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ALIENATED CHILDREN IN DIVORCE AND SEPARATION*

By Andrew Schepard**

In 1998 this column¹ focused on *In re Marriage of Marshall*,² a then recent and highly publicized Illinois case in which the trial judge sent a 12-year-old girl, Heidi, to a juvenile detention center shackled in leg irons, and “grounded” her 8-year-old sister, Rachel, for refusing to visit with their father. I wrote then that the trial court’s decision was based on a “troubling idea. It reflects a view that a court can order a child to have a relationship with a parent over the child’s fears or objections rather than viewing a damaged parent-child relationship as having to be repaired and nurtured over time.” The 1998 column identified some therapeutic and educational interventions that might have helped the court and the Marshall family deal with Heidi and Rachel’s “alienation” from their father.

This column revisits the issue of child alienation 12 years later. Allegations that one parent has alienated the child from the other parent continue to be made repeatedly in New York cases and cases elsewhere.³ The challenges that alienated children like Heidi and Rachel pose for the family court system have not, however, gotten any easier over the years. Among them are:

- Alienated children challenge the ideal that a child should have a relationship with both parents following divorce and separation;
- Some children may be alienated from the parent for very good reason such as domestic violence, child

abuse or substance abuse. On the other hand, children may be alienated from a parent because of the pernicious influence that the favored parent exerts over the child without cause. The court must find a way of distinguishing one kind of alienation from the other;

- An “alienated child” raises critical issues about the capacity of children to make their own decisions about their relationships and best interests and to set the objectives for those who represent them in court. Should a lawyer for Heidi and Rachel advocate for what they want—never to see their father again—even if their alienation has been unjustly caused by the favored parent and is not in their long-run best interests?
- The theme of the 1998 column remains correct—courts cannot jail children for refusing to visit a parent and need alternatives to repair relationships.

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It is easier to list the challenges that alienated children pose than to solve them. The purpose of this column is, however, to inform judges, lawyers, mediators, psychologists and other family court stakeholders that the January 2010 issue of the Family Court Review, an interdisciplinary academic journal, is a state of the art resource on the subject.⁴ It is a Special Issue guest edited by a Canadian interdisciplinary team of a law professor (Nicholas Bala) and a psychologist and mediator specializing in work with high conflict divorcing and separating families (Barbara Jo Fidler). The special issue brings together the best empirical research, judicial administration practices, therapeutic and program innovations and legal analysis from both the United States and Canada currently available on child alienation. For those who are concerned with the problem, it is the best thing produced in Canada since the Vancouver Olympics.

This column summarizes a few of the major themes of the special issue. An obvious limitation must be stated at the outset: the subject is too complex and too important to be comprehensively addressed in this short column. All I can do is encourage readers to review the entire issue.

Another critical limitation must also be stated at the outset—we have to be modest in discussing what we know and what we do not know about alienated children. There is very little systematic research on how courts should best deal with alienated children. As Professor Bala and Dr. Fidler caution: “Well-designed, methodologically sound research into the efficacy of all of the different legal, educational, and clinical responses to mild, moderate and severe alienation is needed to know these remedies and interventions ‘do no harm,’ but also to be confident that they have positive effects.”

They also recognize, however, that “[w]hile research is vitally important, legal and mental health practitioners cannot wait for science to catch up to their ongoing cases, as recommendations and decisions need to be made pending the outcome of good research. For example, it is already clear that therapy and education, at least the methods and programs currently available, are ineffective for the severe cases of alienation. In addition, there is good research available on the impact of separation, high conflict, and intimate

partner violence on children and adolescents and on related matters that can inform our work in alienation cases.”⁵

Gender Wars and Alienation

The special issue editors define child alienation in a practical way as: “a child's strong resistance or rejection of a parent that is disproportionate to that parent's behavior and out of sync with the previous parent-child relationship”⁶ A number of articles describe research and theory supporting different psychological models defining and describing child alienation. The issue does not shy away from controversy. Disagreements about whether the concept of alienation of a child focusing on a single cause (the behavior of the favored parent) is a useful one and what should be done about it are thoroughly aired. Probably because of the difficulties in defining the term, the editors report that: “[t]here are no reliable statistics on the prevalence of alienation.”⁷

Professor Bala and Dr. Fidler focus on the consequences of making alienated children a battleground in the divorce wars between the genders:

Some men's rights activists claim that mothers alienate children from their fathers to seek revenge for separation, some making false and malicious allegations of abuse. These groups may further assert that the courts are gender-biased against fathers in dealing with child custody matters generally and especially when addressing alienation. Some feminists dismiss all, or most, alienation claims as fabricated by male perpetrators of intimate partner violence, often also abusive fathers, to exert control over the victimized mother and maintain contact with children, who justifiably resist or refuse contact with them, this being an adaptive and positive coping mechanism.

While there is some validity to both of these narratives, each has significant mythical elements, and furthermore, in our view, neither is especially helpful for improving the lives of children. The

reality of these cases is often highly complex and not captured by either of these relatively simplistic explanations.

Clinical experience and research have shown that abusive men may alienate their children from their victim mothers. These men may allege attempted alienation by the victim as a smokescreen to their own abusive behavior, or claim that it is the mother's behavior that has alienated the children. Rightly, mothers whose partners are abusive attempt to protect their children. *And*, not “but,” there are indeed other women consciously, or unconsciously, motivated by vengeance or due to personality disorders or mental illness who may alienate their children from fathers with whom the child had at least an adequate relationship and in many cases a good and loving relationship. A subset of these women may make repeated false allegations of abuse, some intentionally and more unintentionally, truly believing and even after thorough investigations not being able to be reassured that the abuse did not occur. The existence of alienation is not equivalent to a denial of child abuse or intimate partner violence. What is concerning is that the feminist advocates who, in the name of helping women, deny that alienation exists, do a great disservice to not only the many mothers who are unjustifiably alienated from their children, and often by abusive men, but more importantly do a disservice to the children. Similarly, fathers' rights and “parental alienation *syndrome*” groups do a disservice to children and rejected parents if they portray all rejected parents as “victims” and resist scrutiny of the conduct of these parents.”⁸

The special issue provides some empirical data on what courts actually do in cases when child alienation is alleged. An article reports on a study of all reported Canadian cases between 1989 and 2008 that dealt with claims of “alienation” of children in the context of parental separation. The study found that “[b]etween 1989 and 2008 alienation was found by the court in 106 out of 175 cases raising the issue (61 percent). The mother was the alienating parent in 72 cases (68 percent), and the father was the alienating parent in 33 cases (31 percent).”

A significant number of fathers are thus alienating (favored) parents. The key variable in determining which parent is more likely to be the alienator is which one has custody, not that parent’s gender. The authors explain:

While there are gender differences in both rates of alienating children (mothers are more likely to do this) and making unsubstantiated claims of alienation (fathers are more likely to make such claims), this reflects the fact that alienation is most commonly perpetrated by the parent with custody or primary care of the children. If alienation is found, the most common judicial response is to vary the custody regime. There is no evidence of gender bias in judicial responses to these cases.⁹

What Can Be Done?

The special issue articles express a consensus on the need for a strong and consistent judicial case management plan and early identification and intervention to most effectively address the challenges of child alienation. “Courts as institutions and judges as individual professionals do not serve the families they deal with well unless the court takes control of the case [involving child alienation] by identifying the problem early and assigning one judge to deal with it throughout... The case must be managed at the pre-resolution stage, the resolution stage and the enforcement stage.”¹⁰

Another group of articles contain detailed presentations on innovative programs (e.g., a five-day intensive “summer camp” for alienated parents and children named Overcoming Barriers¹¹ and an intensive approximately four-day experiential and educational program called Family Bridges¹²) that help alienated children and parents readjust their relationships. The programs are, however, in their relative infancy. They are presented with careful qualifications and acknowledgment of disagreements about what we know and do not know about them so that implementation can proceed cautiously. One article argues, for example, that there is insufficient evidence for courts to require or support these programs,¹³ a contention that generates a spirited response from one of the developers of the Family Bridges program.¹⁴

The special issue shows that in the years since Heidi and Rachel Marshall came to national attention, we have learned something about how to address the challenges alienated children pose for the family court system. But we still have a long way to go. Judges, lawyers, mental health professionals, mediators and advocates for children need to communicate and collaborate if progress is to continue to be made in this very difficult area. The special issue gives that collaboration a foundation to build on.

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Endnotes

1. Law and Children: “When Children Refuse to Comply With Visitation,” NYLJ Jan. 29, 1998 at 3, col. 1.

2. *In re Marriage of Marshall*, 663 N.E.2d 1113 (Ill. App.

3d. 1996).

3. See, e.g., *Lew v. Sobel*, 46 A.D.2d 893, 849 N.Y.S.2d 586 (2d Dept. 2007) (“While one parent's alienation of a child from the other parent is an act inconsistent with the best interests of the child here, the children's bond to the alienating parent is so strong that a change of custody would be harmful to the children without extraordinary efforts by both parents and extensive therapeutic, psychological intervention”); *Zafran v. Zafran*, 306 A.D.2d 468, 470, 761 N.Y.S.2d 317, 319 (2d Dept. 2002) (“Evidence that the father's conduct resulted in the alienation of the parties' two older sons from their mother supports the Supreme Court's determination that the mother is the more suitable custodial parent”).

4. Special Issue on Alienated Children in Divorce and Separation: Emerging Approaches for Families and Courts, 48 FAM. CT. REV. 5 (2010).

5. Barbara Jo Fidler & Nicholas Bala, “Children Resisting Post Separation Contact With a Parent: Concepts, Controversies and Conundrums,” 48 FAM. CT. REV. 10, 38 (2010).

6. Barbara Jo Fidler & Nicholas Bala, Guest Editors' Introduction to Special Issue on Alienated Children in Divorce and Separation: Emerging Approaches for Families and Courts, 48 FAM. CT. REV. 6 (2010).

7. Fidler & Bala, *supra* note 5, 48 FAM. CT. REV. at 11.

8. Fidler & Bala, *supra* note 5, 48 FAM. CT. REV. at 10 (emphasis in original).

9. Nicholas Bala, Suzanne Hunt & Carolyn McCarney, “Parental Alienation: Canadian Court Cases 1989-2008,” 48 FAM. CT. REV. 164, 176 (2010).

10. Donna J. Martinson, “One Case-One Specialized Judge: Why Courts Have an Obligation to Manage Alienation and Other High Conflict Cases,” 48 FAM. CT. REV. 180, 181, 183 (2010).

11. Matthew J. Sullivan, Peggie A. Ward & Robin Deutsch, “Overcoming Barriers Family Camp: A Program for High-Conflict Divorced Families Where a Child Is Resisting Contact With a Parent,” 48 FAM. CT. REV. 116 (2010).

12. Richard A. Warshak, “Family Bridges: Using Insights From Social Science to Reconnect Parents and Alienated Children,” 48 FAM. CT. REV. 48 (2010).

13. Peter G. Jaffe, Dan Ashbourne and Alfred A. Mamo, “Early Identification and Prevention of Parent-Child Alienation: A Framework for Balancing Risks and Benefits of

Intervention,” 48 FAM. CT. REV. 136 (2010).

14. Richard A. Warshak, “Alienating Audiences From Innovation: the Perils of Polemics, Ideology, and Innuendo,” 48 FAM. CT. REV. 153 (2010).

NEWS BRIEFS

GENERAL NEWS

Change in Term “Law Guardian”

Pursuant to recent legislation the term “law guardian” has been changed in most instances in New York statutes to “attorney for the child” or “attorney for children” to better reflect the attorney’s advocacy role.

New York Children’s Lawyer

The *Law Guardian Reporter* has changed its name to *New York Children’s Lawyer*. *New York Children’s Lawyer* will be published three times, rather than four times, per year.

FIRST DEPARTMENT NEWS

(Please read General News above)

Domestic Training DVD - We are in the process of posting the DVD’s online. As soon as it is available you will notified. Recertification will not be delayed, but attorneys will be required to view the program and notify the office.

Attorneys are urged to use the electronic check-in system. As with any new initiative, it will take some time for everyone to use it to full advantage, but it is important that the attorneys check-in and fulfill their responsibility. If used properly, it will serve everyone well.

There are lunchtime CLE’s planned for both Manhattan and the Bronx. Amy Ostrau will notify you by

email as to the details.

Have a good and healthy summer.

SECOND DEPARTMENT NEWS

(Please read General News above)

Update on Electronic Attorney Check-In Program

The Electronic Attorney Check-In Program has been in operation in Kings County since September of 2009, and in Westchester County since April of 2010. Effective July 1, 2010, attorneys in Queens and Richmond Counties will also be required to check into the court parts electronically. Elissa Krauss, Principal Management Analyst, Office of Court Administration, has met with the panel attorneys to provide step by step training on the use of this system. If you have any questions about the Electronic Attorney Check-In program please contact Ms. Krauss at ekrauss@courts.state.ny.us.

Continuing Legal Education

On April 28, 2010, the Appellate Division, Second Judicial Department, together with the Appellate Division, First Judicial Department, co-sponsored *An Administrative/Procedural Orientation for Mental Health Professionals Conducting Court Ordered Evaluations*. The presenters were the Hon. Paula Hepner, Supervising Judge, Kings County Family Court, Harriet Weinberger, Esq., Director, Office of Attorneys for Children,

Appellate Division, 2nd Judicial Department, and Nancy Guss Matles, LMSW, Support Services Coordinator, Office of Attorneys for Children, 2nd Judicial Department.

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

On March 1, 2010, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored *Immigration Law and Rights of Immigrants - Part II*. The presenter was Carmen Ray, Esq., Attorney, Sanctuary for Families. This lunchtime seminar was held at the Office of Attorneys for Children.

On May 3, 2010, the Appellate Division, Second Judicial Department and the Kings County Family Court presented *An Overview of the C/V/O Family Court Rules and Procedures*. The presenters were the Hon. Ann E. O’Shea, Kings County Family Court Judge, and Carol Komissaroff, Esq., Court Attorney, Kings County Family Court. This lunchtime seminar was held at the Office of Attorneys for Children.

On May 10, 2010, the Appellate Division, Second Judicial Department, together with the Appellate Division, First Judicial Department, co-sponsored *Adoption - The Legal and Social Work Perspective*. The presenters were the Hon. Phoebe Greenbaum, Judicial Hearing Officer, Kings County Family Court, Elizabeth

Fee, Esq., Kraus, Diamond and Fee, PLLC, and Claudette LaMelle, LMSW, Social Worker, Private Practice. Jayne Roberman, LMSW, Social Worker, Private Practice, served as moderator for this seminar.

On June 7, 2010, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored ***Evidence Update: the Business Record Exception to Hearsay and Recent Caselaw***. The speaker was Philip C. Segal, Esq., Segal and Greenberg, LLP. This lunchtime seminar was held at the Office of Attorneys for Children.

Tenth Judicial District (Nassau County)

On May 6, 2010, the Appellate Division, Second Judicial Department and the Nassau County Family Court presented ***An Evidence and Child Welfare Update, and Issues of Equitable Estoppel***. The presenters were the Hon. Patricia E. Doyle, Court Attorney Referee, Nassau County Family Court, Margaret A. Burt, Esq., Attorney at Law, and Richard Mayer, M.D., Psychiatrist, Private Practice.

Ninth Judicial District (Westchester County)

The Appellate Division, Second Judicial Department, together with the Westchester County Family Court, will present ***Forensic Reports: Understanding Diagnostic Codes***. It is anticipated that this training will be held in late Spring or early Summer. A notice to the panel will be forthcoming

with further details regarding this lunchtime training.

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.

Interested attorneys may obtain copies of the materials from the above seminars by contacting the Office of Attorneys for Children.

THIRD DEPARTMENT NEWS

(Please read General News on page 6)

2010 Edition of the Law Guardian Program's Administrative Handbook

The Law Guardian Program's Administrative Handbook is now available for viewing on the Law Guardian Program website, www.nycourts.gov/ad3/lg. The Administrative Handbook contains important information about the agency's operations, including updated lists of the Law Guardian Advisory Committee and Liaison Committee for each Judicial District.

Mileage Rate Change

Law guardians should note that the mileage rate for law guardians has been changed to \$.50 per mile, effective January 1, 2010.

Website

The Law Guardian Program continues to update its web page located at

www.nycourts.gov/ad3/lg. Law guardians have access to a wide variety of resources, including online CLE, the New York State Bar Association Law Guardian Representation Standards, the 2010 edition of the Law Guardian Program 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 Publication Order Form allows Third Department law guardians to email the Law Guardian Program with any requests for written materials handed out in conjunction with CLE programs.

John T. Hamilton, Jr., Esq. Award for Excellence in Law Guardian Representation

Presiding Justice Anthony V. Cardona is pleased to announce that Joyce M. Galante, Esq., Rensselaer County Law Guardian Panel member, was this year's recipient of the John T. Hamilton, Jr. Law Guardian Award which was presented by the Appellate Division on April 23, 2010 in conjunction with the annual topical conference at the Holiday Inn in Colonie. Ms. Galante has demonstrated an outstanding commitment to high-quality law guardian representation and to the well-being of law guardian clients. The award commemorates the distinguished service of John T. Hamilton, Jr., Esq., of Delhi, as a long-time law guardian and member of the Law Guardian Advisory Committee for the Third Department.

Training News

The following continuing legal educations programs are scheduled for Fall 2010:

Law Guardian Update '10-11 will be held at the Binghamton Regency on Friday, September 10, 2010 and again on Saturday, November 13, 2010 at the Clarion Hotel (Century House) in Latham. Registration information will go out by e-mail to all Third Department Law Guardians six to eight weeks prior to the training dates.

Fundamentals of Law Guardian Advocacy, introductory training of new law guardians, will be held on Friday and Saturday, December 3-4, 2010 at the Clarion Hotel (Century House) in Latham.

When available, program dates and agendas will be posted on the Law Guardian Program website, www.nycourts.gov/ad3/lg/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 law guardians, please contact Betsy Ruslander, Assistant Director of the Law Guardian Program in the Third Department, at (518) 471-4826, or by e-mail at lgp3d@nycourts.gov.

Liaison Committee Meetings

The Law Guardian Liaison Committees for the Third, Fourth and Sixth Judicial Districts met this past spring to discuss matters relevant to the representation of children in their counties. The

committees were developed to provide a means of communication between law guardian panel members and the Law Guardian Program. The Liaison Committees, whose members are nominated by Family Court judges, meet twice annually and will meet again in the fall of 2010. Additionally, representatives are frequently in contact with the Law Guardian Program 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 Jack Carter or Betsy Ruslander by telephone or e-mail at lgp3d@nycourts.gov. If you have any issues you would like brought to the attention of the Law Guardian Program, please contact your county's liaison representative.

FOURTH DEPARTMENT NEWS

(Please read General News on page 6)

2009 Honorable Michael F. Dillon Awards

Congratulations to the recipients of the 2009 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 2009 Awards were presented to the recipients by Presiding Justice Henry J. Scudder at a ceremony at the M. Dolores Denman Courthouse on June 22, 2010. The recipients are as follows:

Fifth Judicial District

Diane Martin-Grande, Oneida County
Marc Waldauer, Onondaga County

Seventh Judicial District

Lisa Morris, Monroe County
Deetza Benno, Steuben County

Eighth Judicial District

Theresa Lorenzo, Erie County
James Kreuzer, Erie County

Training of Attorneys for Children (AFC) on Domestic Violence:

To remain on the Fourth Department AFC panel, on or before December 31, 2010, you are required to view four segments of DV training on the Fourth Department AFC website (www.courts.state.ny.us/ad4), click on AFC Program link, then on DV on-line video link).

Pursuant to recent legislation and Court Rule, all attorneys for children are required to receive initial and ongoing training on domestic violence, including the dynamics of domestic violence, its effect on victims and on children, and the relationship between such dynamics and the issues considered by the court, including, but not limited to, custody, visitation and child support.

In January 2010, we co-sponsored four full-day seminars featuring nationally known speakers on the topic of domestic violence in the First, Second and Fourth Departments (**the mandatory DV training requirement is not applicable to AFCs that attended**

any of those seminars). The seminars were videotaped and the four segments we selected to meet the DV training requirement are available on the Fourth Department AFC website as stated above. Pursuant to NYS CLE Program rules, you can receive free CLE for viewing the videos, as long as you follow the directions on the DV link and have been admitted for more than two years.

Detailed directions about how to view the segments and receive CLE credit are on the DV on-line video link. If you have questions after carefully reading those directions, email your question (do not call) Lisa Merritt at lmerritt@courts.state.ny.us .

A bound copy of the materials was sent to you March 31, 2010. The materials include information pertaining to the mandatory segments, as well as segments that are not available at this time. The unavailable segments may be placed on the DV on-line video site after December 31, 2010, so please retain your materials even after you have complied with mandatory training. **NOTE:** Authority to view the DVDs on the DV link is restricted to AFC and access is password protected. You should have received your user name and password on March 31 with the bound copy of the materials. If you need your user name and password, please email your request to lmerritt@courts.state.ny.us. Do not share your user id or password with any other person.

