NEW YORK CHILDREN'S LAWYER

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Collateral Consequences For Young People Convicted as Adults*

By Andrew Schepard**

My last column supported the Governor's Children's Cabinet Advisory Board's call for a commission to examine why, in contrast to other states, so many of New York's young people are treated as adult criminals.[1] This column focuses on the same issue from a different perspective. It outlines some of the long-term "collateral consequences"—including disabilities for education and employment and government benefits—that affect young people convicted as adults. Although the formal punishment the young person receives may not be a life sentence, the collateral consequences that follow them can be. In contrast, by being spared most collateral consequences, young people convicted of crime as juveniles have a greater chance to rehabilitate themselves and become productive members of society.

Classifications

Young people accused of crime in New York are classified under a confusing system of names: "juvenile delinquent," "youthful offender," or "juvenile offender." The confusion starts with the fact that those many of us would regard as young—New Yorkers aged 16 or 17—are treated as adults, not youth, when charged with crime. Most other states treat 16- and 17-year-olds accused of crime the other way—as youths.[2] The New York Times reports that 45,873 young people, ages 16 and 17, were arrested last year in New York.[3] As will be discussed below, in some circumstances 16- and 17-year-olds are eligible for youthful offender status which can mitigate the collateral consequences of being treated as an adult.

A juvenile delinquent is a young person between the ages of 7 and 16 who is not "criminally responsible" for his or her acts due to age.[4] A juvenile delinquent is tried exclusively in family court, convicted as a juvenile, and receives the benefit of the family court's rehabilitative orientation and philosophy.

A young person who would otherwise be a "juvenile delinquent" based on age can, however, be classified as a "juvenile offender" (as opposed to "youthful offender") if he or she is 13, 14 and 15 and is "criminally responsible" for a serious crime such as sexually motivated felonies, criminal sexual acts, or murder. Juvenile offenders are treated as adult criminal offenders,[5] but can in some circumstances be converted to "youthful offenders."

In effect, a youthful offender is a young person charged as an adult but given another chance at rehabilitation otherwise reserved for juvenile delinquents. A youthful offender is a juvenile

CONTENTS

offender— a young person 13 to 15 years old who commits a serious crime—or an adult offender between ages 16 and 19 whom an adult court has determined to be eligible to have their criminal conviction deemed vacated and replaced with a non-criminal adjudication.[6] This status is conferred by the adult criminal court through consideration of the nature of the crime and the offender's prior record.[7]

Tom's Story

How the classification system works can be partially illustrated by a hypothetical—Tom's story. Tom is a 16-year-old high school student. He is short for his age, wears glasses and overcompensates to be accepted by the "cool" kids. At the beginning of the school year, Tom's "friends" dared him to take his teacher's wallet. The wallet contained credit cards and, as a result, Tom is charged with a felony, and, as he is 16, as an adult criminal.[8] Tom was very remorseful and returned the wallet and the credit cards it contained to his teacher. Since Tom has committed no prior crimes he is classified as a "youthful offender," a statutory status that does not give Tom an adult criminal record.[9]

Tom, unfortunately, did not draw the appropriate lesson from his first encounter with the justice system. Tom's "friends" told him he was "cool" for getting arrested and began to treat him more as "one of the gang." Months later, these boys were hanging out in their usual spot in the park and passing around a joint. As the joint got passed to Tom, a police officer approached the boys and arrested Tom since he was holding the joint.

Tom is now charged with smoking marijuana in a public place. This time, he is not eligible for youthful offender status because he used up his one youthful offender "free pass" when he was convicted of a felony for stealing the teacher's credit cards.[10] Tom must now face a criminal court judge, and stiffer sentences. He will also be saddled with an adult criminal record that will follow him for life.

Tom is surely immature and exercised bad judgment in continuing to associate with the "friends" after the first incident. He should be appropriately punished for his criminal acts and accept responsibility for them. The question is, however, given Tom's age, how much punishment, for how long and with what effect?

The answer to that question should take into account the reality that Tom's conviction as an adult brings with it serious collateral consequences discouraging his rehabilitation and evolution into a productive member of society.

Consequences of Conviction

At age 16, Tom now possesses a permanent adult criminal record. He will have to disclose information about his record when applying to college, the conviction will show up on background checks when he is applying for jobs, a license to practice a profession, and public housing. In effect, the world knows—or can know—that this young person has been convicted of a crime and is warned to approach him warily, no matter how well he has progressed in the years since his conviction. The only way that the criminal record of a youth convicted as an adult can be sealed is if the youth is determined to be an "eligible youth" for youthful offender status, an option no longer open to Tom.[11]

What does Tom's adult criminal record mean for his future? The consequences include the following.

Restricted educational opportunities. If Tom applies to college he will have to reveal the conviction on the application,[12] making him a less appealing candidate for admission. Tom must also disclose drug-related convictions on financial aid applications, which can operate as a potential bar to receiving federal financial aid.[13]

Restricted employment opportunities. Tom is going to have greater difficulty finding a job because of his conviction, a serious problem in a less than robust economy. The New York Times recently reported on how the Internet has made criminal background checks by employers so much easier than in the past. It also reported a 2010 survey which found that "almost 90 percent of the companies surveyed, most of them large employers, said they conducted criminal background checks on some of all job candidates."[14] Tom's adult criminal conviction will likely appear on these checks, making employment difficult if not impossible for him.[15] He will also face a background check if he tries to enlist in the military.[16] Many occupations such as barbers, taxi drivers, nurses and security guards require a professional license, and Tom will have a harder time qualifying for one than someone without a record.[17]

Occupational licensing agencies can view public records, and a criminal record can operate as a disqualifier for these types of licenses.[18]

Restricted access to public housing. Tom and his family will also have greater difficulty getting into public housing. The public housing application process includes a background check. Any person older than age 16 that will be living in the household is required to undergo one.[19]

In contrast, if Tom had been convicted as a juvenile delinquent, the collateral consequences he faces would be less daunting. Juvenile delinquency proceedings are not a matter of public record, so the record of the adjudication can be sealed.[20] The juvenile delinquent can also have his or her record permanently expunged.[21]

A juvenile delinquent adjudication will thus usually not affect a youth's ability to apply to college; the SUNY application, for example, directs applicants to answer the question whether the applicant has been convicted of a felony on the character and fitness section with "no" if they have been adjudicated a juvenile delinquent.[22] Employers are not permitted to ask about juvenile delinquency adjudications. Conviction as a juvenile delinquent would not disqualify Tom from pursing any profession or occupation nor will it affect his ability to receive a professional license.[23] Tom's family would still be eligible for public housing.

Age of Responsibility

The collateral consequences of Tom's adult criminal conviction are significantly more severe than a juvenile conviction for the same offense would be. Admittedly, Tom may not be representative of most New York young people who are treated as adult criminals. Some of those young people are, no doubt, more dangerous repeat offenders than Tom.

If, however, as the advisory committee suspects, too many young people are treated as adult criminals, it is likely that too many are also suffering the long-term negative collateral consequences of their convictions. Which young people accused of crime are treated as adults, how serious their offenses are, and what effect collateral consequences have on their futures are all important questions for the commission called for by the advisory board to study systematically.

The core premise of the juvenile justice system is that young people are different both morally and developmentally from adults and should be treated differently when charged with crime. Young people should be given a chance to redeem themselves, to accept responsibility for their wrongful acts, learn from them, and become productive members of society. There is reason to believe that too many of New York's young people are denied that freedom from worry by the collateral consequences of inappropriate adult criminal convictions that haunt them for the rest of their lives.

****Andrew Schepard** *is a professor of law and director of the Center for Children, Families and the Law at Hofstra Law School.* **Ashley Crowder**, *a student at Hofstra Law School, assisted in the research of this column.*

Endnotes

1. Andrew Schepard, "Raising New York's Age of Criminal Responsibility for Juveniles," N.Y.L.J. Jan. 28, 2011 at 3, col. 1.

2. Mosi Secret, "States Prosecute Fewer Teenagers in Adult Court," N.Y. Times Reprints available at http://www.nytimes.com/2011/03/06/nyregion/06juvenile.html?scp=1&sq=juvenile+crime&st=nyt (originally published March 5, 2011).

3. Id.

4. N.Y. Fam. Ct. Act §301.2(1) (McKinney 2010).

5. Processing Juvenile Cases, NYC Department of Juvenile Justice. http://www.nyc.gov/html/djj/html/cases.html (Last visited Feb. 15, 2011).

6. Processing Juvenile Cases, NYC Department of Juvenile Justice. http://www.nyc.gov/html/djj/html/cases.html (Last visited February 15, 2011).

7. Id.

8. N.Y. Penal Law §155.30 4. (McKinney 2010) (grand larceny in the fourth degree).

9. N.Y. Crim. Proc. Law §720.10 2. (McKinney 2010).

10. N.Y. Crim. Proc. Law §720.10 2. c. (McKinney 2010).

11. N.Y. Crim. Proc. §720.15(2) (McKinney 2010).

12. See The State University of New York Undergraduate application, available at https://www.suny.edu/student/oas/welcome.do;jsessionid=0e303da19ef62b17ba6758552a43241d75e2.

13. United States Department of Education, Free Application for Federal Student Aid, available online at http://www.fafsa.ed.gov/fafsaws01bw.pdf .

14. Erica Goode, "For Some, Internet Can Complicate Job Search," N.Y. Times, April 28, 2011 at A17, col. 1

15. Id.

16. Kevin Flynn, "Can I Join the Military if I Have a Felony?," Miltary Spot.com available at http://www.militaryspot.com/enlist/can-i-join-the-military-if-i-have-a-felony/ (last visited April 29, 2011).

17. N.Y. Comp. Codes R. & Regs. Part 6050.1.

18. Id.

19. See Guide to Applying for Public Housing, New York City Housing Authority (January 2011), available online at www.nyc.gov/html/nycha/downloads/pdf/070008_pub_hsg_guide.pdf.

20. N.Y. Fam. Ct. Act §375.2 (McKinney 2010).

21. N.Y. Fam. Ct. Act §375.3 (McKinney 2010).

22. See The State University of New York Undergraduate application, available athttps://www.suny.edu/student/oas/welcome.do;jsessionid=0e303da19ef62b17ba6758552a43241d75e2 .

23. N.Y. Fam. Ct. Act §380.1(2) (McKinney 2010).

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Articles of Interest to Attorneys for Children, including legal analysis, news items and personal profiles, are solicited. We also welcome letters to the editor and suggestions for improvement of both this publication and the Attorneys for Children Program. Please address communications to Attorneys for Children Program, M. Dolores Denman Courthouse, 50 East Avenue, Suite 304, Rochester, New York 14604.

Address changes should be directed to the Department's Attorneys for Children Program office in which you reside.

NEWS BRIEFS

FIRST DEPARTMENT NEWS

A reminder, New York State is making changes in their payment system. Some of you have already received email messages, and you will all receive more communication over the next few months. Each vendor (anyone receiving payment from the state for services) will be assigned a Vendor ID number. That number will be associated with an address and voucher processing and payments will be made using that information. Our web based voucher system will not change substantially, there will be some adjustments made to accommodate new information. Over the next few months we will keep you informed as to changes in our system, but you must respond to all inquiries from OSC (Office of the State Comptroller.) Any questions regarding vendor identification information or anything else about the new payment system should be directed to VMU@osc.state.ny.us

SECOND DEPARTMENT NEWS

Continuing Legal Education

On March 24, 2011, the Appellate Division, Second Judicial Department, and the Attorneys for Children Advisory Committee co-sponsored ***Grandparent Visitation***. The presenter was the Hon. Elaine Jackson Stack, Judicial Hearing Officer, of the Nassau County Family Court.

On April 4, 2011, the Appellate Division, Second Judicial Department, and the Attorneys for Children/Assigned Counsel Advisory Committee co-sponsored A ***Two-Part Training Series: A New Model Program for Juvenile Delinquents Focusing on the Brooklyn for Brooklyn Initiative***. The presenters were Felipe Franco, MA, Acting Deputy Commissioner of the Division of Juvenile Justice and Opportunities, New York State Office of Children and Family Services, Theresa Sgobba, Esq., Senior Program Associate, Vera Institute of Justice, Center on Youth Justice, Renee Barbel, MSW, Community Initiatives, Downstate Coordinator, New York State Office of Children and Family Services, and Rebecca A. Colman, Ph.D., Research Scientist, New York State Office of Children and Family Services. The second part of this program was presented on April 11, 2011.

On April 27, 2011, the Appellate Division, Second Judicial Department, and the Attorneys for Children/Assigned Counsel Advisory Committee presented ***Immigration Issues in Family Court: Special Immigrant Juvenile Status - Changes in Federal Law and Recent Appellate Division Decisions.*** The speakers were Katherine Fleet, Esq., NYC Legal Aid Society-Immigration Law Unit, Theo Liebmann, Esq., Clinical Professor and Attorney-in-Charge, Hofstra Child Advocacy Clinic, and Helen Pundurs, Esq., Director, Legal Services Center-The Door.

The Appellate Division, Second Judicial Department, the Attorneys for Children Advisory Committee and the Nassau County Family Court co-sponsored a three part training series beginning on June 2, 2011 with the presentation of ***Juvenile Delinquency Motion Practice***. The speaker was Randy Hertz, Esq., Director, Clinical and Advocacy Programs, NYU School of Law. On June 9, ***Accessorial Liability*** was presented by the Hon. John G. Marks, Executive Director, NCTPVA.. On June 16, 2011, ***Trial Practice Issues*** was co-presented by the Hon. Ellen Greenberg, of the Nassau County Family Court and the Hon. Conrad Singer, also of the Nassau County Family Court.

On July 11, 2011, the Appellate Division Second Judicial Department, and the Mental Health Professionals Recertification Committee, Appellate Division First and Second Judicial Departments, presented ***How to Achieve Better Outcomes For Children in Court Proceedings by Understanding The Impact of Child and Adolescent Development***. Members of the Mental Health Professionals Panel and the Attorneys for Children/Assigned Counsel Panel were invited to attend this training. The speaker was Howard M. Krieger, Ph.D., Connecticut Resource Group, LLC, Psychological Services for Children, Adolescents, and Adults.

THIRD DEPARTMENT NEWS

2011 Revisions to the *Administrative Handbook*

The latest version of the Administrative Handbook of the Office of Attorneys for Children is available on the program's website, http://nycourts.gov/ad3/OAC. The Administrative Handbook contains important information about the agency's operations, including updated lists of the Advisory Committee and Liaison Committee for each Judicial District, as well as office contact information.

Mileage Rate Change

Attorneys should note that the mileage reimbursement rate was changed to $.55 per mile, effective July 1, 2011.

Website

The Office of Attorneys for Children continues to update its web page located at http://nycourts.gov/ad3/OAC. Attorneys have access to a wide variety of resources, including online CLE, the New York State Bar Association Representation Standards, the 2011 edition of the Administrative Handbook, forms, rules, frequently asked questions, seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The Publication Order Form allows Third Department panel attorneys to email the office with any requests for written materials handed out in conjunction with CLE programs.

Training News

The following continuing legal education programs are scheduled for Fall 2011. Registration information will go out by e-mail to all Third Department panel attorneys six to eight weeks prior to the training dates.

Children's Law Update '11-12 will be held at the Traditions at The Glen Resort, in Johnson City, NY on Friday, September 9, 2011, and will be repeated at the Clarion Hotel (Century House) in Latham, NY on Saturday, November 5, 2011, and at the Crowne Plaza Resort in Lake Placid, NY on Friday, May 4, 2011.

Upstate Conference for Attorney for the Child will be held at the Otesaga Hotel and Resort in Cooperstown, NY on Friday and Saturday, October 21-22, 2011. This conference will be jointly held with the Fourth Department Office of Attorneys for Children, and will present cutting edge and controversial issues faced by children's lawyers involved in child welfare and delinquency issues, as well as updates on current custody law and custody best practice directives.

Introduction to Effective Representation of Children, introductory training of new attorneys for children, will be held on Friday and Saturday, December 2-3, 2011 at the Clarion Hotel (Century House) in Latham, NY.

When available, program dates and agendas will be posted on the Office website, http://nycourts.gov/ad3/OAC/cle, along with previously taped training programs that are available for online viewing by panel attorneys. For any additional information regarding these programs, or general questions concerning the continuing legal education of attorneys for children, please contact Jaya Connors, Assistant Director of the Office of Attorneys for Children in the Third Department, at (518) 471-4850, or by e-mail at jlconnor@courts.state.ny.us.

Liaison Committee Meetings

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts will meet this fall to discuss matters relevant to the representation of children in their counties. The committees were developed to provide a means of communication between panel members and the Office of Attorneys for Children. The Liaison Committees, whose members are nominated by Family Court judges, meet twice annually and will meet again in the spring of 2012. Additionally, representatives are frequently in contact with the Office of Attorneys for Children on an interim basis. If you would like to know the name of your Liaison Committee representative, it is listed in the Administrative Handbook or you may contact Betsy Ruslander by telephone at (518) 471-4826 or e-mail at brusland@courts.state.ny.us. If you have any issues you would like brought to the attention of the Office of Attorneys for Children, please contact your county's liaison representative.

Vendor ID Numbers

As you have been previously advised, there will be a major change in the statewide financial system. As of October 1, 2011 all vendors, including attorneys for children, doing business with the State of New York are required to have a state Vendor ID Number in order to get paid. Your Social Security Number will no longer be the identifying feature although this information will still be required by the Office of Attorneys for Children for purposes of processing your vouchers. Many attorneys have already received their Vendor ID number and many will be getting that information shortly. If you have not been advised of your Vendor ID number by the middle of September, please contact Betsy Ruslander at (518) 471-4826 or by e-mail at brusland@courts.state.ny.us.

FOURTH DEPARTMENT NEWS

2010 Honorable Michael F. Dillon Awards

Congratulations to the recipients of the 2010 Hon. Michael F. Dillon Awards. Each year two attorneys from each Judicial District in the Fourth Department are chosen to receive this award for their outstanding advocacy on behalf of children. The 2010 Awards were presented to the recipients by Presiding Justice Henry J. Scudder at a ceremony at the M. Dolores Denman Courthouse on June 21, 2011. The recipients are as follows:

Fifth Judicial District

Paul Deep, Oneida County
Arlene Bradshaw, Onondaga County

Seventh Judicial District

Deborah Indivino, Monroe County
Beth Rachford, Monroe County

Eighth Judicial District

Lydia Evans, Chautauqua County
Catherine Nagel, Erie County

2011 Revisions to the Administrative Handbook

You should have received the latest version of the Administrative Handbook of the Office of Attorneys for Children in April. It also is available on the program's website, http://nycourts.gov/ad4 . The Administrative Handbook contains important information about the Program's operations, including updated lists of the Advisory Committee and Liaison Committee for each Judicial District, as well as office contact information.

Vendor ID Numbers

As you have been previously advised, there will be a major change in the statewide financial system. As of October 1, 2011, all vendors, including attorneys for children, doing business with the State of New York are required to have a state Vendor ID Number in order to get paid. Your Social Security Number will no longer be the identifying feature although this information will still be required by the Office of Attorneys for Children for purposes of processing your vouchers. Most attorneys for children in the Fourth Department have already received their Vendor ID number. Any questions regarding vendor identification information or anything else about the new payment system should be directed to VMU@osc.state.ny.us

Resort Seminar 2011

The Third and Fourth Department Attorneys for Children Programs are hosting a "resort" seminar at the Otesaga Resort Hotel in Cooperstown on October 21-22, 2011. Those of you who attended any of the previous "resort" seminars know that the upstate conferences are a great opportunity for attorneys for children in the Third and Fourth Departments to get together for training, talk, and some much-deserved relaxation in great locations. If you are not familiar with the historic Otesaga Resort Hotel, located on Otsego Lake, and the beauty and recreational possibilities of Cooperstown (home of the Baseball Hall of Fame), we urge you to check them out, starting with the hotel website at www.otesaga.com. Daily rates at the Otesaga are based on the **Full American Plan** (FAP) which **includes the accommodation, and breakfast, lunch, and dinner daily** (beginning with dinner on the evening of arrival and concluding with lunch on the day of departure). The cost of a single room accommodation will be $290 per day for single occupancy and $365 per day for double occupancy. An upgrade to a two-room suite, if available, is an additional $135 per day. Daily FAP rates for children sharing a room

with parents run from no charge for children four years old and under, to $75 per child aged 12 to 18. All rates are subject to taxes. Attorneys for children and their guests who choose not to stay at the hotel may join us for lunch and dinner at a cost of approximately $18 and $70 respectively. The Attorneys for Children Programs will host a reception (cash bar) on Friday evening with complementary hors d'oeuvres. On Saturday we will provide a full day of free CLE.

Fall Seminar Schedule

September 9, 2011

Update
Bohn's Restaurant
Batavia, NY

September 23, 2011

Update
Holiday Inn
Auburn, NY

October 21-22, 2011

Resort Seminar
Otesaga Resort Hotel
Cooperstown, NY

October 27-28, 2011

Fundamentals of Attorney for the Child Advocacy
M. Dolores Denman Courthouse
Rochester, NY

On-line Training Videos Available

Free online CLE is now available to Fourth Department Attorneys for Children on the website (http://www.nycourts.gov/courts/ad4/AFC/AFC-index.html).

In January 2010, the Fourth Department Attorneys for Children Program co-sponsored four full-day seminars featuring nationally known speakers on the topic of domestic violence in the First, Second and Fourth Departments. The seminars were videotaped. Seven segments, comprising two tiers or levels of domestic violence training, are available on the website. Four videos are mandatory for prospective AFC prior to designation. The remaining domestic violence videos ("Coercive Control") and three videos taped at the Syracuse Update on March 31, 2011 are also available on the site. By the time of publication of this edition of the *NY Children's Lawyer*, it is expected that videos taped at the Legal Aid AFC Update held on June 6-7, 2011 in Syracuse will also be available for viewing. Fourth Department AFC who did not attend the live seminars are strongly encouraged to view the videos at their convenience. Online training will not satisfy the Fourth Department training requirement for purpose of recertification. Pursuant to NYS CLE Program rules, however, AFC can receive free CLE for viewing the videos, as long as the directions on the site are followed and the attorney has been admitted for more than two years. Authority to view the training videos is restricted to AFC and is password protected.

