

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

Case Digest 2011

ADOPTION

Petitioner Not Consent Father

On remittal, Family Court held a hearing where petitioner was afforded an opportunity to present evidence that he was a consent father, rather than a notice father, and to be heard on the issue of the child's best interests. Following the hearing, the court determined that petitioner was not a consent father. The Appellate Division affirmed. Petitioner failed to meet his burden of establishing that he had a right to consent to the adoption. Petitioner testified that he had no contact with the child for three years before the hearing. The record did not support petitioner's assertion that he attempted to communicate regularly with the child during those three years because the only evidence of such attempt was a single card sent to the child more than two years after petitioner learned of the child's mother's death.

Matter of Jaleel E. F., 81 AD3d 1302 (4th Dept 2011)

Determination That Respondent Was "Notice Father" Violated His Right to Due Process

Family Court denied father's petition for custody and freed the child for adoption. The Appellate Division modified by vacating those parts of the order that denied the custody petition, determined that petitioner was a "notice father" and freed the child for adoption and remitted for further proceedings before a different judge. The child was the subject of a neglect petition against the mother. While the child was in foster care petitioner was adjudicated the father. Thereafter, petitioner commenced this proceeding seeking custody of the child. The court heard testimony on the custody petition following the dispositional hearing in the permanent neglect proceeding against the mother. The court erred in failing to make the requisite findings of extraordinary circumstances before determining the best interests of the child. The court also erred in treating the custody matter as though it had before it only the permanent neglect petition. By determining that petitioner was a "notice father" the court deprived him of due process – that reference was correct only in the context of the permanent neglect proceeding. The issue whether petitioner's consent was required before the child could be adopted was not before the court.

Matter of Washington v Erie County Children's Servs., 83 AD3d 1433 (4th Dept 2011)

Biological Father Not Consent Father

Family Court determined that respondent biological father forfeited his right to consent to the adoption of the subject child. The Appellate Division affirmed. The court properly determined that the adoption could proceed without respondent's consent. Respondent failed to meet his burden of establishing his right to consent to the adoption. He did not provide any financial support to petitioner mother during the three years preceding the filing of the adoption petition in 2009, had not seen the child since 2006, and failed to

communicate with the child or mother from 2006-2008. Respondent's insubstantial and infrequent attempts to contact the mother and child did not constitute substantial and continuous contact and his substance abuse treatment did not provide an adequate excuse.

Matter of Ethan S. 85 AD3d 1599 (4th Dept 2011)

CHILD ABUSE AND NEGLECT

Respondent's Murder of Girlfriend's Son Constituted Derivative Neglect of Son's Sister as a Matter of Law

Family Court adjudged that respondent neglected and abused his girlfriend's son and derivatively neglected the son's older sister. The Appellate Division affirmed. On appeal, respondent challenged only the finding of derivative neglect of the sister. Respondent's contentions in opposition to the motion for summary judgment were raised for the first time on appeal and therefore were not properly before the Court. In any event, petitioner established as a matter of law that respondent was a person legally responsible for the sister, and that when he murdered his girlfriend's son he derivatively neglected the sister.

Matter of Paige K., 81 AD3d 1284 (4th Dept 2011)

Mother's False Allegations and Antagonistic Conduct Against Father Constituted Neglect

Family Court adjudged that respondent mother neglected her children and ordered that her visitation with the children be supervised. The Appellate Division affirmed. Respondent's false allegations and antagonistic conduct against the father placed the children in imminent danger of becoming impaired. The scope of examination of the witnesses was within the sound discretion of the trial court.

Matter of Thomas C., 81 AD3d 1301 (4th Dept 2011), *lv denied* 16 NY3d 712

Father Unable to Care for Newborn

Family Court adjudicated the infant child of petitioner "putative" father to be neglected. The Appellate Division affirmed. The evidence demonstrated that the father was virtually homeless and that at the time of the hearing he neither had the resources nor the ability to care for the child. The father's contention for the first time on appeal that he was not a parent or other person legally responsible for the child's care was not properly before the Court and, in any event, was wholly inconsistent with his testimony at the hearing.

Matter of Shania S., 81 AD3d 1380 (4th Dept 2011)

Father Neglected Child by Continual Failure to Address Drug Problem

Family Court adjudged that respondent father neglected his child. The Appellate Division affirmed. Although the court erred in finding that the child was neglected based upon respondent's purported threats to remove the child from the hospital, it properly found that respondent neglected the child based upon his continued failure to address his illegal drug use. Respondent did not object to the court's judicial notice of prior

orders detailing respondent's long-standing inability or refusal to deal with his drug usage.

Matter of Alexander M., 83 AD3d 1400 (4th Dept 2011), *lv denied* 17 NY3d 704

Mother's Sexual Abuse of Her Child Supported by Evidence

Family Court found that respondent mother sexually abused her child. The Appellate Division affirmed. The findings were supported by a preponderance of the evidence. The child's out-of-court statements were sufficiently corroborated by the testimony of an evaluating psychologist who opined that the child's statements made to the psychologist and to a caseworker during a videotaped interview were credible. The evidence that respondent attempted to introduce about the father's alleged corporal punishment was not relevant to the issue whether respondent sexually abused the child. Although the court improperly delegated to a psychologist the authority to determine whether contact between respondent and the child should occur during therapy sessions, the order of protection had expired and therefore the issue was moot.

Matter of Nicholas J. R., 83 AD3d 1490 (4th Dept 2011)

Family Court Violated Mother's Right to Due Process

Family Court adjudged that respondent mother neglected her child. The Appellate Division reversed and remitted. The court violated respondent's right to due process by refusing to allow her to testify during the fact-finding phase of the proceeding. The court's order in this case was based in part upon a prior order finding respondent to have neglected the subject child's three siblings for failure to take action when respondent was informed that one of the children had been sexually abused by their father. The subject child, however, was not the subject of the proceeding in the prior order and therefore respondent should have been afforded an opportunity to be heard in response to the new evidence offered by petitioner in this proceeding.

Matter of Thor C., 83 AD3d 1585 (4th Dept 2011)

Child Neglected Based Upon Derivative Evidence That Mother's Other Children Neglected

Family Court adjudicated the subject child to be neglected by respondent mother. The Appellate Division modified by vacating that part of the order that required the mother to comply with the treatment recommendations of a mental health evaluation. The court properly found the child to be neglected based upon derivative evidence that four of respondent's other children were determined to be neglected children, including evidence that respondent failed to address the mental health issues that led to those neglect determinations. Further, the finding of neglect with respect to one of respondent's other children was entered about two months before the subject child's birth and therefore the prior neglect finding with respect to the other child was so

proximate in time that it could reasonably be concluded that the condition still existed. The court erred in including a provision in the dispositional order that required respondent to comply with treatment recommendations of a mental health evaluation report that was not admitted into evidence and was not in the record on appeal. The court did not abuse its discretion in denying respondent's mother's attorney's request for an adjournment so that the mother could testify and so he could subpoena an additional witness.

Matter of Sophia M. G.- K., 84 AD3d 1746 (4th Dept 2011)

Frye Hearing Not Required

Family Court placed respondent father under the supervision of petitioner agency based upon a finding that he sexually abused his daughter. The Appellate Division affirmed. The court did not abuse its discretion in denying respondent's motion for a *Frye* hearing with respect to the admissibility of validation testimony of a court-appointed mental health counselor. Because the Sgroi method used by the counselor in interviewing the child was widely used and the testimony of the counselor was not on a novel topic, a *Frye* hearing was not required. The court properly determined that the out-of-court statements of the child were sufficiently corroborated.

Matter of Bethany F., 85 AD3d 1588 (4th Dept 2011)

Finding of Derivative Neglect Supported by the Evidence

Family Court adjudged that respondent mother derivatively neglected her child. The Appellate Division affirmed. Because the mother failed to object to the admission of postpetition evidence, her challenge on appeal was not preserved for review. In any event, although petitioner should have amended the petition, because the evidence was received without objection, the Appellate Division, in the interests of justice, sua sponte conformed the petition to the evidence. The finding of derivative neglect was supported by a preponderance of the evidence. The mother's neglect of the child was so closely connected with her care of her other children that it could be said to evidence fundamental flaws in her understanding of the duties of parenthood, which justified the finding that the mother derivatively neglected the subject child.

Matter of Angel L. H., 85 AD3d 1637 (4th Dept 2011), *lv denied* 17 NY3d 711

Father Neglected Child by Failing to Protect Him From Sexual Abuse

Family Court determined that respondent father neglected the child by failing to protect him from being sexually abused by his oldest brother and his cousin. The Appellate Division affirmed. Both the child and his brother testified that the father was aware of their sexual activity but took no action to prevent it from continuing. The child was also derivatively neglected as a result of the father's sexual abuse of the father's nephew. The nephew's family shared a house with respondent's family during the relevant time

period. The father was the functional equivalent of a parent with respect to his nephew and therefore the nephew was the legal responsibility of the father within the meaning of the Family Court Act.

Matter of Zachary T., 85 AD3d 1663 (4th Dept 2011)

Parents Neglected Their Children

Family Court adjudicated respondents' children to be neglected. The Appellate Division affirmed. A preponderance of the evidence established that the mother neglected her children by attempting to drive a motor vehicle in an intoxicated condition with the children in the vehicle. The record supported the court's determination that the father deliberately failed to take anti-seizure medication so he could consume alcohol and that he was aware that he was likely to become violent when he had a seizure and that he had two seizures on the day in question. The dissent would have reversed with respect to the father because he knew only that there was some unspecified possibility that he might have a seizure, might become violent, and that the children might be harmed if they were present. The dissent also would have reversed with respect to the mother because there was insufficient evidence that she was intoxicated or that her actions placed the children in imminent risk.

