, visit the child on a regular basis and attend the referred services.

Matter of Tanisha Shabazz A., 91 AD3d 482 (1st Dept 2012)

Motion to Vacate Default TPR Order Properly Denied

Respondent mother failed to appear at a combined fact-finding and disposition hearing. Family Court terminated mother's rights and freed the child for adoption. Mother then filed motion to vacate default order, which court denied. The Appellate Division affirmed. The mother's motion to vacate her default was properly denied because she failed to demonstrate a reasonable excuse for her nonappearance and a meritorious defense to the neglect petition. The mother's claim that she had a conflict with another

hearing failed to explain why she made no effort to reschedule the other hearing when she had notice of the fact-finding hearing before the time the other hearing was set. Petitioner established that it made diligent efforts to reunite mother and child, but despite those efforts the mother failed to complete any part of her service plan.

Matter of Lisa Marie Ann L., 91 AD3d 524 (1st Dept 2012)

Motion to Vacate Default TPR Order Properly Denied

Family Court denied respondent mother's motion to vacate order terminating her parental rights based on permanent neglect. The Appellate Division affirmed. Respondent 's purported excuse for her nonappearance - that she was ill - was properly rejected because she failed to provide any documentation to substantiate her claim and she did not explain why she was unable to contact the court or her attorney about her inability to attend. Further, respondent did not provide a meritorious defense. She offered only a general claim that she was engaged in her service plan and failed to provide any details or documentation. It was undisputed that respondent never completed any part of her service plan and she never challenged the finding that she failed to consistently visit the child.

Matter of Evan Matthew A., 91 AD3d 538 (1st Dept 2012)

Child's Best Interest to Terminate Father's Parental Rights

Family Court terminated respondent father's parental rights and committed guardianship and custody of the children to the Commissioner for the purpose of adoption. The Appellate Division affirmed. The record established that the agency made diligent efforts to encourage and strengthen respondent's relationship with the children by referring him to parenting skills training and mental health therapy and by scheduling regular visitation. There was no evidence in the record to support respondent's claim that financial hardship was the impediment to taking the children. The evidence supported the court's finding that it was in the children's best interest for respondent's rights to be terminated because of the possibility of adoption by the foster mother who had cared for the children for nearly 16 years .

Matter of Nadine L., 92 AD3d 517 (1st Dept 2012)

Mother's Mental Illness Resulted in Inability to Properly Care for Child

Family Court terminated parental rights of mother. The Appellate Division affirmed. There was clear and convincing evidence that the mother's mental illness rendered her incapable of caring for her child. Two psychologists, after reviewing mother's medical records and interviewing her, testified that the mother suffered from schizoaffective disorder, which detrimentally affected her parental judgment and ability. The mother's expert lacked credibility because the expert had not reviewed mother's complete medical record.

Matter of Paulidia Antonis R., 93 AD3d 502 (1st Dept 2012)

Motion to Vacate Default Denied

The father failed to appear at his permanent neglect fact-finding hearing or dispositional hearing. Family Court found that father permanently neglected his children and terminated his parental rights. Thereafter, the court denied the father's motion to vacate. The Appellate Division affirmed. The father's excuse, that he was attending a mandatory housing program, was not reasonable. Even if he had to be at the program, he failed to notify his counsel, court or agency of his unavailability. Further, the father had no meritorious defense to the permanent neglect allegations because he could not show that he had not relapsed, that the agency had not provided services to him, or that he had completed the drug program. Also, the father was not able to show that he had made suitable plans to care for the children. The appeal with regard to one of his children was moot because the court reopened the dispositional hearing and the child had been returned home to father upon trial basis.

Matter of Octavia Loretta R., 93 AD3d 537 (1st Dept 2012)

Mother Unable to Care for Child at Present and Foreseeable Future

Family Court terminated mother's parental rights and denied mother post-termination visitation with child.

The Appellate Division affirmed. ACS established, by clear and convincing evidence, that mother's mental illness prevented her from providing proper and adequate care for her child presently and for the foreseeable future. ACS's evidence included expert testimony that mother suffered from long-standing paranoid schizophrenia that prevented her from acting in accord with the child's needs.

