

**Office of Attorneys for Children
Appellate Division, Fourth Department**

2010 Case Digest

ADOPTION

Abuse of Discretion to Deny Respondent's Request for Adjournment

Family Court dispensed with respondent's consent to the adoption of the subject child. The Appellate Division reversed and remitted. On October 14, 2008, respondent was served with the petition seeking to allow petitioners to adopt the child. On December 1, 2008, respondent's attorney appeared for the first court appearance. The court informed respondent that a hearing on the merits of the petition would take place that day. Respondent's attorney requested an adjournment until January 12, 2009, on the ground that he was unaware that the hearing was scheduled to take place that day, but the court denied the request and went forward with the hearing. There was no evidence that the father had notice that the hearing was scheduled to occur on December 1, 2008. Moreover, the record established that the proceedings were not protracted, that this was the father's first request for an adjournment, and that the court had adjourned proceedings concerning the child's biological mother to the precise adjournment date sought by respondent.

Matter of Nicole J., 71 AD3d 1581 (4th Dept 2010)

Court Failed to Determine Whether Enforcement of Post-Adoption Agreement in Child's Best Interests

Family Court granted the motion of respondent adoptive parents to dismiss biological mother's petition to enforce a post-adoption contract. The Appellate Division reversed. The court properly applied principles of contract law in making its determination. The agreement, which was incorporated into the conditional surrender order, provided that it would be voided if the biological mother missed two visits within any 12-month period. The biological mother testified at the hearing on the petition that she missed the June 2008 visit because she was incarcerated and, although the adoptive parents ceased visitation after August 2008, she would have missed the December 2008 visit as a result of her incarceration. Thus, the biological mother failed to demonstrate that she was ready, willing and able to meet her obligations under the contract. Her incarceration was no excuse because it stemmed from her own conduct. The court erred, however, in failing to determine whether enforcement of the agreement was in the child's best interests. Because the record was insufficient for the Appellate Division to make that finding, the case was reversed and remitted to the trial court.

Matter of Mya V.P., 79 AD3d 1794 (4th Dept 2010)

CHILD ABUSE AND NEGLECT

Petitioner Established Educational Neglect

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

Matter of Cunntrrel A., 70 AD3d 1308 (4th Dept 2010), *lv dismissed* 14 NY3d 866

Finding of Abuse and Derivative Neglect Affirmed

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

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

Prior Neglect Adjudication Too Remote to Sustain Derivative Neglect

Respondent mother appealed from an order adjudicating her child to be a neglected child based on a finding of derivative neglect. The Appellate Division reversed and dismissed the petition. The Appellate Division noted that although respondent's contention that the court erred in failing to conduct a hearing within three court days of her application pursuant to FCA 1028 was moot, Family Court had erred because no good cause was demonstrated for the delay. The Appellate Division determined that the derivative neglect finding also was error. The mother consented to a prior adjudication of neglect with respect to her two other children based on the condition of her home and her failure to obtain medical treatment for the children. Five years later the child at issue was born and petitioner commenced this proceeding with respect to that child. Under the circumstances, the prior adjudication of neglect was too remote in time to sustain the court's finding of derivative neglect. In addition, the evidence presented at

the hearing failed to establish that the conditions that led to the prior neglect adjudication currently existed and could reasonably be expected to exist in the foreseeable future. The witnesses presented by petitioner had either no contact or very limited contact with the mother in the 2 ½ years before the birth of the child at issue and thus they were unable to provide testimony with respect to the current living situation of the mother. Indeed, the mother presented several witnesses who testified that, when this proceeding commenced, the mother's home was clean, she had attended all prenatal appointments for the child, and she was equipped with the skills necessary to be a good parent.

Matter of Dana T., 71 AD3d 1376 (4th Dept 2010)

Neglect Based on Domestic Violence Affirmed

Family Court adjudged that respondent parents neglected the subject children, two of whom were the father's biological children and two of whom were the mother's biological children. The Appellate Division affirmed. Respondent father failed to preserve his contention that the court erred in relying on evidence of the father's use of alcohol that postdated the filing of the neglect petition. In any event, the court's finding was based also on evidence that the father engaged in acts of domestic violence against the mother and at least one of the children. The children's out-of-court statements describing the domestic violence were sufficiently corroborated by independent proof, including the testimony of the school nurse and petitioner's caseworker. Respondents also contended that the court erred in removing the children from the home without conducting a full dispositional hearing. The appeals from the order insofar as they concerned disposition were moot because superseding permanency and custody orders with respect to all the children had been entered.

Matter of Dustin B., 71 AD3d 1426 (4th Dept 2010)

Derivative Abuse Based on Causing Death of Sibling Affirmed

Family Court ordered a suspended judgment, finding that respondent father derivatively abused three of his children based upon his admission that he committed serious abuse in causing the death of their sister. The Appellate Division affirmed. The evidence was legally sufficient to support the finding of derivative abuse: proof of abuse or neglect of one child is admissible evidence on the issue of abuse or neglect concerning any of respondent's other children. Further, if the conduct that formed the basis for the finding of abuse regarding one child is so proximate in time to the derivative proceeding that it reasonably can be concluded that the condition still exists, a finding of abuse should be made as to the surviving children. Respondent failed to preserve his contention that the court erred in failing to conduct a separate dispositional hearing, and that contention and respondent's remaining contentions, were without merit.

Matter of Keyarei M., 71 AD3d 1510, *lv denied* 14 NY3d 712 (2010)

Family Court Properly Exercised Inherent Authority to Vacate Prior Order

Family Court granted agency's petition and vacated an order that had dismissed a petition alleging abuse and neglect. The Appellate Division affirmed. Subsequent to the dismissal, respondent mother entered an *Alford* plea with respect to the sexual abuse of one of her children. Although the judgment of conviction upon her guilty plea did not constitute newly discovered evidence within the meaning of CPLR 5015, the court properly exercised its inherent authority to vacate a prior order in the interest of justice. Here, even absent any specific admissions by the mother during her plea colloquy, her conviction of sexual abuse constituted conclusive proof of the abuse allegations in the petition with respect to that child. The conviction of sexual abuse therefore directly contradicted the testimony of the mother that she did not sexually abuse the child. Thus, the court properly exercised its discretion in vacating a prior order based on fraud. Further, the trial court had the inherent power to set aside its decision in a non-jury case on its own initiative and in doing so, may ignore the 15-day limitation set forth in CPLR 4405. The mother's remaining contentions were without merit.

Matter of Aaron H., 72 AD3d 1602 (4th Dept 2010)

Respondents Neglected Children

Family Court adjudicated respondent parents' child and the older child of respondent mother to be neglected by respondents. The Appellate Division affirmed. Respondent father's contention that he was not the person legally responsible for the care of the mother's older child was rejected. Petitioner agency established that the father and the mother were living together as a family during the relevant time, and thus father acted as the functional equivalent of a parent with respect to the mother's older child, rendering him responsible for that child's care. The father's contention that the evidence did not support the court's determination that he neglected respondents' child was without merit. A finding of neglect was warranted here because father was an individual legally responsible for the care of a child who allowed that child to be cared for by individuals known to be unsuitable caregivers. The mother and respondents' child tested positive for cocaine at the time of the child's birth and the mother's explanation to the father with respect to those test results was not credible. In addition, the father was present during an incident prior to the date on which he allowed the mother to care for the child overnight where another individual attempted to deliver marijuana to the mother's residence. The father failed to preserve for review his contention that he was punished for exercising his right to a fact-finding hearing rather than accepting an adjournment in contemplation of dismissal.

Matter of Donell S., 72 AD3d 1611 (4th Dept 2010)

Mother Unable to Meet Her Own Needs or Needs of Any Child in Her Care

Following the termination of parental rights of respondent mother with respect to her older child on the ground of mental illness, Family Court granted petitioner agency's

motion for summary judgment and adjudged that respondent's younger child was a neglected child. The Appellate Division affirmed. Respondent was diagnosed as having bipolar disorder, attention deficit disorder, posttraumatic stress disorder, reactive attachment disorder and psychotic disorder. Respondent suffered from a thyroid condition, lead poisoning, possibly autism, and she was dependent on marijuana. Petitioner established that respondent did not follow medical advice, did not take prescribed medication and did not complete various mental health, substance abuse and anger management treatment programs. Further, in the opinion of the court appointed psychologist, respondent was unable to care for her own needs and was unable to meet the needs of any child placed in her care. Respondent's contention that the record contained triable issues of fact was rejected. Respondent's condition was longstanding and developmental in nature and there was no evidence in the record that her condition had changed. Further, the statement by respondent to a social worker during the initial investigation of the neglect petition concerning the younger child that respondent was seeing a mental health provider was unsubstantiated.

Matter of Majerae T., 74 AD3d 1784 (4th Dept 2010)

Parents Failed to Exercise Minimum Degree of Care

Family Court adjudged that respondent parents neglected their four children. The Appellate Division affirmed. Petitioner agency established by a preponderance of the evidence that the physical, mental or emotional condition of the children had been impaired as a consequence of the parents' failure to exercise a minimum degree of care. Respondent mother repeatedly subjected the children to unnecessary and demeaning physical examinations and gave them herbal remedies that she knew to be toxic. With respect to respondent father, he knew or reasonably should have known that the mother was harming the children.

Matter of Elizabeth W., 74 AD3d 1787 (4th Dept 2010)

Petitioner Established Prima Facie Case of Child Abuse and Neglect

Family Court adjudged that respondent parents abused and neglected their two-week-old child and derivatively neglected their 18-month-old child. The Appellate Division affirmed. Gaps in the transcript of the fact-finding hearing resulting from audibility problems were insignificant and did not preclude meaningful appellate review. Further, the evidence was legally sufficient to support the court's findings. Petitioner presented the testimony of a physician that established that the younger child sustained a fracture of the left humerus and a laceration of the liver and that none of the explanations offered by respondents were consistent with the nature and severity of those injuries. Petitioner also established by a preponderance of the evidence that the older child was derivatively abused and neglected because the abuse and neglect of the younger child was so closely connected with the care of the older child as to indicate that he was equally at risk.

Matter of Devre S., 74 AD3d 1848 (4th Dept 2010)

Respondent Failed to Provide Adequate Supervision

Family Court's order adjudged respondent mother's children to be neglected. The Appellate Division affirmed. The court was entitled to draw the strongest inference against mother based on her failure to testify at the fact-finding hearing. Further, petitioner met its burden of establishing by a preponderance of the evidence that the children were neglected. The court properly found that the two children, ages one and three, were in imminent risk of harm when the mother left them unattended in a vehicle for at least 15 minutes.