Matter of Damian G., 88 AD3d 1268 (4th Dept 2011)

Father Sexually Abused Child – Visitation Suspended

Family Court determined that respondent father sexually abused his child, granted petitioner mother sole custody of the child, and suspended visitation with respondent. The Appellate Division affirmed. The child's out-of-court statements were sufficiently corroborated by the testimony of the child's therapists, who both opined that the child's behavior following the alleged abuse was consistent with a child who had been sexually abused. Further, the child's out-of-court statements were corroborated by the unsworn testimony she gave on cross-examination at the fact-finding hearing. The court did not err in allowing the child's therapists to testify, even though they were not identified as potential witnesses in the abuse petition. The Family Court Act does not require petitioner to list all potential witnesses. The court did not err in suspending visitation. The court determined that respondent sexually abused the child and respondent refused to proceed with recommended sex offender treatment and mental health counseling. One of the child's therapists opined that visitation would be harmful to the child and the child did want to see the father or return to the father's home.

Matter of Lydia C., 89 AD3d 1434 (4th Dept 2011)

Neglect Finding Supported by Evidence of Prior Neglect of Mother's Other Children

Family Court adjudged that respondent mother neglected her children. The Appellate

Division affirmed. The court did not err in conforming the pleadings to the proof. Respondent conceded that her objection to petitioner's motion was not based upon surprise and the record demonstrated that respondent suffered no demonstrable prejudice when the court conformed the pleadings to the proof and considered evidence that occurred after the filing of the neglect petition. Petitioner established that respondent neglected the children. Respondent's parental rights were terminated with respect to one of her older children on the ground of mental illness during the proceedings concerning the subject children. The record contained evidence that respondent continued to experience mental health problems associated with her schizophrenia and had been hospitalized twice for mental health issues after her parental rights with respect to the older children were terminated.

Matter of Ariel C.W.-H., 89 AD3d 1438 (4th Dept 2011)

Finding of Derivative Neglect Supported by Finding of Severe Neglect of Father's Other Child

Family Court adjudged that respondent father abused his children. The Appellate Division affirmed. The court did not err in finding that respondent derivatively abused his children based upon the finding that he severely abused one of his other children, resulting in the child's death. The finding was appropriate in view of the nature and severity of the abuse of the child who died.

Matter of Alaysha M., 89 AD3d 1467 (4th Dept 2011)

Father's Older Daughter Severely Abused Child and Younger Daughter Derivatively Abused

Family Court determined that respondent severely abused his older daughter and that his younger daughter was derivatively abused. The Appellate Division affirmed. There was clear and convincing evidence that respondent committed felony sex offenses against his older daughter. The older daughter's out-of-court statements to a school counselor and a nurse practitioner were sufficiently corroborated by medical evidence of sexual intercourse and the testimony of petitioner's validator. Further, the court was entitled to draw the strongest possible inference against respondent based upon respondent's failure to testify.

Matter of Chelsey B., 89 AD3d 1499 (4th Dept 2011), *lv denied* ___NY3d___

Mother Neglected Youngest Son and Derivatively Neglected Older Sons

Family Court determined that respondent mother neglected her youngest son and derivatively neglected her two older sons. The Appellate Division affirmed. Although respondent took her youngest son to the hospital when directed, the court's finding that she knew or should have known that the child was being abused by her live-in boyfriend and that she failed to take steps to avoid the risk of harm to the child when she

continued to live with the boyfriend and allowed him to babysit, was supported by a preponderance of the evidence. Further, the court was entitled to draw a negative inference against respondent based upon her failure to testify.

Matter of Brian P., 89 AD3d 1530 (4th Dept 2011)

Finding of Neglect Supported by Father's Adult Stepdaughter's Testimony About Sexual Abuse

Family Court adjudged that respondent father neglected his children. The Appellate Division affirmed. The father's adult stepdaughter, who was the sole witness for petitioner, testified that respondent sexually abused her for a period of years beginning when she was 15. That testimony supported a finding of derivative neglect with respect to the subject children because the impaired level of parental judgment shown by respondent's behavior created a substantial risk to the subject children. The court could make a finding of derivative neglect even if the child who was sexually abused was not a subject of the neglect petition. The finding of neglect also was supported by the stepdaughter's testimony that respondent engaged in acts of domestic violence, occasionally in the presence of the children. The court properly admitted respondent's substance abuse treatment records because they were relevant to the issue of neglect.

Matter of Kennedie M., 89 AD3d 1544 (4th Dept 2011), *lv denied* ___NY3d___

Neglect Adjudication Reversed

After respondent father pleaded guilty to a criminal charge of third degree assault based upon an incident where the father struck his oldest son in the face, the same judge granted petitioner summary judgment on its petition alleging that the father neglected his oldest son. The court also denied father's motion to dismiss the petition and his request for a fact finding hearing. The Appellate Division reversed. Petitioner failed to meet its burden of establishing that the acts underlying the criminal conviction constituted neglect as a matter of law and that the issues in the neglect proceeding were resolved by the father's guilty plea. Under the circumstances here, petitioner failed to establish that the father intended to hurt his son or that his conduct was a pattern of excessive corporal punishment. The case was remitted for further proceedings before a different judge.

Matter of Nicholas W., 90 AD3d 1614 (4th Dept 2011)

Neglect Adjudication Affirmed

Family Court adjudged that respondent mother neglected her children. The Appellate Division modified by vacating all references to respondent's alcohol abuse and related treatment in 2006. There was no mention of alcohol abuse and treatment in the court's decision and where there is a conflict between the order and the decision, the decision controls. Petitioner established by a preponderance of the evidence that the mental and

physical condition of the children had been or was in imminent danger of becoming impaired as a result of respondent's failure to maintain the family's residence free from unsanitary or unsafe conditions and respondent's longstanding failure to seek treatment for substance abuse. The evidence presented by petitioner, together with the adverse inference the court was allowed to draw based upon respondent's failure to testify, supported the court's findings about the imminency of the children's impairment and respondent's inability to exercise the degree of care required to provide proper supervision.

Matter of Alexis H., 90 AD3d 1679 (4th Dept 2011)

CHILD SUPPORT

Mother's Support Arrears Reduced to \$500

This case had been held and remitted to Family Court to determine whether petitioner mother's income was less than or equal to the poverty level when \$14,000 in child support arrears accrued against her. The mother had commenced this proceeding to vacate a consent order on the ground that given her income, arrears could not accrue in excess of \$500. Although consent orders are generally not appealable, under the circumstances of this case the Appellate Division determined that the consent order was subject to vacatur. Family Court found that the mother's income during the time at issue was far less than the poverty guidelines. The Appellate Division, in the interests of justice and on the law, reduced the arrears to \$500.

Matter of Chomik v Sypniak, 81 AD3d 1259 (4th Dept 2011)

Father's Willful Violation of Support Order Established

Family Court confirmed the Support Magistrate's determination that respondent willfully failed to obey an order of support and sentenced respondent to 90 days in jail. The Appellate Division affirmed. The contention of respondent that the Support Magistrate erred in allowing him to proceed pro se at the fact-finding hearing was not preserved for review. The record established that there was a court order requiring him to pay child support and respondent conceded that he did not do so. Respondent's testimony that he lacked the means to pay child support because he did not want to jeopardize his business or incur tax problems was not competent credible evidence of respondent's inability to make the required payments.

Matter of Huard v Lugo, 81 AD3d 1265 (4th Dept 2011), *lv denied* 16 NY3d 710

Father's Willful Violation of Support Order Established

Family Court confirmed the Support Magistrate's determination that respondent willfully failed to obey a New Jersey order of child support and sentenced respondent to 90 days in jail. The Appellate Division affirmed. Respondent's admission at the hearing that he had not paid child support as required by the support order constituted prima facie evidence of a willful violation and the father's voluntary termination of his employment without any other employment prospects other than his general plan to develop real estate did not constitute some competent and credible evidence justifying his failure to pay support. Respondent's contention that the court was biased against him was rejected as well as his contention that he was deprived of his right to counsel at the support proceedings.

Erie County Dept. of Social Servs. v Shaw, 81 AD3d 1328 (4th Dept 2011)

Court Empowered to Make Modification of Prior Support Order Retroactive to

Filing of Petition

Family Court granted respondent father's objection to the order of the Support Magistrate granting mother's petition seeking to modify a prior order of child support. The Support Magistrate had directed the Support Collection Unit to recompute the father's child support arrears by adding back the amount for which the father was credited between the date that the parties' daughter began living with petitioner mother and the date the petition was filed. The court was empowered only make modification of the prior support order retroactive to the date the petition was filed. Family Court had no general equity jurisdiction and lacked authority to grant retroactive relief based upon equitable principles.

Matter of Paladino v Paladino, 81 AD3d 1472 (4th Dept 2011)

Respondent Father Denied His Right to Counsel

Family Court confirmed the Support Magistrate's determination that respondent father willfully failed to obey an order of the court and sentenced him to six months in jail. The Appellate Division reversed. The court erred in allowing respondent to proceed pro se at the hearing. The court failed to make the requisite searching inquiry of respondent's awareness of the dangers and disadvantages of proceeding without counsel.