Matter of Michele Amanda N., 93 AD3d 610 (1st Dept 2012)

Unwillingness to Take Responsibility For Sexual Abuse and Re-incarceration Results in TPR

Family Court found that the father permanently neglected his two children and terminated his parental rights. The Appellate Division affirmed. The agency presented ample evidence that diligent efforts had been made to strengthen the parent-child relationship by, among other things, providing father with service plan to address his specific needs and making referrals for treatment programs to address his issues, even when the father was incarcerated. Despite those efforts, other than completing the anger management program, the father entirely failed to complete the service plan. The father failed to take responsibility for sexually abusing children, although he knew it stood in the way of reunifying with children. It was in children's best interests for father's rights to be terminated because the children had been living with kinship foster parents for over four years and were doing well, and foster parents wished to adopt them. In view of the father's repeated incarcerations, a suspended judgment was not warranted.

Matter of Naisha J.V., 94 AD3d 416 (1st Dept 2012)

Father's Refusal to Seek Services for Mental Illness and Obtain Suitable Housing Results in TPR

Family Court found that respondent father permanently neglected his children and terminated his parental rights. The Appellate Division affirmed. The father refused to accept his diagnosis of schizophrenia and failed to go to a shelter even though he was homeless. Although the agency was not required to make reasonable efforts to return children to father because his parental rights to seven of his other children had been involuntarily terminated, it did make diligent efforts by referring him to mental health programs and helping him obtain suitable housing. The father's failure to pursue appropriate services and his decision to remain homeless, together with fact that since birth children have been living in a loving pre-adoptive foster home, supported the court's determination that it was in children's best interest for father's rights to be terminated.

Matter of Ronald Anthony G., 94 AD3d 424 (1st Dept 2012)

Finding of Default Permanent Neglect and TPR Affirmed

Upon respondent mother's default, Family Court terminated her parental rights on the ground of permanent neglect and thereafter denied her motion to vacate the dispositional order. The Appellate Division affirmed. The mother failed to demonstrate that she had a reasonable excuse for her default and a meritorious defense. The mother alleged that she had a severe toothache on day of hearing and a dentist verified mother was referred to an oral surgeon on that day. However, the mother failed to notify counsel, court or the agency of her health issue and her condition did not prevent her from doing so. Also, the mother failed to complete the required programs outlined in her service plan within the relevant period and her incarceration during this time did not excuse her from planning for her children's future.

Matter of Tyieyanna L., 94 AD3d 494 (1st Dept 2012)

Agency's Failed to Tailor Service Plan to Fit Mother's Needs

Family Court dismissed the termination of parental rights petition against respondents mother and father. The Appellate Division affirmed. Petitioner agency failed to show by clear and convincing evidence that it made diligent efforts to reunite mother and children. The agency failed to tailor a plan specific to mother's needs, sent referral letters not addressed to mother's home, and the agency's witness testified about events that had occurred two years prior to proceeding without any records of such events. The agency was without authority to unilaterally suspend mother's visitation rights and then accuse her of not complying with service plan that included visitation. The agency also failed to meet its burden with respect to the father – the agency only met with him on one occasion.

Matter of Essence S., 94 AD3d 526 (1st Dept 2012)

Family Court's Default Permanent Order and TPR Affirmed

Family Court issued default permanent neglect order and terminated mother's parental rights based on her failure to appear at fact-finding and dispositional hearings. The Appellate Division affirmed. The mother's excuse, that she was suffering from depression and was evicted, was unreasonable because it was unsupported by evidence and the mother was unable to explain why she did not contact her counsel or court to advise them of her status. The mother failed to establish a meritorious defense because she had failed to comply with service plan requirements, including, but not limited to, completing drug treatment program, anger management program and obtaining domestic violence counseling. It was in children's best interests for mother's rights to be terminated so children could be adopted by their foster parents.