Matter of Serenity P., 74 AD3d 1855 (4th Dept 2010)

Respondent Mother Failed to Provide Proper Supervision

Family Court adjudged respondent mother's three children to be neglected. The Appellate Division affirmed. The evidence presented at the fact-finding hearing demonstrated that the mother attempted to commit suicide by overdosing on prescription medication causing her to lose consciousness for a prolonged period of time. Because of her voluntarily induced drug stupor, the mother failed to provide the children with proper supervision or guardianship and as a result, the children's physical, mental and emotional condition was in imminent danger of becoming impaired.

Matter of Alexandra J., 77 AD3d 1299 (4th Dept 2010)

Stepdaughter Testified to Sexual Abuse Not Aggrieved by Finding of Abuse

Family Court adjudged that respondent stepfather abused his stepdaughter and derivatively abused his daughter. The Appellate Division affirmed. The stepdaughter's appeal was dismissed. Because the stepdaughter testified at the hearing that she was sexually abused by the stepfather she was not aggrieved by the finding of neglect. Further, even if she were aggrieved, she was not entitled to affirmative relief because she did not take an appeal from the order. The court's determination of neglect was supported by a preponderance of the evidence – DNA evidence establishing stepfather's sperm and seminal material were on the stepdaughter's shorts.

Matter of Zanna E., 77 AD3d 1364 (4th Dept 2010)

Dismissal of Neglect Petition Modified

At the close of petitioner's proof, Family Court dismissed the petition on the ground that petitioner failed to make a prima facie case of neglect against respondent parents. The Appellate Division modified by reinstating the petition against respondent father insofar as the petition alleged that his alcohol abuse impaired his ability to safely care for the child. Petitioner failed to establish by a preponderance of the evidence that the child's

physical, mental or emotional condition was impaired or was in imminent danger of becoming impaired by the alleged incidents of domestic violence between the parents. Petitioner established a prima facie case of neglect with respect to the issue of respondent father insofar as the petition alleged that his alcohol abuse impaired his ability to safely care for the child. Petitioner submitted evidence that police intervention was required on several occasions during which the father engaged in violence against the mother while he was intoxicated.

Matter of Alfonzo H., 77 AD3d 1410 (4th Dept 2010)

Finding of Severe Abuse Vacated

Family Court found, among other things, that respondent father severely abused one of his sons and derivatively abused another of his sons. The Appellate Division modified by vacating the findings of severe abuse and derivative severe abuse but affirming the findings of abuse and derivative abuse. The evidence established that the son sustained injuries consistent with shaken baby syndrome and the physician that examined the child opined that some of the hematomas were days old and that the fracture preceded the most recent hematoma. None of the explanations of respondent or the mother were consistent with the extent of the child's injuries. Further, respondent's failure to testify allowed the court to draw the strongest inference against him. There was insufficient evidence of severe abuse because the injured child was also in the care of the mother and grandparents during the time frame at issue. The findings of severe abuse under these circumstances were not supported by clear and convincing evidence that respondent acted under circumstances evincing a depraved indifference to human life.

Matter of Jezekiah R. A., 78 AD3d 1550 (4th Dept 2010)

Children Neglected By Mother Where One Child Witnessed Domestic Violence

Family Court adjudicated respondent mother's three children to be neglected. The Appellate Division affirmed. Respondent did not move to dismiss the petition on the ground that the evidence was insufficient that any of her children were present during a domestic violence incident and she therefore did not preserve the issue for review. In any event, the record contained sufficient evidence from which the court could have determined that at least one of the children was present during the incident. The domestic violence case worker did not recant her testimony that one of the children was present, but instead clarified the basis for that testimony.

Matter of Syira W., 78 AD3d 1552 (4th Dept 2010)

Neglect Based on Mother's Failure to Protect Affirmed - Other Findings Vacated

Family Court adjudicated respondent mother's three children to be neglected. Respondent's failure to protect the children from their father after she was told that one

of the children had been abused by the father demonstrated a fundamental defect in her understanding of the duties of parenthood and created an atmosphere detrimental to the children's well-being. The child's out-of-court statements about the abuse were sufficiently corroborated by, among other things, the testimony of an examining physician who opined that the child's symptoms were consistent with sexual abuse, as well as the testimony of a psychologist who opined that the child's statements made during a videotaped interview were credible. The videotape was properly admitted into evidence. Its accuracy and authenticity was established by the testimony of the case worker during the fact-finding hearing. The evidence was insufficient, however, to support findings that respondent sent the children to school in inappropriate and dirty clothing and failed to give one child medication.

Matter of Annastasia C., 78 AD3d 1579 (4th Dept 2010)

Finding of Father's Sexual Abuse Against Daughter Affirmed

Family Court found that respondent father sexually abused his daughter. The Appellate Division affirmed. The finding of sexual abuse was supported by a preponderance of the evidence. The court properly determined that the child's out-of-court statements were sufficiently corroborated by the testimony of a sexual abuse validator, as well as the child's age-inappropriate knowledge of sexual conduct.

Matter of Shardanae T. L., 78 AD3d 1631(4th Dept 2010)

Ample Corroboration of Child's Statements of Abuse

Family Court adjudged that respondent father abused his child and placed the child with DSS until completion of the next permanency hearing. The Appellate Division affirmed. There was sufficient corroboration of the child's unsworn out-of-court statements, i.e., statements made by respondent to an investigator employed by the New York State Police, as well as the testimony of a psychologist, who determined that the contextual details of the child's statements were consistent with a description of actual events. Respondent received effective assistance of counsel.

Matter of Alston C., 78 AD3d 1660 (4th Dept 2010)

Petition Reinstated With Respect to Father

Family Court dismissed the neglect petition against respondent parents. The Appellate Division modified by reinstating the petition against the father. The court did not err in refusing to admit evidence of domestic violence incidents from May 2008 through January 2009 because any allegations concerning those incidents were raised or could have been raised in a separate petition previously filed by petitioner in January 2009, in which petitioner alleged that the parents neglected the child. Thus, the evidence was properly excluded on the ground of res judicata. The court erred, however, in granting that part of the parents' motion to dismiss the petition against the father. Petitioner

presented evidence that during a May 2009 altercation between the parents, the father was wielding a knife and pushed the mother onto a bed where the six-month-old child was lying.

Matter of Alfonzo T., 79 AD3d 1724 (4th Dept 2010)

CHILD SUPPORT

Respondent Willfully Violated Child Support Order

Family Court determined that respondent mother willfully violated a prior child support order and imposed a 30-day suspended sentence on the condition that she pay all future child support. The Appellate Division affirmed. Despite the mother's contention, the court properly confirmed the Support Magistrate's determination that she was in willful violation of the prior child support order. Petitioner father presented evidence of a willful violation by establishing that the mother repeatedly failed to pay child support as ordered, and the mother failed to meet her burden of establishing her inability to make required payments. There was no basis to disturb the Support Magistrate's determination that the substance abuse issues of the mother did not render her unable to make payments, and the mother otherwise presented no evidence that she was financially unable to satisfy her obligation during the time it accrued. Moreover, the mother presented no evidence that she made any efforts to obtain employment to meet her child support obligation of \$25 per month. Further, the record did not support the mother's contention that she paid the child support arrears during the parties' final appearance.

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

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

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

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

Court Properly Considered Defendant's "Additional Parenting" Responsibilities

Supreme Court, among other things, directed defendant to pay plaintiff \$61.50 per week in child support and \$19,500 per year in maintenance for a period of three years. The Appellate Division affirmed as modified. Contrary to plaintiff's contention, the court did not abuse its discretion in refusing to award child support on the parties' combined income in excess of \$80,000: the court properly relied on the fact that the parties' financial resources after the payment of maintenance were roughly equivalent, that each parent would have one child living with him or her, that there would be no change in the children's standard of living and that the additional parenting responsibilities of defendant following the divorce affected his ability to enhance his salary by working

overtime. The court erred in including the amount of maintenance awarded to plaintiff in her income for purpose of calculating the parties' respective child support obligations. Further, the court applied the incorrect child support percentage in its calculation. Therefore, the defendant's pro rata share of the child support obligation and the uninsured medical costs of the children was 67%, plaintiff's 33%, and defendant's child support obligation was increased to \$88.92 per week.

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

Referee's Refusal to Impute Income Not Abuse of Discretion

Supreme Court, among other things, directed plaintiff father to pay \$103.85 per week in child support. The Appellate Division affirmed, rejecting defendant mother's contention that the Referee should have imputed additional income to the father in calculating his child support obligation. The record established that the father's prior employment ended when his employer terminated the part of the business in which he was employed. In addition, the father did not significantly decrease his income by starting his own business rather than accepting similar employment from another employer. Finally, the mother's contention that the father should have been required to maintain life insurance for the benefit of the children was not preserved for review.

Hurley v Hurley, 71 AD3d 1470 (4th Dept 2010)

Order Directing Defendant Father to Pay Weekly Child Support Affirmed

Supreme Court directed defendant father to pay weekly child support in the sum of \$100.00 to plaintiff mother. The Appellate Division affirmed. Contrary to the father's contention, the court properly determined that the parties had a shared custody arrangement and that the father was the noncustodial parent. The father failed to establish that he had physical custody of the child for a majority of the time. Contrary to the mother's contention on her cross-appeal, the court properly calculated the amount of child support and the parties' respective shares. The court was not required to determine the mother's income based on her federal tax return for the previous year because she was receiving a higher salary at the time of the hearing. The court properly set forth its reasons for determining that it was unjust and inappropriate to require the father to pay child support pursuant to the statutory percentage and thus that it was necessary to deviate from that percentage. Finally, the court did not abuse its discretion in permitting the father to claim the child as a tax exemption.

Eberhardt-Davis v Davis, 71 AD3d 1487 (4th Dept 2010)

Order Determining Child Support Obligations Affirmed

Supreme Court determined the child support obligations of the parties, including their respective shares of education expenses. The Appellate Division affirmed. Plaintiff father's appeal was treated as valid despite the fact that he appealed from the order

rather than the judgment of divorce. The court did not abuse its discretion in setting a cap of \$160,000 for the combined parental income and it properly set forth the factors it considered in deviating from the \$80,000 statutory cap. Further, the court did not err in directing father to pay his pro rata share of the children's private school tuition because the appropriate special circumstances existed, including the educational background of the parents, the children's academic ability, and the parents' financial ability to provide the necessary funds.