RECENT BOOKS AND ARTICLES

ADOPTION

Naomi Cahn, *No Secrets: Openness and Donor-Conceived "Half Siblings"*, 39 Cap. U. L. Rev. 313 (2011)

Andrea B. Carroll, *Cracks in the Cost Structure of Agency Adoption*, 39 Cap. U. L. Rev. 443 (2011)

Jessica R. Caterina, *Glorious Bastards: The Legal and Civil Birthright of Adoptees to Access Their Medical Records in Search of Genetic Identity*, 61 Syracuse L. Rev. 145 (2010)

J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 Cap. U. L. Rev. 345 (2011)

Katherine Hermann, *Reestablishing the Humanitarian Approach to Adoption: The Legal and Social Change Necessary to End the Commodification of Children*, 44 Fam. L. Q. 409 (2011)

Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child's Right to a Permanent Family*, 46 Wake Forest L. Rev. 1 (2011)

Jennifer B. Mertus, *Barriers, Hurdles, and Discrimination: The Current State of LGBT Intercountry Adoption and Why Changes Must be Made to Effectuate the Best Interests of the Child*, 39 Cap. U. L. Rev. 271 (2011)

Sara C. Mills, *Perpetuating Ageism Via Adoption Standards and Practices*, 26 Wis. J. L. Gender & Soc'y 69 (2011)

Steve Sanders, *Where Sovereigns and Cultures Collide: Balancing Federalism, Tribal Self-Determination, and Individual Rights in the Adoption of Indian Children by Gays and Lesbians*, 25 Wis. J. L. Gender & Soc'y 327 (2010)

Symposium, *International Adoption: Permanency for Children*, 55 N. Y. L. Sch. L. Rev. 687 (2010/2011)

Tanya Washington, *Suffer Not the Little Children: Prioritizing Children's Rights in Constitutional Challenges to "Same-Sex Adoption Bans"*, 39 Cap. U. L. Rev. 231 (2011)

ATTORNEY FOR THE CHILD

Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 Ariz. L. Rev. 381 (2011)

Marcia M. Boumil et. al., *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J. L. & Fam. Stud. 43 (2011)

Sarah Valentine, *When Your Attorney is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation for Queer Youth*, 19 Colum. J. Gender & L. 773 (2010)

Kasey L. Wassenaar, *Defenseless Children: Achieving Competent Representation for Children in Abuse and Neglect Proceedings Through Statutory Reform in South Dakota*, 56 S. D. L. Rev. 182 (2011)

CHILD WELFARE

Helen M. Alvare, *Father-Absence, Social Equality, and Social Progress*, 29 Quinnipiac L. Rev. 123 (2011)

Emily Buss & Mavis Maclean, The Law and Child Development, Ashgate Publishing Limited (2010)

Alison Davidian, *Beyond the Locker Room: Changing Narratives on Early Surgery for Intersex Children*, 26 Wis. J. L. Gender & Soc'y 1 (2011)

Andrew W. Eichner, *Preserving Innocence: Protecting Child Victims in the Post*-Crawford *Legal System*, 38 Am. J. Crim. L. 101 (2010)

Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 Me. L. Rev. 1 (2010)

Jason Fuller, *Corporal Punishment and Child Development*, 44 Akron L. Rev. 5 (2011)

Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 Ohio N. U. L. Rev. 819 (2010)

Carissa Byrne Hessick, *Disentangling Child Pornography From Child Sex Abuse*, 88 Wash. U. L. Rev. 853 (2011)

Karenina Lines, *Different Isn't Always Better: The Problems with California's Dependency System*, 38 W. St. U. L. Rev. 111 (2010)

Lisa S. Nored & George Lange III, Crawford v. Washington: *An Examination of the Impact on Child Abuse Prosecutions*, 47 Crim. L. Bull. 66 (2011)

Symposium, *Predators, Porn & the Law: America's Children in the Internet Era,* 61 Syracuse L. Rev. 371 (2011)

CHILDREN'S RIGHTS

Maggie Abbulone, *Redaction is not the Answer: The Need to Keep Third Party Minors' Abortion Clinic Medical Records Safe From Discovery,* 39 Cap. U. L. Rev. 161 (2011)

Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts Over American Indian Children, Carolina Academic Press (2010)

Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship,* 101 J. Crim. L. & Criminology 77 (2011)

John Hofstetter, *Shielding Ohio's Newborns: Defending a Broad Interpretation of "Child" Within the Meaning of O.R.C. § 3113.31,* 58 Clev. St. L. Rev. 717 (2010)

Vanessa Lu, *The Plan B Age Restriction Violates a Minor's Right to Access Contraceptives,* 44 Fam. L. Q. 391 (2011)

Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children,* 63 Fla. L. Rev. 345 (2011)

Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children,* 42 Colum. Hum. Rts. L. Rev. 759 (2011)

CONSTITUTIONAL LAW

Anne C. Dailey, *Children's Constitutional Rights,* 95 Minn. L. Rev. 2099 (2011)

Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach,* 63 Fla. L. Rev. 395 (2011)

Alysa B. Koloms, *Stripping Down the Reasonableness Standard: The Problems with Using* In Loco Parentis *to Define Students' Fourth Amendment Rights,* 39 Hofstra L. Rev. 169 (2010)

Illya D. Lichtenberg, *Advocating Equal Protection For Men in Reproductive Rights and Responsibilities,* 38 S. U. L. Rev. 53 (2010)

Joseph O. Oluwole & William Visotsky, *The Faces of Student Cell Phone Regulations and the Implications of Three Clauses of the Federal Constitution,* 9 Cardozo Pub. L. Pol'y & Ethics J. 51 (2010)

Symposium, *The Fourth Amendment Rights of Children and Juveniles,* 80 Miss. L. J. 789 (2011)

Emily Gold Waldman, *Students' Fourth Amendment Rights in Schools: Strip Searches, Drug Tests, and More,* 26 Touro L. Rev. 1131 (2011)

Thomas Wheeler, *Facebook Fatalities: Students, Social Networking, and the First Amendment,* 31 Pace L. Rev. 182 (2011)

COURTS

Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory,* 34 L & Psychol. Rev. 55 (2010)

James J. Carty, *Is the Teen Next Door a Child Pornographer? Parenting, Prosecuting, and Technology Clash Over "Sexting" in* Miller v. Skumanick, 42 U. Tol. L. Rev. 193 (2010)

Heather A. Cole & Julian Vasquez Heilig, *Developing a School-Based Youth Court: A Potential Alternative to the School to Prison Pipeline,* 40 J. L. & Educ. 305 (2011)

Stephanie Gaylord Forbes, *Sex, Cells, and SORNA: Applying Sex Offender Registration Laws to Sexting Cases,* 52 Wm. & Mary L. Rev. 1717 (2011)

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FEDERAL COURTS

No Confrontation Clause Violation

Police officers dispatched to a gas station parking lot found a man who was mortally wounded and who told them that he had been shot by defendant outside defendant's house and had then driven himself to the lot were allowed to testify at trial about what the murder victim said. Defendant was convicted of murder. The Supreme Court affirmed, holding that there was no Confrontation Clause violation in admitting the victim's statements to police in the parking lot. The police asked defendant what happened, who shot him, and where the shooting occurred. The identification and description of the shooter and the location of the shooting were not testimonial statements because the statements had a primary purpose to enable the police to meet an ongoing emergency. To make the primary purpose determination, a court must objectively evaluate the circumstances in which the encounter between the individual and the police occurred and the parties' statements and actions. While the existence of an ongoing emergency at the time of the encounter is not determinative, it is among the most important circumstances informing the interrogation's primary purpose. An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. The statements and actions of both the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Here, the circumstances of the encounter as well as the statements and actions of the victim and the police objectively indicated that the interrogation's primary purpose was to enable police assistance to meet an ongoing emergency. The police were faced with an armed shooter, whose motive and location was unknown, and who had mortally wounded the victim within a few blocks and a few minutes of the location where the victim was found. The dissent would have found a violation of the Confrontation Clause on the ground that it is only the declarant's state of mind that is relevant and here the victim knew he had nothing to fear.

Michigan v Bryant, ___US___, 131 S.Ct 1143 (2011)

Constitutional Issue Raised by Caseworker's In-School Seizure of Child Was Moot

In this section 1983 action, the mother alleged that the in-school seizure of her daughter violated the Constitution. The Ninth Circuit affirmed the District Court's grant of summary judgment on the Fourth Amendment claims, concluding that defendant caseworker and deputy sheriff were entitled to qualified immunity because, even assuming that the child was kept for two hours in a closed room by a caseworker and a uniformed police officer carrying a firearm, defendants reasonably could have believed that the seizure was reasonable. However, the Court of Appeals went on to hold that the seizure was, in fact, unconstitutional, and that although exigent circumstances permit a caseworker to seize a child without a warrant if there is reasonable cause to believe the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant, traditional Fourth Amendment probable cause and warrant requirements apply in other cases. The Supreme Court granted certiorari. The Supreme Court held that it may review a lower court's constitutional ruling at the request of a government official who was granted immunity. The fact that the victor filed the appeal did not deprive the Court of jurisdiction. The parties in such cases may have a sufficient interest to present a case or controversy. Although the Court generally has declined to consider cases at the request of a prevailing party even though the Constitution permits it, qualified immunity cases are in a special category. Constitutional determinations in such cases are not mere dicta, rather they are rulings that have a significant future effect on the conduct of public officials. Here, however, the case was moot because the child, who was months away from her eighteenth birthday, had moved to Florida with no intention of moving back to Oregon. She faced not the slightest possibility of being seized in a school in the Ninth Circuit's jurisdiction as part of a child abuse investigation, and thus could not be affected by the Ninth Circuit's ruling. The Court vacated the part of the Ninth Circuit's opinion that addressed the Fourth Amendment issue whether a caseworker must obtain a warrant before interviewing a suspected child abuse

victim at school.

Camreta v. Greene, ___US___, 131 S.Ct 2020 (2011)

Police Must Consider Juvenile's Age When Deciding Whether Miranda Warnings Necessary

Police questioned a 13-year-old boy (J.D.B.) at his school about two residential break-ins. JDB was taken from his classroom by a uniformed police officer to the school's closed door conference room where he was questioned by another police officer, who knew J.D.B.'s age, for at least 30 minutes. Before he was questioned, J.D.B. was not given Miranda warnings or the opportunity to call his legal guardian or told he was free to leave the room. After an assistant principal who was present during the questioning told J.D.B. to "do the right thing" and the police officer told him he could be sent to juvenile detention, J.D.B. confessed to his involvement in the break-ins. He was then told he could refuse to answer questions and was free to leave. In two juvenile petitions, J.D.B. was charged with breaking and entering and larceny. His motion to suppress on the ground that his statements had been taken in violation of his Miranda rights was denied. After he was adjudicated delinquent, the state appeals courts affirmed his adjudication. The Supreme Court reversed, holding that the police must consider a juvenile's age when determining whether Miranda warning are necessary and remanded to the state court for a determination whether J.D.B. was in custody during questioning, taking account of all the relevant circumstances of the interrogation, including J.D.B.'s age. Although whether a suspect is in custody during an interrogation is an objective inquiry, police and courts consider the circumstances surrounding the interrogation and then ask whether a reasonable person would have felt free to leave. A reasonable child subjected to police questioning would sometimes feel pressured to submit when a reasonable adult would feel free to go. The dissent would have affirmed on the ground that the Miranda rule needs to be clear and easily applied in all cases and consideration of an individual characteristic - age- is not necessary to protect the constitutional rights of minors.

J.D.B. v North Carolina, ___US___, 131 S.Ct 2394 (2011)

Digitally Altered Photographs of Minor Constituted Child Pornography

Defendant "morphed" the faces of two minors onto adult bodies in photographs depicting sexual activity. The District Court convicted defendant of child pornography crimes and enhanced his sentence on the basis that one of the photographs depicted sadistic or masochistic imagery. The Second Circuit affirmed, holding that child pornography created by digitally altering sexually explicit photographs of adults to display the face of a child is not protected expressive speech under the First Amendment. The interests of actual minors are implicated when their faces are used in creating morphed images that make it appear that they are performing sexually explicit acts. Moreover, here the actual names of the minors were added to many of the photographs, making it easier to identify them and bolstering the connection between the actual minor and the sexually explicit conduct. The enhanced sentence was appropriate. The image made it appear that a minor was partially nude, handcuffed, shackled, wearing a collar and leash and tied to a dresser.

United States v Hotaling, 634 F3d 725 (2d Cir 2011)

Caseworker Not Entitled to Qualified Immunity on Summary Judgment

In a section 1983 action, plaintiff father and his children alleged that defendant caseworker, employed by defendant City of New York, entered their home unlawfully and effected an unconstitutional removal of the children. The District Court concluded that defendant caseworker was entitled to qualified immunity with respect to all claims against him. The Second Circuit reversed. The District Court erred in its application of the corrected affidavit doctrine, under which a defendant who makes erroneous statements of fact in a search warrant affidavit is entitled to qualified immunity, unless the false statements in the affidavit were necessary to the finding of probable cause. The District Court, in applying the probable cause standard in FCA 1034 (2), cited an amended version of the statute that was not in effect at the time of defendant caseworker's application. Under the statute that applied at the time of defendant caseworker's actions, the

affiant was required to demonstrate probable cause to believe that an abused or neglected child may be found *on the premises*. The children defendant caseworker identified did not reside at plaintiff's home. The Second Circuit rejected the District Court's conclusion that no reasonable juror could infer that defendant caseworker knowingly and intentionally made false and misleading statements to the Family Court. Substantial evidence, viewed in the light most favorable to plaintiffs, suggested that defendant caseworker had reason to know that plaintiff father's allegedly suicidal daughter was not residing at the home, and knowingly or recklessly misrepresented the nature of a paint swallowing incident involving the daughter by failing to note that the incident occurred at school rather than in the father's home or that the child may have been living outside the home. With respect to plaintiff's procedural due process claims, the Second Circuit noted that it was clearly established at the time of the removal that state officials could not remove a child from the custody of a parent without either consent or a prior court order unless emergency circumstances existed. With respect to plaintiff's substantive due process claims, the Court noted that although the parties appeared to agree that a post-removal judicial confirmation proceeding was held, and that this proceeding took place within several days after removal, they provide no further detail upon which the timeliness and adequacy of the proceeding could be assessed and the Second Circuit was unable to determine from the record the factual basis on which the Family Court decided that the continued removal was warranted. Defendant caseworker was not entitled to qualified immunity because it could not be concluded as a matter of law that defendant caseworker lacked sufficient legal guidance by which to discern the lawfulness of his actions. With respect to plaintiff's Fourth Amendment claims, the Second Circuit noted that although its decision in *Tenenbaum*, after defendant effected the removal, changed the legal framework by applying Fourth Amendment rather than due process principles, it would be inappropriate to afford defendant qualified immunity solely because, two years after the events in question, the court shifted the constitutional framework for evaluating those claims from the Fourteenth to the Fourth Amendment.

Southerland v. City of New York, __ F3d __, 2011 WL 2279186 (2d Cir 2011)

Bullying Disabled Child May Be Basis For IDEA Claim

Plaintiff challenged her public school placement by the New York City Department of Education under the Individuals with Disabilities Education Act, alleging that her public school placement was procedurally and substantively inappropriate, and her parents sought reimbursement for private school tuition. Plaintiff's primary complaint was that she was deprived of an appropriate education because her assigned public school did nothing to prevent her from being so bullied by other students that her opportunity for an appropriate education was significantly reduced. The Court, after discussing at length the problem of bullying and its effects on children, determined that an evidentiary hearing must be held and formulated a test for evaluating this type of claim. The question to be asked is whether school personnel were deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities. When responding to bullying incidents that may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination. Because plaintiff provided evidence of each element of the test the court denied defendant school district's motion for summary judgment dismissing the case.

T.K. v. New York City Dept. of Education, __ F Supp _, 2011 WL 1579510 (EDNY 2011)

COURT OF APPEALS

Absconding From Non-Secure Facility is Not Escape Within Meaning of Penal Law § 205.10 (1)

Respondent ran out the door of a non-secure juvenile detention facility where he had been remanded pending his adjudication on a juvenile delinquency petition. Thereafter, he was charged in another juvenile delinquency petition with the commission of an act that, if committed by an adult, would constitute the crime of escape in the second degree. Family Court dismissed the petition on the ground that absconding from a non-secure facility did not fall within the proscription of the felony escape statute relied upon by petitioner. The Appellate Division affirmed. The Court of Appeals also affirmed. Penal Law § 205.10 (1) provides that a person is guilty of escape in the second degree when a person escapes from a detention facility. A detention facility is defined in Penal Law §205.00 (1) (b) as "any place used for confinement , pursuant to an order of a court, of a person *** charged with being or adjudicated a ***juvenile delinquent." Although respondent escaped from a "detention facility" within the literal meaning of the Penal Law statute, article 3 of the Family Court Act does not equate detention with confinement, but instead defines it more broadly than the Penal Law as "the temporary care and maintenance of children away from their own homes." Nonsecure detention facilities, in contrast to secure facilities, are characterized in the Family Court Act as lacking physically restrictive construction, hardware and procedures. Moreover, in *People v Ortega* (69 NY2d 763) the Court held that a nonsecure psychiatric facility did not constitute a detention facility within the meaning of Penal Law § 205.00 (1) and therefore one may not commit the crime of escape in the second degree by leaving the facility without permission. It would be entirely incongruous to treat an adult acquitted of rape upon an insanity plea as exempt from the felony of escape in the second degree, but to deem a child awaiting adjudication on a juvenile delinquency petition subject to that felony charge by leaving a nonsecure detention facility through its evidently unlocked door. The dissent would have reversed on the ground that the plain meaning of Penal Law § 205.10 (1) applied.

Matter of Dylan C., 16 NY3d 614 (2011)

Doctor's Testimony Did Not Violate Confrontation Clause

Defendant, who was babysitting his girlfriend's three-year-old son, allegedly placed the child's feet and lower legs into a tub filled with scalding hot water, resulting in second and third degree burns. When the mother returned home, she and defendant took the child to the hospital, where he was examined and treated by an emergency room pediatrician. At trial, the court allowed the pediatrician to testify that when she asked the child why he did not get out of the tub, the child responded " he wouldn't let me out". Defendant was convicted of assault and endangering the welfare of a child. The Appellate Division affirmed. The Court of Appeals also affirmed, holding that the child's statement was properly admitted as germane to his medical diagnosis and treatment. The pediatrician asked the child how he had been injured to order to determine the time and mechanism of the injury so she could properly administer treatment. She also was attempting to determine whether the child had a predisposing condition, such as a neurological disorder, that may have prevented him from getting out of the bathtub. The Court also concluded that there was no violation of defendant's Sixth Amendment right of confrontation. Under the Supreme Court's primary purpose test, the statement was not testimonial because the primary purpose of the pediatrician's inquiry was to determine the mechanism of injury so she could render a diagnosis and administer medical treatment. Moreover, in *Michigan v. Bryant*, the Supreme Court noted that statements to physicians in the course of receiving treatment would be excluded, if at all, under hearsay rules and not the Confrontation Clause. It was of no significance that the pediatrician may also have been motivated to fulfill her ethical and legal duty as a mandatory reporter of child abuse. Her first and paramount duty was to render medical assistance to an injured child.

People v Duhs, 16 NY3d 405 (2011)

Expert's Testimony Did Not Bolster Victim's Testimony

Defendant was convicted of sex crimes based upon his sexual contact with a young boy. The Appellate Division affirmed. In a 4-3 decision, the Court of Appeals affirmed. The Child Advocacy Center nurse-practitioner's testimony about the child's statements to her regarding why he was at the Center did not improperly bolster the child's credibility. That testimony was relevant to diagnosis and treatment. The nurse-practitioner did not identify who the child said touched him and she acknowledged that she did not know whether the child was being truthful. Because the testimony fell within the hearsay exception for statements relevant to diagnosis and treatment, it was not improperly admitted. Moreover, the nurse's observations of the child's demeanor and manner – that he was embarrassed and nervous --were relevant to medical decisions about the necessity for counseling or psychological therapy or other treatment. The admission of expert testimony regarding Child Sexual Abuse Accommodation Syndrome (CSAAS) was not erroneous. From the outset, defendant attacked the child's credibility by emphasizing his failure to report the alleged abuse promptly and his willingness to continue to associate with defendant. Thus, the court properly allowed the expert to testify about CSAAS to rehabilitate the child's credibility. The expert stressed that CSAAS was not a diagnosis; but instead, it described a range of behaviors observed in cases of validated child sexual abuse and that some of those behaviors may seem counterintuitive to a lay person. The expert testified that the presence or absence of any particular behavior was not substantive evidence that sexual abuse had occurred. He made it clear that he knew nothing about the facts of the case before taking the witness stand; that he was not giving an opinion whether sexual abuse took place in this case; and that it was up to the jury to decide whether the child was being truthful. Further, defendant failed to preserve his claim that some of the hypothetical questions too closely mirrored the child's circumstances and thus improperly bolstered the child's credibility. In any event, the expert did not express an opinion on the boy's credibility. The Court also rejected defendant's challenge to the scientific reliability of CSAAS. The dissent would have reversed. The nurse practitioner's testimony about the child's embarrassment and nervousness at the examination had no medical significance. The testimony was offered for credibility purposes. Further, the prosecutor asked the expert on CSASS, in hypothetical terms, about almost every detail in the case. Although the expert did not expressly render an opinion whether the child was a victim of sexual abuse, the expert's confirmation of almost every detail in the case and of the child's behavior as consistent with that of a victim of sexual abuse, was the functional equivalent of rendering an opinion regarding the child's truthfulness.

People v Spicola, 16 NY3d 441 (2011)

Mere Presence of Sex Offender Parent in Children's Home Does Not Establish Neglect

In 2007, respondent father pleaded guilty to rape in the second degree for engaging in sexual intercourse with a person less that 15 years of age and patronizing a prostitute in the third degree, which at the time of his conviction was defined as patronizing a prostitute under 17 years of age. He was adjudicated a level three sex offender but was not ordered to attend sex offender treatment. He was sentenced to time served and returned home. Shortly after his conviction, DSS filed neglect petitions against respondent and the children's mother, alleging that respondent was an "untreated" sex offender whose crimes involved victims between 13 and 15 years old and that the mother failed to protect the children. Family Court found that both parents had neglected the children. The Appellate Division reversed and the Court of Appeals affirmed the reversal. DSS failed to prove by a preponderance of the evidence that the father's status as a level three sex offender, standing alone, constituted actual or imminent danger of physical, emotional or mental impairment to the children and that his status as a sex offender resulted in a failure to exercise a minimal degree of parental care. DSS proved only the father's conviction – nothing more. Respondent's status as a sex offender did not create a presumption that he posed a danger to his children. Respondent did not refuse sex offender treatment and there was no evidence that such treatment was necessary. Moreover, even assuming a level three sex offender is evidence of likely recidivism, DSS failed to show that the father's crimes endangered his

children.

Matter of Afton C., 17 NY3d 1 (2011)

Conviction For Unauthorized Use of Vehicle in The Second Degree Supported by Legally Sufficient Evidence

While patrolling a residential area, a police officer observed defendant exit the driver's side door of a Lincoln Town Car, holding a small black box. Defendant started walking toward the police office but when he saw the officer he dropped the box and continued to walk. The officer and a fellow officer stopped defendant and recovered the box, which turned out to be a computerized automobile light control module. The officers observed that the vehicle's door lock was broken and the dashboard was ripped open, exposing the internal wiring. When the officers arrested defendant they recovered a screwdriver, rachet and four sockets from his pants pocket. Defendant did not have permission to use the car. Defendant was indicted for a number of crimes, including unauthorized use of a vehicle in the second degree. He was convicted of all counts against him but the Appellate Division modified by vacating the unauthorized use of a vehicle in the second degree. The Court of Appeals reversed and reinstated that conviction. A violation of the unauthorized use of a vehicle statute occurs when a person enters an automobile without permission and takes actions that interfere with or are detrimental to the owner's possession or use of the vehicle. The dissent would have held that in order for a lone defendant to come within the unauthorized use of a vehicle statute, there must be evidence that the defendant, without authorization from the vehicle's owner and with intent to operate the vehicle, obtained the means to start the vehicle.

People v Franov, 17 NY3d 58 (2011)

APPELLATE DIVISIONS

ADOPTION

Biological Mother's Consent to Adoption Not Required

The Family Court properly determined that the biological mother's consent to the adoption of the children by the petitioner was not required. Contrary to biological mother's contention, the petitioner sustained their burden of establishing, by clear and convincing evidence, that she abandoned the children pursuant to DRL § 111 (2) (a). The record showed that she last visited with the children in September 2005. Although she testified that she sent weekly letters to the children during a period of time in 2006, and that she telephoned the petitioners in December 2006, who advised her not to call again or they would call the police, the petitioners both testified that they did not receive any such letters or telephone call. The Family Court resolved this conflicting testimony in favor of the petitioners, and there was no basis for the Appellate Division to disturb the Family Court's credibility determination. In any event, even if the biological mother's testimony had been credited, it would not excuse her admitted failure to attempt to contact the children or the petitioners throughout the year 2007.

Matter of Alyssa A., 79 AD3d 740 (2d Dept 2010)

Petitioner Not Consent Father

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

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

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

Family Court denied father's petition for custody and freed the child for adoption. The Appellate Division modified by vacating those parts of the order that denied the custody petition, determined that petitioner was a "notice father" and freed the child for adoption and remitted for further proceedings before a different judge. The child was the subject of a neglect petition against the mother. While the child was in foster care petitioner was adjudicated the father. Thereafter, petitioner commenced this proceeding seeking custody of the child. The court heard testimony on the custody petition following the dispositional hearing in the permanent neglect proceeding against the mother. The court erred in failing to make the requisite findings of extraordinary circumstances before determining the best interests of the child. The court also erred in treating the custody matter as though it had before it only the permanent neglect petition. By determining that petitioner was a "notice father" the court deprived him of due process – that reference was correct only in the context of the permanent neglect proceeding. The issue whether petitioner's consent is 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)

CHILD ABUSE AND NEGLECT

Finding of Maltreatment Annulled

Respondent OCFS alleged that petitioner mother maltreated her daughter by using excessive corporal punishment. After an administrative hearing, it was determined that respondent maltreated the child. The Appellate Division annulled the finding of maltreatment, amended the report of maltreatment to "unfounded" and sealed the report. The administrative determination was not supported by substantial evidence. The only witness at the hearing, petitioner, testified that in response to her daughter slamming the door to her room, crying and throwing things around

when the child was asked to look for pencils to do her homework, petitioner told the child that she could not act that way. When the behavior continued, petitioner found a "child's belt" intending to hit her daughter with it on the child's behind. The child was accidently hit with the belt buckle when petitioner grabbed the child as she was running away. Petitioner put bacitracin on the scratch and it healed in a day or so. The ALJ's determination was erroneous that even if petitioner did not intend to hit her daughter with the belt on her face the accident established neglect because petitioner allegedly struck the child out of anger resulting in "impairment or threatened impairment of the child." There was no evidence presented at the hearing that the child required medical treatment or that petitioner had ever used excessive corporal punishment before.

Matter of Parker v Carrion, 80 AD3d 458 (1st Dept 2011)

Mother's Mental Illness Resulted in Inability to Care For Child

Family Court found that as a result of respondent mother's mental illness, her ability to care for her infant was impaired, and entered a disposition of neglect against the mother. The Appellate Division affirmed. Psychiatric and medical reports chronicled respondent's many long-standing mental health diagnoses, drug abuse, and unstable relationships. In 2006, the court entered a finding of neglect with respect to respondent's two sons and placed them in foster care. In 2007, the court ordered respondent to engage in a variety of services and submit to random drug testing. The subject child was born in 2008, weighing 4 pounds, 14 ounces and was HIV-positive, which required immediate specialized medication intervention. Six days later, ACS filed a neglect petition against respondent alleging that her mental illness impaired her ability to care for the subject child and, about two weeks later, added allegations that respondent failed to take her prescribed medications, that there was a prior finding of neglect with respect to her two other sons, and that she failed to comply with the 2007 order. The court did not err in denying respondent's motion for appointment of an expert mental health professional. Respondent's medical records and testimony by the psychiatrist who treated her for eight years obviated the necessity for additional expert testimony. The finding of neglect was supported by a preponderance of the evidence. Respondent's psychiatrist testified that without medication respondent would be unable to care for her child and that she failed to take her medication for two periods of several days, once while she was pregnant and once shortly after the child was born. The dissent, interpreting the two instance of noncompliance with medication differently, would have reversed.

Matter of Noah Jeremiah J., 81 AD3d 37 (1st Dept 2011)

Neglect and Derivative Neglect Determination Reversed

Family Court determined that respondents mother and father neglected and derivatively neglected their children. The Appellate Division reversed and dismissed the petition. Petitioner's prima facie evidence showing a single oblique fine-line fracture of the child's femur that would ordinarily not have occurred except by reason of respondent parents' acts or omissions was sufficiently rebutted by evidence, not addressed by the court, that the injury could have occurred when respondent mother bent down to pick up garbage while the child was secured against her chest in a "snuggly" and that the injury could have been exacerbated during a procedure performed the same day by the child's pediatrician during a previously scheduled well-child visit.

Matter of Jose Luis T., 81 AD3d 406 (1st Dept 2011)

Father Should Have Known of Mother's Substance Abuse

Family Court found that respondent father neglected his child and released the child to the mother and father with Administration for Children's Services supervision and subject to conditions. The Appellate Division affirmed. A preponderance of the evidence showed respondent neglected the child because he should have known of the mother's substance abuse and failed to protect the child. Respondent father's election to "turn a blind eye" and not to inquire more fully into whatever suspicions he may have had was no defense.