Matter of Julian Michael G., 94 AD3d 573 (1st Dept 2012)

TPR Affirmed

Family Court terminated respondent mother's parental rights upon a fact-finding determination of permanent neglect and abandonment. The Appellate Division affirmed. Clear and convincing evidence established that the children were permanently neglected. Evidence at the hearing established that the agency made diligent efforts to strengthen the relationship between mother and children including, but not limited to, formulating service plan, scheduling visits between mother and children, and referring mother to various treatment and parenting skills programs. The mother failed to complete drug treatment and parenting programs, failed to attend counseling, failed to follow through with referrals, and failed to attend scheduled visits. Additionally, mother's failure to see the children for six months prior to the filing of petitions, although she was not prevented from doing so, gave rise to presumption of abandonment that was not rebutted. It was in the children's best interest for mother's rights to be terminated because the children had been in loving pre-adoptive foster home for nearly four years.

Matter of Laqua'sha Renee G., 94 AD1st 625 (1st Dept 2012)

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

Contrary to the mother's contention, the Family Court properly found that she permanently neglected the subject children. The petitioner established by clear and convincing evidence that it made diligent efforts to assist the mother in maintaining contact with the children and planning for the children's future. These efforts included facilitating visitation, repeatedly providing the mother with referrals for services and counseling, repeatedly advising the mother that she must enroll in and attend group services, and advising the mother that she needed to secure adequate housing for herself and the children. Furthermore, the Family Court properly determined that it was in the best interests of the children to terminate the mother's parental rights. It was noted that a suspended judgment was not appropriate in light of the mother's lack of insight into her problems, and her failure to acknowledge and address many of the issues which led to the children's removal in the first instance.

Matter of Anthony R., 90 AD3d 1055 (2d Dept 2012)

Mother Only Partially Complied with Service Plan

Contrary to the mother's contention, the Family Court properly found that she permanently neglected the subject children. The petitioner agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship by meeting with the mother to review her service plan and discussing the importance of compliance, making efforts to enroll the mother in a day treatment program to address her anger management and mental health issues, and scheduling visitation between the mother and the subject child. The mother's partial compliance with the service plan was insufficient to preclude a finding of permanent neglect. Furthermore, the Family Court correctly determined that it would be in the children's best interests to terminate the mother's parental rights and free the children for adoption by their respective foster parents, with whom the three children had been living continuously since 2004.

Matter of Hadiyyah J.M., 91 AD3d 874 (2d Dept 2012)

Parent's Inability to Care For Children as Result of Mental Illness Results in TPR

The Appellate Division affirmed a decision of Family Court to terminate parental rights of mother who was mentally ill. The Appellate Division held that in order to terminate parental rights based upon mental illness, DSS must show by clear and convincing evidence that the parent is presently and for the foreseeable future unable to provide proper and adequate care for the children due to mental illness. In this case, the evidence included testimony of two court-ordered psychologists who testified that the mother suffered from, among other things, borderline intellectual functioning and severe borderline personality disorder and these disorders together with the children's developmental disabilities and special needs, diminished her capacity to make good decisions and appropriate judgments. They both opined that the mother's mental condition would persist for the foreseeable future and there was little likelihood that medication would help. The mother engaged in relationships with and exposed the children to sexual offenders. She was resistant to change, took little responsibility for her actions and minimized her behavior. Although respondent argued that she was engaged in parenting and substance abuse programs, the Appellate Division held that the "mere possibility that [mother's]... condition with proper treatment could improve in the future is insufficient" to reverse Family Court's decision and DSS did not need to make diligent efforts in such cases. The Appellate Court further held a dispositional hearing was not necessary as evidence showed in addition to the fact that it was unlikely mother's mental health is likely to substantially improve in the future, the children have benefitted emotionally, socially and educationally since removal.