Matter of Francis v Francis, 72 AD3d 1594 (4th Dept 2010)

Court Properly Dismissed Petition For Child Support

Family Court dismissed mother's petition for an award of child support and granted respondent father's objections. The Appellate Division dismissed the father's cross-appeal because he was not an "aggrieved party" and otherwise affirmed. The court properly dismissed the petition because petitioner failed to establish that the parties' agreement was unfair or that there was a requisite change in circumstances. The fact that the order contained language or reasoning that respondent deemed adverse to his interests did not provide him with a basis for standing to take an appeal.

Matter of Cooper v Cooper, 74 AD3d 1868 (4th Dept 2010)

Monthly Child Support Order Reduced

Family Court abused its discretion in calculating the father's child support on a presumptive amount. Petitioner mother testified that the household expenses were \$15,000 per month, and the Support Magistrate determined that only \$10,000 per month were expenses for the children. The Support Magistrate's determination of the children's expenses, which was entitled to great deference, was supported by the record. The Appellate Division modified the order by providing in the seventh ordering paragraph that the father's child support obligation was \$10,000 per month and by vacating the amount of retroactive child support. The matter was remitted to determine the father's retroactive child support for the period of November 17, 2003 through February 28, 2005.

Matter of Coan v Thompson, 74 AD3d 1878 (4th Dept 2010)

Respondent Willfully Violated Order of Child Support

Family Court found that respondent father willfully violated an order of child support and sentenced him to 30 days in jail. The Appellate Division affirmed. The father's contentions in this case were the same as those raised in *Matter of Paige v Paige* (50 AD3d 1542) and the order here was affirmed for the reasons set forth in that case. The Appellate Division noted that contrary to the further contentions of the father, the court properly refused to issue a suspended commitment order and the father received meaningful representation.

Matter of Burriss v Loving, 899 NYS2d 687 (4th Dept 2010)

Order Committing Respondent to Jail for Six Months Reversed

Family Court committed respondent mother to Cattaraugus County Jail for a term of six months for violation of a prior child support order. The Appellate Division reversed. The court erred in finding the mother in willful violation of the prior support order. Although petitioner agency established that the mother failed to pay support, the mother presented competent, credible evidence of her inability to make the required payments. The court further erred in continuing the prior order of support and denying the mother's petition seeking a downward modification. The mother was unable to maintain steady employment and her income level was well below the poverty line and thus her support obligation should have been reduced to \$25 a month. The mother's contention that the court erred in failing to cap her unpaid support was raised for the first time on appeal and was not preserved for review.

Matter of Cattaraugus County Department of Social Servs. v Stark, 75 AD3d 1098 (4th Dept 2010)

AD Reinstates Respondent's Petition For a Downward Modification of Support Obligation

Family Court denied respondent father's objection to an order of the Support Magistrate that determined respondent to be in willful violation of his child support obligation, sentenced him to a jail term, and dismissed his petition for a downward modification of his child support obligation. The Appellate Division modified by reinstating the petition for a downward modification. Respondent did not seek a stay of the jail sentence, which had expired, and therefore that part of his appeal was moot. There was sufficient support for the finding of a willful violation. Respondent's admission that he had not paid child support as required by the judgment of divorce constituted prima facie evidence of a willful violation and therefore the burden shifted to respondent to present some competent and credible evidence justifying his failure to pay support. Respondent failed to meet that burden. Because the parties' stipulation of settlement, which was incorporated but not merged into the judgment of divorce, provided that respondent could seek a downward modification without showing a change of circumstances, the Support Magistrate and the court applied an improper legal standard in denying respondent's petition on the ground that he failed to show a "substantial and unforeseen change of circumstances."

Matter of Lomanto v Schneider, 78 AD3d 1536 (4th Dept 2010)

Undertaking of \$5000 or Six Months in Jail For Willful Violation Affirmed

Family Court directed respondent father to make a cash undertaking of \$5000 in order to purge himself of a six-month jail sentence for willful violation of a child support order. The Appellate Division affirmed. Petitioner made a prima facie case of a willful violation

by asserting respondent's failure to pay, which respondent did not dispute. The burden then shifted to respondent to present some competent and credible evidence justifying his failure to pay support. Respondent failed to meet that burden. The record showed no evidence of respondent's efforts to obtain money he asserted was wrongfully withheld from him by the State of Texas and, in any event, the record established that he had the money to make the child support payments. The court did not abuse its discretion in imposing the maximum term of incarceration, particularly in view of the fact that respondent made no effort to comply with the order.

Matter of Riggs v VanDusen, 78 AD3d 1577 (4th Dept 2010)

CUSTODY AND VISITATION

Child's Preference Insufficient Information to Assess Best Interests

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

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

Petitioner Did Not Consent to Authority of Referee

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

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

Hearing Not Automatically Required

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

Matter of Warrior v Beatman, 70 AD3d 1358 (4th Dept 2010), *lv denied* 14 NY3d 711

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

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

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

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

Family Court granted petitioner grandparent's violation petition for specified visitation with their granddaughter. The Appellate Division reversed and dismissed the petition, noting at the outset that the court erred in determining that any future violation of the order on appeal would be deemed to be willful, because a determination of a willful violation can only be made after a full evidentiary hearing. The evidence presented by the grandparents in support of the petition failed to address whether the mother willfully violated the order, and the court made no finding whether the mother violated the order. Instead, although the court modified the prior order by establishing a visitation schedule, it made no findings whether visitation was in best interests of the child. The evidence presented by the mother at the hearing and obtained by the court at the *Lincoln* hearing established that the child, who was being treated for leukemia, was opposed to visitation with her grandparents. Further, although the mother had historically facilitated visitation between the child and the grandparents, the child objected to visitation after she became ill, so the mother yielded to the child's wishes. Thus, although the Appellate Division was unable to review the propriety of the court's determination with respect to grandparent visitation because the court failed to set forth findings, the Appellate Division determined that it was not in the child's best interests to continue to visit with the grandparents.

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

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

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

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

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

Supreme Court granted plaintiff mother sole custody of the parties' children and granted defendant father visitation. The Appellate Division affirmed as modified. The court did not abuse its discretion in limiting the father's visitation. The father admitted he had sexual thoughts about children, including his own, and both the expert psychologist and

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

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

Change to Transportation Provision Unwarranted

Family Court dismissed mother's petition which sought permission to modify certain stipulated provisions of the divorce judgment concerning visitation with parties' children. The Appellate Division affirmed. The court properly granted that part of the motion to dismiss the petition insofar as it sought an order directing the father to provide all transportation for visitation. The mother failed to establish a change in circumstances sufficient to warrant the modification sought.

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

Modification Unwarranted: Court Failed to Consider Child's Preference

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

Matter of Stevenson v Stevenson, 70 AD3d 1515 (4th Dept 2010), *lv denied* 14 NY3d 712

Father Properly Granted Sole Custody and Permission to Relocate to Arizona

Respondent mother appealed from an order granting the father's petition for sole custody of the parties' child and for permission to relocate with the child to Arizona. She also appealed from an order settling the record in the first appeal. The Appellate Division affirmed both orders. Addressing the second appeal first, the Court held that the JHO did not err in settling the record to include a transcript from a family offense proceeding commenced against the mother by the child's paternal grandfather, who was also a respondent in the first appeal. The JHO was entitled to consider the actions of the mother in the family offense proceeding in making the custody determination, and all the parties to the first appeal repeatedly referred to the event described in the transcript. The Appellate Division also affirmed the custody order, rejecting the mother's contention that the father failed to plead or to establish a change in circumstances sufficient to warrant modification. The amended petition alleged that mother's deteriorating mental health constituted a change in circumstances warranting modification, thus alleging that the mother was unfit or perhaps less fit to continue as the proper custodian. Further, the JHO properly determined that the mother presently was less fit than the father and less able to provide for the child's stability and well-being. Additionally, the contention that mother did not have notice of the allegations in the amended petition or an opportunity to be heard was belied by the record. Although the mother contended that the amended petition was filed without proper proof of service, she waived that contention by appearing in the proceeding without raising the defense of lack of personal jurisdiction. The mother failed to preserve her contention that she was deprived of a fair hearing based on various alleged errors committed by the JHO, and the JHO did not err in granting permission for the child to relocate with the father. Although the JHO failed to include an analysis of the factors she considered, the record on appeal was sufficient to enable the Appellate Division to analyze the relevant factors and thus determine the propriety of the decision.

Matter of Dove Jr. v Rose, 71 AD3d 1411 (4th Dept 2010)

Court Properly Granted Sole Custody of Child to Maternal Grandmother

Family Court granted the maternal grandmother's petition seeking to modify a prior order of custody. The Appellate Division affirmed. Respondent paternal grandmother failed to demonstrate that she was prejudiced by the alleged defect in verification of the petition. Further, the petition was not barred by the doctrine of equitable estoppel. The court properly determined that petitioner established a change of circumstances warranting modification of the prior order and that it was in the best interests of the child to award the maternal grandmother sole custody.

Matter of Perez v Perez, 71 AD3d 1496 (4th Dept 2010), *lv denied* 14 NY3d 714 (2010)

Order Granting Sole Legal Custody Affirmed

Family Court awarded sole custody of the parties' children to petitioner mother. The Appellate Division affirmed. The order was supported by a sound and substantial basis in the record. The record established the offensive behavior of respondent father toward the mother in the presence of the children, his sporadic and often nonexistent exercise of visitation with the children, and his refusal to accept the medical diagnosis of the older child or cooperate with the treatment of that child. In addition, the parties' acrimonious relationship and inability to communicate with each other rendered the existing joint custody arrangement inappropriate.

Matter of Ingersoll v Platt, 72 AD3d 1560 (4th Dept 2010)

Order Granting Father Sole Custody in Children's Best Interests

Family Court granted father's petition seeking sole custody of the parties' two younger children. The Appellate Division affirmed. The court's award of sole custody to the father was entitled to great deference. Among the factors considered were the quality of the home environment and the parental guidance the custodial parent provided for the children, the ability of each parent to provide for the children's emotional and intellectual development, the financial status and ability of each parent to provide for the children, the relative fitness of the respective parents, and the length of time the present custody arrangement had been in effect. The record established that the court's determination had a sound and substantial basis in the record.

Matter of Goossen v Goossen, 72 AD3d 1591 (4th Dept 2010)

Court Erred in Granting Petition on Default

Family Court granted mother's petition for sole custody of the parties' child. The Appellate Division reversed. The court erred in entering the order upon the father's default because the father was represented by counsel and counsel appeared in court. Further, the court erred in granting the petition without conducting an evidentiary hearing because the record did not contain sufficient evidence to support the award of sole legal custody.