Matter of Joseph Benjamin P., 81 AD3d 415 (1st Dept 2011)

Imminent Danger Posed by Guns Within Reach of Children

Family Court found that respondent father neglected his children. The Appellate Division affirmed. A preponderance of the evidence established that respondent neglected the children. The hearing testimony showed that detectives who executed a search warrant of respondent's residence found guns and ammunition within reach of the children. This evidence established that respondent created an imminent danger that the physical, mental and emotional health of the children would be harmed. Because proceedings under the Family Court Act are civil rather than criminal in nature, the negative inference drawn from respondent's failure to testify did not violate his Fifth Amendment right in the pending criminal case.

Matter of Leah M., 81 AD3d 434 (1st Dept 2011)

Corroboration of Sexual Abuse Provided by Testimony of Age-Inappropriate Knowledge

Family Court found that respondent father sexually abused his son and derivatively abused the daughter of respondent mother and that he neglected both children. The Appellate Division affirmed. Corroboration of the victim's out-of-court statements of sexual abuse by respondent was provided by the social worker's testimony that the children's behavior, including age-inappropriate knowledge of ejaculation by the four-year-old boy and other sexual behavior manifested verbally in activities with drawings and aggressive outbursts by both children, was symptomatic of sexual abuse. However, the testimony offered in support of the claim that respondent inflicted excessive corporal punishment on the children failed to establish by a preponderance of the evidence the necessary elements of that charge.

Matter of Selena R., 81 AD3d 449 (1st Dept 2011)

Imminent Danger Posed by Proximity to Accessible Narcotics

Family Court determined that respondent mother neglected her child. The Appellate Division affirmed. The court's finding of neglect was supported by a preponderance of the evidence. The 21-month-old child was found in an apartment by police investigating marijuana dealing. The officer who executed the search warrant testified that there was marijuana in the bedroom where the child was staying and that there was a strong odor of marijuana on the child's body, hair and clothing. The evidence also established that at least some of the adults in the apartment were engaged in the sale of marijuana. Respondent's conduct in placing the child in near proximity to accessible narcotics and the dangerous activity of drug trafficking posed an imminent risk of danger to the child's physical, mental and emotional well-being.

Matter of Jaylin E., 81 AD3d 451 (1st Dept 2011)

Children's Out-of-Court Statements Corroborated by Caseworker's Observations, Medical Records And Photos

Family Court determined that respondent mother neglected her children. The Appellate Division affirmed. The agency sustained its burden of demonstrating by a preponderance of the evidence that respondent neglected the children by inflicting excessive corporal punishment, failing to provide the children with proper medical and dental care, and failing to provide them with adequate food. The caseworker testified that two of the children stated that respondent hit one child with a broomstick and sometimes hit both children with her hand or a belt. The caseworker observed the injured child and heard respondent admit to the police that she struck the child. Respondent admitted that she failed to take the children for medical and dental appointments for at least a year and the caseworker noted that when she visited the home there was no food in the refrigerator or kitchen cabinets. The children's out-of-court statements were corroborated by the caseworker's observations and her testimony, the children's medical and dental records, and photographs of the injured child.

Matter of Alex R., 81 AD3d 463 (1st Dept 2011)

Finding of Neglect Reversed

Family Court found that respondent mother neglected her child by failing to provide him with adequate supervision and guardianship and proper medical care.

The Appellate Division reversed. The court's finding of neglect was not supported by a preponderance of the evidence. The finding stemmed from an incident where the child's father struck the child in the face while the mother was at work. The father maintained that he hit the child by mistake and there was no evidence that the father had previously hit the child or otherwise physically harmed him. Further, the domestic violence incident reports, which were the sole evidence of the father's violent propensities, were unsworn hearsay allegations. Therefore, there was no basis for a determination that the mother neglected the child by leaving him in his father's care while she was at work. Although the father was subsequently adjudicated to have committed the crime of endangering the welfare of a child, the injury was not serious. Although a single incident of excessive corporal punishment may constitute neglect, the incident here was relatively minor and not part of a pattern. Therefore, the mother did not neglect the child by failing to remove him from the home in response to the single incident of excessive corporal punishment by the father.

Matter of Dontay B., 81 AD3d 539 (1st Dept 2011)

Finding of Neglect Affirmed

Mother appealed neglect finding arguing insufficient evidence. The Appellate Division dismissed her claims. Mother lived at home with father who was actively involved in criminal activity, mother was aware of such activity and on one occasion she remained in the home while such activity was occurring. Father had already been found to have neglected child as a result of his criminal activity. Additionally, the Appellate Division held that Family Court properly drew negative inference from mother's refusal to testify and such inference did not violate her Fifth Amendment right. Mother's lack of insight into her parental responsibility justified court's decision to place child with maternal great-grandmother.

Matter of Aria E., 82 AD3d 427 (1st Dept 2011)

Neglect Finding Reversed

The Appellate Division reversed a finding of neglect against mother because it was not supported by a preponderance of the evidence. Mother's false statement about hitting child with a belt did not establish her failure to exercise a minimum degree of care or that the child was in imminent danger of becoming impaired as a result of the false statement.

Matter of Kennya S., 82 Ad3d 577 (1st Dept 2011)

Neglect Finding Affirmed

Family Court made a finding of neglect against parents of three- month-old child. The Appellate Division affirmed. The finding was supported by testimony from police officers who, acting under a warrant, found a large quantity of cocaine, empty ziplock bags, and $1,451 in the residence while the child was in the residence. The court drew the strongest negative inference from parents' failure to testify and concluded either or both parents were engaged in the sale of cocaine in their apartment, which supported a finding of impaired level of parental judgment resulting in imminent danger to child's health.

Matter of Eugene L., 83 AD3d 490 (1st Dept 2011)

Excessive Corporal Punishment Warranted Neglect Finding

Family Court found mother had neglected her two children based on children's hearsay statements to caseworker, later corroborated by caseworker's observation of children's injuries and condition of home, that mother had struck them with broomstick, prodded child's ear with broomstick, punched other child and rammed her head into wall. By establishing the mother neglected two of her children by using excessive corporal punishment, petitioner demonstrated derivative neglect of mother's other two children. The Appellate Division affirmed.

Matter of Ameena C., 83 AD3d 606 (1st Dept 2011)

Failure to Follow Medical Advice Results in Neglect Finding

Family Court found by preponderance of the evidence that mother had neglected one child and derivatively neglected her other child based on mother's failure to follow medical advice and get treatment for her mental illness, failure to properly feed one of her children and

her decision to live on the streets and sleep on the subway. The Appellate Division affirmed.

Matter of Ronald Anthony G., 83 AD3d 608 (1st Dept 2011)

Neglect Finding Affirmed; Father Abused Drugs in the Presence of the Child

Contrary to the father's contention, the Family Court's finding of negligence was supported by a preponderance of evidence. The record showed that the father regularly abused illegal drugs in the presence of his child, and was aware of the mother's drug use during the time she was responsible for the child's care, but failed to intervene. This proof established a prima facie case of neglect pursuant to FCA §1046[a][iii].

Matter of Sadiq H., 81 AD3d 647 (2d Dept 2011)

Court Determined Child Would Suffer Emotional Trauma if Compelled to Testify in Appellant's Presence

The Family Court properly found that the appellants neglected the subject child, based on evidence of infliction of excessive corporal punishment, domestic violence in the child's presence, and punishment of the child by restricting his food intake and making him sleep on the floor. Consequently, the child ran away from home numerous times, feeling too unsafe and threatened to stay, and as a result of feeling this way, the child stated he might hurt himself or someone else. The record further demonstrates that the Family Court did not err in excluding the appellants from the courtroom during the child's testimony. Due to the impairment of the child's physical and emotional well-being, the Family Court reasonably concluded that the child would suffer further emotional trauma if compelled to testify in the appellant's presence.

Matter of Deshawn D.O., 81 AD3d 961 (2d Dept 2011)

Petition Alleging Father Sexually Abused His Children was Dismissed

The step-father appealed from an order stating that he sexually abused the children, thus requiring that he have no contact with his step-children and no contact with his biological children, except for supervised visits. The Family Court erred in finding that the subject child's out-of-court statements were sufficiently corroborated. Thus, the petition was dismissed.

Matter of Iyonte G., 82 AD3d 765 (2d Dept 2011)

Father Found to Emotionally and Mentally Neglect the Children

The Family Court affirmed the finding that the appellant neglected the subject children by a preponderance of evidence. The appellant's conduct impaired the mental or emotional well being of one child and placed her in imminent danger. (See FCA §1012[f]). Further, the appellant demonstrated an impaired level of parental judgment that was sufficient to support the Family Court's finding of derivative neglect of the other child.

Matter of Janiyah T., 82 AD3d 1108 (2d Dept 2011)

Family Court Properly Vacated a Temporary Order of Protection Against the Father

The Family Court properly vacated the temporary order of protection against the father. Pursuant to FCA §1056, the issuance of an order of protection on behalf of a foster care agency's employees was not authorized. Further, since the Family Court had no power to issue the temporary order of protection initially, it was rendered void.

Matter of Robert B.-H., 82 AD3d 1221 (2d Dept 2011)

Father Neglected Child as Demonstrated by a Preponderance of Evidence

Upon review of the record, the Family Court concluded that the petitioner satisfactorily demonstrated by a preponderance of the evidence that the child was neglected. The record clearly showed that the father choked the child in response to a minor dispute. Accordingly, the Family Court improperly dismissed the petition.

Matter of Chanyae S., 82 AD3d 1247 (2d Dept 2011)

Court's Determination of Parental Neglect Affirmed

The father appealed from a hearing that found he neglected the child by failing to address the child's mental health needs and by inappropriately touching the child. Although the father was aware of the child's behavioral problems, he failed to follow the recommendations of the school principal, guidance counselor, and caseworker for the Administration for Children's Services that he obtain psychological counseling for the child. As a result, a preponderance of the evidence showed that the father failed to address the child's mental needs. Further, contrary to the father's contention, the child's allegations that the father inappropriately touched him were sufficiently corroborated by the child's caseworker and school principal.

Matter of Charlie S., 82 AD3d 1248 (2d Dept 2011)

Father Sexually Abused and Derivatively Neglected his Children

Contrary to the father's contention, the petitioner established by a preponderance of evidence that he sexually abused his daughter. The daughter's out-of-court allegations were corroborated both by her brother's out-of-court testimony as a witness to the abuse, and by the testimony of an expert in psychology with a specialization in child abuse, who evaluated the children. The Family Court further determined that due to the father's flawed understanding of the duties of a parent, he derivatively neglected his two sons as well.

Matter of Andrew W., 83 AD3d 727 (2d Dept 2011)

Record Did Not Support Finding of Neglect

Upon reviewing the record, the Appellate Division found that the Family Court improvidently exercised its discretion in determining that the respondent proved, by a preponderance of the evidence, that the father neglected the child. The hearing evidence demonstrated that the subject child, then four months old, had been hospitalized for 10 days for treatment of presumptive meningitis and, during that time, a procedure was performed to release fluid from the child's head. When the child was discharged, his head was still enlarged, but the parents were advised that this condition would ameliorate within one week. Three days later, the mother called the child's doctor at 10:00 p.m. because the child had vomited and his head was still enlarged. The doctor advised that it was difficult to assess the child's condition from a telephone conversation and that the parents "should probably" bring the child to the emergency room. The mother then checked the child's temperature, which was normal, and the parents decided to take the child to the doctor in the morning. The father stayed up most of the night with the child to monitor his condition. The following morning the parents took the child to the doctor, and the child was admitted to the hospital. The day after the child was admitted, he underwent another procedure to release excess fluid from his head. There was no allegation that the child's condition was actually impaired by the father's conduct. Further, there was no medical testimony presented, and it was not otherwise evident, that the decision to wait until morning to seek medical care placed the child in imminent danger. Order reversed.

Matter of Alanie H., Jr., 83 AD3d 1066 (2d Dept 2011)

Mother Entitled to Hearing for a Reasonable Efforts Determination

The mother appealed from a decision of the Family Court which, in effect, granted summary judgment to the Administration for Children's Services (ACS), on the issue of her severe abuse of one child (Leon) and derivative severe abuse of two other children. ACS argued that reasonable efforts to encourage and strengthen the parental relationship between the mother and child were excused because the mother was convicted of assault in the second degree which resulted in "serious physical injury" to child (see FCA § 1039-b (b) (1). The Appellate Division held that a reasonable efforts determination could not be made without a hearing, as "serious physical injury" was not an element of assault in the second degree to which the mother had pleaded guilty (see PL § 120.05 [2]). The order was reversed and the matter was remitted for an evidentiary hearing and a new determination. In a related case, the Appellative Division held that it was error to grant summary judgment in favor of ACS on the issue of the mother's derivative abuse and derivative severe abuse of Elijah, who was Leshawn's half brother, given the passage of time between the

conduct which formed the basis for the finding that Leshawn was abused and Elijah's birth (see *Matter of Elijah O.*, 83 AD3d 1076).

Matter of Leon K., 83 AD3d 1069 (2d Dept 2011)

Finding of No Reasonable Efforts Reversed

Mother was found to have abused and neglected her children and children were placed in foster care. Children continued in placement after first permanency hearing, even though Family Court found DSS had *not* made reasonable efforts to re-unite mother and children. Subsequent permanency order continued placement of children. Thereafter, a consent order of custody to maternal great- aunt was issued. On appeal the Appellate Division found moot mother's appeal of second permanency order, as consent custody order was issued thereafter. However, Court held that the first permanency order was appealable as Family Court had found DSS had *not* made reasonable efforts to reunite parent and child and financial implications would result for DSS if matter wasn't resolved on appeal. After reviewing the record, the Appellate Court held that DSS had made reasonable efforts, but noted that in future DSS needs to "provide more specificity in its permanency reports".

Matter of Bianca QQ. 80 AD3d 809 (3d Dept 2011)

Not an Abuse of Discretion to Proceed With Neglect Hearing Without Respondent Present

After fact-finding hearing mother was found to have neglected children by using excessive corporal punishment. Although mother failed to appear on third day of hearing based on alleged back pain, Family Court made the decision to proceed without her and later re-opened the proceedings to allow her to testify. Appellate Court affirmed Family Court's finding of neglect noting that " a litigant does not have an absolute right to be present at all stages of a civil proceeding, including a Family Court Act article 10 proceeding...[and] pursuant to Family Court Act § 1042, if the parent or other person legally responsible for the child's care is not present, the court may proceed to hear a petition under this article [as long as] the child is represented by counsel."

Matter of Jack P., 80 AD3d 812 (3d Dept 2011)

DSS Failed to Make Reasonable Efforts to Finalize Permanency Plan

Case involves developmentally disabled child freed for adoption. Rest of his siblings were adopted by other family members. While Family Court approved the permanency plan for child , it also found that DSS had failed to make reasonable efforts to finalize plan. Later on plan was amended but the prior finding of no reasonable efforts was appealed due to financial implications for DSS's . Appellate Court upheld Family Court's decision , noting that DSS's negative view of the child, the caseworker's single suggestion to child's then placement facility that child needs adult resources, and a pre- court discussion with adoptive parent of sibling that she become significant resource for child, cannot be considered making reasonable efforts. In a footnote, the Court observed that a 15 year old cannot be placed in an adult residential facility.

Matter of Taylor EE., 80 AD3d 822 (3d Dept 2011)

Reasonable Efforts Not Required in Severe Abuse

Father sentenced to jail time after assaulting infant. Thereafter Family Court granted DSS a summary judgment adjudicating father as having severely abused child, and held that DSS did not have to make reasonable efforts to reunite father and child. Thereafter, Family Court held what it termed a "fact-finding" hearing and terminated father's rights and freed the child for adoption. Father appealed arguing that DSS had failed to make reasonable efforts to re-unite him with his child. Appellate Court affirmed Family Court finding. The Appellate Division held that although Family Court referred to hearing at issue as "fact-finding", it was dispositional in nature and as Family Court' had summarily determined father had severely abused child, the only issue left was to decide whether to enter a suspended judgment against father or terminate his rights.

Matter of Cauline WW., 80 AD3d 839 (3d Dept 2011)

Finding of Sexual Abuse Affirmed

DSS filed child sexual abuse petition against respondent/father on behalf of one child and derivative neglect petitions on behalf of his other two children. Child who was abused gave out of court statement regarding abuse to Police and CPS . Both father and child had expert witnesses testify on the sexual abuse protocol followed by police and caseworkers. Although expert witness, who testified on behalf of father, attempted to discredit the interview protocol employed by CPS worker, and although child's in court testimony was not completely consistent with statements made out of court, Family Court held that her "testimony was not rendered incredible as a result" and child was in fact "truthfully recalling incidents that she had actually experienced". Additionally, court found her testimony was spontaneous and had sensory detail, which both experts who testified on behalf of child and father stressed as important in evaluating sexual abuse. The Appellate Court gave due deference to Family Court's credibility assessment and affirmed the finding.

Matter of Miranda HH., 80 AD 3d 896 (3d Dept 2011)

Father's Mental Illness Supported Finding of Neglect

DSS filed neglect petition against father of two sons due to his failure to provide proper supervision and care for his children as a result of mental illness. Petitioner's proof included father's belief that mother was working for governmental agencies which had implanted devices in his body including infrared in his eyes, children had been convinced by father this was so, and children were becoming hostile to mother and showing signs of mental illness due to this belief. Father's illness had led him to violate an order of protection and threaten to kill mother in the presence of police officer. Father had also admitted that he had lied to his doctors about taking his medication. Based on the above, Family Court found neglect, which was affirmed by the Appellate Division.

Matter of Anthony TT., 80 AD3d 901 (3d Dept 2011)

Neglect and Derivative Neglect Findings Upheld

Mother was unable to control her young teen daughter so she sent child to live with child's paternal uncle and aunt whom mother had never met. Aunt took child to an undisclosed location and mother never made attempt to locate child, was not concerned about child's school attendance, and later when she found out that child was at a motel where child's father, a registered sex offender was also residing, mother did nothing. When child came back to mother, she disclosed she had been raped. Mother waited several days before seeking medical care for child. DSS filed neglect against mother and matter was adjourned in contemplation of dismissal (ACD). Thereafter, mother allowed child to stay overnight with boyfriend. Child became pregnant , failed to attend school, and DSS moved to violate mother under the ACD and filed new neglect petition against her. Both neglect matters came before Family Court and court found mother had neglected child and derivatively neglected her other child. Mother appealed. Appellate Division affirmed court's decision, finding DSS had shown by preponderance of the evidence that mother had neglected one child and derivatively neglected the other as mother had such an impaired level of parental judgment, it created a "substantial risk of harm for any child in her care."

Matter of Shannon AA., 80 AD3d 906 **(**3d Dept 2011)

Termination of Parental Rights Affirmed

Child was removed from mother's care and placed in custody of DSS shortly after his birth. A year after placement, Family Court terminated mother's rights based on permanent neglect. Mother appealed arguing that DSS failed to make diligent efforts to re-unite her with child. Appellate Court affirmed, finding that Family Court record showed by clear and convincing evidence that DSS had been diligent in providing mother with services but that mother had failed to plan for child's future. Although mother knew she needed to comply and complete drug rehabilitation program to get custody of child, mother failed to do so. Additionally Family Court did not abuse its discretion by ordering termination of mother's rights instead of issuing suspended sentence as mother continued to deny she had drug problem despite overwhelming

evidence of her drug use.

Matter of Ja'Heem W., 80 AD3d 917 (3d Dept 2011)

Boyfriend is Person Legally Responsible for Child's Care

Boyfriend had three children, two with mother, and mother also had child with another man, who was the subject of these proceedings, and whom mother was previously adjudicated as having abused. This proceeding in Family Court was initiated against boyfriend on behalf of mother's child. Boyfriend was found to have abused child and derivatively neglected his other three children. Boyfriend appealed arguing that Family Court erred in determining he was "person legally responsible" for mother's child under section §1012(g) of the Family Court Act. The Appellate Division held that among other factors, based on the fact that boyfriend treated child as his own, saw mother and child every day, mother was pregnant with his child, boyfriend had put child to bed the night child sustained the injury, boyfriend "acted as the functional equivalent of a parent in a familial household setting"... and was accordingly a "person legally responsible" for child's care.

Matter of Alexandria X., 80 AD3d 1096 (3d Dept 2011)

Change of Permanency Goal to Adoption is in Child's Best Interest

Mother was found to have neglected all four of her children and children were placed in foster care. Appellant, father of three of the children, was not named as respondent in neglect proceeding. He appeared at fact-finding hearing but did not participate in it. At permanency hearing, mother agreed to have children continue in foster care and although father appeared, he failed to participate in hearing, presented no evidence and did not request custody. The permanency goal for two of the children was changed to adoption. Father appeals from the order with regard to one of the children, his biological child, arguing that Family Court abused its discretion by modifying permanency goal . Prior to appeal, mother surrendered her rights with regard to these two children**.** The Appellate Division affirmed court's decision, and held that in this case, despite efforts by DSS to reunify father and child, father made no effort to participate in court proceedings, barely interacted with child and told DSS he was not a custodial resource.

Matter of Jacklyn TT., 80 AD3d 1119 (3d Dept 2011)

Mother Can Appeal Neglect Finding After Surrendering Parental Rights

Mother was charged with neglect of her three children. During the course of fact-finding hearing, mother admitted to certain allegations in the petition. Court found neglect and mother consented to the terms of disposition, which continued placement of her children in foster care, without prejudice to her right to appeal the neglect finding. A short while thereafter mother gave birth to fourth child and DSS again filed neglect proceeding against her. After fact-finding hearing, mother was found to have derivatively neglected child. Once more mother agreed to terms of disposition which recommended placement, and preserved her right to appeal neglect finding. Later, mother surrendered her parental rights to fourth child. Mother appealed neglect adjudications. The Appellate Court disagreed with attorney for the children's argument that mother cannot appeal first neglect finding with regard to the three children as mother consented to it. Court held that although mother agreed to some of the allegations in neglect petition, she did not agree to the finding of neglect. The Appellate Division also disagreed with children's attorney's position that mother's conditional surrender of her fourth child renders moot her appeal. Court stated to do so would be to "create a permanent and significant stigma that may adversely affect the mother in future proceedings". However, on the merits, the court dismissed mother's claims and supported Family Court's findings.

In re Armani KK., 81 AD3d 1001 (3d Dept 2011)

Corroborative Evidence Supported Reliability of Child's Out of Court Allegation of Abuse

Mother of nine children, two of whom were children of father, and father were found to have neglected all nine children based primarily on father's sexual abuse of one of mother's children. Child who alleged that Respondent had abused her, told of abuse to her aunt

and CPS caseworker. Mother also testified child had made same statement to mental health worker and to mother as well. Father denied inappropriately touching child but did testify " it would be fine with him" if mother wouldn't have anything to do with him if he did it again. Father had criminal history involving sexual abuse of his daughter. The Appellate Court affirmed Family Court 's decision finding that "some degree of corroboration can be found in the consistency of the out-of-court repetitions"..[of touching disclosed by the child]...as well as in [father's]... admitted criminal history involving sexual abuse of his daughter...and his failure to deny the allegations made by [child]... when confronted by the mother about them."

In re Joshua UU., 81 AD3d 1096 (3d Dept 2011)

Neglect Based on Domestic Violence

Mother allowed father to move into home with herself and her teenage son, who was unaware he was biological child of father until that time. A hot line report was soon filed after father moved in due to the home being in "total disarray and the father intoxicated". Child admitted that father had choked him twice, when angry, and father committed acts of domestic violence against mother. An order of protection was issued against father, directing he stay away from child, mother and mother's apartment. Thereafter, neglect proceedings were filed against both parents and after fact- finding hearing, both parents were found to have neglected child. Finding against mother was based on unsafe condition of the apartment, mother not complying with terms of the order of protection by continuing to telephone father, permitting father to spend one night at the apartment, telling caseworker that if father came to live with her she would find another place for child to live, describing conduct by father choking child as "not ...bad" as child hadn't actually been choked. Mother appealed. The Appellate Division affirmed court's order finding that based on the whole and giving due deference to Family Court, its decision was supported by a sound and substantial basis in the record.

In re Thomas M., 81 AD3d 1108 (3d Dept 2011)

Sufficient Evidence to Prove Child Sexual Abuse and Derivative Neglect

Parents had two children and father adopted mother's child. Adopted child disclosed to mother that adoptive father had been sexually abusing her for eight years. Child sexual abuse and neglect petitions were filed against the father. The court, after hearing testimony from adopted daughter and psychologist who validated child's testimony, and drawing an adverse inference from father's failure to testify, found father had sexually abused his adopted daughter and derivatively neglected his two other children. On father's appeal of the abuse and derivative neglect findings, the Appellate Division upheld Family Court's decision finding that father's repeated sexual abuse of his adopted child "demonstrate[d] such an impaired level of parental judgment as to create a substantial risk of harm for any child in his care".

In re Rebecca FF., 81 AD3d 1119 (3d Dept 2011)

Not Giving Medication Neglectful

DSS filed neglect petition against mother for failing to get treatment for her child who had mental health problems, including suicidal ideation and trying to harm himself. Mother herself had mental health concerns. Mother failed to comply with court order directing her to have child evaluated and follow recommendations of evaluator. Child was then removed from mother's care and placed in foster care. Evaluating pediatrician recommended that due to child's extreme high risk behavior, a low dosage of medication to deal with his hyperactivity disorder would help diagnose other potential mental illnesses. Despite low risk of side effect and high risk for safety issues if medication was not given to child, mother refused to allow child to receive medication. Family Court found mother had neglected child. Appellate Division affirmed finding that while a parent has a right to be concerned about side effects of a medication on his or her child, the evidence in this case demonstrated that parent refused to act on "any suggestions regarding treatment for the child." The Appellate Court further noted that the evidence showed that " without treatment, the child's condition would adversely affect his ability to learn and could result in physical harm to himself and/or others." Therefore the

Appellate Division held that Family Court had a sound and substantial basis in finding neglect.