Tentative Fall Seminar Schedule

September 16, 2010

Update
Holiday Inn
Lockport, NY

October 1, 2010

Update
Holiday Inn
Auburn, NY

October 15-16, 2010

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

RECENT BOOKS AND ARTICLES

ADOPTION

Tyler M. Hawkins, *Adoption of Infants Born to Unaware, Unwed Fathers: A Statutory Proposal That Better Balances the Interests Involved*, 2009 Utah L. Rev. 1335 (2009)

Irene D. Johnson, *A Suggested Solution to the Problem of Interstate Succession in Nontraditional Family Arrangements: Taking the "Adoption" (and the Inequity) Out of the Doctrine of "Equitable Adoption,"* 54 St. Louis U. L. J. 271 (2010)

Molly Miller, *Embryo Adoption: The Solution to an Ambiguous Intent Standard*, 94 Minn. L. Rev. 869 (2010)

Krista Stone-Manista, *Parents in Illinois are Parents in Oklahoma Too: An Argument for Mandatory Interstate Recognition of Same-Sex Adoptions*, 19 L. & Sexuality 137 (2010)

Symposium, *Arkansas Initiated Act 1 of 2008*, 63 Ark. L. Rev. 1 (2010)

ATTORNEY FOR THE CHILD

Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons From a Civil Gideon Experiment*, 37 Fordham Urb. L. J. 93 (2010)

CHILD SUPPORT

Sandra Leigh King, *Abandonment: How the Texas Legislature and Family Court System Fail to Meet the Needs of Texas Children*, 51 S. Tex. L. Rev. 75 (2010)

CHILD WELFARE

Samuel D. Castor, *Internet Child Protection Registry Acts: Protecting Children, Parents and . . . Pornographers? Allowing States to Balance the First Amendment with Parents' Right to Privacy and Sovereignty in the Home*, 59 Cath. U. L. Rev. 231 (2009)

Reena Kapoor & Howard Zonana, *Forensic*

Evaluations and Mandated Reporting of Child Abuse, 38 J. Am. Acad. Psychiatry & L. 49 (2010)

Seymour Moskowitz, *Save the Children: The Legal Abandonment of American Youth in the Workplace*, 43 Akron L. Rev. 107 (2010)

Stephen L. Nelson, et. al., *Families in Crisis, Challenges for Policymakers: Examining the Troubled Lives of Drug Endangered Children*, 36 Ohio N.U. L. Rev. 81 (2010)

CHILDREN'S RIGHTS

Mary Koll, *Growth, Interrupted: Nontherapeutic Growth Attenuation, Parental Medical Decision Making, and the Profoundly Developmentally Disabled Child's Right to Bodily Integrity*, 2010 U. Ill. L. Rev. 225 (2010)

Paul Stenzel, *Safe Haven Laws and the Indian Welfare Act: Conflicting Laws and Policy Goals Leave Indian Children at Risk*, Children's Legal Rights Journal, Volume 29, Number 3, 1 (2009)

Samantha S. Uslan, *What Parents Don't Know: Informed Consent, Marriage, and Genital-Normalizing Surgery on Intersex Children*, 85 Ind. L. Rev. 301 (2010)

CONSTITUTIONAL LAW

Allison E. Hayes, *From Armbands to Douchebags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 Akron L. Rev. 247 (2010)

John A. Humbach, *"Sexting" and the First Amendment*, 37 Hastings Const. L. Q. 433 (2010)

Laura Jarrett, *Excessively Intrusive in Light of Age or Sex?: An Analysis of Safford United School District No. 1 v. Redding and its Implications for Strip Searches in Schools*, 33:1 Harv. J. L. & Gender 403 (2010)

Isaac A. McBeth, *Prosecute the Cheerleader, Save the*

World? Asserting Federal Jurisdiction Over Child Pornography Crimes Committed Through "Sexting," 44 U. Rich. L. Rev. 1327 (2010)

Jessica Moy, *Beyond 'The Schoolhouse Gates' and into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment After Morse v. Frederick*, 37 Hastings Const. L. Q. 565 (2010)

Michael Young, *In Defense of the Constitutionality of Critically Discussing Religion and Ethics in Schools in Light of Free Exercise and Parental Rights*, 70 Ohio St. L. J. 1565 (2009)

COURTS

Emily C. Aldridge, *To Catch a Predator or to Save His Marriage: Advocating for an Expansive Child Abuse Exception to the Marital Privileges in Federal Courts*, 78 Fordham L. Rev. 1761 (2010)

Lisa Pearlstein, *Walking the Tightrope of Statutory Rape Law: Using International Legal Standards to Serve the Best Interests of Juvenile Offenders and Victims*, 47 Am. Crim. L. Rev. 109 (2010)

Shannon Shafron-Perez, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 32 J. Marshall J. Computer & Info. L. 431 (2009)

Jane M. Spinak, *Reforming Family Court: Getting it Right Between Rhetoric and Reality*, 31 Wash. U. J. L. & Pol'y. 11 (2009)

CUSTODY AND VISITATION

Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 St. Louis U. L. J. 113 (2010)

Karen J. McMullen, *The Scarlet "N": Grandparent Visitation Statutes That Base Standing on Non-Intact Family Status Violate the Equal Protection Clause of the Fourteenth Amendment*, 83 St. John's L. Rev. 693 (2010)

Daniel R. Victor & Keri L. Middleditch, *When Should Third Parties Get Custody or Visitation*, 27 GPSolo 14 (2010)

DOMESTIC VIOLENCE

Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essential Proposal*, 31 Wash. U. J. L. & Pol'y. 39 (2009)

Rebecca Hulse, *Privacy of Domestic Violence in Court*, 16 Wm. & Mary J. Women & L. 237 (2010)

Symposium, *Ninth Annual Women and the Law Conference and 2009 Ruth Bader Ginsburg Lecture Confronting Domestic Violence Head on: The Role of Power in Domestic Relationships*, 32 T. Jefferson L. Rev. 21 (2009)

DIVORCE

Tali Schaefer, *Saving Children or Blaming Parents? Lessons From Mandated Parenting Classes*, 19 Colum. J. Gender & L. 491 (2010)

EDUCATION LAW

Samar A. Katnani, *Pics. Grutter, and Elite Public Secondary Education: Using Race as a Means in Selective Admissions*, 87 Wash. U. L. Rev. 625 (2010)

Jeffrey A. Knight, *When Close Enough Doesn't Cut It: Why Courts Should Want to Steer Clear of Determining What Is - And What Is Not - Material in a Child's Individual Education Program*, 41 U. Tol. L. Rev. 375 (2010)

Amy P. Meek, *School Discipline "As Part of the Teaching Process": Alternative and Compensatory Education Required by the State's Interest in Keeping Children in School*, 28 Yale L. & Pol'y Rev. 155 (2009)

Allison S. Owen, *Leaving Behind a Good Idea: How No Child Left Behind Fails to Incorporate the Individualized Spirit of the IDEA*, 78 Geo. Wash. L. Rev. 405 (2010)

Davin Rosborough, *Left Behind, and Then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions*, 87 Wash. U. L. Rev. 663 (2010)

Symposium, *Looking to the Future: Legal and Policy Options for Racially Integrated Education in the South and the Nation*, 88 N.C. L. Rev. 713 (2010)

Alison Powers, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 Rutgers L. Rev. 241 (2010)

FAMILY LAW

Darryn Cathryn Beckstrom, *Balancing Civic Values and Parents' Free Exercise Rights*, 45 Gonz. L. Rev. 149 (2010)

Krista L. Schram, *The Need for Heightened Procedural Due Process Protection in Juvenile Sex Offender Adjudications in South Dakota: An Analysis of The People in the Interest of Z.B.*, 55 S. D. L. Rev. 99 (2010)

Alafair S. Burke, *When Family Matters*, 119 Yale L. J. 1210 (2010)

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Ashleigh Garvey & Claire Mitchell, *Who's Your Daddy? A Proposal for Paid Family Leave to Promote the Growth of Families*, 27 Hofstra Lab. & Emp. L. J. 199 (2009)

W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing a Lesser Juvenile Charge With an "Aggravating Factors" Framework*, 77 Tenn. L. Rev. 1 (2009)

Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 La. L. Rev. 751 (2010)

Danielle Johnson, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and why Divorce is an Incident of Marriage That Should be Uniformly Recognized Throughout the States*, 50 Santa Clara L. Rev. 225 (2010)

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FEDERAL COURTS

In Wrongful Removal Case ACS Attorneys Entitled to Absolute Immunity and ACS Caseworkers Entitled to Qualified Immunity

Mother came home from work and found her fiancé holding their infant son Kenny. The child was not breathing and was taken to the hospital. The next day, a non-physician hospital employee reported to the NYS Register of Child Abuse and Maltreatment that Kenny had suffered a broken rib, diffuse cerebral edema, and a heart attack as a result of violent shaking by the father. Subsequently, the rib fracture was found to be several weeks old. Although the ACS caseworker assigned to investigate learned from the hospital physician she spoke with that mother had “no part” in the immediate injuries, the broken rib could have been the result of a prior shaking incident. ACS then informed mother that Kenny and mother’s other child were to be removed from her custody. The other child had no injuries and was placed in kinship care and Kenny died a few days later. Petitions were filed in Family Court accusing both parents of child abuse of both children. Thereafter, a city medical examiner informed an ACS attorney that she could not say that Kenny was a victim of shaken baby syndrome and the fractured rib was actually a congenital rib malformation. In a final autopsy report, the medical examiner concluded that the cause of Kenny’s death was a rare and natural heart defect and the previous finding of a rib fracture was a congenital abnormality. ACS moved to withdraw the petitions and Family Court ultimately agreed. Mother then commenced actions on behalf of herself and child against the City of New York and ACS caseworkers and attorneys (defendants), among others, alleging violations of state and federal law arising from actions taken by defendants in connection with the investigation into the death of Kenny and resulting in the removal of her other child. The District Court granted defendants summary judgment on grounds of absolute and qualified immunity. The Court of Appeals affirmed, on the ground that some form of immunity attached to each of the defendants sufficient to preclude liability.

Cornejo v. Bell, 592 F3d 121 (2d Cir 2010)

In Wrongful Removal Case City of New York and ACS Caseworkers and Supervisors Entitled to Qualified Immunity

Plaintiff mother and grandmother took mother’s infant to the hospital with a swollen leg, where he was diagnosed with a broken leg. The hospital reported the injury to the NYS Register of Child Abuse and Maltreatment and subsequently submitted another report that the child also had a frontal skull fracture and old and new retinal hemorrhages. ACS investigated. Initially, neither mother nor grandmother were able to provide an ACS caseworker with an explanation for the child’s injury, although mother, who had been bedridden for six weeks, alleged that she was physically incapable of inflicting the injuries. Subsequently, the grandmother, who had been the child’s primary caregiver during this period, admitted that she had slipped while holding the child and his leg had hit the counter but she was unable to explain the other injuries. After the head of the hospital’s child protection team concluded that the child’s retinal injuries were indicative of shaken baby syndrome, ACS commenced a child protective proceeding in Family Court and the child was removed from mother’s custody. At trial, the head of the hospital’s child protective team and another physician testified that the child suffered from shaken baby syndrome and mother’s expert physician testified that the injuries were more consistent with childbirth injuries. Before the court’s decision, ACS moved to withdraw all allegations against mother. Mother then commenced this action on behalf of herself and her child against ACS caseworkers and supervisors and the City of New York (collectively the “City defendants”), as well as the head of the hospital’s child protective team and the hospital, alleging violations of mother’s and child’s rights under the Fourth and Fourteenth Amendments and claims under New York State law for malicious prosecution and abuse of process. The District Court denied the City defendants’ motion for summary judgment, which had sought dismissal of the action on the grounds of absolute and/or qualified immunity and on the basis of the “*Rooker-Feldman*” doctrine. The Court of Appeals reversed. The *Rooker-Feldman* doctrine did not apply to bar this action because mother did not lose in state court: before commencement of the action ACS had withdrawn all its

claims against mother and Family Court had released the child to the mother's custody. However, defendants reasonably relied on physician's shaken baby diagnosis when they removed the child from mother's custody and therefore were entitled to qualified immunity. Even if defendants were aware of physician's alleged reputation for mis-diagnosing shaken baby syndrome, physician was head of the hospital's child protection team and the diagnosis was shared by another physician and mother did not give alternative explanation for the injuries. Defendants were entitled to absolute immunity under New York law for claims of malicious prosecution and abuse of process.

V.S. v. Muhammad, 595 F3d 426 (2d Cir 2010)

Plaintiffs Not Entitled to Reimbursement For Private School Tuition Under IDEA

Plaintiff parents on behalf of their child commenced this action against defendant School District pursuant to the Individuals with Disabilities Act (IDEA) seeking reversal of a State Review Office (SRO) denial of parents' request for tuition reimbursement for the 2005-2006 school year. The District Court denied parents' motion for summary judgment and granted defendant's motion for summary judgment. The child had received special education services since preschool. An Individualized Education Plan (IEP) was developed and implemented during the child's attendance at grades one through five. In fifth grade the parents noticed a significant decrease in the child's abilities and the child's teachers noticed that the child was falling behind. In sixth grade the child was in a self-contained classroom with no more than 15 students with one teacher and one aide (15:1:1). She had ten goals and 135 objectives to meet those goals. She met three objectives. In seventh grade (2004-2005) the Committee on Special Education (CSE) recommended that the child receive additional counseling and speech services and that she attend extended school year services and a summer PARISS program to prevent regression. The parents sent defendant a letter requesting that it incorporate a Lindamood-Bell [LmB] Learning Process in the child's program. The parent's rejected the CSE's summer recommendation and enrolled the child in the LmB summer program. During the 2004-2005 school year the parents enrolled the child part-time in LmB. The 2004-2005 school year

was settled by the parties. The CSE held a review to develop the child's IEP for the 2005-2006 year. The parents provided CSE with a recent independent neuropsychological evaluation and other materials from LmB. The CSE recommended that the child be placed in a 15:1:1 class for three hours and 20 minutes per day and assigned an aide to assist her one on one (1:1). Recommended services included daily speech-language therapy, with alternating group and individual sessions, counseling one time per six day cycle and daily supportive reading in a 2:1 setting. Numerous other supports and accommodations also were included. The parents rejected the summer 2005 and 2005-2006 school year programs and advised defendant that they would be enrolling the child in LmB and would be seeking reimbursement for both the 2005 summer and 2005-2006 school year. The child attended the summer 2005 LmB program and signed out of public school at 12:30 each day of the 2005-2006 school year to attend LmB. After the Impartial Hearing Officer and subsequently the SRO denied the parents' request for reimbursement of LmB tuition, the parents commenced this action. The district court held that the parents were not entitled to reimbursement for their unilateral decision to place their child in LmB. There was adequate support for the SRO's determination that the CSE's recommendation for summer 2005 was appropriate and the IEP for the 2005-2006 school year offered the child a free appropriate education.

Antignano v Wantagh Union Free School Dist., 2010 WL 55908 (EDNY 2010)

Marriage and Family Therapist Testimony Precluded

In an action arising out of the Hague Convention, petitioner mother, a UK resident, alleged that respondent father, a US citizen, wrongfully retained the couple's children, ages 9 and 12, in the United States. The District Court granted petitioner's motion *in limine* to strike the report and preclude the testimony of respondent's expert witness. Upon reconsideration of that ruling, the court adhered to its decision. Respondent had asserted that, in the event petitioner made a prima facie case for return of the children, the court should determine whether the children prefer to remain in the US and are old and mature enough "for the so-called 'age and maturity' defense to apply and

for it to be outcome-determinative.” Petitioner retained a licensed forensic psychologist who, after evaluating the children and administering testing, concluded the children were too immature for the court to credit their preference. Respondent retained a licensed marriage and family therapist, who was not a psychologist. Respondent’s expert submitted a written report criticizing petitioner’s view and conclusions and stating that one of the psychological tests he administered, which had been performed by petitioner’s expert, yielded contrary results. Respondent’s expert was not qualified to testify as an expert with regard to the children’s maturity. Respondent’s expert is not a psychologist and “marriage and family therapy” and “psychology” are substantively different professions with different licensing requirements and procedures. Respondent’s expert lacked the formal credentials to opine as an expert on the psychological analysis of the children’s maturity provided in petitioner’s expert report or to perform the psychological tests himself.

Haimdas v Haimdas, 2010 WL 652823 (EDNY 2010)

COURT OF APPEALS

Appellate Division Reversed: Court Erred in Admitting Hearsay Evidence

The trial court erred in admitting hearsay evidence without a proper foundation. [Note: the AD decision (60 AD3d 1091) had held that judicial notice could be taken of the complainant's bank records.] Even assuming some documents may be admitted as business records without foundation testimony, the document here was not such a document because nothing on its face indicated that it was made in the regular course of business. Under the circumstances present in this case, the error could not be deemed harmless.

People v Ramos, 13 NY3d 914 (2010)

Prosecution Could Not Rely on "Exceptional Circumstances" Exclusion For Speedy Trial Purposes

In a felony complaint, defendant was charged with attempted dissemination of indecent material to minors in the first degree. The communication at issue did not involve the transmission of any sexual images. About six months later, the Second Department, in *Kozlow*, held that a defendant could not be charged with the crime defendant was charged with where the communication upon which the conviction was sought did not include sexual images. The DA determined that defendant could not be indicted, but left the criminal complaint pending. Nine months later, the Court of Appeals reversed *Kozlow*, holding that a defendant could be convicted of the subject crime even where there were no nude or sexual images. The People then presented their case to the grand jury and defendant was indicted 16 months after he was initially arraigned on the felony complaint. Defendant moved to dismiss on speedy trial grounds. The People contended that 275 days of delay should be excluded pursuant to the "exceptional circumstances" provision of CPL 30.30 (4) (g). The Court of Appeals disagreed. The "exceptional circumstances" exception is limited by the dominant legislative intent of the statute to discourage prosecutorial inaction and, therefore, the exception is only available when the People for practical reasons beyond their control cannot proceed with a legally viable prosecution. Here, after the Appellate Division's

decision in *Kozlow*, there was no legal basis to proceed against defendant. While the circumstances in the instant case were unusual, they were not exceptional. What was involved was prosecutorial inaction resulting in the prolonged pendency of a criminal complaint without any judicial intervention and any notification to defendant of the status of the proceeding.

People v Price, 14 NY3d 61 (2010)

Asserted Father's Petition to Vacate Adoption Decree of Cambodian Child Properly Granted

The parties were unmarried lovers who brought a Cambodian child to the United States and planned to adopt him together. The adoption proceedings became complicated, the parties broke up, and each claimed to be the child's sole parent. The Surrogate granted the alleged father's petition to vacate an adoption decree previously granted to the alleged mother and the Appellate Division affirmed. The Court of Appeals also affirmed. The parties met the child in a Cambodian orphanage and brought him to the United States for the purpose of receiving medical care. The parties wanted to adopt the child and believed that United States law presented an obstacle to the adoption because there was a moratorium on the adoption of Cambodian children. Therefore, the alleged father, who was a United States citizen, but was born in Trinidad, reestablished Trinidadian citizenship and planned to adopt the child in Trinidad. The parties thought that because the child would no longer be a Cambodian, the alleged mother then also could adopt him. After the alleged father reclaimed his Trinidadian citizenship, the Cambodian authorities (MOSAVY), in 2004, approving his request to adopt the child. The alleged father, however, was not allowed to adopt the child in Trinidad because single men could not adopt under Trinidadian law. The parties' romantic relationship ended. Thereafter, the alleged father, at the alleged mother's request, signed a letter to MOSAVY relinquishing the 2004 Cambodian approval of the adoption and the alleged mother made her own application to adopt the child. In 2005, MOSAVY issued the alleged mother a certificate identical to the one issued to the alleged father in 2004. In 2006, the alleged mother, without notice to the alleged father, filed a petition to adopt the child in New

York State, which was granted later that year. During the pendency of the adoption proceeding the Cambodian government issued to the alleged mother two documents: a letter stating, among other things, that the Cambodian government validly granted the alleged mother permission to adopt the child and a “Sor Chor Nor” (translated as a “governmental edict or clarification of rights”) repeating the substance of the aforementioned letter and adding that the alleged father’s request to adopt the child was “null and void.” The Court of Appeals agreed with the Surrogate that the alleged father became the child’s father by virtue of the certificate issued to him in 2004. The Cambodian adoption was properly accorded comity and thus the alleged father was the child’s father under New York State law. The father did not give valid consent in his 2004 letter to the adoption of the child by the alleged mother because the letter did not meet the requirements of Domestic Relations Law § 115-b. Cambodian law did not govern the issue of the validity of the letter: once parental rights were validly established under New York law, between an adoptive parent and child who continued to live in New York, New York law governed. The 2006 MOSAVY letter and Sor Chor Nor were not “acts of state” of the Cambodian government that must be respected by United States courts because they were not acts done within Cambodia. The father, the child and the alleged mother were living in New York in 2006. Parents living in New York with their adopted children should not run the risk that those adoptions can be nullified by the decree of a foreign government. The child’s best interests, while important, were not dispositive. The parental rights of a child’s father cannot be ignored because a court thinks it would be in the child’s best interests to be adopted by someone else.

Matter of Doe, 14 NY3d 100 (2010)

Probable Cause Existed For Search of Vehicle After Traffic Stop

Defendant was driving a vehicle that was stopped by the police based upon probable cause to believe a traffic infraction had occurred. During the stop, cocaine residue was observed on defendant’s hand. After defendant was arrested, the officers discovered crack cocaine in defendant’s pocket and over a half-pound of the drug in the vehicle. Supreme Court denied

defendant’s motion to suppress the drugs but the Appellate Division reversed, concluding that once the police officers determined that a traffic infraction had occurred, the purpose for the detention was exhausted and the seizure illegal. The Court of Appeals reversed. The initial stop was permissible and the police officers’ subjective motivation to investigate possible drug activity did not negate the objective reasonableness of the officers’ actions. It was proper for the police officers to return to defendant’s vehicle in order to complete the stop. Because drug residue was first seen while the police officer had a justifiable basis to continue the detention for the traffic infraction, that observation provided probable cause to arrest and search defendant and the subsequent impoundment and inventory search of the vehicle were valid.

People v Edwards, Jr., 14 NY3d 741 (2010)

Biological Father May Assert Equitable Estoppel Defense

In 1994, A. was born. Her mother was unmarried but living with Raymond, who was listed as A.’s father on A.’s birth certificate. Mother and Raymond had a child together before A. was born and had another child together after A. was born. When A. was seven years old, she became aware that Raymond might not be her biological father. At that time, her mother called respondent Kenneth at his home in Florida and A. asked him questions concerning his physical characteristics. When Kenneth attempted to speak to A. a second time, Raymond warned Kenneth not to speak to A. again. Kenneth had no further contact with A. When A. was twelve years old her mother filed a petition against Kenneth seeking an order of filiation and support. The Support Magistrate did not advise Kenneth of his right to counsel, but did advise him that he had the right to admit or deny paternity. Kenneth agreed to a genetic marker test, which indicated a 99.9 % probability that he was A.’s biological father. At a later hearing, where Kenneth had assigned counsel, he protested that he had not spoken to his attorney and the attorney admitted that was so but the Support Magistrate proceeded with the hearing anyway. When Kenneth raised the issue of the equitable estoppel, the Support Magistrate transferred the case to a Family Court Judge, who determined that Kenneth was the father of A. and entered an order of filiation. The

Appellate Division affirmed, holding that equitable estoppel is applicable in paternity proceedings only where it is invoked to further the best interests of the child and it is generally not available to a party seeking to disallow paternity for the purpose of avoiding child support. The Court of Appeals reversed. Kenneth properly sought to invoke equitable estoppel against the mother, who led Kenneth to form the reasonable belief that he was not A.'s father and his contention was appropriate that it was not in A.'s best interests to have her current long-term child-father relationship with Raymond interrupted. Contrary to the attorney for the child's contention, equitable estoppel can be used by a person who has already been determined to be the biological father. The Court remitted to Family Court for a hearing to decide the merits of Kenneth's claim and directed that Raymond be joined as a necessary party so Family Court could consider the nature of A's and Raymond's relationship and make a proper determination of A.'s best interests.

Matter of Juanita A. v Kenneth Mark N., ___ NY3d ___ (2010)

Same-sex Former Partner Lacked Standing to Assert Right to Visitation But Is Parent Pursuant to Vermont Civil Union.

Respondent Janice R. is the biological mother of M.R., a six-year-old boy who was conceived through artificial insemination before Janice entered into a civil union in Vermont with her then partner, petitioner Debra H. M.R. was born one month before the civil union. About three years later, Janice and Debra broke off their relationship and Janice allowed Debra to have supervised visitation with M.R., until two year after that, when Janice scaled back and ultimately stopped visitation. Thereafter, Debra commenced this proceeding, seeking joint legal and physical custody of M.R. Supreme Court concluded that the facts alleged by Debra, if true, established a prima facie basis for invoking equitable estoppel and ordered another hearing to determine the issue. Janice appealed and obtained a stay of the equitable estoppel hearing pending appeal. The Appellate Division reversed and dismissed the petition, reasoning that equitable estoppel may not be invoked where a party lacks standing to assert a right to visitation. The Court of Appeals reversed and remitted. The Court reaffirmed its

holding in *Matter of Alison D. v Virginia M.* (77 NY2d 651) that a non-biological same-sex former partner was not a parent within the meaning of Domestic Relations Law § 70. The Court stated that *Alison D.*, in conjunction with the opportunity for second-parent adoptions, created a bright-line rule that promoted certainty in the wake of domestic breakups that can be contentious. The Court held, however, that because Debra and Janice entered into a civil union, Debra was a parent under Vermont law and, after according Vermont law comity, recognized Debra as M.R.'s parent. The Court remitted for a best interests hearing where Debra would have to establish facts warranting an award in her favor. There were three separate concurrences.

Debra H. v Janice R., ___ NY3d ___ (2010)

Support Petition Brought by Biological Mother Against Former Same-sex Partner Reinstated

The parties H.M. and E.T., both females, were involved in a romantic relationship from 1989 through 1995 and cohabited during much, if not all of that time. In 1993, E.T. performed the procedure by which H.M. was inseminated and H.M. subsequently became pregnant. The parties separated four months after the child was born. H.M. moved into her parents' home in Montreal with the child. E.T. continued to provide gifts and monetary contributions to the child. In 2006, H.M. filed an application in Ontario, Canada, seeking a declaration of E.T.'s parentage and an order of child support, retroactive to the child's birth. Pursuant to the Uniform Interstate Family Support Act (UIFSA), the application was transferred to Family Court, Rockland County. The Support Magistrate dismissed the petition on the ground that no legal basis for jurisdiction existed. Upon H.M.'s objections, Family Court reversed and ordered a hearing on whether E.T. should be equitably estopped from denying parentage and support obligations. The Appellate Division reversed and reinstated the Support Magistrate's order dismissing the petition for lack of subject matter jurisdiction. The Court of Appeals reversed and reinstated the petition. Family Court had subject matter jurisdiction to determine whether any parent, regardless of gender, was responsible for child support pursuant to Family Court Act § 413 (1) (a) and that statutory jurisdiction carried with it ancillary jurisdiction to

fulfill the court's core function. Thus, because Family Court has jurisdiction to determine a parent's support obligation, it also has inherent authority to ascertain whether a respondent is a child's parent. The dissent would have affirmed on the ground that Family Court lacked jurisdiction to grant equitable relief.