Matter of Commissioner of Genesee County Dept. of Social Services v Jones, 87 AD3d 1275 (4th Dept 2011)

Imputation of Income Proper Even Though Father Was Incarcerated

Family Court denied respondent father's objections to an order of child support imputing income to respondent based upon the minimum wage for a period of over three years and ordered arrears for that period in the amount of \$1,870.68. The Appellate Division affirmed. Although it was undisputed that respondent was incarcerated for most of the relevant time period, to the extent that respondent's financial hardship was the result of his own wrongful conduct he was not entitled to a reduction in his child support obligation. Because respondent's income included imputed income, his income was not below the poverty income guidelines and he was not entitled to a reduction of arrears to \$500. The Support Magistrate was not obliged to accept respondent's unsupported testimony that he had a medical condition that prevented him from working.

Matter of Niagara County Dept. of Social Services v Hueber, 89 AD3d 1433 (4th Dept 2011), *lv denied* ___NY3d___

Imputation of Income Proper Even Though Father Was Incarcerated

Family Court denied respondent father's objections to an order of child support imputing income to respondent based upon the minimum wage for a period of about one year and ordered arrears for that period in the amount of \$659.18. The Appellate Division

affirmed. Although it was undisputed that respondent was incarcerated for most of the relevant time period, to the extent that respondent's financial hardship was the result of his own wrongful conduct he was not entitled to a reduction in his child support obligation. Because there was no evidence that the child's noncustodial mother had any income or was capable of earning income, there was no basis to apportion 50 % of the child support obligation to her. Petitioner was not required to produce the child's custodian, on whose behalf the proceeding was commenced, at the hearing on the petition. Further, if respondent wished to challenge the custodian's eligibility for welfare, he should have done so at the hearing where he had the opportunity to be heard.

Matter of Niagara County Dept. of Social Servs. v Hueber, 89 AD3d 1440 (4th Dept 2011)

Father Not Deprived of Right to Counsel Because Court Disqualified His Attorney

Supreme Court awarded maintenance, child support and attorney's fees to defendant mother. The Appellate Division affirmed. The court did not abuse its discretion in disqualifying plaintiff father's attorney based upon that part of rule 3.7 of the Rules of Professional Conduct, providing "[a] lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." The record established that it was likely that plaintiff's original trial attorney would be called to testify about transferring plaintiff's funds in apparent violation of the court's order. Although it appeared that plaintiff's attorney did not testify at the second trial, the express language of rule 3.7 provides only that it is "likely" that the attorney would be called as a witness and here it was likely. The court was not required to make a searching inquiry about whether plaintiff understood the dangers and disadvantages of self-representation because there is no right to counsel in a divorce action.

Jozefik v Jozefik, 89 AD3d 1489 (4th Dept 2011)

Court Erred in Dismissing Petition to Terminate Support Obligation Without Hearing

Family Court dismissed father's petition seeking to terminate his support obligation for the parties' son, alleging that respondent mother had frustrated the father's visitation rights and that his son had abandoned him. The Appellate Division reversed. The Referee erred in dismissing the petition without conducting a hearing. The father established a prima facie case for termination of his support obligation by submitting evidentiary material establishing that his son abandoned him. His submissions established that his repeated attempts at communication with his son had been refused and his son had expressed a clear desire to have nothing to do with the father. Additionally, the petition alleged that the mother refused to allow the father to exercise his visitation rights and such deliberate frustration of visitation rights can warrant the suspension of future child support payments.

Matter of Coleman v Murphy, 89 AD3d 1500 (4th Dept 2011)

Father's Total Income Must Be Recalculated

Family Court denied the parties' objections to an order increasing respondent father's child support obligation. The court determined that respondent's 2008 adjusted gross income from his subchapter S corporation was \$707,511, including \$109,106 in capital gains, \$5,238 in entertainment expenses, and \$562,113 in imputed income based upon increased depreciation. The Appellate Division reversed and remitted the matter for recalculation of the father's income and child support obligation. Contrary to respondent's contention, he was self-employed within the meaning of the CSSA and the court properly included in his income the \$109,1096 in capital gains. Because petitioner mother failed to establish that respondent's entertainment expenses were personal in nature, it was an abuse of discretion to include the entertainment expenses in the amount of \$5,238 in respondent's income. Although respondent's income for child support purposes might ultimately include imputed depreciation income, the manner in which the court calculated the amount was incorrect under the Family Court Act because it was not calculated as depreciation "greater that depreciation calculated on a straight-line basis for the purpose of determining business income."

Matter of Grosso v Grosso, 90 AD3d 1672 (4th Dept 2011)

CUSTODY AND VISITATION

Petition for Modification Properly Denied

Family Court denied mother's petition seeking to modify a prior order of custody and visitation by providing her with unsupervised visitation with two of her children who were in the custody of their paternal aunt. The Appellate Division affirmed. Petitioner failed to demonstrate a sufficient change in circumstances to discontinue supervised visitation with the children and supervised visitation was in the children's best interests.

Matter of Anderson v Roncone, 81 AD3d 1268 (4th Dept 2011), *lv denied* 16 NY3d 712

Order of Visitation Modified, Respondent Established Requisite Change in Circumstances

Family Court adjudged that respondent father did not wilfully violate an order of the court and suspended petitioner mother's visitation with the parties' children. The Appellate Division affirmed. The parties stipulated to certain testimony at the hearing on their respective petitions, which established the requisite change in circumstances. The prior order required petitioner to pay the cost of transporting respondent and the children to the correctional facility where she was incarcerated and she failed to do so. Further, the court's determination that it was in the best interests of the children to suspend visitation had a sound and substantial basis in the record.

Matter of Black v Watson, 81 AD3d 1316 (4th Dept 2011), *lv denied* 17 NY3d 747

Stepmother Properly Awarded Guardianship

Family Court denied mother's petition seeking custody of her child and granted stepmother's petition seeking guardianship of the child. The Appellate Division affirmed. Although the court erred in admitting in evidence transcripts of testimony from 2004 without first determining whether the witnesses were unavailable, the error was harmless because the court primarily relied upon evidence and testimony presented at the fact-finding hearing on the instant petitions in making its findings of fact and conclusions of law. Moreover, the only testimony from the 2004 proceeding to which the court referred was the testimony of a child sexual abuse counselor regarding her validations of the allegations of sexual abuse against the mother and the mother did not challenge admission of the 2004 order in evidence. The stepmother met her burden of establishing extraordinary circumstances. The evidence established that the mother had been convicted of driving while intoxicated three times; that she was on probation for the third conviction at the time of the hearing; that she violated her probation; that she has a history of alcohol abuse; that she has ongoing mental health issues; and that she had been unemployed and unable to support herself since 2007. The best interests of the child would be served by guardianship to the stepmother in light of the facts that the child has lived with the stepmother for over four years, the stepmother had been the child's primary caregiver during that period, and the stepmother has provided for the

child's emotional and financial needs.

Matter of Beth M. v Susan T., 81 AD3d 1396 (4th Dept 2011)

Supervision of Father's Visitation Not Warranted

Family Court denied mother's petition for modification of visitation and granted the cross petition of father for joint custody of the parties' child. The Appellate Division modified by denying the cross petition for joint custody. The court did not abuse its discretion in determining that the father's visitation need not be supervised. The mother failed to establish that supervised visitation was in the child's best interests – the allegations against the father in her petition were entirely unsubstantiated. The court properly altered the father's visitation schedule because changes in his work schedule prevented him from exercising his visitation rights as set forth in the prior order. The court erred, however, in granting joint custody in view of the parties' acrimonious relationship and failure to cooperate with each other.

Matter of Vasquez v Barfield, 81 AD3d 1398 (4th Dept 2011)

Order Finding Father Willfully Violated Order Reversed

Family Court found respondent father in civil contempt for violating the visitation provisions of a custody order and imposed a \$500 fine to be applied against the amount of child support owed to the father by mother. The Appellate Division reversed. The order failed to set forth required findings that father's conduct was calculated to, or actually did, impair, impede or prejudice the mother's rights or remedies. Although the record contained testimony from the mother that, if credited, could support a finding that the father violated the visitation provisions of the order, the court failed to specify the testimony it found credible.

Matter of Wilce v Scalise, 81 AD3d 1407 (4th Dept 2011)

Award to Incarcerated Mother of Six Supervised Visits Per Year Affirmed

Family Court modified the terms of petitioner mother's visitation by awarding her six supervised visits per year with her children at the correctional facility where she was incarcerated and the court determined that the children were prohibited from further contact with their stepfather. The Appellate Division affirmed. The court did not improperly limit mother's visitation with the children. The mother was convicted of burglary in 2008 and was sentenced as a second felony offender to 5 years, 10 months to 14 years incarceration. A police officer testified at the hearing on the petitions that one of the children was with the mother while she committed the burglary. The court expressed concern that the mother casually lied; that her judgment was impaired; and that she appeared to be morally indifferent. The mother's contention that the court erred in prohibiting the children to have contact with their stepfather based solely upon hearsay concerning an allegation that the stepfather engaged in inappropriate sexual

contact with one of the children was not preserved for review. In any event, in light of no evidence to suggest the children had regular contact with the stepfather and the allegation of sexual misconduct, there was no basis to disturb the court's determination that the children have no contact with him.

Matter of Nicole J. R. v Jason M. R., 81 AD3d 1450 (4th Dept 2011), *lv denied* 17 NY3d 701

Family Court in Best Position to Evaluate Credibility

Family Court modified the parties' judgment of divorce by awarding primary physical custody of the parties' child to petitioner mother. The Appellate Division affirmed. The court had jurisdiction over the proceeding because the initial custody determination was made by a court of this State. The court was not required to decline to exercise jurisdiction based upon any unjustifiable conduct on the mother's part. The court was in the best position to evaluate the witnesses' credibility and character and it properly weighed the appropriate factors in determining that modification of the judgment by awarding primary physical custody to the mother was in the child's best interests.

