NEW YORK CHILDREN'S LAWYER

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Faulting Counsel's Advocacy, Panel Reverses Neglect Finding*

Andrew Denney

A divided upstate appeals court found that, while a lower court properly determined that a mother neglected her three children, the children's trial attorney failed to advocate for the wish of two of the children to remain with the mother and thus provided ineffective assistance of counsel.

A 3-2 panel of the Appellate Division, Fourth Department, ruled in *Matter of Brian S.*, 526 CAF 15-00314, Douglas Bates, an attorney who represented the children in the case, took a position contrary to that of two children he represented.

The panel reversed Cayuga County Family Court Judge Thomas Leone's finding of neglect—despite saying there was sufficient evidence that the mother, who may have used drugs in the house, had neglected her children—and remitted the case to Cayuga County for appointment of new counsel for the children and a new fact-finding hearing.

According to the decision, Alyssa, Brian and Katie were aged 15, 13 and 12, respectively, when the Cayuga County Department of Social Services filed a neglect petition against their parents.

Alyssa expressed a "strong desire" to continue living with her mother, while Brian said that he would live with either the mother or the father.

The Rules of the Chief Judge state that an attorney for a child must advocate his client's position even when he does not feel the child's position is in her best interests. There are two exceptions to the rule, but they did not apply to this case, the panel said.

But when the mother moved to dismiss the neglect petition, Bates filed to oppose her motion. Additionally, he "undercut" the children's position by asking questions during cross-examination that were designed to elicit unfavorable testimony against their mother.

The majority said that, since the children were in their teens at the time of the filing, there was no basis to conclude they lacked the capacity for "knowing, voluntary and considered" judgment. It also found no evidence that the children's decision would place them at "substantial risk for imminent, serious harm" (see *Matter of Allyson J.*, 88 AD3d 1201, 1203).

The court additionally found that, given their inharmonious positions, it was impossible for Bates to "advocate zealously" for all three children and that the children should have been entitled to the appointment of several attorneys to represent their conflicting interests (see *Matter of James I.*, 128 AD3d 1285, 1286).

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With respect to the finding of neglect, the majority said that, while the evidence consisted largely of hearsay statements by the children to a caseworker, those statements and the fact that the mother did not testify were sufficient to make a neglect finding.

Bates died two months after Leone's ruling at the age of 67, according to an obituary published in the Syracuse Post Standard.

The majority consisted of Justices Erin Peradotto, Stephen Lindley and Brian DeJoseph.

In their dissent, Justices John Centra and Patrick NeMoyer disagreed that the children received ineffective assistance and said that Leone's ruling should have been affirmed.

Centra and NeMoyer agreed with the majority that the county established a preponderance of evidence that the children were neglected by their parents, but said there was substantial risk of harm to the children if they remained in their parents' custody.

Adam Van Buskirk, who is of counsel to Karpinski, Stapleton & Tehan, represented the mother on appeal. He said the decision was a victory for his client. He is not representing the mother when the case is returned to Cayuga County, but said the finding of neglect "was very heavily based on hearsay."

"At trial, that can all be delved into and attacked," Van Buskirk said.

Allison Bosworth, an associate at Harris Beach, appeared for the Cayuga County Department of Social Services.

Marybeth Barnet of Canandaigua represented Alyssa; Susan James of Benjamin & James in Waterloo represented Katie; and Theodore Stenuf of Minoa represented Brian.

James said she was "glad that my client is going to be represented by her own attorney at the next trial."

Stenuf said in an interview that the finding of neglect was based on "too many assumptions" and that the majority's decision "reaffirmed the importance" of zealous advocacy for children.

"In the case of attorneys for children, they have to advocate for what the children want," he said.

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The Memorandum and Order in Brian S. (CAF 15 - 00314)

IN THE MATTER OF BRIAN S., KATIE S., AND ALYSSA S.

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

SCOTT S., RESPONDENT,
AND TANYA S., RESPONDENT-APPELLANT.

SUSAN JAMES, ESQ., ATTORNEY FOR THE CHILD
KATIE S., APPELLANT.

MARYBETH D. BARNET, ESQ., ATTORNEY FOR THE
CHILD ALYSSA S., APPELLANT.

THEODORE W. STENUF, ESQ., ATTORNEY FOR THE
CHILD BRIAN S., APPELLANT.

KARPINSKI, STAPLETON & TEHAN, P.C., AUBURN (ADAM H. VANBUSKIRK OF COUNSEL), FOR RESPONDENT-APPELLANT.

SUSAN JAMES, ATTORNEY FOR THE CHILD, WATERLOO, APPELLANT PRO SE.

MARYBETH D. BARNET, ATTORNEY FOR THE CHILD, CANANDAIGUA, APPELLANT PRO SE.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA, APPELLANT PRO SE.

HARRIS BEACH PLLC, BUFFALO (ALLISON A. BOSWORTH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered March 2, 2015 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent Tanya S. had neglected the subject children.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the matter is remitted to Family Court, Cayuga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother and each Attorney for the Child assigned to the three subject children (appellate AFC) appeal from an order that, inter alia, determined that the mother neglected the children and placed the children in the custody of petitioner. Initially, we reject the contentions of the mother and the appellate AFCs that petitioner failed to meet its burden of establishing neglect by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [I]). Although the evidence of neglect at the fact-finding hearing consisted largely of hearsay statements made by the children to a caseworker employed by petitioner, those statements were adequately corroborated by other evidence tending to establish their reliability (*see* § 1046[a] [vi]; *Matter of Gabriel J. [Stacey J.]*, 127 AD3d 667, 667; *Matter of Tristan R.*, 63 AD3d 1075, 1076-1077). Moreover, the children's out-of-court statements to the caseworker cross-corroborated each other (*see Gabriel J.*, 127 AD3d at 667; *Tristan R.*, 63 AD3d at 1076-1077). In sum, we conclude that the children's statements, "together with [the] negative inference drawn from the [mother's] failure to testify, [were] sufficient to support [Family Court's] finding of neglect" (*Matter of Imman H.*, 49 AD3d 879, 880).

