

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

**2012 Case Digest**

**Covers January through December 2012 Decision Lists**

## **ADOPTION**

### **Petitioner's Revocation of Extrajudicial Consent Not Given Effect**

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

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

## **CHILD ABUSE AND NEGLECT**

### **Petitioner Failed to Submit Sufficient Evidence of Derivative Neglect**

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

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

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

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

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

### **Dismissal of Neglect Petition Reversed**

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

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

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

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

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

*Matter of Makayla L. P.*, 92 AD3d 1248 (4th Dept 2012), *lv denied* 19 NY3d 886

### **Neglect Adjudication Against Father Reversed**

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

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

### **Children's Statements Sufficiently Corroborated**

Family Court adjudged that respondent father abused his children. The Appellate Division affirmed. The out-of-court statements of the children were sufficiently corroborated by other evidence tending to support their reliability. The cross-corroborating accounts of the children with respect to the nature and progression of the

sexual abuse gave sufficient indicia of reliability to each child's out-of-court statements. The allegations of sexual abuse were further corroborated by the children's age-inappropriate knowledge of sexual matters.

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

### **Sufficient Evidence of Neglect and Derivative Neglect**

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

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

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

Family Court determined that respondent father sexually abused his daughter and derivatively neglected his son. The Appellate Division affirmed. The finding of sexual abuse of the daughter by the father was supported by a preponderance of the evidence. The daughter's out-of-court statements were sufficiently corroborated by the testimony of petitioner's expert, who found the daughter's consistent accounts of the abuse to be reliable and opined that her statements paralleled those normally made by abuse victims. Petitioner also proved that the son was derivatively neglected. The sexual abuse of the daughter demonstrated a fundamental flaw in respondent's understanding of parenthood.

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

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

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

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

### **Petition Not Subject to Dismissal Because The Proof Did Not Conform to Petition**

Family Court adjudged children under respondent's care to be abused and neglected. Before the hearing on the issue whether respondent was a "person legally responsible," he pleaded guilty to sexually abusing one child and was sentenced to a term of incarceration. The Appellate Division affirmed. The petition did not have to be dismissed because respondent pleaded guilty to a count in the indictment that alleged sexual contact in 2004, not 2006, as alleged in the petition. The proof at the hearing on whether respondent was a person legally responsible established that the sexual contact occurred in 2004. Because the proof did not conform to the allegations in the petition, the court could amend the allegations to conform to the proof and the petition was not subject to dismissal on that ground.

*Matter of Samed S.*, 96 AD3d 1406 (4th Dept 2012), *lv denied* 19 NY3d 812

### **Order on Consent Not Appealable**

Family Court placed respondent mother's child in petitioner's custody upon a finding that the mother neglected the child. The Appellate Division dismissed the appeal. Because the order was entered upon the mother's consent without admission the appeal was dismissed. Also, because the mother never moved to withdraw her consent, her contention that her consent was not knowing, voluntary and intelligent was not properly before the Appellate Division. The mother failed to show that her counsel was ineffective.

*Matter of Violette K.*, 96 AD3d 1499 (4th Dept 2012)

### **Order Granting Unsupervised Visitation Reversed**

Family Court denied petitioner DSS's application to remove respondent father's daughter from his custody, granted the father unsupervised visitation with his son and determined that petitioner did not make reasonable efforts to prevent the removal of his children, but that the lack of such efforts was reasonable. The Appellate Division reversed. There was a sound and substantial basis in the record that the son was in imminent risk of harm. The evidence was overwhelming that the father slapped the son in the face, leaving marks in the morning. The testimony further established that the father often lost his temper with the children and the son had prior instances of bruising. A caseworker testified that she had seen the son cower and plead with the father not to hit him when the father became angry with the son. The record established that the daughter also was at risk of imminent harm and that the risk could not be mitigated by reasonable efforts to avoid removal. The court erred in allowing the father to have unsupervised visitation with the son because the record established that the father was unable to care for the child in a safe manner and there was the threat of future harm to him. The court also erred in finding that reasonable efforts were not made, but the lack of efforts was reasonable because anger management services were not identified as necessary until just before the hearing on removal of the children. The evidence at the hearing established that petitioner provided an intensive family coordinator who met with the father seven hours a week and a preventative caseworker who met with him

several times a month. Additionally, petitioner provided a mental health evaluation for the father, financial assistance, transportation assistance, emergency food vouchers, and case work counseling. Thus, petitioner established that it made reasonable efforts to prevent or eliminate the need for removal.

*Matter of Austin M.*, 97 AD3d 1168 (4th Dept 2012)

### **Court Erred in Finding Neglect Without Conducting Hearing**

Family Court found that respondent father neglected his child and awarded custody of respondent father's child to Mr. and Mrs. Raymond M. The Appellate Division reversed. The court erred in entering the fact-finding order on respondent's alleged default. Although the father did not appear at the scheduled court appearance, respondent's attorney advised the court that he was authorized to proceed in the father's absence and the father's attorney objected to the entry of a default order. The court also erred in making a finding of neglect without first conducting a fact-finding hearing.

*Matter of Kairis v Kairis*, 98 AD3d 1281 (4th Dept 2012)

### **Court Erred in Granting Petitioner's Motion For Summary Judgment**

Family Court granted the motion of petitioner agency for summary judgment with respect to respondent's neglect of her child. The Appellate Division reversed. Because petitioner attached only a petition and a psychological assessment from a termination of parental rights proceeding involving one of respondent's other children, without any evidence establishing the outcome of that proceeding, the court erred in granting petitioner summary judgment. Although the court indicated its familiarity with the prior proceedings involving the mother's other children, the record did not contain necessary information about those proceedings.

*Matter of Terrence G.*, 98 AD3d 1294 (4th Dept 2012)

### **Respondent's Drug Use Was Prima Facie Evidence of Neglect**

Family Court adjudged that respondent mother neglected her child. The Appellate Division affirmed. Pursuant to Family Court Act § 1046 (a) proof of a parent's repeated and chronic misuse of drugs or alcohol, which substantially impairs the parent's judgment while the child is entrusted to the parent's care, constitutes prima facie evidence of neglect. Petitioner met its burden of proof by establishing that the mother used the drug Suboxone on numerous occasions; that she purchased the drug on the street whenever she could; and that she was prostituting herself to obtain money to purchase the drug. The mother failed to rebut the presumption. The mother's contention that Suboxone was not a drug within the meaning of the statute was not preserved for review. The court did not err in admitting an intake report filed with OCFS because the person making the report was a mandated reporter.

*Matter of Samaj B.*, 98 AD3d 1312 (4th Dept 2012)

**Preponderance of The Evidence Supports Court's Findings of Sexual Abuse**

Family Court adjudged that respondent sexually abused a five-year-old child for whom he was a parent substitute and derivatively neglected his two-year-old child. The Appellate Division affirmed. The out-of-court statements of the child who was allegedly sexually abused 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. Further, the court properly drew a strong inference against respondent for failing to testify.

*Matter of Raygen D.*, 100 AD3d 1413 (4th Dept 2012)

## **CHILD SUPPORT**

### **Respondent Willfully Violated Child Support Order**

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

*Matter of Yamonaco v Fey*, 91 AD3d 1322 (4th Dept 2012), *lv denied* 19 NY3d 803

### **Reduction in Child Support Affirmed**

Family Court denied the objections of petitioner mother to the order of the Support Magistrate modifying a prior order reducing petitioner father's child support obligation and his share of child care and unreimbursed medical expenses. The Appellate Division affirmed. Petitioner presented evidence that his income from employment decreased as a result of an involuntary reduction in his overtime hours and the determination that the loss of income was sufficiently substantial to warrant a downward modification was entitled to great weight.