Matter of Burton C., 91 AD3d 1038 (3d Dept 2012)

Termination of Rights Not an Abuse of Discretion

Mother consented to a finding of neglect and removal of her child due to excessive corporal punishment. The special needs child remained in DSS custody for over a year. DSS filed a permanent neglect TPR. After a hearing, Family Court found permanent neglect by clear and convincing evidence and terminated the mother's parental rights. The mother appealed and the Appellate Division affirmed holding that DSS had made diligent efforts to strengthen the parent-child relationship by offering numerous services. While mother eventually completed parenting classes, she refused to engage in anger management or domestic violence counseling despite several altercations with her fiancé resulting in police intervention. She failed to attend more than one-half of the child's counseling sessions and failed to understand her role in causing the child anxiety or leading to his adjustment and attachment disorder. She failed to visit the child on consistent basis, and twice failed to see the child for over three months. She failed to establish a stable and safe home for him and failed to make realistic plans for his future. It was in child's best interests to terminate the mother's parental rights as the child became aggressive toward his foster siblings after visits with mother and he was doing well in the pre-adoptive home and foster parent wished to adopt him.

Matter of Styles DD., 91 AD3d 1054 (3d Dept 2012)

TPR Affirmed

DSS filed a permanent neglect petition against the father of two children and paternal grandmother filed for custody. The father failed to appear at the fact-finding hearing and Family Court found the children to be permanently neglected. After holding a combined dispositional and custody hearing, Family Court terminated the father's rights, dismissed the grandmother's custody petition and placed the children with DSS. The father appealed from both decisions. The Appellate Division held that no appeal lies from the fact-finding decision as that order was issued upon father's default. As father did not appeal from dispositional order, he did not preserve the issue and was not entitled to request a suspended sentence; and he had no standing to challenge dismissal of grandmother's petition as he is not the aggrieved party.

Matter of Chase F., 91 AD3d 1057 (3d Dept 2012)

Despite Diligent Efforts by DSS, Clear and Convincing Evidence Showed Father Failed to Plan

DSS filed to terminate rights of father who had failed to keep in contact with his child for over four years. The child's mother had surrendered her parental rights. After a fact-finding hearing, Family Court terminated the father's rights and he appealed. The Appellate Division affirmed holding that DSS had made diligent efforts to strengthen the parent-child relationship but despite doing so, the record contained clear and

convincing evidence to support the court's finding that the father had failed to develop a "realistic plan for child's future". The record showed that despite the fact that the father lived in another state, the DSS caseworker had, among other things, continued to contact him by phone and letters, kept him informed of child's progress, scheduled weekly time for phone calls with child, offered assistance to travel to New York, scheduled visits for him with child, recommended mental health and substance abuse evaluations, referred him to parenting and domestic violence programs, and referred him to available services in his area. Despite these efforts, the father failed to participate consistently with phone calls with child, missed meetings with caseworker, did not engage in recommended programs, had little understanding of child's needs, failed to interact with child and when he did visit, he left abruptly for no reason. Father had been unemployed since 1989 and had no family members who were willing to assist him in caring for child.

Matter of Jacelyn TT., 91 AD3d 1059 (3d Dept 2012)

Father's Sporadic Contacts With Child Insufficient To Overcome Permanent Neglect Finding

Child was removed from mother's care two weeks after birth due to mother's admission into psychiatric facility and placed in care of paternal aunt. The father, who lived elsewhere, visited the child. Around age two, the child was returned to the mother and she relocated with the child without informing the father. A couple of years later, the child was again removed from mother and placed in foster care. DSS located the father, who was then in a correctional facility, and informed him of the child's placement. The father called the child during a three month period but after being transferred to a facility that required inmates to make collect calls, he stopped calling. Five months later, the father informed DSS that he would be incarcerated for two years and recommended that the child be placed with his aunt. However, she declined to accept the child. Seven months later, the father sent two cards to the child but thereafter, failed to keep in contact. Six or more months later, DSS filed a permanent neglect petition against father. After a fact-finding hearing, Family Court found that the father had permanently neglected the child and after a dispositional hearing, terminated his parental rights. The father appealed and the Appellate Division affirmed holding that DSS had established by clear and convincing evidence that it had made "affirmative, repeated and meaningful efforts to restore the parent-child relationship" by initially seeking out father's whereabouts and notifying him of child's placement, sending him permanency reports, inquiring about his plans for future, facilitating telephone contact and more. Although the father made attempts to maintain contact, his efforts were sporadic and inconsistent and he failed to make realistic plans for child's future. Additionally it was in child's best interests to terminate father's rights as father would remain incarcerated for some time and child had developed close relationship with foster family and foster parent testified she would "gladly" adopt him.