In re Samuel DD., 81 AD3d 1120 (3d Dept 2011)

Neglect Based on Knowledge of Sexual Abuse and Failure to Protect

Family Court held mother had neglected her two children based on her knowledge that father, who was earlier adjudicated to have sexually abused and neglected his children, was sexually abusing her children. Evidence regarding mother's knowledge of abuse included out of court statements of both children, mother's lack of surprise when child's disclosure was made known to her, and factually similar case involving two of mother's other children who had been sexually abused by her then- boyfriend. Taking into consideration the sufficiency of a "low degree of corroborative evidence" and according "due deference" to Family Court's credibility assessments, the Appellate Court affirmed the finding.

In re Telsa Z., 81 AD3d 1130 (3d Dept 2011)

No Appeal Available From Neglect Finding

Family Court held that father's actions constituted neglect based on his testimony in a neglect hearing that he had "struck his child four times with a belt". Family Court however ruled that the aid of court was not required and dismissed the neglect petition. Father appealed court's response. The Appellate Division held that as there was no adjudication of neglect, father is not aggrieved and has no basis for an appeal. The Appellate Court held father's argument that he lost his employment due to neglect matter "is indistinguishable from other collateral consequences of involvement in legal proceedings and does not demonstrate that a substantial and important right of respondent has been adversely affected and that the interests of justice require that he be permitted to appeal the adverse finding."

In re Xavier II., 81 AD3d 1222 (3d Dept 2011)

Change of Permanency Goal Appropriate as No Meaningful Progress

Mother had been found to have neglected two of her children due to previous finding that father of one of her children had sexually abused another one of her sons. Later on, she sent the biological son of the father to visit the father, who lived out of state. Father refused to return child and mother sought relief in Family Court and child was returned to her. Thereafter DSS filed child neglect petitions against mother on behalf of her now three children, and upon consent of mother, Family Court found mother had neglected her children and they were placed in foster care with permanency goal of return to parent. After permanency hearing, goal was changed to "placement for adoption". Mother appealed change of permanency goal. The Appellate Division affirmed holding that DSS had demonstrated by preponderance of the evidence that mother had failed to make meaningful progress in her ability to care for her children. The Appellate Court pointed out that, among other factors, mother had made no progress in addressing her mental health issues, she had stopped attending her therapy sessions, made no progress in finding suitable housing or employment and still failed to believe the father had sexually abused one of her children.

Matter of Destiny EE., 82 AD3d 1292 (3d Dept 2011)

Finding of Neglect Affirmed

Family Court found mother and her nineteen- year old boyfriend to have neglected four of mother's teenage children as a consequence of their failure to exercise a minimum degree of care in providing children with proper supervision and guardianship. Family Court's decision was based on the fact that mother and boyfriend routinely smoked marihuana when children were in the home, some of the children smoked marihuana, one time with boyfriend, drank in the home and mother allowed her teenage daughter's boyfriend to sleep with her daughter on many occasions. Mother and boyfriend appealed. Boyfriend alleged that as he was not a person legally responsible for the children, he should not be held liable for neglect. The Appellate Court held that even though boyfriend was only a few years older than two of the children, he had lived in the home for about a year as mother's "paramour", he had

helped cook and care for children as well as help them with their homework, and so was a person legally responsible. Mother's claims of insufficient proof were dismissed.

Matter of Tyler MM., 82 AD3d 1374 (3d Dept 2011)

Finding of Child Abuse and Derivative Neglect Upheld

Mother and Father are the married parents of two children. Mother had three children from other relationships. After giving birth to father's child, mother was incarcerated. Soon thereafter youngest child was brought to the hospital with severe injuries which included, bilateral sub-dural hematomas, bilateral infarctions of the brain, substantial loss of brain tissue and several rib fractures. At abuse hearing, DSS presented evidence from child's pediatric neurosurgeon, caseworker and mother. Family Court found father had abused child. Father appealed arguing that the injuries could have occurred while child was in the babysitter's care. The Appellate Division affirmed Family Court's decision, finding that DSS had shown by preponderance of the evidence that child was in father's care when the injuries were sustained and father's explanation of how and when the abuse occurred was unpersuasive. Derivative neglect findings on behalf of the other children were affirmed as the nature of abuse inflicted on the abused child evidenced fundamental flaws in the father's understanding of parenthood.

Matter of Alexander F., 82 AD3d 1514 (3d Dept 2011)

Neglect Due to Domestic Violence

Mother and father, with a history of alcohol and substance abuse, were found to have neglected their children and after completing several programs, the children were returned to their care. However a short time later and when the children were in the home, mother struck father in the head several times with a frying pan. Father had reportedly been drinking excessively. Relatives of the parents filed for custody and while the custody matter was pending, DSS filed a neglect petition against mother. Orders of custody were issued and mother moved to dismiss the neglect petition arguing that custody orders made neglect proceeding unnecessary. Mother also moved for summary judgment stating there were no triable issues , or alternatively, she argued she should be given an ACD. Family Court denied her motions and the mother appealed. The Appellate Division affirmed, stating that Family Court correctly determined that dismissal would not adequately protect the children as the custody orders had been issued without giving DSS notice or having DSS involved. Additionally, the custody order was subject to modification without notice to DSS. If the neglect matter were dismissed there would be no requirement for mother to work with DSS. As to mother's summary judgment motion, the Appellate Court determined that such a legal vehicle is a "drastic procedural remedy", appropriate only in those cases where there are no triable issues of fact, and based on the allegations against mother, Family Court correctly denied her request . As to mother's request for an ACD, DSS did not consent to such a resolution therefore it was properly denied.

Matter of Quinton GG., 82 AD3d 1557 (3d Dept 2011)

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

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

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

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

Family Court adjudged that respondent mother neglected her children and ordered that her visitation with the children be supervised. The Appellate Division

affirmed. Respondent's false allegations and antagonistic conduct against the father placed the children in imminent danger of becoming impaired. The scope of examination of the witnesses was within the sound discretion of the trial court.

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

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)

Mother's Sexual Abuse of Her Child Supported by Evidence

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

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

Family Court Violated Mother's Right to Due Process

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

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

CHILD SUPPORT

Court Required to Hold Hearing to Determine if Child Constructively Emancipated

Supreme Court granted plaintiff father a money judgment of $7824 in child support arrears and attorney's fees and entered judgment in plaintiff's favor in the sum of $17,709, which included the arrears and defendant mother's share of the reasonable expenses incurred by plaintiff on the child's behalf. The Appellate Division modified by reducing the award to $7,824 and remanded for a hearing to determine the issues of constructive abandonment and the

reasonableness of plaintiff's incurred expenses. Defendant's contention that the child support order was void under CSSA was without merit. While a court may apply the CSSA standards in determining the appropriate amount of temporary child support, it is not obligated to do so. The court erred in failing to determine whether the parties' child was constructively emancipated in 2004 and whether the expenses incurred by plaintiff after that date were reasonable. There were issues of fact whether the child's behavior demonstrated that he was emancipated, thus warranting relieving defendant of her support obligation.

Readick v Readick., 80 AD3d 512 (1st Dept 2011)

Child Not Constructively Emancipated

Family Court granted respondent mother's objections to the Support Magistrate's order terminating petitioner father's support obligation. The Appellate Division affirmed. The record supported the court's finding that the father failed to meet his burden to show that the child was constructively emancipated. The child's failure to return the father's telephone calls or contact him indicated reluctance on the child's part to contact him, but not that the child abandoned the relationship with the father.

O'Sullivan v Katz, 81 AD3d 480 (1st Dept 2011)

No Unanticipated or Unreasonable Change in Circumstances to Warrant Modification

Family Court denied mother's petition for upward modification of child support and child support arrears and granted father's cross motion for arrears of mother's share of the child's private school tuition. The Appellate Division affirmed. Mother's allegation that child's attention deficit hyperactivity disorder resulted in educational and medical expenses that she could not meet was not enough to show there was substantial change of circumstances necessitating an upward modification of support, and award of arrears to father was proper.

Shachnow v Shafer, 82 AD3d 423 (1st Dept 2011)

Order of Support Modified

Supreme Court imputed $300,000 annual income to father and ordered spousal and child support to mother in the amount of $18,725 per month and ordered father to pay all of mother's insurance premiums, automobile expenses and minimum payments on mother's credit card. The Appellate Division reduced the amount of support to $15,725, but otherwise affirmed. The father, who had been earning $400,000 as a real estate lawyer had to leave his position due to mental health issues. His annual income was reduced to $36,000 earned from partnerships and royalties and earned an undisclosed amount from his private practice. The court did not abuse its discretion is imputing income to father, but a slight adjustment was needed to better accommodate the needs of father and mother.

Maidman v Maidman, 82 AD3d 577 (1st Dept 2011)

Imputation of Income Appropriate

Supreme Court imputed income to father in the amount of $180,000 based upon his failure to provide documentation regarding his income and his admission that he worked part-time as a lawyer and received, in addition to cash, goods and services as barter. The Appellate Division affirmed.

LeCrichia v LeCrichia, 82 AD3d 599 (1st Dept 2011)

Award of Counsel Fees Reversed

Supreme Court directed defendant father to pay plaintiff mother $200,000 in interim counsel fees, $10,000 per month for vacations and other recreational expenses and $10,000 per month for housekeeping staff. The Appellate Division modified by vacating the award of counsel fees without prejudice to renew. The award for housekeeping staff and recreational expenses were not disguised temporary maintenance. With regard to counsel fees, neither mother nor her counsel provided adequate documentation of the amount of fees already paid to counsel, the amount required for experts, and the dates and nature of service previously rendered by counsel or the amount of work to be performed.

Mimran v Mimran, 83 AD3d 550 (1st Dept 2011)

Record Did Not Support Upward Modification

The mother moved for an upward modification of the father's child support and health care payments, and for an award of maintenance. In her affidavit, the mother asserted that she suffered from fibromyalgia, chronic fatigue syndrome, Hashimoto's disease (a type of thyroid disorder), anxiety, and depression, as well as chronic pain. She stated that she met the Social Security Administration's requirements to be classified as disabled, and submitted a doctor's report and a letter from the Social Security Administration to document these conditions. The mother also asserted that she receives the sum of $1,018 per month in Social Security disability insurance benefits, but pays only $300 per month in rent because she lives with a friend. She also asserted that the parties' son suffered from anxiety, panic attacks, germ phobias, and obsessive-compulsive disorder. The mother submitted a spreadsheet outlining the son's medical expenses, which totaled $120 per month for various physicians' visits and prescriptions. Upon reviewing the record, the Appellate Division concluded that the defendant failed to establish an extreme hardship, nor an unforeseen change in circumstances sufficient to warrant an increase in child support.

Cashin v Cashin, 79 AD3d 963 (2d Dept 2010)

Father Not Required to Maintain Health Insurance Beyond His Employer's Health Insurance

The father did not violate an order of support which required him to maintain his employer's health insurance coverage for the benefit of the children, since the 19-year-old daughter was not eligible for health insurance through the father's employer, and contact lenses were not covered by health insurance and were not a medical necessity. The order of support did not require the father to maintain health insurance beyond his employer's health insurance.

Matter of McCarthy v McCarthy, 79 AD3d 1130 (2d Dept 2010)

Father Collaterally Estopped from Relitigating Issues Raised in Prior Proceedings

Since the identical issues raised in the underlying motion had been determined in prior proceedings, and the father had a full and fair opportunity to litigate these issues, the Support Magistrate properly denied the father's motion to vacate a prior order of support dated September 23, 2008, entered upon his default in appearing at the hearing on the petition. The father was collaterally estopped from relitigating the issues raised in the proceeding and, thus, he failed to establish that he had a potentially meritorious defense to the petition. Had the Support Magistrate granted the motion, it would have had the effect of allowing the father improperly to relitigate those issues. Accordingly, Family Court properly denied the father's objections to the Support Magistrate's order.

Matter of Lockitt v Booker, 80 AD3d 700 (2d Dept 2011)

Father's Petition to Modify a Prior Order of Child Support was Denied

Family Court properly denied the father's objections to the Support Magistrate's order denying his petition to modify a prior order of child support (see FCA §461[b][ii]). The father failed to show that there had been a deterioration in his financial situation between the time of issuance of the original child support order and the time he sought modification.

Matter of Jehuda Ish-Shalom, 81 AD3d 648 (2d Dept 2011)

Downward Modification of Father's Child Support Obligation was Denied

Family Court properly denied the father's objections to the order that denied him a downward modification of his child support obligation. Upon review, it was shown that the father failed to file proof of service of a copy of the objections upon the mother (see FCA §439[e]). By failing to file proof of service of a copy of his objections on the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order. Consequently, he waived his right to appellate review of the merits of his objections.

Matter of Deborah Lusardi, 81 AD3d 958 (2d Dept 2011)

Father Not Required to Pay for School Tuition Pursuant to the Parties' Stipulation of Settlement

Family Court properly affirmed the denial of the mother's petition, which was for reimbursement from the father for his proportionate share of the child's private school and religious education tuition. The record supports the Support Magistrate's findings that the father was not required to pay certain private school tuition, as they were a gift from the maternal grandmother. Additionally, under the terms of the parties' stipulation of settlement, the father was not required to pay for religious school expenses. The mother was not entitled to an award of an attorney's fee, as she did not prevail on all the issues.

Matter of Allison Bederman, 82 AD3d 759 (2d Dept 2011)

Father Failed to Establish a Change of Circumstances Warranting a Downward Modification of Child Support

Supreme Court properly denied the father's petition to grant a downward modification in a prior child support order. It was found that the appellant's financial documentation provided an incomplete account of his finances. It further found that the appellant, a former law firm partner, had the necessary skills and ability to obtain employment in the legal profession. Thus, Supreme Court found that the appellant failed to establish the requisite change of circumstances warranting a downward modification of his child support obligation.

Christopher Basile v. Sherry Wiggs, 82 AD3d 921 (2d Dept 2011)

Defendant's Motion for a Downward Modification of Child Support Obligation was Improperly Denied

The defendant's motion which was for a downward modification of his child support obligations was improperly denied without a hearing. The defendant made a prima facie showing of a substantial unanticipated and unreasonable change in circumstances by submitting an affidavit in support of his motion in which he averred that he unexpectedly lost his job, that he actively searching for a new job, and that he was unable to find work. Thus, Supreme Court revered and remitted the matter back to Supreme Court.

Doreen Dey Ritchey v. Jeffrey Wayne Ritchey, 82 AD3d 948 (2d Dept 2011)

Downward Modification Denied

The unsubstantiated conclusory allegations from the father stating that he diligently sought employment that commiserated with his qualifications and experience were insufficient to meet his burden. Therefore, the Support Magistrate properly denied the father's petition for a downward modification of his child support obligation. Moreover, although Family Court temporarily reduced the father's child support payments during the pendency of his petition, it properly reinstated the father's child support obligation pursuant to a prior order of child support.

Scotti v Scotti, 82 AD3d 1107 (2d Dept 2011)

Family Court Allowed Father to Purge His Contempt of Willfully Violating a Prior Order of Support

Family Court affirmed the decision finding that the father was allowed to purge his contempt of willfully violating a prior order of support by posting an undertaking in the sum of only $3,000, when it was recommended he be incarcerated for six months. It was determined that Family Court did not improvidently exercise its discretion by allowing the father to purge his sentence of incarceration by posting an undertaking for the sum of only $3,000.

Matter of Amy Rube, 82 AD3d 1246 (2d Dept 2011)

Wilful Finding Upheld

Appellant father was in arrears for $24,000, and Support Magistrate issued wilful finding with a suspended sentence which was confirmed by Family Court. Thereafter father failed to pay and Family Court vacated suspension and father was jailed. Appellate Court held father's appeal of wilfulness was not proper as he had consented to wilfulness finding, and father's allegation that Family Court should have considered

"good behavior allowances" towards his sentence was moot as he had already completed his sentence.

Matter of St. Lawrence County Dept. of Social Serv. v Pratt, 80 AD3d 826 (3d Dept 2011)

Wilful Violation Affirmed

Support Magistrate found father/appellant had wilfully violated order and imposed suspended sentence which Family Court confirmed. Father did not appeal this order. Another wilful petition was filed against father by DSS and once again he was found in wilful violation and matter was referred to Family Court. Family Court found him to be in wilful violation, imposed a jail sentence, and vacated the prior suspended sentence. Father appealed the initial wilful finding by the Support Magistrate and Family Court's confirmation of that order. Appellate Division held that as father had never appealed the previous order by the Support Magistrate nor its confirmation by Family Court, his appeal was not proper. Father's contention that Family Court erred in finding wilfulness was held to be without merit.

Matter of Estrin v Yerry, 80 AD3d 831 (3d Dept 2011)

Mother's Commitment to Jail Confirmed

Default order of support was entered against appellant/mother who later was found to be in wilful violation. Thereafter the support amount was reduced. Another wilful violation petition was filed by father alleging mother was in violation of the new order. Support Magistrate found wilfulness and recommended jail time unless mother found gainful employment. After a hearing, Family Court confirmed the Support Magistrate's findings and committed mother to jail. The Appellate Division accorded Family Court's credibility assessments due deference and upheld the decision.

Matter of Lewis v Cross, 80 AD3d 835 (3d Dept 2011)

No Unanticipated Change in Circumstances

Mother and father entered into separation agreement, incorporated but not merged into their judgment of divorce, which agreed to joint legal custody and agreed that notwithstanding the provisions of the Child Support Standards Act, neither party would be obligated to pay child support. Thereafte**r,** mother filed for child support alleging that the children were living with her, and this was an unanticipated change in circumstances. Support Magistrate granted mother child support, but Family Court vacated the order finding no change in circumstances. On appeal the Appellate Division upheld the Family Court decision, finding that there was no unanticipated change in circumstances as both children had moved in with mother prior to the entry of the judgment of divorce.

Matter of Baker v Baker, 80 AD3d 849 (3d Dept 2011)

$25 Per Week Awards Not Entitled to Automatic Cap

Healthy, unemployed father ordered to pay $25 per week in child support. Father's arrears accrued to over three thousand dollars. Finding of wilfulness was made by Support Magistrate, which was confirmed by Family Court and father was sentenced to jail unless he purged the arrears amount. Father challenged Family Court's determination of wilfulness based on assertion that he had unsuccessfully applied for many jobs and argued that the court should have capped his arrears at $500. Appellate Court found father had failed to present credible evidence that he had sought employment, and if he wished to invoke the cap on his arrears, "his remedy was to make an application to 'modify, set aside or vacate' the earlier order" pursuant to FCA section 413 (1)(g) **.**

Matter of Madison County Commr. of Social Servs. v Felker, 80 AD3d 1107 (3d Dept 2011)

Reversal of Commitment Affirmed, Dismissal of Modification Reversed

Father was in violation of child support order. Family Court, upon Support Magistrate's recommendation, directed incarceration of father but suspended the sentence. Family Court appointed new counsel for Respondent, then later reversed its suspension of incarceration. Respondent filed modification of support petition , which was dismissed by the Support Magistrate and affirmed by Family Court. Father appealed. Appellate Division held that while Family Court could, sua sponte, reverse a suspension of

incarceration, it erred in not conducting an evidentiary hearing before dismissing the modification petition filed by father.

Horike v Freedman, 81 AD3d 1091 (3d Dept 2011)

Child Support Orders Affirmed

Father sought relief from his accrued child support obligation by challenging the underlying validity of the support orders issued against him in 1989, 1994 and 1995. Appellate Division dismissed his application as the appeal from the 1989 order was not timely, the 1994 order had already been reviewed and affirmed; and father's argument that the 1995 order was based upon a 1987 order that was vacated by the Court was without merit as the 1987 order had not been vacated.

Matter of Collins v Carella, 81 AD3d 1117 **(**3d Dept 2011)

Support Magistrate Incorrectly Determined Visitation Issue

Eighteen year old girl, who was placed in the custody of her father five years previously, moved from father's home to mother's and mother filed for child support. Father defended petition arguing that he should not have to pay support as child was emancipated, mother had acted to alienate child from him and that child had abandoned her relationship with him**.** The Support Magistrate rejected father's defenses and awarded support. Father's objections were denied. On appeal, the Appellate Division reversed holding that " one of the issues that Support Magistrates are not empowered to hear and determine is contested visitation" and the Court held that visitation was alleged here by use of the term "abandonment" by father. When father asserted this defense, the matter should have been referred to Family Court for resolution of the issue.

Barney v Van Auken, 81 AD3d 1129 (3d Dept 2011)

Order of Dismissal Reversed

Mother filed support petition on behalf of 17 year-old - child. Support Magistrate dismissed petition in support of father's claim that child was emancipated . Mother filed objections and Family Court reversed Support Magistrate's decision and restored matter. After a support hearing, the Support Magistrate dismissed the petition on the grounds that mother had failed to make a prima facie case of entitlement to support , and had failed to show specific expenses she had incurred on behalf of child. Family Court affirmed. Mother appealed and the Appellate Division reversed. In this case, mother testified, and father chose not to cross-examine her, that the child was living with her and she provided for all his basic needs. Mother had also filed a financial disclosure with the court which showed she was currently unemployed. The Appellate Division held that pursuant to section 413 of the FCA, there was a sufficient showing by mother that she was entitled to support from the father, and specific expenses incurred by the mother on behalf of child is only relevant in determining whether the father's pro-rata share of support is unjust or inappropriate, and it is the father in this instance ,who has the burden of proof.

Matter of Seelow v Seelow, 81 AD3d 1188 (3d Dept 2011)

Order of Child Support Affirmed

Parents of three children shared parenting time on a two-week rotation schedule. Father's income was over 5 times what mother earned. Mother successfully petitioned for spousal and child support. Father filed objections, which Family Court denied. Father appealed to the Appellate Division arguing that the award of child support should be reduced as the children were with him more than mother and he is in fact the *de facto* custodial parent. The Appellate Division affirmed Family Court's order refusing to disturb Family Court's credibility assessment in its determination that the children spent almost equal time with both parents, and as father earned substantially more than mother, she was the custodial parent under the CSSA.. The Appellate Court noted that Family Court did consider father's substantial contributions to the children other than child support, father's 15-year old child who lived with him and mother's employment history and work-related injury before rendering its decision.

Matter of Disidoro v Disidoro, 81 AD3d 1228 (3d Dept 2011)

Federal Child Support Act Preempts UIFSA in Modification of Out of State Support Order

Parents were married in Washington state and had a child. Following a separation, mother and child moved to New York and father moved to California. Judgment of divorce was issued in Washington which incorporated but did not merge a custody and child support order. Mother was granted custody and father was ordered to pay child support. Mother filed to modify custody in New York and father answered and cross-petitioned for custody. Both parties appeared in court in New York and visitation provisions were modified. Mother then registered Washington support order in New York, and filed upward support modification petition. Father successfully moved to dismiss petition arguing New York Court lacked subject matter jurisdiction . Family Court affirmed Support Magistrate's decision. Mother appealed. The Appellate Division reversed. The Court held that although pursuant to UIFSA section 580-205 [a],[d] of the Family Court Act, mother had to be non-resident of New York to pursue support matter in this state, Congress implicitly intended that where state law conflicts with federal law, federal law preempts state law and the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) preempts UIFSA. In this case, Washington, the issuing state, no longer had jurisdiction over the child support matter**,** the support order was registered in New York, New York had personal jurisdiction over the "nonmovant" father, both UIFSA and FFCCSOA seek to eliminate judicial competition and conflicting orders in interstate child support matters, and legislative history and directive behind the enactment of FFCCSOA's provision in 28 USC section 1738B[a] which specifically provides that each state shall enforce according to its terms a child support order of another state, and "shall not seek or make a modification of such order except in accordance with its provisions", impliedly supported finding that FFCCSOA preempts UIFSA and New York has jurisdiction to modify.

Matter of Bowman v Bowman, 82 AD3d 144 (3d Dept 2011)

Finding of Wilful Violation

Support Magistrate found father to have wilfully violated child support order in the amount of $23, 526.35. Family Court confirmed finding and sentenced father to ninety days in jail. Father appealed arguing court committed him to time in jail without looking at his ability to pay. Appellate Division affirmed finding that prima facie proof of father 's wilful violation had been made based on testimony from mother and representative from Support Collection Unit, with was not rebutted by evidence from father. Father's testimony that he was recipient of social security benefits, food stamps and that previous gunshot injury prevented him from working did not show his inability to work, as he also admitted to working as truck driver and he had no medical proof of inability to work.

Matter of Wilson v LaMountain, 83 AD3d 1154 (3d Dept 2011)

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)

CRIMES

Finding of Depraved Indifference Murder Affirmed

Defendant knew her son had sustained devastating, life-threatening injuries and was in severe pain. Only the co-defendant inflicted the fatal injuries and she did so on the night the child died. After the injuries occurred, defendant did not call an ambulance or take her son to the hospital. Instead, she and the co-defendant made worthless efforts to treat the child with home remedies, and she otherwise ignored her child's injuries over a period of seven hours and made casual telephone calls without mentioning the child's injuries, drank beer and smoked, and then went to sleep. She called 911 at or around the time the child died, and took the time to dispose of potentially incriminating evidence before making the call. She admitted that she did not seek medical attention earlier because she was afraid of being blamed for the injuries. Defendant was convicted of depraved indifference murder. The Appellate Division affirmed. There was legally sufficient evidence of depraved indifference murder because defendant's liability was based entirely on her failure to perform the duty of obtaining medical attention for her injured child. Further, the court did not err in refusing to receive expert testimony on abusive domestic relationships. Because the People had expressly limited themselves to the theory that defendant's liability was based solely on her failure to obtain medical attention for the child on the particular night he died, evidence explaining why she remained with the co-defendant would have been irrelevant and potentially misleading.

People v Matos, 83 AD3d 529 (1st Dept 2011)

Defendant Correctly Convicted of Criminal Acts in the First Degree

The Court properly denied the defendant's appeal. The Court correctly convicted the defendant of attempted criminal act in the first degree, sexual abuse in the first degree, and endangering the welfare of a child. The record demonstrated that the defendant's plea of guilty was entered knowingly, intelligently, and voluntarily. Contrary to the defendant's contention, his plea was not

rendered invalid due to lack of adequate representation and allegedly not being advised of the possible immigration consequences of his plea.