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

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

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

at issue was predicated upon defendant's failure to pay the full amount of child support.

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

### **Father Not Entitled to Downward Modification**

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

*Matter of Leonardo v Leonardo*, 94 AD3d 1452 (4th Dept 2012), *lv denied* 19 NY3d 807

### **No Evidence that Mother Made Reasonable Efforts to Obtain Employment**

Family Court determined that respondent mother willfully failed to pay child support and directed that she be incarcerated if she did not pay certain arrears within two weeks. The Appellate Division affirmed. Respondent's contention that the finding of willful violation of the support order was not supported by the evidence lacked merit. Respondent failed to submit some competent, credible evidence of her inability to make the required support payments. She also failed to establish that she made reasonable efforts to obtain gainful employment to meet her support obligations.

*Matter of Jelks v Wright*, 96 AD3d 1488 (4th Dept 2012)

### **Court Had Personal Jurisdiction Over Respondents**

In a July 2012 order, upon non-resident respondents parents' default, father was directed to pay \$775 per week in child support effective from the date the children were placed in foster care in New York and the stepmother was directed to notify the support unit of any change in employment status and health insurance benefits. The parents did not file objections to the July 2010 order. In October 2010, respondents moved to vacate the support orders and to dismiss the proceedings on the ground of lack of personal jurisdiction. In November, Family Court dismissed respondents' motion to vacate. Respondents filed objections to the November orders and the court dismissed

those objections and affirmed the November order. The Appellate Division affirmed. Respondents' contention that the court erred in failing to review their challenge to the July orders in the context of their objections to the November orders was rejected. Respondents moved to vacate the July orders on the basis of alleged lack of personal jurisdiction, not on the ground of excusable default. Respondents' contention that the court's jurisdictional determination was not based upon competent evidence also was rejected. The Support Magistrate was not required to hold a hearing on the issue of personal jurisdiction before issuing the July orders. Respondents waived any right to a hearing on jurisdiction by submitting their motion on papers only. Respondents failed to preserve their contention that the jurisdictional findings were not based upon competent evidence because they did not challenge the competence of the evidence in their motion to vacate the July orders. The court properly determined that it had personal jurisdiction over respondents because the children began residing in New York as a result of acts or directives of respondents. The assertion of personal jurisdiction did not violate respondents' right to due process.

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

### **Court Erred in Determining Child Support Obligation**

Family Court denied the objections of respondent father to the child support order of the Support Magistrate. The Appellate Division modified by vacating that part of the order providing that respondent's pro rata share of the basic child support obligation was \$410.69 per week and that part of the order providing that respondent pay petitioner mother \$374.06 per week for the basic child support payment, exclusive of health care expenses, and substituting provisions that respondent's pro rata share of the basic child support obligation was \$357.26 per week and that respondent pay to petitioner \$320.63 per week for the basic child support payment, exclusive of health care expenses. The Appellate Division also vacated that part of the order that provided that respondent pay to petitioner past child support in the amount of \$10,853.95 and remitted for a recalculation of past child support. The Support Magistrate erred in determining the amounts of rental and investment income the parties received and the amount of investment income the mother received.

*Matter of Fendick v Fendick*, 96 AD3d 1554 (4th Dept 2012)

### **Father Required to Pay Child Support - Child Not Emancipated**

Family Court denied petitioner father's objections to the Support Magistrate's order that determined that the parties' child was not emancipated and continued the father's child support obligation until the child turned 21 years of age. The Appellate Division affirmed. Although the parties' child worked on a full-time basis and filed individual income tax returns, the fact that respondent mother continued to pay for the child's gas, food, and cell phone demonstrated that the child was not economically independent and self-supporting.

*Matter of Cedeno v Knowlton*, 98 AD3d 1257 (4th Dept 2012)

### **Because Father Received SS I Income Court Could Not Suspend Hunting and Fishing Licenses**

Family Court denied respondent father's objections to an order issued by the Support Magistrate. The Appellate Division modified by vacating the part of the order suspending respondent's hunting and fishing licenses. Petitioner's introduction of a calculation of respondent's arrears was prima facie evidence of a willful violation of the support order. In response, respondent failed to introduce some credible evidence of his inability to make the required payments. The evidence that respondent was receiving Social Security disability benefits, by itself, did not preclude the court from finding that he was capable of working. Respondent's contention that the court should have capped his child support arrears at \$500 was not preserved for review. His contention that the court should not have suspended his hunting and fishing licenses also was not preserved for review but was reviewed in the interests of justice. Family Court Act § 458-c (a) allows the court to suspend recreational licenses of respondents in arrears but does not apply to respondents who receive supplemental security income. It was undisputed that respondent received supplemental security income.

*Matter of Commissioner of Social Servs. v Turner*, 99 AD3d 1244 (4th Dept 2012)

### **No Evidence that Father Made Reasonable Efforts to Obtain Employment**

Family Court denied respondent father's written objections to the Support Magistrate's order granting mother's petition for child support arrears and denied father's cross petition for a downward modification. The Appellate Division affirmed. Where a parent fails to pay support as ordered, the burden shifts to that parent to show some competent, credible evidence of an inability to make the required payments. Here, respondent failed to submit some competent, credible medical evidence of his inability to make the required support payments. He also failed to establish that his claimed disability continued at the time of the hearing. Respondent's cross petition was properly denied. Respondent failed to make a good faith effort to seek other employment or show that he was unable to perform other work.

*Matter of Commissioner of Cattaraugus County Dept. of Social Servs. v Jordan*, 100 AD3d 1466 (4th Dept 2012)

### **No Evidence that Father Made Reasonable Efforts to Obtain Employment**

Family Court denied respondent father's written objections to the Support Magistrate's order finding that respondent willfully violated a child support order and denied his petition seeking modification of that order. The Appellate Division affirmed. Respondent's failure to pay support as ordered constituted prima facie evidence of a willful violation and thus the burden shifted to him to show some competent, credible evidence of inability to make the required payments. Respondent did not meet his

burden. Although he testified that he had been a carpenter for 16 years, he did not testify that he made efforts to obtain carpentry work after he ceased operating his construction company. He also failed to demonstrate a substantial change in circumstances justifying a downward modification because he presented no evidence that he diligently sought re-employment commensurate with his former employment.

*Matter of Greene v Hanson*, 100 AD3d 1558 (4th Dept 2012)

### **Father Failed to Establish Reasonable Efforts to Obtain Employment**

Family Court confirmed the determination of the Support Magistrate that respondent father willfully violated a child support order and directed that he be incarcerated for four months. The Appellate Division dismissed the appeal insofar as it concerned incarceration and otherwise affirmed. Respondent's failure to pay support as ordered constituted prima facie evidence of a willful violation and thus the burden shifted to him to show some competent, credible evidence of inability to make the required payments. Respondent failed to meet his burden inasmuch as he did not present evidence establishing that he made reasonable efforts to obtain employment so he could meet his support obligation. His contention about incarceration was moot because the commitment portion of the order had expired by its own terms

*Matter of Cattaraugus County Dept. of Social Servs. v Gore*, 101 AD3d 1739 (4th Dept 2012)

### **After Father's Business Deteriorated Failed to Pursue Employment Options**

Family Court found that respondent father willfully violated a child support order and sentenced him to six months of weekends in jail. The Appellate Division affirmed. Respondent's failure to pay support as ordered constituted prima facie evidence of a willful violation and thus the burden shifted to him to show some competent, credible evidence of inability to make the required payments. After respondent's business deteriorated, he did not actively pursue other employment options. Further, respondent did not sell his assets to enable him to make his support obligations.