Matter of Balls v Doliver, 72 AD3d 1618 (4th Dept 2010)

Modification Petition Properly Denied

Family Court denied respondent mother's petition seeking to modify a prior custody order. The Appellate Division affirmed. While not properly before the court, the Judicial Hearing Officer (JHO) did not err in applying the relocation standard set forth in *Matter of Tropea v Tropea*. The JHO properly considered the relevant factors, and properly determined that the mother failed to establish that the lives of the mother and child would be enhanced economically, emotionally and educationally by the move. Although

the mother cited her desire to promote a relationship between the child and his half sibling, she offered no evidence that relocation was necessary to accomplish that goal. Because the court's order was stayed during the pendency of the appeal, the parties have continued to have alternative periods of physical custody of the child. The mother was thus directed to return the child to the father at the expense of the mother within five days after service of the order.

Matter of Murphy v Peace, 72 AD3d 1626 (4th Dept 2010)

Custody Order Had Sound and Substantial Basis in the Record

Family Court continued the award of physical and legal custody of the parties' two children to petitioner mother and reduced respondent father's visitation with the children to one weekend every three months, and prohibited the father from discussing religion with the children. The Appellate Division affirmed. The ability of the father over that of the mother to provide for certain material needs of the children was only one factor to consider in determining best interests. Here, the record established that father frequently disparaged the mother in the children's presence, consistently used his religion in an attempt to alienate the mother from the children, and disregarded court orders concerning the mother's right to choose the religious upbringing of the children. Further, the court's determination that effectively denied the father visitation was supported by compelling reasons and substantial evidence, including that the father harmed the children by disobeying court orders and using religion to alienate them from the mother. The court did not abuse its discretion in prohibiting the father from discussing religion with the children because such discussion caused the children harm. Finally, any error in the admission of a report containing recommendations that were based on inadmissible hearsay was harmless because the record contained ample evidence to support the court's determination.

Matter of Matthews v Matthews, 72 AD3d 1631 (4th Dept 2010)

Petitioner Failed to Demonstrate Change in Circumstances

Family Court dismissed mother's petition seeking modification of a prior custody order. The Appellate Division affirmed. A hearing is not automatically required whenever a parent seeks modification of a prior order. Because petitioner failed to demonstrate a sufficient change in circumstances there was no basis for modification. Petitioner failed to preserve her contention for review that the court abused its discretion in dismissing the petition without conducting a *Lincoln* hearing because she failed to request such hearing.

Matter of Knuth v Westfall, 72 AD3d 1642 (4th Dept 2010)

Court Erred in Modifying Prior Order Without a Hearing

Family Court granted grandmother's petition and modified an order of visitation. The

Appellate Division reversed. The court erred in failing to conduct a hearing before granting the petition. Based upon the record, there was not sufficient information to render an informed determination that was consistent with the children's best interests. With respect to the order in respondent mother's second appeal, the mother did not raise any issues concerning that order in her brief on appeal and those issues were deemed abandoned.

Matter of Rousseau v Kraft, 72 AD3d 1643 (4th Dept 2010)

Order of Custody Modified: Primary Custody Awarded to Defendant

Supreme Court awarded primary physical custody of the parties' children to plaintiff father. The Appellate Division modified. The award of primary physical custody to plaintiff was not in the children's best interest and lacked a sound and substantial basis in the record. The record established that defendant mother was the children's primary caretaker throughout the marriage. In addition to maintaining a full time job, defendant prepared the meals, bathed the children, made day care arrangements, administered the children's medications, read to the children and put them to bed. By contrast, plaintiff's involvement with the children largely consisted of attending a few medical appointments and school conferences. Plaintiff spent a significant amount of time pursuing his own recreational activities, leaving the children in defendant's care. The court in focusing on irrelevant matters, including the defendant's alleged marital infidelity. The court also improperly based its determination on defendant's relocation to Ithaca, which was 65 miles from the marital residence. The record reflected that defendant moved to Ithaca to obtain a new job only after plaintiff sent a letter to defendant's supervisor criticizing defendant's work and alleging job-related misconduct. Defendant was awarded primary physical custody and the matter was remitted to the court to set an appropriate visitation schedule.

Matter of Sitts v Sitts, 74 AD3d 1722 (4th Dept 2010)

Support Magistrate Lacked Subject Matter Jurisdiction

Petitioner commenced this proceeding pursuant to article 4 of the Family Court Act seeking an order directing respondent mother to pay one-half the travel expenses related to two of the parties' children, who were 17 years, 11 months old and 20 years and 11 months old. Family Court denied the objections of respondent to the order of the Support Magistrate, which had denied the mother's motion seeking, among other things, to dismiss the petition and refer the case to Family Court upon finding that the Support Magistrate lacked jurisdiction. The Appellate Division vacated the provision in the order that referred the matter to the Support Magistrate and remitted. The Support Magistrate did not have subject matter jurisdiction over the petition because travel expenses related to visitation were properly considered custody and visitation issues pursuant to Family Court Act article 6. Further, the father was not entitled to reimbursement for travel expenses related to visitation incurred after the children reached the age of 18. The petition did not specify which of the travel expenses sought were attributable to visitation

that occurred before the older child reached the age of maturity and therefore the matter was remitted for further proceedings.

Matter of Stroud v Vahl, 74 AD3d 1726 (4th Dept 2010)

Petition Requesting Permission to Relocate Reinstated

Family Court granted respondent father's petition at the close of petitioner mother's proof to dismiss the petition seeking permission for the parties' three children to relocate with the mother from Utica to New York City. The Appellate Division reversed, reinstated the petition, and remitted. The mother established a prima facie case that relocation was in the children's best interests. The 20-year-old mother was the primary caretaker of the children, and her parents, who were moving to New York City, provided extensive assistance to the mother and would continue to do so if she were to relocate. Further, the mother had several family members in the New York City area who were available to assist her with housing and child care. Although the father exercised alternate weekend visitation, the mother established that he did not work to support the children, that he sold marijuana, and that based upon an incident of domestic violence, the court issued an order of protection in favor of the mother.

Matter of Ramirez v Velazquez, 74 AD3d 1756 (4th Dept 2010)

No Willful Violation: Order Reversed

Family Court found that respondent mother willfully violated an order of visitation. The Appellate Division reversed. The order indicated that the mother breached her duty to foster the relationship of the parties' two children with the father when she allowed one of the children to decide for herself whether to accompany the father for Christmas visitation. The record did not support the court's determination. The evidence in the record established that the mother prepared the child's backpack for Christmas visitation, placed it by the front door and unequivocally told the child in question that she would be going with the father for visitation. The mere fact that the mother made equivocal statements to a babysitter outside the presence of the child was insufficient to establish that the mother willfully interfered with the father's relationship with the child and thus willfully violated the order of visitation.

Matter of Koss v Michaud, 74 AD3d 1763 (4th Dept 2010)

No Change in Circumstances: Order Reversed

Family Court granted the petition of father and transferred primary physical residence of the parties' child from respondent mother to father. The Appellate Division reversed. The father failed to establish the requisite change in circumstances to warrant modification of the existing custody order. The father alleged in his petition that the mother had emotionally and physically abandoned the parties' child, the mother's relationship with the child had deteriorated, and that the child wanted to live with the father. Evidence

presented at the hearing, however, focused on the mother's work schedule and changes in the mother's residence. There was no showing at the hearing that the mother's work schedule had changed substantially. In addition, it was undisputed that the mother was forced to change residence after ending her relationship with her live-in boyfriend, and the child remained in the same school district and maintained her customary summer camp schedule. The attorney for the child's contention that the mother was unfit because she allowed the child to travel to Pennsylvania without the mother was rejected. There was no showing that the individuals caring for the child put the child at risk in any fashion while she was in their care. Although the child wished to reside with her father, it was well settled that the established custodial arrangement should not be changed solely to accommodate the child's desires.

Matter of Porter v Nesbitt, 74 AD3d 1786 (4th Dept 2010)

Award of Sole Custody Affirmed

Family Court awarded petitioner mother sole custody of the parties' twin daughters and visitation to respondent father. The Appellate Division affirmed. Contrary to the father's contention, the court retained jurisdiction over the proceeding. Although the children resided in Virginia with their father, they visited the mother in New York several weeks each year. In addition, the children visited regularly with other relatives in New York and shortly before the mother commenced this proceeding, the father filed a petition in the same court in New York seeking to modify child support. New York was not an inconvenient forum. There was evidence at the hearing that the children were subject to mistreatment by the father in Virginia and there was substantial evidence in this state from which to make a custody determination. Moreover, psychological evaluations conducted in Virginia were admitted in evidence, the attorney for the children traveled to Virginia to meet with the father and other individuals with knowledge of the children, and the court was able to conduct a *Lincoln* hearing with the children in New York. It was further noted that the court gave the father permission to conduct depositions of witnesses from Virginia, but the father did not avail himself of that opportunity. The court did not err in the admission of hearsay statements of the children, because it was well settled that there was an exception to the hearsay rule in custody cases involving allegations of abuse and neglect, where, as here, their statements were corroborated. Finally, there was ample support in the record that the court's determination of sole custody to the mother was in the children's best interests.

Matter of Sutton v Sutton, 74 AD3d 1838 (4th Dept 2010)

No Change in Circumstances

Family Court dismissed the petition of mother, which sought to modify a prior custody order entered upon consent of the parties. The Appellate Division affirmed. The mother failed to demonstrate a change in circumstances sufficient to warrant a change in the established custody arrangement. Further, the record did not establish whether a conflict of interest existed with respect to the attorney for the children's representation of all five

children in question.

Matter of Horn v Horn, 74 AD3d 1848 (4th Dept 2010)

Mother Not Deprived of Fair Hearing

Family Court awarded petitioner father custody of the parties' child. The Appellate Division affirmed. The court did not abuse its discretion in the denial of respondent mother's request to testify by telephone. Respondent's contention that she was deprived of the right to a fair hearing was raised for the first time on appeal. In any event, that contention was without merit. Respondent in fact appeared by counsel, and although she had notice of the hearing, she chose not to attend. Further, the record did not support respondent's contention that the court erred in awarding custody of the child to the father based solely upon her default. The record established that the court properly placed great emphasis on respondent's failure to value and support the child's relationship with the father as shown by evidence in the record of her active interference with the father's scheduled parenting time on more than one occasion, her failure to comply with prior orders relative to returning to the region, and her failure to offer evidence of compelling circumstances requiring her relocation of the child to Oregon, Georgia and then back to Oregon.