Matter of Marquise JJ., 91 AD3d 1137 (3d Dept 2012)

Father's Failure to Plan Results in TPR

Father consented to neglect finding based on, among other factors, domestic violence and failure to adequately supervise his two children. They were placed in foster care and almost 18 months after removal, DSS commenced a permanent neglect proceedings against father. Following a fact-finding hearing, Family Court determined that the father had permanently neglected the children and after a dispositional hearing, terminated his parental rights and freed the children for adoption. Father appealed the permanent neglect finding. The Appellate Division affirmed finding a sound and substantial basis in the record to terminate father's rights. Mother's rights were also terminated. The court held that DSS had shown by clear and convincing evidence that diligent efforts had been made to strengthen the parental relationship, including referring father to numerous services, assigning caseworker to assist with his parenting skills, and providing periodic service plan and family team meetings. Although father participated in most of the services and programs, he failed to adequately plan for the future of his children. He did not meaningfully benefit from services or cooperate with DSS. Among other factors, he was difficult to contact, provided inaccurate information, arrived late for visits, disappointed the children with his inconsistency, failed to respond appropriately to their needs, took at least one year to find a home and then gave wrong address to DSS. Later, when DSS came to see the home, indications were that the father was not residing there. When the father finally found a home, he gave excuses for not expanding visitation hours and despite all the services provided, continued to have difficulty

supervising the children, never progressing to a point where he could safely supervise them. At the dispositional hearing, evidence showed that the father was facing possible eviction from the home and had made little progress in planning for the children. It was in children's best interests to terminate the father's parental rights and remain in care of pre-adoptive foster parent.

Matter of Jyashia RR., 92 AD3d 982 (3d Dept 2012)

Family Court Erred in Imposing Concurrent and Contradictory Plan for Child

Respondent mother appealed from permanency plan which had concurrent goal of "return to parent and placement for adoption". The Appellate Division reversed finding that the court failed to consult with child or even child's attorney of child's wishes as directed by FCA § 1089 (d) before issuing the plan and that the court erroneously imposed concurrent and contradictory goals, as DSS cannot both work towards placing child up for adoption and trying to reunite child with parent. In a footnote, the Appellate Division added that if it is likely that the child will not be returned to the parent, the court should direct in written order "what efforts should be made to evaluate or plan for another permanent plan" but still have one permanency goal.

Matter of Dakota F., 92 AD3d 1097 (3d Dept 2012)

Failure to Correct Conditions that Led to Removal of Children Supports Permanent Neglect

Three children, two who were the biological children of parties and one who was the biological child of father and mother's sister, were removed from parties due to history of substance abuse and domestic violence and parties were adjudicated to have neglected them. The mother was acting as legally responsible caregiver for her sister's child after the sister had surrendered her parental rights. After being DSS care for more than a year, DSS filed a permanent neglect petition against parties. Following a fact-finding hearing, Family Court adjudicated the children to be permanently neglected and following dispositional hearing, terminated the parental rights. On appeal, the Appellate Division affirmed finding DSS had shown by clear and convincing evidence that diligent efforts had been made to strengthen and encourage parent-child relationship and that despite these efforts by DSS, the parents failed to adequately plan for children's future as they "failed to correct the conditions that led to the removal of the children". They were unwilling to cooperate with services, the mother failed to complete domestic violence and substance abuse programs, and both admitted to relapsing and continuing their relationship despite its toxicity. The record also supported finding that it was in children's best interests for parental rights to be terminated.