The mother failed to preserve her further contention that her attorney was improperly excluded from an in camera examination of two of the subject children (*see Matter of Jennifer WW.*, 274 AD2d 778,779, *lv denied* 95 NY2d 764). In any event, it appears that the limited purpose of the examination was for the court to determine where the children would live during the pendency of the proceeding, and the court did not consider the children's statements at the examination as evidence of the mother's neglect.

Children in a neglect proceeding are entitled to effective assistance of counsel (*see Matter of Jamie TT.*, 191 AD2d 132, 136-137). Here, the appellate AFC for Katie and the appellate AFC for Brian contend that Katie and Brian were deprived of effective assistance of counsel by the Attorney for the Children who jointly represented them as well as their sister Alyssa during the proceeding (trial AFC). Katie's appellate AFC contends that the trial AFC never met with or spoke to Katie. Although an AFC is obligated to "consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2 [d] [1]; *see Matter of Lamarcus E. [Jonathan E.]*, 90 AD3d 1095, 1096), there is no indication in the record whether the trial AFC consulted with Katie. The contention of Katie's appellate AFC is therefore based on matters outside the record and is not properly before us (*see Matter of Gridley v Syrko*, 50 AD3d 1560, 1561; *Matter of Harry P. v Cindy W.*, 48AD3d 1100, 1100).

We agree with Brian's appellate AFC, however, that Brian was deprived of effective assistance of counsel because the trial AFC failed to advocate his position. The Rules of the Chief Judge provide that an AFC "must zealously advocate the child's position" (22 NYCRR7.2 [d]), even if the AFC "believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]; *see Matter of Mark T. v Joyanna U.*, 64 AD3d 1092, 1093-1094). There are two exceptions to this rule: (1) where the AFC is convinced that the "child lacks the capacity for knowing, voluntary and considered judgment"; or (2) where the AFC is convinced that "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]; *see Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1680; *Matter of Lopez v Lugo*, 115AD3d 1237, 1238). Here, there is no dispute that the trial AFC took a position contrary to the position of two of the subject children, Brian and Alyssa, both of whom maintained that Katie was lying with respect to her allegations against the mother. Alyssa expressed a strong desire to continue living with the mother, while Brian said that he wanted to live with either the mother or his father, who entered an

admission of neglect prior to the hearing and was thus not a custodial option. Nevertheless, when the mother moved to dismiss the petition at the close of petitioner's case based on insufficient evidence of neglect, the trial AFC opposed the motion, stating that, although this was "probably not a very strong case," petitioner had met its burden of proof. Also, during his "cross-examination" of petitioner's sole witness, the trial AFC asked questions designed to elicit unfavorable testimony regarding the mother, thus undercutting Brian and Alyssa's position.

Inasmuch as the trial AFC failed to advocate Brian and Alyssa's position at the fact-finding hearing, he was required to determine that one of the two exceptions to the Rules of the Chief Judge applied, as well as "[to] inform the court of the child[ren]'s articulated wishes" (22 NYCRR 7.2 [d] [3]). Here, the trial AFC did not fulfill either obligation (*cf. Matter of Alyson J. [Laurie J.]*, 88AD3d 1201, 1203). Indeed, the record establishes that neither of the two exceptions applied. Because all three children were teenagers at the time of the hearing, there was no basis for the trial AFC to conclude that they lacked the capacity for knowing, voluntary and considered judgment, and there is no evidence in the record that following the children's wishes was "likely to result in a substantial risk of imminent, serious harm to the child[ren]" (22 NYCRR 7.2 [d][3]). According to the trial AFC, the most serious concern he had about the children was that they frequently skipped school which, although certainly not in their long-term best interests, did not pose a substantial risk of *imminent* and serious harm to them. Similarly, the fact that the mother may have occasionally used drugs in the house, and was thus unable to care for the children, does not establish a substantial risk of imminent and serious harm to Brian or Alyssa. Finally, the fact that the mother, on a single occasion, may have struck Katie on the arm with a belt, leaving a small mark, did not establish a substantial risk of imminent and serious harm to Brian or Alyssa if they continued living with the mother.

We note that, although the record does not reveal whether the trial AFC consulted with Katie, it is clear that Katie's position with respect to the neglect proceeding differed from that of her siblings. Under the circumstances, it was impossible for the trial AFC to advocate zealously the children's unharmonious positions and, thus,"the children were entitled to appointment of separate attorneys to represent their conflicting interests" (*Matter of James I. [JenniferI.]*, 128 AD3d 1285, 1286; *see Corigliano v Corigliano*, 297 AD2d 328,329; *Gary D.B. v Elizabeth C.B.*, 281 AD2d 969, 971-972). We therefore remit the matter to Family Court for appointment of new counsel for the children and a new fact-finding hearing.

Finally, the contention of Brian's appellate AFC that there was insufficient evidence of neglect against respondent father is not reviewable on appeal because, among other reasons, the father entered an admission of neglect, and the resulting order was thereby entered upon consent of the parties (*see Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497; *Matter of Violette K. [Sheila E.K.]*, 96 AD3d 1499, 1499; *Matter of Carmella J.*, 254 AD2d 70, 70).

All concur except CENTRA, J.P., and NEMOYER, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent because, in our view, the children received effective assistance of counsel, and we would therefore affirm the order. Respondent mother and respondent father are the parents of Alyssa, Brian, and Katie, who were 15, 13, and 12 years old at the time petitioner filed the neglect petition herein against the parents. The parents lived in separate homes and, at the time of the filing of the petition, the girls lived with the mother and Brian lived with the father. One attorney was assigned to represent the children as Attorney for the Children (trial AFC), as he had done in prior proceedings involving the parents. Ont his appeal, the three children are each represented by a different attorney (appellate AFC), and only the appellate AFCs for Brian and Katie contend that they were denied the effective assistance of counsel by the trial AFC.