*Matter of Bushnell v Bushnell*, 101 AD3d 1741 (4th Dept 2012)

### **Father Did Not Made Reasonable Efforts to Obtain Employment**

Family Court confirmed the finding of the Support Magistrate's order that respondent father willfully violated a child support order. The Appellate Division affirmed. Respondent's failure to pay support as ordered constituted prima facie evidence of a willful violation and thus the burden shifted to him to show some competent, credible evidence of inability to make the required payments. The Support Magistrate, who was in the best position to evaluate credibility, determined that the father was not credible and did not make reasonable efforts to obtain employment. Further, the court properly granted the relief sought in the violation petition because the father failed to submit a

financial disclosure statement. The court properly denied father's petition for a downward modification of child support and did not err in denying the petition without receiving a financial disclosure statement. The burden was on the father to demonstrate a substantial change in circumstances warranting a downward modification. Any error in relying on documents not in evidence was harmless because the Support Magistrate's credibility determination was supported by admissible evidence.

*Matter of Kasprowicz v Osgood*, 101 AD3d 1760 (4th Dept 2012)

### **Father Denied Right to Counsel**

Family Court determined that respondent father was in willful violation of a child support order and sentenced him to six months incarceration. The Appellate Division reversed. Respondent was denied his right to counsel at the hearing before the Support Magistrate to determine whether he was in willful violation of the support order. The record established that respondent advised the Support Magistrate that he had spoken to a person at the Public Defender's Office and expected an attorney at the hearing. The Support Magistrate reminded respondent that he had stated at the initial appearance that he would be representing himself. When the Support Magistrate asked him whether he was prepared to go forward with the hearing, respondent answered "Well, I guess I am." Where, as here, the court failed to conduct a searching inquiry, reversal was required.

*Matter of Storelli v Storelli*, 101 AD3d 1787 (4th Dept 2012)

## **CUSTODY AND VISITATION**

### **Order Granting Father Sole Custody in Children's Best Interests**

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

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

### **Order Granting Father Sole Custody in Children's Best Interests**

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

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

### **Petition Requesting Permission to Relocate Properly Denied**

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

*Matter of Ramirez v Velazquez*, 91 AD3d 1346 (4th Dept 2012), *lv denied* 19 NY3d 802

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

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

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

### **Order Granting Father Sole Custody in Children's Best Interests**

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

*Matter of Tin Tin v Thar Kyi*, 92 AD3d 1293 (4th Dept 2012), *lv denied* 19 NY3d 802

### **Petition For Visitation Barred by Res Judicata**

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

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

### **Father Failed to Show Change in Circumstances**

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

*Matter of Harder v Phetteplace*, 93 AD3d 1199 (4th Dept 2012), *lv denied* 19 NY3d 808

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

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

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

### **Court Erred in Suspending Mother's Visitation**

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

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

## **Hearing Warranted on Custody Modification**

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

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

## **Father Not Entitled to Custody**

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

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

## **Award of Physical Custody to Father Reversed**

Family Court awarded the parties joint custody of their child and primary physical custody of the child to petitioner father. The Appellate Division modified by awarding primary physical custody of the child to respondent mother. Because the case was an initial custody determination, it was not a relocation case and the mother's relocation to Brooklyn was only one factor to be considered. The court erred in requiring the mother to establish by a preponderance of the evidence that her move to Brooklyn was in the child's best interests. Moreover, the court's best interests determination lacked a sound and substantial basis in the record. Prior to the commencement of this action, when the

child was 14 months old, the mother was the primary caretaker. Both parties had suitable homes. The mother demonstrated the greater ability to provide for the child's intellectual and emotional development. The court erred in concluding that the father was better able to provide financially for the child. He earned \$10,000 a year as a real estate agent and was dependant upon his parents for his standard of living. The court erred in admitting the father's journal into evidence and the error was not harmless because the journal had prejudicial "notes" concerning the mother and the court referred to the journal in its decision. The dissent would have affirmed and deferred to the court's assessment of credibility.

*Matter of Saperston v Holdaway*, 93 AD3d 1271 (4th Dept 2012), *lv dismissed* 19 NY3d 887

### **Child's Wishes While Not Controlling Entitled to Great Weight**

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

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

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

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

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

### **Father Failed to Show Change in Circumstances**

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

*Matter of Maria F.*, 93 AD3d 1351 (4th Dept 2012), *lv denied* 19 NY3d 807

### **Order Not Entered Upon Father's Default**

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

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

### **Matter Remitted: Insufficient Record For Appellate Review**

Family Court granted petitioner supervised visitation with the parties' children and denied father's amended petition to modify a prior visitation order. The Appellate Division reversed. Because the record was insufficient for the Appellate Division to make the requisite findings of fact, the matter was remitted for a new hearing, including a new in-camera hearing with the children. The court did not improperly delegate the issue whether unsupervised visitation should resume and, if so, when, to the attorney for the children.

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

### **Court Properly Denied Mother Permission to Relocate**

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

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

### **Father Failed to Show Change in Circumstances**

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

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

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

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

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

### **Mother Failed to Establish Change in Circumstances**

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

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

### **Not In Child's Best Interests to Have Overnights With Incarcerated Mother**

Family Court denied mother's petition to modify a prior stipulated order of custody that granted mother visitation with the parties' child on alternate Saturdays at the correctional facility where she was incarcerated. The mother sought to modify the order to allow overnight visitation through the Family Reunification Program at the correctional facility. The Referee concluded that the mother failed to establish a sufficient change in circumstances to warrant a modification, but nevertheless stated that it was not in the best interests of the child to have overnights with the mother at the correctional facility. The Appellate Division affirmed. Even assuming, for the purpose of argument, that the

mother established changed circumstances, the conclusion of the Referee that it was not in the best interests of the child to have overnights was supported by a sound and substantial basis in the record. Any error in admitting certain photos in evidence without proper authentication was harmless because the Referee did not rely on the photos in denying the petition.

*Matter of Consilio v Terrigino*, 96 AD3d 1424 (4th Dept 2012)

### **Court Properly Changed Custody to Sole Custody to Father**

Family Court modified the parties' existing custody arrangement by transferring custody of the parties' two children to petitioner father, granted the father sole custody of the children, and adjudicated the mother to have violated prior court orders. The Appellate Division affirmed. The court's determination that the mother willfully violated a prior court order by preventing the father from receiving custodial access had a sound and substantial basis in the record. The court did not err in considering testimony regarding matters that predated the parties' custody agreement and the custody order. The testimony was required to provide background regarding the nature of the parties' relationship before the custody order to enable the court to understand the reluctance of the older child to spend time with the father and to make a more informed decision on the father's modification petition. There was sufficient evidence of changed circumstances to warrant a review of the custody arrangement. Before the establishment of the custody arrangement, the parties had no issues with the father's custodial access, the father had successful visitation, and both children were loving in their interactions with the father and paternal grandparents. After the custody arrangement, the father was denied access to the children on at least three occasions, the older child began to exhibit hostility toward the father and paternal grandparents, showed an unwillingness to enjoy time with them, and began acting in a violent manner toward the father. The change in custody was in the children's best interests.