Matter of H.M. v E.T., ___ NY3d ___ (2010)

Class Action Certification to Developmentally Disabled Children Upheld

In an action originally brought on behalf of seven children in foster care and subsequently added 11 intervenor developmentally disabled plaintiffs, who were or had been in NYC Administration for Children's Services's (ACS) care, custody or guardianship, the amended complaint set forth six causes of action against ACS and the NYS Office of Mental Retardation and Developmental Disabilities (OMRDD), alleging, among other things, that ACS and OMRDD failed to place them in the least restrictive settings that were appropriate for their needs and that ACS's and OMRDD's failures were especially harmful to children who were "aging out" of the foster care system because delayed referrals to OMRDD made it more difficult for that agency to find permanent placements for them. Plaintiffs alleged that there were at least 150 children who were similarly injured by ACS's and OMRDD's failures to provide services. Plaintiffs moved for class certification and ACS opposed the motion and cross-moved for partial summary judgment dismissing plaintiffs' prospective claims as moot because eight plaintiffs had been placed in appropriate facilities and the other three had been approved by OMRDD and were awaiting vacancies. Supreme Court denied the motion of ACS and certified the class. The Appellate Division, and thereafter the Court of Appeals, affirmed. The exception to the mootness doctrine applied because plaintiffs raised substantial and novel questions and the issues were likely to recur and might evade review. Although each of the plaintiffs and proposed class members possessed his or her own unique factual circumstances and special needs, and a determination regarding appropriate placements would require a particularized inquiry as to each plaintiff's requirements, the Appellate Division properly identified four common allegations that transcend and predominate over any individual matters: (1) all but one

of the plaintiffs alleged that ACS failed to timely make a referral to OMRDD; (2) plaintiffs claimed that ACS submitted incomplete or outdated referral packets to OMRDD on their behalf, resulting in unnecessary rejections and further delays; (3) ACS's purported and recurring failure to meet its permanency planning obligations caused plaintiffs to age out of the foster care system before appropriate services or placements were secured, and most of the plaintiffs were now 21 years of age or older; and (4) each of the plaintiffs asserted that, when they were referred to OMRDD, that agency failed to provide timely services, often placing them on open-ended waiting status. Commonality cannot be determined by any mechanical test, and the fact that questions peculiar to each individual may remain after resolution of the common questions was not fatal to the class action. The dissent would have reversed and granted ACS's motion "because the mootness exception is inapplicable for essentially the same reason that class action is inappropriate: each case is unique, and there is no meaningful 'likelihood of repetition' of any plaintiff's claim."

City of New York v Maul, ___ NY3d ___ (2010)

APPELLATE DIVISIONS

ADOPTION

Respondent's Consent Not Required

Family Court adjudged that the consent of respondent father to the adoption of his child was not required. The Appellate Division affirmed. The father contended that he was denied effective assistance of counsel because his attorney did not challenge the constitutionality of section 111 (1) (d) of the Domestic Relations Law. The failure to advance a challenge that had no merit did not constitute ineffective assistance of counsel. Section 111 (1) (d) was amended to comply with *Caban v Mohammed* (441 US 380), which held that where a parent failed to come forward to participate in the rearing of his or her child, the Equal Protection Clause did not preclude a state from withholding from that parent the privilege of vetoing an adoption. The statute now provides that consent of the father of a child born out-of-wedlock and placed with adoptive parents more than six months after the birth of child is required, but only if the father maintained substantial and continuous or repeated contact with the child. Furthermore, because the father's contact with the child was not as extensive as the mother's contact with the child, the absence of a challenge by the father's attorney to the constitutionality of the statute based on a claim of the denial of equal protection of the law as applied to the father, also did not deprive him of meaningful representation. The father's attorney properly attempted to demonstrate that the father maintained substantial contact with the child.

Matter of Kayla R., 67 AD3d 1420 (4th Dept 2009)

CHILD ABUSE AND NEGLECT

Fact-finding Determination of Neglect Reversed

Family Court found that respondent mother neglected her children. After the fact-finding determination of neglect, the order of disposition placed the children with their paternal grandmothers until completion of the permanency hearing. The Appellate Division reversed. The evidence supporting the neglect finding was that police officers recovered from the apartment where respondent and the children resided one glassine

envelope each of heroin and cocaine sufficient to establish misdemeanors and a digital scale. The heroin was recovered from the dining area, the cocaine from respondent's mother's bedroom, and the scale from a dresser drawer in respondent's bedroom. A police officer testified that the mother of respondent told him the controlled substances in the apartment were hers and that respondent told him her mother used drugs and the drugs belonged to her mother. The officer also testified that respondent told him the scale belonged to the father of her infant son, who no longer lived in the apartment. The Appellate Division, citing *Nicholson* (3 NY3d 357), held that the evidence was legally insufficient to establish neglect.

Matter of Charism D., 67 AD3d 404 (1st Dept 2009)

Respondent Should Have Known Child in Danger of Being Sexually Abused

Family Court determined that respondent mother neglected her child and derivatively neglected her three other children. The Appellate Division affirmed. Respondent should have known that her child was in danger of being sexually abused by respondent's live-in boyfriend, yet she permitted the boyfriend to remain in the home unsupervised, thus demonstrating parental judgment so impaired as to create a substantial risk of harm to any child in her care.

Matter of Alasha M., 67 AD3d 476 (1st Dept 2009)

Excessive Corporal Punishment of Child Constituted Neglect

Upon a fact-finding determination that respondent mother neglected her children, Family Court released the children to her without supervision. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence, which showed that respondent inflicted excessive corporal punishment by beating her daughter with two intertwined belts that left a buckle-shaped bruise and puncture marks on her arm. The out-of-court testimony of the child to the police detective was corroborated by the detective's observation of the injuries. The mother's failure to testify at the hearing permitted the court to

draw the strongest inference against her.

Matter of Jazmyn R., 67 AD3d 495 (1st Dept 2009)

Dispositional Determination on Default Not Appealable

After a fact-finding determination that respondent father neglected his children, the order of disposition placed the children with petitioner until completion of the next permanency hearing. The Appellate Division affirmed. Because the father failed to appear at the dispositional hearing, the dispositional determinations were entered on default and were not appealable. The finding of neglect was established by a preponderance of the evidence that father should have known of the mother's substance abuse and failed to take steps to protect the children.

Matter of Albert G. Jr., 67 AD3d 608 (1st Dept 2009)

Placement of Grandfather Under Supervision of Agency Affirmed

Family Court placed respondent grandfather under the supervision of petitioner agency, with submission to random drug screening. The Appellate Division affirmed. The court properly denied respondent's motions to dismiss neglect petitions pertaining to his two grandchildren. One child was placed with her mother and the other with respondent's mother. Respondent stated that he wanted contact with his grandchildren and he did have unsupervised visitation with them. Given the seriousness of respondent's involvement with controlled substances, supervision by the agency was necessary for the purpose of monitoring his conduct.

Matter of Sharnaza Q., 68 AD3d 436 (1st Dept 2009)

Finding of Neglect Supported by Evidence That Sex Abuse Occurred

In an order of fact-finding, Family Court found that the child Isis was neglected and the child Isaiah was derivatively neglected. The Appellate Division affirmed. The findings of neglect were supported by a preponderance of the evidence that sexual abuse occurred, including testimony by a mental health expert

based upon independent observations of the children, Isis's demonstration to the expert using anatomically correct dolls, which corroborated her prior, consistent, independently recalled out-of-court statements regarding the abuse, and Isaiah's out-of-court statements corroborating Isis's account of the abuse. The court properly found, based upon the expert's testimony, that one of the respondent's Abel test results was not relevant to whether acts of intrafamilial sexual abuse as alleged here occurred because that test was designed to diagnose and treat pedophilia and not intrafamilial sexual abuse, which occurs as a result of family dynamics rather than a general sexual interest in children.

Matter of Isaiah F., 68 AD3d 627 (1st Dept 2009)

After Mother's Child's Death Her Other Children Properly Found to be Derivatively Neglected

Upon a fact-finding determination, Family Court found that respondent mother abused her infant son and derivatively neglected her other children and, in an order of disposition, placed the children with their non-party father. The Appellate Division affirmed. Petitioner established that while in respondent's exclusive care her infant son died of asphyxiation when a coin lodged in his throat and that while in respondent's exclusive care the infant had suffered at least one other anoxic event. Respondent failed to rebut the evidence of her culpability and the court properly drew the strongest negative inference against her for her failure to testify. Her children were derivatively neglected in light of the fact that - at best- respondent took no action to assist the baby on more than one occasion when he was unable to breath while in her exclusive care.

Matter of Abraham P., 69 AD3d 492 (1st Dept 2010)

Fact-finding Determination of Neglect Based Upon Mental Illness Reversed

Upon a fact-finding determination that respondent mother neglected her child, Family Court placed the child with his maternal grandmother. The Appellate Division reversed. Petitioner agency failed to prove by a preponderance of the evidence that mother had mental illness that impaired her child, placed him in imminent

danger of becoming impaired, or put him in imminent risk of harm. The agency's assertion that mother suffered from intermittent explosive disorder and had borderline cognitive abilities with poor insight and judgment was not supported by evidence in the record. The unrefuted expert testimony of a psychologist established that there was no diagnosis in psychiatrist's report upon which agency's allegations were based and there were no witnesses that testified to mother's alleged bizarre behavior. Although the court was entitled to draw the strongest negative inference against mother for her failure to testify at the fact-finding hearing, here the evidence was insufficient to support the finding of neglect.

Matter of Jayvien E., 70 AD3d 430 (1st Dept 2010)

Petitioner Established Prima Facie Case of Abuse

After the commencement of respondent mother's testimony at a fact-finding hearing, Family Court granted mother's motion to dismiss the abuse and neglect petition against her for failure to establish a prima facie case. The Appellate Division reversed and remitted. The daughter testified that she told her mother twice that her stepfather was sexually harassing her; that her mother arranged the stepfather's regular visits to her bedroom at night (in an attempt to improve their relationship); that her mother approved of the massages the stepfather gave her; and that her mother had ridiculed her claims and dismissed them as lies. This testimony, which the court credited, as well as e-mails sent by the mother to the daughter's biological father, contradicted the mother's claim that she had no knowledge of her daughter's sexual harassment complaints and established a prima facie case of abuse. Mother's motion to dismiss was made shortly after she began testifying, but before she addressed the allegations against her and she did not give an explanation that rebutted the evidence of her culpability. The court observed that the mother's disinclination to believe her daughter could be explained by other evidence, including out-of-court statements made by the mother that the petitioner and attorney for the child had no opportunity to cross-examine. Thus, the court apparently assumed, without evidentiary foundation, both that the mother would have testified that her daughter's allegations were fabricated and that a claim of fabrication would have

constituted a reasonable explanation for her failure to take action to protect her daughter.

Matter of Elizabeth S., 70 AD3d 453 (1st Dept 2010)

Respondent's Due Process Rights Not Violated by Video Testimony

Family Court, upon a finding that respondent father sexually abused his sister in-law and derivatively neglected his daughter, released the sister in-law to the custody of her non-respondent mother and released respondent's daughter to the custody of respondent and non-respondent mother with one year supervision, upon the condition that respondent enter a sex offender program, receive a mental health evaluation, cooperate with ACS referrals, and comply with the order of protection. The Appellate Division affirmed. Respondent's due process rights were not violated when his sister in-law, who was 13 at the time of the alleged abuse, was permitted to testify via video conference. The child's psychologist recommended that the child testify outside respondent's presence after the child had been intimidated by respondent's gaze during her initial in-court testimony. This intimidation caused her emotional distress, manifested by sleeping difficulties and an increase in thoughts about her abuse. The court properly considered the intimidation of the sister-in-law and her emotional distress together with respondent's right to be present for the testimony, in utilizing live, two-way video, which allowed all parties to observe the child's testimony and demeanor, gave respondent's counsel an opportunity to cross-examine her, and allowed the court to make a record of her testimony.

Matter of Arlenys B., 70 AD3d 598 (1st Dept 2010)

Neglect Established by Mother's Failure to Meaningfully Treat Her Addiction

The petition against mother was dismissed after a fact-finding hearing and the petitioner appealed. The Appellate Division found that the mother's long-term use of illegal drugs, failure to meaningfully treat her addiction, and history of erratic behavior in the home established, by a preponderance of the evidence, that the mother neglected the child. The court's dismissal of the petition constituted error as a matter of law.

Matter of Arthur S., 68 AD3d 1123 (2d Dept 2009)

Neglect Based Upon Act of Domestic Violence

The petitioner proved by a preponderance of the evidence that father neglected his child. The evidence presented at the fact-finding hearing was sufficient to show that father committed an act of domestic violence during which he demanded that the child get him a knife and then held the knife to mother's throat in the child's presence, thereby impairing, or creating an imminent danger of impairing, the child's physical, emotional, and mental conditions.

Matter of Briana F., 69 AD3d 718 (2d Dept 2010)

Parents Rebutted Allegations of Abuse

In response to the petitioner's prima facie showing of abuse, the parents provided a satisfactory explanation for the child's injuries which rebutted the allegations of abuse. The parents adduced evidence, which included testimony from a pediatrician and expert in child abuse, and a pediatric neurosurgeon, that the injuries sustained by the subject child were caused, not by head trauma, but by a form of meningitis, its sequelae, and the treatment he received for the disease. Thus, the parents sufficiently rebutted the allegations of abuse asserted against them. However, Family Court improvidently exercised its discretion in granting the parents' application pursuant to Family Court Act § 1028 to return the subject child to their custody. Under the circumstances, including those that formed the basis for the finding by the Family Court that the parents had committed medical neglect, the evidence supported the conclusion that the child's emotional, mental, and physical health would be at imminent risk if he were returned to live with his parents. Accordingly, the matter was remitted for a dispositional hearing.

Matter of Alanie H., Jr., 69 AD3d 722 (2d Dept 2010)

Award of Summary Judgment on Issue of Severe Abuse Improper

The Administration for Children's Services (hereinafter ACS), with the support of the attorney for the children, moved for summary judgment against the parents on the issues of abuse and severe abuse, establishing that

the mother pleaded guilty to assault in the second degree (Penal Law § 120.05 [2]), and the father pleaded guilty to attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]), for their commission of the same abusive acts alleged in the petitions. Notably, in their plea allocutions, both parents admitted that the assault victim was the one of their three children. Based upon these submissions, an award of summary judgment was proper on the issue of whether the parents abused this child and derivatively abused the other two children (*see* Family Ct Act § 1012 [e] [i], [ii]). However, with respect to the issue of severe abuse, even though the convictions satisfied Social Services Law § 384-b (8) (a) (iii) (C), an award of summary judgment was improper, since, as ACS properly conceded on appeal, ACS failed to establish that it either made diligent efforts to encourage and strengthen the parental relationship which were unsuccessful, or that a demonstration of such efforts was excused (*see* Social Services Law § 384-b [8] [a] [iv]). Order modified.

Matter of Leon K., 69 AD3d 856 (2d Dept 2010)

Mother Failed to Protect Children From Live-in Companion

An abuse and neglect proceeding was commenced against the mother, and her live-in companion based upon allegations that the live-in companion sexually abused two of her seven children, that the mother did not protect them from the abuse, and that unsanitary conditions were maintained in the home. In the fact-finding order, Family Court, after a hearing, found that the allegations of abuse and neglect were sustained against the live-in companion and the mother. The mother's claims that the live-in companion's conduct involved isolated incidents, or that she was not fully aware of the problem, were belied by evidence in the record, including her admission that the father of the subject children told her that his daughters had complained to him about the live-in companion's conduct. Order affirmed.

Matter of Daniel R., 70 AD3d 839 (2d Dept 2010)

Neglect Finding Reversed and Petition Dismissed

Appellate Division held that petitioner failed to meet its

burden of demonstrating neglect by a preponderance of the evidence. Proof that respondent failed to meet his child support obligations did not, by itself, rise to level of neglect. Additionally, failing to obtain domestic violence counseling did not constitute neglect as there was no evidence that such was required. Finally, the verbal disputes between the parents did not rise to the level of neglect since there was no proof that child was present or even aware and no one was injured. Finding of neglect reversed and petition dismissed.

Matter of Alyssa OO., 68 AD3d 1158 (3d Dept 2009)

Petitioner Failed to Establish by Clear and Convincing Evidence That Respondent Willfully Violated Family Court Order

In this neglect proceeding, petitioner filed violation petitions alleging that respondent failed to appear for urinalysis examinations and deliberately attempted to sabotage the in-home device that was installed to monitor his alcohol consumption. While it was undisputed that the device failed to transmit any data to petitioner during a five-day period, the Appellate Division held that there was no proof that respondent was responsible for that failure. Respondent testified that he did everything he was instructed to do and even called the caseworker to tell her that the machine may have malfunctioned. There was conflicting testimony regarding respondent's notification for the urinalysis test and the court could not conclude that the evidence clearly and convincingly established that respondent willfully violated any order he received requiring that he appear for such a test or examination. Despite the fact that respondent had already served 90 days in jail, the court held that the appeal was not moot, as petitioner and the law guardian argued, because a finding that respondent had deliberately violated a court order involving the placement of his children would be relevant and have adverse consequences for respondent's position in future proceeding to regain custody of his children.

Matter of Ashley E., 68 AD3d 1185 (3d Dept 2009)

Proof of Neglect of Other Children Supports Finding of Derivative Neglect of Newborn

In November 2007, respondent and her husband were

found to have neglected her older children based, in part, upon her refusal to acknowledge that her husband sexually abused one of their daughters, her continuing relationship with him and permitting the husband to have contact with the children. After respondent again gave birth in May 2008, petitioner brought this petition for derivative neglect of that child. The Appellate Division held that Family Court's determination of derivative neglect was proper. "Considering the proximity of the prior neglect finding, the continuation of the conditions which led to that finding, and the nature of the finding that demonstrated a fundamental inability to protect her children from her husband, Family Court did not err in holding that respondent derivatively neglected Darren."

Matter of Darren HH., 68 AD3d 1197 (3d Dept 2009)

Neglect Adjudication Affirmed

In this Article 10 proceeding there was a sound and substantial basis for the determination that the grandfather disregarded the imminent danger created by exposing the young child to a sex offender and failed to take appropriate steps to exercise a minimum degree of care to protect the child. Three caseworkers testified that they visited the grandfather's home and that the grandfather permitted a convicted sex offender to sleep in a tent in the backyard and be present at his home. Despite repeated warnings by the caseworkers regarding the danger of exposing the child to a sex offender, the grandfather told them he was reluctant to exclude him from his property because the man was considered as family. This evidence, together with the grandfather's prior history of neglecting his own children and the negative inference that Family Court drew from the grandfather's failure to testify, supported Family Court's determination.

Matter of Michael VV., 68 AD3d 1210 (3d Dept 2009)

Standing to Seek Custody Does Not Require DSS to Make Diligent Efforts

After child was placed in foster care as a result of the mother's neglect, the mother's former paramour sought custody. Family Court determined that she had standing to do so. Subsequently, the mother's parental rights were terminated and the petition for custody was

dismissed. Petitioner argued that because she had standing to seek custody, DSS was obligated to make diligent efforts to reunite the child with her. The Appellate Division agreed with Family Court that it did not. No such obligation exists because the petitioner was not the subject of a TPR. In any event, petitioner missed three court appearance, failed to contact DSS for visits and although she cared for him when he was first born, she had no contact with him since he went into foster care. It was in the child's best interests to remain in foster care where he is thriving, with his siblings, and be freed for adoption by the foster mother who has proceedings pending to adopt them all.

Matter of Jocelyn II. v Vanesha P., 68 AD3d 1260 (3d Dept 2009)

Neglect Established Where Mother Left State Without Informing Children, Left Them Unattended, and Exposed Them to Domestic Violence

The testimony here established that respondent's live-in boyfriend physically abused her and that the children could hear "major arguments" and "serious yelling," saw respondent's injuries and feared for her safety. One day, while the children were in school, respondent and her boyfriend left the state without notifying the children or arranging for their care. The son called the police after he found a note under his pillow from respondent directing him to call 911, which he understood to be related to the domestic violence. That respondent attempted to minimize these incidents indicates that she lacked insight into the effect her actions had on the children's emotional and physical well-being. Accordingly, it was held that the proof sufficiently supported Family Court's finding of neglect. Also, even though the son turned 18 years old and the daughter had been returned to respondent's custody, this appeal was not moot because the finding of neglect could be used against respondent in the future.

Matter of Celine O., 68 AD3d 1373 (3d Dept 2009)

Grandmother's Motion to Terminate Preadoptive Placement Should Have Been Granted

When the subject child was removed from the parents,

Family Court found that no suitable relative existed with whom she could appropriately reside and placed her with petitioner. Thereafter, the parents admitted to neglecting the child, a TPR was filed and the child remained in foster care despite the permanency goal remaining as return the parents. The grandmother, who had custody of two of the child's siblings, first sought visitation and later filed for custody, moving to terminate the child's foster placement in favor of a placement with her. Family Court's denial of her motion was reversed on appeal. FCA § 1061 permits Family Court to modify or vacate any order made in a child protective proceeding upon a showing of good cause, which the grandmother argued was found in the failure of petitioner to comply with FCA §1017 (since amended) which sets out the steps to be followed in determining the appropriate placement of a child when initially removed from his or her home. When a child is removed from the home, the agency is obligated to locate relatives and inform them of the proceeding and the opportunity to seek foster care or custody and that the child may be adopted if reunification with the parent is not possible. Family Court was then required to determine if the child could suitably reside with any such relative. Only if no suitable relative could be located would Family Court consider another placement. "The statute, in short, is intended to guard not only the rights of relatives of a child who is removed from his or her home, but also 'to protect the *rights and interests of children* to be placed with their relatives.'" The burden is not on the grandmother but on the petitioner and failure deprived the child of the right to placement with a relative. Whether the grandmother was a suitable relative and what the appropriate placement should be was remitted for further proceedings.

Matter of Randi NN., 68 AD3d 1458 (3d Dept 2009)

Father Awarded Custody After Mother Found to Have Neglected Child

A neglect petition was filed against mother and her boyfriend alleging excessive corporal punishment by the boyfriend and failure to protect against the mother. The proof showed that the mother knew the boyfriend had a violent criminal background and was aware that he struck the child repeatedly with a belt, causing marks on his face and body that were readily visible

several days later. The mother minimized the incident, even spanked the child herself shortly after it occurred and continued to allow her paramour to watch the child alone. While the mother disputed the frequency with which she used corporal punishment and denied that the boyfriend had previously disciplined the child, "even a single incident of excessive corporal punishment can be sufficient to constitute child neglect." Notwithstanding some confusion about the prior custody order, a finding of neglect constituted substantial change in circumstances that permitted modification. The father had brought a custody proceeding and the court held a combined dispositional and custody hearing, and properly awarded custody to the father.

Matter of Omavi A., 68 AD3d 1463 (3d Dept 2009)

Child's Out-of-Court Statements Were Corroborated

Family Court found that the father had sexually abused his daughter, the father contended on appeal that the proof was insufficient to establish the abuse by a preponderance of the evidence. However, there was sufficient proof, including the child's sworn in camera testimony which was subject to cross-examination, the child's prior hearsay statements, testimony from the caseworkers which included the mother telling them that the father ultimately admitted the abuse to her. Corroboration of a child's out-of-court statements regarding incidents of sexual abuse or neglect "can be gleaned from any evidence tending to support the reliability of the statements....Furthermore, Family Court is vested with considerable discretion in determining whether such statements have been reliably corroborated and whether the record supports a finding of abuse and/or neglect. There was no abuse of discretion and Family Court's finding that the father sexually abused and neglected the child was amply supported by the record.

Matter of Aaliyah B., 68 AD3d 1483 (3d Dept 2009)

Mother's Motion to Vacate Admission to Neglect and Consent to Disposition Properly Denied

In this neglect proceeding, after admitting to certain allegations and consenting to the disposition, respondent mother moved to vacate the disposition

claiming extreme emotional distress. Family Court denied her motion holding that she did not show good cause to vacate the order. On appeal she argued that both the admission and the disposition should be vacated because Family Court failed to provide her with notice as required by FCA § 1051(f). Initially, the Appellate Division noted that, although a party may not ordinarily appeal from an order entered upon consent, the mother was entitled to and did move to vacate the orders based upon her allegations that her consent was not knowing and/or voluntary. However, such arguments were unavailing. At various court appearances, the mother had been repeatedly advised by Family Court of her right to hearings, petitioner's burden of proof and the consequences of a finding of neglect, and she expressly indicated her understanding. Despite these admonitions, the mother made certain admissions of conduct constituting neglect and consented to the entry of orders of fact-finding and disposition. Family Court's disclosures complied with FCA § 1051(f). Any confusion or frustration on the mother's part related to her desire to get her daughter back and not to any lack of understanding of her rights. Also, the mother failed to show good cause to vacate. "Inasmuch as the allocution does not reveal that the mother's admission was made based upon collateral promises, vacatur of such admission cannot be founded upon her allegations of petitioner's "unfulfilled promise of "prompt action towards reconciliation".

Matter of Gabriella R., 68 AD3d 1487 (3d Dept 2009)

Respondent Stepfather Properly Found in Willful Violation of Order of Supervision

Respondent was found to have sexually abused his stepdaughter and he was placed under an order of supervision which required that, among other things, he complete sex offender treatment. However, he was later discharged from such a program for failing to cooperate. Upon petitioner's motion, Family Court granted a new dispositional hearing and an extension of the order of supervision based upon respondent's willful violation. The Appellate Division affirmed holding that Family Court had ordered respondent to "fully cooperate" and that the testimony of caseworkers and therapist established that respondent had been informed that acknowledgment of the abuse was required to reach the treatment program's goals and that he

admittedly failed to meet that requirement. Additionally, the evidence showed that respondent failed to keep petitioner informed of his address and that when he was offered treatment alternatives, he refused to take a polygraph test, discuss hypothetical situations involving sexual abuse or watch a videotape dealing with sexual abuse.

