Law Guardian Program
Appellate Division, Fourth Department

Cumulative Case Digest

2007-2008

ADOPTION

Surrender Agreement Conditions Unmet: Petition for Visitation Properly Dismissed

Family Court properly granted, without a hearing, the motion of respondent, petitioner's father, to dismiss the petition seeking visitation, which alleged that her father and stepmother revoked her visitation privileges. Petitioner voluntarily executed judicial surrenders with respect to her three biological children pursuant to an agreement, approved by the court, between her and her father and stepmother, pursuant to which the father and stepmother would adopt the children and petitioner would be permitted weekly visitation so long as she did not miss two visits within any 12-month period unless there was a crisis beyond her control. The record established that petitioner did not visit her children for more than one year and the petition failed to set forth any reason beyond petitioner's control for the missed visitation. The petition also failed to set forth the manner in which the visitation sought was in the best interests of the children. Thus the petition was facially insufficient.

Matter of Carrie W. v Cayuga County Dept. of Health and Human Servs., 37 AD3d 1059 (4th Dept 2007), *lv denied* 8 NY3d 813

Support Payments Made Through Wage Deduction Not Involuntary

Family Court properly dismissed the petition on the ground that respondent mother's consent was required because she had not abandoned the child. The evidence at trial established that respondent timely and consistently paid child support pursuant to an order entered upon her agreement with the child's father in conformity with the CSSA. Such payments are deemed a substantial communication with the child or person having legal custody of the child and precluded dispensing with respondent's consent on the ground of abandonment. The court properly rejected petitioner's contentions that the amount was not fair and reasonable and that the payments were not voluntary because they were made through a wage deduction order.

Matter of Adoption of Devin F., 41 AD3d 1197 (4th Dept 2007)

Respondent's Consent Not Required

Petitioners sought to adopt respondent's child, and Family Court determined that respondent's consent to the adoption was not required**.** The Appellate Division affirmed. The record established that the mother failed to maintain contact with the child for a period of six months prior to the filing of the petition, although able to do so. The mother's only contact with the child during the relevant period was an occasional telephone call, and was insufficient to preclude a finding of abandonment. The court was entitled to discredit the mother's testimony that petitioners thwarted her efforts to

contact the child.

Matter of Adoption of Patrick D., 52 AD3d 1280 (4th Dept 2008)**,** *lv denied* 11 NY3d 711

CHILD ABUSE AND NEGLECT

Sexual Abuse Finding Affirmed

Family Court determined respondent sexually abused his 12-year-old daughter and derivatively abused his other children. The Appellate Division affirmed. Family Court's findings were supported by a preponderance of the evidence. The testimony of the physician detailing the physical findings of sexual abuse sufficiently corroborated the out-of-court statements of the child that respondent sexually abused her.

Matter of Teonia B., 37 AD3d 1101 (4th Dept 2007)

Petitioner Failed to Establish Respondent Was "Person Legally Responsible"

Family Court reversibly erred in granting petitioner's motion for summary judgment determining that respondent abused the three children of his girlfriend pursuant to FCA § 1012 (e) (ii). Petitioner failed to meet its initial burden of establishing as a matter of law that respondent was a "person legally responsible" for the care of the children within the meaning of section 1012 (a) and (g).

Matter of Devon B., 37 AD3d 1120 (4th Dept 2007)

Sexual Abuse Finding Reversed Based on Lack of Corroboration

Family Court found that respondent sexually abused his daughter, Kalifa, and derivatively abused his other two children. The Appellate Division reversed. No evidence was offered corroborating the child's unsworn out-of-court statements. None of petitioner's witnesses gave testimony establishing expertise in child sexual abuse or even child abuse, and none discussed symptoms or behaviors commonly seen in victims of child sexual abuse by way of comparison to symptoms or behaviors displayed by Kalifa. Kalifa's repetitive statements to various persons did not constitute sufficient corroboration.

Matter of Kalifa K., 37 AD3d 1180 (4th Dept 2007)

Medical Neglect Finding Vacated

Family Court adjudged respondent's child abused, after a trial on stipulated facts that included police reports, case notes of petitioner's employees, and letters from two physicians who treated the four-month-old child for a spiral fracture of the right femur. Family Court should not have considered statements made to police by respondent's

neighbor, which were expressly excluded from the stipulated facts but were improperly before the court because they had not been redacted from the police report. The Appellate Division concluded, however, that the evidence apart from the statements was legally sufficient to support the finding of abuse. The Appellate Division modified by vacating the finding that respondent neglected the child by failing to provide adequate medical care. Although the court noted in its decision that there was a delay of two to three hours in obtaining medical treatment, the court made no finding that respondent's actions caused the child to be neglected. To the extent that the decision and order conflicted, the decision controlled.

Matter of David R., 39 AD3d 1187 (4th Dept 2007)

Petition Properly Dismissed: Evidence of Abuse Not Established Against Any Particular Person

Family Court properly granted respondents' motion seeking dismissal of the petition charging them with abusing a three-month-old child who had sustained a fractured skull. The evidence presented by petitioner established that respondents, among others, acted as the caretakers of the child within the 48 hours preceding the diagnosis of a fractured skull. Although many witnesses testified on behalf of petitioner, the evidence did not establish a prima facie case of abuse against any particular person or persons.

Matter of Tony B., 41 AD3d 1242 (4th Dept 2007)

Mother's Admission Stands

On appeal, respondent mother contended that Family Court erred in refusing to modify its order to the extent that the court determined that she had abused and neglected her two children. The mother admitted at fact-finding that she had subjected the older child to needless medical procedures, which created a substantial risk of death to the child, serious or protracted disfigurement of the child, or protracted impairment of the child's physical or emotional health. The court placed both children in the custody of petitioner, and approximately 18 months after her admission, and after proceedings to terminate respondents' parental rights had been commenced, the mother moved to vacate her admission and proceed to trial. Assuming that the postdispositional motion was properly before the court, the Appellate Division affirmed. The record established the mother understood the proceedings and made the admission after consulting with counsel, and the allocution did not support her contention that she made the admission based on the representation of a social worker that if she did so, she would obtain custody of her children within a few months. Thus the mother failed to demonstrate good cause for vacating the court's order.

Matter of Jayson G., 41 AD3d 1289 (4th Dept 2007)

No Evidence Participation in Drug Treatment Was Voluntary

After determining that respondent father was not precluded from appealing from that part of Family Court's order concerning the finding of neglect based on his stipulation to the dispositional portion of the order, the Appellate Division affirmed. According to the undisputed evidence, the father abused drugs in the presence of the children and was at one time hospitalized for treatment of an overdose. In addition, he made statements to a child protective worker admitting he used illegal drugs on a daily basis. His prior participation in a drug treatment program was not sufficient to bring the matter within the statutory exception for parents who voluntarily and regularly participate in a rehabilitative program (*see* FCA § 1046 [a] [iii]) because there was no evidence that his prior participation was voluntary, and in any event, he was not participating either at the time of the filing of the petition or at the time of the fact-finding hearing.

Matter of Hailey W., 42 AD3d 943 (4th Dept 2007), *lv denied* 9 NY3d 812

Neglect Based on Violation of Order of Protection Affirmed

Respondent mother appealed from an order adjudicating her three children to be neglected by mother and father as a result of violation of an order of protection requiring respondent father to stay away from the family home and the children. The order of protection was entered in connection with a criminal proceeding against the father arising from an incident in which he punched his then 8-year-old daughter in the face, causing bruising and swelling. The Appellate Division affirmed. The record established that, with knowledge of his abusive tendencies and in knowing violation of the OP, the mother allowed the father to be alone in the family home with the children over the course of at least two days, creating an imminent danger of impairment of the children's "physical, mental or emotional condition."

Matter of Angelina W., 43 AD3d 1370 (4th Dept 2007)

Derivative Neglect Finding Affirmed

Respondent's child Sasha was properly adjudged neglected based on derivative evidence that respondent's three sons were adjudged neglected, and evidence that respondent failed to address the mental health issues that led to those neglect determinations and the placement of the custody of those children with petitioner. Further, orders extending the placements of two of the children and terminating respondent's parental rights with respect to a third child were entered within one month of Sasha's birth, and thus the prior findings were so close in time that it could reasonably be concluded that the condition still existed. Family Court also properly relieved petitioner of the requirement that it make reasonable efforts to reunite Sasha with respondent. Petitioner established by clear and convincing evidence that respondent's parental rights with respect to Sasha's half sibling had been involuntarily terminated and that respondent failed to cooperate with recommended treatment for

mental health issues and had progressed only minimally in parenting skills, despite attendance at parenting programs and visitation with Sasha and another child.

Matter of Sasha M., 43 AD3d 1401 (4th Dept 2007)

Finding Based on Excessive Use of Corporal Punishment Affirmed

Family Court adjudged one of respondent's children to be neglected and another to be derivatively neglected. The court erred in drawing a negative inference from respondent's failure to appear for several days of testimony at the fact-finding hearing, because respondent testified on her own behalf, notwithstanding occasional absences. Nevertheless, the Appellate Division affirmed. Petitioner established that respondent neglected her son, i.e., that her excessive use of corporal punishment and perpetration of acts of violence in her son's presence created an imminent danger of harm to the child's physical, mental, and emotional health. Further, her neglect of the son was "so closely connected with the care" of the daughter as to indicate that she was "equally at risk."

Matter of Raymond D., Jr., 45 AD3d 1415 (4th Dept 2007)

Respondent Failed to Rebut Presumption

The weight of the evidence supported Family Court's finding that respondent abused his child. Petitioner presented evidence that the child suffered from shaken baby syndrome, and that the father was caretaker of the child at the time the injury occurred. Although the father attempted to rebut the prima facie case by presenting evidence that other persons were present in the household when the injury occurred, the court found that none of those persons was responsible for the abuse, and the Appellate Division found no basis to disturb that finding.

Matter of Damien S., 45 AD3d 1384 (4th Dept 2007), *lv denied* 10 NY3d 701

Court Lacked Authority to Impose "No Pregnancy" Condition

Family Court denied mother's motion to vacate an order prohibiting her from becoming pregnant. The Appellate Division reversed. Regardless of whether mother defaulted willfully defaulted with respect to the hearing, an order prohibiting conception is unprecedented in the State and as such could not have been anticipated by respondent; thus the court should have granted mother's motion to vacate and afforded her an opportunity to be heard. Further, the court should have granted the motion because it had no authority to impose the "no pregnancy" condition. None of the conditions authorized by FCA § 1057 and the regulations includes prohibiting procreation nor does any authorized condition impliedly include it.

Matter of Bobbijean P., 46 AD3d 12 (4th Dept 2007), *lv denied* 9 NY3d 816

Order Dismissing Petition Reversed and Petition Granted

The Appellate Division reversed Family Court's order dismissing the petition and found the subject children derivatively neglected. The 1989 adjudication of neglect with respect to children respondent had sexually abused was not too remote in time. Although 17 years had passed between the prior adjudication and birth of the subject children, there was no reason to believe that the father's proclivity for sexually abusing children had changed, nor was there any indication that he had addressed the issues that led to the prior adjudication. Father's attorney acknowledged that father is a convicted sex offender who has not started a treatment program despite having been advised repeatedly to complete one; that the father is on probation and as a condition of probation is prohibited from having contact with children under the age of 18; and that an order of protection was entered against the father with respect to another child in the care of respondent mother.

Matter of Ahmad H., 46 AD3d 1357 (4th Dept 2007)

Court Properly Refused to Vacate Order

Family Court adjudged that respondent neglected his daughter, and denied the motion of respondent seeking to vacate the order. The Appellate Division affirmed. Even assuming respondent did not willfully refuse to appear at the fact-finding hearing, he failed to show a meritorious defense to the neglect petition.

Matter of Alexis D., 46 AD3d 1450 (4th Dept 2007), *lv dismissed* 10 NY3d 788

Evidence Supported Derivative Neglect

Respondent mother appealed from an order adjudicating one of her daughters to be derivatively neglected. The Appellate Division affirmed. The court properly relied on evidence establishing the mother's four older daughters were previously determined to be neglected and that the mother failed to address the issues that led to the neglect determinations. Specifically, petitioner established that mother did not successfully complete any of the services recommended by petitioner to address her mental health issues and drug and alcohol abuse. Indeed the mother surrendered her parental rights with respect to those daughters three months prior to the birth of the child at issue.

Matter of Alexandria C., 48 AD3d 1047 (4th Dept 2008)

Evidence Insufficient to Establish Petitioner Committed an Act of Maltreatment

In this article 78 proceeding, the Appellate Division annulled a determination denying petitioner's request to amend an indicated report of children maltreatment maintained at the State Central Register, concluding that the determination that petitioner committed

the act of maltreatment alleged in the report was not supported by substantial evidence. After discovering that her 14-year-old daughter stayed out overnight without permission, petitioner confronted her with a plastic toy wiffle bat, struck her several times in the legs and buttocks, and then accidentally struck her once in the head, producing a small welt or bruise under the right eye. A DSS caseworker separately interviewed the daughter, another daughter who witnessed the incident, and petitioner. All three gave similar accounts and both daughters confirmed that petitioner rarely, if ever, employed corporal punishment. Following the incident, the daughter in question resided with her father for several days and then returned to petitioner's house without further incident. The report concluded that the daughter was "maltreated/abused" and that the allegations of excessive corporal punishment, inadequate guardianship, and lacerations, bruises, and welts were substantiated. At the fair hearing, the only witness to testify on behalf of DSS was the caseworker, who testified that his conclusion that petitioner had engaged in excessive corporal punishment was based on the fact that she had used physical punishment and caused the mark or bruising below her daughter's eye. There was no evidence that the daughter received medical treatment for her eye or another condition, or that petitioner had used corporal punishment on any other occasion.

Matter of Hattie G. v Monroe County Dept of Soc'l Servs., 48 AD3d 1292 (4th Dept 2008)

Temporary Removal of Newborn Affirmed

Family Court properly granted the application seeking temporary removal of respondent's newborn child pursuant to FCA § 1022 (a). The record, including the evidence establishing prior neglect adjudications involving the child's four siblings, supported the court's determination that temporary removal was necessary to avoid imminent danger to the child's life or health.

Matter of Amanda M.K., 49 AD3d 1249 (4th Dept 2008)

Court Erred By Dismissing Petition: Allegations Sufficient

Family Court sua sponte dismissed the article 10 petition on the ground that the allegations were legally insufficient. The Appellate Division reversed. The petition alleged that respondent neglected her 14-year-old daughter by failing to provide her with adequate supervision and guidance, thus permitting her to become pregnant on more than one occasion, and by failing to ensure that she received appropriate care and guidance after she gave birth to a child. The petition further alleged that respondent repeatedly misused illegal drugs. Consequently, the allegations of drug use along with the allegations of her failure to supervise her daughter were sufficient, if established at fact-finding, to make out a prima facie case of neglect. Finally, the petition alleged that respondent engaged in several physical altercations with her daughter, one of which occurred when the daughter was seven months pregnant.

Matter of Courtney G., 49 AD3d 1327 (4th Dept 2008)

Default Finding Affirmed: Willful Failure to Appear and No Meritorious Defense

Family Court did not abuse its discretion by denying the motion of respondent father to vacate an order of fact-finding entered upon his failure to appear, after which the court found he neglected his daughter. The record established that the father was present in court when the hearing was scheduled, that his attorney left him several telephone messages reminding him of the date and time, and that the father did not appear. Thus the court properly found that the father willfully failed to appear. If he did not willfully fail to appear, he failed to show a meritorious defense to the neglect petition.

Matter of Ceirra L., 50 AD3d 1520 (4th Dept 2008)

Court Entitled to Discredit Varying Explanations for Child's Injury

Respondent mother appealed from an order finding her three-year-old child to be an abused child and her newborn child to be derivatively neglected. The Appellate Division affirmed. A physician testified that the three-year-old sustained extensive bruising on his face and shoulder as the result of pressure placed around his neck for at least 30 seconds, establishing a prima facie case of abuse with respect to the three-year old, the mother failed to rebut the presumption of parental responsibility. The record established that the mother gave the caseworkers varying explanations for the child's injury, and the court was entitled to discredit those explanations. The newborn was born several days after the three-year-old was injured and the court properly determined the child was derivatively neglected.

Matter of Seth G., 50 AD3d 1530 (4th Dept 2008)

Age-Inappropriate Knowledge of Sexual Conduct Sufficient Corroboration

In adjudicating respondent's child to be abused and neglected, Family Court did not err in relying on the child's unsworn out-of-court statements. Although a child's repetitive statements to various persons do not constitute sufficient corroboration, in this case, the corroboration requirement was met by the child's age-inappropriate knowledge of sexual conduct.

Matter of Briana A., 50 AD3d 1560 (4th Dept 2008)

Evidence of Direct Abuse of Stepdaughter Supported Finding of Derivative Neglect

Family Court did not err by adjudicating respondent's stepdaughter to be an abused child and his biological children to be derivatively neglected. The record established

that over a period of approximately one year, the father repeatedly pressed himself against the stepdaughter while she was in her bed, for his own sexual gratification. The record also established he repeatedly made sexual comments to her, and that on one occasion he attempted to kiss her and place his tongue in her mouth. That evidence of direct abuse established fundamental flaws in his understanding of the duties of parenthood, thus supporting the findings of derivative neglect. The Appellate Division also rejected the contention of the father that he was prejudiced by the court's denial of his request for appointment of an expert pursuant to County Law § 722-c to enable him to respond to the expert testimony presented by petitioner. The father did not make the requisite showing that the appointment of an expert was "necessary."

Matter of Michelle M., 52 AD3d 1284 (4th Dept 2008)

Respondent Precluded From Challenging Court's Acceptance of Consent

Family Court adjudged respondent neglected her child, and placed the child with petitioner for one year. The Appellate Division affirmed. Under the circumstances of this case, the court's error in failing to comply with FCA § 1033-b (1) (b) did not require reversal. The mother did not move to withdraw her consent to the entry of an order of fact-finding of neglect without admission, and thus the mother was precluded from challenging the court's acceptance of her consent on the ground that the court failed to give the warnings required by FCA § 1051 (f). The record did not support her contention that her consent was the result of duress.