*Matter of Tarrant v Ostrowski*, 96 AD3d 1580 (4th Dept 2012)

### **Court Should Have Granted Mother's Motion to Change Child's School District**

Family Court dismissed mother's petition seeking an order allowing her to change the school district of the parties' child from the Grand Island School District to the Kenmore-Tonawanda School District. The Appellate Division reversed. Considering the facts in the light most favorable to the mother, accepting her proof as true and affording her every favorable inference, the mother met her initial burden on the petition. Because the father's attorney stated on the record that he would not have presented evidence at trial if the court denied the motion, the Appellate Division considered whether the proposed relocation was in the child's best interests and concluded that it was. The relocation would enhance the mother and child economically because it would alleviate the mother's burden of transporting the child to and from school or, in the alternative, finding new housing on Grand Island, and it would enable the mother to increase her efforts to obtain employment. There was no evidence that the Grand Island schools

were superior to the Kenmore-Tonawanda schools and there was no evidence that the father's access to the child would be affected by the change in school districts.

*Matter of Mineo v Mineo*, 96 AD3d 1617 (4th Dept 2012)

### **Court Properly Changed Custody to Primary Physical Custody to Father**

Family Court modified the parties' prior custody order from shared custody of the parties' child to primary physical custody of the child with respondent father and visitation to petitioner mother. The Appellate Division affirmed. The parties agreed that there was a change of circumstances created by the fact that the child had reached school age, rendering the shared physical custody arrangement impractical. The court's determination that both parties were fit and loving parents but that the father was better able to provide for the child's needs was supported by a sound and substantial basis in the record.

*Matter of Flint v Ely*, 96 AD3d 1681 (4th Dept 2012)

### **Family Court Lacked Jurisdiction to Modify Surrogate's Order**

Family Court denied the motion of respondent maternal aunt to vacate a stipulation and a related order modifying a decree of Surrogate's Court that granted letters of guardianship to respondent authorizing her as guardian of the child. The Appellate Division vacated the order of Family Court. The child's mother died in 2008. In 2009, when the father's health declined, he commenced proceedings in Surrogate's Court to designate respondent, a family friend, as the child's standby guardian. Surrogate's Court issued letters of guardianship to respondent in May 2010. Before the father died in August 2010 he named respondent as the child's guardian in his will. Five months after the letters of guardianship were issued to respondent, petitioner commenced this custody proceeding in Family Court. When two courts (such as Family and Surrogate's) have concurrent jurisdiction (over matter such as guardianship), once one has exercised jurisdiction in the matter, it should not be entertained by the other. Thus, Family Court erred in ignoring the letters of guardianship and the prior decree of Surrogate's Court, and in entertaining the petition because Family Court lacked jurisdiction from the onset.

*Matter of Allen v Fiedler*, 96 AD3d 1682 (4th Dept 2012), *lv denied* 19 NY3d 815

### **Court Properly Awarded Visitation to Incarcerated Father**

Family Court granted the father's petition for visitation with his child, awarding him one four hour visit during the months of January and April 2012, and then every other month commencing in July 2012. The Appellate Division affirmed. Before the father's incarceration he was present for the child's birth and he testified that during the six or seven months in which he was not incarcerated following the child's birth, he visited the child on approximately 12 occasions. Although the father had not seen the child since

his incarceration, the father has repeatedly requested that the mother transport the child to the correctional facility for visitation, and he had attempted to maintain a relationship with the child over the telephone and by sending letters, cards and gifts. Although the three-year-old child will be required to travel two hours each way to effectuate visitation, the father had arranged for his mother and sisters to transport the child. Although the child was not familiar with the father's mothers and sisters, the court purposely scheduled limited visits during the initial six-month period to afford the parties the opportunity to familiarize the child with those family members. The father's earliest release date was in September 2016 and such a long period of separation could be detrimental to the established relationship between father and child.

*Matter of Granger v Misercola*, 96 AD3d 1694 (4th Dept 2012), *lv granted* 19 NY3d 1098

### **Court Erred in Making Neglect Finding Without Hearing**

Family Court denied mother's petition to relocate with the parties' child to Alabama. The Appellate Division modified by vacating the provision that if mother relocates to Alabama it was in the child's best interests that the father be the primary custodial parent. The court properly considered the *Tropea* factors in denying mother's relocation petition. Her primary reason for relocating was that she had obtained a job in Alabama that paid her \$40,000, but by the conclusion of the hearing she no longer had that job. Further, the mother made no attempts to obtain employment in New York State after she voluntarily closed her day care center. The court erred in ordering that if mother relocated, custody of the child would be transferred to father because it impermissibly altered the parties' custodial arrangement automatically upon a future event without taking into account the child's best interests at that time.

*Matter of Bradley M.M.*, 98 AD3d 1257 (4th Dept 2012)

### **Court Erred in Granting Father Sole Legal and Primary Physical Custody of Child**

Family Court awarded petitioner father sole legal custody of his daughter. The Appellate Division modified by granting respondent mother primary physical custody, joint legal custody to petitioner and respondent and unsupervised visitation to petitioner. Although the father made a sufficient evidentiary showing of a change in circumstances to warrant an inquiry into whether the existing custody arrangement should be modified, it was in the child's best interests for the mother to retain primary physical custody. Throughout the child's life the mother was the child's primary caregiver and there was nothing in the record to support the conclusion that the mother was unfit or less fit than the father. Evidence at the hearing was presented that the child and mother often argued and that the child wanted to live with the father, but there was also evidence that the child relied on the mother, not the father, when she was sick. Further, the father's visitation had previously been supervised as a result of his substance abuse. Although the father submitted evidence that he had been sober and sought help for his substance abuse, the record did not support the drastic change to sole custody,

although it did support granting father unsupervised visitation.

*Matter of Kairis v Kairis* 98 AD3d 1281 (4th Dept 2012)

### **In Child's Best Interests to Change School District**

Family Court granted the parties' motions to reargue with respect to a prior order of custody and on reargument dismissed mother's petition for sole custody of the child and granted that part of father's petition seeking a determination that the child attend Pittsford schools. The Appellate Division affirmed. The mother failed to establish a change in circumstances warranting an award of sole custody. Although she testified that the father was responsible for a complete breakdown in communication between the parties, she stipulated to the admission into evidence of the report of the court-appointed psychologist, who opined that the child was doing well under the existing custody arrangement and that the issues between the parties was not insurmountable. Although the court appeared to place significant weight on NYS Department of education data on the merits of Pittsford school, there was also evidence from the parties and an expert witness that provided a sound and substantial basis for the court's determination that the child's best interests would be served by attending Pittsford schools.

*Matter of Crudele v Wells*, 99 AD3d 1227 (4th Dept 2012)

### **Error to Dismiss Incarcerated Father's Petition for Visitation with Child**

Family Court dismissed incarcerated father's petition for visitation with his child. The Appellate Division reversed. Petitioner was incarcerated for rape. In dismissing the petition, the court failed to give due consideration to the presumption in favor of visitation, notwithstanding the father's incarceration. Respondent mother presented no evidence to overcome the presumption that visitation would be in the child's best interests, and the record was insufficient for the Appellate Division to make that determination. The matter was remitted for a hearing where the court must consider the full range of factors pertinent to the visitation determination.