Matter of Caitlyn U., 69 AD3d 1012 (3d Dept 2010)

Child's Out-of-Court Statements Sufficiently Corroborated

In this sexual abuse proceeding, Family Court found the allegation of abuse was supported by a preponderance of the evidence and respondent contended on appeal that the proof was insufficient. The Appellate Division affirmed holding that the out-of-court statements by the child to an emergency room nurse and later to the caseworker, were corroborated by the testimony of a State Police investigator who testified that respondent initially denied wrongdoing, but later admitted that he had touched the child's vaginal area on two occasions and that he needed help. Further, respondent signed a written transcription of his statement, shook the hand of another investigator, thanked him, and repeated that he needed help. While the court noted its concern that medical evidence was lacking, it found that the interviewing investigator's testimony was highly credible; and it refuted the opinion of a psychologist that respondent was easily manipulated and had been pressured into making his statement; and that respondent's testimony that his admissions were lies was weak and unconvincing. Giving deference to the court's credibility determinations, the Appellate Division found that the child's statements were sufficiently corroborated by respondent's admissions, and the court's conclusion that the child was abused was supported by a preponderance of the evidence.

Matter of Brooke KK., 69 AD3d 1059 (3d Dept 2010)

Family Court's Adjudication of Neglect Adequately Supported by Record

In a combination of six neglect proceedings, various allegations of neglect were made against respondents. Following an extensive fact-finding and in camera of two of the three subject children, Family Court

sustained the allegations of each petition, found the children to be neglected and issued an order of placement. The Appellate Division affirmed, rejecting respondent's claim that the adjudication was not adequately supported and outlined the testimony of several witnesses that supported such a determination. Additionally, the court properly drew the strongest inference against the father for his failure to testify. Respondents failed to preserve their claim of due process violation relative to the in camera hearing that neither they nor their counsel were present or had an opportunity to cross-examine the children. At no time did they object or ask to be present. Furthermore, in a conference with counsel after the hearing, the court summarized the children's testimony, indicated that it had found them both to be credible, and stated that transcripts could be obtained if necessary. Respondents neither requested transcripts nor an opportunity to cross-examine the children at the subsequent fact-finding hearing.

Matter of Jesse XX., 69 AD3d 1240 (3d Dept 2010)

Subsequent TPR Does Not Moot Appeal From Permanency Hearing Placement

Respondent was found to have neglected her child and the child was placed with her aunt in Tennessee. Following a permanency hearing, Family Court continued the placement and respondent appealed. While this appeal was pending, respondent's parental rights were terminated. However, the Appellate Division did not find this appeal to be moot because any appeal by respondent from that later order had not been determined and the issue of proper placement could still arise. On the merits, respondent failed to show that she had made progress to overcome the problems that led to the child's removal and thus, Family Court's determination was not to be disturbed.

Matter of Kasja YY., 69 AD3d 1258 (3d Dept 2010)

Appellate Division Affirms Findings of Neglect

Neglect petition against respondent parents alleged domestic violence in the children's presence, physical abuse and drug use. Contrary to respondents' argument on appeal, Family Court's findings of neglect were supported by a preponderance of the evidence. In this

case, the children's out-of-court statements were cross-corroborated by one another as well as their own sworn testimony and that of the parents. Even though some portions of the children's out-of-court statements were not sufficiently corroborated, the bulk of the statements were, and Family Court appropriately exercised its discretion in considering them. Respondents' remaining claim, that they were improperly excluded from the in camera hearing conducted with the subject children, is without merit. While respondents are entitled to due process, they had no absolute right to be present at every step of the trial. Family Court appropriately balanced respondents' due process right against the desire to protect the children's mental and emotional well-being by permitting counsel to cross-examine the children in the absence of respondents themselves.

Matter of Lindsey BB., 70 AD3d 1205 (3d Dept 2010)

Record Amply Supports Neglect Finding

From the testimony of a caseworker it was clear that the mother had no desire to have contact with, or responsibility for, her child. The record showed that the mother failed to cooperate after the child was placed, refused to visit with the child, learn about her problems in school or participate in the child's mental health counseling. She had stated to the caseworker that she did not care what happened to the child, wanted the state to deal with the child and had no intent to fulfill her parental obligations. Furthermore, the proof showed that this conduct contributed to the child's depression, suicidal inclinations and admission to a residential treatment center. In light of Family Court's opportunity to assess the credibility of the witnesses, there was a sound and substantial basis for its finding that the child was in imminent danger of impairment due to the mother's failure to exercise a minimum degree of care. To the extent that Family Court failed to state the grounds for its disposition in the order of disposition itself, such defect was held to be technical and harmless.

Matter of Janice G., 70 AD3d 1210 (3d Dept 2010)

No Appeal Lies From Consent Order

In this neglect proceeding, respondent with the assistance of counsel made admissions and consented

to both a neglect finding and disposition. On appeal he argued that he is not a person legally responsible for the children's care. The Appellate Division dismissed the appeal because no appeal lies from an order entered on consent. Respondent argued that his consent was not knowing, intelligent or voluntary but he failed to make an application in Family Court to vacate the order.

Matter of Mary UU., 70 AD3d 1227 (3d Dept 2010)

Neglect Adjudication Affirmed

Family Court adjudicated respondent parents' daughter to be a neglected child. The Appellate Division affirmed. Petitioner presented evidence that established that the physical, mental or emotional condition of the child had been impaired or was in imminent danger of becoming impaired as a result of her parents' failure to exercise a minimum degree of care in providing her with adequate food and medical care. Further, petitioner established that the child failed to thrive because she was undernourished, and that her condition was of such a nature that would ordinarily not exist except by reason of the acts or omissions of the parents. The remaining contentions were either unreserved or without merit.

Matter of Lorelei M., 67 AD3d 1383 (4th Dept 2009)

Determination of Neglect Proper Based Upon Evidence of Respondent's Neglect of Other Four Children

Family Court determined that respondent mother neglected her child based upon evidence that her other four children were determined to be neglected by her. The prior determinations of neglect were sufficiently proximate in time to the birth of the subject child to demonstrate that the conditions that led to the older children's removal continued to exist and that the mother suffered from such an impaired level of parental judgment as to create a substantial risk of harm to any child in her care.

Matter of Amanda M.K., 67 AD3d 1384 (4th Dept 2009), *lv denied* 14 NY3d 701

Petitioner Established Educational Neglect

Family Court adjudged that respondent neglected two of his children. The Appellate Division affirmed. Petitioner submitted evidence that established that each child had a significant, unexcused absentee rate that had a detrimental effect on the children's education. The father failed to present evidence that the children were attending school and receiving the required instruction in another place, or to establish a reasonable justification for the children's absences.

Matter of Cunntrel A., 70 AD3d 1308 (4th Dept 2010)

Finding of Abuse and Derivative Neglect Affirmed

After a fact-finding hearing and disposition, Family Court adjudged that respondent mother abused her daughter and derivatively neglected her son. The Appellate Division affirmed. Contrary to the mother's contentions, the court did not err in admitting in evidence out-of-court statements of a child who was not the subject of the proceeding. The mother failed to object to the admission in evidence of the daughter's medical records on the grounds raised on appeal and thus failed to preserve her contention for review. The finding of abuse was supported by a preponderance of the evidence; the mother knew or should reasonably have known that her daughter was in danger of being physically and sexually abused by her adult son, and a reasonably prudent parent would have acted differently. Further, the finding of derivative neglect was proper because the mother, by allowing the daughter to be abused, thereby demonstrated a fundamental defect in her understanding of the duties and obligations of parenthood and created an atmosphere detrimental to the physical, mental and emotional well-being of the son.

Matter of Cory S., 70 AD3d 1321 (4th Dept 2010)

CHILD SUPPORT

Incarcerated Parent Had Right to be Heard

Family Court denied respondent father's objection to the Support Magistrate's child support order. The Appellate Division reversed. Respondent wrote to the court advising it that he was incarcerated and desired to

participate in the hearing on child support. No effort was made to produce him for the hearing or to allow him to testify by telephone or other electronic means. An incarcerated parent has a right to be heard on matters concerning his child where, as here, there is neither a willful refusal to appear or a waiver of appearance.

Matter of Karla V. v Angel L., 68 AD3d 443 (1st Dept 2009)

No Support in Record For Imputation of Income

Family Court dismissed respondent father's supplemental petition for a downward modification of his child support obligation and modified his obligation upward to \$342 biweekly. In an order of the same court, the court denied respondent's objections to an earlier order, which had denied his motion to vacate his default and remanded for a hearing to determine child support based upon the child's needs or standard of living, whichever was higher. The Appellate Division modified and granted respondent's objections to the extent of remitting to the court for a recalculation of his income, including any reduction due to the amount of court-ordered child support provided to his two sons who were not subjects of this case, and to determine whether his income would fall below the poverty level. According to respondent's tax return he would have been below the poverty level after paying his child support obligations and the court did not provide a sufficient record to determine whether it was proper to impute income to respondent. Also on review was an order that denied respondent's objections to a decision denying his motion to recuse the Support Magistrate. The Appellate Division affirmed. In the absence of statutory grounds the decision upon a recusal motion is a discretionary one. Also on review was an order directing a money judgment in favor of petitioner and dismissing as premature respondent's objection to the extent that it challenged the finding of a willful violation and the recommendation of incarceration. The Appellate Division affirmed. The motion was premature because the Support Magistrate's recommendation was subject to confirmation by the court.

Matter of Anderson v Harris, 68 AD3d 472 (1st Dept 2009)

Parents May Not Terminate Child Support By Written Agreement

Family Court denied respondent father's objection to the Support Magistrate's finding that the parties' son was emancipated for a six-month period, abated child support for that period and fixed child support arrears. A second order awarded arrears and terminated the child support provision of the divorce judgment. The Appellate Division reversed. The parties had a stipulation of settlement that provided that petitioner father was obligated to pay child support until the parties' son turned 21 or was otherwise emancipated. The stipulation defined emancipation as, among other things, "the Child's engaging in fulltime employment; fulltime employment during a scheduled school recess or vacation period shall not, however, be deemed an emancipation event." The son worked full-time at a music store for a six month period as a condition of substance abuse treatment he was receiving while living in a halfway house. During this period respondent mother gave the son financial support and paid all of his unreimbursed medical expenses. The parents of a child under the age of 21 cannot, by written agreement, terminate child support based upon a child's full-time employment unless it can be shown that the child is financially independent. Here, the son was not emancipated because he was not financially independent: his employment was a requirement of participation in the halfway house substance abuse treatment program, the halfway house and a trust fund covered some of the son's expenses, and the mother paid some of his expenses and all of his unreimbursed medical expenses.

Matter of Thomas B. v Lydia D., 69 AD3d 24 (1st Dept 2010)

Award Limited to Child Care Expenses Actually Incurred

Supreme Court awarded plaintiff former wife a money judgment for child support and child care arrears in the amount of \$188,383. The Appellate Division modified by reducing the arrears to \$163,308. The court accepted plaintiff's calculation of \$26,665 attributable to child care, an amount that far exceeded the \$1,590 in child care expenses that she actually incurred. In light of the language in the parties' separation agreement providing

for payment of child care expenses "incurred" by plaintiff the award was reduced by \$25,075.

Marin v Anisman, 69 AD3d 440 (1st Dept 2010), *lv denied* ___NY3d___ (2010)

Child Support Obligation Not Limited to Child's Share of Public Assistance

Since the support obligation of a parent of a child receiving public assistance is measured by the child's needs and the parent's means, not by the amount of public assistance paid on behalf of the child, the Family Court acted properly in declining to limit the amount required to be paid by the father to the Department of Social Services (DSS) to the child's share of the public assistance grant. Furthermore, contrary to the father's contention, he was not entitled to offset alleged unpaid child support from the mother against the amount he owed to DSS. Indeed, during the relevant time period, there was no support obligation imposed upon the mother for the children who were in the custody of the father.

Matter of Gregory v Gregory, 68 AD3d 770 (2d Dept 2009)

No Express Agreement to Pay Support After Child Reached Age of 21

Contrary to the plaintiff's contention, Supreme Court properly denied that branch of her motion which was for an award of child support since the subject child had reached the age of 21 and there was no express agreement to pay such support.

Uzamere v Uzamere, 68 AD3d 855 (2d Dept 2009)

Original Child Support Order Remained in Effect

The Support Magistrate erred in reducing the father's child support obligation from \$610 per month to \$25 per month, since the father did not submit any evidence of a change in his ability to work in some capacity from October 15, 2007, to March 5, 2008. The record revealed that the mother commenced a petition in 1996 which resulted in the original child support order of December 23, 1997. Pursuant to the original child support order, the Family Court Hearing Examiner

found that the father had failed to establish that he was unable to work in any capacity. While it was undisputed that in or around 1999 the father began receiving Social Security disability benefits retroactive to a date prior to the entry of the original child support order, the father failed to establish in connection with his several unsuccessful petitions for downward modification of his child support obligation, that he was no longer capable of working in some capacity. Thus, Family Court's prior determination that the father was capable of working in some capacity remained in effect as of October 15, 2007.

Matter of Madelowitz v Bodden, 68 AD3d 871 (2d Dept 2009)

Court Should Have Considered Father's Reduced Income

Supreme Court erred in determining the plaintiff's child support obligation. The court failed to properly consider that the plaintiff's opportunities to earn overtime compensation at his job had lessened in recent years, and that the home improvement jobs that he performed on the side were for family and friends, with no showing that he profited therefrom. Order modified.

Mongelli v Mongelli, 68 AD3d 1070 (2d Dept 2009)

Mother Not Required to Demonstrate Change in Circumstances

The father was directed to pay 50% of the child's private secondary school tuition. The record revealed that the parties' judgment of divorce and stipulation of settlement were silent as to costs of private secondary education. Thus, contrary to Family Court's conclusion, the mother was not required to demonstrate an unanticipated and unreasonable change in circumstances to support her application to modify the father's child support obligation. The appropriate standard for determining the mother's application was found in the Child Support Standards Act.

Matter of Durso v Durso, 68 AD3d 1107 (2d Dept 2009)

Father Entitled to Opportunity to Provide Proof

The Support Magistrate erred in failing to permit the father to submit evidence that he was unable to pay the current amount of child support. There was no claim that the father's financial records should be excluded on the grounds that he refused to obey a disclosure order, or failed to disclose information that ought to have been disclosed.

Matter of Nuesi v Gago, 68 AD3d 1122 (2d Dept 2009)

Mother Failed to Show She Actively Sought Employment

The Family Court correctly denied the mother's objections to the Support Magistrate's determinations. Although the mother asserted that she was unemployed and had no money to pay child support, she did not present competent, credible evidence to show that she had actively sought employment.

Cooper v Robertson, 69 AD3d 614 (2d Dept 2010)

Father Overpaid Child Support Obligation

Upon reviewing the record, the Appellate Division found that based upon the application of the 29% child support percentage, the father underpaid the total sum of \$2,521.32 from November 8, 1996, through January 28, 1998, the effective date of the parties' agreement. However, the total owed by the father for child support from August 11, 2004, until the date of the Support Magistrate's order was only \$73,601.19, and the amount he actually paid during that time was \$86,590.12, leaving an overpayment of \$12,988.93. Deducting the underpaid sum of \$2,521.32 from the overpaid sum of \$12,988.93 left a total sum of \$10,467.61 overpaid by the defendant. Deducting that sum from the total sum of \$20,712.05 which the Support Magistrate directed the father to pay as counsel fees and costs, the father should have been directed to pay the total sum of \$10,244.44 as counsel fees and costs.

Saveni v Burgaleta, 69 AD3d 734 (2d Dept 2010)

Father Obligated to Pay One-Half of Daughter's College Expenses

Contrary to the father's contention, Supreme Court properly determined that he was obligated to pay one half of the college expenses of the parties' daughter. The parties' separation agreement, which was incorporated but not merged in their judgment of divorce, expressly required the father and the mother "to split equally any costs for college expenses" for their daughter, without any conditions or limitations. The father's obligation to pay college expenses was not triggered because the mother failed to consult with him regarding their daughter's college plans. The agreement contained no requirement that the parties consent to the selection of a school for the child.

Scala v Wilkens, 69 AD3d 948 (2d Dept 2010)

Child's Reluctance to See Parent Did Not Amount to Abandonment

Under the circumstances of this case, the Supreme Court correctly concluded that the father failed to meet his burden of proving that his daughter was constructively emancipated from him. The record revealed that the father may have caused the alienation between himself and his daughter. The Appellate Division noted that a child's reluctance to see a parent does not amount to abandonment.

Kordes v Kordes, 70 AD3d 782 (2d Dept 2010)

Court Failed to Consider Financial Impact of Allocation of College Expenses

In directing the father and mother to pay 76% and 24%, respectively, of their daughter's college expenses, the Family Court improvidently exercised its discretion, as it failed to consider the financial impact of its allocation of expenses upon the father's ability to maintain a separate household, which included dependents. Matter remitted.

Ocasio v Smith, 70 AD3d 952 (2d Dept 2010)

Child's Petition Against Mother for Support Wrongfully Dismissed

Seventeen-year-old daughter residing in New York with her mother brought a petition against both parents for child support. The father lives in California where he is subject to an existing child support order. Therefore, holding that it lacked subject matter jurisdiction against the father, Family Court properly dismissed the petition as to him. However, Family Court improperly dismissed the petition against the mother. Holding that the petition against the mother was not a modification petition but rather a de novo support application, the Appellate Division reversed and remitted.

Matter of Clarke v Clarke, 68 AD3d 1203 (3d Dept 2009)

Court Erred in Terminating Suspension of Father's Driver's License

Because the father failed to make court-ordered support payments for a period of five months, the Support Collection Unit (hereinafter SCU) notified him that his driver's license would be suspended. The father then filed for modification of support and a violation petition alleging that SCU intended to wrongfully suspend his driver's license. Following a hearing, a Support Magistrate dismissed all petitions but recommended that SCU refrain from suspending his driver's license as long as he continued making payments. Thereafter, the father commenced this proceeding, alleging that his income was improperly garnished and requesting a refund. Upon the consent of the father and the mother, the Support Magistrate issued an amended order of support, modifying the amount to be paid by the father toward arrears. Also, although not requested, the Support Magistrate directed that SCU was not to impose any administrative orders or any driver's license suspension, and that any suspension currently in effect must be vacated. DSS filed objections and appealed Family Court's denial arguing that the termination of the suspension of the father's driver's license was in error because the father failed to exhaust his administrative remedies. The Appellate Division agreed and reversed holding "that the statutory scheme [of FCA §454] requires a support obligor to exhaust administrative remedies prior to seeking court review of SCU's determination to suspend

his or her driver's license."

Matter of Circe v Circe, 68 AD3d 1194 (3d Dept 2009)

Respondent Willfully Violated Support Order Downward Modification Unwarranted

Shortly after entering into a consent order, the father sought a downward modification and the mother filed a violation petition. Following a hearing, the Support Magistrate dismissed the father's modification petition and found the father in willful violation of the prior order. Family Court denied the father's objections and he appealed. The Appellate Division affirmed holding that the father failed to meet his burden of showing his inability to pay and the change of circumstances that warranted modification. The father failed to submit any competent medical proof to support his claim of disability; and Family Court properly found that the proof of his actual income and the diligence of his efforts to find employment was insufficient, and that his testimony regarding the same lacked credibility.

Matter of Friedman v Horike, 68 AD3d 1205 (3d Dept 2009)

Pursuant to UIFSA New York Retains Partial Jurisdiction Following Oklahoma Modification

Parties were married in Maryland, had a daughter and were subsequently divorced while mother was living in New York with the child and father was residing in California. Mother later moved with the child to Connecticut and the father moved to Oklahoma. Mother obtained an order in Oklahoma modifying child support. When she was unsuccessful in obtaining reimbursement for college expenses, as provided in their divorce settlement, she moved in New York for enforcement. On the father's cross-motion, Supreme Court dismissed the mother's petition on the ground of lack of subject matter jurisdiction (and the child's constructive emancipation). On appeal the Appellate Division reversed and remitted holding first of all that the parties' settlement agreement clearly evinced their intent both that it be incorporated in the judgment of divorce and that it not merge therein, and that the mistake in the judgment of divorce should be cured so as to conform its terms with the parties' unequivocal intent. Secondly, the Court held that under the UIFSA,

once Oklahoma issued an order modifying the New York judgment of divorce, New York continued to have jurisdiction to enforce the judgment only with respect to amounts in arrears under the judgment that accrued before the modification and any nonmodifiable provisions of the judgment. The Court rejected the mother's argument that Supreme Court's jurisdiction was expanded by the parties' settlement agreement as subject matter jurisdiction "cannot be conferred on the court even by stipulation of the parties."

Ventura v Leong, 68 AD3d 1318 (3d Dept 2009)

Child Support Stipulation Complied With CSSA and Was Not Void

In this violation proceeding, the Support Magistrate found willfulness and referred the matter to Family Court for confirmation and punishment. Respondent was found to be in willful violation but no punishment was imposed. He appealed arguing that the support order was void because it failed to comply with the recitals set forth in the CSSA [FCA § 413]. However, in this case, the support order incorporated by reference a "written [child support] understanding reflecting the terms of the stipulation placed on the [c]ourt record" which recited that "the parties have been advised that the presumed correct amount of child support under the [CSSA] is [\$]50 per month" and that such amount "is in accordance with [r]espondent's ability to earn [\$]223 per week." Thus, but for an acknowledgment of the parties' general awareness of the CSSA, the child support understanding substantially complied with the requirements of the statute. Furthermore, since the child support amount did not deviate from the presumptively correct amount under the CSSA, nothing further was required to ensure that the purposes of the "statutory catechisms" were met.

Matter of Broome County SCU v Morais, 68 AD3d 1466 (3d Dept 2009)

Stipulation to Pay College Expenses Not Unconditional

Following a stipulated settlement of divorce, the parties cross-moved for various relief related to child support. Without holding a hearing, Supreme Court rendered its decision regarding the father's income, college expenses

and the mother's withdrawal of certain funds. On appeal it was held that the parties' stipulation unambiguously obligated the father to pay tuition, room and board for the daughter as a full-time student. It did not, however, obligate the father to unconditional, open-ended funding without regard to the daughter's actual attendance or performance in school. The court was unable to ascertain from the stipulation whether the parties intended that the father's obligation to pay her expenses would continue indefinitely. Therefore, the matter was remitted for a hearing to determine whether the father failed to pay Carolyn's college expenses for any period during which she actively attended college as a full-time student in accordance with the parties' intention. Finally, determination of whether the parties' modification of the stipulation permitted the mother to withdraw funds in a CD also raised an issue of fact that required a hearing.

Bjerke v Bjerke, 69 AD3d 1042 (3d Dept 2010)

Order Holding Father in Willful Violation and Incarcerating Him Affirmed

In this violation proceeding, the respondent father testified that he has limited education, no job or job prospects (although he was not registered with the state employment service), no driver's license, no home of his own and he suffers from social anxiety disorder (although he did not receive disability assistance). He earned cash doing odd jobs but spent his earnings on tobacco and food. He testified that he only made support payments to avoid incarceration and that such payments were made on his elderly mother's credit card. According due deference to Family Court's findings of fact and credibility determinations, the record supported its determination that the father was in willful violation of the support order and it was affirmed on appeal. Additionally, Family Court's decision to incarcerate him was upheld. He failed to demonstrate his inability to make his required support payments through competent and credible evidence, and the testimony was sufficient to establish his willful violation of the support order by clear and convincing evidence.

Matter of Chamberlain v Chamberlain, 69 AD3d 1249 (3d Dept 2010)

Record Did Not Support Earning Capacity Attributed to Mother

In this divorce action it was held on appeal that there was no sound and substantial support for the amount of income imputed to the mother. The parties were married in 1976 and the husband filed for divorce in 2005. The husband holds an engineering degree and worked since early in the marriage. The wife earned an undergraduate degree and worked before leaving the work force to care for her children in 1992. Thereafter, she worked part time. She appealed from, among other things in the divorce, Supreme Court's award of child support which included imputed income to her. The Appellate Division disagreed and held that the record did not support the earning capacity imputed to the wife. There was no evidence that the wife had substantial income. Her Social Security and tax records showed that she had no earnings in any year after 1993 except 1995, when she earned \$2,344, and 2004, when she earned approximately \$28,000. Supreme Court relied on an expert opinion that the wife could earn \$60,000 annually, set forth in a report by an evaluator appointed by the court that merely quoted another expert's conclusion without setting forth any part of the factual foundation or calculations upon which it was based. Thus, this was not properly admitted. When the amount of income imputed to a party has been improperly determined, the amount may be imputed based on evidence in the record. While the wife was capable of gainful employment, she would need time to reenter the job market and her earning capacity was too speculative to impute anything more than a minimum wage. Thus, the matter was remitted for determination of the imputed amount.