Matter of Summer G., 93 AD3d 959 (3d Dept 2012)

No Right of Appeal From Non-Dispositional Order in Permanent Neglect Proceeding

Mother of two children consented to a neglect finding without admission based upon uncontested sworn facts alleged in petition and proof submitted by DSS. An order of supervision was issued placing the children in care and custody of DSS. The mother was required to follow through with services recommended by DSS. Thereafter, DSS filed a permanent neglect petition and following a lengthy fact-finding hearing, Family Court found that the mother had permanently neglected the children. Eventually, the mother voluntarily surrendered her parental rights. She appealed the permanent neglect fact-finding order. The Appellate Division dismissed mother's appeal holding that there was no appeal as of right in a non-dispositional proceeding under SSL § 384-b. While FCA § 1112(a) allows an appeal from intermediate and final orders in a neglect proceeding, such cases could involve immediate risk to the children, whereas in permanent neglect cases, the children have been in foster care for more than a year and there are no issues of immediate risk to children.

*Matter of Alyssa L.,*93 AD3d 1083 (3d Dept 2012)

No Abuse of Discretion in Terminating Parental Rights

Finding of neglect was made against mother of seven children, four the subject of the instant proceeding, based on her substance abuse, mental health issues, pattern of choosing dangerous relationship partners, and financial circumstances. Two of her children were removed and placed in care of DSS. Mother entered family treatment court and was provided with services to address her needs. The children were returned to her

under DSS supervision. A year later, she tested positive for benzodiazepine and during a follow-up home visit was found to be in violation of a court order by having an individual, who was to have no contact with children, in her home. All four children were removed. More than one year later, DSS filed a permanent neglect petition and following a fact-finding and dispositional hearings, Family Court terminated mother's rights. On appeal the Appellate Division affirmed finding there was no abuse of discretion in Family Court's finding as DSS had shown by clear and convincing evidence that it had made meaningful efforts to restore parent-child relationship by, among other factors, referring mother to mental health and substance abuse programs, facilitating visits between mother and children, arranging home visits, periodic drug testing and conducting team meetings in conjunction with family treatment court. However, the mother failed to plan for children's future as she failed to take meaningful steps to address issues that led to children's removal. Although she completed two inpatient programs and visited the children frequently, she failed to remain clean and sober during the one year period. Evidence showed that during the relevant period, she tested positive for amphetamines, twice tested positive for alcohol and tested positive for cocaine, used her paycheck and part of proceeds from vehicle to buy cocaine which she used "every day" for over a month. She continued to make poor relationship choices. Viewing the record as a whole and taking into consideration the mother's admission that she smoked crack-cocaine three weeks prior to dispositional hearing, it was in children's best interest to terminate mother's rights.

Matter of Chorus SS., 93 AD3d 1097 (3d Dept 2012)

Not Persuaded Insufficient Time To Comply With Terms and Conditions of Suspended Sentence

Mother was adjudicated to have permanently neglected her one child and court issued a one year suspended judgment subject to many terms and conditions. Four months later, DSS filed a show cause order seeking a violation finding against the mother and terminating her parental rights. After a hearing, Family Court found that the mother had violated the order and terminated her parental rights. She appealed and the Appellate Division affirmed holding that DSS had shown by preponderance of the evidence that mother had failed to comply with the terms and conditions of the order. She had not become a fit parent during this "grace period" as she had, among other factors, missed appointments with caseworker, missed visitation with child, was involuntarily discharged from mental health treatment as she missed appointments and continued to misuse prescription medication. The Appellate Division gave deference to the lower court's credibility determination and found unpersuasive the mother's contention that she had not been given enough time to comply with order. And, despite the mother's argument that she had good relationship with the child, she had failed to address in any meaningful way, the issues that resulted in the child's removal. The child has been in foster care for the majority of her life, and it was in her best interests to be freed for adoption as the paternal grandmother, who was her foster parent, wished to adopt her.

Matter of Alexandria A., 93 AD3d 1105 (3d Dept 2012)

Sound and Substantial Basis to Determine Father Violated Suspended Sentence

Father was found to have permanently neglected his two children and court issued a one-year suspended judgment subject to many terms and conditions. DSS filed a violation petition seeking revocation of the suspended sentence and terminating the father's parental rights. After a hearing, Family Court held that DSS had shown by preponderance of the evidence that father had violated order and terminated his parental rights. The evidence showed that the father had failed to get treatment for alcohol dependance issue, continued to drink, and lied about his treatment as alcohol was found in his home. Despite being advised to find a suitable home for the children, he continued to live in a home which stank of garbage and cat urine and which he shared with another individual who had been found to have abused and neglected his children. He also missed over one-half of the scheduled visits with the children and missed child support payments. The Appellate Division affirmed holding that there was a sound and substantial basis in the record to determine that the father had violated the order and that terminating his parental rights was in the children's best interests.