Matter of Stiles v Edwards, 74 AD3d 1869 (4th Dept 2010)

Matter Remitted to Determine if Extended Summer Visitation in Child's Best Interests

Family Court ordered that petitioner father was entitled to a certain period of extended visitation with the parties' child during summer vacation should he take a vacation. The Appellate Division reversed. The court erred in failing to conduct an evidentiary hearing. Although no hearing would have been required if it was clear from the record that the court possessed sufficient information to determine best interests, that was not the case here. Because there was no indication in the record that there was any prior hearing involving the child, and the only evidence before the court with respect to the current visitation schedule was based upon brief allegations of the parties' attorneys and the attorney for the child during one court appearance, the matter was remitted to determine if extended summer visitation was in the child's best interests.

Matter of McDade v Spink, 74 AD3d 1904 (4th Dept 2010)

Attorney for the Child Vigorously Represented the Interests of the Children

Family Court denied the attorney for the children's petition seeking to suspend respondent father's supervised visitation with the parties' children and directed him to pay the attorney's fees and costs of the father based upon the "frivolity" of the petition. In another order, the court found mother in willful violation of a prior order of custody and visitation. The Appellate Division modified. The court abused its discretion in imposing

sanctions on the attorney for children because the court failed to afford him an opportunity to be heard. Moreover, the attorney for children zealously represented the interests of the children. However, the court properly denied the petition seeking to suspend the father's supervised visitation. The denial of visitation was a drastic remedy only to be employed when visitation would be harmful to the children's welfare and that was not the case here. Further, the record was sufficient for the Appellate Division to find that mother willfully violated the prior custody and visitation order. The evidence presented at the hearing established that the mother disparaged and belittled the father in the presence of the children. In addition, the mother failed to participate in individual therapy and to apprise the father of the children as required by the prior order.

Matter of Chapman v Tucker, 74 AD3d 1905 (4th Dept 2010)

Court Not Required to Allow Petitioner to Testify by Electronic Means

Family Court dismissed mother's petition to modify a custody order. The Appellate Division modified. The court was not required to allow petitioner to testify at the custody hearing by electronic means as a reasonable accommodation under the Americans with Disabilities Act because she failed to demonstrate that she had a covered disability under that act. However, the court erred in making any future filings by the mother contingent on her submission of medical proof establishing her ability to travel to New York.

Matter of Barnes v McKown, 74 AD3d 1914 (4th Dept 2010)

Nonparent Established Extraordinary Circumstances

In appeal no. 1, father (Tucker) filed a petition for custody of his then 14-year-old child who had lived for twelve years with her recently deceased mother and her mother's boyfriend, respondent Martin. In appeal number no. 2, Martin filed a petition against Tucker, seeking custody of the child. Family Court dismissed Tucker's petition and granted custody of the child to Martin. The Appellate Division affirmed. Martin met his burden of establishing extraordinary circumstances. There was support in the record that Martin fulfilled a "father" role for the child, that the most familiar and comfortable setting for the child was with Martin, and that Martin was part of the only family unit the child had ever known. That family unit included half-siblings with whom the child had a close relationship, and grandparents, aunts, uncles, and cousins living in the area where she resided with Martin and her mother. Martin and the mother provided for the needs of the child since the child was two and the father had only limited involvement. Separating the child from the only family unit she had known would undoubtedly exacerbate the already significant emotional injury suffered by the child as a result of her mother's death. Moreover, the father was separated from his spouse and was earning a living managing parking lots while he pursued a bachelor's degree. He was relying heavily on student loans and was unsure where he would live when he finished school. It was in the child's best interests that custody be granted to Martin. The child, who was now 16 years of age, had established ties to schools, friends, and family in Oneida County and knew no

one but the father at the out-of-state location where the father resided. Martin also was more financially stable than the father and was better equipped to provide for the child's health and prospective post-secondary educational needs. The dissent would have granted sole custody to the father because extraordinary circumstances could not be established absent the biological parent's "unfitness, abandonment, persistent neglect or other gross misconduct or grievous cause" and there was no evidence of those factors here.

Matter of Tucker v Martin, 75 AD3d 1087 (4th Dept 2010)

Family Court Lacked Jurisdiction Over Mother's Petition

Petitioner mother commenced a proceeding seeking, among other things, to modify a 2009 custody order that was entered in Indiana. Family Court dismissed the petition. The Appellate Division affirmed. There was no indication in the record that the Indiana court determined that it no longer had exclusive, continuing jurisdiction under Domestic Relations Law § 76-a or that New York State would be a more convenient forum under Domestic Relations Law § 76-f. Indeed, the Indiana court's order was entered less than one week before the mother commenced this proceeding and the order noted that the issue of child support was "deferred." Further, the father continued to live in Indiana and therefore neither Family Court nor the Indiana court could determine that the children and their parents did not reside in Indiana.

Matter of Saunders v Hamilton, 75 AD3d 1173 (4th Dept 2010), *lv denied* 15 NY3d 713 (2010)

Order Allowing Post-Termination Visitation Reversed

Petitioner, the birth mother of the infant who was adopted by respondents, sought to enforce the terms of a visitation agreement entered at the time of the child's surrender. The agreement provided for visitation between the birth mother and child for six hours once a month and in the event respondents relocated less than 250 miles from petitioner's home at the time of the adoption, petitioner would pay the cost of transportation to visitation, but in the event the respondents relocated more than 250 miles they would pay petitioner's transportation and lodging costs for visitation six times each year for six hours over a two day period. The court determined that there was a combined means of public transportation that would require petitioner to travel less than 250 miles from her residence, but it would be difficult to make the trip in one day, and thus petitioner would be allowed two six-hour visits over a two-day period six times each year. The Appellate Division reversed and remitted. The court erred in its interpretation of the agreement, which was ambiguous to the extent that it failed to provide for a method of computing the 250-mile provision. The court, in computing the distance, erred in relying on extrinsic evidence that was neither submitted by the parties nor included in the record. Further, the court erred in altering the unambiguous visitation terms set forth in the agreement insofar as they concerned the length and frequency of visitation.

Matter of Dustin K. R., 76 AD3d 794 (4th Dept 2010)

Father's Modification Petition Properly Denied: AFC's Petition Properly Granted

Family Court dismissed father's petition to modify a custody order and granted the Attorney for the Child's petition to modify visitation. The Appellate Division affirmed. The father failed to show a significant change in circumstances to warrant a change in the custodial arrangement. Even assuming, arguendo, that father showed changed circumstances, the record demonstrated that it would not be in the best interests of the child to change custody. The Attorney for the Child established that since entry of the prior visitation order, the father relocated from Virginia to Texas and the requirement in the visitation order that the child spend six weeks with the father in the summer presently interfered with the child's increasing participation in social and extracurricular activities at her primary residence. The 15-year-old child's desire to limit the time she spent away from her primary residence, while not determinative, was entitled to great weight. The court did not err in holding an in camera hearing with the child before further evidence was presented at the hearing. The evidence presented following the in camera interview did not raise new issues.

Matter of VanDusen v Riggs, 77 AD3d 1355 (4th Dept 2010)

Award of Custody to Mother Affirmed

Family Court awarded sole custody of the parties' child to mother with supervised visitation to father and granted mother an order of protection. The Appellate Division affirmed. The court properly weighed the relevant factors in making a custody determination and concluded that those factors weighed heavily in the mother's favor. The court did not abuse its discretion in granting supervised visitation with the father. The record established that the father committed acts of domestic violence against the mother, often in the children's presence, and that he threatened to kill the mother and leave with the child. Father also was unable to control his behavior at the hearing. A fair preponderance of the credible evidence supported the determination that the father committed acts constituting the family offense of harassment in the second degree, which warranted the order of protection.

Matter of Chilbert v Soler, 77 AD3d 1405 (4th Dept 2010)

Respondent Failed to Establish Change in Circumstances

Family Court denied respondent mother's cross petition for primary physical custody and continued the existing award of primary physical custody with petitioner father. The Appellate Division affirmed. Respondent failed to establish the requisite countervailing circumstances to warrant such change. Although the prior custody order specified that a change in schooling could constitute a change in circumstances, it further specified that the decisive factor was the best interests of the child. The court's determination that it was in the child's best interests to continue primary physical custody with the father was

supported by a sound and substantial basis in the record. Further, both parties have other children and thus an award of custody to either party would necessarily separate the child at issue from some of his siblings.

Matter of Slade v Hosack, 77 AD3d 1409 (4th Dept 2010)

Family Court Erred in Failing to Set Forth Sufficient Facts

Family Court granted the parties joint custody of their child. The Appellate Division reversed. The court erred in failing to set forth its findings of fact essential to its decision. Effective appellate review, particularly in child custody cases, required that the court make appropriate factual findings, because it is best able to make credibility determinations. Upon remittal, the focus must be on the best interests of the child.

Matter of Bradbury v Monaghan, 77 AD3d 1424 (4th Dept 2010)

Petition for Sole Custody Properly Dismissed

Family Court dismissed mother's petition, which sought to modify a prior order of joint custody, for sole custody of the parties' child. The Appellate Division affirmed. The prior order was entered after a lengthy hearing and petitioner failed to show the requisite change in circumstances. An existing custody arrangement will not be altered because of a change in marital status, economic circumstances or improvements in moral or psychological adjustments absent a showing that the custodial parent is unfit or perhaps less fit.

Matter of Dormio v Mahoney, 77 AD3d 1464 (4th Dept 2010)

Order Granting Relocation Affirmed

Family Court granted petitioner father's motion to relocate with the parties' children to New Jersey. The Appellate Division affirmed. The best interests of the children would not be served by granting respondent mother's petition for joint custody with primary physical custody with her. The court properly considered the *Tropea* factors in determining that the children's best interests would be served by granting father's petition.

Matter of Harnanto v Gandasaputra, 78 AD3d 1527 (4th Dept 2010)

Dismissal of Modification Petition Affirmed

Family Court dismissed father's petition for modification of custody with prejudice. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination that the father did not make a sufficient showing of change in circumstances to warrant an inquiry into whether the best interests of the child would be served by a change in custody.

Matter of Jackson v Beach, 78 AD3d 1549 (4th Dept 2010)

Court Erred in Imposing Condition Precedent to Visitation

Family Court dismissed mother's petition for a modification of custody of the parties' child. The Appellate Division reversed. In her petition, mother sought communication, including telephone contact and visitation, with the parties' child. The court erred in dismissing the petition on the ground that petitioner failed to complete her alcohol and drug assessment and psychological assessment as a condition precedent to further visitation with the child. The court lacked authority to impose conditions precedent to the resumption of a parent's contact and visitation with a child.