People v Romero, 82 AD3d 1013 (2d Dept 2011)

Motion to Suppress Properly Denied; Police Conduct Reasonably Limited in Scope

The Supreme Court properly denied the defendant's motion to suppress physical evidence and identification testimony. The record revealed that at about 1:45 A.M., on August 18, 2007, three uniformed police officers were patrolling a neighborhood when they saw a man chasing the defendant down a residential street. When the officers exited their patrol car, the man who had been chasing the defendant stopped to speak to one of them. After making eye contact with a different officer, the defendant ran past the patrol car and into the backyard of private residence. Two of the officers followed the defendant into the backyard, where they found him hiding under a pile of leaves. The defendant was briefly detained and brought to the front of the residence, where the man who had been chasing him identified the defendant as the individual who had just robbed him. The Appellate Division found, contrary to the defendant's contention, that the police conduct in this case was justified at its inception and reasonably limited in scope at each step in response to the circumstances presented.

People v Ross, 83 AD3d 741 (2d Dept 2011)

Photo Array Identification Not Unduly Suggestive

Contrary to the defendant's contention, his detention and arrest by the police were supported by information provided by eyewitnesses to the subject shooting, information obtained from an identified citizen informant which was corroborated by police observation, and the identification of the defendant as the shooter from a photo array by three eyewitnesses. Furthermore, even if the police action had been improper, the identifications from the photo array were not an exploitation of any antecedent illegality, as the defendant's photograph was obtained from a source independent of the alleged unlawful conduct and the hearing court determined that the photo array identification procedure was not unduly suggestive and did not require suppression of the witnesses' in-court identification testimony.

People v Diaz, 83 AD3d 958 (2d Dept 2011)

In Court Identification Was Proper; Statements Made by Defendant During Arrest Prior to Miranda Warnings Were Admissible

Contrary to the defendant's contention, the People established by clear and convincing evidence that the in-court identification of the defendant was based upon the witness's independent observation of the defendant during the commission of the crime. Moreover, the record supported the hearing court's conclusion that the People established that the police had reasonable suspicion to stop the defendant and that reasonable suspicion ripened into probable cause to place him under arrest. Further, the defendant's statements to law enforcement officials were properly admitted into evidence. The hearing court properly determined that the statements made by the defendant as he was being secured and placed under arrest, but before he was administered *Miranda* warnings were not triggered by police questioning or other conduct which reasonably could have been expected to elicit a declaration from him. The hearing court also properly determined that the defendant's statements made after *Miranda* warnings were administered were voluntarily made after he knowingly and intelligently waived his *Miranda* rights. After the defendant was advised of, and waived, his *Miranda* rights, additional warnings were not necessary, since he remained in continuous custody.

People v Shaw, 83 AD3d 1101 (2d Dept 2011)

CUSTODY AND VISITATION

Court Properly Found Father in Contempt

Supreme Court held defendant father in contempt of court, awarded plaintiff mother temporary sole custody of parties' child, and ordered that visitation be supervised. The Appellate Division affirmed the finding of neglect and dismissed father's remaining contentions as without merit of academic. The father's request that the Justice presiding over the contempt matter be recused was improperly raised for the first time on appeal. Were it to be considered, the Appellate

Division would have concluded that recusal was unwarranted. The court properly found the father in contempt and sentenced him to a period of incarceration because the order forbade the parties from introducing their child to anyone with whom he or she was having a "romantic relationship." The order was not vague or ambiguous and defendant was sentenced upon discovery of a second violation of the order.

Wheeler v Wheeler, 83 AD3d 502 (1st Dept 2011)

Petition Dismissed upon Default

The mother's petitions for custody of the children were dismissed upon her default and she appealed. Since she was unable to demonstrate a reasonable excuse for the default and the existence of a potentially meritorious cause of action or defense, the order was affirmed.

Matter of Lorraine D. v Widmack C., 79 AD3d 745 (2d Dept 2010)

Evidentiary Hearing Required; Court Failed to Conduct an Examination of the Parties, Interview the Child, or Solicit the Opinion of the Attorney for the Child

In light of the parties' conflicting allegations, the Family Court erred in awarding sole custody of the subject child to the mother without the benefit of an evidentiary hearing. Nor did the court conduct an examination of the parties, interview the child, or solicit the position of the attorney for the child. Under such circumstances, it could not be concluded that the court possessed sufficient information to render an informed determination consistent with the child's best interests. Accordingly, the Appellate Division remitted the matter to the Family Court for a hearing and, thereafter, a new determination on the custody petition.

Peek v Peek, 79 AD3d 753 (2d Dept 2010)

Evidentiary Hearing Not Required

The parties were divorced in 2003 by a judgment which incorporated, but did not merge, the terms of a stipulation providing that the father would have visitation with the subject children. In 2009, the father commenced an enforcement proceeding in the Family Court, alleging that the mother was interfering with his visitation. On the date scheduled for trial, the parties informed the Family Court that they had come to an agreement regarding, inter alia, the father's visitation. The agreement was read into the record and the parties waived their right to a hearing. The Family Court permitted the attorney for the children to elicit testimony from the mother and the father. The Family Court had already interviewed the children in camera, and had a forensic evaluation conducted of the parties and the children. Under these circumstances, the Family Court had adequate information before it to determine that it was in the children's best interests to have visitation with the father as outlined in the parties' agreement. Accordingly, contrary to the contention of the attorney for the children, the Family Court did not err in failing to conduct an evidentiary hearing.

Matter of Feldman v Feldman, 79 AD3d 871 (2d Dept 2010)

Temporary Custody Should Not Have Been Granted Without a Hearing; Allegations Raised Significant Issues as to the Father's Fitness to Assume Custody

This case involves a custody dispute between the father of the subject children, who are teenagers, and their adult sister, who had custody of the subject children, based upon an agreement with the mother, which was later revoked. The Appellate Division noted that the general rule is that while temporary custody may be granted without a hearing, "where sufficient facts are shown by uncontroverted affidavits, it is error as a matter of law to make an order respecting custody, even in the pendente lite context, based on controverted allegations without having had the benefit of a full hearing." (see *Carlin v Carlin*, 52 AD3d 559) Further, temporary custody should not be awarded to a parent where there are questions of fact as to whether the parent awarded temporary custody is a suitable temporary custodian. Here, the allegations of the children and their adult sister raised significant issues as to the father's fitness to assume custody, thereby requiring a hearing. In particular, the evidence was uncontroverted that the father moved back and forth between the United States and the Dominican Republic on a regular basis. The father was absent from the United States for extended periods of time, and his living arrangements with others were not appropriate

living accommodations for the children. Further, considering the ages of the children, their refusal to stay with the father, in and of itself, may have constituted an extraordinary circumstance.

Matter of Garcia v Ramos, 79 AD3d 872 (2d Dept 2010)

Change-of-Circumstance Analysis Not Required

The mother appealed from an order of the Family Court, which, after a hearing, denied her petition for sole custody of the parties' child and granted the father's cross petition for sole custody of the child. As there was no prior custody order in effect at the time this proceeding was commenced, the Family Court was not required to engage in a change-of-circumstances analysis. The temporary custody order issued during the pendency of this proceeding without the benefit of a full plenary hearing was only one factor relevant to the ultimate determination of custody. Order affirmed.

Matter of Quinones v Gonzalez, 79 AD3d 893 (2d Dept 2010)

Grandmother Petitioner Had Standing to Seek Visitation

In this case, where another grandparent allegedly frustrated the grandmother petitioner's relationship with the grandchildren, the grandmother petitioner established that, in addition to the bond she formed with the subject children when they lived with her during the first years of their lives, she also made a sustained and concerted effort to maintain contact with them, which was sufficient to confer standing to seek grandparent visitation. Moreover, the record was devoid of any indication as to why the respondent objected to visitation.

Matter of Waverly v Gibson, 79 AD3d 897 (2d Dept 2010)

Court Should Have First Determined Whether it Should Have Continued to Exercise its Temporary Emergency Jurisdiction

In her petition, the mother claimed that the father had committed numerous acts of physical and verbal abuse against her and the children, and asserted, in effect, that the children were at imminent risk of harm. After the proceeding commenced, the Family Court learned that the father had filed a child custody petition in Delaware. Upon learning of the Delaware proceeding, the Family Court complied with the statutory requirement that it immediately communicate with the Delaware court (see DRL § 76-c [4]). The Family Court also learned that the father had failed to submit an affidavit of service demonstrating that the mother had been served in that proceeding. Notwithstanding the foregoing, the Family Court erroneously dismissed the instant proceeding. Since it is undisputed that, at the relevant times, the children were present in New York, it was incumbent upon the Family Court to determine whether, under the circumstances presented and in light of the allegations set forth in the petition, it was necessary "to protect the child, a sibling or parent of the child" (see DRL § 76-c [1]). Accordingly, the Appellate Division concluded that the Family Court erred in dismissing the proceeding on the ground that there was a proceeding pending in Delaware, without first determining whether it should have continued to exercise its temporary emergency jurisdiction because it was "necessary in an emergency to protect the child, a sibling or parent of the child" (see DRL § 76-c [1]).

Santiago v Riley, 79 AD3d 1045 (2d Dept 2010)

Petition to Register Foreign Order of Custody Properly Granted

In a proceeding pursuant to DRL § 77-d, seeking to register a foreign order of custody, the mother appealed from an order of the Family Court, which, upon an order of the same court, in effect, confirming the amended report and recommendations of the same court, made after a hearing, adopted the recommendations of that report and, in effect, granted the petition. Here, the mother failed to establish either that the court which issued the original order lacked jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement (UCCJEA) or that the court which purportedly modified the original order had jurisdiction pursuant to the UCCJEA (See DRL §§ 75-d, 76-a [1]; § 76-b). Thus, the Family Court properly granted the petition.

Matter of Moursi v Ansara, 79 AD3d 1131 (2d Dept 2010)

Family Court Improperly Declined to Exercise its Jurisdiction

The mother appealed from an order of the Family Court, which declined jurisdiction over the matter pursuant to DRL § 76-g, dismissed her petition, and directed the parties to file any further requests for relief in the State of Florida. The Family Court improperly declined to exercise its jurisdiction pursuant to DRL § 76-g, since jurisdiction in New York was not gained by virtue of "unjustifiable conduct" on the part of the mother. The Florida court's erroneous dismissal of the father's initial visitation proceeding was not caused by any fraudulent misrepresentations made by the mother, but rather by a misinterpretation of the law. Accordingly, the New York court did not obtain jurisdiction over the matter by virtue of any fraud committed by the mother upon the Florida court. Further, the mother's conduct in returning with the child to New York, which was her state of residence prior to the child's birth, and where she had been residing with the child since his birth, was not "unjustifiable". Moreover, "unjustifiable conduct" for purposes of declining jurisdiction is limited to conduct that actually creates the court's jurisdiction. Here, the declination of jurisdiction was based, in part, on the mother's conduct during the proceedings held in New York after jurisdiction was placed in New York.

Matter of Schleger v Stebelsky, 79 AD3d 1133 (2d Dept 2010)

Award of Sole Custody to Mother in Children's Best Interests

Here, the trial court, after having had the opportunity to evaluate the testimony, consider the recommendations of a forensic expert, interview the children in camera, and consider the position of the attorney for the children, determined that the children's best interests would be served by an order awarding sole custody of the children to the mother and visitation to the father from Monday at 6:00 p.m. to Wednesday at 6:00 p.m. on alternate weeks. The Appellate Division concluded that the determination was supported by the record.

Matter of Andrews v Mouzon, 80 AD3d 761 (2d Dept 2011)

Relocation to Another State Was Not in the Best Interests of the Child

The mother failed to demonstrate by a preponderance of evidence that relocation to Texas was in the best interests of the child. Thus, the father's petition to prohibit the mother from relocating to Texas with the parties' child was affirmed.

Matter of Sheldon Antonio Steadman, 81 AD3d 653 (2d Dept 2011)

Custody Awarded to Maternal Grandmother

The mother appealed an order from the Family Court denying her petition to modify an order of the same court entered upon her consent awarding custody of the subject child to the maternal grandmother. Upon reviewing the record, the Appellate Division found that the Family Court erred in failure to make the threshold determination of extraordinary circumstances. The maternal grandmother has supported and cared for the child since the child was 10 days old, with no contribution from the mother. Thus, there had been an "extended disruption of custody" during which the mother had "voluntarily relinquished care and control of the child" (see DRL §72[2][b]). The Court further determined that the best interests of the child was to remain with the maternal grandmother.

Matter of Wanda Wright, 81 AD3d 740 (2d Dept 2011)

Father's Petition to Modify a Visitation Order was Dismissed

The Family Court properly dismissed the father's petition to modify a prior order of visitation. The father failed to allege a sufficient change in circumstances from when the time the order of visitation was issued and the filing of his petition on the issue of whether he was entitled to supervised therapeutic visitation.

Matter of Jose Figueroa, 81 AD3d 823 (2d Dept 2011)

Father Prohibited from Driving with Children in Automobile

The Family Court properly granted the mother's petition to modify a judgment of the Supreme Court, by

prohibiting the father from driving with the children in an automobile. The father has repeatedly suffered from diabetic reactions that required him to be taken to a hospital, owing to his failure to properly control the insulin intake for his diabetes. After crashing the car into a residential lawn while the children were in the car, the Court determined that it was in the children's best interests to prohibit the father from driving them in an automobile.

Matter of Karen Jean Gallo, 81 AD3d 826 (2d Dept 2011)

Mother's Prior Stipulation to the Issue of Extraordinary Circumstances Unenforceable

The paternal grandmother appealed from an order of the Family Court which granted the mother's petition to modify an order of the same court entered upon the consent of the parties, awarding the paternal grandmother sole custody of the children, so as to award the mother sole custody of the children. The mother had stipulated in the prior consent order that, in any future custody dispute, the "extraordinary circumstances" standard would be deemed satisfied, and the sole basis for the determination would be the best interests of the children. The Appellate Division held that a stipulation in which a parent agrees that a nonparent need not show extraordinary circumstances in a future custody dispute is unenforceable and does not constitute a judicial finding of extraordinary circumstances. Therefore, despite the stipulation, the Family Court should have made a threshold determination of the existence of extraordinary circumstances. However, the Appellate Division found that it was not necessary to remit the matter to the Family Court to make a threshold determination of extraordinary circumstances, since there was a sound and substantial basis in the record to support the Family Court's determination that there was a substantial change in circumstances requiring a modification of custody, and that it was in the best interests of the children for the mother to have sole custody. The Appellate Division therefore affirmed the Family Court's order.

Souza v Bennett, 81 AD3d 836 (2d Dept 2011)

Not Viable for Child to be Reunified with Parents; Guardianship Granted

In a guardianship proceeding, the Family Court denied the appellant's motion and petition seeking an order granting him special immigration status pursuant to 8 USC § 1101[a][27][J] and the appointment of a guardian. Upon review of the record, the Appellate Division found that the appellant demonstrated extraordinary circumstances justifying a guardianship appointment. He has been living in the United States since the age of twelve, and his parents have not communicated with him during that time. If he returned to his native country, he would have no where to live and no means to support himself. The Court also found that it was not viable for the minor to be reunified with his parents due to parental abuse, neglect, or abandonment. Additionally, it was determined that guardianship was in the best interests of the appellant because the guardian provided the appellant with a loving home and educational opportunities.

Matter of Alamgir A., 81 AD3d 937 (2d Dept 2011)

Father Awarded Sole Custody

The Family Court granted the father's petition for sole custody of the child with a provision that the mother would have visitation as agreed upon by the parties. Based upon the totality of the circumstances, the Appellate Division found it was in the best interests of the child to award sole custody to the father. By removing the child from the marital home and relocating to a distant foreign country without informing the father of the child's whereabouts, the mother severely interfered with the relationship between the child and the father. This act conflicted with the child's best interests, and raised a strong possibility that the mother is unfit to act as the custodial parent. However, the case was remitted to the Family Court to establish a detailed visitation schedule.

Matter of Carlos E. Ortega-Bejar, 81 AD3d 962 (2d Dept 2011)

Sole Custody Awarded to Mother

The Family Court affirmed it's prior decision stating that joint custody was no longer appropriate since the

record here is "replete with examples of hostility and antagonism between the parties, indicating that they were unable to put aside their differences for the good of the child." Likewise, the record supported the determination that sole legal and physical custody should be with the mother; not the father. The mother had primary physical custody of the child since birth, and the father failed to show circumstances warranting a disruption of "stability and continuity of the present situation." Additionally, the record also supported the Court's determination to reduce the father's visitation to allow the child to spend more time with his mother's family.

Matter of Gregory Gorniok, 82 AD3d 767 (2d Dept 2011)

Mother Granted Permission to Relocate to Another State with the Children

The mother appealed after a hearing that awarded her custody of the parties' three children, but denied her permission to relocate with the children to Pennsylvania. The order was reversed and remitted to the Supreme Court for a hearing to establish an appropriate post-relocation visitation schedule for the father. Contrary to the Supreme Court's finding and the assertion of the attorney for the children, the mother's desire to move to Pennsylvania did not appear to have been motivated by bad faith but, rather, was an opportunity to escape domestic violence in the home, to reside in close proximity to supportive family members, and to secure affordable housing. Although the mother's relocation would inevitably impact the father's ability to spend time with his children, a liberal visitation schedule was implemented.

Matter of Roger W. Clarke, 82 AD3d 976 (2d Dept 2011)

Relocation to Another State Not in the Children's Best Interests

The Family Court properly affirmed the denial of the mother's petition to relocate with the child to the state of Arkansas. The Family Court found that although the mother possessed sole custody of the children, there was no change in circumstances warranting a modification of the parties' custody agreement. Furthermore, the Court properly determined that the proposed relocation of the child to Arkansas was not in the child's best interests.

Matter of Sharlene Wallace, 82 AD3d 994 (2d Dept 2011)

Family Court Lacked Sufficient Information to Properly Award Mother Sole Custody of Child

The Family Court reversed and remitted an order that granted the mother sole legal and residential custody of the child. Under the circumstances of this case, the Family Court lacked sufficient information to render an informed determination as to the child's best interest. The fact that the father was incarcerated at the time that the Family Court made its determination was an insufficient basis to award sole custody to the mother without affording the father the benefit of a hearing. Thus, the case must be remitted back to Family Court.

Matter of Michelle Perez, 82 AD3d 1106 (2d Dept 2011)

Mother Not Permitted to Testify

The Family Court affirmed the ruling that granted the father's petition to modify a prior order of custody and visitation. It was in the child's best interests to award sole custody to the father. The Court properly took judicial notice of the order of filiation entered on consent. The Court's determination that the mother could not testify, in rebuttal to the admission of the order of filiation, that she lacked capacity to consent to the order of filiation, was not an improvident exercise of discretion. Further, the Court providently exercised discretion in prohibiting the mother from telling the child that any man other than the father was the child's biological father.

Matter of Michael Buxenbaum, 82 AD3d 1223 (2d Dept 2011)

Father Granted Permission to Relocate His Family to North Carolina

The Family Court properly granted the father sole custody of the parties' children, granted him permission to relocate to North Carolina, and barred the mother's

fiancé from attending the mother's visitation periods. When the parties divorced in 2001, they were awarded joint custody, with the father obtaining physical custody. The Court concluded that the father met the burden of establishing by a preponderance of evidence that relocation was in the children's best interests. Permitting the children to relocate with their father would strengthen the post-divorce family formed by the father. The prospects of a strong post-divorce family with the mother, on the other hand, was limited, in view of the mother's plans to marry her fiancé, since the older child was estranged from the mother and her fiancé. Additionally, the father was presented a unique economic opportunity in North Carolina, and was the sole provider of his family.

Matter of Joseph Englese, 83 AD3d 705 (2d Dept 2011)

Child's Best Interests Lie with the Father

The father's petition for sole custody of the subject child was properly granted. Contrary to the mother's contention, the Family Court did not apply an incorrect legal standard in making its determination. As there was no prior custody order in effect at the time this proceeding commenced, the Family Court treated this as an initial custody determination and was not required to engage in a change-of-circumstances analysis. The Family Court's determinations that the child's best interests would be served by awarding sole custody to the father had a sound and substantial basis in the record.

Matter of David Thomas, 83 AD3d 722 (2d Dept 2011)

Mother Granted Sole Custody of Child

The Family Court properly granted sole custody of the child to the mother. Contrary to the father's contention, the Family Court's determination to award sole custody of the infant child to the mother had a sound and substantial basis in the record. The mother was more than willing to foster a meaningful relationship between the child and the father. Moreover, the Family Court possessed sufficient information to render an informed decision regarding custody consistent with the subject child's best interests.

Matter of Michelle Kreischer, 83 AD3d 841 (2d Dept 2011)

Father Actively Alienated Children from Mother

The Family Court properly awarded the mother sole custody of the parties' two children. The evidence at the hearing clearly established that the father had severely alienated the children from the mother. The mother left the father in 2008, and took the children with her because she alleged that the father sexually and physically abused her. Since then, during the father's visits with the children, the father made inappropriate statements in the presence of the children about the ongoing litigation, and also made frequent disparaging comments about the mother and her parenting skills. This caused the children to aggressively challenge the mother's authority. Further, the father had encouraged the children to falsely accuse the mother of corporal punishment. In light of the foregoing, the Family Court's determination that the mother was more fit to be the custodial parent and more likely to assure meaningful contact between the children and the non-custodial parent, had a sound and substantial basis in the record.

Matter of Rosario Reyes, 83 AD3d 849 (2d Dept 2011)

Mother Has No Standing to Contest Custody Modification

Father and mother had one child. A year after child's birth, grandmother and grandfather obtained custody of child, without prejudice. Later, grandfather passed away and father filed to modify custody. Family Court granted father and grandmother joint legal custody with primary physical custody to grandmother. Mother appealed order. The Appellate Division dismissed mother's appeal finding that she had no standing, as mother was not custodial parent, had not sought to change her status with regard to the child, and therefore its resolution did not affect her status or affect

her legal rights.

Matter of Valenson v Kenyon, 80 AD3d 799 (3d Dept 2011)

Instability of Home and Domestic Violence Sufficient to Find Change in Circumstances

Father and mother had two children. After divorce, father took physical custody of one child and mother took custody of the other. Four years later, mother asked father to take the other child as well. A year after that, mother took child back and father filed a modification petition seeking custody of that child. Family Court found that father had met his burden of showing a substantial change in circumstances. Mother had sent daughter to father to begin a romantic relationship with boyfriend, mother's boyfriend physically abused mother in the children's presence, he verbally abused children , and mother's one bedroom apartment was unsuitable as daughter was forced to sleep on the couch. The Appellate Division affirmed.

Matter of Starkey v Ferguson, 80 AD 3d 799 (3d Dept 2011)

Relocation in Child's Best Interest

Pennsylvania Father and New York mother had one child. Father obtained primary, physical custody and mother had supervised parenting time. Mother initially filed modification and violation petitions seeking custody and requesting father be held in contempt for failing to comply with court ordered visitation. Father filed modification petition seeking to move to Thailand with son. Mother then moved to dismiss all proceedings arguing court had no jurisdiction and was inconvenient forum. Family Court granted father's petition and dismissed mother's petitions based on fact that New York had significant connection to child and mother, and substantial evidence was "available in state concerning the child's care, protection, training and personal relationships". Court further held that re-location was in child best interest based on: child's close relationship with father, child's step-mother had lucrative job in Thailand, and although the move would restrict mother's time with child, mother's continued derogatory comments about father, manipulating the child to say negative things about father, repeatedly missing supervised visits with child, and showing child a photo of fetus she lost in miscarriage which caused child to return to psychological counseling, all supported court's decision. Additionally, there was evidence to show that child's emotional condition was impaired after visits with mother.
Matter of Hissam v Mancini, 80 AD3d 802 (3d Dept 2011)

Award of Custody Affirmed

Mother and father had a brief relationship which resulted in the birth of child. Shortly thereafter, mother filed for sole custody and father filed for joint. Family Court granted joint custody with primary physical custody to mother. Father appealed . The Appellate Division affirmed , finding that Family Court had a sound and substantial basis for its decision. Mother had been primary caregiver, had other children with whom child had close sibling relationship, and mother fostered relationship between he children and their fathers. The father on the other hand, while he had an appropriate home, "appeared to be inappropriately focused on the mother's social life" and his testimony concerning his finances was not credible.

Matter of Dupuis v Costello, 80 AD3d 806 (3d Dept 2011)

Re-location Not in Child's Best Interest

Father and mother had two children. Parents had joint legal and physical custody of children. The parties remarried and thereafter their relationship began to deteriorate, culminating in an order of protection against father on behalf of mother and her new husband. Father lost his job, found another job in Kentucky, and filed to modify custody order based on his move. Mother cross-petitioned for sole custody. After a hearing, mother's petition was granted and father's petition was dismissed by Family Court. The Appellate Division affirmed, finding that Family Court's decision was based on the children's best interest. The factors considered by the court in rendering its ruling included the quality of the relationship between the children and parents; impact of move on quality and quantity of relationship between children and non-custodial parent; the economic, emotional, and educational enhancement to children's life due to move; suitable visitation arrangement with non-custodial parent. Additionally the Appellate court held that the decision to grant sole custody to mother was appropriate given the parents' mutual hostility and

inability to communicate.

Matter of Sofranco v Stefan, 80 AD3d 814 (3d Dept 2011)

Failure to Adjourn Hearing Not An Abuse of Discretion

Father and mother had one child. Mother had primary physical custody and father, who lived out of state, had parenting time several times a year for at least eight consecutive days each time. After child began kindergarten, mother filed to modify order of visitation alleging that schedule interfered with child's school, child suffered from acute stress disorder when he had to visit father and father did not consistently see child. After several appearances, hearing days were scheduled. "Approximately two weeks later", father asked to adjourn hearing due to the fact that he "lives in the south and other family obligations". Family Court did not grant adjournment and went on with hearing, finding a change in circumstances and modifying the existing visitation order. Father appealed. Appellate Court held as father had failed to provide the court with "any detailed explanation" for the adjournment, there was no abuse of discretion by Family Court in going forward with the hearing. Additionally, Family Court's decision to modify the order was based on sound and substantial basis in the record.