Matter of Chappell v Dibble, 82 AD3d 1669 (4th Dept 2011)

Modification of Custody to Father Affirmed

Family Court modified the existing custody arrangement by awarding primary physical custody of the parties' children to petitioner father. The father established a change in circumstances. The record established that after the parties stipulated to the existing custody arrangement, the mother moved several times, requiring the children to change schools and she left the children for three months to explore employment opportunities in Florida and to spend time with her boyfriend. She transferred her professional license as a certified nurse assistant to Florida, which jeopardized her ability to obtain employment in New York. The father established that his residence and employment remained consistent and that the children thrived in his care.

Matter of Yelton v Froelich, 82 AD3d 1679 (4th Dept 2011)

Court Properly Dismissed Visitation Petition Without Hearing

Family Court dismissed father's petition for visitation with his children without a hearing. The Appellate Division affirmed. There was sufficient evidence before the court to enable it to make an independent comprehensive review of the children's best interests. The father was incarcerated for killing respondent mother's boyfriend and the attorney for the children informed the court that there was an order of protection in effect that prohibited the father from having contact with the children for 100 years. Father's counsel did not dispute that the order of protection was in effect.

Matter of Secrist v Brown, 83 AD3d 1399 (4th Dept 2011), *lv denied* 17 NY3d 706

Award of Sole Legal Custody to Father in Child's Best Interests

Family Court modified a prior order and granted sole legal and physical custody of the parties' child to petitioner father, directed that visitation with the mother be supervised, and directed the mother to obtain mental health counseling before filing an application to modify visitation. The Appellate Division modified by vacating the court's condition regarding future application by respondent to modify visitation. The father established a change in circumstances reflecting a need for change to ensure the best interests of the child. The mental health expert testified that the mother suffered from a delusional disorder and that the mother was not likely to benefit from therapy because she was not able to recognize alternative possibilities and explanations for her delusions and was not able to form a trusting bond with her therapist. There was a sound and substantial basis to support the requirement that visitation be supervised. The court did not have authority to condition future applications for modification of visitation on respondent's participation in mental health counseling.

Matter of Vieira v Huff, 83 AD3d 1520 (4th Dept 2011)

Mother's Permission to Relocate to Louisiana Affirmed

Family Court granted mother's petition to relocate to Louisiana. The Appellate Division affirmed. The mother met her burden to show that the relocation was in her child's best interests. Respondent father's contention that the petition should have been denied because his financial circumstances precluded him from traveling to visit the child was rejected. Because the father paid minimal child support, the mother was the source of the child's health care, child care and education. The mother's income was limited in the states closest to New York and jobs available to her in those locations were temporary, whereas the position she obtained in Louisiana was permanent and paid an excellent salary with benefits. Because the father had no accustomed close involvement in the child's everyday life, the need to give appropriate weight to preserving the relationship between the noncustodial parent and the child did not take precedence over the need to give appropriate weight to the economic necessity for relocation.

Matter of Canady v Binette, 83 AD3d 1551 (4th Dept 2011)

Change in Custody Affirmed

Family Court modified a prior order by granting petitioner father primary physical custody of the parties' child and visitation to the mother. The Appellate Division affirmed. The court failed to make sufficient findings, but the record was sufficiently complete to enable the Appellate Division to make its own findings of fact. The evidence established that the mother repeatedly changed residences and on one occasion returned to and left her estranged husband within one week; the mother was living with a paramour who had a significant history of domestic violence and irrational behavior; her transient lifestyle resulted in the child attending three different schools

within a few years; and the mother had been unemployed for several years. In contrast, the father had a stable home life; he made arrangements for daycare and schooling, provided books and toys and spent time playing with the child; he had a steady income; and he provided the child with a safe environment.

Matter of Brothers v Chapman, 83 AD3d 1598 (4th Dept 2011)

Award of Sole Custody to Father Affirmed

Family Court granted sole custody of the parties' child to petitioner father. The Appellate Division affirmed. Petitioner made a sufficient evidentiary showing of changed circumstances. Respondent mother admitted that she withheld the child from the father and the record established that she made numerous unfounded allegations of sexual abuse against the father. It was in the child's best interests to award the father sole custody. In addition to the mother's admissions about her unfounded allegations of sexual abuse against the father, the record established that the mother subjected the child to unnecessary medical examinations.

Matter of Howden v Keeler, 85 AD3d 1561 (4th Dept 2011)

Change in Physical Custody to Father Affirmed

Family Court transferred physical custody of the parties' children to father. The Appellate Division affirmed. The father established the requisite changed circumstances to warrant modification of the custody arrangement. The evidence established that the mother moved four times in the year prior to filing the petition and that she sometimes stayed in a residence for only two or three weeks and that the conditions in the mother's new residence were not suitable for the children. The father had a stable residence with appropriate beds and he was fully employed.

Matter of Carey v Windover, 85 AD3d 1574 (4th Dept 2011), *lv denied* 17 NY3d 710

Dismissal of Petition for Modification of Custody Reversed

Family Court dismissed mother's pro se petition for modification of a prior order custody of her child entered upon consent. The Appellate Division reversed. The prior order awarded mother and respondent grandmother joint custody of the child and awarded the grandmother primary physical custody of the child. The court erred in dismissing mother's petition without first receiving a report from the Referee and providing the mother an opportunity to object to it. The Referee was authorized only to hear the matter and issue a report – there was no evidence that the parties consented to referral to the Referee for a final determination. Further, the Referee's failure to advise the mother of her right to counsel constituted reversible error.

Matter of Howard v Howard, 85 AD3d 1587 (4th Dept 2011)

Award of Joint Custody Affirmed

Family Court granted respondent father's cross petition for joint custody of the parties' child, with primary physical custody with the father. The Appellate Division affirmed. Because there was no prior order determining custody, respondent was not required to establish changed circumstances. The court's determination following a hearing on the best interests of the child was entitled to great deference and the record established that the court weighed the proper factors. The mother failed to preserve for review her contentions regarding the lack of a *Lincoln* hearing and, in any event, in view of the child's young age, there was no abuse of discretion in the court's failure to conduct such hearing.

Matter of Thillman v Mayer, 85 AD3d 1624 (4th Dept 2011)

Award of Primary Physical Custody to Father in Child's Best Interests

Family Court granted father's petition to modify the custody and visitation provisions of the parties' judgment of divorce and awarded primary physical custody of the parties' child to the father. The Appellate Division affirmed. The mother did not challenge that a change in circumstances existed and the court's best interests determination was supported by a sound and substantial basis in the record. The child had no siblings and in view of her age any expressed desire concerning custody was of little significance. The father was better able to provide for the child financially. Although both the parties relied upon government benefits and loans for day-to-day support, the mother's financial stability was significantly dependant on her boyfriend, who paid her housing cost, shared the cost of food, and watched the child while the mother was at work. The father lived in a home owned by his father and grandparents, and his parents lived four miles from the father, transported the child to and from preschool and took care of the child while the father was at school. The mother waived her contention that the court erred in proceeding without the original attorney for the child because she consented to the substitution of a new attorney for the child. In any event, the child's interests were fully protected by the substituted attorney.

Matter of Clime v Clime, 85 AD3d 1671 (4th Dept 2011)

Denial of Relocation Reversed

Family Court denied respondent mother's cross petition for permission for the child to relocate with her to Pennsylvania. The Appellate Division reversed. The record reflected that the court did not adequately, if at all, consider the financial considerations underlying the requested relocation. The mother requested permission to relocate because she and her husband lost their jobs within a relatively short period of time and the husband's health insurance and severance pay ran out thereafter. The couple depleted their savings and their house was placed into foreclosure. The couple were unable to find jobs in Western New York and the husband accepted a job in Pennsylvania out of economic necessity. The court based its determination on its

conclusion that relocation would “qualitatively affect” the relationship between father and child. That factor does not take precedence over economic necessity. In any event, the record established that given the mother’s and husband’s testimony regarding how they would facilitate visitation and contact between father and child, the proposed relocation would not have a substantial impact on the visitation schedule.

Matter of Butler v Hess, 85 AD3d 1689 (4th Dept 2011), *lv denied* 17 NY3d 713

Child Did Not Have Significant Connection With New York

Family Court dismissed the petition of mother alleging that respondent father was in violation of a prior order pursuant to which the parties had joint custody of their youngest child and the mother had primary physical custody. The mother alleged that the father was keeping the child in South Carolina and refusing to allow her to bring the child back to New York. The Appellate Division affirmed. The parties and the child moved to South Carolina in 2007, and the father, with the mother’s consent, had primary physical custody of the child since 2007. The mother did not move back to New York until about the time she filed the instant petition in 2010. Thus, the child did not have a significant connection with New York and substantial evidence concerning the child’s care was no longer available in New York.

Matter of Maida v Capraro, 86 AD3d 924 (4th Dept 2011)

Father May Take Two-Year-Old Child to Italy

Family Court granted petitioner father permission to travel to Italy with the parties’ child. The Appellate Division modified by vacating the restriction that the trip shall occur in the spring of 2011. The court failed to set forth the facts it deemed essential in allowing the child to travel to Italy, but the record was sufficient to enable the Appellate Division to make those findings. Although the father’s visitation with the child was limited to a maximum of 48 hours at a given time, the father had a close bond with the child and, during visitation, he prepared her meals, bathed her, administered medication when necessary, and took her out on outings. The mother did not express any concerns that the father would abscond with the child, but rather opposed the trip because the two-year-old child had never been away from the mother for more than 48 hours and would be in an unfamiliar environment with unknown relatives. The mother’s concerns did not warrant denial of the father’s request. It would be in the child’s best interests to travel to Italy to meet her extended family.