Matter of Bray v Destevens, 78 AD3d 1564 (4th Dept 2010)

Father Met Burden of Showing Change in Circumstances

Family Court granted father's petition to modify custody by granting him sole custody. The Appellate Division affirmed. Petitioner met his burden to show a change in circumstances. Respondent mother, who had primary physical custody of the children, moved four times between 2004-2009, and as a result one of the children changed schools five times during that time period. Further, respondent testified that she was planning to move again in the near future, which would require the children to change schools yet again. Thus, it was in the best interests of the children to modify the custody arrangement by granting petitioner sole physical custody of the children.

Matter of Moore v Moore, 78 AD3d 1630 (4th Dept 2010)

Visitation With Incarcerated Father Not in Child's Best interests

Family Court denied father's petition, which sought visitation with his child. The Appellate Division affirmed. The father was sentenced in 2002 to 27 2/3 years to life based upon his convictions for arson and intimidating a witness. Although the court failed to apply the proper burden of proof in denying the petition, the record was sufficient for the Appellate Division to determine that visitation was not in the child's best interests. The record demonstrated that the father failed to establish a meaningful relationship with the child. The father had been incarcerated since the child was two years old, his last visit with the child took place when the child was three or four years old, and the father waited at least five years thereafter to file a petition for visitation. The child had no memory of the father. Moreover, in view of the father's sentence, the father will remain in prison long after the child reaches maturity. Further, the child suffers from severe car sickness and visiting the father would require a long car ride with paternal grandparents with whom the child had no relationship.

Matter of Butler v Ewers, 78 AD3d 1667 (4th Dept 2010)

Primary Physical Custody to Father Reversed

Family Court awarded primary physical custody of the parties' children to respondent father. The Appellate Division reversed. The court erred in failing to set forth its findings of fact and the reasons for its custody determination. The court's conclusory statements in its decision did not enable the Appellate Division to provide effective appellate review. Although the record was sufficient for the Appellate Division to make its own findings of fact, it declined to do so because the trial court was best able to measure the credibility of the witnesses.

Matter of Rocco v Rocco, 78 AD3d 1670 (4th Dept 2010)

AFC's "New Information" on Appeal Results in Vacating Order

Family Court modified an order of custody by awarding petitioner father primary physical custody of his three children with visitation to the grandmother. The Appellate Division vacated the order and remitted the case to the trial court. The Attorney for the Children submitted new information during the pendency of the appeal indicating that the father no longer wished to pursue the petition. Although that information was not in the record, the Appellate Division could take notice of new information and allegations to the extent that they indicated the record was no longer sufficient to determine a party's fitness and the right to custody.

Matter of Nichols v Nichols-Johnson, 78 AD3d 1679 (4th Dept 2010)

Grandfather Established Extraordinary Circumstances

Family Court denied mother's petition for sole custody of her son. The Appellate Division affirmed. Respondent paternal grandfather had been awarded sole custody of the child in 2004, when the child was four-years-old and before that the paternal grandmother had custody of the child. Although the court failed to make the requisite finding of extraordinary circumstances, the Appellate Division made the finding based upon the mother's instability, the prolonged separation between mother and child, and the psychological bond between the child and his grandfather. The Appellate Division also concluded that it was in the best interests of the child to remain in the custody of his grandfather because the grandfather was more fit to care for the child and because the child's stability and continuity would be promoted. Mother failed to show a change in circumstances warranting the change in custody. The Appellate Division noted that the expressed wish of the nine-year-old child to live with his mother was not controlling. Contrary to mother's contention the attorney for the child apprised the court of the child's wishes. Nevertheless the attorney for the child advocated that the child remain in the grandfather's custody based on the determination that the child could not make a knowing, voluntary and considered judgment.

Matter of Rosso v Gerouw-Rosso, 79 AD3d 1726 (4th Dept 2010)

Award of Sole Custody to Father In Child's Best Interests

Family Court granted petitioner father sole custody of the parties' child. The Appellate Division affirmed. The mother did not challenge the court's finding of a change of circumstances and thus the only issue was whether sole custody to the father was in the best interests of the child. Although the court failed to state the findings it deemed essential to its award of custody, the record was sufficient for the Appellate Division to so. There was no basis to disturb the court's determination because it was based upon the court's credibility determinations and because it had a sound and substantial basis in the record.

Matter of Dubuque v Bremiller, 79 AD3d 1743 (4th Dept 2010)

Father's Relocation From Federal to State Prison Not Sufficient Change in Circumstances

Family Court dismissed father's petition seeking to modify the visitation provision of the parties' divorce judgment by awarding him visitation with the parties' daughter at the facility where he was incarcerated. The father's relocation from a federal prison to a state prison did not constitute a sufficient change in circumstances warranting modification of the judgment. The allegations in the petition were insufficient to warrant an evidentiary hearing. The court did not err in failing to appoint an attorney for the child and petitioner received effective assistance of counsel

Matter of Frazier v Frazier, 79 AD3d 1746 (4th Dept 2010)

Petition for Leave to Relocate Properly Denied

Family Court denied mother's petition for leave to relocate with the child to California. The mother failed to establish that her daughter's life and her own life would be enhanced economically, emotionally and educationally by the relocation. Further, the court properly determined that the relationship with respondent father and other supportive relatives would be adversely affected by the move. The mother also failed to establish that there was a visitation arrangement that would be conducive to the maintenance of a close relationship between father and child.

Matter of Webb v Aaron, 79 AD3d 1761 (4th Dept 2010)

Determination That New York Was Inconvenient Forum Reversed

Family Court granted the motion of respondent mother to transfer the instant custody proceeding to Alabama. The Appellate Division reversed. The record failed to establish that the court considered all the requisite statutory factors in determining that New York was an inconvenient forum. Further, although the parties disputed whether the court lacked jurisdiction pursuant to Domestic Relations Law § 76-a, there was no indication in the record that the court based its decision on that ground. The case was thus remitted for a determination whether the court had jurisdiction and, if so, whether New York would be an inconvenient forum based upon the applicable statutory factors.

Matter of Wilson v Linn, 79 AD3d 1767 (4th Dept 2010)

Court Erred in Dismissing Violation Petition

Family Court dismissed mother's petition alleging that respondent father violated a prior order that awarded father custody and established a visitation schedule for the mother. The Appellate Division reversed. The statement of the court that the violation petition was the 11th petition filed by the mother during a 7-year period and its observation that the mother's latest modification petition was then pending on appeal did not reflect bias on the part of the court. The court erred, however, in dismissing the petition without holding a hearing because the petition alleged sufficient factual and legal grounds to establish a violation of the prior order.

Matter of Warrior v Beatman, 79 AD3d 1770 (4th Dept 2010)

Denial of Petition For Sole Custody Reversed

Family Court denied mother's petition seeking sole custody of the parties' children. The Appellate Division reversed. Modification of an existing joint custody arrangement is warranted where, as here, the relationship between the parents so deteriorates that they are wholly unable to cooperate in making decisions affecting their children. The court abused its discretion in sanctioning the mother upon determining that she filed her petition frivolously because the court failed to afford her a reasonable opportunity to be heard.

Matter of Kramer v Berardicurti, 79 AD3d 1794 (4th Dept 2010)

Denial of Incarcerated Father's Petition for Visitation in Children's Best Interests

Family Court denied father's petition seeking visitation with the parties' children. The Appellate Division affirmed. The court properly determined that it was not in the children's best interests to grant father visitation. The parties' son had psychiatric diagnoses and the court properly credited the testimony of the son's treating therapist that visitation in prison would be detrimental to the son's emotional and psychological welfare. The court properly determined, without the benefit of psychological evidence, that the parties' daughter should be allowed to grow and develop before any in-person visitation with the father. Neither the parties nor the attorney for the children requested any psychological evaluations and the court did not err in failing to order such evaluations sua sponte where, as here, there was sufficient evidence from the parties for the court to resolve the issue.

Matter of Lando v Lando, 79 AD3d 1796 (4th Dept 2010)

Permission to Relocate Properly Granted

Family Court granted father's petition for permission to relocate the parties' children to

Maryland. The Appellate Division affirmed. Petitioner met his burden of establishing by a preponderance of the evidence that the proposed relocation was in the children's best interests. The father demonstrated an economic necessity for the move and while no single *Tropea* factor is dispositive, economic necessity may present a particularly persuasive ground for allowing the move. Although the attorney for the children indicated on her brief on appeal that the children no longer wished to move to Maryland, those wishes were not determinative.

Matter of Thomas v Thomas, 79 AD3d 1829 (4th Dept 2010)

FAMILY OFFENSE

Order of Protection Affirmed

Family Court granted petitioner's order of protection against respondent "ex-partner." The Appellate Division affirmed. Respondent's contention that the court lacked subject matter jurisdiction because the alleged acts giving rise to the finding of harassment underlying the order of protection occurred before the effective date of the amendment to Family Court Act § 812 (1), which expanded the definition of term "member of the same family or household," was without merit. The date of entry of the order of protection controls rather than the date of respondent's actions underlying the order. The court properly determined that the parties had been in an intimate relationship within the meaning of Family Court Act § 812 (1). The evidence established that the parties had been in a sexual relationship, that petitioner was pregnant with respondent's child, that petitioner had previously given respondent a key to her apartment, and petitioner described respondent as her "ex-partner."

Matter of Lavann v Bell, 77 AD3d 1422 (4th Dept 2010)

Record Inadequate For Meaningful Appellate Review

Family Court dismissed petitioner's family offense petition. The Appellate Division reversed. Because the transcript of the hearing included only one page of petitioner's direct testimony, meaningful appellate review of the pivotal basis for the court's determination, i.e., that petitioner was not credible, was not possible. The order was reversed and the case remitted for a new hearing.

Matter of Alessio v Burch, 78 AD3d 1620 (4th Dept 2010)

Mother Committed Family Offense

Family Court found that respondent mother committed a family offense and issued an order of protection directing respondent to refrain from offensive conduct against petitioner father and the parties' child. The Appellate Division affirmed. Petitioner met his burden of showing that the mother committed the family offense of reckless endangerment in the second degree by lurching her car forward and stopping within inches of petitioner and the parties' child, thus warranting the issuance of an order of protection.

