

Fourth Department Case Law Update

(Covers February 2011 through July 2011 Decision Lists)

Mark Schlechter, Esq.
Confidential Law Clerk to
Hon. Peter C. Bradstreet
Steuben County

Attorneys for Children Program Update
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I. ADOPTION

A. ABANDONMENT

Biological Father Not Consent Father

Family Court determined that respondent biological father forfeited his right to consent to the adoption of the subject child. The Appellate Division affirmed. The court properly determined that the adoption could proceed without respondent's consent. Respondent failed to meet his burden of establishing his right to consent to the adoption. He did not provide any financial support to petitioner mother during the three years preceding the filing of the adoption petition in 2009, had not seen the child since 2006, and failed to communicate with the child or mother from 2006-2008. Respondent's insubstantial and infrequent attempts to contact the mother and child did not constitute substantial and continuous contact and his substance abuse treatment did not provide an adequate excuse.

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

Petitioner Not Consent Father

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

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

B. DUE PROCESS

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

Family Court denied father's petition for custody and freed the child for adoption. The Appellate Division modified by vacating those parts of the order that denied the custody petition, determined that petitioner was a "notice father" and freed the child for adoption and remitted for further proceedings before a different judge. The child was the subject of a neglect petition against the mother. While the child was in foster care petitioner

was adjudicated the father. Thereafter, petitioner commenced this proceeding seeking custody of the child. The court heard testimony on the custody petition following the dispositional hearing in the permanent neglect proceeding against the mother. The court erred in failing to make the requisite findings of extraordinary circumstances before determining the best interests of the child. The court also erred in treating the custody matter as though it had before it only the permanent neglect petition. By determining that petitioner was a “notice father” the court deprived him of due process – that reference was correct only in the context of the permanent neglect proceeding. The issue whether petitioner’s consent was required before the child could be adopted was not before the court.

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

II. CHILD ABUSE AND NEGLECT

A. GENERAL NEGLECT

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

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

Matter of Thomas C., 81 AD3d 1301 (4th Dept, 2011)

Father Unable to Care for Newborn

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

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

Father Neglected Child by Continual Failure to Address Drug Problem

Family Court adjudged that respondent father neglected his child. The Appellate

Division affirmed. Although the court erred in finding that the child was neglected based upon respondent's purported threats to remove the child from the hospital, it properly found that respondent neglected the child based upon his continued failure to address his illegal drug use. Respondent did not object to the court's judicial notice of prior orders detailing respondent's long-standing inability or refusal to deal with his drug usage.

Matter of Alexander M., 83 AD3d 1400 (4th Dept, 2011), *lv den*, __ NE2d __

Father Neglected Child by Failing to Protect Him From Sexual Abuse

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

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

B. DERIVATIVE NEGLECT

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

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

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

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

Family Court adjudicated the subject child to be neglected by respondent mother. The Appellate Division modified by vacating that part of the order that required the mother to

comply with the treatment recommendations of a mental health evaluation. The court properly found the child to be neglected based upon derivative evidence that four of respondent's other children were determined to be neglected children, including evidence that respondent failed to address the mental health issues that led to those neglect determinations. Further, the finding of neglect with respect to one of respondent's other children was entered about two months before the subject child's birth and therefore the prior neglect finding with respect to the other child was so proximate in time that it could reasonably be concluded that the condition still existed. The court erred in including a provision in the dispositional order that required respondent to comply with treatment recommendations of a mental health evaluation report that was not admitted into evidence and was not in the record on appeal. The court did not abuse its discretion in denying respondent's mother's attorney's request for an adjournment so that the mother could testify and so he could subpoena an additional witness.