Matter of Russo v Carmel, 86 AD3d 952 (4th Dept 2011), *lv denied* 17 NY3d 713

Court Properly Granted Sole Custody to Mother

Family Court granted petitioner mother sole custody of the parties’ children and denied the cross-petition of father for sole custody. The Appellate Division affirmed. Contrary to the attorney for children’s contention the court properly granted mother sole custody of

the children. The court's determination, based on its assessment of the character and credibility of the parties, was entitled to great weight and would not be disturbed where, as here, the determination was the result of a careful weighing of appropriate factors and had a sound and substantial basis in the record.

Matter of Canfield v Canfield, 87 AD3d 1272 (4th Dept 2011)

Biological Parents Not Entitled to Post-Adoption Visitation Despite Contract

Family Court denied petitions of biological parents to enforce a visitation provision in the post-adoption contract agreement with respect to their biological children who had been adopted by respondents. Pursuant to Domestic Relations Law § 112-b (4) a court should not enforce an order incorporating a post-adoption contract agreement unless such enforcement was in the child's best interests and here there was a sound and substantial basis for the court's determination that visitation was not in the children's best interests. Moreover, petitioners were expressly warned before they signed the judicial surrenders that the post-adoption contract agreement was subject to modification. The court properly granted respondent's cross petition seeking an order requiring the biological father to stay away and refrain from contact with respondents and the children. Because this proceeding was in the nature of a visitation proceeding, the court had the authority to issue an order of protection setting forth reasonable conditions. Because the court did not state an expiration date for the order the Appellate Division modified by directing that the stay away provision be in effect until the youngest child turned eighteen.

Matter of Kristian J.P. v Jeannette I.C., 87 AD3d 1337 (4th Dept 2011)

Court Properly Granted Sole Custody to Father

Family Court granted sole custody of the parties' child to petitioner father with visitation to respondent mother. The Appellate Division affirmed. The father met his burden to show changed circumstances. The petition was prompted by an incident where the mother left the six-year-old child alone in a casino hotel for three hours while the mother gambled. A hotel patron found the child crying in a hallway and the police were called. As a result, the mother was arrested, the child missed her first day of first grade, and CPS issued an indicated report for inadequate guardianship and lack of supervision. After the casino incident the mother and child stayed overnight at the home of a man unknown to the child. The man and the mother went out for drinks, leaving the child in the care of the man's daughters. Additionally, the father, stepmother, and a social worker testified that the child had poor hygiene when in the care of the mother and during the time the mother had sole custody, the child's teeth decayed to the point that she required 11 extractions and the placement of stainless steel crowns. The award of sole custody to the father was in the child's best interests because the father was better able to meet the child's financial, emotional and educational needs.

Matter of Grybosky v Riordan, 87 AD3d 1339 (4th Dept 2011)

Petition Alleging Violation of an Order of Visitation Properly Dismissed

Family Court dismissed the father's petition alleging that respondent mother violated a prior order of visitation with respect to the parties' son. The Appellate Division affirmed. A hearing on the petition was not required even where a factual dispute exists if the allegations in the petition are insufficient to support a finding of contempt. Here, the father failed to indicate how the mother allegedly violated the order, and as the court noted, the order was ambiguous.

Matter of Fewell v Koons, 87 AD3d 1405 (4th Dept 2011)

Grant of Primary Physical Custody of Children to Father Reversed

Family Court granted petitioner father primary physical custody of the parties' children. The Appellate Division reversed. Even assuming, *arguendo*, that the father showed a change in circumstances, it was in the children's best interests for primary physical custody to remain with the mother because the record established that the mother had been the children's primary caregiver throughout their lives and the children had a close relationship with the half-sibling residing in the mother's home.

Matter of Walker v Cameron, 88 AD3d 1307 (4th Dept 2011)

Prior Joint Custody Arrangement Unworkable

Family Court granted sole custody of the parties' child to the mother with visitation to the father and supervised contact with the stepfather. The Appellate Division affirmed. The mother met her burden of establishing a change in circumstances. Under the prior consent order, the parties shared residential custody of the child and that arrangement was no longer feasible because it caused confusion upon the child's attainment of school age. Further, the parties' relationship had deteriorated and their inability to co-parent rendered the existing joint custody arrangement unworkable. The father failed to preserve for review his contention that the court erred in precluding testimony concerning the "Abel test" administered to the stepfather or in failing to hold a *Frye* hearing with respect to the admissibility of testimony concerning that test.

Matter of York v Zulich, 89 AD3d 1447 (4th Dept 2011)

Court Properly Dismissed Violation Petition

Family Court denied the mother's petition for sole custody of the parties' children and granted the father's petition for sole custody. The Appellate Division affirmed. The court properly dismissed mother's violation petition because she failed to establish that the father willfully violated a clear mandate of the prior order or that his conduct defeated, impaired, impeded or prejudiced any right or remedy to which she was entitled. The court properly considered, as one of the factors in its determination, the support the father's parents gave to the children, which contributed to the children's stability and

emotional comfort. The mother failed to preserve for review her contentions that the court improperly interjected itself into the hearing by questioning her about matters not addressed on direct or cross-examination and that the court erred in admitting into evidence the custody evaluation on the ground that it contained hearsay.

Matter of Oravec v Oravec, 89 AD3d 1475 (4th Dept 2011)

Sole Custody to Father With Supervised Visitation to Mother Affirmed

Family Court awarded sole custody of the parties' daughter to petitioner father, with supervised visitation to respondent mother. The Appellate Division affirmed. The court did not err in transferring temporary custody of the parties' daughter to the father before the custody hearing because the father demonstrated the requisite exigent circumstances. In any event, reversal would not have been required because the court subsequently conducted the requisite evidentiary hearing and the record of the hearing fully supported the court's determination following the hearing. Further, the court properly denied the mother's motion to reopen and reschedule a "mediation conference" that was held by the court after the custody hearing. The record of the custody hearing established that the court's decision concerning visitation to the mother was based entirely on evidence presented at the custody hearing, where the mother appeared with counsel and participated.

Matter of Ward v Ward, 89 AD3d 1518 (4th Dept 2011)

Return From Deployment Overseas Constituted Changed Circumstances

Family Court granted respondent mother primary physical custody of the child. The Appellate Division affirmed. Although petitioner father's return from overseas deployment with the United States Army constituted a change in circumstances warranting review of the existing custody arrangement, the court, after holding an evidentiary hearing and conducted an in camera hearing with the parties' children, made a custody determination that was supported by a sound and substantial basis.

Matter of Messimore v Messimore, 89 AD3d 1547 (4th Dept 2011)

Not Necessary to Strictly Adhere to Relocation Factors Where Initial Custody Determination

Family Court granted petitioner mother sole custody of the parties' infant son. The Appellate Division affirmed. The father's contention was without merit that the Referee erred in failing to consider the *Tropea* factors before awarding custody to the mother, who had moved from Syracuse to North Carolina shortly after she commenced this proceeding. Because this was an initial custody determination, it was not necessary to strictly apply the factors to be considered in a potential relocation as enunciated in *Tropea*. Although the court failed to make an explicit finding that the award of custody to the mother was in the child's best interests, the record enabled the Appellate Division

to do so and it concluded that custody to the mother was in the child's best interests. There was no dispute that as of the hearing date the father had never seen the child and that he did not avail himself of opportunities to visit the child during the pendency of the proceeding. The father failed to appear for a scheduled home visit with the attorney for the child, who sought to arrange visits between father and child.

Matter of Moore v Kazacos, 89 AD3d 1546 (4th Dept 2011), *lv denied* ___NY3d___

Matter Remitted on Issue Whether Visitation Properly Denied

Family Court dismissed father's petition seeking visitation with the parties' child. The Appellate Division reversed. The court abused its discretion in denying the father visitation with the child because there was no evidence to support the conclusion that visitation with the father was detrimental to the child.

Matter of Diedrich v Vandermallie, 90 AD3d 1511 (4th Dept 2011)

Court Failed to Address Issue Whether Extraordinary Circumstances Existed

Family Court granted physical custody of the subject child to petitioner maternal grandmother and joint custody to father and maternal grandmother. The Appellate Division reversed. The court erred in failing to determine whether extraordinary circumstances existed before determining that it was in the child's best interests to grant physical custody of the subject child to petitioner maternal grandmother and joint custody to father and maternal grandmother. Because the record was insufficient to enable the Appellate Division to make that determination, the case was remitted to the court to determine whether extraordinary circumstances existed, after affording the parties the opportunity to submit additional evidence.

Matter of Vazquez v Valez, 90 AD3d 1559 (4th Dept 2011)

Father Awarded Increased Visitation

Family Court granted father's petition seeking increased visitation with the parties' child. The Appellate Division affirmed. The court did not preclude respondent mother's testimony concerning the father's alleged attempted suicide on the ground that it was too remote. Rather, the court allowed the testimony over the father's objection, but advised the mother that the testimony was not relevant to the best interests of the child in the absence of evidence concerning the father's recent mental health. The court also allowed the mother to testify that the father struck her in 2001, although the court noted it was more interested in the five or six years prior to the hearing. The court did not abuse its discretion in limiting testimony about verbal altercations between the parties because the court was well aware of the parties' acrimonious relationship. There was no evidence in the record to indicate that the court should have ordered, *sua sponte*, a psychological or social evaluation of the father.