Matter of Kobel v Holiday, 78 AD3d 1660 (4th Dept 2010)

FOSTER CARE

Statute Did Not Require Commissioner to Certify Person With Whom Child Was Placed as an Emergency Foster Parent

Family Court granted the motion of the attorney for the child to designate the foster parent of the subject child a kinship foster care parent. The Appellate Division reversed. After the Department of Human Services (DHS) moved to place the subject child in the care of a family friend who had custody of the child's half-siblings, the court granted the motion of the attorney for the child seeking an order directing DHS to certify the child's caregiver as an emergency foster care provider. In granting the order, the court stated that Family Court Act § 1017 (2) (a) (iii) required that if the caregiver was qualified to take care of the child, the caregiver shall be certified as an emergency foster parent and that the court could direct DHS to certify emergency kinship foster care homes generally. Neither the statute nor the regulations required DHS to certify the person with whom the child was placed as an emergency foster parent but rather DHS was required only to certify such person as a foster parent, upon determining that the person was so qualified. Further, the court encroached upon the powers granted to DHS by the Social Services Law § 398 (2) (b) to "receive and care for any child alleged to be neglected, ... including the authori[zation] to establish, operate, maintain and approve facilities for such purpose in accordance with the regulations of [DHS]."

Matter of Jermaine H., 79 AD3d 1720 (4th Dept 2010)

JUVENILE DELINQUENCY

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

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

Matter of Sean P. K., 70 AD3d 1308 (4th Dept 2010), *lv denied* 15 NY3d 703 (2010)

Order Reversed Based on Defective Admission

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed an act which, if committed by an adult, would constitute the crime of forcible touching. The Appellate Division reversed. Respondent's admission was defective because the court failed to advise him of his right to present witnesses, to confront witnesses presented against him, and to have the presentment agency prove beyond a reasonable doubt that he committed the alleged act. Further, the court failed to ascertain whether respondent and his parents were aware of the possible specific dispositional orders.

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

Evidence Sufficient for Crime of Assault in Third Degree

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed an act which, if committed by an adult, would constitute the crime of assault in the third degree. The Appellate Division affirmed. Both respondent and his mother testified that, while they were arguing with each other, respondent grabbed his mother's arm. After respondent and his mother fell to the floor, respondent held her wrists and bit her shoulder. Even if the court were to accept respondent's testimony that

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

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

Respondent Properly Adjudged Juvenile Delinquent

Following a jury trial in County Court, respondent was found guilty of rape in the second degree and criminal sexual act in the second degree. Because he was not criminally responsible for those crimes by reason of infancy, County Court ordered the verdict deemed vacated and replaced by a juvenile delinquency fact determination, and the action was removed to Family Court for disposition. Family court adjudicated respondent a juvenile delinquent based upon the finding that he committed acts that would constitute the crimes he was found guilty of in County Court. The Appellate Division affirmed. The evidence was legally sufficient to establish that the victim lacked mental capacity to consent to sexual relations and respondent failed to establish that he was unaware of the victim's mental disability. Further, there was sufficient evidence to corroborate the victim's testimony, because the testimony of respondent established that he attempted to engage the victim in sexual intercourse or oral sexual conduct at the time and place of the alleged incident. The verdict was not against the weight of evidence: resolution of issues of credibility, as well as the weight to be accorded the evidence presented, are primarily questions to be determined by the finder of fact. The court did not abuse its discretion in placing respondent in the custody of OCFS for 18 months. The court was not required to try the lowest form of intervention before ordering placement. Although respondent had some success with electronic monitoring, he also had a record of infractions while in detention and failed to take responsibility for his actions.

Matter of Christopher T., 71 AD3d 1384 (4th Dept 2010)

Family Court Lacked Authority To Order Respondent To Leave Country

Respondent pled guilty to one count of criminal possession of marijuana in the fourth degree. At the dispositional hearing, Family Court admitted diagnostic reports recommending probation supervision and the testimony of respondent's mother who had flown to Erie County from Puerto Rico for the hearing. The court adjudicated respondent a juvenile delinquent and, over the objections of petitioner and respondent, granted a

conditional discharge for a 12 month period with the condition that respondent leave Erie County in the custody of his mother and remain in Puerto Rico for the 12 month period. Six months later respondent was arrested in Erie County and the court found that he violated the conditional discharge. The court “vacated” the prior order of conditional discharge and adhered to its original condition, ordering Erie county to transport respondent to Puerto Rico. The Appellate Division reversed. Upon the court’s revocation of the order of conditional discharge, the proceedings were returned to the dispositional phase of the application to restore the matter to the calendar. Thus, the court erred in again ordering respondent to be transferred to Puerto Rico. Moreover, the court had no authority to order respondent to leave the county or the country where the incident occurred.

Matter of Eduardo R., 72 AD3d 1488 (4th Dept 2010)

Respondent Properly Adjudicated Juvenile Delinquent

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that he committed acts which, if committed by an adult, constituted the crime of attempted robbery in the second degree. The Appellate Division affirmed. Respondent waived his contention that the presentment agency’s failure to provide him with the transcript of the testimony of the complaining witness from the co-respondent’s hearing constituted a *Rosario* violation. The transcript was not prepared because the hearing in question had occurred the day before, and respondent declined the court’s offer for an adjournment to allow the transcript to be produced. Further, respondent’s contention that the evidence was legally insufficient was without merit. The evidence at the hearing established that respondent shoved the victim and was aided by at least one companion in the immediate vicinity.

Matter of Javier R., 72 AD3d 1553 (4th Dept 2010)

Adjournment in Contemplation of Dismissal Improper Disposition

Family Court adjourned respondent’s proceeding in contemplation of dismissal. The Appellate Division reversed and remitted. The court had previously made a finding that respondent was a juvenile delinquent and thus lacked the authority to adjourn the proceeding in contemplation of dismissal.

Matter of Eduardo R., 72 AD3d 1570 (4th Dept 2010)

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed an act which, if committed by an adult, would constitute the crime of manslaughter in the first degree. The Appellate Division affirmed. After a dispositional hearing, the court determined that respondent required a restrictive placement and the court ordered an initial placement with OCFS for three years. In placing respondent in a

restrictive placement the court properly considered the seriousness of the crime, respondent's need for extensive treatment, the need to protect the community, and the aggressive behavior of respondent towards himself and others.

Matter of Joseph G., III, 78 AD3d 1700 (4th Dept 2010)

PERSON IN NEED OF SUPERVISION

PINS Adjudication Reversed

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

Matter of James L. Jr., 74 AD3d 1775 (4th Dept 2010)

TERMINATION OF PARENTAL RIGHTS

Progress Insufficient to Warrant Return of Child

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

Matter of Tiara B., 70 AD3d 1307 (4th Dept 2010), *lv denied* 14 NY3d 709

Petitioner Agency Made Diligent Efforts

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

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

Termination on Ground of Mental Illness Affirmed

Family Court terminated respondent mother's parental rights with respect to one of her children on the ground of mental illness. The Appellate Division affirmed. The failure of the court-appointed psychologist to provide a precise, clinically accepted diagnosis did not render his testimony legally insufficient. Further, a separate dispositional hearing was not required following the determination that the mother was unable to care for the child because of mental illness. Finally, respondent failed to demonstrate that she was afforded less than meaningful representation by counsel.

Matter of Demariah A., 71 AD3d 1469 (4th Dept 2010)

Compliance With Terms of Suspended Judgment Alone Not Sufficient

Family Court properly revoked a suspended judgment and terminated respondent's parental rights. Compliance with the terms of a suspended judgment does not

necessarily lead to dismissal of the petition. The evidence at the hearing established that it was in the child's best interests to terminate the mother's parental rights. At the time of the order, the child was three-years-old, had been living with the same foster parents since birth, and they wished to adopt her. There was no evidence that the mother was currently in a position to have even unsupervised visitation with the child. The caseworker testified that the mother had not demonstrated consistency in parenting the child, nor had she shown that she had learned anything from her parenting classes. The visitation supervisor testified that the mother made poor progress in setting boundaries for the child, and that she often gave in to the child's demands and would respond inappropriately when she became frustrated with the child. Further, the mother was arrested for shoplifting a few months after petitioner filed the petition, had been unemployed for at least the past three years, and had not been seeking employment. Moreover, the mother resided in a facility for individuals recovering from drug or alcohol addiction, and that facility did not allow for full-time custody. None of the mother's service providers recommended that the child be returned to her and her own therapist testified that before having unsupervised visits with the child, the mother needed to demonstrate that she was competent to do so. Thus, although the mother established that she had made substantial progress in some areas, she failed to establish that she was able to take full responsibility for the care of the child. Further, the court properly denied the mother's request for post-termination visitation. Since the birth of the child, the mother had only supervised visitation. While there was testimony that the child had formed a bond with her mother, there was also testimony that the three-year-old child had a strong bond with her foster parents. In addition, the foster parents testified that the child would act out and have more temper tantrums after extended visitation with the mother.

Matter of Malashia B., 71 AD3d 1493 (4th Dept 2010)

Motion to Vacate Default Properly Denied

Family Court properly denied the motion of respondent father to vacate an order entered upon his default in appearing at the fact-finding and dispositional hearing in the proceeding seeking termination of his parental rights with respect to four of his children. Respondent failed to meet his burden of providing a reasonable excuse for his failure to appear and a meritorious defense to the petition.

Matter of Alexis C.R., 71 AD3d 1511 (4th Dept 2010), *lv dismissed* 14 NY3d 922 (2010)

Suspended Judgment Properly Revoked

Family Court granted the petition to revoke a suspended judgment and terminated respondent mother's parental rights with respect to the subject children. The Appellate Division affirmed. The mother violated the terms and conditions of the suspended judgment. The record established that she attended only one third of the scheduled visitation sessions with her children, she failed to attend appointments for the children, and she failed to obtain suitable housing. The mother's contention that the petitioner failed to use diligent efforts was without merit. Further, the court did not err in admitting

hearsay testimony in evidence. Because a hearing on the issue of the revocation of a suspended judgment is part of the dispositional phase of a permanent neglect proceeding, hearsay testimony is admissible if material and relevant.

Matter of Janasia H., 71 AD3d 1524 (4th Dept 2010), *lv denied* 15 NY3d 701(2010)

Parental Rights Properly Terminated on Grounds of Permanent Neglect

Family Court terminated respondent mother's parental rights with respect to one of her children on the ground of permanent neglect. The Appellate Division affirmed. The mother's contention that the court was biased against her as evidenced by the court's statements was without merit. The statements made were relevant to the issue whether the mother had failed to plan for the future of the child, although physically and financially able to do so. Further, the court did not abuse its discretion in refusing to enter a suspended judgment because the mother's progress was not sufficient to warrant any further prolongation of the child's unsettled familial status. The child was 4 ½ years old and had been placed in foster care on three separate occasions because of the mother's substance abuse. Although the record established that the mother made progress in treatment and maintained her sobriety for intermittent periods, the record also established that she relapsed each time the child was returned to her.