McAuliffe v McAuliffe, 70 AD3d 1129 (3d Dept 2010)

Order Directing Respondent to Pay Uninsured Medical Expenses Affirmed as Modified

The Appellate Division modified Family Court's order directing respondent to pay his share of the uninsured medical expenses for the parties' child by vacating the amount awarded for uninsured medical expenses and providing that respondent pay his share of those expenses incurred on or after July 14, 2005. The court erred in ordering respondent to pay uninsured medical expenses incurred prior to July 14, 2005, the date the

order directing him to pay his share of those expenses was entered. Respondent was entitled to a hearing to determine the reasonable cost of the uninsured medical expenses, but he was not entitled to a hearing on the issue whether the treatment itself was unnecessary.

Matter of Coan v Thompson, 68 AD3d 1655 (4th Dept 2009)

No Emancipation Based on Child's Move to Other Parent's Home

Respondent mother appealed from an order directing her to pay child support to the father. The Appellate Division affirmed. The court properly determined that the parties' daughter did not emancipate herself. The evidence in the record established that the daughter was a college student supported by her parents and that she relocated from the mother's residence to the father's residence with the father's permission. The mother eventually acquiesced regarding the move. A child's moving from one parent's home to the other parent's home does not constitute emancipation where, as here, the child is neither self-supporting nor independent of all parental control, i.e., the daughter did not become independent of her parents' control because the father expressly permitted her to move in with him and the mother acquiesced. A dissenting justice would have found "constructive emancipation" and reversed, on the ground that the record showed that the child moved out of the mother's home voluntarily, without the mother's permission, for the purpose of avoiding discipline and control.

Matter of Stabley v Caci-Stabley, 68 AD3d 1682 (4th Dept 2009)

Respondent Willfully Violated Child Support Order

Family Court determined that respondent mother willfully violated a prior child support order and imposed a 30-day suspended sentence on the condition that she pay all future child support. The Appellate Division affirmed. Despite the mother's contention, the court properly confirmed the Support Magistrate's determination that she was in willful violation of the prior child support order. Petitioner father presented evidence of a willful violation by establishing that the mother repeatedly failed to pay child support as

ordered, and the mother failed to meet her burden of establishing her inability to make required payments. There was no basis to disturb the Support Magistrate's determination that the substance abuse issues of the mother did not render her unable to make payments, and the mother otherwise presented no evidence that she was financially unable to satisfy her obligation during the time it accrued. Moreover, the mother presented no evidence that she made any efforts to obtain employment to meet her child support obligation of \$25 per month. Further, the record did not support the mother's contention that she paid the child support arrears during the parties' final appearance.

Matter of Hopkins Jr. v Gelia, 70 AD3d 1335 (4th Dept 2010)

Court Failed to Determine Whether Mother's Income Exceeded Poverty Income Guidelines Amount

Family Court denied the objections of petitioner mother to the order of the Support Magistrate. The Appellate Division remitted for further proceedings. Family Court erred in failing to determine whether the mother's income was less than or equal to the poverty income guidelines for a single person as reported by the Federal Department of Health and Human Services when \$14,000 in child support arrears accrued. In the event the mother's income was less than that amount, unpaid child support arrears in excess of \$500.00 would not have accrued.

Matter of Chomik v Sypniak, 70 AD3d 1336 (4th Dept 2010)

Monthly Child Support Order Reduced

The Support Magistrate ordered that respondent father's monthly child support obligation was \$8,126, which took into account \$17,000 the father made in tuition payments for the oldest child and other voluntary payments. Family Court determined that the Support Magistrate abused her discretion in offsetting the child support obligation and ordered that the father's monthly child support was \$13,526.06. The Appellate Division modified and remitted. The court abused its discretion in calculating the father's child support on a presumptive amount. Petitioner mother

testified that the household expenses were \$15,000 per month, and the Support Magistrate determined that only \$10,000 per month were expenses for the children. The Support Magistrate's determination was supported by the record and was entitled to great deference. The matter was remitted to determine the father's child support obligation beginning June 18, 2006 - the date the oldest child turned 21 - and the amount of retroactive child support for the period of November 17, 2003 through February 28, 2005.

Matter of Coan v Thompson, 70 AD3d 1426 (4th Dept 2010)

Court Properly Considered Defendant's "Additional Parenting" Responsibilities

Supreme Court, among other things, directed defendant to pay plaintiff \$61.50 per week in child support and \$19,500 per year in maintenance for a period of three years. The Appellate Division affirmed as modified. Contrary to plaintiff's contention, the court did not abuse its discretion in refusing to award child support on the parties' combined income in excess of \$80,000: the court properly relied on the fact that the parties' financial resources after the payment of maintenance were roughly equivalent, that each parent would have one child living with him or her, that there would be no change in the children's standard of living and that the additional parenting responsibilities of defendant following the divorce affected his ability to enhance his salary by working overtime. The court erred in including the amount of maintenance awarded to plaintiff in her income for purpose of calculating the parties' respective child support obligations. Further, the court applied the incorrect child support percentage in its calculation. Therefore, the defendant's pro rata share of the child support obligation and the uninsured medical costs of the children was 67%, plaintiff's 33%, and defendant's child support obligation was increased to \$88.92 per week.

Burns v Burns, 70 AD3d 1501 (4th Dept 2010)

CRIMES

Defendant Did Not Abandon Knapsack Left Inside Fenced Yard

The Supreme Court denied the defendant's motion to suppress physical evidence. Upon reviewing the record, the Appellate Division found that the People failed to prove that the defendant intended to abandon his knapsack, which was opened by the police without his consent, searched, and found to contain a gun and marijuana. The defendant did not discard or otherwise rid himself of the knapsack. Rather, he simply put it down on the stoop of his residence, inside a fenced yard, and walked to the curb to talk with the driver of a vehicle parked there. This conduct was not indicative of an intention to abandon the bag. Contrary to the People's contention, the defendant did not relinquish his expectation of privacy in the contents of his knapsack. Order reversed.

People v Davis, 69 AD3d 647 (2d Dept 2010)

CUSTODY AND VISITATION

Superseding Order Rendered Respondent's Appeal Moot

Family Court directed a trial discharge of the subject child by petitioner agency to the nonrespondent father. The Appellate Division dismissed respondent mother's appeal as moot. The order appealed from was superseded by another order of the same court, on the stipulation of respondent, petitioner agency, the father, and the attorney for the child, awarding custody to the father. Were the Appellate Division to reach the merits, it would have found that custody to the father was in the child's best interests in view of the facts that the mother had relapsed in her addiction, the father was drug-free, the mother was ineligible for housing assistance, the father was eligible for such assistance, and the mother was unemployed and the father had been employed for a year.

Matter of Kimberly M., 67 AD3d 562 (1st Dept 2009)

Ability to Nurture Relationship of Non-custodial Parent and Child Favors Mother

Family Court awarded custody of child to respondent mother and visitation to petitioner father. The Appellate Division modified by eliminating the provision in the order requiring father to notify the mother of the address and phone number of any home other than the

father's where the child stays during visitation with the father. No basis existed to disturb the court's finding that although both parents were fit on most counts, the ability of the mother to nurture a relationship between father and child tipped the scale in her favor. The evidence was that father was hostile toward mother and intentionally undermined mother's role in the child's life. Father's contention that the attorney for the child, who recommended custody of the child to mother, did not review the testimony in the trial that occurred before she was substituted in the proceeding was speculative and not preserved for review. The record supported the court's decision not to follow the recommendation of the court-appointed psychologist because the persuasive force of the expert's testimony was diminished by evidence relating to the mother's rehabilitation and the father's hostility to the mother after the expert interviewed the parties, prepared her report, and testified in this protracted proceeding.

Matter of Matthew W. v Meagan R., 68 AD3d 468 (1st Dept 2009)

Change in Custody Justified by Mother's Unwillingness to Cooperate

Family Court granted father's petition to modify a prior order and awarded father sole legal and physical custody with visitation to the mother. The mother willfully violated multiple orders by unilaterally deciding the child's educational and medical needs and by continuously interfering with the father's visitation rights. The mother, unlike the father, did not cooperate with attempts by a court-appointed social worker and psychologist to facilitate the parties' co-parenting arrangement and her conduct and attitude showed a continued unwillingness to support and encourage a father-son relationship.

Matter of Gregory L.B. v Magdalena G., 68 AD3d 478 (1st Dept 2009)

No Basis to Disturb Existing Custody Arrangement

Family Court determined that it was in the best interests of the children to remain in the custody of respondent father. The Appellate Division affirmed. The court conducted a full evidentiary hearing where it had the opportunity to hear the testimony of both parents and

assess their demeanor and credibility. Further, the court interviewed the two children in camera, after which the court declined to alter the existing custody arrangement. The children were happy, healthy and well-adjusted in their father's care. The father adequately provided for the children's needs, and, while not determinative, the children expressed a preference to continue the current custody arrangement. Although petitioner failed to preserve her argument concerning the alleged conflict of interest of the attorney for the children, the Appellate Division noted that the attorney for the children's representation of the children's sibling in a neglect proceeding ended before the commencement of the instant custody proceeding to which the sibling was not a party, and the interests of the sibling were not material to the custody proceeding. Further, there was no indication that the attorney for the children disclosed or utilized privileged information that the attorney for the children learned while representing the sibling.

Matter of Nelissa O. v Danny C., 70 AD3d 572 (1st Dept 2010)

Supreme Court Erred in Denying Father's Motion Without a Hearing to Determine Best Interests of the Child

In view of the parties' and the child's disputed factual allegations in this case, which directly bear upon the issue of enhanced visitation, the recommendations of three mental health experts that the father be given normalized visitation with the child, the father's allegations of a change in circumstances based on custodial interference, and the absence of any prior hearing in six years of litigation concerning custody and visitation, the Supreme Court improvidently exercised its discretion in denying those branches of the father's motion which were for joint custody and joint decision-making authority with respect to the child, or, in the alternative, expanded overnight visitation with the child, without a hearing to determine whether the denial was in the best interests of the child. Thus, the order was reversed and the matter was remitted for a hearing, to be held with "all convenient speed."

Goldstein v Goldstein, 68 AD3d 717 (2d Dept 2009)

Relocation to Florida Denied

There was a sound and substantial basis in the record for the Family Court's determination to deny the mother's petition for custody of the parties' child and her separate petition to modify a prior order of visitation so as to allow her to relocate with the child to Florida. The mother's claims that the schools in Florida were better than those in New York and that she had a greater possibility of gaining employment in Florida were not substantiated by any evidence in the record. Further, the mother failed to establish that her request for relocation should be granted based on economic necessity.

Matter of Sylvain v Paul, 68 AD3d 883 (2d Dept 2009)

Error Did Not Diminish Basis for Award of Custody to Mother

The Supreme Court's determination to award custody of the parties' son and daughter to the mother had a sound and substantial basis in the record. While the court erred in its factual finding that the father had relinquished custody of one of his daughters from his first marriage, given the total circumstances of this case, that error did not diminish the basis for the award of custody to the mother.

Salvatore v Salvatore, 68 AD3d 966 (2d Dept 2009)

Family Court Should Have Determined Whether it Had Exclusive, Continuing Jurisdiction

Since the initial child custody and visitation order was made by a New York court, the Family Court should not have, in effect, dismissed the father's petition without first determining whether it had exclusive, continuing jurisdiction over the visitation issue pursuant to DRL § 76-a (1). The order was reversed and the matter was remitted.

Norton v Szewczyk, 68 AD3d 994 (2d Dept 2009)

Supervised Visitation in Child's Best Interests

The Family Court properly determined that it was in the son's best interests to have only supervised contact with his mother. The mother's past conduct of absconding with the son, coupled with her evasive testimony and

disruptive behavior at the fact-finding hearing, provided an ample basis for the Family Court's determination to deny her unsupervised visitation with him.

Lane v Lane, 68 AD3d 995 (2d Dept 2009)

Child's Home State Was The Philippines

The plaintiff mother and the defendant father were married in the Philippines and their daughter was born there. They emigrated to the United States and lived together from August 2005 until late June 2007, when the father took the subject child back to the Philippines. On July 24, 2008 the father filed a petition in the Philippines to annul the marriage and for custody of the child. The next day, the mother filed a summons with notice in the Supreme Court for a divorce and ancillary relief, seeking custody of the child. The father moved to dismiss, for lack of subject matter jurisdiction, so much of the complaint as sought custody of the child, and the court granted the motion. Upon, in effect, reargument, the court adhered to the original determination. The Appellate Division found that at the time the custody proceeding was commenced in the Philippines, the child's "home state" was the Philippines, as she had been living there with the father for 13 months. See DRL § 75-a[7] and § 76[1][a]. By taking the child to the Philippines, the father did not engage in "unjustifiable conduct" such that the Philippines should have declined jurisdiction, since the mother knew of the child's whereabouts and there was no existing custody order in place preventing the father from taking the child to the Philippines. Order affirmed.

Sanjuan v Sanjuan, 68 AD3d 1093 (2d Dept 2009)

Appropriate to Condition Award of Sole Custody On Relocation from South Carolina to New York

The Family Court's award of sole custody to the mother was in the children's best interests. The mother was more capable of making appropriate decisions concerning the children's education and mental and physical health needs, and was a more active advocate for children. However, since the mother did not establish that it was in the best interests of the children to relocate to South Carolina, it was appropriate to condition the award of sole custody to her upon her relocating to New York, and because she elected not to

relocate to New York, shared joint custody, with the father having physical custody, was in best interests of children.

Yasus v Yasus, 69 AD3d 738 (2d Dept 2010)

Court Failed to Advise Mother of Right to Counsel

The Family Court erred in failing to properly advise the petitioner of her of her right to counsel.

The petitioner was entitled to be represented by counsel, as she was a parent seeking custody of her child and, during the pendency of the custody proceeding, visitation with the child (see FCA § 262 [a] [v]), and a petitioner in a proceeding pursuant to Family Court Act article 8 (see FCA § 262 [a] [ii]). The order was reversed and the matter was remitted.

Matter of Collier v Norman, 69 AD3d 936 (2d Dept 2010)

Award of Sole Custody to Father in Children's Best Interests

Contrary to the mother's contention, the hearing court properly considered the totality of the circumstances in determining that the best interests of the subject children would be served by awarding the father sole custody of the children with certain visitation to the mother. The hearing court's determination was made after a hearing, in camera interviews with the subject children, and a review of home studies of the parties' residences and forensic evaluations of the parties and the children.

Matter of Arduino, 70 AD3d 682 (2d Dept 2010)

New York Was Children's Home State

The father appealed from an order of the Family Court, dated April 6, 2009, which, without a hearing, dismissed without prejudice his petition, in effect, for a modification of an order of protection of the Superior Court of the State of California, dated June 13, 2008, which, after a hearing, inter alia, directed him to stay away from the mother and the parties' three children for a period of five years. The California court issued a separate order granting custody of all three children to the mother, with no visitation for the father. On June

30, 2008, the California court and the Family Court communicated to determine jurisdictional issues pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act. The courts agreed that New York was the "home state" and that the California court, in issuing the orders of protection and custody, had acted solely in the exercise of its temporary emergency jurisdiction under the UCCJEA. Under the circumstances of this case, the Family Court had jurisdiction to entertain the father's petition, in effect, for modification of the California order of protection. The order was reversed and the matter was remitted to the Family Court for a determination of the father's petition on the merits.

Matter of Dodson v Pica, 70 AD3d 686 (2d Dept 2010)

Father Not Entitled to Hearing

The father's petition for supervised visitation was dismissed without a hearing where the Family Court had before it a complete record of the father's longstanding abusive conduct and patent disregard for his children's well being. The Family Court also had before it the report of the forensic evaluator who diagnosed the father as having severe psychological disorders, and expressly recommended against granting the father's request for visitation merely because he attended therapy. Under these circumstances, the father failed to make the requisite evidentiary showing sufficient to establish the need for a hearing.

Matter of Flangos v Flangos, 70 AD3d 691 (2d Dept 2010)

Order Enjoining Mother from Relocating Within New York City Affirmed

The father's motion to enjoin the mother from relocating within New York City (from Brooklyn Heights to Staten Island) with the parties' children was granted. The father had frequent contact with the children, including substantial time during the week. Although the proposed relocation was only 20 miles from mother's current residence, the difficulties for both the father and the children in maintaining their current quality and quantity of contact while traveling during morning and evening rush hours in New York City traffic was apparent. The father also argued that

such onerous travel arrangements would likely affect children's willingness to visit him as frequently as they currently did. The Appellate Division agreed. Order affirmed.

Schwartz v Schwartz, 70 AD3d 923 (2d Dept 2010)

Record Insufficient to Determine Custodial Arrangement in Child's Best Interests

On appeal, the attorney for the child advised the Appellate Division of significant new developments which had occurred since the issuance of the order appealed from, including the commencement of a Family Court article 10 child protective proceeding against the mother, the filing of multiple domestic incident reports by both parents, and the lodging of complaints against both parents with the New York State Central Register of Child Abuse and Maltreatment. In light of these new factual circumstances, the record before the Court was no longer sufficient to determine which custodial arrangement was in the child's best interests. Therefore, the matter was remitted to the Supreme Court, to be consolidated with the related petitions pending in the Family Court, and for a new hearing and a new custody determination thereafter by the Family Court.

Matter of Greenidge v Henry, 70 AD3d 946 (2d Dept 2010)

Sexual Abuse by Stepbrother in Father's Home Warranted Change of Custody to Mother

In this modification proceeding, there was undisputed testimony that the subject child was repeatedly sexually abused by an older stepbrother who lived in the father's home. Family Court properly determined that this constituted a change in circumstances warranting a modification of custody to the mother. While the father did not know that the abuse was occurring, he admitted that it took place in his home and the court concluded that on many occasions it took place while he was there. The court pointed out that the father had divided loyalties and that his plan to have both children continue to reside in the same house but share "no contact" was untenable. Family Court's order was modified by reversing so much thereof as delegated to

the child's therapist the discretion to permit contact between the subject child and the stepbrother. "Any specific plan to reunite these two children-even under therapy-unless agreed to by the parties and the attorney for the child shall be crafted only with the approval of the court on formal application of either parent or the child's attorney."

Matter of Laurie II. v Raymond JJ., 68 AD3d 1170 (3d Dept 2009)

Modification of Shared Custody Warranted When Child Reached School Age

Divorced parents stipulated to joint legal custody and shared physical custody of their young son. Subsequently, by modification order, the mother moved to western Massachusetts while the father remained in Saratoga County. Then the mother commenced this proceeding, seeking primary physical custody and permission to relocate to Connecticut to reside with her husband and their child. The parties did not dispute that the child reaching school age constituted a change in circumstances warranting a modification of custody. Following a bench trial, Family Court denied the mother permission to relocate with the child and awarded primary physical custody to the father. On appeal the Appellate Division held that this was in the child's best interests; that the father could provide more stability and familial support. While both parents were loving and committed, the mother did not provide much information on the living situation in Connecticut; and she withheld some medical information about the child from the father. However, the father had lived his entire life in the same area and was close to extended family on both sides. While not binding, the court noted that the law guardian supported the same conclusion.

Matter of Dickerson v Robenstein, 68 AD3d 1179 (3d Dept 2009)

Court Properly Awarded Sole Custody to Mother With Two Hour Weekly Visits to Father

In this initial custody determination, the evidence showed that the father had significant mental health issues, no income, no job prospects, and no appropriate housing. He had not contributed financially to

children's living expenses and he was unable to set aside his own activities during visitation to focus on the children. On the other hand, the mother had job, provided income for family's expenses, and had been actively and consistently involved in all aspects of children's lives. The mother encouraged the children's relationship with their father but the father only focused on the mother's shortcomings. Award of sole custody to mother with two hour weekly visitation to the father was appropriate.

Matter of Marchand v Nazzaro, 68 AD3d 1216 (3d Dept 2009)

Change of Circumstances, Not Extraordinary Circumstances, Burden of Proof After Prior Extraordinary Circumstances Finding

Grandmother, who had previously been awarded custody upon finding of extraordinary circumstances, was not required to prove that extraordinary circumstances still existed in father's proceeding to modify prior order of custody. "Where, as here, 'the preferred status of the birth parent . . . has been lost by [an earlier] determination of extraordinary circumstances, the appropriate standard in addressing the possible modification of the prior order is whether there has been a change of circumstances requiring a modification of custody to ensure the best interests of the child.'" The child had lived with the grandmother for seven years when the father rekindled his interest after taking a parent education and awareness program. Family Court properly noted that the father had taken no role in the child's life for several years and only recently began obtaining school information, his current living situation was crowded. He failed to sustain his burden of proof that a change in circumstances warranted a modification of custody.

Matter of Cusano v Milewski, 68 AD3d 1272 (3d Dept 2009)

Joint Custody With Primary Physical Custody to Father Affirmed

The parties were married with five children, three of whom were minors at the time of this custody proceeding (ages 17, 15 and 9). The parties separated and the children remained with the father. The mother

alleged that the family relationship broke down when the father's brother and family moved into their home. Shortly after separating, each party filed for custody. When Family Court granted custody to the father and visitation to the mother, she appealed. Family Court had acknowledged and the Appellate Division deferred to their findings, that there was conflicting testimony regarding family relations. The mother claimed that the father alienated the children from her but the testimony of the children did not support her claims. Visitation did not go well which sometimes made them reluctant to go. There was no basis to disturb Family Court's findings that it was in the children's best interests to remain in the custody of their father.

Matter of Yisak v Ashera, 68 AD3d 1282 (3d Dept 2009)

Father Properly Awarded Sole Custody

Parties are the unmarried parents of two children. Their relationship ended following an assault of the father by the mother. When the mother subsequently threatened the father and his girlfriend, the father filed a family offense petition and sought custody of the children. Following a hearing (at which the mother failed to appear but was represented by counsel), Family Court found that the mother had committed a family offense, awarded sole custody to the father and limited the mother's visitation. The mother appealed both determinations. The father had been the primary caretaker and had always provided a safe and stable home for the children. He was consistently employed and provided for the children's needs. The mother had substance abuse problems, lost her job and failed to adequately plan for the children. Award of custody to the father was supported by sound and substantial basis in the record. Family offense finding was also proper.

Matter of Cukerstein v Wright, 68 AD3d 1367 (3d Dept 2009)

Father Awarded Custody After Mother Found to Have Neglected Child

When the mother and her boyfriend were alleged to have neglected the child based upon excessive corporal punishment and failure to protect, the father sought and obtained custody. In analyzing the child's best

interests, the record established a sound and substantial basis that the child's best interests would be served by awarding custody to the father. He could provide the child with greater stability. He was actively involved in the child's social and intellectual development and was willing to promote extended family relationships. To the contrary, the mother was neglectful and abruptly moved to Ohio during the proceedings. Also, she admitted she would encourage the child's relationship with the father should she obtain custody.

Matter of Omavi A., 68 AD3d 1463 (3d Dept 2009)

Mother's Request to Move Two Hours Away Properly Denied

Parents of teenaged son were never married and mother had sole custody with alternate weekend visitation to the father. When she got engaged she sought the permission of the court to relocate with the child from Elmira to Rochester, approximately two hours away. Family Court properly found that the move would not promote the child's best interests. The father enjoyed a strong bond with his son which was significantly maintained through the boy's athletics, which the father coached. The child also has a strong bond with his extended family, all of which are in Elmira. Although the mother showed how the move would benefit her, "she has not shown how the move could avoid disrupting the familial engagement under which the child has clearly thrived." Family Court's dismissal of mother's petition affirmed.

Matter of Solomon v Long, 68 AD3d 1467 (3d Dept 2009)

Mother's Mental Illness Constituted Extraordinary Circumstances Warranting Award of Custody to Aunt and Uncle Notwithstanding Separation From Sibling

Family Court properly found that extraordinary circumstances existed warranting removal of the son from the mother's custody and awarding custody to the aunt and uncle who cared for him throughout the mother's continuous struggle with mental illness. She was diagnosed bipolar, did not consistently take her medication, acted in a bizarre and erratic way, was hospitalized numerous times, incarcerated, and was not

able to consistently provide a suitable living environment for the son. While residing with petitioners will necessarily involve a period of separation from the child's biological sister, the fact is that he thrived while in their care and became very close with their children. Petitioners have attended to all of his needs, and his behavior, attitude and physical appearance improved while in their care. There is sufficient justification for Family Court's conclusion that the child's best interests would be served by being placed in petitioners' custody.