Matter of Canfield v McRee, 90 AD3d 1653 (4th Dept 2011)

Court Not Required to Abide by Child's Wishes

Family Court modified the parties' prior custody agreement by awarding petitioner father sole custody of the child. The attorney for the child appealed. The Appellate Division affirmed. The attorney for the child conceded that there was a showing of changed circumstances. The totality of the circumstances supported the award of custody to the father in light of the ample evidence of the mother's interference with the father's visitation, including after she was warned several times by the court that visitation must occur according to a strict schedule promulgated by the court. Additionally, the child's treating psychologist and the court appointed psychologist testified that a change in custody would be warranted if the parties could not abide by the visitation schedule. The child's wishes were not determinative, particularly where, as here, following the child's wishes would be tantamount to severing the child's relationship with her father.

Matter of Marino v Marino, 90 AD3d 1694 (4th Dept 2011)

DISCOVERY

Information Sought in Interrogatories Was Reasonable and Necessary

Defendant husband and non-party respondents opposed plaintiff wife's motion to direct non-parties to answer interrogatories. Defendant and the non-parties contended that the information sought was not relevant to the matrimonial action because defendant's sole involvement in the limited partnerships that were the subject of the interrogatories was as custodian for the interests held by the parties' children. Supreme Court compelled non-party respondents to answer the interrogatories, concluding that the information sought was limited in scope and that child support would be directly affected by any tax liability of the children or assets held by them. The Appellate Division affirmed. The information sought in the interrogatories was reasonable and necessary in plaintiff's prosecution of the matrimonial action.

D'Angelo v D'Angelo, 89 AD3d 1424 (4th Dept 2011)

FAMILY OFFENSE

Mother Violated Order of Protection

Family Court found that respondent mother violated an order of protection and committed her to six months in jail. The Appellate Division dismissed the order insofar as it committed respondent to jail and otherwise affirmed. The mother's contention that the court violated Family Court Act § 1041 (a) by making findings of fact with respect to a violation petition that was not timely served was without merit. The record established that the mother had notice of petitioner's allegations that she violated the order of protection, that she was present during a combined neglect/violation hearing, and that she was served with the violation petition at the continued neglect hearing before the issuance of the court's findings of fact. Although the court lacked the authority to commit her to a jail term because the order of protection was not an "order of supervision" the issue was moot because the commitment portion of the order had expired by its own terms.

Matter of Alex A.C., 83 AD3d 1537 (4th Dept 2011)

Mother Failed to Establish Father Committed Family Offense

Family Court dismissed mother's family offense petition. The Appellate Division affirmed. The court did not err in taking sworn testimony from the mother before issuing a temporary order of protection. The court properly dismissed the family offense petition because the mother failed to meet her burden of establishing by a fair preponderance of the evidence that the father committed the family offense of harassment in the second degree. The court was entitled to credit the testimony of the father.

Matter of Helles v Helles, 87 AD3d 1273 (4th Dept 2011)

Respondent Committed a Family Offense

Family Court continued the prior schedule of visitation with respect to the parties' children, determined that respondent committed a family offense against petitioner, and ordered respondent to stay away from petitioner. The Appellate Division affirmed. There was a sound and substantial basis in the record for the determination to continue the prior visitation schedule. The record supported the court's determination that petitioner established by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree. Respondent verbally abused and threatened petitioner throughout a single day and left numerous threatening messages on petitioner's cellular phone that were played in court. The prior experience of petitioner with respect to respondent's assaultive behavior made the threats credible. Although obscenities alone will not constitute criminal conduct, the verbal acts made in the context described by petitioner were not constitutionally protected.

Matter of Beck v Butler, 87 AD3d 1410 (4th Dept 2011), *lv denied* 18 NY3d 801

Evidence Insufficient to Establish Family Offense

Family Court determined that respondent husband committed the family offense of stalking in the fourth degree and ordered respondent to stay away from petitioner. The Appellate Division reversed. The evidence was insufficient to establish that respondent acted with “no legitimate purpose” within the meaning of the stalking statute. Letters and cards sent by respondent to petitioner were sent with the legitimate purpose of attempting to reconcile with petitioner, a purpose that was not unreasonable based upon the parties’ lengthy marriage and history of separation and reconciliation. There was nothing on the face of the cards or letters that was improper or threatening. Petitioner’s remote allegations of physical violence did not establish a cognizable pattern of behavior on respondent’s part so as to render his behavior devoid of a legitimate purpose.

Matter of Ovsanik v Ovsanik, 89 AD3d 1451 (4th Dept 2011)

JURISDICTION

Court Properly Exercised Temporary Emergency Jurisdiction Under UCCJEA

Family Court, exercising temporary emergency jurisdiction under the UCCJEA, determined that the subject children were neglected and placed the children with DSS. The Appellate Division affirmed. The children's parents moved to New Mexico with the children in 2007. In 2008, the parents were arrested and charged with seven counts of child abuse. The charges stemmed from allegations that the parents left three of the children unsupervised in a bug-infested trailer miles from the family residence with inadequate food and limited supplies for a six to eight week period and that the parents, as a form of discipline, had confined the children to their bedrooms or to the garage for weeks or months at a time, where they received only bread, water, peanut butter and a sleeping bag and were allowed to go to the bathroom once or twice a day. As a result of the charges, the parents were ordered to avoid all contact with the children and the parents placed the children in the care of their maternal step-aunt and uncle in Chautauqua County. After the children were placed, the New Mexico Children, Youth and Families Department closed its file on the children and the parents notified the step-aunt and uncle that they were revoking the children's temporary placement and intended to place the children elsewhere. The aunt and uncle refused and filed a petition in Chautauqua County Family Court for custody of the children. Thereafter, the parents filed, pursuant to the UCCJEA, a petition against the step-aunt and uncle, confirming that they were the legal guardians of the children and appointing another temporary guardian until the criminal charges were resolved. Two days later, Family Court issued a temporary order of custody asserting temporary emergency jurisdiction pursuant to the UCCJEA and granted temporary custody of the children to the aunt and uncle. Thereafter, the New Mexico Court ordered the immediate transfer of the children to guardians the parents had selected who resided in Ohio. At a hearing on DSS's petition for an award of temporary custody of the children, a psychologist testified that the move to Ohio, orchestrated by the parents, would result in emotional abuse of the children. In light of the circumstances, including the emotional abuse by the parents, the absence of a neglect proceeding in New Mexico and the refusal of the New Mexico courts to protect the children, Family Court properly exercised temporary emergency jurisdiction because the children remained in imminent risk of harm. The dissent would have reversed because it found no imminent danger that the children would be returned to the parents or placed under their control.

Matter of Bridget Y., 92 AD3d 77 (4th Dept 2011)

JUVENILE DELINQUENCY

Restitution as Condition of ACD Proper

Respondent was accused of committing acts that, if committed by an adult, would constitute the crimes of unauthorized use of a motor vehicle in the third degree. Family Court granted an adjournment in contemplation of dismissal upon the condition that respondent pay \$800 as restitution for damage to the vehicle that he and other juveniles used. The Appellate Division affirmed. The court did not abuse its discretion in ordering restitution as a condition of the ACD. Respondent accepted the ACD, which the court unequivocally conditioned upon payment of restitution. The testimony of the victim regarding damage to his vehicle was sufficient to warrant the imposition of restitution. Respondent's contention that the court was required to consider his ability to pay before ordering restitution was not preserved for review.

Matter of Dante P., 81 AD3d 1267 (4th Dept 2011)

Placement in Limited Secure Facility Least Restrictive Alternative

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 attempted assault in the second degree. The Appellate Division affirmed. The evidence was legally sufficient to prove beyond a reasonable doubt that respondent committed the acts alleged in the petition. The record established that placement in a limited secure facility was the least restrictive alternative consistent with the needs and best interests of respondent and the need for protection of the community

Matter of Leporia L.L., 83 AD3d 1539 (4th Dept 2011)

Finding of Willful Violation of Conditional Discharge Reversed

Family Court found that respondent willfully violated an order of conditional discharge and placed her with OCFS. The Appellate Division reversed and dismissed the petition. The court erred in revoking an order of conditional discharge based on its finding that respondent violated a condition directing her to enroll in a specified private facility for troubled youth. Petitioner's own evidence at the hearing established that respondent took the steps required of her but was unable to enroll in the program because her mother could not afford the fees.

Matter of Rhea L. W., 85 AD3d 1613 (4th Dept 2011)

Court Did Not Act as "Second Prosecutor"

Family Court adjudged respondent to be a juvenile delinquent based on the finding that she committed the crime of unlawful possession of weapons by persons under 16 and committed an act which, if committed by an adult, would constitute the crime of assault

in the second degree. The Appellate Division affirmed. Respondent's contention that the petition should have been dismissed because the acts alleged occurred outside New York State was without merit. The evidence established that the acts in question were committed at a gas station in Monroe County. Respondent failed to preserve for review her contention that the court acted as a "special prosecutor" and, in any event, although the court questioned several witnesses, the questioning was nonadversarial and served only to clarify prior testimony. Any error in admitting or excluding certain evidence was harmless.