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

C. EVIDENCE

Mother's Sexual Abuse of Her Child Supported by Evidence

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

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

Frye Hearing Not Required

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

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

Finding of Derivative Neglect Supported by the Evidence

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

Matter of Angel L. H., 85 AD3d 1637 (4th Dept, 2011)

D. DUE PROCESS

Family Court Violated Mother's Right to Due Process

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

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

III. CHILD SUPPORT

Mother's Support Arrears Reduced to \$500

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

subject to vacatur. Family Court found that the mother's income during the time at issue was far less than the poverty guidelines. The Appellate Division, in the interests of justice and on the law, reduced the arrears to \$500.

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

Father's Willful Violation of Support Order Established

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

Matter of Huard v Lugo, 81 AD3d 1265 (4th Dept, 2011)

Father's Willful Violation of Support Order Established

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

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

Court Empowered to Make Modification of Prior Support Order Retroactive to Filing of Petition

Family Court granted respondent father's objection to the order of the Support Magistrate granting mother's petition seeking to modify a prior order of child support. The Support Magistrate had directed the Support Collection Unit to recompute the

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

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

IV. CUSTODY AND VISITATION

A. GENERAL CUSTODY

Award of Joint Custody Affirmed

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

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

B. MODIFICATION

Change in Custody Affirmed

Family Court modified a prior order by granting petitioner father primary physical custody of the parties' child and visitation to the mother. The Appellate Division affirmed. The court failed to make sufficient findings, but the record was sufficiently complete to enable the Appellate Division to make its own findings of fact. The evidence established that the mother repeatedly changed residences and on one occasion returned to and left her estranged husband within one week; the mother was living with a paramour who had a significant history of domestic violence and irrational behavior; her transient lifestyle resulted in the child attending three different schools within a few years; and the mother had been unemployed for several years. In contrast, the father had a stable home life; he made arrangements for daycare and schooling, provided books and toys and spent time playing with the child; he had a steady income; and he provided the child with a safe environment.

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

Change in Physical Custody to Father Affirmed

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

Matter of Carey v Windover, 85 AD3d 1574 (4th Dept, 2011)

Modification of Custody to Father Affirmed

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

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

Award of Sole Custody to Father Affirmed

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

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

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

Family Court modified a prior order and granted sole legal and physical custody of the parties' child to petitioner father, directed that visitation with the mother be supervised, and directed the mother to obtain mental health counseling before filing an application to

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

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

Supervision of Father's Visitation Not Warranted

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

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

Petition for Modification Properly Denied

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

Matter of Anderson v Roncone, 81 AD3d 1268 (4th Dept, 2011)

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

Family Court granted father's petition to modify the custody and visitation provisions of the parties' judgment of divorce and awarded primary physical custody of the parties' child to the father. The Appellate Division affirmed. The mother did not challenge that a change in circumstances existed and the court's best interests determination was

supported by a sound and substantial basis in the record. The child had no siblings and in view of her age any expressed desire concerning custody was of little significance. The father was better able to provide for the child financially. Although both the parties relied upon government benefits and loans for day-to-day support, the mother's financial stability was significantly dependant on her boyfriend, who paid her housing cost, shared the cost of food, and watched the child while the mother was at work. The father lived in a home owned by his father and grandparents, and his parents lived four miles from the father, transported the child to and from preschool and took care of the child while the father was at school. The mother waived her contention that the court erred in proceeding without the original attorney for the child because she consented to the substitution of a new attorney for the child. In any event, the child's interests were fully protected by the substituted attorney.

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

C. RELOCATION

Denial of Relocation Reversed

Family Court denied respondent mother's cross petition for permission for the child to relocate with her to Pennsylvania. The Appellate Division reversed. The record reflected that the court did not adequately, if at all, consider the financial considerations underlying the requested relocation. The mother requested permission to relocate because she and her husband lost their jobs within a relatively short period of time and the husband's health insurance and severance pay ran out thereafter. The couple depleted their savings and their house was placed into foreclosure. The couple were unable to find jobs in Western New York and the husband accepted a job in Pennsylvania out of economic necessity. The court based its determination on its conclusion that relocation would "qualitatively affect" the relationship between father and child. That factor does not take precedence over economic necessity. In any event, the record established that given the mother's and husband's testimony regarding how they would facilitate visitation and contact between father and child, the proposed relocation would not have a substantial impact on the visitation schedule.