Matter of Braswell v Braswell, 80 AD3d 827 (3d Dept 2011)

Appeal Not Permitted From Default Order

Appellant mother failed to appear at pre-trial conference involving custody petitionfiled by third party on behalf of her child. In an earlier Article 10 proceeding, mother had been adjudicated to have derivatively, severely abused child. Mother appeared with counsel at the initial custody appearance, and was later advised in writing by court that her failure to appear at the conference would constitute a waiver of her right to be present and court could proceed without her. Mother failed to appear, no reason was provided for her absence and her counsel chose to remain silent during the proceeding. Family Court then entered a default order of custody to third party based upon its determination that extraordinary circumstances existed, and held that placement with third party was in child's best interest. The Appellate Division affirmed, finding entry of the default order was proper. Mother's recourse would have been to vacate the court order.

Matter of Naomi KK. v Natasha LL., 80 AD3d 834 (3d Dept 2011)

No Extraordinary Circumstances Exist Despite Parent's Stipulation

Father stipulated to order of custody based on extraordinary circumstances, consenting to giving custody of his two children to maternal grandfather. Prior to stipulation, children had been living with mother and father, who were abusing drugs and alcohol. Children were in custody of grandfather for eight months, during which time father completed substance abuse classes, anger management training, parenting classes and underwent counseling. He also obtained stable employment, became involved in a stable relationship and obtained suitable housing. Father made an initial attempt to modify custody but withdrew it based on grandfather's threat to deny him summer visitation. Thereafter father successfully petitioned for sole custody. The Appellate Division affirmed Family Court's decision that extraordinary circumstances did not exist when custody was given to grandfather, rather it was father's drug abuse that was the "catalyst" for his stipulation. As there was no extraordinary circumstances, the Appellate Court held that there was no need to address the issue of best interest as a "biological parent has a claim of custody of his or her child, superior to that of all others**....**" The court also found that the "period of separation" between parent and child during which a parent is trying to regain custody of the children is entitled to little weight in determining whether extraordinary circumstances exist.

Matter of Ferguson v Skelly, 80 AD3d 903 (3d Dept 2011)

Sole Legal Custody To Father and Primary Physical Custody To Mother Affirmed

Parents of young child agreed to order of joint legal and physical custody**.** Two years later and within an eight month period, each parent commenced three

proceedings against the other, seeking to modify and enforce orders. After many court appearances, parents agreed to have Family Court decide the issues based on all the proceedings had thereto. Family Court issued an award of sole legal custody to father with primary, physical custody to mother. Father appealed the determination of primary physical custody to mother. While the Appellate Division upheld Family Court's modification of its previous order , giving due deference to the court's finding of change in circumstances as a result of, among other things, the "consistent and ongoing fighting" between the parents, in a footnote the Court held that the award of sole legal custody to father and primary physical custody to mother was an awkward arrangement, especially in light of the acrimony between these parents.

Matter of Rikard v Matson, 80 AD3d 968 (3d Dept 2011)

Denial of Visitation Upheld

Father of infant engaged in acts of domestic violence against mother and child which resulted in his receiving felony convictions and a prison sentence exceeding 20 years. While the criminal matter was pending, father filed for visitation and mother filed for sole custody. Family Court granted mother sole custody and limited father's contact to pictures only and barred him from communicating with his daughter until her 18th birthday. Family Court also stated that father's completion of anger management and parenting classes would constitute sufficient change of circumstances to petition for expanded visitation. Father appealed arguing that Family Court cannot limit factors to be considered when determining whether there was basis for modification. Appellate Court affirmed, finding that the court did not limit the factors that father could allege for more visitation, it only stated "one scenario...where the threshold of change in circumstances will be considered satisfied."

Matter of Leonard v Pasternack-Walton, 80 AD3d 1081 (3d Dept 2011)

Adoption is in Best Interests of Children Rather Than Custody to Grandmother

Parents' rights were terminated and upon that basis, Family Court held grandmother had extraordinary circumstances to pursue custody. An evaluation of what was in children's best interest between custody to grandmother or placement with DSS with goal of adoption, resulted in finding that DSS placement was best for the children. The court based its decision on evidence that grandmother demonstrated inappropriate and aggressive conduct toward agency employees in the presence of children**,** children had a loving relationship with their pre-adoptive foster parents, they were thriving in school and their behavioral problems were being successfully addressed through therapeutic counseling. The Appellate Court affirmed.

Matter of Carolyn S. v Tompkins County Dept. of Social Servs., 80 AD3d 1087 (3d Dept 2011)

Limitation of Visitation Upheld

Mother had sole custody and father had visitation with child every other weekend from Thursday to Saturday. Both filed several petitions against the other, with the mother seeking to limit the father's access and father requesting custody. After fact-finding and *Lincoln* hearings, Family Court continued sole custody with mother and limited father's visits to every other Saturday. Father appealed. Appellate Division held that although Family Court "did not expressly find that the change of circumstances warranted the modification of the visitation order," the Appellate Court could do so independently based on the record, and in this case the Court did so, as the record showed that father harassed mother, used illegal drugs in front of the child, over-medicated the child by giving him cold medicine in high dosage amounts (over what would be given to adults) and shot at rats in his parents' home in front of the child.

Matter of White v Cicerone, 80 AD3d 1102 (3d Dept 2011)

Hindrance of Parent-Child Relationship is Important Factor in Determining Custody

Divorced parents of two children who had joint legal and physical custody moved to modify physical custody when one of their children reached kindergarten age. After a fact-finding and *Lincoln* hearings, Family Court awarded primary, physical custody to father and

visitation to mother. Mother appealed. The Appellate Division affirmed, giving great deference to Family Court's factual findings that although both parents loved the children and had suitable homes for them, mother's hindrance of the relationship between the children and their father was an important factor in arriving at a decision.

Matter of Hughes v Hughes, 80 AD3d 1104 (3d Dept 2011)

Custody Determination Supported by Sound and Substantial Basis

Mother and father's relationship deteriorated soon after birth of their child and mother filed family offense and custody petitions, father filed for divorce and all matters were consolidated to be heard in Supreme Court. Temporary orders were issued and prior to trial the parents resolved all matters except for physical custody and child support. After a trial on the pending issues, the court granted primary physical custody to mother with parenting time to father consistent with the terms and conditions of the previous temporary order. Father appealed seeking one more overnight with child. The Appellate Division held Supreme Court properly considered what was in the child's best interest in making its decision, and even though an additional overnight with child would equalize father's and mother's overnights with child, father's ill feelings towards mother superceded the father's consideration of the child 's best interest and thus the court's decision was appropriate. The Appeals Court scolded the Supreme Court for failing to reference the position of the attorney for the child in its decision.

Porcello v Porcello, 80 AD3d 1131 (3d Dept 2011)

Mother's Alienating Behaviors Resulted in Sole Custody to Father

Mother appealed Family Court order which modified joint legal custody with primary physical custody of children with mother, to sole legal and physical custody to father, with limited parenting time to mother. After an extensive hearing, Family Court found that mother's actions, including but not limited to, having children call her boyfriends "daddy", regularly giving the children allergy medication to make them go to bed early so she could drink alcohol and smoke marihuana, lying about father being convicted of felony and drug charges, lying about father fracturing child's skull, conditioning the children to fear their father, admitting one of her children into a mental health facility due to her allegations that he had become violent due to seeing father commit acts of domestic violence against her and his sister, supported the modification. In affirming Family Court's decision the Appellate Division noted that while the mother has a loving relationship with her children, she is nevertheless unable to "appreciate the detrimental impact that her manipulation of the children's view of their father has upon them."

Opalka v Skinner, 81 AD3d 1005 (3d Dept 2011)

Mother/Adoptive Sister Lacks Standing To Seek Visitation

Appellant mother's rights to her children were terminated based on permanent neglect and children were adopted by appellant's adoptive mother. Three years later appellant filed to have visitation with the children arguing that she has standing as a sibling, and denying her visitation is unconstitutional because parents who voluntarily surrender their parental rights can seek post-termination visitation with their children. The Appellate Division held that siblings do not have an automatic right to visitation. They can apply for it and if "circumstances exist where...equity would see fit to intervene" such visitation can be awarded. Such is not the case in this instance as mother's rights were terminated due to permanent neglect. Additionally, the Appellate Division held that as appellant's rights were terminated as she defaulted on the petition alleging permanent neglect rather than challenging the allegations or refusing to surrender her children, her due process rights were not violated.

Matter of Carrie B. v Josephine B., 81 AD3d 1009 (3d Dept 2011)

Significant Change in Circumstances

Order of custody was issued giving sole legal custody of two teenage children to father and parenting time to the mother at her home in Nebraska. Thereafter, father successfully moved to modify parenting time to mother as mother was allowing child access to alcohol while

knowing the child was being treated for substance abuse addiction. Appellate Division affirmed.

Bentley v Bentley, 81 AD3d 1012 (3d Dept 2011)

Father's Separation from Step-Mom Not Substantial Change in Circumstances

Father obtained sole custody of child and mother stipulated to no contact with child . Father and his wife separated and mother filed to modify visitation to have contact with the child based on father's separation from his wife. Family Court held that proof of father's separation alone, without any showing of harm to the child as a result or other change in circumstances, was not sufficient to modify the custody order. The Appellate Division affirmed.

Matter of Fox v Grivas, 81 AD3d 1014 (3d Dept 2011)

No Change in Circumstances

Appellant sought to modify custody order which gave other parent sole custody and supervised visits to appellant. Appellant sought joint legal custody and bi-weekly parenting time. Family Court dismissed petition as there were no allegations of a change in circumstances. The Appellate Division affirmed.

Heater v Heater, 81 AD3d 1017 (3d Dept 2011)

Family Court's Denial of Relocation Overruled

Mother of three children, who had sole legal custody with father having supervised visits through DSS, filed a modification petition seeking to relocate with children to another county. After a hearing, Family Court dismissed mother's petition. Mother appealed. A divided Appellate Division reversed the Family Court Order. The Appellate Court, taking into consideration the factors articulated in *Tropea*, held that relocation was in the children's best interest based on, among other factors, father's initial abdication of any responsibility or support of the children, mother's consent to comply with the visitation schedule set forth by Family Court and the attorney for the child's advocacy of the relocation. Dissenting opinion argued that mother had failed to show how the children's lives will be enhanced economically, emotionally or educationally by the move.

Sniffen v Weygant, 81 AD3d 1054 (3d Dept 2011)

Temporary Georgia Order Precludes Registration of New York Order

Consent order awarding mother custody of two sons and a daughter, and granting father visitation was issued in Georgia. Mother moved to New York with the children. After exercising visitation with the children, father failed to return daughter to mother. Mother simultaneously applied to register Georgia order of custody, and to enforce and modify visitation order. One day after mother filed the above proceedings, father filed to modify custody order and the Georgia court issued a temporary order of custody, with custody of daughter to father and kept custody of the sons with mother. After speaking with the Georgia court regarding these proceedings, New York court denied mother's application to register Georgia order and dismissed her petitions. Mother appealed. The Appellate Court affirmed Family Court's order, finding that pursuant to the UCCJEA, father's temporary order precluded registration of the Georgia order in NY, and Georgia retained exclusive, continuing jurisdiction over the matter.

Evanitsky v Evans, 81 AD3d 1086 (3d Dept 2011)

Custody Determination Supported by Sound and Substantial Basis

Mother and father were awarded joint legal custody of their two sons with primary, physical custody to mother and parenting time to father. Thereafter mother filed a modification petition seeking sole legal custody of the children. Father cross filed for same relief alleging mother's home was not a safe environment, then filed another petition seeking temporary custody of children on the basis that mother's husband was physically abusing children. Family Court awarded temporary custody of the children to father. Mother sought to vacate the temporary order and the court modified the temporary relief, placing one child with each parent and carving out parenting time. After fact-finding and *Lincoln* hearings, Family Court continued its order as the final order. Mother appealed. The Appellate Division held that although the allegations of physical

abuse was through hearsay testimony of father, father's testimony was corroborated by other testimony, including the child's testimony at the *Lincoln* hearing. Turning to the issue of the children living apart, the Appellate Division held that Family Court's determination was supported by the record which included testimony of the therapist of one of the children, who supported the children living with different parents based on their violent and conflicted relationship.

Lowe v O'Brien, 81 AD3d 1093 (3d Dept 2011)

Clear and Convincing Evidence to Modify Custody

Mother of two children filed petition and amended petition to modify order of joint custody, and violation petition seeking to have father found in wilful violation of court order. Following fact-finding and *Lincoln* hearings, Family Court held father had violated order and granted mother sole custody with parenting time to father. Father appealed. Appellate Division held that mother had proven by clear and convincing evidence that father had violated the order of custody by interfering "with the mother's custodial time and unilaterally interfered with both children's education and health care treatment." The Appellate Court held that the father's "cruel violations" included, among other factors, not consenting to his children going on a long planned school-sponsored field trip, intentionally keeping the youngest daughter from performing in the only school play in which she had a role, preventing that same daughter from reading certain school assigned books, intentionally keeping his older daughter from attending her 6th grade graduation ceremony until it was half over, not consenting to necessary orthodontic treatment, refusing to return children to mother's custody during spring break . The Appellate Court further held that father's behavior and continuing deterioration of the parent's relationship was a significant change in circumstances, warranting modification of custody from joint to sole.

Searcord v Seacord, 81 AD3d 1101 (3d Dept 2011)

Relocation in Child's Best Interest

Father and mother of young child divorced. Father refused to leave the family home so mother and child moved in with mother's parents. Mother's parents then had to relocate due to their employment and mother and child relocated with them. Father sought *pendente lite* relief in Supreme Court to preclude mother from moving and for visitation with the child. After hearing, Supreme Court awarded father visitation but allowed relocation. Father appealed. Appellate Division affirmed Supreme Court decision finding no abuse of discretion and that mother had proven by preponderance of the evidence that re-location was in child's best interest. Appellate Court considered many factors including mother's superior ability to provide emotional, financial and emotional needs of child, mother's need for emotional support from her parents as a result of "grievous sexual assault" while in college, mother's willingness to support child's relationship with father and father's family, father's own mental health problems and attempts by father and his family to jeopardize mother's parents employment by writing accusatory letters to their employers.

DiLorenzo v DiLorenzo, 81 AD3d 1110 (3d Dept 2011)

Sole Custody to Mother in Child's Best Interest

Mother and father of child separated and soon thereafter mother filed custody and family offense petitions against father. Family Court awarded temporary order of protection and amended it to allow father visitation. Father cross-petitioned for custody and also filed violation of visitation petitions against mother. After fact-finding hearing, Family Court dismissed father's petitions and awarded mother sole custody with visitation to the father. Father appealed. The Appellate Division gave great deference to Family Court's credibility assessments of the witnesses and held that the record supported Family Court's concern over father's lapses in judgment including " walking around the house carrying a shotgun following a heated domestic dispute with the mother, and.... attempt[ing] to show his then-13-year-old stepdaughter videos on his computer of people having sex." Based on the record as a whole, the Appellate Court held that there was sound and substantial basis to award sole custody to the mother.

Renee J. v Aaron J., 81 AD3d 1115 (3d Dept 2011)

Grandmother Lacks Standing

Appellant/paternal grandmother sought to have visitation with grandchild. Grandmother and mother had acrimonious relationship. Attorney for the child, joined by mother, moved to dismiss visitation petition on the basis that grandmother lacked standing. Family Court dismissed grandmother's petition without a hearing. Grandmother appealed. Appellate Division held that grandparent does not have automatic standing to file visitation but must show that "circumstances exist which equity would see fit to intervene." DRL section 72[1]. In this case, the Appellate Court held that grandmother did not have an existing relationship with the child, and as there had been several orders of protections on behalf of the mother against grandmother, which orders were caused as a result of grandmother's own conduct not as a result of the mother's actions, Family Court correctly dismissed grandmother's petition without a hearing.

Roberts v Roberts, 81 AD3d 1117 (3d Dept 2011)

Modification of Custody Affirmed

The Appellate Division affirmed a Family Court order which modified a 2004 Pennsylvania order of primary physical custody from father to mother. As of the date the order was modified, both parents had relocated, necessitating the need for the child to enroll in a new school. The evidence also showed that father's seasonal job as ski instructor resulted in his daughter having to do homework in the "pro room" which was noisy and full of people. Father usually took the child to a pub for dinner after his shift, which ended at 9:00 p.m., the child's grades were suffering, father admitted to using marihuana and drinking and father discouraged relationship between child and mother. Mother on the other hand had a stable home and agreed to encourage the relationship between father and child.

Lewis v Tomeo, 81 AD3d 1193 (3d Dept 2011)

Order of Clarification and Dismissal Affirmed

Convicted sex offender, father of two children, boy and girl, by two separate mothers, petitioned to modify visitation orders. With regard to the daughter, father sought to begin therapeutic visitation with her . Family Court dismissed father's petition holding that its previous order directed that therapeutic visits could begin only if daughter's mental health evaluation recommended that such visits could begin and there was no evidence that daughter had undergone any such evaluation. With regard to the son, while father petitioned for unsupervised visits he also argued that he believed the previous order allowed him unsupervised visits. Father withdrew his petition in response to court 's query as to why he filed such a petition if he believed he was already entitled to such relief. Family Court then clarified its visitation order regarding the son, finding that father was only entitled to supervised visits. Father appealed order denying him visitation and appealed Family Court's clarification of the visitation order concerning his son. The Appellate Division affirmed the orders, and held that as father had withdrawn his petition regarding his son, he was not aggrieved by the denial of the relief requested. Additionally, the Appellate Court held that a trial court has the discretion to "cure mistakes, defects and irregularities that do not affect substantial rights of parties, or to amend[an order to reflect what it]clearly intended."

Matter of Glazier v Brightly, 81 AD3d 1197 (3d Dept 2011)

Modification of Custody Reversed

Family Court awarded joint legal custody of child to parents with primary, physical custody to mother and specific parenting time to father. Within a month of this order being issued, a physical altercation occurred between the parents with father receiving an order of protection from City Court, and filing a modification petition seeking primary, physical custody of the child. Mother then filed a petition seeking a writ of habeas corpus alleging that father had failed to return child to her as ordered by the court. A hearing was held and Family Court awarded the father sole legal custody. Mother appealed. The Appellate Division reversed, holding that Family Court had abused its discretion in awarding father relief he did not request. Additionally, the Appellate Court held there had been no showing of a change in circumstances to modify the existing order of custody as the parents relationship had always been acrimonious and as the parents had been in Family Court many times before the court was well aware of

their conflicted relationship.

Joseph A. v Jaimy B., 81 AD3d 1219 (3d Dept 2011)

Strong Parent-Child Bond Between Convicted Sex Offender and Child Warranted Visitation

Father, an elementary school teacher, was convicted of 49 counts of sexually molesting boys in his classroom and sentenced to twelve years in prison. Mother allowed father to see daughter when father was initially indicted of the counts of sexual abuse, but then, when daughter was eighteen months old, mother refused to allow father to see his child. Thereafter the parents were divorced and sixteen months later, father filed for visits with child. Family Court awarded mother full custody but granted father four visits per year at his place of incarceration, with child being accompanied by responsible adult other than mother, ordered child and escorts to prison counseling before and after visits, ordered monitored telephone contact and written communication between father and child, and directed mother to bear the cost of counseling and telephone calls to prison. Mother appealed. Appellate Division reviewed testimony of psychologists. Father's expert opined that visits with father at the prison would be "healthful and safe" and child would feel abandoned were she not able to see father. Mother's expert testified that visits at prison would damage child's future relationship with father. The Court held that it is in a child's best interest to have a meaningful relationship with both parents, and as there had been a strong parent-child bond before father's incarceration, and as the child showed no fear of her father, Family Court's order is sound. The Court did state that mother should not have to bear the costs of telephone calls or counseling for the child and her escorts. A strong dissenting opinion argued that for father 's expert to opine that visitation between a convicted sex offender and a young child in a maximum security prison serves the child's best interest without even conducting a "perfunctory assessment of that offender" was disingenuous. Additionally the dissent pointed out that while the father was establishing a strong parent-child bond with his daughter, he was molesting young boys in his classroom.

Matter of Culver v Culver, 82 AD3d 1296 (3d Dept 2011)

Children's Best Interest to Grant Mother Sole Custody

Mother and father of five children separated and father moved with the children to paternal grandparent's home. Mother filed for custody and father cross-petitioned. After a hearing, Family Court awarded sole legal and physical custody to mother with visitation rights to father. Father appealed. The Appellate Division held that in determining initial custody, Family Court must look at many factors including each parent's ability to provide the children with a stable home environment, past performance as parents, relative fitness of each parent, wishes of children, and great deference would be given to Family Court's assessment of credibility and its ultimate determination. In this case, the Appellate Court affirmed Family Court's order noting, among other factors, that the evidence showed mother had been primary caregiver of the children and it was mother who dealt with the children's educational and other needs. Furthermore, father was verbally and physically abusive to the children, he spent much of the day in his bedroom watching television , playing video-games and eating his meals alone.

Matter of Baker v Baker, 82 AD3d 1462 (3d Dept 2011)

New York Has No Jurisdiction as it is Not Home State

Parents agreed to share joint legal custody of their five children with mother having primary, physical custody and father having visitation upon mutual agreement. Shortly thereafter, mother and children relocated to Louisiana. Almost two years later, father filed to modify and enforce prior custody order. Family Court dismissed on grounds it had no jurisdiction. No appeal was taken. Two years later, father again filed modification and violation petitions. The petitions were again dismissed for lack of jurisdiction. Father appealed. The Appellate Division affirmed finding that New York was no longer the home state of the children as the children had lived with the mother for well over six months outside of New York State.

Matter of Chichester v Kasabian, 82 AD3d 1511 (3d Dept 2011)

Children's Best Interest to Award Sole Custody to Father

Parents of four children divorced and father was given sole custody and mother was directed to pay child support while father was directed to pay spousal support. Mother appealed. The Appellate Court held that father had been the more stable parent since mother had left the home; two of the children were strongly bonded to the father, and father encouraged the relationship between mother and the children, mother was estranged from one of the children and refused to take responsibility for her actions in causing the estrangement, including telling him not to return home after they had quarreled, falsely reporting to the police that her car had been stolen while her son was driving it which resulted in her son being stopped and surrounded by police. The Appellate Court also noted that the communication break down between the parents was due to mother's actions and although there was domestic violence perpetrated by father against mother in the past, the Court gave due deference to the trial court's credibility determination and found there was sound and substantial basis to award custody to father. Mother was also unsuccessful in her appeal of the award of child support for her oldest son with whom she was estranged as she had caused or contributed to the estrangement. However, mother's contention that the Supreme Court erred in directing that the amount of child support she paid should increase once the spousal support stopped was successful.

Farina v Farina, 82 AD3d 1517 (3d Dept 2011)

Best Interest of Child to be With Grandparent

Father and mother of one child consented to maternal grandmother obtaining guardianship of child. Fourteen months later, father filed to terminate guardianship and moved for custody of child. Grandmother filed to dismiss or in the alternative moved for summary judgment . The father counter filed to have grandmother's petition dismissed and for summary judgment. Family Court denied the motions and after a hearing, dismissed father's petition and continued guardianship with grandmother. Father appealed. The Appellate Division affirmed holding that a biological parent has a right to custody over a non parent in the absence of "unfitness or other like extraordinary circumstances". In this case grandmother's affidavit alleged that father was unable to provide a safe and appropriate environment for his child based on his lack of "emotional and intellectual means". She alleged that father had a criminal history, a history of domestic violence against mother, and no suitable housing. The Appellate Court held that Family Court had properly concluded that extraordinary circumstances existed in this case based on grandmother's affidavit alleging father's unfitness along with the fact that child had lived with grandmother since birth, and this was sufficient to dismiss father's summary judgment motion. The Appellate Court further held that Family Court had sound and substantial basis in the record to continue guardianship with grandmother as it was in child's best interest.

Ortiz v Winig, 82 AD3d 1520 (3d Dept 2011)

Strict Application of Relocation Factors Not Necessary in Initial Custody Determination

Father and mother became involved in romantic relationship while father was engaged in romantic relationship with another woman. Father lived in Tompkins County but became involved with mother while working on a construction project in Herkimer County. While mother was aware of father's other relationship, father's other girlfriend was not aware of his relationship with mother. Once his job ended, father successfully encouraged mother and her two daughters to move to Tompkins County. He purchased home for mother and financially supported her while still being involved with and supporting his other girlfriend. Girlfriend became pregnant and father married her. Mother then became pregnant with father's child. A few years after the birth of the parties' child, the mother filed for joint legal custody seeking primary physical custody, and sought to return to her former county. Father cross-petitioned for sole, then mother amended her petition seeking sole custody. Following a fact-finding hearing, the court awarded mother sole custody, allowed her to re-locate back to Herkimer County and provided liberal visitation for father. Father appealed. On appeal the Appellate Division affirmed Family Court's decision holding that in an initial custody case, it is not necessary to adhere to a strict application of the factors involved in a re-

location case as enunciated in *Matter of Tropea v Tropea.*, and upon considering all the relevant factors in determining the child's best interest, including financial gain to the mother if she moves, the Appellate Court held that Family Court's decision was based on a sound and substantial basis in the record.

Matter of Lynch v Gillogly, 82 AD3d 1529 (3d Dept 2011)

Dismissal of Modification Petition Reversed

Parents were awarded joint legal custody of child with mother having primary, physical custody and father having supervised visits due to his homelessness. The Supreme Court order directed that father had the right to apply for a modification of the order in the event his circumstances changed and after he has shown some consistency with the current visitation schedule. Two months later, father filed to modify visitation alleging in his petition that he had obtained a permanent residence. Without conducting a hearing, the Supreme Court dismissed his petition, issued a final order suspending father's visitation and ordered any telephone or text contact between father and child be supervised. father appealed. The Appellate Division reversed holding that an evidentiary hearing needed to be held before dismissing father 's petition because the petition set forth sufficient facts, which could if established, grant the relief sought. Additionally, the Appellate Court held that Supreme Court erred in issuing a final decision suspending father's visits without conducting a hearing , because it deprived the father of his fundamental right to a hearing.