As a preliminary matter, we agree with the majority that petitioner established by a preponderance of the evidence that the children were neglected by the parents. The evidence established educational neglect by the mother inasmuch as Brian's and Alyssa's school attendance was poor while they were in the mother's custody (*see* Family Ct Act § 1012 [f] [i] [A]; *Matter of Cunntrel A. [Jermaine D.A.]*, 70 AD3d 1308, 1308, *lv dismissed* 14 NY3d 866). In fact, the school made a PINS referral for Alyssa based on her excessive

absences, but the mother did not follow through with the referral. The evidence also established that the mother inadequately supervised the children inasmuch as she remained in her bedroom for excessive periods of time and was oblivious to the fact that the children were leaving the home to drink alcohol and smoke marihuana (*see* § 1012 [f][i] [B]). Finally, there was evidence that the mother snorted crushed "hydros, oxies," thus supporting the determination that the mother neglected the children by misusing drugs (*see id.*; *Matter of Edward J. Mc. [Edward J. Mc.]*, 92 AD3d 887, 887-888). With respect to the father, he admitted that he inappropriately abused alcohol, which was sufficient to establish that he repeatedly misused alcohol "to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of . . . intoxication" (§ 1046[a] [iii]), and that he thereby neglected the children (*see* § 1012 [f][i] [B]; *Matter of Samantha R. [Laurie R.]*, 116 AD3d 867, 868, *lv denied* 23 NY3d 909; *Matter of Tyler J. [David M.]*, 111 AD3d 1361,1362).

Children who are the subject of a Family Court Act article 10 proceeding are entitled to the assignment of counsel to represent them (§ 249 [a]; § 1016), and the children are entitled to the effective assistance of counsel, or meaningful representation (*see Matter of G.*, 264 AD2d 522, 523; *Matter of Jamie TT.*, 191 AD2d 132, 135-136). As the above evidence shows, the children were neglected by the parents, and the trial AFC understandably argued in summation that petitioner had proven its case. Although the trial AFC did not set forth the wishes of the children, Family Court was aware that Alyssa wanted to live with the mother, that Brian wanted to live with the mother or the father, and that Katie wanted to live with an aunt. Nevertheless, the appellate AFCs for Brian and Katie contend that Brian and Katie were denied effective assistance of counsel because the trial AFC advocated a finding of neglect, which was against the apparent wishes of his clients.

The appellate AFCs and the majority rely on 22 NYCRR 7.2 (d),which provides that the AFC "must zealously advocate the child's position," and 22 NYCRR 7.2 (d) (2), which provides that, "[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests." If an AFC is convinced, however, "that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the [AFC] would be justified in advocating a position that is contrary to the child's wishes" (22 NYCRR 7.2 [d] [3]). We conclude that the trial AFC was reasonably of the view, in light of the evidence supporting a finding of neglect, that there was a substantial risk of imminent, serious harm to the children if they remained in the custody of the parents, and was not ineffective for advocating a finding of neglect (*see generally Matter of Lopez v Lugo*,115 AD3d 1237, 1238). Indeed, we note that in cases where an AFC has been found to have rendered ineffective assistance of counsel to his or her client in a Family Court Act article 10 proceeding, the reason is that the AFC did not do *enough* to establish that the child had been abused or neglected (*see Matter of Colleen CC.*, 232 AD2d 787, 788-789; *Jamie TT.*, 191 AD2d at 137). In addition, even assuming, arguendo, that the exception set forth in 22 NYCRR 7.2 (d) (3) does not apply to the circumstances of this case, we nevertheless would conclude, under all the circumstances presented, that Brian and Katie received meaningful representation (*cf. Jamie TT.*, 191 AD2d at 137; *see generally People v Baldi*, 54 NY2d 137, 147.)

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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, Rochester, New York 14604.

NEWS BRIEFS

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

Save the Date! The Fall Mandatory Seminar for the panel in Nassau County has been scheduled for November 16, 2016, to be held at Hofstra University Law School from 6 p.m. to 9 p.m. The Fall Mandatory Seminar for the panel in Suffolk County has been scheduled for November 14, 2016, to be held at the Suffolk County Supreme Court from 6 p.m. to 9 p.m. The Fall Mandatory Seminar for the panels in Westchester, Orange, Dutchess, Putnam and Rockland counties has been scheduled for October 28, 2016, to be held at the Westchester County Supreme Court from 9 a.m. to 3 p.m. Please note that the scheduling of the Fall Mandatory Seminar for the panels in Kings, Queens, and Richmond Counties has not yet been finalized. Further details for the above mentioned seminars to follow by e-mail.

Second, Eleventh & Thirteenth Judicial Districts (Kings, Queens, and Richmond Counties)

On May 12, 2016, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, and the Kings County Family Court DMR/DMC Committee co-sponsored ***Young Men of Color and the Other Side of Harm: Addressing Disparities in Our Responses to Violence***. The speakers were the Hon. Ilana Gruebel, Kings County Family Court, and Danielle Sered, Executive Director, Common Justice. This seminar was held at the Kings County Family Court, Brooklyn, New York.

On June 17, 2016, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored ***Understanding Immigration Status and Consequences***. The speakers were Marie Mark, Esq., Immigrant Defense Project, and Lee Wang, Esq., Skadden Fellow, Immigration Defense Project. This seminar was held at the Office of Attorneys for Children, Brooklyn, New York. This program was taped and can be viewed online. Please contact Gregory Chickel at gchickel@nycourts.gov to obtain access to our website.