Matter of Julia R., 52 AD3d 1310 (4th Dept 2008), *lv denied* 11 NY3d 709

Mother Must Acknowledge Her Role in Father's Abuse of Son

After rejecting respondent mother's contention that she received ineffective assistance of counsel, the Appellate Division affirmed Family Court's order that adjudged respondent neglected her son and derivatively neglected her daughters. The hearing testimony established that the mother continued to reside with the children's father and refused to believe that her son was sexually abused by his father, despite the fact that the father pled guilty to sexual abuse in the first degree based on an incident in which he touched the son's penis. Additionally, the requirement that the mother acknowledge her role in the sexual abuse of her son was a permissible condition of the mother's supervision.

Matter of Derrick C., 52 AD3d 1325 (4th Dept 2008), *lv denied* 11 NY3d 705

Finding of Derivative Neglect Affirmed

Family Court determined that respondent parents' son was a neglected child. The Appellate Division affirmed. Family Court's determination was supported by a

preponderance of the evidence. With regard to the mother, the court properly relied upon evidence that established that the older son previously was determined to be a neglected child, and that the mother failed to address the issues that led to that determination. Although the mother completed the required parenting class, the executive director of the agency that conducted the class noted in a letter to petitioner DSS's caseworker that the mother was not an active participant in the class and that it was difficult to determine whether she actually comprehended or retained what was taught. Further, during supervised visits with both children, the caseworker had to "prompt" the mother with respect to proper parenting methods. Also, with respect to the older son, the mother surrendered her parental rights only five months before the birth of the child here at issue. With respect to the father, the record established that his inability to provide a stable home and to provide the mother with adequate assistance in caring for their two children, in light of the mother's intellectual limitations, "demonstrates a fundamental defect in his understanding of the duties of parenthood [citations omitted]."

Matter of Jonathan S., 53 AD3d 1089 (4th Dept 2008), *lv denied* 11 NY3d 709

Finding of Sexual Abuse and Derivative Neglect Affirmed

Family Court adjudged that respondent father sexually abused his son and derivatively abused his two daughters. The Appellate Division affirmed. The court properly gave collateral estoppel effect to respondent's plea of guilty to a charge of sexual abuse in a parallel criminal action.

Matter of Derrick C., 55 AD3d 1320 (4th Dept 2008)

Father Neglected Son by Exposing Him to Pornographic Videos

Family Court adjudged that respondent father neglected his two sons by exposing them to pornographic videos, placed respondent under the supervision of petitioner DSS, and ordered him to undergo a mental health evaluation. The Appellate Division affirmed. The mental health evaluation was not a subsequent action or proceeding and thus did not constitute re-litigation of the allegations of sexual abuse that would have been barred by the doctrine of collateral estoppel. Further, the court had a well reasoned basis for ordering respondent to undergo the mental health evaluation because of respondent's conduct in exposing his sons to pornographic videos.

Matter of Dylan L., 55 AD3d 1343 (4th Dept 2008)

Finding of Neglect Affirmed

Family Court adjudged that respondent neglected her daughters and placed the two girls with their paternal grandparents. The Appellate Division affirmed. Family Court's

determination of neglect was supported by a preponderance of the evidence. Petitioner presented evidence that the apartment in which the mother resided with her daughters was both unsanitary and unsafe, that the younger daughter suffered from bottle rot, abscesses and infections as the result of poor dental hygiene, and that the older daughter was not consistently provided with adequate clothing. Further, the court properly dismissed mother's violation petitions. Mother failed to meet her burden of establishing that the respondents DSS and the daughters' paternal grandparents willfully violated prior orders by interfering with the mother's visitation rights.

Matter of Alyssa L.D., 56 AD3d 1184 (4th Dept 2008)

Finding of Neglect Reversed

Family Court adjudged that respondent father neglected his children. The Appellate Division reversed. Petitioner DSS failed to establish by a preponderance of the evidence that the children's physical, mental or emotional conditions had been impaired or were in imminent danger of becoming impaired: the court based its finding of neglect on father's admission that there were occasions when he drank alcohol or used drugs while caring for the children, while the children were asleep, but there was no evidence of repeated misuse of drugs or alcoholic beverages.

Matter of Anna F., 56 AD3d 1197 (4th Dept 2008)

Evidence of Marihuana Use and Failure to Have Food in the Home Supported Neglect Finding

Family Court properly determined that petitioner established neglect by a preponderance of the evidence that respondent mother failed to exercise a minimum degree of care in supplying the children at issue with adequate food, and in failing to provide them with proper supervision and guardianship by misusing marihuana, thereby placing them in imminent danger of becoming impaired. The evidence established there was no food in the house in mid-June 2005 and that, although the mother had given the children's maternal grandmother some food stamps to use while the grandmother cared for the children, the mother used the remaining food stamps to purchase food for a birthday party for her brother. The mother admitted she had smoked marihuana during her pregnancy with the child born in February 2005, and that she had been discharged from a substance abuse treatment program based on her failure to complete the program successfully. Further, the mother failed to testify, and the court properly drew the strongest inference the opposing evidence permitted. The dissenting justices would have reversed on the ground that no evidence was presented with respect to the frequency of the mother's use of marihuana or the effect on her mental state, including whether it substantially impaired her judgment. The dissenters would have concluded that petitioner failed to establish the requisite causal connection between the mother's admitted marihuana use or her failure to have any food in the house or food stamps on one occasion and alleged harm or imminent harm to the children resulting therefrom.

Matter of Lavountae A.,57 AD3d 1382 (4th Dept 2008)

Father Failed to Provide His Child With Adequate Medical Care

Family Court adjudged that respondent father neglected his son. The Appellate Division affirmed. The court properly denied respondent's motion to dismiss the second amended petition at the close of petitioner's proof inasmuch as petitioner established a prima facie case of neglect by presenting evidence of both parental misconduct and harm or potential harm to the child. Petitioner presented evidence that the child's behavioral issues, which included suicidal and homicidal ideations, were a direct result of the conflict among the child's three caregivers, i.e., the father, the mother, and the stepmother. The father, however, refused to pursue the recommended family therapy and did not offer an alternative form of treatment until the child had sustained a spinal fracture after jumping out of a second-floor window at the father's residence. The father thus breached his nondelegable affirmative duty to provide his child with adequate medical care.

Matter of Dustin P.,57 AD3d 1480 (4th Dept 2008)

CHILD SUPPORT

Insufficient Evidence of Child Care Expenses

Contrary to respondent's contention on appeal, the Support Magistrate correctly calculated respondent's basic weekly child support obligation. Petitioner did not prove by sufficient evidence, however, that she incurred child care expenses for services provided by petitioner's sister. Family Court should have granted respondent's objection concerning the amount of child care arrears respondent owned as a result of those expenses.

Matter of Jacqueline B. v Norman E.G., 37 AD3d 1136 (4th Dept 2007)

Magistrate Entitled to Impute Income

Family Court properly denied the objections of petitioner to the order of the Support Magistrate dismissing his petition seeking downward modification of his child support obligation and granting that part of respondent's cross petition seeking judgment for child support arrears. The parties' Separation/Opting Out Agreement established the amount of petitioner's child support payments and provided that there would be no downward modification of the payments as long as petitioner's income during the year in question was $140,000. Petitioner did not meet his burden of establishing that his income fell below $140,000. The Support Magistrate was not bound by the account provided by petitioner of his own finances. Further, the Magistrate properly used the definition of "income" in the CSSA absent a more restrictive definition set forth in the Agreement, and was therefore entitled to impute income to petitioner from sources other

than his business, including non-income producing assets and substantial gifts provided to petitioner by his parents.

Matter of Todd R.W. v Gail A.W., 38 AD3d 1181 (4th Dept 2007)

Court Failed to Set Forth Statutory Factors

Plaintiff sought an increase in the amount of child support set forth in the parties' separation agreement. Supreme Court calculated the parties' incomes, determined that defendant's income was 95% of the combined parental income, and increased defendant's obligation from $2000 to $7000 per month. The Appellate Division modified. Defendant failed to preserve his contention that the court was required to use his 2003 or 2004 income tax returns because he did not submit those documents. In any event, the contention lacked merit because the court was not required to use reported income but could base its determination on a party's actual income and ability to support the children. The court did not err in its calculation of defendant's income and the combined parental income. At the outset of the hearing, defendant stipulated to the amount of his average income for the three years preceding the filing of the order to show cause. The court properly used that amount as defendant's income for child support purpose; and properly calculated the parties' combined parental income using that amount and the amount of plaintiff's income as reflected in plaintiff's income tax returns. Although the court articulated a proper basis for refusing to apply the CSSA formula to combined parental income in excess of $80,000, the court failed to set forth the findings and calculations to support its award of $7000 per month, so that the Appellate Division could not assess whether the court gave due consideration to the statutory factors. In addition, the court erred in determining the extent to which the award should be adjusted based on a split custody situation that arose after one of the three children left plaintiff's home in order to reside with defendant.

Matter of Stanley v Hain, 38 AD3d 1205 (4th Dept 2007)

Court Properly Imputed Income, but Case Remitted to Address Children's Actual Needs

Supreme Court did not err in imputing income to defendant without a finding that defendant voluntarily reduced his income. Child support is determined by the parents' ability to provide rather than their current situation, and a court is not required to find a parent deliberately reduced his income before imputing income. The figures on defendant's tax return were unreliable, and the court was entitled to impute the amount of $61,432 to defendant based on his predivorce profit margin, after apparently applying a discount based on defendant's economic distress. Neither the record nor the court's "record articulation," however, was sufficient to support the court's application of the CSSA percentage to all of the combined parental income in excess of $80,000. The children's actual needs were not adequately addressed in the record and the parties were in the midst of bankruptcy proceedings at time of trial. The Appellate Division

remitted, noting an error of $1000 in the combined parental income, and adjusting defendant's income percentage accordingly. Arrears would also have to be recalculated.

Irene v Irene, 41 AD3d 1179 (4th Dept 2007)

Court Must Determine Whether Health Insurance Benefits Are Available

The order of the Support Magistrate included the provision that health insurance was not "available and affordable at this time." Upon the objection of petitioner CSEU, Family Court determined that the decision whether benefits were available, i.e., reasonable in cost, should be made by the court, and the Support Magistrate had determined that health insurance benefits were not available. The court therefore granted the objection to the extent of providing that the parties shall notify petitioner CSEU "in writing regarding any change in health benefits available to them." The court further ordered that petitioner CSEU "shall not issue a medical execution without a determination made by a court of competent jurisdiction that the health insurance benefits are "available" within the meaning of FCA § 416 (d) (2). The Appellate Division affirmed, rejecting petitioner's contention that the court erred in limiting petitioner's authority to issue a medical execution pursuant to CLPR 5241(b)(2)(I), which provides that an execution for medical support enforcement may be issued by the support collection unit "where the court orders the debtor to provide health insurance benefits for specified dependents." Under FCA 416 (h), the court shall direct a legally responsible relative to enroll eligible dependents where the court determines that health insurance benefits are available, and under FCA (d) (2)"available health insurance benefits" are those that are reasonable in cost. Thus the prerequisite for issuance of a medical execution has not been met, and the court properly determined that petition lacked authority to issue a medical execution in the absence of a determination by the court that health insurance benefits were available.

Matter of Oneida County Dept. of Soc'l Servs. v Paul S., 41 AD3d 1189 (4th Dept 2007), *lv denied* 9 NY3d 810

Proper to Consider Child's Reasonable Needs Where Parental Income Exceeds Cap

After a previous remittal, the Support Magistrate made additional findings based on the record, calculated each parties' share of the combined parental income, and the father's share of child support, again finding that all parental income in excess of $80,000 should be considered and applying the percentage to the full amount of income. The Appellate Division modified and remitted to Family Court to recalculate the father's child support by applying the CSSA percentage to one half of the combined parental income over $80,000. The court has discretion to calculate child support based on the presumptive cap or upon all or part of the parental income beyond $80,000. The court

is obligated, however, to articulate a basis for applying the percentage to all or part of the parental income beyond $80,000, and in cases where parental income is well in excess of $80,000, it is proper to consider and base the award upon the child's "actual reasonable needs." Although children must generally be permitted to share in a noncustodial parent's enhanced standard of living and a court is not permitted to make an award based solely on their actual needs, the child's needs may be considered in determining an award on income exceeding the cap. In this case, there was no evidence supporting the determination that the father's appropriate share of child support was over $2000 per month.

Matter of Steven M. v Meghan M., 43 AD3d 1349 (4th Dept 2007)

No Upward Modification and No Recoupment of Overpayments

Family Court properly granted respondent father's objections to the Support Magistrate's order granting petitioner mother an upward modification of a prior support order. Petitioner failed to demonstrate a sufficient change in circumstances. The court erred, however, in permitting respondent to recoup overpayments made in the interim between the Magistrate's order and the order granting respondent's objections: there is a strong public policy against recoupment, and the limited circumstances in which it is permissible were not presented. The Appellate Division noted that the father recouped a part of the overpayments before the Court stayed execution of that part of the order on appeal, and in light of the Court's decision, which in effect canceled the overpayments, the mother should not be permitted to seek arrearages for the period between the filing of the order on appeal and the issuance of the Court's order staying execution of that part of the order.

Matter of Annette M.R. v John W.R., 45 AD3d 1306 (4th Dept 2007)

Respondent Failed to Rebut Presumption

Respondent appealed from an order finding he willfully violated a prior order of child and spousal support and sentencing him to three weeks in jail. The Appellate Division affirmed. The evidence that respondent failed to pay support as ordered constituted prima facie evidence of a willful violation, and respondent failed to meet his burden to produce some competent, credible evidence of his inability to make the required payments inasmuch as he failed to present evidence that he made reasonable efforts to obtain gainful employment to meet his obligations.

Matter of Christine L.M. v Wlodek K., 45 AD3d 1452 (4th Dept 2007)

Respondent Failed to Show Inability to Pay

Respondent father appealed from an order finding him in willful violation of a prior order of child support, committing him to six months in jail, and suspending the sentence upon

payment of a sum to the child support enforcement unit. The Appellate Division affirmed. Petitioner mother's submission of a certified calculation of all child support provided by the father constituted prima facie evidence of his failure to pay. Although the father initially testified that he was unemployed during the period he failed to pay child support, he subsequently admitted that he had continued to work part-time but failed to make child support payments. Thus he failed to meet his burden of producing competent, credible evidence of his inability to pay.

Matter of Valerie Q. v Arturo H., 48 AD3d 1049 (4th Dept 2008)

Family Court May Not Enforce Allocation of Income Tax Dependency Exemption

Family Court lacked subject matter jurisdiction to enforce that part of a support order allocating the income tax dependency exemption for the parties' child pursuant to the parties' stipulation. Family Court is a court of limited jurisdiction and with respect to enforcement of support orders, the summary enforcement procedures of FCA article 4 apply only to payments that in fact constitute "support" or "maintenance." In this case, the father's entitlement to claim the child as a dependent for income tax purposes was not an element of support set forth in FCA article 4. The father must seek enforcement of the stipulation by way of plenary action in Supreme Court. The Appellate Division reversed the order.

Matter of John M.S. v Bonni L.R., 49 AD3d 1235 (4th Dept 2008)

Respondent Failed to Produce Medical Evidence of Disability

Family Court properly confirmed the Magistrate's order finding respondent willfully violated an order of child support and sentencing him to six months in jail. Although respondent contended he was unable to obtain employment based on his disability, he failed to introduce medical evidence supporting that contention.

Matter of Paige v Paige, 50 AD3d 1542 (4th Dept 2008)

Respondent Failed to Provide Medical Evidence of Disability

Family Court properly denied respondent father's objections to the Magistrate's order dismissing the petition to modify his child support obligation downward. The father testified that after the prior order of support was entered, he became disabled as a result of an ATV accident and was unable to return to work. The father failed, however, to provide competent medical evidence of his disability or establish that his alleged disability rendered him unable to work. The Appellate Division was unable to review the contention that respondent was denied effective assistance of counsel based on counsel's failure to present expert medical testimony or to introduce his medical records in evidence because any such alleged medical evidence was not before Family Court and thus was properly not included in the record.

Matter of Gray v Gray, 52 AD3d 1287 (4th Dept 2008), *lv denied* 11 NY3d 706

Child Support Modified

Supreme Court ordered defendant father to pay 80% of college expenses for the parties' daughter and denied his motion to reduce his child support obligation. The Appellate Division modified. The court erred in failing to consider defendant's maintenance obligation in the calculation of the percentage of his contribution to daughter's college expenses. After subtracting defendant's maintenance obligation, the Appellate Division calculated that father was entitled to reduction of his pro rata share of college expenses of the parties' daughter from 80% to 64%. The court properly denied that part of defendant's cross-motion seeking a downward modification of his child support obligation because defendant failed to establish a sufficient change in circumstances. Defendant's stipulated income now was not substantially less than his stipulated income at the time the judgment of divorce was entered. Further, the increase in plaintiff mother's income or the daughter's college attendance did not constitute a substantial change in circumstances. The court properly determined that defendant was entitled to a credit against his child support only in the amount of his pro rata share of the daughter's college meal plans. Here, plaintiff must obtain a household for her daughter during school breaks and weekend visits; therefore, defendant was not entitled to a credit for the daughter's rooming expenses.

Matter of Pistilli v Pistilli, 53 AD3d 1138 (4th Dept 2008)

Order of Support Modified and Remitted

Supreme Court distributed the parties' marital property and ordered defendant father to pay child support for the parties' remaining unemancipated child, as well as his pro rata share of the college expenses of the parties' middle child until she completed college or attained the age of 25. The Appellate Division modified and remitted the matter. The court erred in determining that defendant was not entitled to a credit against his child support arrears for his voluntary payment of child support during the pendency of this action. The court also erred in determining that defendant's severance payments were marital property. Defendant's rights to the severance payments did not exist during the marriage or prior to the commencement of the action. Finally, as plaintiff mother conceded, the court erred in directing defendant to pay his pro rata share of the college expenses of the parties' middle child because she had attained the age of 21.