Matter of Twiss v Brennan, 82 AD3d 1533 (3d Dept 2011)

No Right of Appeal From Default

Mother and Father are the married parents of two children. Mother left the marital home with the children and obtained a temporary order of protection against father which provided father with parenting time to be arranged by paternal grandparents. Mother filed for custody, then moved with the children, without father's consent, to Texas. Father cross-petitioned for custody and paternal grandmother filed for visitation. A hearing was scheduled at which mother failed to appear but her lawyer participated in the proceedings. After the hearing, Family Court issued a joint legal and physical custody order and awarded the grandmother visitation. Mother appealed both the decision and argued ineffective assistance of counsel. The Appellate Division affirmed Family Court's decision holding that no appeal lies from a default and mother's contention that she should have been granted an adjournment was without merit as mother failed to proffer a reasonable excuse for her nonappearance. The Appellate Court found that Family Court had considered the best interests of the children in issuing an order that had sound and substantial basis in the record. Mother's allegation of ineffective counsel was dismissed.

Matter of Ariane I. v David I., 82 AD3d 1547 (3d Dept 2011)

Right To Adjournment Discretionary

Appellant is incarcerated father of child who was placed in the care and custody of DSS. Child was returned to mother on a trial basis and appellant had rights of visitation with child. Court also directed that child have contact with his half sibling, father's child from a different relationship, during his visits with father. DSS commenced proceeding to terminate child's placement and return him to mother. All parties, including father, was provided notice of the permanency report and hearing date. At the hearing, father objected to DSS's recommendation of child's return to mother due to mother' lack of sobriety and mistreatment of child by mother's boyfriend and moved to adjourn. Family Court denied his request for adjournment and after the hearing, child was returned to the custody of his mother. Appellate Division affirmed noting that whether or not to grant an adjournment was within the "sound discretion of the trial court" . Additionally, appellant had six months notice of the hearing date to prepare, he had the opportunity to cross-examine mother and caseworker about mother's continuing sobriety but failed to do so, focusing primarily on sibling visitation issues, and he failed to demonstrate during the hearing that it was contrary to the child's best interest to return him to mother, or that Family Court abused its discretion in returning the child to the mother.

Matter of Nicholas V., 82 AD3d 1555 (3d Dept 2011)

Orders Dismissing Custody Modification and Family Offense Affirmed

Father and mother of three children divorced and entered into stipulated custody order providing for joint legal custody with primary physical custody to father and supervised visits to mother due to her polysubstance abuse. Upon consent, the order was later modified to sole legal custody to father with supervised parenting time to mother. Mother, due to mental illness and substance abuse, had little or no contact with the children for two years thereafter. Mother then filed custody modification and violation petitions against father, seeking sole custody of children and alleging physical, sexual and mental abuse of children by father. She also filed family offense petitions on behalf of oldest daughter who she alleged was almost struck intentionally by father with his car. Father filed violation petition against mother. After a fact-finding hearing, Family Court dismissed mother 's petitions and granted father's violation petition. Mother appealed arguing that based on the evidence presented, the father should have been found to have committed a family offense. She further argued that she had proved a change in circumstances as she had completed her substance abuse program and the children wished to live with her. The Court gave due deference to Family Court's credibility determination on the issue of the family offense and affirmed the order. As to the modification and violation petitions, the Court held that the record supported Family Court's determination, and the children's preference that they wished to live with the mother failed to establish a change in circumstances**.**

Matter of Sharyn PP. v Richard QQ., 83 AD3d 1140 (3d Dept 2011)

Change in Custody and Suspension of Child Support Due to Alienation

Father and mother of two children with acrimonious relationship, entered into stipulated custody order which granted mother sole custody and parenting time to father. Five years later father filed custody violation and modification petitions alleging that mother was engaging in campaign of parental alienation. Family Court expressed "grave concerns" about mother's alienating behavior, continued sole custody with mother and expanded father's parenting time with the children. Father again filed modification and violation petitions, seeking sole custody of children and terminating his child support. Family Court granted father sole custody of son, terminated his support obligation to his daughter and sentenced mother to sixty days in jail for violating prior orders. Mother and attorney for the child appealed. The Appellate Division held that father had established change in circumstances based on mother's interference in father's relationship with the children. Looking at what was in the children's best interest, Court held that based on the evidence in the record, which among other factors included teenage son's poor performance in school and his regressive behavior including bed-wetting, which mother testified was normal for a teenager, it was not an abuse of discretion to award custody to father. Additionally Family Court's direction that mother have no contact with son for some time was not an abuse of discretion as this was based on testimony of therapist that the "best chance for an orderly change in custody required " son have no contact with mother so that her influence could be broken. While the psychologist who had treated the children testified it would devastate son to live with father, the Court pointed out that his testimony only had "limited utility" as he was not taking into consideration mother's alienating behavior. The Court held that the daughter would continue to live with mother as her relationship with father was irreparable, but child support payments by father on her behalf would be suspended due to mother's conduct in deliberately alienating his relationship with his daughter. Finally the Court reversed Family Court's finding of wilful violation of court orders by mother as the violations alleged in father's petition were not clearly proscribed in the prior Family Court orders.

Matter of Dobies v Brefka, 83 AD3d 1148 (3d Dept 2011).

Attorney For Children's Appeal to Terminate Mother's Visitation Rights Denied

Father and mother of two children entered into consent order of sole custody to father and visitation to mother. Thereafter, daughter had argument with maternal grandmother. Father filed to modify visitation and

mother filed violation petition alleging father had refused her scheduled visits with children. After fact-finding and *Lincoln* hearings, attorney for the children requested that mother's visitation be terminated based upon her clients' wishes. Family Court dismissed all petitions. Attorney for the children appealed arguing mother's visitation rights should have been terminated. The Appellate Division held while there had been a showing of change in circumstances to warrant a review of the existing custody order, denial of visitation to a non-custodial parent is a drastic remedy. The Court held allegations that mother unilaterally stopped seeing her children, did not attend their various activities, children did not want to see their mother, and children disliked mother's boyfriend, did not provide compelling reasons to terminate mother's visitation. The Court also noted there had been some degree of parental alienation by father.

Matter of Bond v McLeod, 83 AD3d 1304 (3d Dept 2011)

Grandfather Established Extraordinary Circumstances

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

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

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)

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)

Stepmother Properly Awarded Guardianship

Family Court denied mother's petition seeking custody of her child and granted stepmother's petition seeking guardianship of the child. The Appellate Division affirmed. Although the court erred in admitting in evidence transcripts of testimony from 2004, without first determining whether the witnesses were

unavailable, the error was harmless because the court primarily relied upon evidence and testimony presented at the fact-finding hearing on the instant petitions in making its findings of fact and conclusions of law. Moreover, the only testimony from the 2004 proceeding to which the court referred was the testimony of a child sexual abuse counselor regarding her validations of the allegations of sexual abuse against the mother and the mother did not challenge admission of the 2004 order in evidence. The stepmother met her burden of establishing extraordinary circumstances. The evidence established that the mother had been convicted of driving while intoxicated three times; that she was on probation for the third conviction at the time of the hearing; that she violated her probation; that she has a history of alcohol abuse; that she has ongoing mental health issues; and that she had been unemployed and unable to support herself since 2007. The best interests of the child would be served by guardianship to the stepmother in light of the facts that the child has lived with the stepmother for over four years, the stepmother had been the child's primary caregiver during that period, and the stepmother has provided for the child's emotional and financial needs.

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

Supervision of Father's Visitation Not Warranted

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

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

Order Finding Father Willfully Violated Order Reversed

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

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

Award to Incarcerated Mother of Six Supervised Visits Per Year Affirmed

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

Matter of Nicole J. R. v Jason M. R., 81 AD3d 1450 (4th Dept 2011)

Family Court in Best Position to Evaluate Credibility

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

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

Modification of Custody to Father Affirmed

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

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

Court Properly Dismissed Visitation Petition Without Hearing

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

Matter of Secrist v Brown, 83 AD3d 1399 (4th Dept 2011)

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

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

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

Mother's Permission to Relocate to Louisiana Affirmed

Family Court granted mother's petition to relocate to Louisiana. The Appellate Division affirmed. The mother met her burden to show that the relocation was in her child's best interests. Respondent father's contention that the petition should have been denied

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

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

Change in Custody Affirmed

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

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

FAMILY OFFENSE

Order of Protection Warranted

Upon reviewing the record, the Appellate Division found that a fair preponderance of the credible evidence adduced at the fact-finding hearing supported the hearing court's determination that the husband committed the family offense of harassment in the second degree, thus warranting the issuance of an order of protection.

Yalvac v Yalvac, 83 AD3d 853 (2d Dept 2011)

Record Supported Court's Dismissal of Petition

In this case, the appellant failed to establish by a preponderance of the evidence that the respondent committed acts constituting a cognizable family offense. See FCA §§ 831[1], and 832. Since the allegations in the petition were not established, the petition was properly dismissed. See FCA § 841[a].

Alicea v Alfano, 83 AD3d 1054 (2d Dept 2011)

Finding of Wilful Violation Affirmed

Father consented to a finding of neglect against him on behalf of his two daughters. Family Court then issued an Order of Protection of behalf of the children, directing the father to, among other provisions, refrain from any illegal conduct towards children, not use any un-prescribed medication and to keep all medication secure in a lock box. Thereafter father was charged with violating the order based on his possession of prescription drugs that was not his own, jumping onto his wife's moving vehicle to stop her as she was taking the children to a mental health appointment and getting into the driver's seat, arguing with her and driving onto the road while the rear door of the car where child was seated was still open, and calling the children names such as "whore, shut [and] bitch". Family Court found that father had violated the medication provision and wilfully violated the provision directing him to refrain from threatening or verbally abusing children or causing their welfare and safety to be at risk. The Appellate Court affirmed.

Matter of Katie II., 80 AD3d 824 (3d Dept 2011)

Venue Transfer, Contempt Finding and Order of Protection Affirmed

Mother filed family offense petition in her county of residence and received a temporary order of protection. Family Court Judge transferred matter, upon father's request, to the Family Court in the county of his residence, as the parties had previously litigated custody in that county. Mother then filed a violation of the temporary order of protection. Family Court Judge in father's county, transferred matter back to the county of mother's residence as father had moved out of that county, and also issued an order of contempt sentencing father to three days in jail for father's egregious behavior in his courtroom. Thereafter, following a fact-finding hearing , father was found to have committed a family offense and to have wilfully violated the order of protection. A five year order of protection on behalf of mother and children was issued. Father appealed. Appellate Court held that pursuant to FCA section 174, Family Court has the discretion to transfer a case to another county. The Appellate Court also held that no appeal lies from a contempt finding against the appellant. The father's recourse was to file an Article 78 petition in Supreme Court. As for the Order of Protection, the evidence fully supported Family Court's decision to issue the five year order.

Matter of Julie G. v Yu-Jen G., 81 AD3d 1079 (3d Dept 2011)

Court Finds Family Offense Despite Delay in Filing and Praise of Offender

Mother filed family offense against father on behalf of herself and their child, alleging that father had assaulted her and child. Family Court heard testimony from father and mother as well as other witnesses. Although mother's delay in filing the petition, and a letter written by her praising the father affected her credibility, the court still held she was credible in recounting the assault while father's testimony was not credible. Based on this, the court issued an order of protection on behalf of mother and child. Father appealed. The Appellate Division gave due deference to Family Court's credibility determinations and affirmed.

Matter of Jenna T. v Mark U., 82 AD3d 1512 (3d Dept 2011)

Order of Protection Issued Based on Verbal Abuse

Mother filed family offense against father alleging harassment. Mother, who was the sole witness at the hearing testified father came to her home, started yelling at her and calling her derogatory names in front of their child for approximately an hour. Mother testified she was too scared to do anything to stop father and tried to get her friends who later came over to take child but father prevented this by grabbing child's leg for "a good four minutes." Family Court held that mother had proved by preponderance of the evidence that family offense had been committed. Father appealed. The Appellate Division gave due deference to Family Court's credibility determinations and affirmed.

Matter of Amber JJ., v Michael KK., 82 AD3d 1558 (3d Dept 2011)

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)

JUVENILE DELINQUENCY

Finding of Delinquency Supported by The Evidence: Dissent Disagrees

Family Court adjudicated respondent to be a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of attempted robbery in the second and third degrees, attempted grand larceny in the fourth degree and jostling and imposed a conditional discharge for a period of up to 12 months. The Appellate Division affirmed. The evidence supporting the finding was that the victim saw respondent staring at him as the victim took his cell phone out of his pocket in the school lunchroom; when the victim left school respondent and two other young men approached him from behind and knocked him down; respondent then began searching the victim's pockets, demanding to know where was the cell phone; and respondent and his companions fled when friends of the victim approached. The act for which respondent was found to have committed and for which he showed no remorse was not the type of offense meriting an ACD. Further, the propriety of an ACD was not preserved for review. Respondent's act involved premeditation, planning and concerted action with confederates. The dissent would have reversed in the interests of justice and granted an ACD. There was no evidence that respondent was in need of supervision, treatment or confinement. Further, respondent had no prior arrest record, he was from a stable home, he was not a disciplinary problem at home or school, and the victim was not hurt and no property was taken from him.

Matter of Derrick H., 80 AD3d 468 (1st Dept 2011)

JD Adjudication Reversed

Family Court adjudged respondent to be a juvenile delinquent upon his admission that he committed an act, which, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for 12 months. The Appellate Division reversed. The court erred in imposing a juvenile delinquency adjudication instead of an ACD. The underlying offense did not involve injuries or weapons; this was respondent's first offense; he had no history of behavioral problems; he was doing generally well at school; and he had a very favorable report from a work-study program in which he participated. Respondent's troubled family background did not warrant a finding of juvenile delinquency, especially because respondent had made significant progress in overcoming the effects of that background.

Matter of Julian O., 80 AD3d 525 (1st Dept 2011)

Respondent's History Justified Enhanced Supervision

Family Court adjudged respondent to be a juvenile delinquent, upon a fact-finding determination that she committed an act, which, if committed by an adult, would constitute the crime of obstructing governmental administration in the second degree and placed her on enhanced supervised probation for 12 months. The Appellate Division affirmed. In light of respondent's running away and drug use, and her troubled relationship with her mother, the court properly exercised its discretion in placing respondent on probation under the enhanced supervision program as the least restrictive placement.

Matter of Lizzette F., 81 AD3d 429 (1st Dept 2011)

Placement Least Restrictive Alternative

Family Court adjudged respondent to be a juvenile delinquent, upon his admission that he committed an act, which, if committed by an adult, would constitute unauthorized use of a vehicle in the third degree and placed him with OCFS for 12 months. The Appellate Division affirmed. Respondent's claim that his mother's allocution was defective was unpreserved and was not reviewed in the interests of justice. Alternatively, the court complied with the statutory parental allocution requirement when, after conducting a thorough colloquy with respondent, it incorporated the colloquy by reference in addressing respondent's mother and she said she understood everything it contained. The placement was proper in view of the underlying offense of a violent taking of a motorbike and respondent's pattern of bad behavior.

Matter of Humberto R., 81 AD3d 471 (1st Dept 2011)

Sufficient Probable Cause For Arrest

Respondent admitted to committing an act, which, if committed by an adult, would constitute the crime of burglary in the second degree, and attempted grand larceny in the fourth degree, and was placed with DSS

for a period of 18 months. The Appellate Division affirmed, rejecting respondent's claim that there was no probable cause for his arrest. Respondent was identified by three reliable citizen informants, and although none of them initiated contact with police, there was no evidence any of them sought benefits in return for the information. The knowledge prong of *Aguilar/Spinelli* test was satisfied because two of the informants heard respondent admit to his involvement in the burglaries. Respondent's confession was not coerced -- those legally responsible for his care were present during the questioning by police, and the kinds of questions asked and length of time for questioning was reasonable.

Matter of Dominique P., 82 AD3d 478 (1st Dept 2011)

ACD Not Appropriate Disposition Due To Severity of Offense

Family Court adjudicated respondent a juvenile delinquent upon his admission that he committed an act, which, if committed by an adult, would constitute the crime of sexual abuse in the third degree and imposed conditional discharge of twelve months. The Appellate Division affirmed. In light of the seriousness of the crime and the short duration of an ACD, the court adopted the least restrictive dispositional alternative.

Matter of Bryant M., 82 AD3d 509 (1st Dept 2011)

Identification Evidence Properly Admitted

Family Court adjudicated respondent a juvenile delinquent upon determination that he had committed an act, which, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the fourth degree and attempted assault in the third degree and placed him on probation for twelve months. The Appellate Division affirmed. The court properly denied respondent's motion to suppress identification testimony. The court's consideration of the "on-the-scene showup" identification by victim, as well as the non-police arranged accidental identification of respondent by victim, was proper.

Matter of Angel W., 82 AD3d 523 (1st Dept 2011)

Proper Identification Based on Temporal and Spatial Proximity

Respondent was found to have committed an act, which, if committed by an adult, would constitute the crime of assault in the third degree and menacing in the third degree, and placed him in custody of DSS for ten months. The Appellate Division affirmed. The court properly denied respondent's motion to suppress the identification testimony because the "showup" identification was made in close temporal and spatial proximity of the crime.

Matter of Daniel E., 82 AD3d 639 (1st Dept 2011)

Age of Juvenile Element of Crime Requiring Non-Hearsay Proof

Family Court adjudged respondent to be a juvenile delinquent upon a determination that he committed the act of unlawful possession of a weapon by a person under 16 and placed him on probation for 12 months. The Appellate Division reversed and dismissed the petition. The petition, including the supporting deposition, did not contain nonhearsay allegations to support the age element of unlawful possession of weapons by persons under 16. The petition and supporting deposition stated respondent's date of birth and the deposition stated without elaboration that during the arrest processing the officer was able to determine that respondent was 15 years old. This did not meet the requirement of a nonhearsay allegation because there was no explanation, on the face of the petition or deposition, of how the officer learned the respondent's age.

Matter of Devon B., 83 AD3d 469 (1st Dept 2011)

ACD Not Least Restrictive Alternative

Respondent was adjudicated a juvenile delinquent based on his admission that he committed the act of unlawful possession of a weapon by a person under 16 and he was placed on probation for a period of 12 months. The Appellate Division affirmed. The disposition of probation, not an ACD, was the least restrictive alternative in light of the fact that respondent brought a knife to school and brandished it at

schoolmate, resulting in injury to the other child.

Matter of Akilino R., 83 AD3d 578 (1st Dept 2011)

In Light of Respondent's Limited Role and Lack of a Prior Record Court Should Have Imposed Supervised ACD

Family Court adjudicated respondent a juvenile delinquent upon a fact finding determination that he committed an act, which, if committed by an adult, would constitute the crime of possession of an imitation firearm and placed him on probation for a period of 12 months. The Appellate Division reversed on the facts and in the interests of justice, vacated, and remanded to the court with the direction to impose an ACD. The testimony at the suppression hearing and at trial showed officers received radio call that a few young men with firearms were a few blocks away and one was black, wearing a blue shirt, blue jeans and sneakers. Officers saw three young boys running and one boy (not respondent) fit the description. The officers yelled "stop," searched the youth that fit the description, found nothing, then searched respondent and found something that looked like a broken gun wrapped in his sweatshirt. At fact-finding hearing, one officer was reminded that although he testified at the suppression hearing that the gun had been recovered from respondent, he testified otherwise at preliminary hearing. The officer also agreed he might have told respondent's mother and others that respondent was not the one on whom gun was found. An eyewitness testified that the gun was not taken from respondent, but from another boy, and her testimony also contradicted what the officers said they heard from bystanders, which was "that's them," when they told the three boys to stop. The court credited the officers' testimony and discounted the testimony of the bystander and respondent's mother, who testified the officer told her it was not her son who had the gun. While the police had reasonable suspicion to stop and frisk the boys, the court's complete rejection of the testimony of an eye-witness was arbitrary and the officers' testimony concerning the gun retrieval was not consistent. The Court reversed the order adjudicating respondent a juvenile delinquent based on possession of an imitation fire-arm. Because respondent briefly possessed the toy gun, which violated a city administrative code, a dismissal was not warranted – an ACD was the least restrictive alternative under these circumstances. The dissent would have affirmed on the ground that the court's findings of fact were entitled to great deference.

Matter of Jahloni G., 83 AD3d 485 (1st Dept 2011)

ACD Not Least Restrictive Alternative Due to Severity of Crime

Family Court adjudicated respondent a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of menacing in the second degree and imposed a 12 month conditional discharge. The Appellate Division affirmed. Based on the seriousness of the offense, swinging a bicycle chain at a much younger child and causing injury to the child, a conditional discharge, not an ACD, was the least restrictive dispositional alternative.

Matter of Anthony N., 83 AD3d 589 (1st Dept 2011)

Term of Probation Reduced

Family Court adjudicated respondent a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for 18 months. The Appellate Division modified by reducing probation to 12 months in view of the facts surrounding the underlying offense and respondent's background.

Matter of Ramon B., 83 AD3d 623 (1st Dept 2011)

Petition Was Jurisdictionally Defective

A juvenile delinquency petition is legally sufficient on its face when "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged" (FCA § 311,2 [3]). Neither the petition nor the supporting depositions provided sworn, nonhearsay allegations as to the appellant's age, which is an element of the criminal act of unlawful possession of weapons by persons under the age of 16. Consequently, as was conceded by the presentment agency, the petition was jurisdictionally defective as to that count, which was the only remaining count in the

petition, and the petition was necessarily dismissed.

Matter of Divine D., 79 AD3d 940 (2d Dept 2010)

Appellant Not Entitled to an Adjournment in Contemplation of Dismissal

Contrary to the appellant's contention, the Family Court did not improvidently exercise its discretion in adjudicating him a juvenile delinquent and placing him on probation for a period of 12 months. The Family Court has broad discretion in determining the proper disposition in a juvenile delinquency proceeding (see FCA § 141). The appellant was not entitled to an adjournment in contemplation of dismissal merely because this was his first "brush with the law" or and in view of the other mitigating circumstances to which he cited. The disposition was appropriate in light of the seriousness of the offense, the appellant's poor record of attendance and performance in school, and the recommendations made in the probation report.

Matter of Michael L., 80 AD3d 611 (2d Dept 2011)

Petition Alleging Appellant Violated His Probation was Dismissed

The Court agreed with the appellant's contention that the Family Court should not have accepted his admission to his petition alleging that he violated a condition of his probation, without conducting an adequate allocution to ascertain that he was voluntarily waiving his right to a hearing. Thus, the Court dismissed the petition alleging that the appellant violated a condition of his probation.

Matter of Alex Z., 82 AD3d 995 (2d Dept 2011)

Court Adjudged Appellant a Juvenile Delinquent

In a juvenile delinquency proceeding, appellant's order that stated the crimes she committed, if committed by an adult, would constitute attempted assault in the second degree was affirmed. The Court adjudged her to be a juvenile delinquent and placed her in probation for 12 months. Upon the exercise of factual review, the Court found that it was legally sufficient to support the prior order.

Matter of Janel B., 82 AD3d 1093 (2d Dept 2011)

Period of Probation Reduced

The Family Court adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for a period of 18 months. Based upon the underlying offense and favorable aspects of appellant's background, the Appellate Division concluded that a 12-month period of probation was the least restrictive alternative consistent with appellant's needs and best interests and the community's need for protection.

Matter of Ramon B., 83 AD3d 623 (2d Dept 2011)

Court Properly Adjudged Respondent to be a Juvenile Delinquent

Based on the severity of the respondent's crime, the Family Court properly adjudged him to be a juvenile delinquent and placed him on probation for two years. If committed by an adult, the respondent's actions would have constituted the crime of reckless endangerment in the second degree. Thus, placing the respondent on probation served his best interests and protected the community.

Matter of Cooper C., 81 AD3d 643 (2d Dept 2011)

Juvenile Delinquent not Entitled to an Adjournment in Contemplation of Dismissal

The appellant appealed from an order from the Family Court which was made upon his admission that he possessed marijuana in the fifth degree. The Court adjudged him to be a juvenile delinquent and placed him on probation for nine months. Upon review, the Court determined that the appellant was not entitled to an adjournment in contemplation of dismissal due to his poor academic and attendance record, his incidents of misbehavior at school, and his failure to take responsibility for his actions as reflected by the probation report. Consequently, the Court ruled that keeping the appellant in probation served his best interests and protected the community.

Matter of Antoine H., 81 AD3d 646 (2d Dept 2011)

Court Properly Placed Juvenile Delinquent on Probation

Based on the severity of the appellant's crime, the Family Court properly adjudged him to be a juvenile delinquent, and placed him on probation for a period of 18 months. The Court's disposition was appropriate based on the violent nature of the appellant's attempted assault in the third degree, poor academic record and school attendance record, school disciplinary record, and his failure to take responsibility for his actions as reflected by the probation report.

Matter of Liston J., 81 AD3d 648 (2d Dept 2011)

No Violation of Respondent's Right to a Speedy Fact-Finding

The Family Court erred when it refused to adjourn a matter until later in the day and dismissed the petition pursuant to FCA § 340.1 [2]). Under the circumstances of this case, the Appellate Division concluded there was no violation of the respondent's right to a speedy fact-finding hearing. Any delay in the commencement of the hearing was de minimis, and would have been obviated by merely recalling the case later that day, after the complainant had an opportunity to arrive. Order reversed.

Matter of Tierra H., 83 AD3d 837 (2d Dept 2011)

Record Supported Placement with OCFS

The appellant appealed from an order of fact-finding and disposition of the Family Court, which, after fact finding and dispositional hearings, and upon his admission, that he had committed an act which, if committed by an adult, would have constituted the crime of attempted burglary in the third degree, adjudicated him to be a juvenile delinquent and placed him with the New York State Office of Children and Family Services for a period of 12 months. Contrary to the appellant's contention, the Family Court providently exercised its discretion in adjudging the appellant a juvenile delinquent, finding that he was in need of supervision, and directing his placement for a period of 12 months with the Office of Children and Family Services instead of continued placement with the Westchester County Department of Social Services, as was recommended by the Department of Probation. Considering the serious nature of the act which the appellant admitted, his failure to accept responsibility or show remorse for the underlying conduct or for the victims, his prior juvenile delinquency adjudications, his poor school attendance record, and the other relevant circumstances, the Family Court properly found that the least restrictive dispositional alternative was to place the appellant in the custody of the Office of Children and Family Services (OCFS).