Matter of Loukopoulos v Loukopoulos, 68 AD3d 1470 (3d Dept 2009)

Family Court's Permission Allowing Relocation Reversed

Unmarried parents shared informal custody arrangement until the father filed for custody upon learning that the mother intended to relocate 180 miles away. Unbeknownst to him, she had actually already done so but continued to meet him in the usual exchange place for visitation. Following a hearing, Family Court granted joint custody with primary physical custody to the mother and permission for her to relocate. On appeal, the father did not object to the custody but only the permission to relocate. In reversing Family Court's determination, the Appellate Division held that, because this was an initial custody determination, the *Tropea* factors did not apply. Furthermore, it was clear that allowing the mother to relocate would "significantly impact the child's access to and ability to foster a meaningful relationship with his father and extended family." The extensive visitation previously enjoyed by the father would no longer be practical due to the distance and would not be practical once the child entered school. Furthermore, the move would not enhance the child's life "economically, emotionally [or] educationally." The mother's vague references to a better quality of life and increased opportunities were either unsubstantiated or contradicted by her own testimony. She had the same job and salary; and the rent free living situation she described had no real stability. Any benefit was "heavily outweighed" by the detrimental effect such a move would have on the child.

Ostrander v McCain, 68 AD3d 1480 (3d Dept 2009)

Change in Circumstances Warrants Modification of Custody to Father

When the mother moved out of the county without permission from the father or Family Court, the father sought custody of the parties' two children. Family Court found change in circumstances from mother's unilateral move, father's release from incarceration, the deterioration in the parties' relationship and the behavioral problems exhibited by the children. In the best interests analysis, Family Court properly found joint custody not appropriate, and that the father should have custody. He was sober and had a stable relationship and residence while the mother admitted she was drinking and saw various men. There was testimony that the children had reported abuse by two of the mother's older children and that the abuser returned to the mother's home after 10 months in foster care. The mother used corporal punishment while the father relied on time-outs and restrictions of privileges for discipline. Considering the record as a whole and according due deference to Family Court's findings and credibility determinations there was a sound and substantial basis in the record to support Family Court's determination.

Matter of Kowatch v Johnson, 68 AD3d 1493 (3d Dept 2009)

Deterioration in Parties' Relationship Constituted Change in Circumstances Warranting Modification of Custody

Parties are the unmarried parents of two children. The father was an admitted drug user and after one altercation, the mother moved to Orange County to live with her father and then again moved to New Jersey. Custody changed from joint custody, primary physical custody to the mother and supervised visitation with the father to temporary custody to the father. A full hearing was held on the most recent cross-petitions for custody and Family Court held that the deterioration in the parties' relationship constituted a change in circumstances that warranted a change in custody and awarded full custody to the mother with supervised parenting time to the father. On his appeal this decision was affirmed with the court holding that the mother, despite her shortcomings, was the only parent that was drug free and "ready, willing and able" to care for the

children at the time of the court's decision. Additionally, she was better able to foster a relationship between the children and the father. The law guardian successfully argued on appeal for a modification of the custody order to direct the mother to attend parenting classes and therapy.

Matter of LaFountain v Gabay, 69 AD3d 994 (3d Dept 2010)

Conditions of Mother's Home Warranted Change of Custody to Father

Young child had been living with the mother under an informal custody arrangement. The father sought an initial custody determination alleging that the mother's home environment was unsafe for the child and after a hearing Family Court agreed. The record revealed that the mother smoked in the house in the child's presence despite the danger to his health and notwithstanding that she was pregnant. She only stopped smoking in front of the child when ordered to do so by the court and she continued to smoke outside the child's presence. While not determinative, neither the father or his live-in girlfriend smoke. The mother's trailer was deemed uninhabitable after a kerosene spill; there was a severe mold problem; and there were problems with the heat. The mother is unemployed and in an unstable relationship. She is unconcerned about the fact that the child spends a considerable amount of time with his grandmother and is exposed to the former stepfather, who has an extensive history of serious domestic violence. On the contrary, the father is employed, in a stable relationship and lives in a two bedroom home. According deference to Family Court's factual findings unique ability to assess the parties' credibility, the Appellate Division could not say that the court failed to properly weigh the relevant factors or that its determination lacked a sound and substantial basis in the record. Order affirmed.

Matter of Richardson v Alling, 69 AD3d 1062 (3d Dept 2010)

Court Properly Awarded Custody to Father and Denied Overnight Visitation to Mother

Upon stipulation in their divorce, the parents shared custody of and parenting time with their son. When the

mother's behavior became bizarre, the father and numerous other witnesses who testified at the hearing, became increasingly concerned for her mental health and for the safety of the child. The mother had recently become estranged from her two older daughters who went to live with their grandmother. Family Court ordered psychological evaluations and granted temporary custody to the father. After lengthy litigation, a final order was issued awarding sole custody to the father and supervised visitation to the mother which progressed to unsupervised but her request for overnight visitation was denied. This was affirmed on appeal. Although Family Court's 97-page decision did not specifically make findings of change in circumstances, the Appellate Division searched the record and found ample support for the court's determination. The parties' relationship deteriorated as a result of the fact that "the mother's behavior became increasingly inappropriate, uncooperative, hostile and paranoid, often in front of the child..." This caused the child to suffer "fear, confusion, anxiety, humiliation and stress." Two experts testified regarding how the mother's mental health impacted her parenting ability.

Matter of Troy SS. v Judy UU., 69 AD3d 1128 (3d Dept 2010)

Mother's Failure to Recognize and Treat Child's Problems and Use of Corporal Punishment Constituted Change in Circumstances

Unmarried parent shared joint legal custody with mother having primary physical custody. Between kindergarten and second grade, the son began exhibiting very troubling emotional and behavioral problems. Upon learning that the mother hit the child, the father took the child to CPS and as a result the mother was indicated. The parties stipulated to a temporary order of physical custody to the father and parenting time to the mother. After a hearing, Family Court awarded the father sole custody and limited the mother's parenting time. However, the Appellate Division modified. While it did find that the child's dangerous behavior (self-mutilation and suicidal thoughts) constituted a change in circumstances warranting a modification of custody, neither the father's petition nor any of the evidence gave the mother notice of a request for a change in legal custody. Furthermore, there was no proof that joint custody was

improper. The evidence showed that the mother failed to recognize or adequately address the child's problems by, among other things, refusing to cooperate with school officials, terminating recommended psychological counseling for the child; and that the mother had used excessive corporal punishment. To the contrary, since the father had physical custody, he has facilitated the child's regular participation in counseling and cooperated with the school; the child's self-mutilation behavior and suicidal thoughts ceased; his school performance improved; and he substantially improved under the temporary order. Therefore, it was in the child's best interests to continue in the father's custody but legal custody could be joint and there was no proof that the parenting time the mother enjoyed was inimical to the child's best interests.

Matter of Terry I. v Barbara H., 69 AD3d 1146 (3d Dept 2010)

Modification of Physical Custody to Father Warranted

Parents stipulated to joint custody with primary physical custody to mother and visitation to father. After about four years, the father sought primary physical custody alleging that the mother's home was unstable and abusive. Following a fact-finding hearing, Family Court granted primary physical custody to the father and the Appellate Division affirmed. There was ample support in the record of change in circumstances. The mother's live-in boyfriend had mental health issues and subjected her to domestic abuse in front of the children. He belittled the children and was twice arrested for endangering the welfare of the subject children. While the mother ended her relationship with him, she began an intimate relationship with his brother. The mother screamed at the children, used vulgar language and made graphic sexual remarks in their presence. Furthermore, she disparaged the father in front of the children and was not forthcoming when he requested information about the children's medical condition, particularly as it related to their seizure disorders. The children were unruly and the younger daughter regularly fell asleep during school, had many absences, and ultimately got expelled for aggressive behavior. Although the father had some shortcomings, he was financially stable, regularly exercised his visitation, and interacted well with the children. Under

the totality of the circumstances, it was in the children's best interests to transfer physical custody to the father.

Matter of Rue v Carpenter, 69 AD3d 1238 (3d Dept 2010)

Hostile and Violent Atmosphere in Parent's Home Constituted Extraordinary Circumstances

Child spent a lot of time with his grandmother and ultimately moved in with her. Grandmother filed a family offense petition against the mother and a petition against both parents for custody based on violence in the parent's house and the father's alcoholism. Following a hearing, Family Court found extraordinary circumstances existed to divest the parents of custody and the Appellate Division affirmed. The proof showed that for nearly the child's whole life, the parent's constant arguments often escalated into violence and many times occurred in front of the child. The parent's also were abusive to the child, pulling her hair, locking her out of the house, grabbing her and screaming at her. The father had admitted an untreated alcohol and anger management problems.

Matter of Gardner v Gardner, 69 AD3d 1243 (3d Dept 2010)

Dismissal of Petition Without Proper Notice Reversed

The result of numerous petitions was an order of supervised visitation to paternal grandmother and specific visitation to the incarcerated father. Subsequently, the mother fled with the children to Florida and visitation ceased. The father brought this petition to modify custody and visitation based on the reversal of his conviction and dismissal of indictment. The mother defaulted and at the inquest the court found a change in circumstances and directed the mother to appear for a hearing. Numerous attempts by the mother's attorney to contact her were unsuccessful. The father then filed violation petitions against the mother but her attorney refused service and successfully moved to be relieved. The court directed personal service on the mother but attempts to do so were unsuccessful. Finally, the JHO dismissed the petition. The Appellate Division agreed with the father that it was improper for Family Court to dismiss the

father's petition without first ordering service by publication pursuant to UCCJEA set forth in DRL §75-g(1). "Here, not only did the mother abscond to Florida with the children while the father's modification petition was pending, but, once in Florida, she refused service by a process server at her home, lied to and threatened a detective agency on the telephone and subsequently provided the address of a vacant lot to the United States Postal Service. Moreover, the court had before it the affidavit of the paternal grandmother which detailed her efforts over a three-year period—including hiring private investigators and making multiple trips to Florida—to locate and serve the mother. Thus, there is ample evidence in the record that such alternative means of service were not practical." Additionally, "the father cannot be faulted for a failure to specifically request service by publication. When his counsel attempted to express other suggested methods of service ... upon the mother, Family Court abruptly cut off counsel, stating 'I'm not really interested in new ideas . . . [T]his is . . . a waste of everybody's time [and] a bad joke on the judicial system . . . [T]o use the Courts to attempt to track down somebody . . . turns this into a three ring circus[,] which is what has occurred here.'"

Matter of Hofelich v Garrow, 69 AD3d 1256 (3d Dept 2010)

Extraordinary Circumstances Warranting Sole Custody to Grandmother

Parent's two children began living with their paternal grandmother in March 2005. Later that year, Family Court awarded sole custody to the grandmother on the father's consent and the mother's default. More than two years later, mother filed custody petition requesting that the children continue to live with the grandmother but that she get joint custody and visitation. Following a hearing, Family Court properly found extraordinary circumstances existed to warrant custody to the grandmother and that the mother should have certain visitation. During the two years the children lived with the grandmother, the mother had minimal contact, made no efforts to get custody of them and did not help the grandmother in making decisions for them. The grandmother provided for all the needs of the children and established a bond. Given the questionable parenting skills of the mother, it was in the best

interests of the children to remain in the sole custody of the grandmother.

Matter of Magana v Santos, 70 AD3d 1208 (3d Dept 2010)

Another Case of Extraordinary Circumstances Warranting Custody to Grandmother

When the subject child was born, her mother was only 19 and they both lived with her mother, the child's grandmother. When both parents were incarcerated for an incident of domestic violence, the grandmother obtained custody on consent. Three years later the father sought sole custody and the grandmother sought to retain custody with visitation to the father. Following a hearing and a *Lincoln* hearing, Family Court properly awarded joint custody to both parents and the grandmother with primary physical custody to the grandmother and visitation to the father. "The father's prior consent to the grandmother's sole custody of the child, the fact that the child had resided with the grandmother in a stable environment for most of her life and is apparently thriving there and the father's failure to maintain a stable residence and ongoing problems with domestic violence sufficiently demonstrate extraordinary circumstances."

Matter of Turner v Maiden, 70 AD3d 1214 (3d Dept 2010)

Erratic Behavior and Domestic Violence Warranted Supervised Visitation

In this custody modification proceeding, Family Court determined that the father's erratic behavior, some of which occurred during visits with the children supported their conclusion that supervised visitation was in the children's best interests. Two police officers testified that the father's girlfriend notified them that the father fled the home and was suicidal. Although the children were visiting, he made no provision for their care in his absence. The police searched for him without success and he returned home after midnight. He then went to a hospital and later to a mental health facility for a psychiatric assessment. The police had to be called when he barricaded himself between two glass doors in the foyer area. Furthermore, there was proof of domestic disputes between the girlfriend and

the father of which the children were aware. The record indicated that the children were upset by this behavior. Consequently, Family Court properly found that unsupervised visitation would be detrimental to the children's safety.

Matter of Sumner v Lyman, 70 AD3d 1223 (3d Dept 2010)

Mother's Modification Petition Properly Dismissed

Father had legal custody of the child and exclusive right to provide for the child's medical care. The mother brought a series of petitions for violations, contempt, modification of custody alleging that the father did not provide for the child's medical care. Family Court granted the father's motion to dismiss and restricted the mother's right to medical information contained in school records. While the Appellate Division agreed that the petitions should be dismissed, holding that the mother's allegations as to the nature and timeliness of the medical care for the child were insufficient on their face to establish a change in circumstances or contempt; and that the record clearly showed that the father appropriately sought medical treatment. However, it found error in restricting the mother's right to medical information as there was nothing in the prior order that did so.

Matter of Hudson v Eck, 70 AD3d 1261 (3d Dept 2010)

Family Court Properly Changed Custody From Sole to Joint

Prior order entered on consent granted sole custody to the mother, with the father getting visitation and the right to be consulted on "all major decisions regarding the child"; and each party was prohibited from consuming alcohol in the child's presence. Seven months later the father sought sole custody alleging that the mother had consumed alcohol in front of the child and re-enrolled the child in kindergarten without consulting him. After a trial and a *Lincoln* hearing, Family Court awarded the parties joint custody with primary physical custody to the father. The Appellate Division affirmed holding that even though Family Court did not specifically state in finding that there was a substantial change in circumstances warranting modification, such was clear from the record. The

mother admitted that she unilaterally changed the child's school. Furthermore, a change in custody would be in the child's best interests. The mother's work schedule requires the child to stay with a babysitter several nights a week, while she could be in her own bed if she lived with her father. Also, the mother was responsible for bruising observed on the child; and despite her history of alcohol abuse and counseling program, the mother admitted to violating the court order by consuming alcohol. There was nothing to suggest that the father was not a proper custodian. Finally, while it was held to be clearly improper for Family Court to request that the Law Guardian provide a recommendation and equally improper for the Law Guardian to comply with that request, because the record amply supported the court's decision, such error was deemed harmless.

Matter of Card v Rupert, 70 AD3d 1264 (3d Dept 2010)

Mother's Neglect Constituted Change in Circumstances Warranting Modification

While Family Court gave a variety of reasons for finding a change in circumstances here, the mother's neglect of this four-year-old child's dental health, requiring root canal, and the mother's seven month absence from the child's home was sufficient to constitute a substantial change in circumstances warranting Family Court to consider the child's best interests. The evidence in that regard was that the mother "had neglected the child's dental health, was cavalier about the child's risk of being burned by an unguarded wood stove, and had allowed the child to be dirty and suffer from a burn, lice infestation and urinary tract infections. In addition, the record shows that the mother had regularly entrusted the care of the child to her boyfriend and the grandmother, with the grandmother unilaterally denying the father visitation on some occasions. The evidence further showed that the mother was overwhelmed and could not properly care for all three of her children at the same time, and that she had no viable plan to support them. Moreover, there was evidence that the mother and her boyfriend spend significant amounts of money on cigarettes even though she is only occasionally employed and their household is on the brink of financial disaster. By contrast, the evidence showed that the father has a

stable and suitable home and an adequate income, and he engages in positive educational and social activities with the child. Given Family Court's review of each parent's strengths and weaknesses, the record provides a sound and substantial basis for its determination to change custody." On the mother's various arguments regarding her representation, the court held that the fact that lawyers assigned to represent child and father in custody proceeding were Public Defender and Assistant Public Defender did not constitute simultaneous representation prohibited by Code of Professional Responsibility. Furthermore, the mother was not denied effective assistance of counsel and in a footnote, the Appellate Division declined to follow prior decisions that required a showing of actual prejudice as part of the ineffective assistance of counsel analysis under the NY Constitution.

Matter of Hurlburt v Behr, 70 AD3d 1266 (3d Dept 2010)

Court's Assessment of Parties' Character and Credibility Entitled to Great Deference

Family Court granted the parties joint custody of their four children, with primary physical residence with the father and visitation to the mother. The Appellate Division affirmed. Following a lengthy hearing, the court determined that the father would provide greater stability to the children and that it would be in their best interests to reside together with him. The determination was based in large part upon the court's firsthand assessment of the character and credibility of the parties, and was entitled to great deference. The determination was supported by a sound and substantial basis in the record. The mother failed to preserve contentions with respect to tape recordings made by the father. The record established in any event that the recordings did not influence the court's determination, and thus any error with respect to the tape recordings was harmless.

Matter of Thayer v Thayer, 67 AD3d 1358 (4th Dept 2009)

Child's Mental Health Evaluation Supported Denial of Visitation With Father Who Engaged in Domestic Violence

Petitioner father appealed from an order denying his

petition seeking visitation with the parties' daughter. The Appellate Division affirmed. The court properly based its determination on the mental health evaluation of the child, concluding that forced visitation with the father, who was incarcerated, would be harmful to the child's emotional and psychological well-being. During the course of the proceeding, the father was incarcerated based upon his conviction of assault in the first degree, arising from his having attacked and beaten the child's older sister. The record established the father had engaged in a pattern of domestic violence in the presence of the child who was the subject of the appeal, that she suffered from posttraumatic stress disorder, and that she did not wish to visit with the father.

Matter of Jacobs v Chadwick, 67 AD3d 1373 (4th Dept 2009)

Court Erred in Summarily Dismissing Modification Petition

Petitioner father appealed from an order that summarily dismissed his petition seeking modification of an existing custody order based on a written stipulation between the parties. The petition alleged that modification was warranted because respondent mother had been arrested for "DUI (drugs)" and endangering the welfare of a child. The Appellate Division reversed, agreeing with the father that the court erred in dismissing the petition without conducting a hearing because the father made a sufficient evidentiary showing of a change in circumstances to warrant a hearing.

Matter of Bell v Raymond, 67 AD3d 1410 (4th Dept 2009)

Modification of Custody Reversed

Family Court granted the cross petition of respondent mother seeking to modify the existing custody arrangement by awarding her sole physical custody of the parties' child. The Appellate Division reversed. The mother failed to establish a significant change in circumstances sufficient to warrant the court to determine whether a change in custody was in the child's best interests. The court erred in determining that the fact that petitioner father began to commute to

an out-of-state college two days a week constituted a significant change of circumstances. The father testified that he continued to arrive home each night before dinner and that the commuting arrangement was temporary. Further, the fact that the mother had given birth to the child's half-sibling did not constitute a significant change in circumstances. Finally, even if mother established a significant change of circumstances, the Appellate Division would conclude, on the record before it, that a change in custody was not in the child's best interests.

Matter of Yaddow v Bianco, 67 AD3d 1430 (4th Dept 2009)

Denial of Motion to Vacate Amended Order Entered on Default Reversed

Family Court denied petitioner father's motion to vacate an amended order entered upon his default. The Appellate Division reversed. The amended order granted respondent mother sole legal and physical custody of the parties' children and permanently terminated respondent's custodial and visitation rights. The determination of the father's motion was contained in a letter but no order was entered. However, the Referee filed the letter with the Family Court Clerk and that letter resolved the motion and advised the father that he had a right to appeal. The Appellate Division determined that the letter would be treated as an order. The Referee erred in denying the father's motion. The father lived in California and he asserted in an affidavit in support of his motion that he failed to appeal on the date scheduled for trial because he relied upon the representation of his attorney that the trial had been adjourned. The father's attorney was suspended from practice for misconduct, including misconduct in failing to appear at the trial of this matter, despite the referee's denial of his request for an adjournment. The father also asserted that the mother had denied him access to their children.

Matter of Louka v Shehatou, 67 AD3d 1476 (4th Dept 2009)

Modification of Custody Affirmed

Family Court modified a prior order by granting sole legal custody of the parties' son to petitioner father.

The Appellate Division affirmed. The court did not err in relying upon evidence that respondent mother's paramour sexually abused the son's step-sisters in determining that the father made the requisite showing of a significant change in circumstances. The mother could not assert the defense of collateral estoppel with respect to the evidence of sexual abuse because although she belatedly objected to the introduction of that evidence, she did not object based on the defense of collateral estoppel or raise that defense in her answer or move to dismiss the petition on that ground. Therefore, she waived her right to assert that defense. The father established a sufficient change in circumstances to warrant inquiry into whether modification of the existing custody arrangement was in the son's best interests. In addition to the evidence of sexual abuse, the record established that the mother continued to reside with her paramour thereafter, that she planned to exercise her visitation with her son in a basement with no furniture and that the son was placed in an environment where he was exposed to pornography and excessive alcohol and drug consumption. The court did not err in permitting the amendment of the pleadings to conform to the evidence presented at the hearing because the mother's attorney consented to the amendment. Finally, even assuming the child was aggrieved when the court denied the mother's request that the court recuse itself, the attorney for the child did not take a cross appeal from the order and therefore could not seek affirmative relief with respect to the denial of the mother's request.

Matter of Simonds v Kirkland, 67 AD3d 1481 (4th Dept 2009)

Return From Active Military Service Is 'Substantial Change in Circumstances'

Family Court granted respondent father's motion to dismiss the petition without conducting a hearing based on the court's determination that the mother failed to show a change of circumstances. The Appellate Division reversed and reinstated the petition based on the recent enactment of Family Court Act § 651 (f). Section 651 (f) (3) provides that the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances. Here, the mother alleged that she had returned from active military duty and thus made a

sufficient evidentiary showing of substantial change in circumstances.

Matter of Hughes v Davis, 68 AD3d 1674 (4th Dept 2009)

Court Properly Granted Permission to Relocate to Alabama

Family Court granted the mother's petition for permission to relocate with the parties' child to Alabama. The Appellate Division affirmed, rejecting respondent's contention that the court should have directed petitioner to be examined by a psychiatrist or psychologist. Although petitioner admitted that she had been diagnosed with bipolar disorder, the record established that she consistently maintained a drug treatment regimen for nearly 20 years and was under the care of a family physician. Respondent failed to submit any evidence that the petitioner's mental health condition was poorly maintained. Petitioner met her burden of establishing that the proposed relocation would be in the best interests of the child. Petitioner had been the primary care taker of the child since his birth, and respondent had not consistently exercised the visitation to which he was entitled under the prior order.

Matter of Linn v Wilson, 68 AD3d 1767 (4th Dept 2009)

Some Evidence of Interference Did Not Outweigh Other Evidence

Petitioner mother appealed from an order dismissing her petition seeking custody of her child. The Appellate Division affirmed. Although there was some evidence in the record that respondent father actively interfered with the mother's relationship with the child, other factors supported the court's determination. The record also did not support the mother's contention that she did not receive effective assistance of counsel: there was extensive cross-examination of the parties, and the court had issued decisions with respect to previous petitions by both parties and thus was familiar with the circumstances of the case.

Matter of Smith v Natali, 68 AD3d 1768 (4th Dept 2009)

Evidence Sufficient to Support Finding of Extraordinary Circumstances

Family Court awarded custody of respondent mother's child to the paternal grandmother. The Appellate Division affirmed. The evidence was sufficient to support the finding of extraordinary circumstances, including evidence of the mother's chronic mental illness, unstable living situation, and a failure on her part to address the special needs of the child.

Matter of Brault v Smugorzewski, 68 AD3d 1819 (4th Dept 2009)

Child's Preference Insufficient Information to Assess Best Interests

Family Court dismissed the father's petition which sought visitation. The Appellate Division reversed and remitted. The father was incarcerated and was not present at the court appearance despite the issuance of an order by the Referee directing that he be transported for appearance on his petition. The Referee erred in summarily dismissing the petition after father's 15-year-old daughter responded that she did not wish to see or communicate with the father because the Referee did not have sufficient information to make a comprehensive assessment of the best interests of the child.