Ninth Judicial District (Westchester, Orange, Rockland, Dutchess, & Putnam Counties)

On May 25, 2016, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, and the Westchester County Women's Bar Association co-sponsored ***A Presentation on the Uniform Interstate Family Support Act (UIFSA)***. The speaker was Professor Merril Sobie, Pace University Law School. This seminar was held at the Westchester County Family Court, White Plains, New York.

The Appellate Division Second Department is certified by the New York State Legal Education Board as an accredited Provider of continuing legal education in the State of New York.

THIRD DEPARTMENT NEWS

New Legislation

As you may be aware, on *June 19, 2016*, was the effective date of new legislation (FCA § 1090-a) giving children a statutory right to participate in permanency hearings, and (FCA Articles 10 and 10-A) governing procedures for release of children to parents, relatives and other suitable persons. Information regarding these changes has been made available to you through an online video, featuring Margaret A. Burt, Esq., along with written materials, which can be found on our webpage at: http://www.nycourts.gov/ad3/OAC/cle.html .

To access the CLE, please email ad3oac@nycourts.gov and provide your name and county of panel membership. You will receive a reply with the *user name* and *password*.

Please be advised that there are new regulations regarding the Indian Child Welfare Act (ICWA) that will apply to cases filed after the effective date (which is yet to be determined), 180 days after the regulations are published in the federal register. These regulations do not essentially modify the Indian Child Welfare Act but clarify some technical details regarding application and some evidentiary processes. If anyone has an ICWA case, it will be important to review these extensive new regulations .

Liaison Committees

A department-wide Liaison Committee meeting was held on Thursday, May 5, 2016 at the Crowne Plaza Resort in Lake Placid and will be held again on Friday, November 4, 2016 at the Office of Attorneys for Children in Albany. The committees provide a means of communication between panel members and the Office of Attorneys for Children. If you have any questions about the meetings, or have any issues of concern that you wish to be on the meeting agenda, kindly contact your liaison committee representative, whose name can be found in our Administrative Handbook, pp. 18-22, http://www.nycourts.gov/ad3/oac/AdministrativeHandbook.

Training News

Training dates for Fall 2016 CLE programs are listed below and agendas are available on the Third Department OAC web page located at: http://www.nycourts.gov/ad3/oac/Seminar_Schedule.html :

Children's Law Update 2016
Friday September 23, 2016
Double Tree by Hilton Hotel - Binghamton, NY

Introduction to Effective Representation of Children
Thursday, October 13 & Friday, October 14, 2016
The Century House Hotel - Latham, NY

Children's Law Update 2016
Friday, October 28, 2016
The Century House Hotel - Latham, NY

Juvenile Sex Offenders and Child Victims of Trafficking
Friday, November 18, 2016
Fort William Henry Hotel - Lake George, NY

Revisions to Article 10- What's Happening in Your County & LGBQGNCT Youth in Foster Care, Friday, December 2, 2016
The Century House Hotel - Latham, NY

Field Trip to Brookwood Correctional Facility on September 9, 2016

A trip to Brookwood Secure Detention Facility, located in Columbia County and operated by OCFS, is planned for *September 9, 2016.* An agenda was emailed to those of you who expressed an interest and desire to meet James LeCain and the students he teaches at Brookwood. In May of 2016, James LeCain was a co-recipient of the NYSBA's Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare presented by the Committee on Children and the Law. Retired from the U.S. Army after 22 years of service, Mr. LeCain has devoted the last 15 years to teaching both high school and college courses at Brookwood. In collaboration with the Columbia Greene Community College, he established the highly successful college program for youth at Brookwood - the only one like it in the country. He also participates in the nationally acclaimed debate competition, "We the People", focusing on good citizenship and civil rights. While so many have given up on youth convicted of serious crimes, Mr. LeCain provides inspiration to us all in seeing the value of education in turning their lives around.

Updated JRP Practice Manuals

The 2016 edition of the Legal Aid Society, Juvenile Rights Practice, Child Welfare Proceedings, Juvenile Delinquency Proceedings and PINS Proceedings Practice Manuals, are now available on the OAC web page located at http://www.nycourts.gov/ad3/Members-Only/JRPPracticeManuals.html. To obtain the access codes, simply email ad3oac@nycourts.gov.

Web page

The Office of Attorneys for Children web page located at nycourts.gov/ad3/oac includes a wide variety of resources, including E-voucher information, online CLE videos and materials, New York State Bar Association Representation Standards, the latest edition of the Administrative Handbook, Administrative Forms, Court Rules, Frequently Asked Questions, seminar schedules and agendas, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The *News Alert* feature currently includes information regarding Language Line, a telephonic interpreter service for use by panel members.

FOURTH DEPARTMENT NEWS

2015 Honorable Michael F. Dillon Awards

Congratulations to the recipients of the 2015 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 2015 Awards were presented to the recipients by Presiding Justice Henry J. Scudder at a ceremony at the M. Dolores Denman Courthouse on June 21, 2016. The recipients are as follows:

FIFTH JUDICIAL DISTRICT

Sherene Pavone, Onondaga County
Jessica Reynolds-Amuso, Oneida County

SEVENTH JUDICIAL DISTRICT

Elizabeth Vander Wal, Livingston County
Robert A. Di Nieri, Wayne County

EIGHTH JUDICIAL DISTRICT

Shannon E. Filbert, Erie County
Laura A. Miskell, Niagara County

UNTIMELY VOUCHERS

The 2015-16 fiscal year closes on September 14. Please send any untimely vouchers to the court, together with a "90-day" affirmation, immediately. This is **mandatory** for vouchers where the case ended on or before March 31, 2015.

SEMINARS

You are not considered registered for a seminar until you have received a confirming e-mail from our office. If you do not receive a confirming e-mail within 3 business days from the date you registered, please call Jennifer Nealon at 585-530-3177.