Bink v Bink, 55 AD3d 1244 (4th Dept 2008)

Insufficient Factual Basis Required Remittal

Family Court denied petitioner father's motion to modify his child support obligation on the ground that the parties' children were no longer residing with respondent mother but

instead were residing with him. The Appellate Division modified and remitted the matter. The children had moved from their mother's residence to that of their father but the Appellate Division was unable to determine the propriety of the Support Magistrate's findings with respect to the parties' child support obligations because the Support Magistrate's reasoning in support of the amount was factually vague. The Support Magistrate failed to set forth an adequate factual basis for her calculations concerning the contribution of the parties towards medical and dental insurance costs of the children and the amount of child support for split custody weeks.

Matter of Miller v Miller, 55 AD3d 1267 (4th Dept 2008)

Father Responsible for Uncovered Medical and College Expenses

Supreme Court directed defendant father to reimburse plaintiff mother for father's pro rata share of uncovered medical expenses for the parties children, ordered him to contribute 85% of the college expenses of the parties' daughter, and awarded mother counsel fees. The Appellate Division affirmed. Pursuant to the parties' stipulation, father was obligated to pay his pro rata share of the children's uncovered medical expenses. Although college expenses were not addressed in the stipulation, the Referee properly ordered father to contribute 85% of the college expenses of the parties daughter because both parents were college educated, their daughter was performing well in college, and the Referee properly determined the appropriate percentage with respect to father's ability to contribute to daughter's college expenses. Further, father was responsible for counsel fees because the initial retainer agreement was executed in anticipation of the need for post-judgment litigation.

Reiss v Reiss, 56 AD3d 1293 (4th Dept 2008)

CONTEMPT

Finding of Willful Violation Reversed

Family Court erred in finding respondent to be in willful violation of a custody/visitation order dated December 10, 2004 and in sentencing her to an intermittent term of incarceration of two weekends. The violation petition alleged that respondent violated a different order, and, in any event, the evidence did not establish that respondent willfully violated a clear mandate of either order.

Matter of Lonniel L.G. v Tammy G.-G., 39 AD3d 1200 (4th Dept 2007)

COUNSEL

No Effective Waiver of Right to Counsel: New Trial Granted

Family Court transferred primary physical placement of the parties' child from petitioner mother to respondent father. Less than two weeks before the scheduled trial, the mother informed the court that her retained attorney had refused to represent her for their previously agreed-upon fee, and she requested a 30-day adjournment to enable her to retain new counsel. The court denied her request, and the court thereafter received a consent to change attorney form signed by the mother prior to the court's denial of her adjournment request. The form purported to substitute an "unknown attorney" for the mother's retained counsel. When the mother appeared on the scheduled trial date without representation and again requested an adjournment, the court again denied the request, and the mother was forced to proceed pro se. The Appellate Division reversed. The court abused its discretion in refusing to grant the mother's request for an adjournment. The record established that the request was not a delay tactic, nor did it result from the mother's lack of diligence in seeking new representation. Under the circumstances, the consent to change attorney form signed by the mother was not a knowing, willing and voluntary waiver of her right to counsel.

Matter of Bobi Jo B. v Jerry L.W., 45 AD3d 1382 (4th Dept 2007)

COURTS

Consent Required to Confer Jurisdiction on JHO

Petitioner father contended on appeal that the JHO erred in dismissing his petition alleging that respondent mother violated the terms of an order of visitation. The Appellate Division reversed, agreeing with the father that, because he refused to consent to the authority of the JHO to hear and determine the matter, the JHO lacked jurisdiction to dismiss the petition.

Matter of David S.S. v Mia B.M., 48 AD3d 1246 (4th Dept 2008)

CUSTODY AND VISITATION

Error to Fail to Advise of Right to Counsel and to Appoint Law Guardian

Petitioner sought to modify a prior order that awarded joint custody of petitioner's children to petitioner and respondent, grandmother of one of the children. Family Court granted the petition, awarding sole custody of the children to petitioner with no visitation to the grandmother. The Appellate Division reversed and remitted the matter for further proceedings before a different judge. In the absence of waiver, Family Court's failure to advise respondent of her right to counsel was reversible error. The fact that respondent had been represented by counsel on prior petitions did not relieve the court of its obligation to inform respondent of her right to counsel on the present petition. The Appellate Division further noted that the court's failure to appoint a law guardian was an abuse of discretion because the children were aged 10 and 16 and had been in the

custody of respondent for almost 10 years. Finally, the Appellate Division agreed with respondent that the record was inadequate for the court to have made a determination on the merits.

Matter of Arlene R. v Wynette G., 37 AD3d 1044 (4th Dept 2007)

Any Error With Respect to Law Guardian "Report" Harmless

Family Court modified the parties' joint custody arrangement by awarding sole custody of the parties' child to petitioner and visitation to respondent. On appeal, respondent contended that the court did not properly weigh the appropriate factors, was biased, and erred by asking the Law Guardian to submit a "confidential report" to the court, ex parte. The Appellate Division affirmed. The record established that the court properly weighed the appropriate factors, including an evaluation of the character and relative parental fitness of the parties. The record did not support the contention that the court was biased against respondent. Reaching the unpreserved contention regarding the Law Guardian "report" and assuming the court requested and considered it, the Appellate Division stated it appeared that the court placed no reliance on the report's contents. Additionally, the report did not refer to any facts or allegations not otherwise fully explored at the hearing, and thus any error with respect to the report was harmless.

Matter of Amy L.W. v Brendan K.H., 37 AD3d 1060 (4th Dept 2007)

Appellate Division Finds "Extraordinary Circumstances"

Family Court granted the petition awarding custody of the child to petitioner, the child's mother, concluding that there were no "extraordinary circumstances." The Appellate Division reversed. The extended disruption of custody between petitioner and her child established extraordinary circumstances: the child was 10 years old at the time of the hearing and had been in the custody of respondent, her grandmother, since shortly after her birth. The Appellate Division further concluded that it was in the child's best interests to remain with respondent.

Matter of Traci M.S. v Darlene C., 37 AD3d 1083 (4th Dept 2007)

Parent Allowed Child to Have Contact With Sex Offender

Family Court transferred sole custody of the parties' youngest child from respondent to petitioner, with visitation to respondent. The Appellate Division affirmed, concluding that respondent was less fit than petitioner as a parent, based on evidence at the hearing that respondent allowed the child to have contact with a convicted sex offender. The Appellate Division further concluded that respondent was less able than petitioner to provide for the child's stability and physical, medical, educational, moral and emotional well-being.

Matter of Richard C.T. v Helen R.G., 37 AD3d 1118 (4th Dept 2007)

No Error to Deny Request for Adjournment

Respondent appealed from an order that granted the petition seeking modification of a prior order providing for joint custody of the parties' child and awarded sole custody to petition. Family Court did not abuse its discretion in denying the request of respondent's attorney for an adjournment and conducting a portion of the hearing in his absence, after balancing the relevant factors, including counsel's unexcused failure to comply with the court's prior directive to arrange for another attorney to appear on respondent's behalf and respondent's own unexplained failure to appear at the hearing.

Matter of Matthew K. v Susan O., 37 AD3d 1119 (4th Dept 2007), *lv denied* 8 NY3d 811

Court Properly Set Forth Its Reasons for Disagreeing With Expert

Family Court modified a prior order entered upon stipulation by granting sole custody of the parties' children to petitioner-respondent. The Appellate Division affirmed. Family Court did not arbitrarily disregard the opinion of the court-appointed psychologist. In disagreeing with certain findings and recommendations of the expert, the court set forth its reasons, which were supported by the record. Further, the court did not err in modifying the arrangement. An existing custodial arrangement based upon stipulation is entitled to less weight that a disposition after a plenary trial. The record established that the children needed more stability and the parties could not work together under the joint custody arrangement to provide that stability. Although the parties worked together for the benefit of the children when they first separated, they were no longer able to do so.

Matter of Alexandra H. v Raymond B.H., 37 AD3d 1125 (4th Dept 2007)

Transfer of Custody Affirmed

Family Court properly granted the petition to modify the parties' existing custody arrangement by continuing join legal custody and transferring physical custody of the parties' youngest child from respondent to petitioner, with visitation to respondent. The record established that, while respondent may not be an unfit parent, she was less fit than petitioner and less able to provide for the child's stability and physical, educational and moral well-being.

Matter of Paul W.H. v Brenda M.M., 37 AD3d 1127 (4th Dept 2007)

Petition Dismissed Without Prejudice - No Change in Circumstance

Family Court dismissed without prejudice the modification petition seeking custody of

petitioner's daughter, who, by consent order, had been in the custody of petitioner's mother since shortly after birth. The petition alleged that petitioner moved into suitable housing, but at an appearance before Family Court relative to the petition, it was disclosed by a Catholic Charities caseworker, and confirmed by petitioner, that petitioner was seeking to relocate for various reasons, including suspected high levels of lead paint in petitioner's current apartment. Because suitable housing was the only change of circumstances alleged in the petition, the court properly dismissed the petition without prejudice because petitioner failed to make a sufficient evidentiary showing to warrant a hearing.

Matter of Mindy L.H. v Steve W.H., 37 AD3d 1145 (4th Dept 2007

Standing Established Without *De Novo* Hearing

Under the circumstances of this case, Family Court properly granted the maternal grandparents' petition seeking visitation with the child without holding a hearing on the issue of standing. The court reviewed a recent determination of the identical issue, made by a court of coordinate jurisdiction after a lengthy hearing regarding an identical petition concerning the same parties and the same child, and the court also reviewed the documents and affidavits submitted by the parties in conjunction with respondent's motion to dismiss the petition. In addition, there was no evidence of changed circumstances in the brief time between the prior determination and the proceeding at issue. Thus a de novo hearing was not required. Finally, respondent's due process rights were not violated by the court's failure to accord special weight to her decision to deny visitation. By requiring petitioner to establish standing, the court gave respondent's decision some presumptive or special weight, which is all that *Troxel* requires.

Matter of Lynda D. v Stacy C., 37 AD3d 1151 (4th Dept 2007)

Error to Order Change in Custody if Parent Fails to Return Children

Petitioner father commenced the proceeding alleging respondent mother had moved to Iowa with the children without notice to petitioner, and seeking to enforce the judgment of divorce pursuant to which respondent was awarded sole custody with weekly visitation to petitioner. Following a hearing, at which respondent was represented by counsel but did not personally appear, Family Court ordered respondent to return to Erie County with the children by a certain date. The Appellate Division concluded that the court erred in also ordering that respondent's failure to comply would result in transfer of custody to petitioner. Petitioner did not seek a change of custody and there was no evidence presented at the hearing on the issue of the children's best interests. Although unilateral removed of the children from the jurisdiction is a factor for the court's consideration, an award of custody must be based on the best interests of the children and not a desire to punish a recalcitrant parent.

Matter of Tekeste B.-M. v Zeineba H., 37 AD3d 1152 (4th Dept 2007)

Separate Hearing Not Necessary to Set Visitation Schedule

Petitioner appealed from an order setting forth a visitation schedule with the parties' child. Family Court had refused six weeks earlier to modify the existing joint custody arrangement whereby respondent had physical placement of the child, upon determining that petitioner failed to establish a sufficient change of circumstances, and ordered that if the parties could not establish a visitation schedule, the court would do so. The record on appeal covered both orders. The Appellate Division, assuming, arguendo, that the appeal from the order setting the visitation schedule brought up for review the court's prior order regarding physical placement, affirmed. The court's determination regarding physical placement was supported by a sound and substantial basis in the record. Further, the court did not err in failing to conduct a hearing before setting the visitation schedule, as the hearing regarding petitioner's request for a change in physical placement assured that the court possessed sufficient information to render an informed determination consistent with the child's best interests.

Matter of Charles K. v Emily A.A., 38 AD3d 1249 (4th Dept 2007)

Error to Condition Grandparents' Future Applications on Prior Approval of Counselor

Family Court properly granted the petition to modify a prior order by restricting the visitation of respondents with their granddaughter, petitioner's daughter, and properly denied respondents' cross petition seeking custody of the child. Respondents failed to establish that petitioner relinquished his parental right to custody because of abandonment, surrender, persistent neglect, unfitness, or other like extraordinary circumstances, and in any event, there was no evidence in the record to support a determination that the best interests of the child warranted a change in custody from petitioner to respondents. The court erred, however, in ordering that respondents may not make any further application to the court regarding custody and visitation of the child without the approval of the child's counselor, who should not be required to pass upon the merits of respondents' petitions.

Matter of Mackenzie v Mary U., 38 AD3d 1249 (4th Dept 2007)

Effect of Physical Custody Prior to Relocation

Family Court continued joint custody of the child and awarded primary physical custody to respondent and visitation to petitioner. The Appellate Division affirmed. The fact that petitioner had primary physical custody of the child for five years prior to her relocation to Florida was not entitled to the same weight to which it would have been entitled had the child remained with petitioner.

Matter of Misty D.B. v David M.S., 38 AD3d 1317 (4th Dept 2007), *lv denied* 8 NY3d 814

Joint Physical and Separate Areas of Legal Custody Affirmed

Supreme Court did not err in refusing to award plaintiff primary physical custody of the parties' children. Both parties sought primary physical custody and the court's determination that joint physical custody was in the children's best interests had a sound and substantial basis in the record. Also, the court did not err in refusing to award plaintiff sole legal custody, i.e., sole decision-making authority, or by setting forth instead the separate areas of sole decision-making authority in the children's lives. The court granted plaintiff decision-making authority with respect to religion, finances, counseling/therapy, and summer activities, and granted defendant decision-making authority with respect to education, medical/dental care, and extracurricular activities. As the court noted, joint legal custody was not a realistic possibility in this case, given the parties' past acrimony and the predictions of the experts and plaintiff herself that the parties would be unable to agree on major decisions.

Wideman v Wideman, 38 AD3d 1318 (4th Dept 2007)

Error to Dismiss Petition Without a Hearing on Existence of Extraordinary Circumstances

Family Court erred in summarily dismissing the petition of the child's biological mother. Because the child was residing with the paternal grandmother pursuant to a consent order, extraordinary circumstances must be shown.

Matter of Tamika C.P. v Denise M., 39 AD3d 1213 (4th Dept 2007)

Respondent Failed to Establish Extraordinary Circumstances

The Appellate Division reversed Family Court's order awarding custody of the petitioner's biological child to a nonrelative respondent on the ground that respondent failed to demonstrate extraordinary circumstances. Petitioner voluntarily relinquished custody to respondent for nine months when she moved from Virginia to New York, solely for the purpose of allowing respondent to place the child in daycare, which never occurred, but she maintained regular telephone contact and visited with the child on four occasions. A dissenting justice would have affirmed, agreeing with Family Court that the mother had been only marginally involved with the child for four or more years, and failed to articulate why her circumstances were so dire that she needed to relinquish custody. The dissenting justice also noted that the law guardian asserted at the hearing and on appeal that respondent established extraordinary circumstances.

Matter of Jenny L.S. v Nicole M., 39 AD3d 1215 (4th Dept 2007), *lv denied* 9 NY3d 801

Petitioner Better Suited to Nurture Children and Accommodate Visitation

Family Court properly awarded the parties joint custody of their two children, with primary physical placement with petitioner mother and visitation to father. After a lengthy hearing, the court determined that both parties had strong and loving bonds with the children, although respondent had a history of anger management problems and petitioner had on occasion failed to recognize safety hazards in her home. The court's determination that, because petitioner was the children's primary caregiver, she was better suited to nurture the children and to provide for their emotional support, and that she was more inclined to accommodate a schedule that permitted the children maximum access to their father, had a sound and substantial basis in the record.

Matter of Angel M.S. v Thomas J.S., 41 AD3d 1227 (4th Dept 2007)

Narrative Portion of Child Protective Services Report Inadmissible Hearsay

Family Court properly determined that extraordinary circumstances existed and that the child's best interests were served by the award of custody to petitioner based on respondent's voluntary relinquishment of physical custody to petitioner, the child's paternal grandmother, and respondent's persistent neglect of the child's health and well-being. The Referee erred in admitting in evidence the narrative portion of a child protective services investigation summary. A child protective services report may be admissible as a business record exception to the hearsay rule, but in this case the source of the information contained in the summary was unknown, so that it was not determinable whether the source of the information was under a business duty to report. The error was harmless, however, because there was ample evidence otherwise in the record establishing extraordinary circumstances.

Matter of Penny K. v Alesha T., 39 AD3d 1232 (4th Dept 2007)

Grandparent Has No Greater Right to Custody Than Foster Parents

The Appellate Division reversed Family Court's order granting the grandfather's petitions for custody of the child and dismissing the foster parents' petitions for custody. In granting the grandfather's petitions, the court erred in failing to determine the existence of extraordinary circumstances before reaching the issue of best interests**,** and abused its discretion in determining that it was in the child's best interests to award custody to the grandfather. A nonparent relative does not have a greater right to custody than the child's foster parents. The child was placed in foster care when she was approximately three months old, after she suffered fractures to her legs, wrists, ribs, and skull, and a lacerated liver while in her parents' care, and the grandfather refused to take her and had little contact with her thereafter except for one hour per week of supervised visitation. The grandfather did not petition for custody until over five months later when it became apparent that his daughter, the child's mother, would not

regain custody. Although the court referred to the best interests standard, the court improperly favored the grandfather based on his biological connection and his suitability as a custodian, and not because the placement was in the child's best interests.

Matter of Matthew E. v Erie County Dept. Of Social Services , 41 AD3d 1240 (4th Dept 2007)

Default Order Reversed

The Appellate Division reversed Family Court's grant of a default order awarding sole legal custody of the parties' child to petitioner. Respondent appeared by assigned counsel, who objected to petitioner's motion and who could have proceeded to a hearing.

Matter of David A.A. v Maryann A., 41 AD3d 1300 (4th Dept 2007)

No Hearing Necessary

Family Court did not err in granting petitioner sole custody of the parties' child without an evidentiary hearing. No hearing is required where the court possesses sufficient information to make a comprehensive assessment of the best interest of the child. As a result of his incarceration, respondent was incapable of fulfilling the obligations of a custodial parent.