Matter of Vaughn v Lambert, 70 AD3d 1322 (4th Dept 2010)

Petitioner Did Not Consent to Authority of Referee

Family Court dismissed the petition for visitation for lack of jurisdiction. Although the order was not appealable as of right because it did not determine a motion made on notice, the Appellate Division took the notice of appeal as an application for leave to appeal in the interest of justice, and reversed. The record established that the father did not sign the stipulation referring the matter to a referee. Because the father refused to consent to the authority of a referee, the Referee lacked jurisdiction to dismiss the petition.

Matter of Walker v Bowman, 70 AD3d 1323 (4th Dept 2010)

Hearing Not Automatically Required

Family Court granted the motion of the attorney for the child and dismissed mother's petition which sought modification of an existing custody order. The Appellate Division affirmed. A hearing is not automatically required whenever a parent seeks modification of a custody order. Here, the mother failed to make a sufficient evidentiary showing of a change in circumstances to warrant a hearing.

Matter of Warrior v Beatman, 70 AD3d 1358 (4th Dept 2010)

Petitioner Failed to Show Child Affected by Mother's Mental Health Issues

Family Court dismissed the father's petition seeking to modify a prior order of custody without conducting a hearing. The Appellate Division affirmed. The father failed to establish that the child was affected by respondent mother's mental health issues and otherwise failed to make a sufficient evidentiary showing to warrant a hearing.

Matter of Gollogly v Thompson, 70 AD3d 1373 (4th Dept 2010)

Order Granting Grandparent Visitation Reversed: No "Best Interests" Finding

Family Court granted petitioner grandparent's violation petition for specified visitation with their granddaughter. The Appellate Division reversed and dismissed the petition, noting at the outset that the court erred in determining that any future violation of the order on appeal would be deemed to be willful, because a determination of a willful violation can only be made after a full evidentiary hearing. The evidence presented by the grandparents in support of the petition failed to address whether the mother willfully violated the order, and the court made no finding whether the mother violated the order. Instead, although the court modified the prior order by establishing a visitation schedule, it made no findings whether visitation was in best interests of the child. The evidence presented by the mother at the hearing and obtained by the court at the *Lincoln* hearing established that the child, who was being treated for leukemia, was opposed to visitation

with her grandparents. Further, although the mother had historically facilitated visitation between the child and the grandparents, the child objected to visitation after she became ill, so the mother yielded to the child's wishes. Thus, although the Appellate Division was unable to review the propriety of the court's determination with respect to grandparent visitation because the court failed to set forth findings, the Appellate Division determined that it was not in the child's best interests to continue to visit with the grandparents.

Matter of Schillaci v Forbes, 70 AD3d 1444 (4th Dept 2010)

Mother Failed to Provide Information About Proposed Relocation or That Father Was Abusive or Unfit

In this consolidated appeal, the Appellate Division affirmed Family Court's dismissal of the mother's three petitions. At the time of the hearing on the relocation petition, the mother did not know where she would be relocating and thus could not provide any information concerning where the children would live or the schools they would attend and therefore failed to meet her burden of establishing that the proposed relocation was in the best interests of the children. The mother's petition, which sought to modify respondent father's visitation rights by requiring that the presently unsupervised visitation be supervised, was properly dismissed because the mother failed to meet her burden of establishing that the father was an abusive or unfit parent. With respect to the mother's appeal from the dismissal of her violation petition, the mother did not raise any contentions concerning that order in her brief on appeal and thus the contentions were deemed abandoned.

Matter of Sportello v Sportello, 70 AD3d 1446 (4th Dept 2010)

Contention That Attorney for Children Did Not Advise Court of Children's Wishes Without Merit

Supreme Court granted plaintiff mother sole custody of the parties' children and granted defendant father visitation. The Appellate Division affirmed as modified. The court did not abuse its discretion in

limiting the father's visitation. The father admitted he had sexual thoughts about children, including his own, and both the expert psychologist and father's social worker testified that the father suffered from pedophilia. While there was no evidence that the father in fact engaged in sexual conduct with minors, the children felt uncomfortable being alone with him and given their age, their preferences were entitled to great weight. The father's contention that the attorney for the children did not advise the court of the children's wishes was both unpreserved and without merit. The record reflected that the attorney for the children met with the children several times in preparation for trial, interviewed both parties, attended all pretrial proceedings, vigorously questioned all the witnesses at trial, made a successful motion for a *Lincoln* hearing, and represented the children during that hearing. The attorney for the children also prepared a post-trial submission arguing that sole custody should be awarded to the mother. Even assuming the attorney for the children did not adequately advise the court of the children's wishes, the court had sufficient information to determine the best interests of the children. The court did not abuse its discretion in requiring the father to pay the expert psychologist's \$600 trial retainer fee. The record established that the trial was postponed based upon the father's representation that the matter was settled, and that the retainer fee was necessary to secure the expert psychologist's appearance on the adjourned date. However, the court erred in ordering the father to pay all of the attorney for the children's fees, because the directive was not required to redress any economic disparity between the parties. Further, such an award should not punish a party for deciding to proceed to trial rather than agree to a settlement. Therefore, the fees should be divided equally between the parties.

Veronica S. v Philip R.S., 70 AD3d 1459 (4th Dept 2010)

Change to Transportation Provision Unwarranted

Family Court dismissed mother's petition which sought permission to modify certain stipulated provisions of the divorce judgment concerning visitation with parties' children. The Appellate Division affirmed. The court properly granted that part of the motion to dismiss the petition insofar as it sought an order directing the father

to provide all transportation for visitation. The mother failed to establish a change in circumstances sufficient to warrant the modification sought.

Matter of Wellington v Riccardo, 70 AD3d 1513 (4th Dept 2010)

Modification Unwarranted: Court Failed to Consider Child's Preference

Family Court granted the father's petition and transferred physical custody of the parties' children to him. The Appellate Division reversed. The father failed to make a sufficient showing of a change in circumstances to warrant modification of the existing custody arrangement. A long-term custodial arrangement established by agreement, such as the arrangement in this case, should not be modified unless it was demonstrated that the custodial parent was unfit or perhaps less fit, and that could not be said with respect to the mother. In addition, given the child's age and apparent maturity, the court erred in failing to consider the child's preference to continue to reside with the mother.

Matter of Stevenson v Stevenson, 70 AD3d 1515 (4th Dept 2010)

FAMILY OFFENSE

Court Could Credit Wife's Testimony Over Husband's

The Appellate Division affirmed an order determining that respondent husband committed the family offenses of disorderly conduct and criminal mischief against petitioner wife. The wife established by a preponderance of the evidence that the husband engaged in acts constituting those crimes. The court's assessment of the credibility of the witnesses was entitled to great weight, and the court was entitled to credit the testimony of the wife over that of the husband.

Matter of Scroger v Scroger, 68 AD3d 1777 (4th Dept 2009), *lv denied* 14 NY3d 705

JUVENILE DELINQUENCY

Adjudication Based Upon Legally Sufficient Evidence and Not Against Weight of Evidence

Family Court adjudicated respondent a juvenile delinquent, upon a fact-finding determination that he committed an act which, if committed by an adult, would have constituted the crimes of robbery in the first degree (two counts) and grand larceny in the fourth degree and placed him on probation for 18 months with community service and restitution. The Appellate Division affirmed. There was no basis to disturb the court's determinations concerning credibility. Respondent's intent to take part in the robbery could be inferred from the fact that he kicked the victim immediately after the other participants took the victim's property and knocked the victim down. There was nothing in the record to support respondent's suggestion that the incident was an altercation where someone incidentally took property.

Matter of Eric J., 67 AD3d 466 (1st Dept 2009)

Restricted Placement Least Restrictive Dispositional Alternative

Family Court adjudicated respondent a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would have constituted the crimes of assault in the second degree (two counts), obstructing governmental administration in the second degree, resisting arrest, and menacing in the third degree and placed him in restrictive placement. The Appellate Division affirmed. In view of the seriousness of respondent's repeated violent behavior both in and out of custody, his violent conduct only four months after being placed on probation, his general lack of cooperation, and a psychologist's unfavorable report, the placement was the least restrictive dispositional alternative consistent with respondent's needs and those of the community.

Matter of Shamel R., 68 AD3d 425 (1st Dept 2009)

Respondent's Conduct Supported Inference That She Intended to Cause Physical Injury

Family Court adjudicated respondent a juvenile

delinquent upon a fact-finding determination that she committed acts which, if committed by an adult, would have constituted the crimes of attempted assault in the second degree, attempted assault in the third degree and menacing in the second degree and placed her on probation for 12 months. The Appellate Division vacated the finding of attempted assault in the third degree and dismissed that count and otherwise affirmed. The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. Respondent's conduct in chest-butting her teacher, swinging at him hard enough to cause a scratch, and continuing to kick and lash out at him for several minutes supported the inference that she intended to cause physical harm. Relatively minor injuries causing moderate, but more than slight pain, may constitute physical injury. The evidence also supported the finding of menacing because respondent placed the victim in reasonable fear of physical injury by threatening him with an umbrella, which here was a dangerous instrument. The count of third degree attempted assault was dismissed as a lesser included offense of second degree assault.

Matter of Lovenia V., 68 AD3d 476 (1st Dept 2009)

Respondent's Confession Sufficiently Corroborated

Family Court adjudicated respondent a juvenile delinquent upon a fact-finding determination that he committed an act which, if committed by an adult, would have constituted the crime of criminal possession of a weapon in the second degree and also committed the act of unlawful possession of a weapon by a person under 16 and placed him with OCFS for 18 months. The Appellate Division affirmed. There was sufficient evidence to satisfy the corroboration requirement. The police saw and heard a weapon fired four times from within a group that included respondent and they pursued respondent and apprehended him a block away where they immediately found a revolver containing four empty shells and two live rounds along the path where respondent had run.

Matter of Devon G., 68 AD3d 674 (1st Dept 2009)

Adjudication Modified

Family Court adjudicated respondent to be a juvenile

delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, constituted the crimes of robbery in the first degree, criminal possession of a weapon in the fourth degree, and menacing in the second degree and placed him with OCFS for a period of 18 months. The Appellate Division modified. The charge of robbery in the first degree was reduced to robbery in the third degree, the charge of menacing in the second degree was reduced to menacing in the third degree and the finding of criminal possession of a weapon in the fourth degree was vacated. The evidence did not establish any of the charges requiring the presence of a dangerous instrument. There was no basis to disturb the court's finding that the device respondent used to intimidate victims was a slingshot rather than a "confetti popper" as described by respondent. Nevertheless, there was no evidence that the slingshot was loaded or otherwise operable. While a slingshot that was loaded with a hard object could have been dangerous, an empty slingshot was not. Here, the evidence did not establish that respondent's slingshot was readily capable of causing death or other serious physical injury. Despite the modification, 18 months placement was the least restrictive alternative.

Matter of Kaheem G., 70 AD3d 582 (1st Dept 2010)

Probation Least Restrictive Alternative

Upon a fact-finding determination, Family Court adjudicated respondent to be a juvenile delinquent based upon the finding that he committed an act which, if committed by an adult, constituted the crime of forcible touching and placed him on probation for 12 months. The Appellate Division affirmed. The court adopted the least restrictive dispositional alternative consistent with respondent's needs and those of the community, given the seriousness of the underlying sexual conduct and respondent's truancy. Although respondent was receiving therapy, probation supervision was necessary because the supervision available under an ACD was inadequate to ensure compliance.

Matter of Yonathan A., 70 AD3d 602 (1st Dept 2010)

Respondent Absconded From Non-Secure Facility

The petition alleging that respondent had committed an act which, if committed by an adult, would have constituted escape in the second degree when he absconded from the nonsecure facility to which he had been remanded upon the filing of a delinquency petition, was properly dismissed. A nonsecure facility for the placement of alleged and adjudicated juvenile delinquents is not a “detention facility” within the scope of Penal Law § 205.10, which sets forth the elements of the crime of escape in the second degree. It would be inconsistent with the rehabilitative purpose for which the juvenile justice system is intended to serve to conclude that the primary purpose of the respondent's remand was to confine him to ensure community safety. Moreover, notwithstanding the Family Court's finding that remand was necessary because the respondent was beyond parental control, and that there was a risk that he would engage in additional delinquent activity, the court deemed the environment of a nonsecure facility sufficient to protect the safety of the community.

Matter of Dylan C., 69 AD3d 127 (2d Dept 2010)

Officer's Testimony Not Credible

The appellant's motion to suppress physical evidence obtained as a result of his arrest should have been granted because the evidence recovered was the product of an illegal search and arrest. The presentment agency failed to establish probable cause to support the arrest because the officer's testimony was not credible and had all the appearances of having been patently tailored to nullify any constitutional objections. Without physical evidence, there was no basis to find that the appellant committed an act constituting criminal possession of a controlled substance in the seventh degree.

Matter of Robert D., 69 AD3d 714 (2d Dept 2010)

Placement Not the Least Restrictive Dispositional Alternative

In view of the recommendation of the New York City Department of Probation that the appellant be placed on probation, the appellant's acceptance into a program

which offered community-based services to juveniles placed on probation, and the highly favorable reports submitted to the court by the appellant's former counselor and by the facility in which he was detained pending disposition, the appellant's placement for a period of 18 months was not the least restrictive dispositional alternative consistent with both the appellant's best interests and the need for protection of the community. The order was modified by imposing an 18-month period of probation upon the appellant.

Matter of David F., 69 AD3d 720 (2d Dept 2010)

Respondent's Allocution Was Proper

Family Court adjudicated respondent a JD and placed him on probation for one year. After numerous violations and an assault charge, respondent was sentenced to three years of adult probation, after which he was arrested on two more charges. Family Court revoked probation and respondent was placed in OCFS custody for one year. Respondent appealed, stating that Family Court accepted his admission of probation violation without allocuting an unrelated adult who was present with him at the hearing. FCA § 321.3 requires the court, when taking an allocution, to make prescribed inquiry of their parent or other person legally responsible for their care, if present. The Appellate Division found that respondent was properly allocuted since the person in question, a friend of respondent's mother, did not act with any parental authority besides having the mother's written authorization to sign medical consents for the respondent. In light of respondent's violent behavior, placement was proper.

Matter of Abram E., 69 AD3d 1006 (3d Dept 2010)

Adjudication Affirmed, Evidence Legally Sufficient

Family Court adjudicated respondent to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, constituted the crimes of assault in the second degree and assault in the third degree. The Appellate Division affirmed. The evidence was legally sufficient to establish that the police officer involved sustained a physical injury within the meaning of Penal Law § 10.00.

Matter of Asa A., 67 AD3d 1372 (4th Dept 2009)

Restitution Did Not Exceed Victim's Out-of-Pocket Expenses

Family Court's amended order adjudicated 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 mischief in the fourth degree, and directed respondent to pay \$1500 restitution to the Office of Probation. The Appellate Division affirmed as modified. The court did not err in ordering respondent to pay restitution. The victim received payment from its insurance company to repair the property. Pursuant to the terms of the victim's subrogation agreement with the insurer, however, payment was a loan made to enable the victim to repair its property, and the loan was to be repaid after the victim received restitution based on the legal action taken against the individuals who caused the damage. Based on the terms of that agreement, the victim's use of the insurance company's loan to effect the necessary repairs constituted out-of-pocket expenses subject to restitution. The amended order, however, must be read to reflect that the restitution payment in this case was to be made to the Office of Probation, which in turn passed the payment to the victim. The court erred in ordering the Office of Probation, at the request of the presentment agency, to disclose respondent's name and address to the victim to enable the victim to commence an action against his parents, because the agency requesting disclosure, i.e. the presentment agency, was not a proper party plaintiff pursuant to GOL § 3-112.

Matter of Sean P. K., 70 AD3d 1308 (4th Dept 2010)

Order Reversed Based on Defective Admission

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 forcible touching. The Appellate Division reversed. Respondent's admission was defective because the court failed to advise him of his right to present witnesses, to confront witnesses presented against him, and to have the presentment agency prove beyond a reasonable doubt that he committed the alleged act. Further, the court failed to ascertain whether respondent and his parents were aware of the

possible specific dispositional orders.

Matter of Dakota L. K., 70 AD3d 1334 (4th Dept 2010)

Evidence Sufficient for Crime of Assault in Third Degree

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 affirmed. Both respondent and his mother testified that, while they were arguing with each other, respondent grabbed his mother's arm. After respondent and his mother fell to the floor, respondent held her wrists and bit her shoulder. Even if the court were to accept respondent's testimony that he was trying to calm his mother down by subduing her, the evidence was legally sufficient to support the court's determination that respondent consciously disregarded a substantial and unjustifiable risk that his mother would sustain a physical injury. Further, the evidence was legally sufficient to support the court's finding that respondent's mother sustained a physical injury, i.e. substantial pain, as a result of respondent's conduct. The photographs presented by the Presentment Agency supported the testimony of respondent's mother that she sustained a bite mark on her right shoulder and extensive bruising on her shoulders, arms and wrists. Respondent's mother testified that she sought medical treatment for her injuries, which included pain and swelling of her wrists and left shoulder. Finally, the court was entitled to credit the testimony of respondent's mother that on a scale of 1 to 10, she rated her pain level at 7 to 8.

Matter of Nico S. C., 70 AD3d 1474 (4th Dept 2010)

ORDER OF PROTECTION

Incarcerated Father Sends Threatening Letters to Mother of Child

In support of her petition for an order of protection, petitioner alleged that she received two letters from respondent who was incarcerated and one from an inmate she did not know who had been incarcerated for a period of time with respondent. The mother believed that the father was involved in the threatening letters

sent by the other inmate due to that inmate's knowledge of personal details of the mother's life. The father admitted to sending two letters, but denied they were threatening. The father stated that the mother, by her own admission, did not initially find the letters threatening and he claimed that no evidence had been presented that he had any involvement in the letters sent by the other inmate. The father had not seen the child since he was two years old, has no relationship with the child, and has previously consented to an order of protection that contained a similar no contact provision. Additionally, due to the threatening nature of the letters and the fact that the father has been convicted of sexual abuse in the first degree, the Appellate Division found that the decision to include the child in the order of protection was proper.

Matter of Amy SS. v John SS., 68 AD3d 1262 (3d Dept 2010)

PATERNITY

Presumption of Legitimacy Rebutted

Mother gave birth to child while married to husband. She left husband before or at about the time of the child's conception and she led petitioner putative father to believe that he was the father of the child and petitioner supported the child and raised her and her brother as his children from the time of the child's birth. Petitioner and the mother attested in a signed and notarized statement that petitioner was the child's father. Family Court dismissed husband's petition to be adjudicated the father upon his default and granted petitioner's petition. Thereafter, the court dismissed nonparty husband's motion to vacate the order of filiation adjudicating petitioner as the father of the child. The Appellate Division modified. The court erred in concluding that husband had no further interest in the outcome of petitioner's paternity proceeding after husband's petition was dismissed. As the husband of the mother at the time of the child's birth, husband was presumed to be the father until the presumption was rebutted and therefore husband was a necessary party to petitioner's paternity proceeding. The motion to vacate should have been denied in any event because the husband could not show excusable neglect and a meritorious claim of paternity. Under the circumstances here, the presumption of legitimacy was rebutted and

equitable estoppel barred husband from challenging petitioner's petition. Husband failed to show that it would nevertheless be in the child's best interests for the court to order a DNA test – he had virtually no contact with or responsibility for the child for the first 18 months of her life, he took no action to assert his paternity or to establish any relationship with her and he allowed another man to take on the responsibilities of fatherhood.

Matter of Jason E. v Tania G., 69 AD3d 518 (1st Dept 2010)

Court Erred in Ordering DNA Testing

Family Court directed that DNA testing be performed on petitioner putative father and the subject child in connection with petitioner's unopposed paternity petition. The Appellate Division reversed and remitted for a hearing on whether DNA testing was in the child's best interests. The existing record was too fragmented to permit the conclusion that DNA testing would not be in the child's best interests.

Matter of Lovely M., 70 AD3d 516 (1st Dept 2010)

Genetic Testing Not in Child's Best Interest

Petitioner commenced a paternity proceeding and sought a DNA test. Charles H. moved to dismiss the petition based upon equitable estoppel, citing his own lifelong relationship with the child and the petitioner's previous refusal to have any relationship with the child. Since the mother had not fraudulently led Charles H. to believe that he was the biological father, the Family Court found that equitable estoppel could not be applied and ordered genetic marker testing. Charles H. appealed and the ruling was reversed by the Appellate Division. The Court ruled that equitable estoppel can be imposed to protect the interests of a child already in a operative parent-child relationship and that the case should be based solely on what is in the best interests of the child. The petitioner had not previously attempted any relationship with the child despite his knowledge he may be the biological father and the child has a strong, eight-year relationship with Charles H., who she believed was her father during that time. Charles H. was named as the child's father on her birth certificate, signed an acknowledgment of paternity, and lived with

the child and developed a close relationship with the child. These factors led the Appellate Division to rule that genetic testing would not be in the child's best interests.

Matter of Dustin G. v Melissa I., 69 AD3d 1019 (3d Dept 2010)

Law Guardian on Appeal Removed for Lack of Contact with Client

Petitioner commenced a paternity proceeding and sought a DNA test. Family Court dismissed the visitation proceeding based on equitable estoppel. Upon the Court's initial consideration of the appeal, it was revealed that the Law Guardian assigned to the appeal had not met with or spoken to the child. For that reason, the Court withheld a decision and ordered that a new Law Guardian be assigned. The Appellate Division held that the Family Court did not err in finding that genetic testing would not be in the best interests of the child. The child was raised by the respondent, is currently supported by child support payments from the respondent, shares the respondent's surname, and was only recently told that petitioner may be his biological father. In addition, the petitioner was incarcerated for 7 of 10 years of the boy's life and began paternity proceedings 11 years after first knowing that he could be the boy's father.

Matter of Mark T. v Joyanna U., 70 AD3d 1068 (3d Dept 2010)

TERMINATION OF PARENTAL RIGHTS

Vacatur Motion Properly Denied - No Reasonable Excuse and No Meritorious Defense

Family Court denied respondent mother's motion to vacate the court's prior order, upon respondent's default, finding that respondent permanently neglected her child, terminated her parental rights, and transferred custody to petitioner for the purpose of adoption. The Appellate Division affirmed. Respondent failed to demonstrate a reasonable excuse for her belated appearance when she was aware of the date of the hearing almost three months earlier, took no steps to ascertain the time she was required to appear in court, and failed to notify the court or her attorney that she

was going to her methadone program before she was due in court and would be delayed. Respondent also failed to show a meritorious defense in view of her failure to provide evidence that she was drug-free. Clear and convincing evidence established that the agency made diligent efforts to encourage and strengthen the parental relationship and that respondent failed to plan for her children's future by failing to complete drug treatment after almost four years.

Matter of Ciara Lee C., 67 AD3d 437 (1st Dept 2009), *lv dismissed* 14 NY3d 437

No Default Where Respondent's Attorney Appeared at Fact-finding

In this TPR proceeding, respondent father failed to appear at the fact-finding and dispositional hearings, but his attorney appeared at the fact-finding hearing. Upon respondent's default in appearing at the dispositional hearing, Family Court terminated his parental rights to the subject child for the purpose of adoption. Family Court denied respondent's subsequent motion to vacate the dispositional order. The Appellate Division affirmed. The fact-finding portion of the order was not entered upon default. Respondent's motion to vacate that order, therefore, was improper and the appeal from the denial of that motion was not properly before the Appellate Division. Were the denial of the motion properly before the Appellate Division, it would have found that respondent failed to demonstrate a reasonable excuse for his absence from the hearings or a meritorious defense to the allegation that he violated the suspended judgment. Moreover, respondent failed to demonstrate that a disposition other than the termination of his parental rights would serve the best interests of his children.

Matter of Amani Dominique H., 67 AD3d 466 (1st Dept 2009)

Alleged Deficiency in Petition Cured by Evidence at Fact-finding

Family Court terminated respondent mother's parental rights and transferred custody to petitioner for the purpose of adoption. The Appellate Division affirmed. Respondent's contention that the petition did not adequately specify petitioner's diligent efforts was

unpreserved. In any event, the petition was sufficient and any alleged deficiency was cured by evidence introduced at the fact-finding hearing of the agency's case progress notes, which provided detail about petitioner's efforts to reunite the child with respondent. The case notes also supported the finding that respondent failed to plan for the child's future and failed to utilize rehabilitative services and resources made available to her. The finding that adoption was in the child's best interests was supported by a preponderance of the evidence.