Fall Seminar Schedule

October 13-14, 2016

Fundamentals of Attorney for the Child Advocacy
Clarion Hotel/Century House
Latham, NY

September 29, 2016

Update
Embassy Suites
Syracuse, NY (full-day, taped)

October 27, 2016

Update
Clarion Hotel
Batavia, NY (full-day, taped)

RECENT BOOKS AND ARTICLES

ATTORNEY FOR THE CHILD

John Hamel, *In the Best Interests of Children: What Family Law Attorneys Should Know About Domestic Violence,* 28 J. Am. Acad. Matrim. Law. 427 (2016)

CHILD WELFARE

Lindsay Gochnour, *Sticks and Stones May Break my Bones, but Words Will Always Hurt me: Why California Should Expand the Admissibility of Prior Acts of Child Abuse,* 43 Pepp. L. Rev. 417 (2016)

Samantha R. Lyew, *Adoption and Foster Care Placement Policies: Legislatively Promoting the Best Interest of Children Amidst Competing Interests of Religious Freedom and Equal Protection for Same-Sex Couples,* 42 J. Legis. 186 (2016)

Thomas A. Mayes, *Understanding Intersectionality Between the Law, Gender, Sexuality and Children,* 36 Child. Legal Rts. J. 90 (2016)

Jessica Forgione Speckman, *Trafficking and the Child Welfare System Link: An Analysis,* 28 J. Am. Acad. Matrim. Law. 391 (2016)

CHILDREN'S RIGHTS

Catherine L. Carpenter, *Throwaway Children: The Tragic Consequences of a False Narrative,* 45 Sw. L. Rev. 461 (2016)

Megan Diffenderfer, *The Rights of Privacy and Publicity for Minors Online: Protecting the Privilege of Disaffirmance in the Digital,* 54 U. Louisville L. Rev. 131 (2016)

Mitchell Osterday, *Protecting Minors From Themselves: Expanding Revenge Porn Laws to Protect the Most Vulnerable,* 49 Ind. L. Rev. 555 (2016)

Mary Beth Tinker, *Mighty Times,* 68 Ark. L. Rev. 895 (2016)

CHILD SUPPORT

Charles J. Meyer et. al., *Child Support Determinations in High Income Families - A Survey of the Fifty States,* 28 J. Am. Acad. Matrim. Law. 483 (2016)

CONSTITUTIONAL LAW

Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws are Constitutional,* 110 Nw. U. L. Rev. 589 (2016)

Daniel Greene, *The Right to "Cure" A Child's Homosexuality?: A Constitutional Analysis of State Laws Banning Sexual Orientation Change Efforts on Minors,* 67 Fla. L. Rev. F. 176 (2016)

Joshua E. Weishart, *Reconstituting the Right to Education,* 67 Ala. L. Rev. 915 (2016)

COURTS

Nicholas Pisegna, *Probable Cause to Protect Children: The Connection Between Child Molestation and Child Pornography,* 36 B.C. J. L. & Soc. Just. 287 (2016)

Dana E. Prescott, *Forensic Experts and Family Courts: Science or Privilege-By-License,* 28 J. Am. Acad. Matrim. Law. 521 (2016)

Myra S. Reyes, *Mandatory Restitution for Enticing a Minor for Sexual Purposes: Additional Punishment or Compensation for the Victim?,* 24 Am. U. J. Gender Soc. Pol'y & L. 401 (2016)

Candice L. Rucker, *Whose Line is it Anyway?:* McDonald v. McDonald *and the Substantive Use of the Guardian Ad Litem's Testimonial Hearsay in Mississippi Chancery Court Proceedings,* 35 Miss. C. L. Rev. 101 (2016)

Kate Stevenson, *A Cadillac, Chevrolet, Pickup Truck, or Convertible:* Endrew F. v. Douglas County School District RE-1 *and a Not-So-Individualized Education Under the "Some Educational Benefit" Standard,* 93 Denv. L. Rev. 797 (2016)

Julie K. Waterstone, *Counsel in School Exclusion Cases: Leveling the Playing Field,* 46 Seton Hall L. Rev. 471 (2016)

Sean Hannon Williams, *Dead Children,* 67 Ala. L. Rev. 739 (2016)

CUSTODY AND VISITATION

David Alan Perkiss, *Boy or Girl: Who Gets to Decide? Gender-Nonconforming Children in Child Custody Cases,* 27 Hastings Women's L. J. 315 (2016)

DOMESTIC VIOLENCE

Filomena Gehart, *Domestic Violence Victims a Nuisance to Cities,* 43 Pepp. L. Rev. 1101 (2016)

Jonathan Grant, *Address Confidentiality and Real Property Records: Safeguarding Interests in Land While Protecting Battered Women,* 100 Minn. L. Rev. 2577 (2016)

Thomas Luchs, *Is Your Client a Good Candidate for Mediation? Screen Early, Screen Often, and Screen for Domestic Violence,* 28 J. Am. Acad. Matrim. Law. 455 (2016)

Kelly F. McTear, *A Practical Primer on Protection From Abuse Law,* 77 Ala. Law. 172 (2016)

Steven P. Shewmaker & Patricia D. Shewmaker, *Domestic Violence and the Military,* 28 J. Am. Acad. Matrim. Law 553 (2016)

Nada J. Yorke, *Avoiding Collusion With Batterers Through Recognition of Covert Behavior for Better Outcomes in Family Court,* 28 J. Am. Acad. Matrim. Law. 563 (2016)

EDUCATION LAW

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FEDERAL COURTS

Error for Court to Fail to Give Full Faith and Credit to Same-Sex Parent Adoption Decree Entered in Another State by Court of Competent Jurisdiction