Matter of Calvin L., 83 AD3d 842 (2d Dept 2011)

No ACD for First Time Offender

Respondent admitted to lighting fireworks in a large barn causing a fire and destroying the barn **.** After disposition, court issued a conditional discharge for one year, restitution of $1,500 and 150 hours of community service. Respondent appealed arguing court failed to comply with FCA section 321.3 when it failed to establish through allocution that respondent acted recklessly when he damaged barn. The Appellate Division rejected respondent's claim and found from his admission, it could be sufficiently inferred that respondent acted recklessly. Court also rejected respondent's argument that Family Court abused its discretion in finding him a juvenile delinquent instead of issuing an ACOD. Although PDI indicated this was respondent's first involvement with the juvenile justice system, he was a good student , not a disciplinary problem and had low risk of recidivism, Appellate Division noted that Family Court has broad discretion in imposing its dispositional orders and in this case, the respondent had caused damage to a property worth over a million dollars, had lied to the police about his culpability and showed little remorse. Court also noted respondent admitted to occasionally consuming alcohol and smoking marihuana.

Matter of Orazio A., 81 AD3d 1104 (3d Dept 2011)

Placement With DSS Affirmed

Respondent was charged as a juvenile delinquent with two counts of assault in the second degree, pursuant to Penal Law sections 120.05(1) and 120.05(2)**.** After

fact-finding hearing, court dismissed one count, but found sufficient proof to find he had committed an act which, if committed by an adult, would constitute the crime of attempted assault in second degree. Prior to disposition, respondent's mother took him to Florida, causing warrants to be issued for their arrest. Upon return, and after a dispositional hearing, respondent was placed with DSS for period of one year. Respondent appealed arguing, among other things, that court was wrong to place him in custody of DSS as this was not the least restrictive alternative. The Appellate Division affirmed, holding that because FCA section 352.2(2)(a) "requires that the court order the least restrictive available alternative...", this did not mean court had to utilize, without success, all less restrictive alternatives. In this case, respondent and his mother left the jurisdiction before disposition of his case showing there was a lack of adult supervision and structure in his life. Therefore court did not abuse discretion in ordering placement with DSS.

Matter of Anthony E., 82 AD3d 1544 (3d Dept 2011)

Delay in Filing Petition Not Unconstitutional

Family Court adjudged respondent to be a juvenile delinquent upon fact-finding determination that he committed acts against two victims, which, if committed by an adult, would constitute the crimes of criminal sexual acts in the first degree. After dispositional hearing, respondent was placed in custody of DSS for one year. Respondent appealed arguing among other issues, that court violated his due process rights by delaying in filing the petitions against him. The Appellate Division rejected his claim stating that speedy trial provisions in FCA article 3 only apply after petition is filed, and while pre-petition delay may result in an unconstitutional denial of due process, court must balance factors such as extent and reason for delay, nature of charges, extent of pre-filing detention, prejudice to defense due to delay, special mental or emotional needs of juvenile and possibility of rehabilitation. The Appellate Division held that family court had properly balanced all these factors in issuing its decision, finding the delay was caused by "good faith mis-communication between the parents and the prosecuting attorney..", the nature of the charges against the juvenile, who had been only twelve when he committed the acts, was severe and he may have mental health or emotional needs where rehabilitation would be required. Additionally, there was no pre-filing detention of the juvenile in this case.

Matter of Gordon B., 83 AD3d 1164 (3d Dept 2011)

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)

PATERNITY

Father Not Equitably Estopped From Pursuing Paternity

Within seven months of his incarceration, father brought a petition seeking to establish paternity of his two and a half year old son. Mother sought to equitably estop him from pursuing paternity, arguing that child had developed a parent- child relationship with her fiancé of four months. Court found that although father had waited two and half years to file a paternity petition, prior to his incarceration he had assumed the role of father of the child for a substantial period of time, and the purpose of equitable estoppel " is to prevent someone form enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiable relying on the opposing party' sanctions has been misled into a detrimental change of position"... and in these proceedings, "it is the child's justifiable reliance" the court considers. In this case, a four - month relationship with fiancé does not negate the "already recognized and operative parent-child relationship."

Matter of Steven W. v Christina X., 80 AD3d 1083 (3d Dept 2011)

PERSONS IN NEED OF SUPERVISION

Record Contained No Underlying Basis for a Pins Petition

The appellant appealed from an order of fact-finding and disposition of the Family Court, which, after fact-finding and dispositional hearings, and upon his admission to truancy, adjudicated him to be a person in need of supervision and directed that he be placed in the custody of the Dutchess County Commissioner of Social Services for a period of up to 12 months. The appellant argued that the order should have been reversed because Family Court determined the petition on the merits despite the facts that the Dutchess County Department of Social Services made an initial determination that a child protective service report involving the appellant was warranted, no neglect proceeding was ever commenced, and the Family Court failed to consider the services that would have been required had a neglect proceeding been commenced. Although unpreserved for appellate review, these contentions were without merit. FCA § 716 provides that the Family Court, on its own motion and at any time in the proceedings, may substitute a neglect petition for a PINS petition. The Family Court did not err in failing to do so here. There was no evidence in the record that the conduct underlying the basis for the PINS petition, specifically the appellant's admitted truancy, was attributable or related to an act of abuse or neglect.

Matter of Alexander C., 83 AD3d 1058 (2d Dept 2011)

Court Did Not Lack Jurisdiction to Restore PINS Petition

PINS petition was filed against respondent for truancy, subordination ,assaulting another student in school and using vulgar language towards school personnel. An ACD for six months was issued requiring respondent to attend school and comply with other provisions of the order. Five months later, the presentment agency moved to restore the original PINS based on respondent's violations of the ACD provisions. One month later a fact-finding hearing was scheduled and respondent's counsel asked to be relieved as counsel as he had not had any contact with his client. Two days later, at the rescheduled appearance, respondent admitted to ACD violations and court restored the PINS petition, ordered a PDI and scheduled a dispositional hearing the following month. The dispositional hearing was adjourned to a month later upon request by probation and upon consent by respondent. One month later, court's disposition directed respondent to be placed in the custody of DSS for one year. Respondent appealed arguing that court lacked jurisdiction to restore PINS and that court erred in scheduling the dispositional hearing more than two months after fact-finding in violation of FCA section 749 (b). The Appellate Division affirmed , finding that the presentment agency, at any time within the six month ACD period, could apply to restore the case, and the Family Court Act does not expressly provide for dismissal for failure to provide speedy dispositional hearing. Additionally, respondent consented to the adjournment.

Matter of Ashley EE., 81 AD3d 1124 (3d Dept 2011)

TERMINATION OF PARENTAL RIGHTS

Mother Unable to Provide Adequate Care by Reason of Mental Retardation

Upon a finding of mental retardation against respondent mother, Family Court terminated her parental rights to the subject child. The Appellate Division affirmed. Clear and convincing evidence supported the court's finding that respondent was presently and for the foreseeable future unable, by reason of mental retardation, to provide proper and adequate care for her Down's syndrome child. Testing by a senior psychologist employed by the court indicated that respondent's full scale IQ was 48, which the court characterized as "very low." The director of the Family Court Mental Health Services opined that, after interviewing respondent and reviewing her records, she was of subaverage intellectual functioning with impairment in adaptive behavior and if the child were returned to respondent's care she would be now and in the foreseeable future in danger of becoming a neglected child.

Matter of Erica D., 80 AD3d 423 (1st Dept 2011)

Father Abandoned His Child

Upon a fact-finding determination that respondent father abandoned his child, Family Court terminated his parental rights and committed the child's guardianship and custody to petitioner for purposes of adoption. The Appellate Division affirmed. The finding of abandonment was established by clear and convincing evidence. The father did not contact the agency or the child and did not send letters, cards or gifts for his son during the six months immediately preceding the filing of the petition. Although a court order prevented the father from visiting the child until a mental health evaluation was completed, that did not absolve him of the obligation to maintain contact and he took no steps to resume contact after the report was complete. The agency was not required to demonstrate diligent efforts.

Matter of Omar Saheem Ali J., 80 AD3d 463 (1st Dept 2011)

Termination on Ground of Permanent Neglect Affirmed

Family Court terminated respondent mother's parental rights with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that notwithstanding petitioner's diligent efforts respondent failed to control her anger; cooperate with the agency in providing home visits and proof of income; attend most of the children's educational and medical appointments; and refused to accept guidance on proper parenting. Any error in excluding the testimony of a social worker who observed a few of respondent's visits with the children was harmless. It was in the children's best interests to be freed for adoption by their foster parents with whom they had bonded and in whose care they had thrived.

Matter of Mark Eric R., 80 AD3d 518 (1st Dept 2011)

Father Failed to Object to Lack of Evidence at Dispositional Hearing

Family Court terminated respondent father's parental rights with respect to the subject child and committed the care and custody of the children with the Commissioner of the Administration for Children's Services for purposes of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that petitioner exercised diligent efforts to encourage and strengthen the parental relationship but that notwithstanding those efforts during the relevant time period respondent did not maintain contact with the agency, visit the child or send him letters, cards or gifts or pay child support. Although the court erred in admitting certain lab reports without proper foundation, the error was harmless because the record contained other evidence of respondent's use of drugs and failure to seek treatment. Respondent failed to object to the court's determination that no further evidence was required at the dispositional hearing. In fact, respondent's counsel responded in the negative when asked by the court whether she wished to present any evidence or witnesses.

Matter of Joshua Jezreel M., 80 AD3d 538 (1st Dept 2011)

Termination on Ground of Permanent Neglect in Child's Best Interests

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed.

The finding of permanent neglect was supported by clear and convincing evidence that petitioner agency made diligent efforts to encourage and strengthen the parental relationship, including working with respondent to formulate a service plan, maintaining frequent contact with her, scheduling visits with the child and referring her for services. Despite those efforts, respondent failed to complete the necessary programs, maintain meaningful contact with the child and plan for the child's future. Respondent defaulted at the dispositional hearing and no appeal lies from a default. In any event, termination of respondent's parental rights was in the child's best interests and a suspended judgment was not warranted.

Matter of Aliyah Julia N., 81 AD3d 519 (1st Dept 2011)

Mother Failed to Plan For Child's Future

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that petitioner agency made diligent efforts to encourage and strengthen the parental relationship, including furnishing the mother with a service plan to meet her individual needs and diligently fostering her reunification with the child by providing her with visitation, notice of the child's medical appointments and referrals to treatment programs. The mother failed to complete a drug rehabilitation program and attend a CPR course for the child's special needs. She also failed to comply with random drug tests as required by the service plan. A preponderance of the evidence established that termination of respondent's parental rights was in the children's best interests. The mother's request for a suspended judgment was not preserved and was unwarranted.

Matter of Damon Bruce W., 81 AD3d 552 (1st Dept 2011)

Permanency Finding Remanded

Family Court terminated father's parental rights to his child and placed the child in the care of DSS with the goal of adoption by foster mother. The Appellate Court remanded to Family Court for a permanency determination for the child. The father contended that the court erred in placing the child in foster home instead of with his cousin, who he had proposed as a resource. The Appellate Division found that since entry of the dispositional order, circumstances changed. Although it was in child's best interest to be adopted by the foster mother rather than the cousin, the child had begun to have hallucinations and exhibited violent tendencies, and the foster mother no longer wished to adopt her.

Matter of Kathleen Shaquana G., 82 AD3d 610 (1st Dept 2011)

Mother's Mental Illness Results in TPR Without Dispositional Hearing

Family Court terminated mother's parental rights based on her mental illness of schizoaffective disorder, which made her incapable of caring for child at present or foreseeable future. The Appellate Division affirmed. There was clear and convincing evidence of mother's inability to care for her child, which mother did not rebut. The lapse in time between the psychological evaluation of mother and the fact-finding hearing and termination of mother's rights without a dispositional hearing, did not warrant a different result.

Matter of Isaiah J., 82 AD3d 651 (1st Dept 2011)

Permanent Neglect Affirmed

Family Court determined that mother permanently neglected children by her failure to maintain contact with her children or plan for their future. The Appellate Division affirmed. During the relevant time period, mother attended only 5 of the 52 scheduled visitation meetings. DSS established by clear and convincing evidence that diligent efforts were made to encourage and strengthen mother's relationship with the children, including meeting with mother to review service plan, scheduling visitation, and changing visitation days and

times to accommodate the mother.

*Matter of Jasmine Courtney C.,*83 AD3d 450 (1st Dept 2011)

No Appeal Lies From Fact-Finding Due to Mother's Default

Mother failed to appear at fact-finding hearing involving permanent neglect petition filed against her by DSS and failed to provide an explanation for her non-appearance. Family Court found that mother permanently neglected her child and terminated her parental rights. The Appellate Division affirmed. Because mother defaulted at the fact finding hearing, she could not appeal the finding of neglect and mother's claims that her counsel should have moved to vacate default order was rejected. Even if this was not a default matter, the record established by clear and convincing evidence that mother failed to plan for her child's future inasmuch as she continued to abuse drugs, failed to complete drug treatment and anger management programs, and failed to obtain suitable housing. The child also had a strong bond with pre-adoptive foster mother, who continued to meet the child's needs.

Matter of Skyler S.M., 83 AD3d 549 (1st Dept 2011)

Permanent Neglect Affirmed

Family Court found mother permanently neglected her child based on her failure to maintain contact with child during the relevant time period and failed to plan for the child's future despite the diligent efforts of DSS to offer mother referral for services and schedule visitation between mother and child. The Appellate Division affirmed. The court correctly exercised its discretion in not allowing further adjournment requests by mother and in striking her testimony at the fact-finding and dispositional hearings because she failed to appear during cross-examination.

Matter of Amilya Jayla S., 83 AD3d 582 (1st Dept 2011)

Court Found that Father Permanently Neglected the Child

The Family Court affirmed their decision finding that the father permanently neglected the subject child, terminated his parental rights, and transferred custody and guardianship of the subject child to Social Services for the purpose of adoption. Contrary to the father's contention, the evidence presented established that the presentment agency made diligent efforts to assist him in planning for the future of his child. However, because the father failed to provide a realistic alternative to foster care for the child's future and as the child had bonded with his foster family, who wanted to adopt him, the Family Court properly determined that the best interests of the child would be served by terminating the father's parental rights.

Matter of Kenneth Frederick G., 81 AD3d 645 (2d Dept 2011)

Mother's Rights Terminated After Failure to Plan for Children's Future

The Family Court properly terminated the mother's parental rights, and properly transferred guardianship and custody of the children to the Administration for Children's Services. The mother failed to plan for the future of the children despite the agency's efforts to encourage and strengthen the parental relationship.

Matter of Jason A.G., 81 AD3d 824 (2d Dept 2011)

Father's Parental Rights Were Terminated as a Result of Permanent Neglect

The Family Court properly affirmed the order that terminated parental rights to the father. The Suffolk County Department of Social Services (hereinafter DSS) established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship, pursuant to SSL § 384-b[7][f]. However, the father missed approximately half of the scheduled visits, failed to participate in a substance abuse treatment program, and continued to use illegal drugs. Thus, DSS sufficiently established that the father permanently neglected the child by failing to plan for the child's future during the relevant statutory period. After the finding of permanent neglect, the Family Court correctly determined that it was in the child's best interest to be freed for adoption.

Matter of John M., 82 AD3d 1100 (2d Dept 2011)

TPR Affirmed

Child was placed in care and custody of DSS shortly

after his birth in 2007. Mother's rights were terminated. Father was incarcerated . He was released shortly thereafter, saw the child twice on supervised visits, was convicted of another crime and incarcerated again. Soon after release from jail, father entered a rehabilitation facility and began to see his child on a weekly, supervised basis. An ACD was issued by Family Court, requiring he remain free of alcohol or drugs. Father was discharged from facility as a result of rule violation, violated an order of protection issued on behalf of mother and was once again imprisoned. DSS commenced TPR while father was incarcerated. Family Court terminated father's rights following fact-finding hearing. Father appealed stating that DSS failed to plan for his re-unification with his child. The Appellate Court found that DSS did "make affirmative, repeated and meaningful efforts to restore the parent-child relationship" despite the fact that father was either in jail or a rehabilitation facility, with the exception of 15days. DSS , among other factors, emphasized father's need for drug/alcohol rehabilitation, provided transportation to father for visitation with child, supervised visits between father and child, provided temporary housing for father during the period he was not in a facility.

Matter of Victorious LL., 81 AD3d 1088 (3d Dept 2011)

Finding of Permanent Neglect Reversed

Family Court held father and mother had permanently neglected their two children as a result of their failure to co-operate with DSS as set forth in the dispositional order. Family Court found that the parents had failed to comply with the terms of the order from September 8, 2008 through December 2009. However, back in February 11, 2009, Family Court relieved DSS of making diligent efforts to re-unite the family. Appellate Division reversed as the permanent neglect finding included the ten months where no diligent efforts to reunite had been made and, " the degree to which a parent has upheld his or her obligations to the children cannot be meaningfully measured when the agency itself has not undertaken diligent efforts on behalf of reuniting parent and child."

In re Lindsey BB., 81 AD3d 1009 (3d Dept 2011)

Participation in Services Without Meaningful Benefit Results in TPR

Appellant is father whose rights to his child were terminated by Family Court . Mother was diagnosed with schizophrenia and father suffered from severe anxiety and obsessive compulsive disorder. Child was removed from parents care and father consented to a finding of neglect. Although father participated in services provided by DSS, he failed to appreciate the severity of leaving child alone in mother's care. Mother's bizarre behavior often frightened the child but father felt that the only problem between mother and child was a communication problem. Additionally father's own mental health problems , his minimization of the developmental delays faced by the child and other factors showed that father did not meaningfully benefit from the services provided to him by DSS. The Appellate Division affirmed Family Court's decision, finding that DSS had shown by clear and convincing evidence that father had failed to plan for child's future.

Matter of Juliette JJ., 81 AD3d 1112 (3d Dept 2011)

Permanent Neglect Finding Affirmed

Family Court terminated the rights of an incarcerated father based on permanent neglect. Father argued that DSS failed to make diligent efforts to encourage and strengthen the relationship between him and the child. Appellate Division held that DSS's efforts, including providing father with copies of all permanency reports, updating him on the child's health and progress, responding to father 's letters and sending him pictures of the child, and based on father's recommendation, looking into possible placement of the child with the paternal aunt, were diligent. While father argued that DSS had not made plans for the child to visit him in prison, the Appellate Division held that aside from the fact that the child was young and the distance to travel for visits great, father had not filed any visitation petitions. And in a two -year period, father had only contacted DSS four times about his child and had not sent any "cards, letters or gifts to the child". Additionally, the Court pointed out that father's only planning for the child's future was to suggest his sister, who had her own child protective history, as a possible placement source.

Matter of Kaiden AA., 81 AD3d 1209 (3d Dept 2011)

Mother's Continued Relationship With Abuser Results in TPR

Mother of two children appealed the finding of permanent neglect alleging that Family Court should have granted her request for a suspended judgment as opposed to terminating her parental rights. On appeal the Appellate Division held that although mother had successfully participated in a number of programs recommended by DSS, was gainfully employed and had an appropriate home, she still continued, even after two years of having her children removed, to have a relationship with an abusive boyfriend and had attempted to conceal the relationship from DSS. Mother placed more importance on her relationship with her boyfriend than her relationship with her children and additionally, the children were thriving in the home of the kinship foster parents. Under these circumstances due deference was given to Family Court's determination that additional time would not improve mother's parenting skills.

Matter of Shania D., 82 AD 3d 1513 (3d Dept 2011)

Abandonment Finding Supported by Clear and Convincing Evidence

Child was removed from mother shortly after child's birth. Mother consented to a finding of neglect and two years later, DSS filed to terminate mother's rights based on the ground of abandonment. Prior to the termination proceeding, mother filed a visitation petition. After a hearing, Family Court found that mother had abandoned the child and terminated mother's rights to the child and dismissed mother's petition. The proposed order was sent to the wrong Judge, who approved the order. The order was then submitted to the correct Judge who approved the order. Mother appealed from both orders. The Appellate Division dismissed the appeal from the first order as it was an improper order. As to the second, the Appellate Court affirmed Family Court's order finding that DSS had met its burden by clear and convincing un-rebutted evidence. Among other factors, mother had acknowledged that she had failed to maintain contact with her child six months prior to filing of the termination petition, spoke to the child only once during this time period, failed to follow up with visitation requests she made, failed to keep appointments with the caseworker, failed to send the child any cards, letters, gifts during the relevant time period and failed to attend two permanency hearings.

Matter of Ryan I., 82 AD3d 1524 (3d Dept 2011)

Permanent Neglect Due to Domestic Violence

Parents of child were held to have permanently neglected the child due to the domestic violence in the household. Evidence showed that father committed numerous acts of domestic violence against mother and killed family pets during his fits of rage. Parents appealed arguing that diligent efforts were not made by DSS to reunite family, and mother argued that the evidence did not support that she permanently neglected her child. However the Appellate Division held that the record amply showed by clear and convincing evidence that diligent efforts had been made to strengthen the relationship between parents and child. Separate service plans were made for the parents, caseworker met with each parent to review the plans, kept them up to date on the status of the child, made and followed up with all the appropriate referrals, and offered assistance in obtaining those services. Father failed to understand his need for anger management counseling and mother continued to have a relationship with father even after completing the programs. Both parents failed to rebut the evidence submitted by DSS. The Appellate Court did state in a footnote that it was an error for Family Court to have allowed the entire DSS file into evidence, but it was harmless error.

Matter of Nicholas R., 82 AD3d 1526 (3d Dept 2011)

Non-Frivolous Issues Exist To Appeal Permanent Neglect Finding

Mother was found to have permanently neglected child. Mother appealed from order. Counsel for mother argued that no non-frivolous issues exist that can be raised on appeal and moved to be relieved of her assignment. Appellate Division held there were appealable issues of arguable merit, including sufficiency of evidence supporting permanent neglect order by court, granted counsel's request to be relieved

and appointed new counsel for mother.

Matter of Jonathon NN., 82 AD3d 1532 (3d Dept 2011)

Termination of Parental Rights Affirmed

Incarcerated father, with a history of sexual misconduct and convicted of attempted rape in the first degree appealed finding of permanent neglect based on failure to plan. Mother had already surrendered her parental rights and child had been in foster care since birth. Father argued that DSS had failed to prove by clear and convincing evidence that it had made diligent efforts to encourage and strengthen parent-child relationship. The Court disagreed and held that the evidence showed that caseworkers provided father with permanency plans, developed appropriate service plans, apprised him of child's well-being, met with father at prison as well as other prison personnel to check on his progress in various prison programs. Father failed to complete sex offender treatment program which was necessary to his having contact with his child. Father failed to plan for child's future as those family members he pointed out as possible placements for child were unwilling or unavailable. Father's contention that court should have issued a suspended judgment instead of terminating his rights was dismissed as unpersuasive.

Matter of Trestin T., 82 AD3d 1535 (3d Dept 2011)

Court Clerk Cannot Cancel Permanency Hearings

Mother's first child was born with positive toxicology of cocaine and exhibited withdrawal symptoms. DSS moved to terminate mother's parental rights to child on the grounds of permanent neglect. Mother had another child, a derivative neglect petition was filed against her and upon mother's consent, child was found to be neglected and placed in DSS custody. At the same time mother was found to have permanently neglected first child but a suspended judgment for one year was issued. Permanency hearings were held for each child with return to mother as permanency goal. Subsequent permanency petitions contained boilerplate language. Prior to the next permanency date, a caseworker sent a letter to Family Court indicating that the children were being returned to mother. No objections were received by either DSS or the attorney for the child, and the court clerk sent letters to counsel indicating further permanency proceedings would be cancelled as permanency had been achieved and the children were returned to mother. A few months later, DSS filed pleadings seeking to revoke mother's suspended sentence with regard to older child and alleged violation of order of disposition with regard to younger child, and sought removal of the children from mother's home to which mother initially consented. Mother then moved to dismiss DSS petitions stating that as children had been returned to her, the suspended judgment and disposition orders were unenforceable. After a hearing, Family Court held the return of children was a "trial discharge" and denied mother's motion to dismiss. Upon appeal, the Appellate Division affirmed noting that Family Court has continuing jurisdiction over a child placed in foster care until permanency is achieved. "[T]he court may provide the local social services district with authority to finally discharge the child to the parent without further court hearing, provided that [10]ten days prior written notice is served upon the court and the child's attorney" pursuant to FCA section 1089(d)(2)(viii) or a child may be released on "trial discharge" unless prohibited by court. In this case, the Court held that final discharge and cancellation of permanency hearings by the court clerk were of no legal effect and Family Court properly treated it as a trial discharge.

Matter of Christopher G., 82 AD3d 1549 (3d Dept 2011)

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)

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)

Suspended Judgment Properly Denied

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

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

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

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

Matter of Michael C., 82 AD3d 1651 (4th Dept 2011)

Respondent Violated The Terms of Her Suspended Judgment

Family Court revoked a suspended judgment and terminated respondent mother's parental rights. The Appellate Division affirmed. A preponderance of the evidence supported the court's determination that

respondent violated numerous terms of the suspended judgment and that it was in the children's best interests to terminate parental rights. Respondent did not ask the court for post-termination contact and, in any event, she failed to establish that such contact would be in the children's best interests.

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

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

Child's Best Interests

Family Court terminated respondent mother's parental rights. The Appellate Division modified in the interests of justice by remitting for a hearing on whether post-termination visitation between mother and child would be in the child's best interests. The record supported the court's determination that the best interests of the child would be served by freeing the child for adoption by the foster parents, who have 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 her daughters who was also adopted by the foster parents.

Matter of Tumario B., 83 AD3d 1412 (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)

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

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

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

Mother Permanently Neglected Her Child

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

Matter of Jordan B., 83 AD3d 1596 (4th Dept 2011)

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