Matter of Dominique M., 85 AD3d 1626 (4th Dept 2011), *lv denied* 17 NY3d 709

Officers Had Articulate Reason For Initial Encounter With Respondent

Family Court adjudicated respondent to be a juvenile delinquent based upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a controlled substance in the third degree. The Appellate Division affirmed. The court properly refused to suppress the tangible evidence seized from respondent by police officers. Respondent's actions in meeting with two other individuals in a chronic open air drug sale location and immediately running upon seeing police officers, provided the officers with an articulable reason for their initial encounter with respondent. Immediately after the initial encounter, the officers observed a surveillance video that showed respondent in the store shoving a plastic sandwich bag down the rear of his pants. When the officers asked respondent what he shoved down his pants respondent said he did not know what they were talking about. Based upon the totality of the circumstances, the officers had probable cause to search respondent, resulting in the seizure of the bags of crack cocaine and money in his possession. The retrieval of a plastic bag protruding from respondent's buttocks was a strip search, not a body cavity search, and did not require a warrant.

Matter of Demitrus B., 89 AD3d 1421 (4th Dept 2011)

PERMANENCY HEARINGS

Permanency Goal Modified

Family Court adjudged that the permanency goal for the subject children was adoption. The Appellate Division modified. The court erred in determining that the permanency goal for the two brothers was adoption but did not err in determining that adoption was the permanency goal with respect to the sister. Petitioner met its burden of establishing by a preponderance of the evidence that its determination to change the permanency goal of the brothers from adoption to placement in another planned permanent living arrangement (APPLA) was in the children's best interests. At the time of the permanency hearing the brothers were 16 and 15 years old respectively; there was uncontroverted evidence that both brothers had been adamantly opposed to adoption for many years; the brother executed adoption waivers after consultation with their attorney for children; and they were very loyal to their birth family. A psychological evaluation report recommended that petitioner honor the brothers' wishes not to be adopted. Further, the record established that the brothers' foster parent signed permanency pacts with them, where he agreed to be a permanent resource for the brothers as long as they needed him. The absence of the brothers from the permanency hearing was not a rational reason for rejecting the permanency goal of APPLA where the Referee had sufficient information to make a determination. Neither petitioner nor the attorney for the children requested a change in the permanency goal with respect to the sister and therefore the attorney for the children's contention that the sister's permanency goal should be changed to APPLA was not considered by the Appellate Division.

Matter of Sean S., 85 AD3d 1575 (4th Dept 2011), *lv denied* 18 NY3d 802

Permanency Goal Modified

After a permanency hearing, Family Court ordered that the permanency goal for the subject child was placement for adoption. The Appellate Division modified by changing the permanency goal to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parents. The court's determination regarding the child's permanency goal lacked a sound and substantial basis in the record. Petitioner met its burden of establishing by a preponderance of the evidence that its recommendation to modify the permanency goal from adoption to APPLA was in the child's best interests. At the time of the permanency hearing the child was 14 years old; the uncontroverted evidence was that despite petitioner's diligent efforts to counsel the child regarding adoption, the child refused to consent to adoption and wished to remain with his foster parents. Petitioner submitted evidence that the child's placement with his foster parents allowed the child to have continued contact with his older brother, with whom he was very close and that he resided in a home in which he was safe and happy. Also, under the APPLA, the child would have access to family and friends who lived in the same area as the foster parents. The child expressly wished to remain with the foster parents. Further, the foster parents were willing to be a

permanency resource for the child. They unequivocally stated their willingness to serve as an ongoing resource for the child.

Matter of Jose T., 87 AD3d 1335 (4th Dept 2011)

Permanency Goal Modified

Family Court ordered that the permanency goal for the subject children was placement for adoption. The Appellate Division modified by changing the permanency goal of one of the children, Lavar, to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parent. The court's determination regarding Lavar's permanency goal lacked a sound and substantial basis in the record. The attorney for the children requested an APPLA at the hearing and petitioner supported that placement on appeal. Lavar, who was 16 years old at the hearing, testified that he did not want to be adopted, that he been pressured into considering adoption, and that he would refuse to consent to adoption. Lavar had resided with his foster parent for over one year and the foster parent testified that he was willing to be a permanency resource for him. The contention of the attorney for the children that the permanency goal for the other child, Lavalle, should be an APPLA was rejected because it was raised for the first time on appeal.

Matter of Lavalle W., 88 AD3d 1300 (4th Dept 2011)

Permanency Goal Modified

After a permanency hearing, Family Court ordered that the permanency goal for the subject child was placement for adoption. The Appellate Division modified by changing the permanency goal to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parent. Although the appeal was moot because a superseding permanency order had been entered, the exception to the mootness doctrine applied because the issue was likely to recur, typically evaded review, and raised a significant question not previously determined. The court's determination regarding the child's permanency goal lacked a sound and substantial basis in the record. Petitioner met its burden of establishing by a preponderance of the evidence that its recommendation to modify the permanency goal from adoption to APPLA was in the child's best interests. At the time of the permanency hearing the child was 16 years old and the uncontroverted evidence was that despite petitioner's diligent efforts to counsel the child regarding adoption, the child refused to consent to adoption and wished to remain with her foster parent. Petitioner submitted evidence that the child had previously been adopted by another foster parent who had surrendered her parental rights to the child and that the child suffered from ongoing emotional stress from that adoption and she would be further mentally traumatized by being forced into another adoption. The child expressly wished to remain with the foster parent and the foster parent was willing to be a permanency resource for the child. Petitioner's failure to call the caseworker and indirect service coordinator who had worked with the child at the permanency hearing was not a rational basis for rejecting APPLA where the

Referee had sufficient information to determine the child's best interests.

Matter of Latanya H., 89 AD3d 1528 (4th Dept 2011)

TERMINATION OF PARENTAL RIGHTS

Respondent's Parental Rights Terminated on the Ground of 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 presented evidence that established that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care of the child. The psychiatrist appointed by the court testified at the hearing on the petition that the mother had a schizoaffective disorder and a substance abuse problem that worsened the symptoms of her mental illness and that although schizoaffective disorder can be treated with medication, respondent denied that she had a mental illness and refused to take any medication to treat it. While persons undergoing treatment can function and are able to care for children, the mere possibility that respondent might be capable of providing adequate care at some indefinite point in the future did not warrant denial of the petition. Further, a separate dispositional hearing was not required following the determination that respondent was unable to care for the child because of mental illness.

Matter of Vincent E.D.G., 81 AD3d 1285 (4th Dept 2011), *lv denied* 17 NY3d 703

Mother Permanently Neglected Her Child

Family Court terminated mother's parental rights to her child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established, by clear and convincing evidence, that it made the requisite diligent efforts to encourage and strengthen the mother's relationship with the child. Petitioner referred mother to treatment programs for substance abuse and mental health, both of which she failed to complete. Petitioner also assisted respondent with transportation and intervened on her behalf to prevent termination of her Medicaid benefits. The court properly determined that mother failed to plan for her child's future. The mother failed to complete her treatment programs, continued to associate with the child's abusive father and appeared for at least two supervised visits with the child under the influence of alcohol. Based upon the conduct of the mother and the supportive and loving environment provided by the proposed adoptive parents, the court did not abuse its discretion in denying mother's request for a suspended judgment.

Matter of Holden W., 81 AD3d 1390 (4th Dept 2011), *lv denied* 16 NY3d 712

Suspended Judgment Properly Denied

Family Court terminated respondent mother's parental rights to her child on the ground of permanent neglect. The Appellate Division affirmed. The court did not abuse its discretion in refusing to grant respondent a suspended judgment. When the dispositional hearing began the mother was incarcerated in state prison for stealing money to purchase drugs. Although mother had been released from prison by the last

day of the hearing, she was living in a homeless shelter and did not have a job or any means to support the child. By mother's own admission, she had been addicted to illegal drugs for many years and the child tested positive for cocaine, morphine and opiates at birth. At the time of the hearing, the mother had not seen the child in 2 ½ years. The proposed adoptive parents had been caring for the child since birth and the child was apparently doing well in their custody.

Matter of Shirley A.S., 81 AD3d 1471 (4th Dept 2011)

Father's Failure to Plan Results in Termination of His Parental Rights

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The children were placed in foster care after respondent left them with a caretaker who was under the influence of drugs and alcohol. Petitioner established by clear and convincing evidence that the father failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the children. The court did not abuse its discretion in refusing to enter a suspended judgment. Although the father completed a 28-day inpatient substance abuse program, he subsequently failed drug tests and had been continuously noncompliant with court-ordered interventions.

Matter of Michael C., 82 AD3d 1651 (4th Dept 2011), *lv denied* 17 NY3d 704

Respondent Violated The Terms of Her Suspended Judgment

Family Court revoked a suspended judgment and terminated respondent mother's parental rights. The Appellate Division affirmed. A preponderance of the evidence supported the court's determination that respondent violated numerous terms of the suspended judgment and that it was in the children's best interests to terminate parental rights. Respondent did not ask the court for post-termination contact and, in any event, she failed to establish that such contact would be in the children's best interests.

Matter of Hassan E., 82 AD3d 1653 (4th Dept 2011)

AD Remits in The Interests of Justice on Issue Whether Post-termination Visitation with Mother in Child's Best Interests

Family Court terminated respondent mother's parental rights. The Appellate Division modified in the interests of justice by remitting for a hearing on whether post-termination visitation between mother and child would be in the child's best interests. The record supported the court's determination that the best interests of the child would be served by freeing the child for adoption by the foster parents, who had cared for the child since birth. On remittal, the court must determine, after a hearing if necessary, whether post-termination visitation would be in the child's best interests. Although this issue was raised for the first time on appeal, the AD reached it in the interests of justice. The adoptive parents appeared to support visitation, as did the attorney for the child. The

adoptive parents currently arranged regular visits between the mother and one of respondent's daughters who also was adopted by the foster parents.