V.L. and E.L. were two women who were in a relationship from approximately 1995 to 2011. E.L. gave birth to a child in 2002 and to twins in 2004. V.L. and E.L. raised the children together as joint parents, and decided to have V.L. formally adopt them. To facilitate the adoption, the couple rented a house in Georgia. V.L. then filed an adoption petition in Georgia Superior Court. E.L. appeared in the proceeding, and gave her express consent to V.L.'s adoption of the children as a second parent. The Georgia court determined that V.L. had complied with the applicable requirements of Georgia law, and entered a final decree of adoption, allowing V.L. to adopt the children, and recognizing both V.L. and E.L. as their legal parents. V.L. and E.L. ended their relationship in 2011. V.L. filed a petition in the Circuit Court of Jefferson County, Alabama, alleging that E.L. had denied her access to the children and interfered with her ability to exercise her parental rights. V.L. asked the Alabama court to register the Georgia adoption judgment and award her some measure of custody or visitation rights. The matter was transferred to the Family Court of Jefferson County, which entered an order awarding V.L. scheduled visitation with the children. E.L. appealed the visitation order to the Alabama Court of Civil Appeals. E.L. argued, among other points, that the Alabama courts should not recognize the Georgia judgment because the Georgia court lacked subject-matter jurisdiction to enter it. The Court of Civil Appeals rejected that argument, but determined that the Alabama family court erred by failing to conduct an evidentiary hearing before awarding V.L. visitation rights. The matter was remanded for the family court to conduct a hearing. The Alabama Supreme Court reversed, holding that the Georgia court had no subject-matter jurisdiction under Georgia law to enter a judgment allowing V.L. to adopt the children while still recognizing E.L.'s parental rights. As a consequence, the Alabama Supreme Court held that Alabama courts were not required to accord full faith and credit to the Georgia judgment. The Supreme Court reversed. The Alabama Supreme Court erred in concluding that the Georgia statute it relied upon went not to the merits, but to the Georgia court's subject-matter jurisdiction. Where a judgment indicated on its face that it was rendered by a court of competent jurisdiction, jurisdiction was presumed unless disproved. The Georgia statute did not speak in jurisdictional terms. The statute did not become jurisdictional merely because its requirements were mandatory and were strictly construed.

V. L. v E. L., __ US __, 2016 WL 854160 (2016)

COURT OF APPEALS

Definition of Consent in Context of "Mechanical Overhearing of a Conversation" Pursuant to Penal Law § 250.00(2) Included Parent's Vicarious Consent Given On Behalf of Minor Child

The child's non-custodial father recorded a conversation between the child and defendant, the mother's boyfriend. The father was concerned for his son's safety because of the volume and tone of defendant's threats. The father heard defendant and the mother yelling at the child, and defendant threatening to beat him. The recording captured a five-year-old crying while defendant was threatening to hit him 14 times and referring to previous beatings. The trial court allowed the recording to be admitted into evidence. The jury found defendant guilty of all charges, except one assault charge, and sentenced defendant to an aggregate term of seven years' imprisonment, to be followed by three years' post-release supervision. The Appellate Division affirmed, adopting the vicarious consent doctrine, as recognized with respect to the federal wiretap statute by the Sixth Circuit in *Pollock v Pollock*, 154 F3d 601 (6th Cir. 1998), and in New York in *People v Clark*, 19 Misc.3d 6 (2d Dept 2008), *lv denied* 10 NY3d 861. The defendant's contentions were rejected that the recording amounted to eavesdropping in violation of Penal Law Section 250.05, because no party to the conversation consented to the recording, and that the recording was therefore inadmissible under CPLR 4506. Given the similarities between the federal wiretap statute and New York's eavesdropping statute, and recognizing that the vicarious consent exemption was rooted on a parent's need to act in the best interests of his or her child, the court deemed it appropriate to adopt the vicarious consent doctrine as an exemption to Penal Law Section 250.05. In a 4-3 decision, the Court of Appeals affirmed. The definition of consent, in the context of "mechanical overhearing of a conversation" pursuant to Penal Law § 250.00(2) (and the admissibility of evidence under CPLR 4506), included vicarious consent given on behalf of a minor child. The Court's narrowly tailored test for vicarious consent required a court to determine: (1) that a parent or guardian had a good faith belief that the recording of a conversation to which the child was a party was necessary to serve the best interests of the child; and (2) that there was an objectively reasonable basis for this belief. The father's basis was objectively reasonable. Although he may have been in doubt about whether physical harm would ensue, and delayed in providing the recording to the police, the evidence that the child had previously expressed fear of returning home added support to the conclusion that the father had a good faith basis. In these cases, a pretrial hearing must be conducted to determine admissibility. In making the admissibility determination, a court should consider, among other things, the parent's motive or purpose for making the recording, the necessity of the recording to serve the child's best interests, and the child's age, maturity, and ability to formulate well-reasoned judgments of his or her own regarding best interests. The dissenting judges asserted that the legislature's failure to address the matter of vicarious consent in the statute indicated a lack of intent to incorporate such a doctrine into the term "consent."

People v Badalamenti, 27 NY3d 423 (2016)

Exigent Circumstances Justified Warrantless Search of Backpack

Family Court adjudicated respondent a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute unlawful possession of an air pistol, and placed respondent on probation for a period of 18 months. The Appellate Division affirmed. The Court of Appeals affirmed. After the police lawfully took respondent into custody for truancy, his backpack produced a distinctive noise when it came into contact with the police vehicle. One of the officers recognized it as the sound a gun makes when it strikes a vehicle. Respondent gave evasive answers when asked what had caused the sound. The officers, who knew respondent had previously been arrested for robbery, asked him to remove the backpack, and he did so but appeared nervous after he gave up the bag. One of the officers then felt what seemed to be a gun in an exterior pocket. Under the circumstances, even assuming that it amounted to an investigative touching, there was a view of the evidence supporting the determination that the officers had a reasonable suspicion that respondent was armed. When the touching revealed the shape of a gun

in the bag, respondent was arrested. Respondent became agitated and upset, and resisted being handcuffed so that two officers were required to handcuff him. Notably, the officers knew that respondent had started to walk away while being handcuffed during his previous arrest. Once in the vehicle, one of the officers opened and searched the backpack, and found what was later confirmed to be an air pistol. The unmarked vehicle had no partition, and the officer who searched the bag was seated next to respondent on the backseat. The record supported the conclusion that the officers reasonably believed that respondent might gain possession of a weapon. Exigent circumstances, consisting of a legitimate concern about the safety of the arresting officers, justified the warrantless search of respondent's backpack.