Matter of Stefanie A. v Loral R.H., Jr., 41 AD3d 1310 (4th Dept 2007)

Change in Custody Affirmed

Family Court properly modified the parties' existing custody arrangement, pursuant to an order entered upon consent approximately six months before the petition was filed, by granting petitioner father primary physical custody of two of the parties' three children. The father established a sufficient change of circumstances by showing that, since the entry of the prior order, the mother's live-in boyfriend used violence against the mother that resulted in police involvement, and against the children, ages 9 and 10. The mother asked the father to care for the children for several days because she feared for their safety as well as her own, and father filed the petition after mother refused to return the children to him following an appointment, and instead returned with the children to her boyfriend's home. Although the court did not specifically address the fact that the children would be separated from their older sister, the Appellate Division concluded that modification was warranted.

Matter of Stephen R.H. v Lisa A.H., 41 AD3d 1310 (4th Dept 2007)

"Law of the Case" Did Not Apply

Family Court dismissed the petition of an incarcerated prisoner seeking visitation with the parties' child based on "law of the case as previously set out in a prior dismissal order" entered in 2002. The 2002 order dismissed an earlier petition seeking visitation on the ground of law of the case as established by a 2001 order of a JHO, which dismissed a previous petition seeking visitation "for failure to state a cause of action." The Appellate Division reversed. Because the record failed to indicate that the parties consented to submit the matter to a JHO, the JHO was without authority to dismiss the petition in 2001. In any event, the court erred in applying the doctrine of law of the case inasmuch as the orders did not determine the respective petitions on their merits. Finally, the court erred in deeming petitioner's release from prison a condition precedent to the filing of a visitation petition.

Matter of Mark C. v Patricia B., 41 AD3d 1317 (4th Dept 2007)

Father Better Able to Provide for Child's Emotional Needs

Family Court modified a prior order entered upon stipulation and awarded the parties' joint custody of the child with primary physical residence to the mother, who was living in Georgia. After determining that the father established the requisite change in circumstances, the court stated the mother was in better position to provide financially and to address the child's educational needs, but noted that the father was much more attuned to the child's emotional development. The Appellate Division modified, agreeing that the father established a change in circumstances but concluding that the father should have primary physical residence of the now-11-year-old son. Regarding the change in circumstances, a psychologist testified regarding the child's anxiety disorder and parent-child relationship problems, and other experts testified that the child reacted badly when asked to discuss his mother and that there was some change in his emotional health when he spent time with her. Regarding the issue of best interests, the Appellate Division noted in particular the expert witnesses' testimony that the father was better able to provide for the child's emotional development and the fact that the child expressed a preference to live with the father, and further noted that the Law Guardian recommended and contended on appeal that the father should have primary custody.

Matter of Jeffrey L.J. v Rachel K.B., 42 AD3d 912 (4th Dept 2007)

Paternal Aunt Failed to Establish "Extraordinary Circumstances"

Family Court properly determined that respondent, the paternal aunt of the child, failed to establish "extraordinary circumstances" and properly awarded custody to petitioner father. The fact that the father agreed the aunt should have physical custody of the child while he was in rehabilitation for substance abuse was insufficient, by itself, to deprive him of custody, and the requisite additional factors were not present. There was no indication in the record that father abandoned the child or that he was separated

from the child for a prolonged period. There was no evidence he had an unstable lifestyle, lacked an established household, associated with criminals, had been convicted of endangering the welfare of a child or was found to have neglected the child. The father's failure to pay child support voluntarily was also insufficient by itself to establish "extraordinary circumstances" and they were also not established by a showing that the aunt could "do a better job of raising the child" or that the child had psychologically bonded with her. Even assuming the aunt established extraordinary circumstances, the child's best interests were served by awarding custody to the father. Finally, the Appellate Division noted its displeasure that the proceeding was pending in Family Court for nearly three years and that the custody hearing spanned 15 months.

Matter of Michele M. v Thomas F., 42 AD3d 882 (4th Dept 2007)

Permission to Relocate Out Of State Affirmed

Family Court properly granted that part of the mother's petition seeking to relocate with the child out of state. In determining that relocation was in the child's best interests, the court properly considered the *Tropea* factors, as well as the effect of the child's relocation on extended family relationships and the fact that petitioner has been the primary caretaker of the child. The court also considered petitioner's unsafe living conditions in Rochester, which resulted in part from the failure of respondent to satisfy his child support and other financial obligations.

Matter of Pamela H. v Cordell W., Jr., 43 AD3d 1319 (4th Dept 2007)

Appellate Division Reverses and Makes Its Own Findings

The Appellate Division reversed Family Court's award of custody of the child to the father, and made its own determination based on the record to award custody to the mother. The court failed to address adequately important factors in its decision, and failed to take into consideration the desires of the child and his need for stability in remaining with the only primary caretaker he knew. The mother was primary caretaker the child's entire life, and although she had some health problems, they had not prevented her from actively raising the child. The mother had a four-bedroom apartment, shared with one or two of the child's half siblings, but the father shared a two-bedroom apartment with his girlfriend and her baby, and on weekends, with her three other children. The father was absent for significant parts of the day, when the child would be cared for by the girlfriend, with whom the child had a questionable relationship. The mother took a more active role in the emotional and intellectual development of the child by enrolling him in numerous extracurricular activities, including music lessons, a library reading program, soccer, and a handbell choir at church. Finally, the Law Guardian indicated that the child was very happy residing with the mother, while the father's girlfriend admitted the child often acted out while at the father's residence.

Matter of Bryan K.B. v Destiny S.B., 43 AD3d 1448 (4th Dept 2007)

Evidence Insufficient to Deny Visitation to Incarcerated Parent

Family Court denied and dismissed the petition seeking visitation with the parties' child. The Appellate Division reversed. Petitioner was incarcerated based on his conviction of second degree manslaughter for recklessly causing the death of respondent's son. The conviction was upon his plea of guilty, and the record was devoid of any information concerning the circumstances of the death, which was relevant to whether petitioner posed any threat to his child and whether visitation was appropriate. The record was also devoid of evidence regarding the effect of visitation in a correctional facility on the psychological health of the child. Additionally, the court recited as an independent basis for denial of the petition the financial circumstances of respondent, but denial of visitation to an incarceration parent should not be based solely on the cost and inconvenience to the custodial parent.

Matter of steven M. V Meghan M., 43 AD3d 1349

Change in Custody Affirmed Based on Mother's Allowing Sex Offender to Move In

Family Court properly granted the petition seeking to modify a prior order by awarding petitioner father sole custody of the parties' child. The award was supported by the record, particularly in view of the evidence that the mother maintained a relationship with a level three sex offender and allowed him to move into her home and to have unsupervised contact with the child.

Matter of Albert T. v Wanda H., 43 AD3d 1320 (4th Dept 2007)

Order Modified and Matter Remitted For Hearing on Visitation

Family Court properly granted the mother sole custody of the child without a hearing: respondent father was incarcerated and incapable of fulfilling the obligations of a custodial parent. The court erred, however, in implicitly denying that part of the father's petition seeking visitation: the fact that a parent is incarcerated does not by itself render visitation inappropriate.

Matter of Cierra L.B. v Richard L.R., 43 AD3d 1416 (4th Dept 2007)

Grandmother Established Extraordinary Circumstances

Family Court did not err in awarding custody of respondent father's child to petitioner grandmother. Petitioner established extraordinary circumstances by evidence that the father voluntarily relinquished physical custody of the child and was otherwise unfit to regain custody, in view of his history of violence and mental illness. The Appellate

Division agreed with the grandmother on her cross appeal, however, that the court should have ordered a home study of the father's living environment in Kansas before it allowed the father to exercise unsupervised visitation. The record established that, although respondent lived in a three-bedroom home, he used one of the bedrooms and only one of the two remaining bedrooms was useable. That bedroom was occupied by his girlfriend's daughter and grandson when they visited, and the frequency and duration of the visits was not apparent from the record. In addition, the record established that the father left for work at 3:30 a.m. every day and that his girlfriend left for work at 6:00 a.m., and the court did not address the issue of supervision of the child during the periods of visitation. Accordingly, the Appellate Division remitted the matter to Family Court to determine visitation following a home study.

Matter of Patricia E.K. v Edward Thomas K., Jr., 45 AD3d 1335 (4th Dept 2007), *lv dismissed* 10 NY3d 731

Denial of Petition for Change in Custody Affirmed

The Appellate Division affirmed Family Court's order denying respondent father's petition seeking a change in custody. The father failed to establish the requisite "change in circumstances which reflects a real need for change." The father established that respondent mother no longer relied on him for child care assistance in excess of the visitation set forth in the parties' agreement because she moved and changed school districts. He did not allege that the mother is an unfit parent, nor did he establish that the existing custodial and visitation arrangement is contrary to the child's best interests.

Matter of James D. v Tammy W., 45 AD3d 1358 (4th Dept 2007)

Mother Without Stable Residence and Means of Support, and in Abusive Relationship

Family Court properly denied respondent mother's motion to dismiss the petition seeking primary physical residence of the parties' child. In addition to alleging the mother was incarcerated, the petition alleged several other changed circumstances, so that her release from incarceration prior to the hearing did not render the petition moot or insufficient to justify a modification. The court properly awarded primary custody to the father inasmuch as he established a sufficient change in circumstances: the father established the mother did not have a stable residence or means of support and the mother remained in an abusive relationship with a man who repeatedly abused the mother in the presence of the child. Although the court properly noted that the father was not without problems of his own, the evidence established that the father was fully employed and had a stable residence with a room for the child.

Matter of Martin M.R. v Kimberli A.K., 45 AD3d 1358 (4th Dept 2007)

No Showing of Changed Circumstances

Family Court properly denied the petition insofar as it sought modification of a prior order establishing respondent father's visitation with the parties' 14-year-old child by requiring visitation only if the child agreed. The court erred, however, in modifying the prior order by altering the existing visitation schedule, thereby reducing the father's visitation: the mother made no showing of a change of circumstances such that modification was required.

Matter of Connie L.C. v Edward C.B., 45 AD3d 1374 (4th Dept 2007)

Court Could Enforce Its Own Orders

Family Court reversibly erred in summarily dismissing the mother's four petitions seeking to modify prior orders granting guardianship of her two children to respondent paternal uncle and visitation to the mother. It was undisputed that there were periods of time in which the uncle had failed to comply with terms of the prior orders. The court further erred in stating that it was without authority to enforce its prior orders, *e.g*., the court could punish the uncle with contempt for interfering with the mother's visitation rights. The Appellate Division noted that the court admonished the uncle at the parties' first court appearance, and it was undisputed that the admonishment did not result in the uncle's compliance with the prior orders.

Matter of Lisa B.I. v Carl D.I., 46 AD3d 1451 (4th Dept 2007)

Change in Custody Based on Mother's Neglect Admission

Family Court properly determined that petitioner father made the requisite showing of a change in circumstances to warrant modification of the existing custody arrangement and properly awarded primary physical custody of the parties' children to the father. The record established that, before the father was awarded temporary custody, an incident of domestic violence occurred between the mother and her boyfriend in the presence of the children, following which the mother took a drug overdose. That incident, along with other incidents of the mother's inappropriate and neglectful behavior, resulted in commencement of a neglect proceeding against the mother, and she admitted the allegations in the petition.

Matter of Jeremy J.A. v Carley A., 48 AD3d 1035 (4th Dept 2008)

Father Better Able to Provide Stable Home

Family Court properly granted father's petition for sole custody of the parties' two children, despite the fact that the mother had been the primary caregiver for most of the children's lives. The evidence established father was able to provide the children with a

stable home and that mother was unable to support herself and relied on her father to pay her living expenses. In addition, mother had previously moved the children from Buffalo to New York City and Yemen indicating that father was more inclined to permit the children maximum access to the other parent.

Matter of Nagi T. v Magdia T., 48 AD3d 1061 (4th Dept 2008)

Proposed Amendments to Petition Insufficiently Alleged Changed Circumstances

Family Court did not abuse its discretion in denying father's motion for leave to amend his petition seeking modification of a prior custody order and in sua sponte dismissing his petition. The petition was insufficient on its face because it failed to allege good cause for modification of the prior order. The father's attorney acknowledged that it failed to contain the necessary allegations of a change in circumstance, and the proposed amendments would not have rendered it facially sufficient to warrant a hearing.

Matter of Harry P. v Cindy W., 48 AD3d 1100 (4th Dept 2008)

Father's Visitation Properly Terminated

Family Court did not err in granting petitioner mother's application to terminate respondent father's visitation with the parties' child and in denying that part of his petition seeking permission to participate with the parties' child in a residential treatment program. The evidence at the hearing supported the court's determination that forcing visitation would be detrimental to the child's welfare. In addition, the court was entitled to credit the testimony of the child's therapist that the child's participation with the father in the residential treatment program would likely be counterproductive and could potentially be damaging to the child.

Matter of Christina F.F. v Stephen T.C., 48 AD3d 1112 (4th Dept 2008), *lv denied* 10 NY3d 710

Court Erred in Entering "Default Finding" on Visitation

Respondent mother appealed from an order granting the petition seeking modification of an order setting forth a visitation schedule with her daughter. The Appellate Division reversed. Family Court erred in entering a "default finding" based on her failure to appear at the hearing. The court also erred in modifying her visitation schedule without conducting a hearing: such determination should be made following a full evidentiary hearing, not on the basis of conflicting allegations.

Matter of Kenneth M. v Monique M., 48 AD3d 1174 (4th Dept 2008)

"Noticed" Father Had Standing to Seek Custody

Family Court erred in dismissing the father's petition seeking custody of the child without conducting a hearing. The court summarily dismissed the petition based on the father's prior consent to be recognized as a "noticed" father with respect to the child's prospective adoption, inasmuch as there was an order of filiation in effect and the record established that respondent withdrew its petition to terminate the father's parental rights. Thus, the father had standing to seek custody despite his status as a "noticed" father with respect to the prospective adoption and the court should have conducted a hearing to determine the best interests of the child.

Matter of Anthony R. v Erie County Children's Servs., 48 AD3d 1175 (4th Dept 2008)

Court Erred in Summary Dismissal; Law Guardian Failed to Advocate

Mother commenced a proceeding seeking to terminate visitation between respondent father and the parties' daughter, who was 10 years old when the appeal was decided. Father was incarcerated based on his conviction of first degree arson. Family Court reversibly erred in granting mother's motion for summary judgment and terminating visitation without conducting a hearing, inasmuch as the record was devoid of information concerning the circumstances of the arson, and such information was relevant to whether the father posed any risk to the child. The Appellate Division also noted that although the Law Guardian was present when the parties appeared for argument on the motion, the record did not reflect any advocacy on behalf of the child.

Matter of Christina M.M. v Shondell R.B., 48 AD3d 1202 (4th Dept 2008)

Court Erred in Custody Award and in Failing to Reappoint Prior Law Guardian

Family Court abused its discretion by granting mother's petition to modify a prior custody order and awarding her primary physical custody of the parties' daughter, born December 2000. The parties were never married and separated when the child was about four months old, when mother and child moved in with mother's parents. In March 2004 mother sought modification and was permitted to move with the child and her parents to Connecticut, with monthly visitation to the father. In August 2004 mother was convicted of driving while intoxicated in Connecticut and received a four-month jail sentence because of her history of such charges. The parties arranged for father to take physical custody of the child at the end of October 2004, and the parties entered into a stipulation in Supreme Court continuing joint custody and giving father primary physical custody. A Supreme Court order continuing the arrangement and specifying the terms of visitation to the mother was entered in September 2005. After three days of testimony, in February 2007 the court granted mother's petition and awarded her physical custody. The Appellate Division granted a stay, and then reversed, determining on its own analysis that custody should remain with the father. Although

the Appellate Division agreed that there had been a significant change in circumstances inasmuch as mother completed her jail sentence and mandatory programs, had stopped drinking, was engaged to a man, and living happily with him and his two children, its analysis of the "best interest factors" differed: Although both homes offered suitable environments and both parents could provide parental guidance, the father had greater financial ability to care for the child: father's salary was modest, but mother was financially dependent on her fiancé and admitted she had given no thought to how she would support the child if something were to happen to her fiancé or their relationship. Also, the father was the more fit parent: mother insisted she was not an alcoholic and could drink like everyone else and her fiancé had two convictions involving breach of the peace, violating an order of protection and possession of drug paraphernalia. The child had lived with each parent approximately half of her life. Finally, the Court, after noting that the parties had had proceedings before at least three different judges and that the same law guardian had been appointed in the first two matters but not in this matter because the mother objected to the law guardian's appointment, and further noting that the child's previous law guardian was available, stated that the law guardian should have been reappointed.

Matter of Kristi L.T. v Andrew R.V., 48 AD3d 1202 (4th Dept 2008), *lv denied* 10 NY3d 716

Award of Custody to Grandmother Reversed

Respondent mother appealed from an order awarding petitioner grandmother custody of the mother's child. The Appellate Division reversed, keeping placement with the grandmother pending a new determination. Family Court erred in granting custody without determining whether extraordinary circumstances existed and whether it was in the child's best interests to be placed in the custody of the grandmother. The record did not support the grandmother's contention that the order on appeal was entered on the stipulation of the parties. There was no indication in the record that the mother agreed to the placement of the child with the grandmother.

Matter of Cynthia A.W. v Brandi W., 48 AD3d 1224 (4th Dept 2008)

Invalid Waiver of Right to Counsel Invalidates Custody Order

The Appellate Division reversed an order of Family Court that granted custody of the parties' children to respondent. Petitioner mother was denied the right to counsel at the custody hearing: the court failed to obtain her valid waiver before it allowed her to proceed pro se. The day of the custody hearing, her assigned counsel renewed his motion to withdraw, and the motion was granted upon the mother's consent. The court denied mother's request for an adjournment and immediately commenced the hearing, with mother proceeding pro se. The court relieved counsel after asking the mother only whether she had any objection to counsel's motion to withdraw. The court's single question did not constitute the searching inquiry necessary to ascertain whether mother understood the dangers and disadvantages of self-representation.