Matter of Butler v Hess, 85 AD3d 1689 (4th Dept, 2011)

Mother's Permission to Relocate to Louisiana Affirmed

Family Court granted mother's petition to relocate to Louisiana. The Appellate Division affirmed. The mother met her burden to show that the relocation was in her child's best interests. Respondent father's contention that the petition should have been denied because his financial circumstances precluded him from traveling to visit the child was rejected. Because the father paid minimal child support, the mother was the source of the child's health care, child care and education. The mother's income was limited in the states closest to New York and jobs available to her in those locations were temporary,

whereas the position she obtained in Louisiana was permanent and paid an excellent salary with benefits. Because the father had no accustomed close involvement in the child's everyday life, the need to give appropriate weight to preserving the relationship between the noncustodial parent and the child did not take precedence over the need to give appropriate weight to the economic necessity for relocation.

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

D. UCCJEA

Family Court in Best Position to Evaluate Credibility

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

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

Child Did Not Have Significant Connection With New York

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

Matter of Maida v Capraro, 926 NYS2d 790 (4th Dept, 2011)

E. REFEREES

Dismissal of Petition for Modification of Custody Reversed

Family Court dismissed mother's pro se petition for modification of a prior order custody of her child entered upon consent. The Appellate Division reversed. The prior order

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

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

F. VIOLATIONS

Order Finding Father Willfully Violated Order Reversed

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

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

G. VISITS FROM JAIL

Award to Incarcerated Mother of Six Supervised Visits Per Year Affirmed

Family Court modified the terms of petitioner mother's visitation by awarding her six supervised visits per year with her children at the correctional facility where she was incarcerated and the court determined that the children were prohibited from further contact with their stepfather. The Appellate Division affirmed. The court did not improperly limit mother's visitation with the children. The mother was convicted of burglary in 2008 and was sentenced as a second felony offender to 5 years, 10 months to 14 years incarceration. A police officer testified at the hearing on the petitions that one of the children was with the mother while she committed the burglary. The court expressed concern that the mother casually lied; that her judgment was impaired; and that she appeared to be morally indifferent. The mother's contention that the court erred in prohibiting the children to have contact with their stepfather based solely upon hearsay concerning an allegation that the stepfather engaged in inappropriate sexual contact with one of the children was not preserved for review. In any event, in light of no evidence to suggest the children had regular contact with the stepfather and the allegation of sexual misconduct, there was no basis to disturb the court's determination

that the children have no contact with him.

Matter of Nicole J. R. v Jason M. R., 81 AD3d 1450 (4th Dept, 2011), *lv den*, ___ NE2d ___

Court Properly Dismissed Visitation Petition Without Hearing

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

Matter of Secrist v Brown, 83 AD3d 1399 (4th Dept, 2011), *lv den*, ___ NE2d ___

Order of Visitation Modified, Respondent Established Requisite Change in Circumstances

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

Matter of Black v Watson, 81 AD3d 1316 (4th Dept, 2011)

H. INTERNATIONAL TRAVEL

Father May Take Two-Year-Old Child to Italy

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

be in an unfamiliar environment with unknown relatives. The mother's concerns did not warrant denial of the father's request. It would be in the child's best interests to travel to Italy to meet her extended family.