Matter of Kayla Emily W., 67 AD3d 477 (1st Dept 2009)

Respondent's Failure to Plan Supports TPR

Family Court determined that respondent mother permanently neglected her children. The Appellate Division affirmed. The court's determination was supported by clear and convincing evidence that respondent failed to plan for her children's future despite petitioner's diligent efforts. The record demonstrated that the agency referred respondent to anger management classes, parenting skills programs and psychiatric examinations and attempted to implement visitation, but respondent consistently rejected petitioner's assistance, failed to attend or was excessively late to visitation and refused to have a psychiatric evaluation. The finding that adoption was in the child's best interests was supported by a preponderance of the evidence.

Matter of Messiah N., 67 AD3d 508 (1st Dept 2009)

Vacatur Denied Where Respondent Failed to Demonstrate Excuse for Failure to Appear

Family Court denied respondent mother's motions to vacate the court's prior orders, the first of which terminated her parental rights with respect to four of her children and transferred custody of the subject children to petitioner for the purpose of adoption, and the second of which terminated her parental rights with respect to three of her children and transferred custody to petitioner for the purpose of adoption. The Appellate Division affirmed. Respondent failed to demonstrate a reasonable excuse for her absence from the dispositional hearing with respect to termination of her parental

rights of the children in the first order. Her excuse that she was confused about the time of the hearing was not reasonable in view of her history of failing to appear. The court properly denied respondent's request for an adjournment of the dispositional hearing that resulted in termination of respondent's parental rights with respect to her children in the second order because her request for the adjournment arose from her own conduct.

Matter of Jaynices D., 67 AD3d 518 (1st Dept 2009)

TPR Supported by Evidence That Child Wished to be Adopted

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The finding that termination of respondent's parental rights was in the child's best interests was supported by the evidence, including testimony at the hearing showing that the child, who was several months from her 14th birthday, wished to be adopted by her foster family and that the family wished to adopt her. The child had been able to visit her siblings and maintain a meaningful relationship with them while living with the foster family. Respondent failed to take the necessary steps to complete any of the service plan goals provided by the agency.

Matter of Kadija Tempie M., 67 AD3d 555 (1st Dept 2009)

Permanent Neglect Supported by Clear and Convincing Evidence

Family Court's finding of permanent neglect was supported by clear and convincing evidence. Despite the diligent efforts of the agency to encourage and strengthen the parental relationship, which included assistance so that respondent mother could attend family therapy, obtain suitable housing, meet her financial needs, and arranging visitation, respondent failed to attend therapy, secure a suitable home, obtain employment and her visitation was inconsistent. The finding that adoption was in the child's best interests was supported by a preponderance of the evidence.

Matter of Nahajah Lituarrah Lavern K., 67 AD3d 565 (1st Dept 2009)

TPR Affirmed

Family Court determined that respondent mother permanently neglected her children and terminated her parental rights. The Appellate Division affirmed. Respondent's contention that the petition was defective because it did not specify petitioner's diligent efforts was unpreserved and were the Appellate Division to review it, it would find that the allegations were more than sufficient to put respondent on notice of the nature of the proceedings. The court's determination was supported by clear and convincing evidence that respondent failed to plan for her children's future despite petitioner's diligent efforts. Despite the agency's efforts of referring respondent to parenting-skills workshops, domestic violence programs, counseling programs, and arranging visitation, respondent continued to deny responsibility for her past neglect of her daughter and lacked insight into her duties as a parent.

Matter of Irene C., 68 AD3d 416 (1st Dept 2009)

Mother Violated Suspended Judgment

Family Court terminated respondent mother's parental rights upon a finding that she violated the terms and conditions of a suspended judgment. The Appellate Division affirmed. A preponderance of the evidence supports the court's finding that there were several instances of respondent's violation of the suspended judgment. Her failure to submit to random drug testing was a material violation of a core term of the suspended judgment that by itself would have warranted revocation. Termination of parental rights was in the child's best interests in light of respondent's repeated poor parental judgment.

Matter of Tony H., 68 AD3d 439 (1st Dept 2009)

Father Violated Suspended Judgment

Family Court revoked respondent father's suspended judgment entered on a finding of permanent neglect and terminated his parental rights. The Appellate Division affirmed. Two and one-half years before the revocation, respondent admitted having permanently neglected his child and consented to the suspended judgment. Respondent's drug use, conviction for sale of a

controlled substance and his failure to secure housing were violations of the suspended judgment. His proposed solution of having the paternal grandmother take temporary custody ignored the grandmother's medical needs and her reluctance to take on that role, as well as the child's preference for adoption by the foster mother.

Matter of Kendra C.R., 68 AD3d 467 (1st Dept 2009), *lv denied* ___NY3d___ (2010)

Mother Received Effective Assistance of Counsel

Upon a fact-finding determination of permanent neglect, Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. Any failure to assign counsel at the fact-finding hearing was caused solely by respondent's decision to absent herself from the proceeding despite several opportunities to appear and despite knowledge of the court dates. When respondent appeared at the dispositional hearing counsel was assigned. Counsel's decision not to seek vacatur of the fact-finding determination did not constitute ineffective assistance of counsel because respondent lacked a reasonable excuse for her default or a meritorious defense. The court properly determined that the child's best interests would be served by terminating parental rights rather than a suspended judgment.

Matter of Nikeerah S., 69 AD3d 421 (1st Dept 2010)

Mother's Failure to Plan Supported TPR

Upon a finding of permanent neglect, Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. The record demonstrated that the agency made diligent efforts to encourage and strengthen the parent-child relationship, including arranging frequent visitations, referrals for domestic violence therapy sessions, counseling sessions, and consultations in an effort to develop a plan for appropriate services for the child. Respondent's sporadic and superficial attendance at therapy sessions aimed at addressing her anger management and the dangers created by her relationship with the child's abusive father did not allow a finding that she planned for her child's return. Further, termination of parental rights to facilitate adoption was in the child's best

interests. The child was in a stable and caring environment provided by a foster mother who wished to adopt her.

Matter of Shaianna Mae F., 69 AD3d 437 (1st Dept 2010)

Respondent's Failed to Acknowledge Problems Leading to Placement

Family Court terminated respondent father's parental rights to his child for the purpose of adoption. The Appellate Division affirmed. Respondent failed to meet his duty to plan for his son's future by refusing, even years after the event, to acknowledge his failure to protect the child from the effects of the mother's alcoholism that led to the need for foster care. Instead, respondent repeatedly described the child's removal as "kidnaping" by the agency. Although respondent substantially complied with plan components, a finding of permanent neglect may be found even where a parent fully complied with the agency's plan. Further, in light of the child's lengthy placement in foster care, substantial questions that were raised regarding respondent's capacity, and the treating psychologist's testimony of the child's need for stability, the court properly declined to order a suspended judgment.

Matter of John G. Jr., 70 AD3d 419 (1st Dept 2010)

Finding of Permanent Neglect Supported by Clear and Convincing Evidence

Family Court terminated respondent mother's parental rights to her child. The Appellate Division affirmed. Contrary to respondent's contention, the record established that the agency made diligent efforts to encourage and strengthen the parental relationship. Despite these efforts, respondent failed to plan for the child's future and failed to obtain the required psychiatric treatment and appropriate housing, and her visits with the child were sporadic. Further, termination of parental rights to facilitate the adoption was in the child's best interests. The child resided with her paternal grandmother for most of her life and they developed a close relationship.

Matter of Precious W., 70 AD3d 486 (1st Dept 2010)

Termination of Mother's Parental Rights in Child's Best Interests

Following a fact-finding determination of permanent neglect, Family Court terminated respondent mother's parental rights to her child for the purpose of adoption. The finding of permanent neglect was supported by clear and convincing evidence. Despite the agency's diligent efforts, respondent failed to complete a mental health evaluation or course of therapy and failed to gain insight into the reasons for the child's placement. Further, the child was thriving in his foster home, where he was living with his biological sister.

Matter of Alexander B., 70 AD3d 524 (1st Dept 2010)

Mental Illness Rendered Mother Unable to Properly Care For Children

Family Court terminated respondent mother's parental rights to her children for the purpose of adoption. The Appellate Division affirmed. Medical records and the un rebutted testimony by an expert psychiatrist provided detailed evidence to support the conclusion that respondent had a long mental health history including diagnoses of schizoaffective disorder, rendering her unable to act in accordance with the children's needs. Respondent's claim that her "mental retardation" originated during her developmental period as defined by Social Services Law § 384-b (6) (b) was un preserved - in any event, the agency proceeded only on a "mental illness" cause of action.

Matter of Genesis S., 70 AD3d 570 (1st Dept 2010)

Child Permanently Neglected and Severely and Repeatedly Abused

Family Court terminated respondent mother's parental rights on the grounds of permanent neglect and severe and repeated abuse. The Appellate Division affirmed. Evidence at the dispositional hearing supported the determination that it was in the child's best interests to terminate respondent's parental rights to facilitate the child's adoption by his foster parents, with whom he had lived most his life and developed a close relationship, and who have tended to his psychiatric and developmental needs. The circumstances did not warrant a suspended judgment.

Matter of Jayvon Nathaniel L., 70 AD3d 580 (1st Dept 2010)

Mother Failed to Complete Alcohol Treatment and Counseling Programs

The petitioner met its burden of proof by establishing that, during the relevant time period, the mother failed to complete an alcohol treatment program, failed to complete a counseling program, and failed to take the steps needed to obtain public assistance, despite the petitioner's diligent efforts to strengthen and encourage the parent-child relationship.

Matter of Dustin H., 68 AD3d 1112 (2d Dept 2009)

Mother Failed to Acknowledge or Address Her Drug and Alcohol Abuse Problems

For a period of more than 15 out of 22 months following placement of the child with an authorized agency, the mother failed to substantially and continuously plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship. Further, for a period of almost two years following the child's foster care placement, the mother failed to acknowledge or address her drug and alcohol abuse problems despite the agency's counseling and referrals for treatment. The mother also failed to visit consistently with the child despite the agency's encouragement. Accordingly, the Family Court properly found that the mother permanently neglected the child.

Matter of Brookes Mc., 68 AD3d 1117 (2d Dept 2009)

Mother Unable to Care for Children by Reason of Mental Retardation

Contrary to the mother's contention, the Family Court properly found that the petitioner established, by clear and convincing evidence, that she is presently and for the foreseeable future unable, by reason of mental retardation, to provide proper and adequate care for the subject children. The uncontroverted testimony of the Mental Health Services psychologist revealed that the mother had significantly impaired adaptive functions,

sub-average intellectual functioning, limited understanding of child rearing and child development, and required supervision, and that because of her mental retardation, the subject children would be in danger of becoming neglected if they were returned to her care.

Matter of Mercedes W.R., 69 AD3d 638 (2d Dept 2010)

Father Did Not Plan for Child's Future Despite Agency's Diligent Efforts

Contrary to the father's contention, the presentment agency established that it made diligent efforts to encourage and strengthen his relationship with the subject child. Those efforts included, inter alia, facilitating visitation when it was in the child's best interest, referring the father for alcohol treatment and domestic violence counseling, and attempting to locate additional treatment programs. Despite these efforts, the father did not visit the child regularly and did not cooperate with rehabilitation programs. Thus, he failed to plan for the child's future.

Matter of Megan R.W., 69 AD3d 737 (2d Dept 2010)

Parents Failed to Complete Substance Abuse Programs or Psychotherapy

The testimony at the fact-finding hearing established that for a period of 16 months following the children's placement in foster care, the mother and the father failed to complete substance abuse treatment programs or psychotherapy, despite the agency's counseling and referrals for treatment. Accordingly, the Family Court properly found that the mother and the father permanently neglected the children. The Family Court also properly determined that the best interests of the children would have been served by terminating the mother's and the father's parental rights and freeing the children for adoption. The testimony established that the children had been living together in the same foster care home for four years, that the older two children, ages 15 and 14 years old, wanted to be adopted, and that the foster parents wanted to adopt all of the children.

Matter of Malen Sansa V., 70 AD3d 707 (2d Dept 2010)

Permanent Neglect Properly Found and Suspended Judgment Not Warranted

Following repeated finding of neglect, respondents parental rights were terminated on the grounds of permanent neglect. Mother argued on appeal that she should have received a suspended judgment and the father claimed his rights should not have been terminated as to his son. Here, the mother had a history of cocaine use and had been receiving services from petitioner for 12 years. Additionally, she continued to deny the father's untreated drug problem and intended to return to live with him. The daughter was in a preadoptive foster home, and the other children thrived in their respective placements. Family Court did not abuse their discretion in terminating the mother's parental rights rather than granting a suspended judgment. The father's claim was also rejected. Contrary to the father's claim that the son was not going to be adopted, he was matched with a preadoptive family. Beyond that, he failed to address his drug problem and did not exercise consistent visitation. Accordingly, termination of his parental rights was proper.

Matter of Nevaeh SS., 68 AD3d 1188 (3d Dept 2009)

Mother's Progress Insufficient to Defeat Permanent Neglect TPR

Soon after the subject child was born there was an emergency removal based on prior findings of neglect of other children and the mother's continued abusive relationship with the child's father. A permanent neglect TPR was filed over a year later and the mother did not dispute the permanent neglect but rather that the court should have issued a suspended judgment instead of terminating her parental rights. The Appellate Division affirmed holding that while the mother had made measurable progress, there was no evidence that she would be able to parent on a daily basis. Additionally, her home environment was unsanitary and not suitable for a young child. As important was the fact that she continued to maintain an abusive relationship with the child's father despite warnings that it could jeopardize the child's return to her. Finally, the child was thriving in the care of the foster family which expressed interest in adopting her.

Matter of Kayla KK., 68 AD3d 1207 (3d Dept 2009)

Standing to Seek Custody Does Not Require DSS to Make Diligent Efforts

After child was placed in foster care as a result of the mother's neglect, the mother's former paramour sought custody. Family Court determined that she had standing to do so. Subsequently, the mother's parental rights were terminated and the petition for custody was dismissed. Petitioner argued that because she had standing to seek custody, DSS was obligated to make diligent efforts to reunite the child with her. The Appellate Division agreed with Family Court that it did not. No such obligation exists because the petitioner was not the subject of a TPR. In any event, petitioner missed three court appearance, failed to contact DSS for visits and although she cared for him when he was first born, she had no contact with him since he went into foster care. It was in the child's best interests to remain in foster care where he is thriving, with his siblings and be freed for adoption by the foster mother who has proceedings pending to adopt them all.

Matter of Jocelyn II. v Vanesha P., 68 AD3d 1260 (3d Dept 2009)

DSS Necessary Party to Private TPR

This was an unusual case where the grandmother, who had Art. 6 custody, filed to terminate the parental rights of a father who had been convicted of manslaughter in the death of the child's mother and was incarcerated. The grandmother was given Article 6 custody of the child and he lived with her for over 5 years when she filed a severe abuse TPR against the father. SSL §384-b (3)(b) in effect allows a TPR by a relative with care and custody in situations where the department failed to act. Here, DSS had not been involved because there were no concerns about the child's safety with the grandmother. When the grandmother sought the TPR there was no proof of "diligent efforts" required by the statute since the agency had never been involved. The grandmother argued that the situation called for a court order of "no reasonable efforts" under FCA §1039-b. However, that statute requires DSS to file the motion. Therefore, Family Court dismissed the petition but the Appellate Division modified and reinstated the matter for further proceedings holding that DSS should be

joined as a party they should decide if the "no reasonable efforts" motion should be made and if so, Family Court should decide if such a motion should be granted.

Matter of Paul Z., 68 AD3d 1473 (3d Dept 2009)

Mental Illness TPR Affirmed

During most of the child's life, the father was incarcerated for possessing an obscene sexual performance by a child (a film in which a male child was performing a sex act on the child's parent) and was otherwise prevented from contact by orders of protection. The father was court-ordered to be evaluated by a psychologist and he argued that the manner in which that evaluation was performed violated his due process rights. He also argued that the proof did not support the TPR. The evaluation was appropriate as it involved face to face contact, a telephone interview, a review of all the mental health information on the father that dated back to the early 1980's including a forensic evaluation in 2004, information from the sex offender program where the father was treated and a personality assessment inventory test. The psychologist's report was received into evidence without objections and he was fully cross-examined by counsel. The father had in the past sodomized a 12-year-old boy and masturbated to pornography in front of a 4-year-old. The psychologist diagnosed the father with pedophilia and an antisocial personality disorder. The father minimized his behavior, took no responsibility and blamed others. He was at high risk to reoffend and thus, due to mental illness, to safely care for his child for the foreseeable future. His parental rights were properly terminated.

Matter of Casey L., 68 AD3d 1497 (3d Dept 2009)

Abandonment TPR Upheld

Respondent mother was an admitted crack addict whose child had been born addicted and was in foster care since birth. For the relevant 6-month period, the mother had not seen the child at all but had made two calls to the caseworker and one to the foster parent. In one call she told the caseworker that she was going to leave her rehab program and the caseworker encouraged her to stay and indicated she could have visitation at the

program. Two days later she left a voice message that she had left the program and wanted a visit but provided no way to be reached and had left no forwarding address at the rehab program. The foster mother received one short phone call in which the mother had generally inquired about the child. These efforts were trivial, sporadic and insubstantial and not enough to defeat an abandonment.

Matter of Gabriel D., 68 AD3d 1505 (3d Dept 2009)

Revocation of Suspended Judgment Reversed Based Upon New Facts

Family Court revoked an extended suspended judgment entered upon a finding of permanent neglect and terminated respondent mother's parental rights. Respondent's contention that the court failed to consider the tolling provisions of Family Court Act § 633 (e) was raised for the first time on appeal and therefore was not properly before the Appellate Division. In any event, the expiration date of the suspended judgment was of no moment because respondent was alleged to have violated the terms and conditions of the suspended judgment. Petitioner met its burden with respect to the extended suspended judgment by presenting evidence that respondent failed to obtain suitable housing, failed to attend two out of three appointments with the child's psychologists, failed to provide required documentation concerning her employment and mental health treatment in a timely manner, and failed to demonstrate the parenting skills necessary to understand the child's unique educational standards. Nevertheless, in view of new facts and allegations that the Appellate Division could properly consider, including that the child was no longer in the preadoptive home and did not want to be adopted, it was not clear that termination of the child's rights was in the child's best interests. Therefore, the matter was remitted to the court for a new dispositional hearing.

Matter of Shad S. Jr., 67 AD3d 1359 (4th Dept 2009)

Dismissal of Petition Seeking Termination of Parental Rights Affirmed

Family Court dismissed the agency's petition, which sought to terminate the parental rights of respondent father. The attorney for the child appealed, contending

that the court erred in finding that petitioner failed to establish that it made the requisite diligent efforts to encourage and strengthen the father's parental relationship with the child. The Appellate Division affirmed. The father was incarcerated and the father's parents were initially rejected as a resource and therefore the permanency planning goal was to return the child to the mother. The father was in agreement with that goal, and petitioner's efforts consequently were directed toward reuniting the child with the mother. With respect to the father, petitioner merely implemented visitation between the father and child, and provided the father with permanency hearing reports setting forth the mother's progress. The attorney for the child's contention that petitioner was not required to use diligent efforts with respect to the father because the father failed to cooperate with petitioner's efforts to assist him in planning for the child's future was rejected. Although the father initially agreed with the permanency planning goal to return the child to the mother, it thereafter became apparent that the goal was no longer feasible. At that time, the father presented his parents as a custodial option, and petitioner then found the father's parents to be appropriate as a custodial resource for the child.

Matter of Roberto C. Jr., 67 AD3d 1384 (4th Dept 2009), *lv denied* 14 NY3d 705

“Non-Respondent” Father Served With Notice of Underlying Neglect Proceeding

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The record demonstrated that the court's "Order of Fact-Finding and Disposition and Permanency Hearing (Neglect)" indicated that respondent was served with a copy of the neglect petition with respect to the child as a "non-respondent parent," but respondent did not appear. Respondent was subsequently served with the termination petition and appeared in response. Respondent did not, however, move to vacate the prior order in the underlying neglect proceeding. In any event, respondent's conclusory assertions that he was not notified of the neglect proceeding was insufficient to raise an issue of fact requiring a traverse hearing. Finally, the court's assignment of counsel for respondent when he appeared in response to the petition to terminate his parental rights was neither

"late" nor "constitutionally inadequate" because respondent had not previously appeared.

Matter of Steven G., 67 AD3d 1429 (4th Dept 2009), *lv denied* 14 NY3d 704

Dismissal of Petition Reversed: Child Freed for Adoption by Appellate Division

The Appellate Division agreed with appellant attorney for the child that Family Court erred in dismissing the petition seeking revocation of a suspended judgment and termination of respondent's parental rights. Respondent waived the contention that Family Court did not acquire personal jurisdiction over him, because he raised the contention for the first time in a post-hearing memorandum and had already participated in the proceedings. On the merits, DSS established that the father violated the conditions of the suspended judgment. The father did not contact the psychologist with whom he was directed to meet for three months and failed to secure appropriate housing; he could not recall what type of special educational services or treatment the child received; and he did not know the nature of the disability for which the child was receiving treatment. Because the record was sufficient to determine the child's best interests, the Appellate Division did so, terminating parental rights and freeing the child for adoption. The evidence established that attempts to reunite the child with the father resulted in psychological trauma to the child; and a court-appointed special advocate who observed the child failed to see any signs of affection between the father and the child, and strongly opposed reunification. Two justices dissented.

Matter of Richelis S., 68 AD3d 1643 (4th Dept 2009), *appeal dismissed* 14 NY3d 767

Evidence of Diligent Efforts Not Required

Family Court properly terminated respondent father's parental rights on the ground of permanent neglect. By virtue of respondent's admission of permanent neglect, petitioner DSS was not required to establish that it made diligent efforts to reunite the father with his son. Further, once permanent neglect is established, an order of disposition must be made solely on the basis of the child's best interests, with no presumption that the

child's best interests will be promoted by any particular disposition. Thus, contrary to the father's contention, a blood relative did not take precedence over a prospective adoptive parent selected by the authorized agency. Finally, the father failed to preserve for review the contention that the court erred in failing to issue a suspended judgment because he failed to request that the court issue such a judgment.

Matter of Nestor H.O., 68 AD3d 1733 (4th Dept 2009)

Court Failed to Conduct Searching Inquiry

Respondent father appealed from an order finding that he permanently neglected his son and terminating his parental rights. The Appellate Division reversed. When the father appeared with his assigned counsel on the scheduled date of the fact-finding hearing, the father's counsel advised the court that the father no longer wanted him to proceed as his attorney. The court responded, "(t)hen I hope he went to law school when he was locked up in jail because you have a trial today . . .," cut the father off when he had spoken only five words, and refused to adjourn the hearing. The court then granted the motion of the father's attorney to withdraw as counsel, whereupon the court stated that the father could "retain himself then." The court conducted the fact-finding hearing, and the father did not cross-examine the single witness presented by petitioner, nor did he call any witnesses. Family Court deprived respondent of his fundamental right to counsel. In order to ensure that the waiver of the right to counsel is valid, the court must conduct a searching inquiry of the party, and there must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel. Here, the court failed to conduct a searching inquiry.

Matter of Deon M., 68 AD3d 1740 (4th Dept 2009)

Termination of Parental Rights Was in Child's Best Interests

The Appellate Division affirmed Family Court's order that revoked a suspended judgment and terminated respondent mother's parental rights with respect to her son. Contrary to the mother's contention, petitioner established by a preponderance of the evidence that the mother violated the terms and conditions of the

suspended judgment. Although the mother participated in the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return. The mother's remaining contentions were unpreserved and without merit.

Matter of Giovanni K., 68 AD3d 1766 (4th Dept 2009)

Progress Insufficient to Warrant Return of Child

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. Contrary to the contention of the father, petitioner established that the father failed to develop a realistic plan for the child's future. Although the record established that he participated in several substance abuse treatment programs, it further established that he suffered frequent relapses and that his progress was insufficient to warrant the return of the child to his care. The record supported the court's determination that any progress made by the father was not sufficient to warrant any further prolongation of the child's unsettled familial status.

Matter of Tiara B., 70 AD3d 1307 (4th Dept 2010)

Petitioner Agency Made Diligent Efforts

Family Court terminated respondent parents' parental rights on the ground of permanent neglect. The Appellate Division affirmed. Despite petitioner's diligent efforts, the parents failed to establish that they had a meaningful plan for the child's future. The evidence at the hearing established that the mother was unable to plan for the future of the child because she failed to correct the behavior that led to the removal of the child. Further, although the father made some progress with his mental health, anger and substance abuse issues after the filing of the petition, the record of the dispositional hearing established that he was still abusing drugs, drinking alcohol, had anger issues and refused to visit with the child because he objected to the visitation procedures.

Matter of Rachael N., 70 AD3d 1374 (4th Dept 2010)

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N O T E S

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