Matter of Kristin R.H. v Robert E.H., 48 AD3d 1278 (4th Dept 2008)

Violation Petitions Properly Dismissed

Father appealed from an order dismissing his three petitions alleging the mother violated terms of a prior custody order. The Appellate Division affirmed, concluding that, with respect to one of the petitions, the evidence did not establish that mother willfully violated by failing to notify him of a medical emergency and by failing to identify him as an emergency contact on a hospital form. The mother brought the child for treatment for an eye injury, whereupon she completed the hospital form, and the record established the injury did not constitute a medical emergency. With respect to dismissal of the other two petitions, father's contentions also lacked merit.

Matter of Maurice H. v Charity C., 49 AD3d 1248 (4th Dept 2008)

Error In Summary Award of Temporary Custody Did Not Require Reversal

Mother appealed from an order granting the father physical custody of the parties' two children. The Appellate Division affirmed. The record established that the parties stipulated that the matter would be heard by a JHO. Although the JHO did not adequately advise mother of her right to assigned counsel at the first court appearance, the JHO eventually assigned counsel to represent her and at the court proceedings when she was without counsel, decided only temporary issues of visitation. The JHO erred also in awarding temporary custody to the father without first conducting a hearing as this was not a case where sufficient facts were shown by uncontroverted affidavits. The error did not require reversal, however, because the JHO subsequently conducted an evidentiary hearing and the record of the hearing fully supported the JHO's determination following the hearing.

Matter of Darryl B.W. v Sharon M.W., 49 AD3d 1246 (4th Dept 2008)

Custody of Appellant Adoptive Child to Biological Aunt and Uncle Affirmed

The subject child, Courtney, born in 1994 and adopted by respondents in 2004, appealed from an order granting the petition of her biological aunt and uncle seeking custody. The Appellate Division affirmed. Family Court properly determined petitioners established extraordinary circumstances: respondent Debra K. had consented to a finding of abuse with respect to a foster child who lived in respondents' home and to a finding of derivative neglect with respect to Courtney. At the time of the present proceeding, charges including second degree rape were pending against Debra K. with respect to the foster child. Family Court also properly determined it was in Courtney's best interests to award custody to petitioners. Petitioners established that they maintained regular contact and had an ongoing relationship with Courtney until January 2003, when Courtney moved to Virginia for a pre-adoption placement and petitioners

were denied access to her. Upon learning Courtney had returned to New York State, petitioners and their attorney met with officials from DSS to discuss adopting Courtney and were told that adoption proceedings were pending. Courtney was then adopted by respondents. Petitioners also established, primarily through testimony of their three adult children, that they had a stable home environment and were able to provide for Courtney's emotional and intellectual development. The court determined on the evidence at the hearing that respondent Frank K. had serious health problems and that Debra K. was primary caretaker of the home and children. The Appellate Division noted, moreover, that during the pendency of the appeal Debra K. was convicted of second degree rape and sentenced to a term of imprisonment. The court did not improperly separate Courtney from her brothers. Courtney had maintained a relationship with her biological sister who lived in Virginia, and petitioner Colleen F. testified she was not opposed to visitation between Courtney and her brothers. Finally, Courtney's expressed desire to remain in respondents' custody, while important, was not determinative.

Matter of Colleen F. v Frank K., 49 AD3d 1228 (4th Dept 2008)

Custody of Children Should Have Remained With Mother

The Appellate Division agreed with the mother and the Law Guardian that Family Court erred in awarding primary physical custody of the mother's son and daughter to their respective fathers. When the son's father, Ronald, filed his petition for custody, the son had been in mother's primary physical custody for 10 years pursuant to an existing arrangement entered upon consent. The record established the son had no behavioral issues and had been doing well academically while residing with mother, whereas he was unhappy and not performing well academically in Ronald's care pursuant to a temporary order. In awarding custody of the children to their fathers, the court was primarily concerned with the mother's association with known criminals, but she testified at the hearing on the petitions that she was no longer associating with them since the court issued the temporary order. Also, both mother and Ronald had allowed the children to be in company with individuals with criminal backgrounds, and Ronald himself had a criminal background. The quality of the home environment weighed in favor of the mother inasmuch as she had a three-bedroom home whereas Ronald had a two-bedroom home that was still under construction. The evidence also established that mother took an active role in the son's emotional and intellectual development, while Ronald had not placed priority on the son's well-being, having the son stay in his vehicle all day while he worked and having taken his son with him on a date. Regarding the daughter, the record established that her father, Michael, also had allowed her to be in the company of individuals with known criminal backgrounds and had hired one of them as a babysitter. Although there was no formal custody arrangement between the mother and Michael, the mother had had primary physical custody of the daughter since Michael moved out of the house in October 2002. Michael worked 60 to 70 hours per week, including midnight shifts, and relied primarily on his present girlfriend, who was married to another man, to care for the daughter. Although Michael denied any issues

with drinking or gambling, the mother's testimony and his own testimony suggested otherwise. Finally, the Court noted that by granting primary physical custody to mother, the siblings will once again be residing in the same household.

Matter of Michael P. v Judi P., 49 AD3d 1158 (4th Dept 2008)

Award of Custody to Father Reversed; Permission to Relocate Granted

Petitioner father sought physical custody of the parties' two children. Mother cross-petitioned for permission for the children to relocate with her to Albany, and then filed an amended cross petition to relocate to North Carolina. Family Court granted the father sole custody. The Appellate Division, concluding that the court failed to weigh the evidence properly, reversed and granted the mother's cross petition. Pursuant to their judgment of divorce, the parties agreed to equal joint physical custody of the children. Both resided in Harrisville, New York until the mother remarried in February 2005. When she moved to Ravenna, New York several months later as a result of her husband's employment, she agreed that the children would reside with the father in order to complete the school year, and she exercised extensive visitation. By June 2006 the relocation request changed from Albany to North Carolina, based on the husband's employment. The mother testified at the hearing that she believed the father had agreed the children would reside with her during the 2006-2007 school year. In reversing, the Appellate Division noted that Family Court based its determination primarily on its conclusion that the relocation would have a negative impact on the children's future contact with the father, but the court's findings did not warrant that conclusion since the court found that the children's relation with the father could be preserved through regular contact by telephone and email, and through visitation during summer and school vacations. The court did not give adequate weight to the educational advantage from the relocation, particularly to the child with educational difficulties, or to the impact of the relationship between the children and the father's live-in girlfriend, who was their art teacher. There was evidence of tension and concern with respect to the parent/teacher "blur" in their relationship, based on the girlfriend's role as quasi-parent and teacher, and there was evidence that one of the children had difficulties at school because of the relationship. In this case, more extensive visits over summers and school vacations would be equally or more conducive to a close parent-child relationship. After noting that joint decision-making authority was appropriate, the Court remitted the matter to determine the transfer date and visitation schedule.

Matter of Parish A. v Jamie T., 49 AD3d 1322 (4th Dept 2008)

Change in Custody Improper If Solely to Accommodate Child's Desires

Family Court properly denied the father's petition seeking to modify the existing custody order by awarding primary physical custody of the parties' children to the father, and properly granted the mother's cross petition seeking to modify the order by awarding sole custody to the mother. The Appellate Division rejected the contention of the Law

Guardian that the court erred in modifying the existing joint custody arrangement because of the parties' acrimonious relationship and failure to communicate. Further, the father failed to establish a change in circumstances reflecting a real need for change in the children's primary physical residence: although one child expressed a desire to live with the father, an established custodial arrangement should not be changed solely to accommodate the desires of the child.

Matter of Betro v Carbone, 50 AD3d 1583 (4th Dept 2008)

Petition Properly Dismissed Following Judicial Surrender

Mother appealed from an order dismissing her petition seeking custody and visitation with her children following a judicial surrender to respondent DSS. The Appellate Division affirmed, rejecting her contention that she was coerced into executing the surrender. If the mother was informed by respondent that it would seek termination of her parental rights if she did not agree to the surrender, informing a parent of an accurate but unpleasant event was not coercion, but was necessary to enable the mother to make an informed decision. The Appellate Division also rejected the contention that the surrender instrument was void because the mother believed she would still have visitation rights with the children: the record established that the only condition of the surrender instrument was that the children would be adopted by the foster parents. Further, there was no agreement providing for communication or contact between the mother and children.

Matter of Jenny A. v Cayuga County Dept. of Health & Human Servs., 50 AD3d 1583 (4th Dept 2008), *lv dismissed* 11 NY3d 809

Record Did Not Support Allegation of Court's Bias

Family Court modified the parties' existing joint custody arrangement, by, among other things, increasing the visitation of petitioner father. On appeal, respondent mother contended that the court was biased against her. The Appellate Division affirmed, concluding that the record did not support her contention, that the court conducted a full and comprehensive hearing, and that the order was supported by the record.

Matter of Rawlins v Finocchiaro, 50 AD3d 1594 (4th Dept 2008)

Extraordinary Circumstances Finding Made on the Record

Respondent mother appealed from an order denying her petition seeking to revoke her letters of guardianship appointing a nonparent as guardian of her child. The Appellate Division affirmed, although it agreed with the mother that Family Court erred in determining that the nonparent was not required to establish the existence of extraordinary circumstances in order to regain custody because the prior order granting custody to the nonparent was entered upon consent. The record was adequate for the

Appellate Division to make its own determination that there were extraordinary circumstances in that the mother was unfit to care for the child, who was born in March 2005 and had been in the custody of the nonparent since she was approximately eight months old.

Matter of Teresa J. v Tanya H., 50 AD3d 1599 (4th Dept 2008)

Petitioner's Desire for More Time With Child Insufficient

Family Court granted the father's petition seeking an increase in visitation. The Appellate Division reversed and dismissed the petition. Although a prior order entered upon stipulation is entitled to less weight than a disposition after a full trial, the father was required to establish a sufficient change in circumstances between the time of the stipulation and the time of the hearing on the petition. Although the father testified the petition was based on his desire to spend more time with the child, his dissatisfaction with the stipulated order, without more, was insufficient to establish a change in circumstances. In addition, the court's determination that it was in the child's best interests to modify the father's visitation was not supported by a substantial basis in the record.

Matter of Gridley v Syrko, 50 AD3d 1560 (4th Dept 2008)

Mother Moved With Child to Florida

The Appellate Division affirmed Family Court's order awarding petitioner father custody of the parties' child. Although respondent mother cross-petitioned for custody without seeking permission for the child to relocate with her to Florida, she moved with the child to Orlando during the pendency of the proceeding. The court properly determined that the mother failed to establish the child's best interests were served by the relocation, but were served by granting father's petition. Because the Appellate Division stayed the court's order during pendency of the appeal, the child remained with the mother. The Appellate Division directed the mother to return the child to the father at the mother's expense within 10 days of the last day of the school year.

Matter of Cunningham v Sudduth, 50 AD3d 1623 (4th Dept 2008)

Summary Dismissal of Petition Seeking Visitation With Half Siblings Proper

Family Court properly dismissed without a hearing the petition seeking visitation with petitioner's two half siblings: respondents, maternal grandparents of the half siblings, established that two orders of protection prohibited petitioner from having any contact with the half siblings. The Appellate Division modified the order, however, by vacating the sanction imposed by the court on its determination that the proceeding was frivolous. The court was required to afford petitioner a reasonable opportunity to be heard before imposing such a sanction.

Matter of Ariola v DeLaura, 51 AD3d 1389 (4th Dept 2008), *lv denied* 11 NY3d 701

False Allegations of Sexual Abuse Support Change in Custody

The father petitioned for sole custody and sole physical residence of the parties' child on the ground that respondent mother made several false allegations that the father had sexually abused the child and had coached and coerced the child into supporting the false allegations. Family Court granted the petition. The Appellate Division affirmed. Although the court erred in admitting into evidence the results of the father's polygraph examination, the error was harmless, and the court did not err in admitting testimony concerning the circumstances surrounding the administration of mother's polygraph examination. The mother did not preserve and the Court did not reach the mother's contention that the court erred in conducting the custody proceeding prior to the neglect proceeding against her, or in permitting the Law Guardian to convey the child's hearsay statement to the court. Finally, the Appellate Division concluded that the court did not abuse its discretion in declining to conduct a *Lincoln* hearing.

Matter of Charles M.O. v Heather S.O., 52 AD3d 1279 (4th Dept 2008)

Supervised Visitation at Neutral Site in Child's Best Interests

Family Court did not lack jurisdiction to award sole custody of the parties' child to respondent mother, who did not file a cross petition seeking that relief: the court has discretion to enter orders for custody in the best interests of the child. The court's determination that the child's best interests would be served by supervised visitation at a neutral site and by a gradual increase in the duration of the visits was supported by the record. Any error in the court's failure to give the Law Guardian the opportunity to present a summation did not warrant reversal as the Law Guardian made her position clear to the court at the hearing, and notably, did not seek reversal of the order.

Matter of Hall v Porter, 52 AD3d 1289 (4th Dept 2008)

Petition for Relocation of Parties' Child to Florida Properly Affirmed

Family Court denied father's petition to modify a prior order of custody and visitation and granted mother's cross petition for permission to relocate with the child to Florida. The Appellate Division affirmed. Father's petition to modify the prior order of custody and visitation by awarding the parties joint legal custody and shared legal custody was properly denied because the prior order was entered on stipulation and father failed to establish a sufficient change in circumstances since the time of the stipulation. The court property granted the cross-petition seeking permission to relocate. Although father exercised his visitation rights and, together with his extended family, developed a relationship with the child, mother established by a preponderance of the evidence that the proposed relocation would be in the child's best interests. The mother had been the

primary caretaker of the child since birth, the mother's family had been continuously involved in the child's life and the child had a relationship with a maternal aunt and cousins who reside in Florida. Further, the relocation would enhance the financial situation of the mother and child. The Appellate Division noted that the court ordered that the father "shall be entitled to visit the child in the state of Florida at any time that he is able to do so and that the cost of transporting the child for visitation is to be divided equally between the parties."

Matter of Scialdo v Cook, 53 AD3d 1090 (4th Dept 2008)

Dismissal of Petition Seeking Visitation Affirmed

Supreme Court dismissed father's petition for visitation with his three children. The Appellate Division affirmed. The court was not required to conduct an evidentiary hearing where it was clear from the record that the court possessed sufficient information to render an informed determination that was consistent with the children's best interests. At the time the petitions were filed, the father was incarcerated based upon his conviction of manslaughter in the first degree for bludgeoning and strangling his estranged wife, the mother of the children in this case. The record further established that the father caused the children profound distress by killing their mother, and that he previously engaged in a pattern of domestic violence against the mother and the children, as well as other criminal activities, which involved non-family members. Further, the children indicated that they did not wish to visit the father. The statement of the father that one of the children secretly expressed a desire to visit him was merely self-serving and insufficient to require a hearing on the petition.

Matter of Piwowar v. Glosek, 53 AD3d 1121 (4th Dept 2008)

Refusal to Modify Prior Custody Order Affirmed

Family Court refused petitioner mother's request to modify a prior custody order and grant her custody of the parties' two children. The Appellate Division affirmed. One of the parties' daughters had attained the age of 18 and that part of the appeal was moot. With regard to the parties' younger child, the record supported the court's determination that mother failed to meet her burden of establishing a sufficient change in circumstances since entry of the prior order. Although the mother had purchased a new mobile home, it lacked running water and sufficient electrical service to meet even the most basic housing needs of a child. Even though the child expressed his wish to reside with his mother, it is well established that custodial arrangements should not be changed solely to accommodate the desires of the child.

Graham v Thering, 55 AD3d 1319 (4th Dept 2008)

Dismissal of Petition to Modify Custody Order Reversed and Remitted

Family Court dismissed mother's petition that sought to modify a prior custody order. The Appellate Division reversed and remitted the matter. The court erred in adopting the report of the Judicial Hearing Officer (JHO) without providing petitioner with notice of the filing of the report or an opportunity to object to it. The petitioner did not explicitly or implicitly consent to the referral of the matter to the JHO for a final determination, and, indeed, the JHO did not issue a final determination on the petition. The JHO explicitly acknowledged that the matter had been referred to him to hear and report, and he concluded his report with only a recommendation.

Wilder v Wilder, 55 AD3d 1341 (4th Dept 2008)

Order Granting Joint Custody Affirmed

Family Court granted the parties joint custody of their two children, with primary residence with petitioner mother and unsupervised visitation to respondent father. The Appellate Division affirmed. The court's determination that both parents were fit and responsible was based on the court's credibility assessments of the witnesses and was supported by a sound and substantial basis in the record. Petitioner's contention concerning a final order in which she failed to take an appeal was not properly before the Appellate Division.

Krug v Krug, 55 AD3d 1373 (4th Dept 2008)

Court Erred in Granting Temporary Custody Without Hearing

Supreme Court denied plaintiff mother's motion for temporary custody of the parties' children, granted defendant father temporary custody, and disqualified mother's attorney. The Appellate Division reversed and remitted the matter. The court erred in awarding temporary custody to father without conducting an evidentiary hearing. Despite conflicting allegations of the parties concerning their respective parenting abilities, the court based its temporary custody determination solely on an in-camera interview with the children and communications with the parties' attorneys during two court appearances. Further, the court erred in disqualifying the mother's attorney because her attorney, a judicial hearing officer for Oneida County Family Court, was not prohibited by either judicial or ethical rules from representing clients before a different court in a different county.

Christensen v Christensen, 55 AD3d 1453 (4th Dept 2008)

Limitation of Custody Affirmed

Family Court awarded custody of father's child to child's maternal grandfather. The Appellate Division affirmed. The issue of the disqualification of the law guardian was not preserved for review. In any event, the father's characterization of the law guardian's

discussion with the grandfather was erroneous: the law guardian acted appropriately in her role as the legal representative of the child. The father also failed to preserve for review his contention that the court erred in admitting hearsay evidence. In any event, any error in the admission of hearsay testimony was harmless because evidence that the father was an unfit parent was overwhelming. The father's voluntary relinquishment of physical custody of the child to the grandfather and the fact that father was otherwise unfit to regain custody of the child, in view of his history of violence with the child's mother and his unstable living arrangements, constituted extraordinary circumstances. The award of custody to the grandfather was in the best interests of the child. The court did not err in limiting father's visitation; the father, who was represented by counsel, agreed to the terms of visitation.