Matter of Kenneth S., 27 NY3d 926 (2016)

No Abuse of Discretion in Ordering Three Consecutive Six-month Sentences for Respondent's Willful Failure to Voluntarily Pay Child Support

Family Court revoked two prior suspended orders of commitment, and ordered consecutive six-month sentences for each, to run consecutively with a third six-month sentence imposed for a current violation of an order of child support. The Appellate Division affirmed, rejecting the contention that consecutive commitments were not authorized by Family Court Act Section 454 (3). The Appellate Division further determined that, given the father's failure to contest the amounts due and his willful refusal to voluntarily pay despite repeated opportunities afforded to him over more than three years, there was no abuse of discretion in the determination to run the sentences consecutively. The Court of Appeals affirmed. Family Court acted well after the initial suspension of the earlier orders, but retained jurisdiction on the two suspended commitments because the father failed to completely satisfy the judgments against him and failed to comply with ongoing support obligations. The judicial authority to commit was intended to prevent violations, deter further violations and vigorously and comprehensively enforce Family Court orders, and, accordingly, consecutive sentences were authorized. The statutory scheme provided protection against incarceration to those respondents simply unable to pay.

Matter of Columbia County Support Collection Unit v Risley, __ NY3d ___ , 2016 WL 3147588 (2016)

Error for Court to Make Final Custody Determination Without Conducting Plenary Hearing

After nearly 15 years of marriage, petitioner mother S.L. commenced divorce proceedings against respondent father J.R., seeking full custody of the parties' two children. The father filed an order to show cause seeking temporary sole legal custody of the children, alleging that he feared for their safety based on a series of alleged incidents involving harassment, extramarital affairs, and abuse of alcohol and prescription medication by the mother. Supreme Court granted the father temporary sole interim legal and physical custody of the children and provided for supervised visitation for the mother. The court later received the report of a court-appointed forensic evaluator, who concluded that the father was the more psychologically stable of the two parents. One month later, the court resolved the custody portion of the parties' dispute by awarding the father sole legal and physical custody of the children. With regard to visitation, the court noted that, although the parties planned to continue to make attempts at reinstating therapeutic or supervised visitation, both visitation and family therapy had been suspended for more than five months. The court did not conduct an evidentiary hearing, remarking that a hearing was not necessary in these circumstances because the allegations were not controverted. In support of its determination, the court cited the mother's acknowledgment of her involvement in many incidents of disturbing behavior, and the opinions of the family therapist, the court-appointed forensic evaluator, and the agency supervising visitation. The Appellate Division affirmed. The Court of Appeals reversed. It was error for the court to make a final custody determination without first conducting a plenary hearing. Custody determinations should generally be made only after a full and plenary hearing. Custody determinations required a careful and comprehensive evaluation of the material facts and circumstances. The value of a plenary hearing was particularly pronounced in custody cases given the subjective factors, such as the credibility and sincerity of the witnesses, and the character and temperament of the parents,that were often critical to the court's

determination. The Appellate Division affirmed based on its determination that the court possessed adequate relevant information that enabled it to make an informed and provident determination as to the children's best interests. However, the undefined and imprecise adequate relevant information standard tolerated an unacceptably high risk of yielding custody determinations that did not conform to the best interest of a child, and did not adequately protect a parent whose fundamental right hung in the balance. The trial court appeared to rely on, among other things, hearsay statements and the conclusion of a court-appointed forensic evaluator whose opinions and credibility were untested by either party. A decision regarding child custody should be based on admissible evidence, not mere information. While the trial court purported to rely on allegations that were not controverted, the mother's affidavit called into question or sought to explain the circumstances surrounding alleged incidents of disturbing behavior. These circumstances did not fit within the narrow exception to the general right to a hearing.

S.L. v. J.R., __ NY3d ___, 2016 WL 3188982 (2016)

APPELLATE DIVISIONS

ADOPTION

Father's Consent to Children's Adoption Not Required

Family Court, after a parental status and dispositional hearing, found that respondent father's consent to adoption was not required and that it was in the children's best interests to have their custody and guardianship committed to petitioner and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The court properly determined that the father's consent was not required for the children's adoption because he had only minimal and sporadic contact with the agency and children and he did not provide the children with financial support. A preponderance of the evidence supported the conclusion that it was in the best interests of the children to be adopted. There was no indication that the father was familiar with the children's special needs and they were well-cared for by their foster parents, who wished to adopt them.

Matter of S'Mya Jade R., 135 AD3d 488 (1st Dept 2016)

Father's Consent to Children's Adoption Not Required

Family Court, upon a fact-finding that respondent father's consent to adoption was not required, committed the subject child's custody and guardianship to petitioner and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The court properly determined that the father's consent was not required for the child's adoption because he failed to provide the child with financial support and, while incarcerated, did not make any effort to maintain regular communication with the child, agency, or the person who had custody of the child. The court providently exercised its discretion in denying the father's request for an adjournment of the fact-finding hearing, where he declined to be produced until he could ensure that he would be returned to his preferred prison facility. A preponderance of the evidence supported the determination that it was in the best interests of the child to transfer his custody and guardianship to the agency so he could be adopted by his foster mother. The record did not show that the father's family was interested in obtaining custody of the child.