*Matter of Fewell v Ratzel*, 99 AD3d 1237 (4th Dept 2012)

### **Enforcement of Prior Custody Order in Child's Best Interests**

Family Court granted father's petition to enforce a prior order of custody and visitation entered upon stipulation of the parties in 2008 and dismissed the mother's petitions for modification of custody and visitation and for enforcement of an order of visitation. The Appellate Division affirmed. The court properly limited proof to incidents that occurred after the 2008 order was entered. Further, although there is an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, the mother failed to offer any evidence to corroborate the child's out-of-court statements and, therefore, the court's preclusion of those statements was proper. The court also

properly determined that enforcement of the 2008 order was in the child's best interests. Finally, the court properly dismissed the mother's enforcement 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.

*Matter of Hall v Hawthorne*, 99 AD3d 1237 (4th Dept 2012)

### **Court Properly Found Father in Contempt of Court**

Family Court found respondent father in contempt of court based upon his willful violation of a prior order directing the return of the parties' son to the custody of petitioner mother. The Appellate Division affirmed. The father was aware of the terms of the prior order and he put in motion the events that resulted in the child being removed from the mother's home and placed in the father's home. The court did not err in conducting a confidential interview with the parties' daughter and there was no indication that the court relied on that interview in reaching its decision.

*Matter of Marvin v Kilmer*, 99 AD3d 1255 (4th Dept 2012)

### **Mother Failed to Prove that Father Sexually Abused Child**

Family Court dismissed mother's petition, which sought modification of a prior custody order that granted her primary physical custody and the father visitation, based upon allegations that the father sexually abused the child. The mother and the attorney for the child appealed. The Appellate Division affirmed. Although several witnesses testified that the then four-year-old child reported to them that the father touched her "poo" and "pee," when a police officer interviewed the child outside the presence of the mother the child said that the touching occurred when the father wiped her after she used the toilet. Further, allegations of sexual abuse against the father had been investigated by DSS and were determined to be unfounded. The contention that the court should have drawn an adverse inference against the father based upon his failure to deny the allegations of sexual abuse at the hearing was rejected. Although the father testified at the hearing, he was not questioned by anyone about the sexual abuse allegations.

*Matter of Danner v Nepage*, 100 AD3d 1405 (4th Dept 2012)

### **Sole Legal Custody to Mother Reversed**

Family Court awarded sole legal custody to respondent mother. The Appellate Division reversed and reinstated the father's petition seeking modification of visitation with the parties' children. Respondent spoke Swahili and an interpreter appeared on his behalf. Although petitioner responded "no" when asked if he and respondent had been married, he previously stated unequivocally that he and respondent had been married in Africa in a cultural ceremony. The court interrupted petitioner's explanation of a cultural

ceremony and petitioner did not complete his response. Respondent testified that the parties were never married. The court's determination that petitioner lacked standing was not supported by a sound and substantial basis in view of petitioner's contradictory testimony through an interpreter. Further, petitioner provided prior sworn petitions where respondent asserted that petitioner was the father of the child and that the parties were married in Africa. Thus, judicial estoppel applied because respondent had secured an order in her favor by adopting a position and then sought to assume a contrary position in this action because her interests had changed.

*Matter of Mukuralinda v Kingombe*, 100 AD3d 1431 (4th Dept 2012)

### **Grant of Grandparent Visitation Lacked Sound and Substantial Basis**

Family Court awarded petitioner grandfather visitation of one weekend per month with his daughter's child. The Appellate Division modified and remitted for further proceedings. The record did not support respondent's contention that the attorney for the child failed to make a recommendation in accordance with the grandchild's wishes. The grandfather had standing to seek visitation. The court properly concluded that the grandfather demonstrated a longstanding and loving relationship with the grandchild. However, the court's determination that it was in the best interests of the child to have overnight, weekend visitation with the grandfather lacked a sound and substantial basis in the record. The mother and grandfather testified to serious wrongdoing by the grandfather, including illegal drug use and sales and vehicular assault upon respondent's boyfriend. Because the court failed to make findings about the credibility of those allegations, the Appellate Division had no basis to determine how they would impact the determination whether visitation was in the child's best interests.

*Matter of Hilgenberg v Hertel*, 100 AD3d 1432 (4th Dept 2012)

### **Referee Without Jurisdiction to Dismiss Petition**

Family Court dismissed father's petition seeking visitation with his son. The Appellate Division reversed and reinstated the petition. Because respondent mother did not sign the stipulation referring the matter to the referee to hear and determine the matter, the referee was without jurisdiction to dismiss the petition.

*Matter of Gunn v Quinn*, 100 AD3d 1506 (4th Dept 2012)

### **Mother's Willful Failure to Obey Visitation Order Results in Civil Contempt And 60 Days in Jail**

Family Court adjudged that respondent mother willfully failed to obey a visitation order that granted visitation of the mother's children to the mother's teenage son and the mother's parents. The Appellate Division affirmed. The contention that the statute allowing grandparents to commence a special proceeding seeking visitation with grandparents is unconstitutional as applied to this case because the subject children's

family is intact was unpreserved. In any event, the mother initially consented to an order providing for grandparent visitation and acknowledged in open court that it was in the children's best interests to visit their grandparents, with whom the children previously resided. By consenting to the visitation order any challenge to the statute was waived.

*Matter of Guck v Prinzing*, 100 AD3d 1507 (4th Dept 2012)

### **Award of Sole Custody to Father Affirmed**

Family Court granted father's request for a temporary change in the residence of the children with the mother in New York to the father in Virginia and determined, after a hearing, that it was in the children's best interests that the father have sole custody and that they reside with him in Virginia. The Appellate Division affirmed. Even assuming, for purposes of argument, that the court erred in granting the father's request for a temporary change in custody, the error was harmless because the court subsequently conducted the requisite hearing. The mother failed to preserve for review her contention that the father failed to establish a change in circumstances. In any event, the mother in her petition alleged that there had been a change in circumstances. There was a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award sole custody to the father.

*Matter of Tisdale v Anderson*, 100 AD3d 1517 (4th Dept 2012)

### **Father Established Changed Circumstances**

Family Court awarded petitioner father primary physical custody of the parties' child. The Appellate Division affirmed. The father established that the mother left the child without adult supervision on several occasions late at night while she ran errands and that the child indicated to both her parents that she had been sexually touched by her half brother. Although the statements were uncorroborated, the mother admitted that after she heard the statements she enrolled the half brother in counseling. The mother's conduct in leaving the child without adult supervision, coupled with the statements about sexual touching by the half brother, constituted the necessary change in circumstances. The court properly considered the totality of the circumstances in determining it was in the child's best interests for the father to have primary physical custody.

*Matter of Burrell v Burrell*, 100 AD3d 1545 (4th Dept 2012)

### **Court Properly Denied Petition to Suspend Visitation**

After a hearing, Family Court denied the mother's petition seeking suspension of visitation between respondent father and the parties' child. The attorney for the child appealed. The Appellate Division affirmed. Visitation with the noncustodial parent is presumed to be in the child's best interests and the denial of such visitation is justified only for a compelling reason. Here, although the relationship between father and child

was strained, there was nothing in the record establishing that visitation was detrimental to the child. The record supported the court's determination that resuming visitation offered the only hope of restoring the father-daughter relationship and suggested that the child's opposition to visitation was the result, at least in part, of parental alienation by the mother. Although the attorney for the child was correct that the court erred in disclosing the child's statement at the *Lincoln* hearing, the error did not justify disturbing an otherwise valid determination.