Matter of Garrett D. v Kevin L., 56 AD3d 1183 (4th Dept 2008)

Referee Should Have Conducted in Camera Interview

Family Court denied the amended petition for modification of an order of custody of the parties' children. The Appellate Division reversed. Petitioner mother sought permission to relocate with the parties children to Texas. The referee erred in failing to ascertain whether the children wished to relocate to Texas with their mother, who was their primary physical custodian. Although the law guardian offered the referee the opportunity to conduct an in-camera interview with the children, the referee declined to do so. Interviews with children involved in relocation disputes are not mandatory but here the better practice would have been to conduct an in-camera interview, because while the express wishes of the children are not controlling, they are entitled great weight, especially considering the ages of the children here were 11 and 13 years old.

Matter of Minner v Minner, 56 AD3d 1198 (4th Dept 2008)

Denial of Transfer of Custody Affirmed

Family Court denied petitioner's request for a transfer of custody of the parties' children. The Appellate Division affirmed. Petitioner father and respondent mother are the parents of four children who live with mother in Omaha, Nebraska, pursuant to a stipulation in connection with the parties' divorce. The judgment of divorce and a subsequent Family Court order provided that mother had custody of the children with visitation to father. The court properly determined that the mother violated the judgment by denying the father visitation with the children, but the court did not abuse its discretion in denying the father's request to change custody without a hearing. The court properly granted the law guardian's motion requesting that the court decline to exercise jurisdiction based on the law guardian's assertion that she could not provide effective representation because the child and relevant evidence relating to the child's best interests were in Nebraska. The record established that the children lived in Nebraska for nearly five years, and evidence necessary for a determination of their best

interests is no longer available in New York.

Matter of Dei v Diew, 56 AD3d 1212 (4th Dept 2008)

Dismissal of Modification of Custody Affirmed

Family Court dismissed, for lack of jurisdiction, petitioner father's petition to modify custody. Father commenced the proceeding seeking to modify a prior custody order that was entered at a time when he resided in Massachusetts and respondent mother and the parties' child resided in New York. For 13 months prior to the filing of the petition, however, the mother and the child resided in Arizona, and the father continued to reside in Massachusetts. The court properly granted the law guardian's motion to dismiss the petition for lack of jurisdiction. The court did not have exclusive, continuing subject matter jurisdiction because neither of the parties nor the child presently resided in New York. The court lacked jurisdiction to make an initial determination because, among other things, the child had lived in Arizona for more than six months prior to commencement of the proceeding.

DelGallo v DelGallo, 56 AD3d 1213 (4th Dept 2008)

Sole Custody With Supervised Visitation Affirmed

Family Court awarded sole custody of parties' child to petitioner father with supervised visitation to respondent mother. The Appellate Division affirmed. Father commenced the proceeding seeking to modify an order that had awarded sole custody of the parties' child to mother on the ground that the mother had intentionally alienated the parties' child from the father since the entry of the order. The court's modification of the existing custody arrangement was in the best interests of the child. The Appellate Division rejected mother's contentions that the court lacked subject matter jurisdiction and that the court erred in awarding her supervised visitation. The law guardian took an active role in the proceeding and the law guardian's advocacy for the child during summation did not constitute a report to the court.

Stewart v Stewart, 56 AD3d 1218 (4th Dept 2008)

Dismissal of Motion to Vacate Prior Custody Order Reversed

Family Court dismissed the motion of respondent father to vacate a prior custody order upon his default. The Appellate Division reversed. Father was deprived his right to counsel because although he did not appear in court, it is undisputed that he made multiple requests for the assignment of an attorney and his requests were ignored. In the absence of any evidence in the record before the court that the father waived the right to an attorney, reversal was required.

Matter of Matthews v. Matthews, 56 AD3d 1268 (4th Dept 2008)

Court Erred in Entering "Default Finding" on Visitation

Family Court modified a prior order of joint custody and awarded petitioner father sole custody of parties' children, with visitation to respondent mother based upon her default. The Appellate Division reversed. The court erred in entering the order based on mother's failure to appear in court. The record established that the mother was represented by counsel and "where a party fails to appear for a hearing but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded (citations omitted)". Further, the court erred in modifying the prior order without conducting a hearing; determinations affecting custody and visitation should be made following a full evidentiary hearing, not on the basis of conflicting allegations. The Appellate Division was unable to determine whether the modification was consistent with the children's best interests. Indeed, the record was devoid of any indication that the court even considered the children's best interest.

Matter of Hopkins v Gelia, 56 AD3d 1286 (4th Dept 2008)

DISCOVERY

Motion to Preclude DSS From Interviewing Child Without Law Guardian Properly Denied

Family Court, in a neglect proceeding, granted respondent mother a one year adjournment in contemplation of dismissal (ACD) and the law guardian moved to preclude petitioner DSS's caseworker from interviewing the child without notice to and outside the presence of the law guardian. The court denied the law guardian's motion. The Appellate Division affirmed. Petitioner had the right to interview the child without notice to the law guardian and outside the presence of the law guardian for the sole purpose of ensuring the safety of the child and the other children residing in the home of respondent parents. The record established that there were four prior indicated reports of neglect with respect to the child and her two older siblings that resulted in an adjudication of neglect against the mother and mother's boyfriend. Based on the prior adjudication, the mother was placed under the supervision of the court and DSS until November 2006. The instant petition, dated December 6, 2006, alleged that the mother and her boyfriend repeatedly bound the hands and ankles of one of the child's brothers and failed to address the suicide attempt of the child's other brother. All three children were removed from the home and placed in foster care, but the court subsequently granted the application of the law guardian for the child to return home. The mother made a formal admission of neglect with respect to the three children and was granted a one year ACD. The law guardian agreed to the terms of the ACD. One of the conditions of the ACD was that the mother and her boyfriend would permit DSS's caseworker to examine and interview the children privately both in and outside of the

home. Although the child had a constitutional and statutory right to legal representation of her interests in the proceedings on a neglect petition, the Appellate Division concluded that the court properly balanced that right against the statutory requirement that the child and the mother remain under DSS's supervision during the ACD. DSS is not required by Code of Professional Responsibility to notify the law guardian prior to interviewing the child because that disciplinary rule applies only to attorneys.

Matter of Tiajianna M., 55 AD3d 1321 (4th Dept 2008)

EVIDENCE

Error to Admit Hearsay Portions of Report

Family Court erred in admitting into evidence portions of a report prepared in Georgia pursuant to the interstate compact on the placement of children: petitioner failed to establish that the reporting party was under a business duty to report the information. The error, however, was harmless, because the hearsay evidence was relevant only on the issue whether respondent should be required to participate in sexual abuse counseling, and that issue was decided in an earlier placement order from which the father did not appeal.

Matter of Dakota S., 43 AD3d 1414 (4th Dept 2007)

FAMILY OFFENSE

Supervised Visitation Properly Ended

Family Court did not err in dismissing the mother's family offense petition and in modifying a prior order by removing the provision that the two-hour period of weekly visitation of the children's father must be supervised by the mother. The mother failed to establish by a fair preponderance of the evidence that the father committed the violation of harassment in the second degree and the crime of menacing in the third degree. Further, the record established that the modification was in the best interests of the children.

Matter of Woodruff v Rogers, 50 AD3d 1571 (4th Dept 2008), *lv denied* 11 NY3d 717

JUVENILE DELINQUENCY

DSS Exhausted Its Placement Options: **Placement with OCFS Affirmed**

Respondent appealed from two Family Court orders placing him with OCFS. The orders modified prior orders adjudicating him a juvenile delinquent and placing him with DSS. The Appellate Division affirmed. Family Court did not abuse its discretion in

determining that placement with OCFS was the least restrictive alternative. Respondent was placed in a therapeutic foster home in September 2004 after a determination that he will fully violated a conditional discharge of the JD adjudication. He was thereafter placed in a second therapeutic foster home and then returned to his mother's home on condition that he participate in the STAR program, which he failed to do. He was again placed in a therapeutic foster home, but that placement was also unsuccessful. He was placed in a facility for a diagnostic evaluation, and based upon the recommendation resulting from the evaluation, was placed in a residential treatment center (RTC) where he resided for approximately seven months. During the first two weeks of trial discharge from the RTC to his mother's home, respondent violated several of the conditions of the trial discharge. A witness for petitioner testified that DSS had exhausted its placement resources for respondent. A representative for OCFS testified that respondent's educational and mental health needs could be addressed through placement in a limited secure facility.

Matter of Eric S.D., 37 AD3d 1045 (4th Dept 2007)

Shelving Unit Could Be "Dangerous Instrument"

Family Court reversibly erred in summarily dismissing the petition on the ground that the allegations were legally insufficient. The court erred in concluding that the wooden shelving unit with which the child struck her mother was not a "dangerous instrument" as a matter of law. The court also erred in refusing to conduct a hearing in order for the mother to testify regarding "physical injury," opting instead to ask its own questions of the mother, then deciding to dismiss the petition on its own motion based on the mother's unsworn responses.

Matter of Victoria H., 37 AD3d 1047 (4th Dept 2007), *lv dismissed* 8 NY3d 942

Petition Facially Sufficient and Finding Based on Sufficient Evidence

Family Court did not err in denying respondent's motion to dismiss the petition with respect to the crime of menacing in the third degree on the ground that the petition was facially insufficient. The petition and supporting statements alleged that the police officer was placed in fear of physical injury as a result of physical menacing, i.e., respondent's conduct in grabbing the police officer's flashlight and raising it above his head as if to strike the officer. The evidence at the hearing was sufficient to establish menacing in the third degree and obstruction of governmental administration. With respect to menacing, two officers testified that, while police were attempting to arrest respondent's father, respondent grabbed a flashlight from an officer's hand and raised it above his head as if to strike the officer. The officer testified he stepped back because he feared respondent would strike him with the flashlight. With respect to obstructing governmental administration, the testimony was sufficient to establish that respondent was attempting to interfere with the arrest of his father.

Matter of Daniel M., 37 AD3d 1101 (4th Dept 2007)

Respondent Not in Custody

Family Court did not err in refusing to suppress respondent's statement on the ground that the questioning by police did not take place in a designated facility pursuant to FCA § 305.2 (4) (b). The court determined that the room was on the OCA list of designated facilities, and respondent did not establish before the Appellate Division that the court erred with respect to that determination. In addition, FCA § 305.2 was inapplicable because, as Family Court properly determined, respondent was not in custody when he made the statement.

Matter of Matthew M.R., 37 AD3d 1133 (4th Dept 2007)

Adjudication Affirmed

Respondent was adjudicated a juvenile delinquent based on the finding that he committed acts that, if committed by an adult, would constitute the crime of criminal trespass in the third degree. The Appellate Division affirmed. The evidence was sufficient to establish that respondent knowingly entered or remained unlawfully in the church. The evidence established that respondent and two others were found in a stairwell leading to the basement of a church at 9:30 p.m., that respondent had entered through a door that led only to the stairwell, and that he did not have permission to be inside the church. Respondent failed to preserve the contention that the evidence failed to establish that the church was enclosed in a manner designed to exclude intruders. Finally, the petition, which alleged the commission of burglary in the third degree, was facially sufficient. The supporting depositions of the arresting officers and the church official sufficiently established the elements of the charge.

Matter of Matthew M.R., 37 AD3d 1134 (4th Dept 2007)

Contention Regarding Return of Stolen Camera Not Preserved

Respondent was adjudicated a juvenile delinquent based on the finding that he committed an acts that, if committed by an adult, would constitute the crimes of criminal possession of stolen property in the fifth degree and obstructing governmental administration in the second degree. The Appellate Division affirmed. Respondent failed to preserve the contentions that the evidence was legally insufficient to support the findings because the stolen camera was improperly returned to the complainant in violation of Penal Law § 450.10, and in any event, the contentions were without merit.

Matter of Matthew M.R., 37 AD3d 1135 (4th Dept 2007)

Court Lacked Statutory Authority to Order Restitution

Family Court lacked authority to order each respondent to pay restitution with respect to the 14 vehicles for which the victim made claim for damages rather than the five vehicles charged in the petitions. Such restitution would be permissible pursuant to PL § 60.27 because the damage to the additional nine vehicles was "part of the same criminal transaction," but it was not authorized under FCA § 353.6. The matter was remitted for a new restitution hearing.

Matter of Jared G., 39 AD3d 1248 (4th Dept 2007)

Case Should Have Been Restored to Calendar Before ACD Expired

Family Court granted petitioner's motion to restore the proceeding to the calendar after the six-month time period specified in the order of adjournment in contemplation of dismissal had expired and extended the time period for an additional six months. The Appellate Division reversed. The court failed to restore the case to the calendar prior to the expiration of the ACD order, and thus the petition was deemed to have been dismissed. The court's subsequent extension of the time period in the ACD order was a nullity. It was irrelevant that petitioner filed the motion to restore prior to that date. The statute (FCA § 315.3 [1]) requires the exercise of the court's discretion in determining whether to restore a case to the calendar, and thus the simple act of filing the motion was insufficient.

Matter of Traneil B., 43 AD3d 1302 (4th Dept 2007)

Court Did Not Act As Advocate For Presentment Agency

Family Court properly adjudicated respondent a juvenile delinquent based on findings that he committed acts that, if committed by an adult, would constitute third degree assault. The court's findings were not against the weight of the evidence. Respondent failed to preserve for review the contention that the court improperly acted as an advocate for the presentment agency by improperly questioning a witness, but in any event, the contention lacked merit: the court was unable to hear the initial answer of the witness to the presentment agency's question, and thus asked the witness only one question, for clarification.

Matter of Aron B., Jr., 46 AD3d 1431 (4th Dept 2007)

Girls' Testimony Against Respondent Did Not Require Corroboration

Family Court adjudicated respondent a juvenile delinquent based on the finding that he committed acts that, if committed by an adult, would constitute the crimes of endangering the welfare of a child and unlawfully dealing with a child, arising from an incident in which he provided alcoholic beverages to three girls under the age of 16. Relying on a different analysis than that of Family Court, the Appellate Division affirmed:

the girls were not accomplices and their testimony against respondent did not require corroboration. Family Court relied on CPL 60.22 as the applicable statute on corroboration when the applicable statute was FCA § 343.2. The girls violated Alcoholic Beverage Control Law § 65-c, which is a violation and not a "crime" within the meaning of Penal Law § 10.00 (6) because that section defines the term "crime" as a misdemeanor or a felony. FCA § 345.2 requires corroboration where the witness "may reasonably be considered to have participated in: (a) the crime charged; or (b) a crime based on the same or some of the facts or conduct which constitutes the crime charged in the petition. Because the girls could not reasonably be considered to have participated in any crime, there was no corroboration requirement for their testimony.

Matter of Daniel C., 48 AD3d 1242 (4th Dept 2008), *lv denied* 11 NY3d 714

Reversal Based on Defective Admission

Respondent's adjudication was reversed, the order vacated and the matter remitted. Respondent's admission was defective based upon the court's failure to comply with FCA 321.3 (1) by ascertaining that respondent and his mother were aware of "all possible dispositional alternatives."

Matter of Andrew J.S., 48 AD3d 1224 (4th Dept 2008)

Child's Needs Best Addressed in Limited Secure Facilty

Family Court did not abuse its discretion by placing respondent in a limited secure facility. The evidence established that respondent was in need of drug treatment, psychological counseling, special educational services and a structured environment, and the court properly determined that those needs could be addressed most effectively in a limited secure facility.

Matter of Joseph B., 49 AD3d 1309 (4th Dept 2008)

Juvenile Delinquency Adjudication Affirmed

Family Court adjudged respondent to be a juvenile delinquent based upon acts that, if committed by adult, would constitute the crimes of assault in the second degree and reckless endangerment in the second degree, and placed respondent on probation. The Appellate Division affirmed. The adjudication arose from an incident in which respondent struck the victim in the head with a two-foot-long stick. The presentment agency was not required to turn over to respondent the statement of respondent's sister to the police as *Rosario* material because the sister was not called as a witness by the presentment agency. Further, there was no *Brady* violation based on the presentment agency's failure to turn over that statement because respondent called her sister as a witness and was fully able to take advantage of any exculpatory testimony that she

might furnish. The court did not err in refusing to grant respondent's request for an adjournment to enable her to present the testimony of a witness. The decision whether to grant or deny a request for adjournment for any purpose is a matter resting within the sound discretion of the court and here the witness had not been subpoenaed, nor was her anticipated testimony material to the issue of respondent's guilt. The evidence supported the court's determination that respondent was not justified in striking the victim and that the stick used in the incident did constitute a dangerous instrument. Finally, the determination was not repugnant. It was possible for the court to find that respondent "intend[ed] one result ... while recklessly creating a [substantial] risk that a different, more serious result ... would ensue from [her] actions [citations omitted]."

Matter of Shakiea B., 53 AD3d 1057 (4th Dept 2008)

Juvenile Delinquency Adjudication Reversed

Family Court adjudged respondent to be a juvenile delinquent based upon a finding that he committed an act that, if committed by an adult, would have constituted the crime of assault in the second degree. Although respondent failed to preserve for the court's review his contention concerning the alleged legal insufficiency of the evidence, the Appellate Division reviewed respondent's contention in the interest of justice and reversed and dismissed the court's finding. Petitioner presented evidence that, as a result of his altercation with respondent, the complainant sustained a small cut below his eye and a puncture to his lip, and that the only treatment received by the complainant was an ice pack, a bandage and ointment. The record was devoid of any evidence that the complainant had scarring or pain following the incident; therefore, the evidence was legally insufficient to establish the impairment of complainant's physical condition or substantial pain.

Matter of Jonathan S., 55 AD3d 1324 (4th Dept 2008)

Evidence Legally Insufficient to Establish Assault in the Second Degree

Family Court adjudged respondent a juvenile delinquent based upon the finding that she committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree and assault in the third degree. The Appellate Division modified by vacating the provision that adjudged respondent a juvenile delinquent based upon the finding that respondent committed an act that, if committed by an adult, constituted a crime of assault in the second degree. The evidence was legally insufficient to establish that respondent intended to cause physical injury to her teacher and thus was legally insufficient with respect to the crime of assault in the second degree. However, the evidence was legally sufficient with respect to the crime of assault in the third degree because the record established that respondent, with intent to cause physical injury to another student, caused injury to her teacher.