Matter of Russo v Carmel, 2011 WL 2654110 (4th Dept, 2011)

V. FAMILY OFFENSE

Mother Violated Order of Protection

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

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

VI. GUARDIANSHIP

Stepmother Properly Awarded Guardianship

Family Court denied mother's petition seeking custody of her child and granted stepmother's petition seeking guardianship of the child. The Appellate Division affirmed. Although the court erred in admitting in evidence transcripts of testimony from 2004 without first determining whether the witnesses were unavailable, the error was harmless because the court primarily relied upon evidence and testimony presented at the fact-finding hearing on the instant petitions in making its findings of fact and conclusions of law. Moreover, the only testimony from the 2004 proceeding to which the court referred was the testimony of a child sexual abuse counselor regarding her validations of the allegations of sexual abuse against the mother and the mother did not challenge admission of the 2004 order in evidence. The stepmother met her burden of establishing extraordinary circumstances. The evidence established that the mother had been convicted of driving while intoxicated three times; that she was on probation for the third conviction at the time of the hearing; that she violated her probation; that she has a

history of alcohol abuse; that she has ongoing mental health issues; and that she had been unemployed and unable to support herself since 2007. The best interests of the child would be served by guardianship to the stepmother in light of the facts that the child has lived with the stepmother for over four years, the stepmother had been the child's primary caregiver during that period, and the stepmother has provided for the child's emotional and financial needs.

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

VII. JUVENILE DELINQUENCY

Restitution as Condition of ACD Proper

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

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

Placement in Limited Secure Facility Least Restrictive Alternative

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed an act which, if committed by an adult, would constitute the crime of attempted assault in the second degree. The Appellate Division affirmed. The evidence was legally sufficient to prove beyond a reasonable doubt that respondent committed the acts alleged in the petition. The record established that placement in a limited secure facility was the least restrictive alternative consistent with the needs and best interests of respondent and the need for protection of the community

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

Finding of Willful Violation of Conditional Discharge Reversed

Family Court found that respondent willfully violated an order of conditional discharge and placed her with OCFS. The Appellate Division reversed and dismissed the petition. The court erred in revoking an order of conditional discharge based on its finding that

respondent violated a condition directing her to enroll in a specified private facility for troubled youth. Petitioner's own evidence at the hearing established that respondent took the steps required of her but was unable to enroll in the program because her mother could not afford the fees.

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

Court Did Not Act as "Second Prosecutor"

Family Court adjudged respondent to be a juvenile delinquent based on the finding that she committed the crime of unlawful possession of weapons by persons under 16 and committed an act which, if committed by an adult, would constitute the crime of assault in the second degree. The Appellate Division affirmed. Respondent's contention that the petition should have been dismissed because the acts alleged occurred outside New York State was without merit. The evidence established that the acts in question were committed at a gas station in Monroe County. Respondent failed to preserve for review her contention that the court acted as a "special prosecutor" and, in any event, although the court questioned several witnesses, the questioning was nonadversarial and served only to clarify prior testimony. Any error in admitting or excluding certain evidence was harmless.

Matter of Dominique M., 85 AD3d 1626 (4th Dept, 2011)

VIII. TERMINATION OF PARENTAL RIGHTS

A. PERMANENT NEGLECT

Suspended Judgment Not Warranted

Family Court terminated respondent father's parental rights on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner agency. The Appellate Division affirmed. Petitioner established, by clear and convincing evidence, that it fulfilled its duty to exercise diligent efforts to encourage and strengthen respondent's relationship with the child. A suspended judgment was not in the child's best interests. Respondent did not ask for post-termination contact with the child and such contact was not in the child's best interests.

Matter of Mya B., 84 AD3d 1729 (4th Dept, 2011)

Mother Permanently Neglected Her Child

Family Court terminated mother's parental rights to her child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established, by clear and convincing evidence, that it made the requisite diligent efforts to encourage and strengthen the

mother's relationship with the child. Petitioner referred mother to treatment programs for substance abuse and mental health, both of which she failed to complete. Petitioner also assisted respondent with transportation and intervened on her behalf to prevent termination of her Medicaid benefits. The court properly determined that mother failed to plan for her child's future. The mother failed to complete her treatment programs, continued to associate with the child's abusive father and appeared for at least two supervised visits with the child under the influence of alcohol. Based upon the conduct of the mother and the supportive and loving environment provided by the proposed adoptive parents, the court did not abuse its discretion in denying mother's request for a suspended judgment.