*Matter of Carter v Work*, 100 AD3d 1557 (4th Dept 2012)

### **Mother Failed to Establish Change in Circumstances**

Family Court denied mother's petition to modify a prior custody order that granted physical custody of the parties' children to respondent father and visitation to mother. The Appellate Division affirmed. The mother failed to establish a change in circumstances sufficient to warrant a modification of custody. The only parenting problems that arose in the two months between the issuance of the prior order and the filing of the instant petition had been resolved before the hearing on the instant petition.

*Matter of Hoffmeier v Byrnes*, 101 AD3d 1666 (4th Dept 2012)

### **Court's Best Interests Determination Supported by Record**

Family Court granted father's petition to modify the custody provisions of a stipulated order and awarded the father primary physical custody of the parties' child and visitation to the mother. The Appellate Division affirmed. The court's best interests determination was supported by a sound and substantial basis in the record. Although the court noted concern about the mother's unstable work schedule that did not give the mother a Hobson's choice between livelihood and parenthood. Rather, the court paid particular attention to the child's wishes and the realities of each parent's home environment. The mother failed to preserve for review the contention that the AFC should have substituted judgment because she made no motion to remove the AFC. In any event, the contention lacked merit. Neither exception in 22 NYCRR 7.2 (d) (3) was implicated here.

*Matter of Swinson v Dobson*, 101 AD3d 1686 (4th Dept 2012)

### **Court Attorney Referee Had Jurisdiction to Hear and Determine Matter**

Family Court awarded petitioners sole legal and physical custody of the subject child. Respondent father appealed. The Appellate Division affirmed for reasons stated by the court, adding only that the Court Attorney Referee had jurisdiction to hear and determine the matter. The father signed the requisite consent and, although he signed it before he was informed of his right to counsel, he and his attorney willingly participated in the subsequent proceedings without objection.

*Matter of Phelps v Hunter*, 101 AD3d 1689 (4th Dept 2012)

### **Court Properly Denied Mother Permission to Relocate**

Family Court denied mother's petition seeking permission to relocate with the parties' child to Georgia. The Appellate Division affirmed. The mother failed to establish that her child's lives would be enhanced economically, emotionally or educationally. Although she testified that she was offered a position as a hair stylist at a salon in Atlanta, there was little evidence adduced concerning the salary and other incidentals of employment. Additionally, the child had meaningful and regular access with respondent father, as well as with the child's maternal and paternal families. The evidence also supported the determination that the child's relationship with the father and other relatives in the Buffalo area would be adversely affected by the relocation.

*Matter of Williams v Epps*, 101 AD3d 1695 (4th Dept 2012)

### **Parties' Difficulty in Communicating Not Change in Circumstances**

Family Court dismissed mother's petition to modify a prior custody and visitation order entered upon the parties' stipulation. The Appellate Division affirmed. The mother failed to establish a change in circumstances sufficient to warrant a modification of custody. The parties' communication problems did not constitute a change in circumstances. Although the record reflected that the parties experienced some difficulty in communicating with each other, there did not appear to be a change in the parties' communication issues since the prior order was entered. Further, the record reflected that the communication problems had not meaningfully interfered with the child's emotional and intellectual development, health or success in school. The father's alleged failure to spend time with the child did not establish changed circumstances.

*Matter of Avola v Horning*, 101 AD3d 1740 (4th Dept 2012)

### **Father's Transfer to Another Prison Not Change in Circumstances**

Family Court dismissed incarcerated father's petition to modify a prior consent order that allowed him to correspond with his child only by mail. The Appellate Division affirmed. The father failed to establish a change in circumstances since the time of the consent order sufficient to warrant a modification of custody. The fact that the father had been transferred to another correctional facility that was closer to the child's home was not a change in circumstances sufficient to warrant the relief sought.

*Matter of Ragin v Dorsey*, 101 AD3d 1758 (4th Dept 2012)

## **FAMILY OFFENSE**

### **Respondent Committed the Family Offense of Disorderly Conduct**

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

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

### **Family Offense Reversed**

Family Court found that respondent wife committed acts constituting harassment in the first or second degree against petitioner husband. The Appellate Division reversed and dismissed the petition. The court concluded that respondent committed a family offense by cutting open her pills on the counter, knowing that petitioner had allergies to medications. With respect to harassment in the second degree, even assuming petitioner was alarmed or seriously annoyed by the pill cutting and assuming that respondent thereby intended to harass, annoy or alarm him, petitioner failed to establish that the conduct served no legitimate purpose. Petitioner testified that she took the medication for acid reflux and she opened the pills and ate it with food because she couldn't swallow it otherwise. Further, respondent failed to establish that he was allergic to the particular medication petitioner cut on the counter. With respect to harassment in the first degree, even assuming petitioner was in fear of physical injury when respondent opened her medication, petitioner failed to establish that his fear was reasonable. The dissent would have affirmed.

*Matter of Marquardt v Marquardt*, 97 AD3d 1112 (4th Dept 2012)

### **Evidence Insufficient to Establish Family Offense**

Family Court ordered respondent, the fiancé of petitioner's estranged husband, 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 Brazie v Zenisek*, 99 AD3d 1258 (4th Dept 2012)

**Respondent Committed Family Offenses**

Family Court granted a protective order to petitioner upon a finding that respondent committed the family offenses of harassment in the second degree and menacing in the third degree. The Appellate Division affirmed. The court's assessment of credibility was entitled to great weight and it was entitled to credit the testimony of petitioner over that of respondent. Although the order of protection had expired, the appeal was not moot because respondent challenged only the finding that he committed two family offenses.

*Matter of Petrie v Petrie*, 100 AD3d 1423 (4th Dept 2012)

## **JUVENILE DELINQUENCY**

### **Evidence of Physical Injury Insufficient**

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

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

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

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

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

### **Court Erred in Dismissing JD Petition**

Family Court granted respondent's motion to dismiss the instant juvenile delinquency petition as facially insufficient because the alleged victim, an infant, was unable to give sworn testimony. The Appellate Division reversed and reinstated the petition. The nonhearsay allegations in the petition, if true, established that respondent subjected the alleged victim to sexual contact by touching her vagina when she was three years old. The petition was therefore facially sufficient to allege that respondent committed acts that, if committed by an adult, constituted the crime of sexual abuse in the first degree. The fact that the alleged victim was unable to give sworn testimony was a latent defect that did not affect the facial sufficiency of the petition. The court's determination that the

alleged victim could not understand the nature of an oath and therefore could not provide the court with sworn testimony was not an implicit determination that she did not have sufficient intelligence and capacity to provide unsworn testimony.

*Matter of Christopher W.*, 96 AD3d 1591 (4th Dept 2012)

## **PATERNITY**

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

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

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

## **PERSON IN NEED OF SUPERVISION**

### **Respondent Waived Contentions Regarding Substitution of PINS Petition for JD Petition**

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

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

### **PINS Adjudication Reversed**

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

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

### **Contentions About Placement Moot**

Family Court adjudged that respondent was a person in need of supervision and placed her in the custody of the Commissioner of Social Services for one year. Respondent's contentions that the court failed to advise her of her right to remain silent at the dispositional hearing and that placement was not an appropriate disposition were moot because the order of placement had expired. Respondent's contention that the court failed to comply with the Family Court Act, which required it to review the pre-petition services at the initial appearance, was unpreserved and lacked merit. The petition and the attached documents established that petitioner complied with the Family Court Act and the court's comments at the initial appearance demonstrated that the court reviewed petitioner's efforts to divert the case.