Matter of Jenna V., 55 AD3d 1341 (4th Dept 2008)

Extension of Placement Affirmed

Family Court extended respondent's placement with petitioner DSS. The Appellate Division affirmed. The petition to extend placement was not untimely. The order placing respondent provided that respondent's placement would expire on June 16, 2008, and directed any petition to extend that placement to be filed prior to April 17, 2008. Before signing the order, however, the court changed the dates in the final ordering paragraph by directing that any petition to extend respondent's placement must be filed by May 17, 2008, and that the permanency hearing must be held prior to July 16, 2008. Petitioner properly relied upon those revised dates as the operative deadlines and thus timely filed the petition on April 23, 2008.

Matter of Donnaven B.,56 AD3d 1274 (4th Dept 2008)

Respondent Properly Adjudged a Juvenile Delinquent

Family Court adjudged respondent a juvenile delinquent based on the finding that he committed acts that, if committed by an adult, would constitute the crimes of rape in the first degree and criminal sexual act in the first degree. The Appellate Division affirmed. The court did not err in refusing to suppress respondent's statement to the police, having properly determined that he was advised of his *Miranda* rights in the presence of his mother and that he and his mother waived those rights before respondent was questioned. Further, respondent's reliance on *Haley v Ohio* was misplaced. In that case, the juvenile was subjected to five hours of questioning by a team of interrogators without counsel or family present, whereas respondent was questioned by a single police officer for a briefer period of time and respondent's mother was present at the police station where the questioning took place. The court did not err in allowing petitioner to reopen its case after it had rested to present corroborating evidence (*see* FCA § 344.2 [3]), as the evidence was simple to prove and not hotly contested, and thus was unlikely to disrupt the trial process or seriously prejudice respondent. Respondent was not placed in double jeopardy because the hearing had not yet been terminated in his favor.

*Matter of Cody D.,*57 AD3d 1491 (4th Dept 2008)

No Suppression Hearing Based on Search of Student by School Official

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed the crime of unlawful possession of weapons by persons under 16. The Appellate Division affirmed. Respondent contended that the court erred in refusing to suppress the gun without conducting a hearing because respondent was illegally searched by the school principal. The Appellate Division rejected that contention. A

suppression hearing was unnecessary inasmuch as respondent's allegations did not lay out a factual scenario which, if credited, would have warranted suppression. The principal confronted respondent based on information from another student that respondent possessed a gun in his book bag. Under ordinary circumstances, search of a student by a school official is justified where there are reasonable grounds for suspecting that the search will turn up evidence that the student had violated or was violating the law, and in this case respondent did not present a legal basis upon which to challenge the principal's conduct..

Matter of William P., 57 AD3d 1509 (4th Dept 2008)

Court Improperly Appeared to Advocate, But Error Harmless

Respondent was on probation based on an order adjudicating him to be a juvenile delinquent. After respondent twice violated probation, Family Court ordered that he be placed in the custody of the Commissioner of Social Services. The Appellate Division affirmed, reaching in the interest of justice respondent's unpreserved contention that Family Court acted as an advocate for the presentment agency at the violation of probation hearing. Although the court improperly assumed the appearance of an advocate when it reminded the presentment agency to have a certain witness make an in-court identification of respondent, the error was harmless because a previous witness had identified respondent as the person involved in the violation. Respondent's contention that he should have received prior notice of out-of-court identifications and an out-of-court statement by him lacked merit. A probation violation hearing should be less formal than a full fact-finding hearing with the prerequisites of formal discovery and notice. Any notice requirement would not apply because the identification was arranged by respondent's school rather than by the police, and respondent's incriminating statement was made to an agent of the school, not the police. Further, the representation provided by respondent's attorney was meaningful.

Matter of Thomas B., 57 AD3d 1455 (4th Dept 2008)

Respondent Failed to Preserve Claims of Error

Family Court adjudicated the respondent to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree. Respondent failed to preserve for review his contentions that Family Court improperly acted as an advocate for petitioner by questioning a witness and in failing to order a probation investigation as required under Family Court Act 351.1. Contrary to respondent's further contention, he received meaningful representation by his Law Guardian.

Matter of George N.B., 57 AD3d 1456 (4th Dept 2008)

ORDERS OF PROTECTION

Children's Wishes Not Controlling

Family Court erred in granting respondent's motion to dismiss the amended petition insofar as it alleged that respondent was interfering with petitioner's telephone contact with the parties' children. Petitioner stated a cause of action for enforcement of the telephone contact provisions of the 2003 order of protection, which expressly provided that petitioner could have monitored telephone contact twice weekly; and neither respondent nor the Law Guardian disputed that the contact had not been occurring. There was no basis in the record for the court's statement in its bench decision that the telephone calls were to be made solely at the children's discretion. In view of the language in the order of protection, the children's wishes with respect to contact with petitioner were not controlling.

Matter of Anthony C. v Kristine Z., 38 AD3d 1317 (4th Dept 2007)

Violence in Children's Presence Warrants Order in Favor of Children

Although respondent erroneously appealed from the fact-finding order, the Appellate Division exercised its discretion to treat the notice of appeal as valid, deemed the appeals taken from the orders of protection, and affirmed. The record supported Family Court's finding that petitioner was the more credible witness and its determination that respondent committed acts constituting the crime of assault in the third degree, thus warranting the issuance of orders of protection in favor of the parties' children and petitioner. Evidence that respondent committed acts of violence against petitioner in the presence of each child warranted the issuance of the order of protection in favor of the children.

Matter of Danielle S. v Larry R.S., Jr., 41 AD3d 1188 (4th Dept 2007)

PATERNITY

Default Vacated

Family Court denied and dismissed petitioner's motion to vacate an order of filiation entered upon his default. The Appellate Division reversed. Petitioner met his burden of establishing a reasonable excuse for the default by averring that he did not refuse to be produced for the court appearance, but failed to appear because the correctional facility had no record of the proceeding. Further, by requesting that a genetic marker test be ordered, petitioner is thereby deemed to assert the defense that he is not the father at issue and thus made the requisite showing of a meritorious defense.

Matter of Pablo G. v Oneida County Dept. of Soc'l Servs., 38 AD3d 1219 (4th Dept 2007)

Court Must Appoint Law Guardian and Hold Hearing Before Vacating Order

Respondent DSS obtained an order of filiation in 1994 determining that petitioner was the child's father and directing him to provide support. Based on a privately arranged DNA test that excluded him as father, petitioner commenced a proceeding seeking an order determining that he was not the biological father and suspending all support obligations. Family Court granted the petition upon default of the mother, whereupon respondent moved to "reopen the paternity and support proceedings" and the court denied the motion. The Appellate Division reversed. Although the court properly determined that there was a reasonable excuse for the default, the court also should have determined that respondent provided a meritorious defense, based on the court's failure to appoint a law guardian and to conduct a best interests hearing before determining whether to grant the petition. If a determination by Family Court has the potential to prejudice the child's interests, appointment of a law guardian to represent the best interests of the child is necessary. Further, a hearing must be conducted to determine the child's best interests prior to vacating an order of filiation.

Matter of Troy D.B. v Jefferson County Dept. of Soc'l Servs., 42 AD3d 964 (4th Dept 2007)

Petitioner Father Properly Estopped From Denying Paternity

Family Court properly determined that petitioner father was estopped from denying paternity based on the best interests of the child, and dismissed the petition. The child was born in 1992 and following the parties' divorce in 1998, she resided continually with the father. In May 2006 the father received information that gave him reason to believe he was not the child's biological father, and a DNA test confirmed this. He then told the child he was not her biological father, whereupon she moved out of his home and into the mother's. The child justifiably relied on the father's representations and formed a bond with him, to her ultimate detriment. The father failed to present any expert testimony indicating that the paternal relationship had been demolished and that further contact with him would be damaging to her.

Matter of Bruce W.L. v Carol A.P., 46 AD3d 1471 (4th Dept 2007), *lv denied* 10 NY3d 707

Court Did Not Lack Subject Matter Jurisdiction Over Paternity Proceeding

Family Court granted petitioner father an order of filiation, and respondent mother appealed, contending that the court lacked subject matter jurisdiction because it was a child custody proceeding pursuant to the UCCJEA and the child's home state was Michigan. The Appellate Division affirmed. Pursuant to DRL § 75-a (4), a child custody proceeding is defined as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for . . . paternity . . ., in which the issue may appear." Here, the sole issue before the court was

paternity, and thus the jurisdictional requirements of DRL § 76 were inapplicable.

Matter of Anthony S.P. v Gina L.R.-W., 52 AD3d 1249 (4th Dept 2008)

PINS

New Dispositional Hearing Required

Family Court advised respondent at fact-finding of her right to remain silent, whereupon she admitted to allegations in the petition. At the dispositional hearing, however, the court did not advise her of her right to remain silent and, following her testimony, adjudicated her a person in need of supervision and placed her in the custody of DSS. The Appellate Division agreed with respondent that the court violated FCA § 741 (a), which required the court to advise respondent of her right to remain silent at the commencement of any hearing under article 7, and that the violation constituted reversible error. Thus the Appellate Division modified the order and remitted for a new dispositional hearing. The petition, however, was not jurisdictionally defective: the petition and attached documents alleged sufficient detail and, although the petition did not expressly allege that petitioner had "complied with the provisions" of FCA § 735 (§ 732 [d]), the attached documents established petitioner's compliance.

Matter of Mercedes M.M., 52 AD3d 1210 (4th Dept 2008)

Adjudication Reversed

Family Court found that respondent was a person in need of supervision. The Appellate Division reversed. Petitioner failed to preserve for review its contention that the court erred in substituting a petition that alleged that respondent was a person in need of supervision for a petition alleging that respondent was a juvenile delinquent at the close of petitioner's proof at the fact finding hearing. Although the court may, with the consent of petitioner, substitute a petition alleging that respondent was a person in need of supervision for a petition alleging that he or she was a juvenile delinquent, here the court failed to obtain petitioner's consent. Further, the court failed to determine at the conclusion of the fact finding hearing whether respondent committed the acts alleged in the petition, and the court further erred in ordering that respondent be placed under probation supervision without ordering a probation investigation and then conducting a dispositional hearing.

Matter of Felix G., 56 AD3d 1285 (4th Dept 2008)

TERMINATION OF PARENTAL RIGHTS

Mere Possibility that Condition Might Improve Insufficient for Reversal

Family Court terminated respondent's parental rights on the ground of mental illness. The Appellate Division affirmed. The court's determination was supported by clear and convincing evidence. Contrary to the contention of respondent, the mere possibility that her condition could improve in the future with proper treatment was insufficient to vitiate the determination.

Matter of Steven M., 37 AD3d 1072 (4th Dept 2007)

Abandonment Not Precluded by Insubstantial Contact

Family Court determined that the child was an abandoned child and terminated the rights of respondent. The Appellate Division affirmed. Even crediting the testimony of respondent that he visited with his child in a parking garage for 10 to 15 minutes on six different occasions after the scheduled visits between the child and his mother, Family Court properly determined that such insubstantial contact did not preclude a fining of abandonment. Furthermore, the subject intent of respondent to seek custody of his child when respondent was released from prison was not sufficient to preclude a finding of abandonment.

Matter of Timothy H., 37 AD3d 1119 (4th Dept 2007), *lv denied* 8 NY3d 813

Record Sufficient for Appellate Division to Make Its Own Findings

Respondent contended on appeal that remittal was required because the court terminated her parental rights along with those of the respondent father based on "their" mental illness and failed to make individual findings with respect to her. The Appellate Division affirmed, making its own findings based on the record. The court-appointed psychologist testified that respondent suffered from severe anxiety and disabling depression, as well as a personality disorder not otherwise specified, and that respondent was mentally ill. The psychologist based her conclusions on respondent's reported history and test results, together with the psychologist's clinical observations of respondent, both alone and with her children. The psychologist further testified that the children would be in danger of neglect and possible abuse for the foreseeable future if they were returned to respondent. The only witness presented by respondent was her counselor, who testified that respondent made "dramatic progress" in counseling, but the counselor conceded that respondent could not properly parent the two-year-old child as of the time of the hearing on the petition. In addition, the conclusion of the counselor that respondent was able to care for the other child was not based on the counselor's observation but was based only on respondent's statement to the counselor to that effect.

Matter of Charity A., 38 AD3d 1276 (4th Dept 2007)

Respondent Not Likely to Change Sufficiently to Enable Her to Parent Children

Family Court did not abuse its discretion in refusing to enter a suspended judgment, and properly terminated respondent's parental rights with respect to each of her three children based on a finding of permanent neglect. The record established respondent lacked space in her home to accommodate the children and had no stable employment. The minimal progress she made in addressing her own personal issues was insufficient to establish that she was able to assist the children with their special needs. The court's determination that respondent was not likely to change sufficiently to enable her to parent the children was entitled to great deference, and any progress respondent made was not sufficient to warrant further prolongation of the children's unsettled familial status.

Matter of Brendan S., 39 AD3d 1189 (4th Dept 2007)

Petitioner Failed to Establish Diligent Efforts and Permanent Neglect

Family Court found respondent's child to be permanently neglected and terminated her parental rights. The Appellate Division reversed on the law. Petitioner failed to meet its initial burden of establishing it made diligent efforts to encourage and strengthen the parental relationship because, based on the evidence presented by petitioner, petitioner failed to tailor its efforts to the needs of this particular parent and child. Even assuming petitioner met its initial burden, petitioner failed to establish that respondent mother failed to plan for the child's future although physically and financially able to do so, and thus petitioner failed to establish that respondent permanently neglected the child. The Appellate Division noted that a petition for termination of parental rights on the ground of mental retardation might be appropriate.

Matter of Olivia L., 41 AD3d 1226 (4th Dept 2007)

Failure to Recognize Child's Needs Properly Considered

Family Court terminated respondent's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The record established that, despite petitioner's efforts to strengthen the parental relationship by providing respondent with drug and alcohol counseling, biweekly visitation with the child, and joint counseling for respondent and the child, respondent was unable to recognize the child's emotional and developmental needs or her own role in contributing to the child's psychological problems, including a diagnosis for "reactive attachment disorder." Respondent's unwillingness to recognize and address the child's particular needs was properly considered by the court as evidence of a failure to take the steps necessary to provide the child with appropriate care.

Matter of Noemi D., 43 AD3d 1303 (4th Dept 2007), *lv denied* 9 NY3d 814

Termination Based on Permanent Neglect Reversed

Appellate Division agreed with respondent that petitioner failed to establish that respondent failed to plan for the child's future although physically and financially able to do so. Inasmuch as petitioner established that respondent father was unable, by reason of his personality disorders and mental health problems, to plan for the child's future, the Appellate Division concluded that petitioner failed to establish he permanently neglected the child, but noted that, under the circumstances, a petition for termination based on the ground of mental illness may be appropriate.

Matter of Olivia L., 43 AD3d 1339 (4th Dept 2007)

Suspended Judgment Properly Revoked

Family Court revoked a suspended judgment entered upon a finding of permanent neglect and terminated respondents' parental rights. The Appellate Division affirmed, noting at the outset that respondent mother's contention that the terms of the suspended judgment were so restrictive that it was impossible for her to comply with them related to whether petitioner exercised "diligent efforts," an issue not properly before the Court because it was determined in prior proceedings, but which, in any event, was without merit because respondents admitted to permanent neglect of the children and consented to the entry of the suspended judgment, and thus were not aggrieved. Revocation of the suspended judgment was proper because the record supported the court's determination that respondents violated numerous terms of the suspended judgment and that it was in the children's best interests to terminate parental rights.

Matter of Ronald O., 43 AD3d 1351 (4th Dept 2007)

Respondent Continued to Deny History of Sexual Abuse

Family Court did not err in determining that petitioner met its burden of establishing by clear and convincing evidence that it made the requisite "diligent efforts" and that despite those efforts, the father "failed substantially and continuously or repeatedly to plan for the future of the children for a period of more than one year following their placement." The father failed to comply with the requirements of his service plan inasmuch as he, inter alia, did not successfully complete sexual abuse counseling. Family Court did not abuse its discretion in refusing to enter a suspended judgment and terminating respondent's parental rights. The father continued to deny his history of sexual abuse, failed to comply with the terms of the required sexual abuse and parenting counseling, and failed to visit with the children on a regular basis.

Matter of Dakota S., 43 AD3d 1414 (4th Dept 2007)

Termination Based on Abandonment Affirmed

Family Court properly terminated respondent father's parental rights based on abandonment. Petitioner established that the father failed to communicate with the child and had contact with petitioner only while in court and through a single letter to the caseworker in the six months immediately preceding the filing of the petition. That limited contact did not preclude a finding of abandonment. Although father testified that he asked the caseworker at the hearing for the address of the child's foster mother, the caseworker contradicted that testimony, and the resulting credibility issue was for the court to decide. The court's finding was also not precluded based on the fact that the father informed petitioner that he planned for his fiancee to take custody of the child and he was not contacted by petitioner following its unsuccessful attempts to contact his fiancee. Petitioner was not obligated to contact the father or initiate efforts to encourage his parental relationship. The father's expressions of subjective intent to care for the child at a future time did not preclude a finding of abandonment.

Matter of Jasmine J., 43 AD3d 1444 (4th Dept 2007)

Respondent Unable to Overcome Specific Problems That Led to Removal

Family Court properly revoked a suspended judgment entered upon a finding of permanent neglect and terminated respondent's parental rights. The record established that the child has severe disabilities and that the mother receives disability income because of "emotional disabilities." Although the mother attempted to comply with the terms and conditions of the suspended judgment, the record established she was unable to overcome the specific problems that led to the removal of the child.

Matter of Erie County Dept of Soc. Servs. v Anthony P., Jr., 45 AD3d 1384 (4th Dept 2007)

Law Guardian Should Have Informed Court of Child's Wishes, But Termination Affirmed

Family Court revoked a suspended judgment entered upon respondent's consent to a finding of permanent neglect and terminated his parental rights. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that the father failed to comply with the terms and conditions of the suspended judgment. The Appellate Division noted, however, that while the Law Guardian should have informed the court of the child's wishes pursuant to the Guidelines for Law Guardians in the Fourth Department, the Law Guardian's failure to do so did not prevent the court from considering the child's best interests.