Matter of Tumario B., Jr., 83 AD3d 1412 (4th Dept 2011), *lv denied* 17 NY3d 705

Termination of Father's Parental Rights on The Ground of Mental Retardation Affirmed

Family Court terminated respondent father's parental rights on the ground of mental retardation. The Appellate Division affirmed. Petitioner presented the testimony of two psychologists who testified that the father was mildly mentally retarded and that he was presently and for the foreseeable future unable by virtue of his mental retardation to provide adequate and proper care for the child. Respondent presented no evidence to the contrary. The father's contention that termination of his parental rights was not in the child's best interests because the child was not freed for adoption was without merit. The Social Services Law did not prohibit termination of parental rights when the child was not freed for adoption. Respondent failed to establish that post-termination contact between respondent and the child was in the child's best interests.

Matter of Cayden L.R., 83 AD3d 1550 (4th Dept 2011)

Termination of Mother's Parental Rights on The Ground of Mental Illness Affirmed

Family Court terminated respondent mother'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 respondent was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child. To the extent that the denial of respondent's motion to vacate the order terminating her parental rights was based upon newly discovered evidence, she failed to show that the evidence could not have been discovered earlier by the exercise of due diligence or that it would have altered the outcome of the proceeding.

Matter of William C.B., 83 AD3d 1583 (4th Dept 2011)

Mother Permanently Neglected Her Child

Family Court terminated respondent mother's parental rights to her children on the ground of permanent neglect and freed the children for adoption. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it exercised diligent efforts to strengthen the mother's relationship with the children but despite those efforts the mother failed to substantially and continuously or repeatedly plan for the future of the children.

Matter of Nicholas B., 83 AD3d 1596 (4th Dept 2011), *lv denied* 17 NY3d 705

Suspended Judgment Not Warranted

Family Court terminated respondent father's parental rights on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner agency. 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 relationship with the child. A suspended judgment was not in the child's best interests. Respondent did not ask for post-termination contact with the child and such contact was not in the child's best interests.

Matter of Mya B., 84 AD3d 1727 (4th Dept 2011), *lv denied* 17 NY3d 707

Dismissal of Termination of Parental Rights Petition Affirmed

The attorney for the child appealed from an order of Family Court dismissing the neglect petition against respondent father. The Appellate Division affirmed. Petitioner failed to establish that it made diligent efforts to strengthen the parent-child relationship. Respondent's child, who was 18 years old, had severe Down's syndrome and petitioner failed to tailor its efforts to the needs of this particular parent and child.

Matter of Colinia D., 84 AD3d 1755 (4th Dept 2011)

Suspended Judgment Properly Revoked

Family Court revoked a suspended judgment and terminated respondent mother's parental rights with respect to her children. The Appellate Division affirmed. Because a hearing on a petition alleging the violation of a suspended judgment is part of the dispositional phase of a permanent neglect proceeding, the court properly allowed petitioner to introduce evidence at the hearing about the children's best interests. A preponderance of the evidence supported the court's determination that respondent violated numerous terms of the suspended judgment and that it was in the children's best interests to terminate her parental rights.

Matter of Keyon M., 85 AD3d 1560 (4th Dept 2011), *lv denied* 17 NY3d 709

Suspended Judgment Not in Child's Best Interests

Family Court terminated respondent mother's parental rights with respect to her child. The Appellate Division affirmed. A suspended judgment was not in the child's best interests. Respondent did not ask for post-termination contact with the child and such contact was not in the child's best interests. The child had resided with her foster family for almost her entire life and the evidence established that there was no bond between mother and child.

Matter of Jane H., 85 AD3d 1586 (4th Dept 2011), *lv denied* 17 NY3d 709

Mother Permanently Neglected Her Children

Family Court terminated respondent mother's parental rights to her children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it exercised diligent efforts to strengthen the mother's relationship with the children by providing counseling, scheduling regular visitation, and providing services to overcome the problems that prevented discharge of the children into mother's care. Although the mother moved to Louisiana shortly after the children were placed in foster care, petitioner regularly updated mother on the children's progress, encouraged her to return to New York, and provided her with contact information for counseling in Louisiana. Despite those efforts, the mother failed to substantially and continuously or repeatedly plan for the future of the children. The mother was not denied due process when the dispositional hearing was held in her absence. After an adjournment of the hearing based upon mother's other child's medical condition, mother failed to appear at the rescheduled hearing and her attorney provided no documentation to justify her absence. In view of the amount of time the children spent in foster care and the fact that mother's attorney vigorously represented her at the hearing, the court did not abuse its discretion in conducting the hearing in mother's absence.

Matter of La' Derrick J. W., 85 AD3d 1600 (4th Dept 2011), *lv denied* 17 NY3d 709

Father Abandoned His Child

Family Court terminated the parental rights of respondent father. The Appellate Division affirmed. Petitioner established that for six months before filing the petition, father failed to visit the child and to communicate with the child or petitioner, although able to do so and not prevented or discouraged from doing so by petitioner. Although the court erred when it applied a disjunctive reading of the statute by referring to the father's "failure to visit or communicate" with the child or petitioner, the error was of no moment because the evidence established that petitioner met its burden under the statute.

Matter of Kevon S., 85 AD3d 1624 (4th Dept 2011)

Petitioner Properly Relieved of Reasonable Efforts Requirement

Family Court terminated respondent's parental rights with respect to her son on the ground of permanent neglect. The Appellate Division affirmed. The court properly granted petitioner's motion to be relieved of the requirement that it make reasonable efforts to reunite the mother and son. Petitioner established by clear and convincing evidence that the mother's parental rights had been terminated with respect to the son's half sibling and that she repeatedly failed to cooperate with programs to address her alcohol, drug use and mental health issues. The mother failed to establish that requiring reasonable efforts would be in the child's best interests and would likely result in reunification.

Matter of Jacob E., 87 AD3d 1317 (4th Dept 2011)

Social Services Law Did Not Implicate Family Court's Subject Matter Jurisdiction

Family Court terminated respondent mother's parental rights with respect to her son upon a finding of permanent neglect and freed the child for adoption. The Appellate Division affirmed. The mother was not denied effective assistance of counsel because the attorney counseled the parent to admit the allegations in the petition and there was no demonstration that mother's attorney's alleged failure to request a suspended judgment or post-termination contact resulted in actual prejudice. Instead, the evidence established that a suspended judgment or post-termination contact was not in the child's best interests. The mother's contention was without merit that the court lacked jurisdiction over the proceeding because it failed to comply with Social Services Law § 384-b (3) (c-1), which applies where one Family Court judge presides over a prior permanency hearing and a termination of parental rights petition involving the same child is assigned to a different Family Court judge. That statute did not implicate subject matter jurisdiction, but rather concerned venue which, as was the case here, if not raised is waived. Further, the statute contained a preference for the same judge to hear the most recent proceeding, not a mandate.

Matter of Sean W., 87 AD3d 1318 (4th Dept 2011)

Mother's Unexplained Failure to Appear Constituted a Default

Family Court denied respondent mother's motion to vacate a prior order revoking a suspended judgment and terminating her parental rights with respect to her five children. The Appellate Division affirmed. The mother failed to appear at the hearing on the revocation of the suspended judgment and although her attorney was at the hearing he did not participate. The unexplained failure to appear at the hearing constituted a default and the Appellate Division therefore dismissed that appeal. In terms of the appeal from the order denying mother's motion to vacate the default, the court properly exercised its discretion in denying the motion. The mother's incarceration at the time of the hearing was not a reasonable excuse for her default because she failed to provide a credible explanation for her failure to advise her attorney, the court, or petitioner of her unavailability and she failed to demonstrate a meritorious defense.

Matter of Lastanzea L., 87 AD3d 1356 (4th Dept 2011)

Remittal For Hearing on Post-Termination Contact

Family Court revoked a suspended judgment and terminated respondent's parental rights to his child. The Appellate Division modified by granting respondent's request for a hearing to determine whether he should be afforded post-termination contact with the instant child. The father failed to demonstrate exceptional circumstances to warrant an extension of the suspended judgment. However, the court should have granted respondent's request for a hearing to determine whether post-termination contact between the respondent and the child was in the child's best interests.

Matter of Lestariyah A., 89 AD3d 1420 (4th Dept 2011)

TPR Warranted on The Ground of Mental Illness

Family Court terminated respondent's parental rights on the ground of mental illness. The Appellate Division affirmed. The testimony and reports of petitioner's experts, as well as the testimony of a caseworker who supervised the mother's visitation with the child, established that the mother was suffering from a mental illness that was manifested by a disorder or disturbance in behavior, thinking or judgment to such an extent that if the child were in the custody of respondent the child would be in danger of becoming a neglected child.

Matter of Royfik B., 89 AD3d 1423 (4th Dept 2011)

TPR on Ground of Mental Illness Affirmed

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. There was clear and convincing evidence that mother was then and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for her children. Although the psychiatrist who testified on behalf of the mother recommended that the mother be given one last chance, once he learned of various misstatements made by the mother, his recommendation changed. Contrary to mother's contention the psychiatrist's ultimate recommendation was not equivocal. The court was entitled to draw an adverse inference from mother's failure to testify.

Matter of Darius B., 90 AD3d 1510 (4th Dept 2011)

Family Services Progress Notes Properly Admitted

Family Court terminated father's parental rights with respect to his child and transferred custody and guardianship of the child to petitioner. The Appellate Division affirmed. The contention of the father that the court erred by admitting into evidence his records from a drug treatment facility was unpreserved and without merit. The court properly admitted in evidence the family service progress notes relating to the father. Petitioner properly laid a foundation for the admission in evidence of those notes through the testimony of its caseworker.

Matter of Shirley A.S., 90 AD3d 1655 (4th Dept 2011)