Matter of Alyssa C., 93 AD3d 1111 (3d Dept 2012)

Mother's Continued Abuse of Illegal Substances Evidenced Lack of Failure to Plan

Child was removed from her mother's care based on the mother's prolonged substance abuse and child's exposure to it. The mother admitted to neglect and the child was placed in foster care. An order of disposition was issued directing, among other things, that the mother refrain from use of illegal drugs and to participate in substance abuse treatment. After the child had been in foster care for over a year, DSS commenced a permanent neglect proceeding. Family Court found DSS had shown by clear and convincing evidence that it had made diligent efforts to strengthen and encourage parent-child relationship by offering mother numerous services aimed at addressing her substance abuse issues. DSS arranged for the mother's substance abuse evaluation and transportation to in-patient treatment facility. Upon completion of the program, DSS provided the mother with referrals for many services and programs, arranged for drug testing, provided a device for alcohol monitoring, helped obtain emergency housing and financial support, got medicaid to cover treatment costs, provided her with tokens for transportation and a pre-paid cell phone. Family Court further found that DSS had shown by clear and convincing evidence that despite these services mother had failed to plan for return of child as, within one month of being discharged from in-patient treatment, she relapsed and resumed using heroin, crack cocaine, marihuana and prescription medication. She appeared at supervised visits exhibiting signs of being under the influence, was arrested, missed treatment, was unable to be located for more than two months during which period she admitted to "getting high" every day. The Appellate Division affirmed the finding of permanent neglect.

Matter of Havyn PP., 94 AD3d 1359 (3d Dept 2012)

Parental Rights Properly Terminated on Grounds of Permanent Neglect

Family Court terminated respondent mother's parental rights with respect to two of her children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the mother's relationship with the children but respondent was unable to keep her house clean, to budget properly or to parent the child properly. During the three years the proceeding was pending, respondent never progressed beyond supervised visitation with the children. The expert psychologists for both petitioner and respondent testified that respondent was not yet able to assume parenting duties for the children. Terminating respondent's parental rights was in the children's best interests. The children had been in petitioner's care for about four years when the order on appeal was entered and they were thriving in their foster home. In contrast, when the children were removed from respondent's care, the son was often nervous and uncontrollable, and the daughter experienced a physical failure to grow.

Matter of Gerald G. Jr., 91 AD3d 1320 (4th Dept 2012)

Court Erred in Determining Reasonable Efforts Not Required

Family Court granted petitioner's motion for a determination that reasonable efforts to unify respondent mother and child were no longer required. The Appellate Division reversed and remitted for further proceedings. Although the mother's parental rights had been involuntarily terminated with respect to two of the mother's other children, here the mother was entitled to a hearing on the child's best interests because there was an issue of fact raised by caseworker testimony that the child could safely be returned to the mother.

Matter of Liliana G., 91 AD3d 1325 (4th Dept 2012)

Respondent's Parental Rights Properly Terminated

Family Court terminated respondent mother's parental rights and freed two of her children for adoption. The Appellate Division affirmed. Respondent was not denied procedural due process because the court conducted a fact-finding hearing in her absence, while she was incarcerated. A parent's right to be present for fact-finding and dispositional hearings in termination cases is not absolute. Here, the court initially adjourned the hearing when respondent appeared without counsel and re-appointed her prior attorney to represent her. Respondent failed to appear in court on the adjourned date and although her attorney appeared, he stated that he did not know where respondent was and she had not met with him to prepare for the hearing. Respondent claimed she was incarcerated until the morning of the hearing but she made no attempt to contact the court to

seek an adjournment. Respondent failed to ask the court to consider any post-termination contact with the child and failed to establish that such contact would be in the child's best interests.