Matter of Davona L., 45 AD3d 1392 (4th Dept 2007), *lv denied* 10 NY3d 707

Diligent Efforts Not Required

Family Court terminated respondent's parental rights upon a finding of permanent neglect. The Appellate Division affirmed, rejecting the contention that petitioner failed to establish by clear and convincing evidence that it exercised diligent efforts to strengthen the parent-child relationship. Pursuant to SSL § 384-b (7) (e) (ii) petitioner was not required to present such evidence. The Appellate Division also rejected respondent's contention that petition failed to meet its burden of establishing that he failed to plan for his child's future while he was incarcerated. Because he was subjected to disciplinary confinement for committing infractions while incarcerated, he was ineligible to participate in rehabilitation programs that petitioner recommended as part of a plan to reunite him with the child.

Matter of Ty'Keith R., 45 AD3d 1397 (4th Dept 2007), *lv denied* 10 NY3d 701

Respondent Had No Contact With Children For Almost Five Months

Respondent father appealed from an order terminating his parental rights based on a finding of permanent neglect. The Appellate Division affirmed. The record showed that father chose to have no contact with the children for almost five months and that his visitation was sporadic for over seven months, for periods of time both before and after the five-month period.

Matter of Charles B., 46 AD3d 1430 (4th Dept 2007), *lv denied* 10 NY3d 705

Respondent Unable to Overcome Specific Problems That Led to Removal

Family Court properly revoked a suspended judgment entered upon a finding of permanent neglect and terminated respondent's parental rights. The record established that the child has severe disabilities and that the mother receives disability income because of "emotional disabilities." Although the mother attempted to comply with the terms and conditions of the suspended judgment, the record established she was unable to overcome the specific problems that led to the removal of the child.

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Fourth Department, the Law Guardian's failure to do so did not prevent the court from considering the child's best interests.

Matter of Davona L., 45 AD3d 1392 (4th Dept 2007), *lv denied* 10 NY3d 707

Father's Evidence Prior to Six-Month Period Not Relevant

Respondent father appealed from an order terminating his parental rights on the ground of abandonment. The Appellate Division affirmed, rejecting the father's contention that he was not allowed to present a defense. The father was precluded only from presenting evidence concerning the period prior to the six-month period before the petition was filed and his incarceration was not a defense to the abandonment petition. The evidence at the hearing established that he had little or no contact with the child in the six months prior to the filing of the petition and he failed to rebut the presumption that he had abandoned his child.

Matter of Maliq M., 48 AD3d 1251 (4th Dept 2008), *lv denied* 10 NY3d 710

Limited Contact Does Not Preclude Finding

Petitioner established by clear and convincing evidence that respondent abandoned his child by failing to visit her or to communicate with her or petitioner, although able to do so, during the six months immediately preceding filing of the petition. The record established that father made one telephone call to the child, saw her on one occasion at the funeral of his mother, and wrote one letter to petitioner. That limited contact was insubstantial and did not preclude finding of abandonment.

Matter of Tonasia K., 49 AD3d 1247 (4th Dept 2008)

Termination Properly Granted on Ground of Permanent Neglect But Not on Ground of Mental Illness

Petitioner commenced the proceeding by initially filing a petition seeking termination of respondent's parental rights with respect to his two children on ground of mental illness and then filing a second petition seeking termination on ground of permanent neglect. After a single fact-finding hearing, Family Court granted both petitions. The Appellate Division modified, noting that granting both petitions was logically inconsistent, but concluding that the court properly granted termination on ground of permanent neglect but not on ground of mental illness. The psychologist testified that the tests administered to respondent were inconclusive and that, during interviews, the father displayed no symptoms of mental illness. The psychologist's conclusion that the father suffered from paranoid schizophrenia was based on the children's statements to the psychologist that the father had stated that other people sent "impulses" to him and that the children would be "switched" and replaced with evil people if they went outside, as well as statements from unnamed people that the father covered the lights on his microwave oven with a towel and altered the grades on the children's report card. No

witnesses testified that they observed the father engaging in strange behavior, and there was no testimony concerning the frequency of strange behavior or connecting such behavior with the circumstances that led to the removal of the children. Termination based on permanent neglect was proper, however, based on his failure to complete a required program of mental health counseling and his failure to acknowledge the children's educational problems, both of which indicated that he was unwilling to correct the conditions that led to the placement of the children in the custody of petitioner. Finally, the Court noted that a dispositional hearing was required based on the termination on ground of permanent neglect.

Matter of Kyle K., 49 AD3d 1333 (4th Dept 2008), *lv denied* 10 NY3d 715

Termination on Ground of Abandonment Affirmed

Family Court properly terminated respondent father's parental rights on ground of abandonment. Petitioner established that in the six months immediately preceding filing of the petition, the father failed to visit or communicate with his child, and his sole contact with petitioner during the period was insubstantial. Thus petitioner established by clear and convincing evidence that the father abandoned the child. Further, the record established that when the father contacted petitioner concerning visitation, the caseworker advised him to obtain a copy of the order setting forth the manner in which the supervised visitation was to occur, and informed him that she would then make arrangements for the visitation. Petitioner's insistence upon compliance with the order with respect to visitation was not interference sufficient to preclude a finding of abandonment.

Matter of Crystal M., 49 AD3d 1312 (4th Dept 2008)

More Required Than Parents' Mere Participation in Programs

Family Court revoked a suspended judgment entered upon a finding of permanent neglect and terminated respondents' parental rights. Noting that the mother failed to preserve her contention on appeal that the court erred in accepting her consent to the finding without conducting a further inquiry and that reversal was required because she was not given notice pursuant to SSL § 384-b (3) (e) that the children could be freed for adoption, the Appellate Division nevertheless concluded that the contentions were without merit. Additionally, petitioner established the requisite "diligent efforts" during the period of the suspended judgment. Petitioner provided the parents with a "coparent" who assisted with household management skills and arranged supervised visitation with the children; services for the mother with respect to personal hygiene, employment skills, and financial management skills, and services for the father that included parenting classes and counseling services. More than the parents' mere participation in the programs was required. The Appellate Division modified the order, however, and remitted for further proceedings on the issue whether post-termination contact between parents and children was in the children's best interests.

Matter of Bert M., 50 AD3d 1509 (4th Dept 2008), *lv denied* 11 NY3d 704

One Contact With Caseworker Insubstantial

The Appellate Division affirmed Family Court's order terminating respondent's parental rights on ground of abandonment. Petitioner established by clear and convincing evidence that he abandoned his two children. The caseworker testified she received a letter from the father, who was incarcerated, asking why his children were in foster care and seeking their address. In reply, the caseworker advised the father to send any cards or letters for the children to petitioner and that she would deliver them, but she received no correspondence for the children nor did the father contact her again, although she sent him additional correspondence. She testified that there was no indication in her file that the father contacted his children. The Appellate Division concluded that the father's sole contact with the caseworker during the statutory period was insubstantial and did not preclude the finding of abandonment. Although the father testified he sent letters to the children, that testimony merely presented a credibility issue that the court was entitled to resolve against the father.

Matter of Rakim D.D.S., 50 AD3d 1521, *lv denied* 10 NY3d 717

Incarcerated Respondent's Absence at Dispositional Hearing Did Not Violate Due Process

The Appellate Division affirmed Family Court's order terminating respondent's parental rights on the ground of permanent neglect and freeing his child for adoption. The due process rights of respondent, who was incarcerated, were not denied by the court's conducting the dispositional hearing in his absence. He was present at the fact-finding hearing and testified that he planned to place the child with his brother while he was incarcerated. Petitioner had previously determined, however, that placement with the brother was unsuitable, and at the dispositional hearing father's attorney questioned the caseworker concerning petitioner's efforts to determine whether there were any suitable relatives of the father with whom the child could be placed. Although it would have been preferable for the court to order that respondent be produced for the hearing or to arrange for his participation by telephone, father's attorney vigorously represented his interests at the hearing and thus father's absence did not prejudice him. Additionally, petitioner established it exercised diligent efforts both before and after father's incarceration. Petitioner established the father did not meaningfully participate in substance abuse and mental health counseling or parenting classes prior to his incarceration, and petitioner had no duty to modify the plan when the father did not make reasonable efforts to avail himself of the services offered. Although petitioner's duty to exercise diligent efforts after his incarceration included making suitable arrangements for visitation within the correctional facility, if such visitation were in the child's best interests, petitioner was relieved of this obligation when the incarcerated parent fails on more than one occasion to plan for the child's future. Here, although the

father indicated by letter to the caseworker that he had some relatives, including his brother, with whom the child could be placed while he was incarcerated, he never replied to the caseworker's request that he provide contact information.

Matter of Eric L., II, 51 AD3d 1400 (4th Dept 2008), *lv denied* 10 NY3d 716

Law Guardian Properly Represented Respondent's Two Children Individually

Family Court properly terminated respondent mother's parental rights with respect to two of her children, and did not abuse its discretion in refusing to enter a suspended judgment. The record established that, although the mother made some progress after the petition was filed, the progress was not sufficient to warrant further prolongation of the unsettled status of the children, and the court's determination that the mother was not likely to change was entitled to great deference. Further, the court did not abuse its discretion in denying her request for an adjournment to enable her to present the testimony of two witnesses. The mother had ample opportunity to subpoena the witnesses but did not do so until the day before she wanted them to testify, months after the hearing began, and she was unable to give any indication that their testimony would be favorable to her. Finally, she did not preserve the contention that the children had conflicting interests and thus should not have been jointly represented by the same Law Guardian. Nevertheless, the contention was without merit: the record established that the Law Guardian properly represented the children individually.

Matter of Kaseem J., 52 AD3d 1321 (4th Dept 2008)

Finding Based on Admission of Permanent Neglect Affirmed

The Appellate Division rejected the contention of the respondent father that Family Court based its finding of permanent neglect on "known false admissions," thereby denying the father due process. The court stated on the record that it was accepting his admissions of permanent neglect as knowing and voluntary and made with the advice and assistance of counsel. Further, the record supported the court's determination that a suspended judgment was in the children's best interests. Finally, in view of the father's admissions of permanent neglect, the court was not required to determine whether petitioner exercised diligent efforts.

Matter of Shadazia W., 52 AD3d 1330 (4th Dept 2008), *lv denied* 11 NY3d 706

Court Properly Determined Permanent Neglect and Terminated Parental Rights

Family Court terminated respondent parents' children parental rights based upon a finding of permanent neglect. The Appellate Division affirmed. Respondent mother is the biological parent of the four children, and respondent father was the biological parent of the youngest three of the four children. The putative father of the oldest child

voluntarily surrendered his rights to the oldest child prior to the commencement of the proceeding. The court did not err in determining that father's three children were permanently neglected. Petitioner established that the father failed to maintain contact with or plan for the future of his children, despite petitioner's diligent efforts to encourage and strengthen the relationship between the father and his children. Further, the court did not err in the admission of evidence that concerned father's drug rehabilitation because those records were admissible under the business records exception to the hearsay rule. The court did not err in terminating respondents' parental rights rather than issuing a suspended judgment. The evidence presented established that there was no reason to further prolong the children's unsettled familial status. The parents failed to preserve for review their contentions that the absence of information concerning the children's wishes required reversal. Although the law guardian should have informed the court of the children's wishes, the failure of the law guardian to do so did not prevent the court from considering the children's best interests.

Matter of Alyshia M. R., 53 AD3d 1060 (4th Dept 2008), *lv denied* 11 NY3d 707

Respondent Father's Parental Rights Properly Terminated

Family Court terminated respondent father's parental rights with respect to his two children. The Appellate Division affirmed. Respondent was serving a prison term of 25 years to life for murdering the children's mother. The court properly concluded that the best interests of the children would be served by freeing them for adoption by their foster parents and not by the long term foster care proposed by respondent, because it would deprive the children of a permanent, nurturing family relationship.

Matter of Cheyanne V., 55 AD3d 1383 (4th Dept 2008)

Termination of Parental Rights Affirmed

Family Court adjudged child to be permanently neglected, terminated respondent parents' parental rights, and placed the child in the care of petitioner DSS. The Appellate Division affirmed. Petitioner encouraged respondents to comply with the requirements of the disposition, including regular visitation, counseling, parenting skills training, appropriate housing and stable income. Petitioner also made efforts to provide Spanish-speaking interpreters and service providers. Further, petitioner made diligent efforts to reunite respondents with their child and the child was returned twice to their care. The two times when the child was returned to respondents, the child sustained an injury or lost a significant amount of weight. Respondents failed to acknowledge responsibility for the child's injuries or medical problems while he was in their care.

Matter of Abraham C., 55 AD3d 1442 (4th Dept 2008)

Termination of Parental Rights Affirmed

Family Court terminated the parental rights of respondent father. The Appellate Division affirmed. Petitioner DSS met its burden of establishing by clear and convincing evidence that the father failed to visit his daughter or to communicate with her or petitioner. Petitioner established that respondent failed to visit his daughter despite the fact that the court permitted father to visit if he obtained a negative drug test. Even assuming respondent established that he visited his daughter on one occasion and that he had bi-monthly telephone contact, such contact was insubstantial and did not preclude the finding of abandonment.

Matter of McKayla, __ AD3d __ , 867 NYS2d 592 (4th Dept 2008)

Termination of Parental Rights Based Upon Mental Illness Affirmed

Family Court terminated the parental rights of respondent parents. The Appellate Division affirmed. The appeal from the order insofar as it concerned the parents' older child was moot because she had attained the age of 18. With respect to the parents' younger child, petitioner met its burden of demonstrating by clear and convincing evidence that the parents are presently and for the foreseeable future unable to provide proper and adequate care for the child by reason of their mental illness. The court was entitled to credit the testimony of the court-appointed psychologist that the parents, by reason of mental illness, were unable to acknowledge or meet the special needs of their son, who has Down syndrome, and that the prognosis for recovery with respect to each parent was poor.

Matter of Anthony M., 56 AD3d 1124 (4th Dept 2008)

Court Properly Revoked Suspended Judgment and Terminated Parental Rights

Family Court revoked an order of suspended judgment entered upon a finding of permanent neglect and terminated respondent mother's parental rights. The Appellate Division affirmed. Petitioner DSS established by a preponderance of the evidence that the mother failed to comply with the terms of the suspended judgment. Specifically, the record established that the mother failed to remain drug free, failed to attend required treatment for substance abuse, and failed to recognize the detrimental impact that domestic violence in the home had on the child. Although the evidence showed that the child maintained a bond with the mother, there also was evidence that the child, who had been in foster care for over two years, had bonded with the foster family.

Matter of Michael D.H. Jr., 56 AD3d 1269 (4th Dept 2008)

Termination of Parental Rights Affirmed

Family Court terminated respondent mother's parental rights and freed the child for adoption. The Appellate Division affirmed. The court did not abuse its discretion in

terminating mother's parental rights rather than issuing a suspended judgment. Petitioner DSS established at the disposition that over the course of more than four years the child had been removed from foster care and returned to respondent's care numerous times but had been returned to foster care because respondent had repeatedly relapsed after completing rehabilitation programs, and that, at the time of disposition, the child was thriving with his foster mother and that the foster mother wished to adopt him. Despite any progress made by respondent in the months preceding the disposition, a suspended judgment was not in the best interest of the child.

Matter of Donovan W., 56 AD3d 1279 (4th Dept 2008)

By Reason of Mental Illness, Parental Rights Properly Terminated

Family Court terminated respondent father's parental rights with respect to his two daughters and denied his request for post-termination visitation. The Appellate Division affirmed. The court properly determined that respondent was unable, by reason of mental illness, to provide proper and adequate care for the children. The evidence, including the testimony of two court-appointed psychologists called to testify by petitioner, and a third psychologist called to testify by the Law Guardian, established that respondent had a personality disorder not otherwise specified that, combined with alcohol dependency and posttraumatic stress disorder, would prevent him from providing proper and adequate care for the children. Although the psychologist who treated respondent testified on his behalf that he could provide proper care to the children if he were gradually given the responsibilities of a caregiver, with a system in place to provide adequate treatment and support for his alcohol, mental health, housing and financial problems, the respondent's psychologist substantially concurred with the diagnosis of petitioner's experts and that of the Law Guardian. Inasmuch as the father was unable to maintain such a system throughout the proceedings despite the assistance of petitioner, the "mere possibility" that he might be capable of providing care at some indefinite future time did not warrant denial of the petition. Finally, respondent failed to establish that contact with the children would be in their best interests.

Matter of Diana M.T., 57 AD3d 1462 (4th Dept 2008)

Suspended Judgment Properly Revoked

Family Court revoked a suspended judgment entered upon a finding of permanent neglect and terminated respondent mother's parental rights. The Appellate Division affirmed. The court's determination that respondent violated the conditions of the suspended judgment was supported by a preponderance of the evidence. The Appellate Division did not consider respondent's contention that petitioner failed to establish that it made diligent efforts and that the evidence did not support a finding of permanent neglect: those issues were conclusively determined in the prior proceeding

to terminate respondent's parental rights, and were therefore not properly before the Appellate Division. Further rejected was respondent's contention that the court failed to conduct a dispositional hearing inasmuch as a hearing on a petition alleging the violation of suspended judgment is part of the dispositional phase of a permanent neglect proceeding.

Matter of Seandell L., 57 AD3d 1511 (4th Dept 2008)

Father Failed to Communicate

Family Court terminated respondent father's parental rights with respect to his two daughters upon a finding that he abandoned them. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that respondent failed to visit his daughters or to communicate with them or petitioner although able to do so, during the six-month period immediately preceding the filing of the petition. Petitioner's caseworker testified that respondent, who was incarcerated, failed to communicate with or to contact petitioner within the statutory period, and that the children indicated to her that they had not spoken with their father during that period. Respondent's incarceration during the statutory period did not relieve him of his responsibility to communicate with the children or petitioner.

Matter of Fonchasity H., 57 AD3d 1525 (4th Dept 2008)