Matter of Holden W., 81 AD3d 1390 (4th Dept, 2011)

Dismissal of Termination of Parental Rights Petition Affirmed

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

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

Mother Permanently Neglected Her Child

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

Matter of Nicholas B., 83 AD3d 1596 (4th Dept, 2011), *lv den*, __ NE2d __

Mother Permanently Neglected Her Children

Family Court terminated respondent mother's parental rights to her children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it exercised diligent efforts to strengthen the mother's relationship with the children by providing counseling, scheduling regular visitation, and providing services to overcome the problems that prevented discharge of the children into mother's care. Although the mother moved to Louisiana shortly after the children were placed in foster care, petitioner regularly updated mother on the children's progress, encouraged her to return to New York, and provided her with contact

information for counseling in Louisiana. Despite those efforts, the mother failed to substantially and continuously or repeatedly plan for the future of the children. The mother was not denied due process when the dispositional hearing was held in her absence. After an adjournment of the hearing based upon mother's other child's medical condition, mother failed to appear at the rescheduled hearing and her attorney provided no documentation to justify her absence. In view of the amount of time the children spent in foster care and the fact that mother's attorney vigorously represented her at the hearing, the court did not abuse its discretion in conducting the hearing in mother's absence.

Matter of La' Derrick J. W., 85 AD3d 1600 (4th Dept, 2011)

B. MENTAL ILLNESS

Respondent's Parental Rights Terminated on the Ground of Mental Illness

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

Matter of Vincent E.D.G., 81 AD3d 1285 (4th Dept, 2011)

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

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

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

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

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

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

C. ABANDONMENT

Father Abandoned His Child

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

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

D. POST-TERMINATION CONTACT

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

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

raised for the first time on appeal, the AD reached it in the interests of justice. The adoptive parents appeared to support visitation, as did the attorney for the child. The adoptive parents currently arranged regular visits between the mother and one of respondent's daughters who also was adopted by the foster parents.

Matter of Tumario B., Jr., 83 AD3d 1412 (4th Dept, 2011), *lv den*, ___ NE2d ___

E. PERMANENCY PROCEEDINGS

Permanency Goal Modified

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

Matter of Sean S., 85 AD3d 1575 (4th Dept, 2011)

F. SUSPENDED JUDGMENTS

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

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The children were placed in foster care after respondent left them with a caretaker who was under the influence of drugs and alcohol. Petitioner established by clear and convincing evidence that the father failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the children. The court did not abuse its discretion in refusing to enter a suspended judgment. Although the father

completed a 28-day inpatient substance abuse program, he subsequently failed drug tests and had been continuously noncompliant with court-ordered interventions.

Matter of Michael C., 82 AD3d 1651 (4th Dept, 2011), *lv den*, ___ NE2d ___

Suspended Judgment Properly Denied

Family Court terminated respondent mother's parental rights to her child on the ground of permanent neglect. The Appellate Division affirmed. The court did not abuse its discretion in refusing to grant respondent a suspended judgment. When the dispositional hearing began the mother was incarcerated in state prison for stealing money to purchase drugs. Although mother had been released from prison by the last day of the hearing, she was living in a homeless shelter and did not have a job or any means to support the child. By mother's own admission, she had been addicted to illegal drugs for many years and the child tested positive for cocaine, morphine and opiates at birth. At the time of the hearing, the mother had not seen the child in 2 ½ years. The proposed adoptive parents had been caring for the child since birth and the child was apparently doing well in their custody.

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

Respondent Violated The Terms of Her Suspended Judgment

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

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

Suspended Judgment Properly Revoked

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

Matter of Keyon M., 85 AD3d 1560 (4th Dept, 2011)

Suspended Judgment Not in Child's Best Interests

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

Matter of Jane H., 85 AD3d 1586 (4th Dept, 2011)