*Matter of Haley M.T.*, 96 AD3d 1549 (4th Dept 2012)

## **PINS Adjudication Reversed**

Family Court adjudged that respondent was a person in need of supervision. The Appellate Division reversed. Although the dispositional part of the order had expired, the appeal was not academic because of the possibility of collateral legal consequences resulting from the adjudication. The court erred in denying respondent's motion to dismiss the petition. In a report attached to the petition, the Probation Department stated in a conclusory fashion that diversion services for respondent and his family were provided before the petition was filed. Thus, the petition failed to show that the Probation Department, pursuant to family Court Act § 735 (a), exerted diligent attempts to avoid the necessity of filing a petition. Failure to comply with the statutory requirements constituted a nonwaivable jurisdictional defect.

*Matter of Joseph C.E.*, 99 AD3d 1245 (4th Dept 2012)

## **TERMINATION OF PARENTAL RIGHTS**

### **Parental Rights Properly Terminated on Ground of Permanent Neglect**

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

*Matter of Gerald G.*, 91 AD3d 1320 (4th Dept 2012), *lv denied* 19 NY3d 801

### **Court Erred in Determining Reasonable Efforts Not Required**

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

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

### **Respondent's Parental Rights Properly Terminated**

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

that such contact would be in the child's best interests.

*Matter of Atreyu G.*, 91 AD3d 1342 (4th Dept 2012), *lv denied* 19 NY3d 801

### **Post-Termination Visitation Not in Child's Best Interests**

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

*Matter of Lashawnda G.*, 91 AD3d 1348 (4th Dept 2012), *lv denied* 19 NY3d 802

### **Mother Was Not Denied Effective Assistance of Counsel**

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

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

### **Parental Rights Properly Terminated on Ground of Permanent Neglect**

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

children.

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

### **Court Properly Revoked Suspended Judgment**

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

*Matter of Jhanelle B.*, 93 AD3d 1201 (4th Dept 2012), *lv denied* 19 NY3d 805

### **Father Was Not Denied Effective Assistance of Counsel**

Family Court terminated respondent father's parental rights with respect to his five children. The Appellate Division affirmed. The father was not denied effective assistance of counsel based upon his attorney's recommendation that the father admit to the allegations of permanent neglect. The recommendation was a matter of strategy. Also, respondent failed to demonstrate that he was prejudiced by his attorney's advice.

*Matter of Brandon B.*, 93 AD3d 1212 (4th Dept 2012), *lv denied* 19 NY3d 805

### **Mother Physically Able to Plan For Children's Future**

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

*Matter of John B.*, 93 AD3d 1221 (4th Dept 2012), *lv denied* 19 NY3d 806

### **Parental Rights Properly Terminated Though Children Not Freed For Adoption**

Family Court terminated respondent father's parental rights to his children on the ground of abandonment. The Appellate Division affirmed. Respondent's parental rights could be terminated even though the children's mother retained her parental rights and the children were not freed for adoption. Petitioner established by clear and convincing evidence that respondent abandoned his children. Respondent failed to demonstrate that there were circumstances rendering contact with the children or petitioner infeasible or that he was discouraged from doing so by petitioner.

*Matter of Drevonne G.*, 96 AD3d 1348 (4th Dept 2012)

### **Motion to Vacate Default Properly Denied**

Family Court denied respondent mother's motion to vacate a default judgment in a permanent neglect proceeding. The Appellate Division affirmed. Respondent's contention that she had a reasonable excuse based upon her lack of knowledge and her incarceration was not preserved for review and, in any event, she failed to establish a reasonable excuse. Further, respondent's unsubstantiated and conclusory assertion of partial compliance with prior dispositional order was insufficient to establish a meritorious defense.

*Matter of Anastashia S.*, 96 AD3d 1442 (4th Dept 2012)

### **No Error in Court's Consideration of Mother's 2007 Psychological Report**

Family Court terminated respondent mother's parental rights with respect to her daughter. The Appellate Division affirmed. The court did not err in basing its determination in part upon a psychological report prepared in 2007 in connection with a parental evaluation of the mother. The report concerned the mental fitness of the mother and was therefore relevant to the best interests of the child.

*Matter of Aubrey A.*, 96 AD3d 1459 (4th Dept 2012)

### **Petitioner Made Diligent Efforts**

Family Court terminated respondent father's parental rights to his child. The Appellate Division affirmed. When petitioner tries diligently to reunite parent and child but the parent is uncooperative or indifferent, petitioner is deemed to have fulfilled its duty. Here, initially the father did not believe the child was his. When respondent was adjudicated the father, he expressed no desire to have custody of the child and instead was in favor of an adoption plan. He was invited to all the service plan reviews with respect to the child but attended only one. The father failed to plan for the future of the child. The evidence established that the father was financially and physically able to take custody of the child since the time the child was placed in care but he did not do so. The court properly refused to issue a suspended judgment. The child had been living in a kinship foster home in Florida for six months, had bonded with the foster mother, and was doing very well, while the father had minimal contact with the child and

he had little to no bonding with the child.

*Matter of Noah V.P.*, 96 AD3d 1472 (4th Dept 2012)

### **Mother's Parental Rights Properly Terminated on Ground of Mental Illness**

Family Court terminated respondent mother's parental rights based upon mental illness. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that respondent could not adequately care for her child by presenting the testimony of a psychiatrist regarding respondent's mental illness. The court did not err in refusing to hold a dispositional hearing because there was no requirement for such hearing following a determination that a parent was incapable of caring for a child based on mental illness.

*Matter of Alberto C.*, 96 AD3d 1487 (4th Dept 2012), *lv denied* 19 NY3d 813

### **Mother Failed to Address Issues Leading to Children's Removal**

Family Court terminated respondent mother's parental rights with respect to three of her children on the ground of permanent neglect. The Appellate Division affirmed. The mother cared for the oldest child for only 10 months following her birth and her twin daughters were removed at birth and never returned to her care. Petitioner proved by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between mother and children. Although the mother completed a parenting and domestic violence program and regularly attended supervised visitation with the children, she refused to attend another domestic violence program after the children's father assaulted her and damaged her home and furniture. The mother also refused to attend recommended drug treatment and failed to provide petitioner's employees access to her home, the condition of which resulted in the removal of the oldest child.

*Matter of Tiosha J.*, 96 AD3d 1498 (4th Dept 2012)

### **Father Failed to Address Issues Leading to Children's Removal**

Family Court terminated respondent father's parental rights with respect to his three children. The Appellate Division affirmed. Although the father completed parenting classes, one anger management class and substance abuse and mental health evaluations, he failed to attend a second anger management program following his arrest in connection with a domestic violence incident where he allegedly assaulted the mother and damaged the interior of her home. Respondent also failed to cooperate with petitioner's employees when they attempted to gain access to his home, the condition of which was the basis of the removal of the oldest child, and he refused to verify his income. Thus, the father did not adequately address the issues that caused the removal of the children. Because during the five years where the children were in foster care prior to the entry of the order of disposition, the father had only supervised visitation

with the children, two of whom had never been in the parents' care and one of whom had been in the parents' care for only 10 months, it was in the children's best interests to terminate the father's parental rights.