Matter of Atreyu G., 91 AD3d 1342 (4th Dept 2012)

Post-Termination Visitation Not in Child's Best Interests

After a finding of permanent neglect, Family Court terminated respondent father's parental rights with respect to the subject child and denied post-termination contact. The Appellate Division affirmed. The court did not err in denying respondent's request for post-termination contact. The evidence established that respondent was serving a 50-year to life sentence and he admitted that he had had a single unsupervised visit with the child in the 18 months preceding the filing of the instant proceeding. His only other visitation during that period and the pendency of this proceeding occurred when petitioner's employees brought the child for supervised visitation with respondent in jail or prison. Additionally, the child had severe mental challenges and became agitated while traveling to prison.

Matter of Lashawnda G., 91 AD3d 1348 (4th Dept 2012)

Mother Was Not Denied Effective Assistance of Counsel

Family Court denied respondent mother's motion to vacate an order terminating her parental rights upon her default. The Appellate Division affirmed. The mother's counsel was not ineffective in failing to make a motion that was unlikely to be successful. The mother was not denied effective assistance of counsel based upon her attorney's failure to request an adjournment when the mother did not appear at the fact-finding and dispositional hearing. When the mother failed to appear her attorney asked to be relieved from his representation of the mother in order to preserve the mother's opportunity to move to vacate the default order entered against her. That tactical decision did not constitute ineffective assistance of counsel. The court properly exercised its discretion in denying the mother's motion to vacate the default order. The mother did not establish a reasonable excuse or a meritorious defense.

Matter of Kenneth L., 92 AD3d 1245 (4th Dept 2012)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights with respect to his children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the father's relationship with the children but the father continued to use drugs; lived in numerous temporary or rundown rooms that were unsuitable for children; continued to have aggression issues in general and to engage in domestic violence with the children's mother; and refused to participate in counseling. Termination of the father's parental rights was in the children's best interests and the court properly refused to allow any post-termination contact between the father and children.

Matter of Justain R., 93 AD3d 1174 (4th Dept 2012)

Court Properly Suspended Judgment

Family Court revoked a suspended judgment and terminated respondent mother's parental rights with respect to her three children. The Appellate Division affirmed. The court was not required to hold a further dispositional hearing. The court had already considered the children's best interests when it suspended judgment and informed the mother that if she failed to comply with certain conditions, her parental rights could be terminated. Given that the children had spent most of their lives in foster care and were in a placement that was an adoptive resource and that the mother had been unwilling to confront her chemical dependency issues, it was in the children's best interests to terminate the mother's parental rights.

*Matter of Jhanelle B.,*93 AD3d 1201 (4th Dept 2012)

Father Was Not Denied Effective Assistance of Counsel

Family Court terminated respondent father's parental rights with respect to his five children. The Appellate Division affirmed. The father was not denied effective assistance of counsel based upon his attorney's recommendation that the father admit to the allegations of permanent neglect. The recommendation was a

matter of strategy. Also, respondent failed to demonstrate that he was prejudiced by his attorney's advice.

Matter of Brandon B., 93 AD3d 1212 (4th Dept 2012)

Mother Physically Able to Plan For Children's Future

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that the mother was physically able to plan for her children's future, but failed to do so. During the first year the children were in foster care mother attended 31 of the 52 scheduled visits with the children. Some of the visits were cancelled because of mother's poor hygiene or because she had a fever. Visits were suspended when the mother failed to provide medical documentation that she did not have a contagious illness. Although the mother testified that she was unable to complete parenting classes, and substance abuse and mental health treatment because she suffered from depression and thereafter developed serious physical illnesses, a mental health diagnosis was not sufficient to establish a lack of physical ability to plan for the children's future and the mother failed to substantiate her alleged physical illnesses.

Matter of John B., 93 AD3d 1221 (4th Dept 2012)

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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, Suite 304, Rochester, New York 14604.

Address changes should be directed to the Department's Attorneys for Children Program office in which you reside.

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