Matter of Roystar T., 72 AD3d 1569 (4th Dept 2010)

Respondent's Parental Rights Properly Terminated

Following a dispositional hearing, Family Court terminated respondent father's parental rights. The Appellate Division affirmed. While the Appellate Division agreed with respondent that the court erred in precluding him from cross-examining witnesses at the dispositional hearing concerning the stability of the foster home environment, the error was harmless because the evidence provided proper support for the court's disposition. Respondent's contention that the court should have issued a suspended judgment was rejected. The children had been living with the foster parents for four years, the foster parents wished to adopt the children, and the children, who were teenagers at the time of the dispositional hearing, wished to be adopted by the foster parents. Further, respondent's progress was not sufficient to warrant any further prolongation of the children's unsettled familial status.

Matter of Kyle K., 72 AD3d 1592 (4th Dept 2010)

Respondent Unable to Provide Proper and Adequate Care for His Child by Reason of Mental Illness

Family Court terminated respondent father's parental rights on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of demonstrating by clear and convincing evidence that the father was presently and for the foreseeable future unable to provide proper and adequate care for his child by reason of mental

illness. Despite father's contention, the foundation for the psychologist's testimony was sufficient. The failure of the psychologist to provide a precise, clinically accepted diagnosis did not render his testimony legally insufficient to satisfy the statutory mandate.

Matter of Demariah A., 72 AD3d 1592 (4th Dept 2010)

Post-Termination Visitation Not in Child's Best Interests

After a finding of permanent neglect, Family Court terminated respondent mother's parental rights with respect to her daughter. The Appellate Division affirmed. The mother failed to preserve for review her contention that the court should have entered a suspended judgment. In any event, that contention was without merit. Any progress made by the mother was not sufficient to warrant a further prolongation of the child's unsettled familial status. Furthermore, the mother failed to ask the court to consider any post-termination contact with the child and failed to establish that such contact would be in the child's best interests.

Matter of Andrea E., 72 AD3d 1617 (4th Dept 2010), *lv denied* 15 NY3d 703 (2010)

Suspended Judgment Properly Revoked

Family Court revoked a suspended judgment and terminated respondent mother's parental rights with respect to her daughter and son. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that the mother violated several conditions of the suspended judgment. Further, respondent failed to establish that it would be in the best interests of the children to have post-termination visitation with her. Because of the mother's actions, the children had visited with the mother only twice in the eight month period prior to the hearing.

Matter of Sean H., 74 AD3d 1837 (4th Dept 2010)

Suspended Judgment Not in Best Interests of Child

Family Court terminated respondent mother's parental rights with respect to her child. The Appellate Division affirmed. The record supported the court's decision that a suspended judgment was not in the child's best interests. Further, respondent failed to demonstrate that post-termination contact would be in the child's best interests.

Matter of Micah H., 74 AD3d 1838 (4th Dept 2010)

Termination on Grounds of Permanent Neglect Affirmed

The Appellate Division affirmed Family Court's order terminating respondent mother's parental rights with respect to her son on the ground of permanent neglect. The child was placed in foster care ten days after his birth as a result of positive toxicology reports

which indicated that a variety of substances were in his system at birth. The record supported the conclusion that despite progress made by the mother in the ten months preceding the dispositional determination, that progress was not sufficient to warrant further prolongation of the child's unsettled familial status. Further, the mother was not denied effective assistance of counsel. The record established that the mother's attorney effectively cross-examined petitioner's witnesses, called several witnesses, effectively demonstrated that the inability of the mother to care for her son was related to prescribed pain medication, that she had made progress in completing the requirements of petitioner's plan for services, and that she visited her son consistently in the several months preceding the dispositional determination.

Matter of Elijah D., 74 AD3d 1846 (4th Dept 2010)

Parental Rights Properly Terminated on the Ground of Abandonment

Family Court terminated respondent mother's parental right with respect to her daughter on the ground of abandonment. The Appellate Division affirmed. The fact that mother visited her daughter once and had one telephone conversation with her in the six months preceding the filing of the petition did not preclude a finding of abandonment. Minimal, sporadic or insubstantial contacts were not sufficient to defeat an otherwise viable claim of abandonment.

Matter of Maddison B., 74 AD3d 1856 (4th Dept 2010)

Father Violated Suspended Judgment

Family Court terminated the parental rights of respondent father. The Appellate Division affirmed. The court properly rejected respondent's request either to continue the period of suspended judgment or to extend the period pursuant to Family Court Act § 633 (f). Although the suspended judgment had not expired at the time petitioner alleged that the father violated its terms and conditions, petitioner established the father's noncompliance by a preponderance of the evidence. At the violation hearing, the record established that the father attended only 5 out of 34 possible visits with the children, and at the time of the dispositional hearing the record established that father had attended only 9 out of 65 possible visits, had not completed a mental health evaluation, was denied public assistance, and could not verify that he was employed. The record also supported the court's finding that the children had a strong attachment to their foster parents who wish to adopt them.

Matter of Terrance M., 75 AD3d 1147 (4th Dept 2010)

Termination Affirmed: Respondent Failed to Maintain Contact or Plan for the Future

Family Court terminated respondent father's parental rights with respect to his children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner

established by clear and convincing evidence that it fulfilled its duty to exercise diligent efforts to encourage and strengthen respondent's relationships with his children. Petitioner was not required to guarantee that the parent succeed in overcoming his predicaments: the parent must assume a measure of initiative and responsibility.

Matter of Whytnei B., 77 AD3d 1340 (4th Dept 2010)

Respondent Unable to Provide Adequate Care Because of Her Mental Illness

Family Court terminated respondent mother's parental rights with respect to her son on the ground of mental illness. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child. Neither the fact that some of the records upon which the court appointed psychologist relied to form his opinion of the mother's mental health were six years old rendered the evidence insufficient, nor did the fact that the psychologist prefaced his opinion by noting that it was based only on the mother's records and that he could not provide a diagnosis without a full examination. The possibility that the mother might be capable of caring for the child at some indefinite point in the future did not warrant denial of the petition.

Matter of Deondre M., 77 AD3d 1362 (4th Dept 2010)

Finding of Permanent Neglect Affirmed

Family Court terminated respondent mother's parental rights with respect to her youngest child on the ground of permanent neglect. The Appellate Division affirmed. Contrary to respondent's contention, where, as here, a parent admits to permanent neglect, there was neither the need for the petitioning agency to put forth evidence, nor was it necessary for the court to determine whether petitioner exercised diligent efforts to strengthen the parental relationship.

Matter of Eleydie R., 77 AD3d 1423 (4th Dept 2010)

TPR Affirmed

Family Court terminated respondent mother's parental rights with respect to her child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of showing, by clear and convincing evidence, that it exercised diligent efforts to encourage and strengthen the parental relationship and to reunite mother and child. Petitioner provided mental health and parenting services for the mother, family counseling for the mother and child, and supervision and transportation for visitation when needed. The record supported the court's determination that termination of respondent's parental rights, while allowing the mother to have post-termination contact with the child, was in his best interests.

Matter of Ayodeji W., 78 AD3d 1563 (4th Dept 2010)

Motion Seeking to Vacate Default Order Properly Denied

Family Court terminated respondent mother's parental rights with respect to her children on the ground of permanent neglect. The Appellate Division affirmed. The court properly terminated respondent's parental rights to her daughters. Petitioner established that respondent did not successfully complete substance abuse and domestic violence counseling and continued to use drugs after she stipulated to the finding of permanent neglect. The court did not abuse its discretion in denying respondent's motion seeking to vacate the default order terminating her parental rights with respect to her son. She failed to appear on the petition and she failed to establish a reasonable excuse for the default or a meritorious defense to the petition.

Matter of Mikia H., 78 AD3d 1575 (4th Dept 2010)

Motion Seeking to Vacate Default Order Properly Denied

Family Court denied respondent mother's motion to vacate an order of fact-finding. The Appellate Division affirmed. Respondent failed to appear at the second day of the fact-finding hearing on termination of her parental rights on the ground that she permanently neglected her child. The court conducted the hearing in respondent's absence and immediately thereafter conducted a dispositional hearing and determined it was in the child's best interests to award custody and guardianship of the child to petitioner. Thereafter, the mother moved to vacate the default order, asserting that she misunderstood the court's statement about the continuation date of the fact-finding hearing. The court denied that part of the motion regarding the finding of permanent neglect but in effect granted the part of the motion with respect to the dispositional hearing by reopening the dispositional hearing to afford the mother the opportunity to testify and present evidence. After the mother testified the court adhered to its prior determination. Both the mother and her attorney were notified of the continuation date of the fact-finding hearing and therefore mother's attorney was not ineffective for failing to do more to ensure the mother's presence on that date. Mother's attorney did attempt to provide the requisite meritorious defense in support of the motion and the court's determination that it was not meritorious did not establish that mother's attorney was ineffective.

Matter of Charity W., 79 AD3d 1722 (4th Dept 2010)

Amendments to Social Services Law Not Retroactive

Family Court terminated the parental rights of respondent mother on the ground of permanent neglect. The Appellate Division affirmed. Because recent amendments to Social Services Law § 384-b were not remedial in nature they were not retroactive and did not apply at the time the instant order was entered. Petitioner made diligent efforts to encourage and strengthen the mother's relationship with the child and it was in the best

interests of the child to terminate respondent's parental rights. The mother failed to complete her service plan despite ample opportunity to do so, made minimal efforts to visit the child, had no viable plan for the child's future, and was generally indifferent toward the child.

Matter of Yasiel P., 79 AD3d 1744 (4th Dept 2010)

TPR on Ground of Mental Illness Affirmed

Family Court terminated respondent's parental rights with respect to her son on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of demonstrating by clear and convincing evidence that respondent was then and for the foreseeable future unable by reason of mental illness to provide proper and adequate care for the child. Post-termination visitation would be contrary to the child's best interests.

Matter of Sean S., 79 AD3d 1760 (4th Dept 2010)

Testimony Supported TPR on Ground of Mental Illness

Family Court terminated respondent father's parental rights with respect to his children on the ground of mental illness. There was an adequate foundation for the opinion that respondent suffered from schizophrenia and had borderline intellectual functioning. That testimony, together with the testimony of caseworkers who supervised the father's visitation with the children, provided the requisite clear and convincing evidence that the father was then and for the foreseeable future unable by reason of mental illness to provide proper and adequate care for the children.

Matter of Devonte M.T., 79 AD3d 1818 (4th Dept 2010)