*Matter of Tiosha J.*, 98 AD3d 1283 (4th Dept 2012)

### **Mother Not Denied Effective Assistance of Counsel**

Family Court suspended respondent mother's parental rights. The Appellate Division affirmed. The mother was not denied effective assistance of counsel at the fact-finding stage of the proceeding. The mother failed to show that any of her attorney's shortcomings resulted in actual prejudice. Although the mother's attorney should have objected to the use of leading questions, any error did not affect the outcome and thus was harmless. Also, while the mother's attorney would have had grounds to object to some of the statements made during petitioner's direct case, the mother failed to show that her attorney's failure to do so was not a strategic decision. Finally, the mother's attorney did not admit on summation that the child was neglected.

*Matter of Alisa E.*, 98 AD3d 1296 (4th Dept 2012)

### **Father Abandoned His Child**

Family Court terminated respondent father's parental rights on the ground of abandonment. The Appellate Division affirmed. It was undisputed that the father had no contact with the child during the statutory six-month period. In fact, the father admitted that he had no contact with the child since he left the residence of the child's mother and moved to Ohio in 2008. Respondent's contention that his failure to contact the child was justified because the child's caseworker failed to return numerous telephone calls he allegedly made seeking information was rejected because petitioner was not required to make diligent efforts to prevail on the abandonment petition. Further, the father's telephone calls to petitioner's office did not rise to the level of effort required to defeat the claim of abandonment.

*Matter of Angela N.S.*, 100 AD3d 1381 (4th Dept 2012)

### **TPR Reversed – Record Unclear Whether Termination in Child's Best Interests**

Family Court terminated respondent mother's parental rights and transferred guardianship and custody of the three children to petitioner agency. The Appellate Division reversed with respect to the child named Gena. The mother's appeals from the permanency orders were dismissed. Because her parental rights had been terminated, the mother lacked standing to participate in the permanency hearing. The mother's contention that the court improperly determined that the mother failed to plan for the children, although able to so, was without merit. The record established that the mother's only viable plan for the children was that they remain in foster care until she was released from incarceration. However, the record was unclear whether termination

of mother's parental rights with respect to Gena was in Gena's best interests. The AFC informed the Court that Gena's clear and consistent wish was to be reunited with her mother. Gena was one month short of her 14<sup>th</sup> birthday when the order on appeal was issued and her consent to adoption would have been required if she had been 15 years old. Also, according to the AFC, Gena, who was now over 15 years old, still refused to be adopted. Thus, the record was unclear whether termination of the mother's parental rights was in Gena's best interests. The matter was remitted for a new dispositional hearing on that issue.

*Matter of Gena S.*, 101 AD3d 1593 (4th Dept 2012)

### **Suspended Judgment Properly Denied**

Family Court terminated respondents parent's parental rights with respect to her two children. The Appellate Division affirmed. The court did not abuse its discretion in refusing to enter a suspended judgment. Although respondents had made progress in improving the deplorable conditions and other problems existing in the family home, the progress was not sufficient to warrant prolongation of the children's unsettled familial status. Freeing the children for adoption by their foster parents was plainly in their best interests.

*Matter of Andie M.*, 101 AD3d 1638 (4th Dept 2012)

### **No Meaningful Plan For Child's Future**

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that the mother permanently neglected her child. It was undisputed that the child was removed from the mother's care two days after her birth and was never returned to the mother's care. The agency established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the mother's relationship with the child. The mother failed to establish that she had a meaningful plan for the child's future, including that she had addressed the problems that caused the child's removal. Although the mother attended some of the parenting classes to which she was referred, she inconsistently applied the knowledge and benefits of the class and argued with service providers and professionals.

*Matter of Serenity G.*, 101 AD3d 1639 (4th Dept 2012)

### **Mother's Parental Rights Properly Terminated on Ground of Mental Illness**

Family Court terminated respondent mother's parental rights with respect to her older child and entered a finding of derivative neglect with respect to her younger child based upon mental illness. The Appellate Division affirmed. The mother's contention that petitioner failed to lay a proper foundation for the testimony of its expert witnesses was unpreserved and lacked merit inasmuch as an adequate foundation was laid for the

testimony. Petitioner established by clear and convincing evidence that respondent was presently and for the foreseeable future unable to provide proper and adequate care for the older child by reason of mental illness. The court did not err in allowing a psychologist to testify based on an evaluation he conducted years earlier in connection with one of mother's other children. The psychologist's testimony was detailed and supported his opinion that mother's condition would not be likely to improve over time and it was substantiated by a second expert who had interviewed the mother in connection with the instant petitions. The court did not err in finding derivative neglect with respect to the younger child. The evidence supported the finding that the mother's untreated and ongoing mental illness resulted in an inability to care for the younger child.

*Matter of Kaylene S.*, 101 AD3d 1648 (4th Dept 2012)

### **Father Failed to Address Sexual Abuse Problem**

Family Court terminated respondent father's parental rights with respect to his children on the ground of permanent neglect. The Appellate Division affirmed. Respondent's contention that the court failed to make the requisite finding that petitioner exercised diligent efforts was belied by the record and his contention that petitioner failed to make diligent efforts lacked merit. There was copious evidence that petitioner exercised diligent efforts but that the father refused to acknowledge and treat the underlying sexual abuse problem that led to the children's placement in foster care.

*Matter of Emerald L.C.*, 101 AD3d 1679 (4th Dept 2012)

### **Hailey ZZ. Applied Retroactively**

Family Court terminated respondent mother's parental rights with respect to her children and granted respondent posttermination visitation with the children. The Appellate Division modified by vacating that part of the order that granted posttermination visitation. The court did not abuse its discretion in refusing to enter a suspended judgment. Because *Matter of Hailly ZZ* (19 NY3d 422) should be applied retroactively, the court erred in granting posttermination visitation.

*Matter of Elsa R.*, 101 AD3d 1688 (4th Dept 2012)

### **Suspended Judgment Not Warranted**

Family Court terminated respondent mother's parental rights. The Appellate Division dismissed the appeal with respect to respondent's oldest child who had attained the age of 18 and otherwise affirmed. Petitioner met its burden of establishing, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the mother's relationship with the younger children and the mother failed to establish that she had a meaningful plan for the children's future, including that she had addressed the problems that caused removal of the children. A suspended judgment would not

serve the best interests of the younger children. The mother's progress was not sufficient to warrant further prolongation of the children's unsettled familial status.

*Matter of Joanna P.*, 101 AD3d 1751 (4th Dept 2012)

### **Suspended Judgment Properly Revoked But New Circumstances Merit Hearing**

Family Court revoked a suspended judgment and terminated respondent mother's parental rights with respect to her child. The Appellate Division reversed. The court properly revoked the suspended judgment because the mother failed to comply with numerous conditions of the suspended judgment. The mother's contention that petitioner was required to submit medical or psychological evidence establishing that termination was in the child's best interests was unpreserved and without merit. However, petitioner and respondent alleged new circumstances that warranted a new dispositional hearing. The new circumstances alleged included that the adoptive placement was disrupted and the child had been living in a group home, that no other adoptive placement had been found, that the child no longer wishes to be adopted, that the child reestablished contact with his maternal grandmother, and that the grandmother intended to pursue custody.

*Matter of Malik S.*, 101 AD3d 1776 (4th Dept 2012)