Matter of Jonathan M. H., 135 AD3d 493 (1st Dept 2016)

Father's Consent to Children's Adoption Not Required

Family Court found that respondent father abandoned the subject child and that his consent to adoption was not required. The Appellate Division affirmed. Clear and convincing evidence supported the court's determination that the father's consent was not required for the child's adoption. The father's admission that he failed to provide financial support for the child was fatal to his claim. Petitioner agency had no obligation to inform the father of his parental obligations. The finding of abandonment was also supported by clear and convincing evidence. The father's two visits to the child at the beginning of the relevant period were insufficient to preclude the finding. The agency was under no obligation to make diligent efforts to encourage the father to visit or communicate with the child.

Matter of Mya Anaya M., 138 AD3d 569 (1st Dept 2016)

Father's Own Misconduct Resulted in Relieving His Multiple Assigned Attorneys

Family Court determined that respondent father's consent for adoption of the subject child was not required. The Appellate Division affirmed. The record supported the court's determination that the father did not meet the statutory criteria to be a "consent" father and that he was only entitled to notice, which he received. The father failed to preserve his due process arguments. In any event, his own misconduct toward his multiple assigned attorneys resulted in their being relieved as counsel and, therefore, the court properly determined that the father exhausted his right to assigned counsel.

Matter of Baby Boy B., 138 AD3d 578 (1st Dept 2016)

Petitioner Failed to Establish She Was Fraudulently Induced to Consent to Adoption

Surrogate's Court properly concluded that petitioner failed to demonstrate by clear and convincing evidence that she was fraudulently induced to consent to her child's adoptions by statements by respondent that petitioner and respondent would be "like sisters," that the child would be enrolled in a yeshiva and would retain his heritage and language, and that the child would always call petitioner "mom." The Appellate Division affirmed. No evidence was presented that even if these promises were made, they were false when made and that respondent did not intend to act upon them.

Matter of E., 138 AD3d 628 (1st Dept 2016)

Petitioner's Consent to Adoption of Subject Child Not Required

The order of disposition, after a hearing, determined that it was in the subject child's best interests to be adopted by his foster parents, terminated the petitioner's parental rights, and dismissed the petitioner's custody petition. The order of fact-finding and disposition determined that the petitioner's consent to the adoption of the subject child was not required and transferred custody and guardianship of the subject child to the Commissioner of Social Services of the City of New York for the purpose of adoption, without further notice to the petitioner. The Appellate Division affirmed. Contrary to the petitioner's contention, the Family Court properly held a hearing in a termination proceeding to determine his status as a consent father. The petitioner intervened in the proceeding, and the issue of whether his consent to the adoption was required was squarely before the court. Even considering the time period after paternity was established, as the Family Court did, the court's determination that the petitioner's consent was not required for adoption was supported by clear and convincing evidence (*see* DRL § 111 [1] [d]). The petitioner failed to establish that he made payments toward the support of his child of a fair and reasonable sum, according to his means, at any time (*see* DRL § 111 [1] [d] [I]). Contrary to the petitioner's contention, the evidence at the dispositional hearing established that the child's best interests would be served by freeing the child for adoption by the foster parents (*see* FCA § 631). A forensic evaluation of the child was unwarranted (*see* FCA § 251), and any error by the Family Court in limiting questions concerning the living arrangements of the child's sibling was harmless given the evidence adduced in the proceedings. Upon the status and best interest determinations, the Family Court properly dismissed the petitioner's custody petition.

Matter of Angel P., 137 AD3d 793 (2d Dept 2016)

Mother's Consent to Adoption Not Required

Family Court determined the biological father's significant other did not have to obtain the mother's consent in order to adopt the subject child. The Appellate Division affirmed. "Consent to adoption is not required of a parent who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so." Here, testimony from the father and the agency caseworker showed that during the relevant six-month period, respondent failed to ask about the child or the child's well being either through email or telephone. Additionally, the child did not receive any cards, letters, gifts or any financial support from respondent. Although respondent argued her lack of contact was due to her incarceration, her lack of financial resources and the no-contact order of protection issued against her on behalf of the child, at the very least, she could have sent a letter. Respondent agreed she did have access to paper and pen and could have written a letter, and could have requested financial assistance for a stamp from family members.

Matter of Hayden II., 135 AD3d 997 (3d Dept 2016)

Father Failed to Satisfy Both Support and Communication Grounds in Order to be Afforded Right to Consent to Adoption

Family Court found the father's consent was not necessary for the adoption of the subject child. The Appellate Division affirmed. A biological father has the right of consent if he has financially supported the child according to his means and if he has "either monthly visitation, when physically and financially able to do so,

or regular communication with the child or the child's caregiver." Only if both these grounds are satisfied can such a determination be made. Although Family Court failed to follow the two-step analysis prior to finding the father did not have the right of consent, the record was sufficiently developed in order for the Appellate Division to make such a determination. The uncontroverted testimony showed the father had never provided any financial support for the child. Although he had been incarcerated for a portion of the two-year period prior to the proceeding, he offered no proof of insufficient income during this time and the absence of a child support order did not excuse his failure to pay. Since both the financial support and communication provisions needed to be satisfied in order to show a right to consent, it was not necessary to address the contact provision.

Matter of Blake I., 136 AD3d 1190 (3d Dept 2016)

Father's Attempts to Maintain Contact With Child Were, at Best, Insubstantial and Sporadic

Family Court granted the adoption petition of the subject child's aunt and uncle, determined the incarcerated father 's consent to adoption was not required and dismissed the father's visitation petition. The Appellate Division affirmed. A biological father's consent to adopt a child over six months old and born out of wedlock is only required if the father has maintained "substantial and continuous contact with the child as manifested by payment of reasonable child support and either monthly visitation or regular communication with the child or custodian," (See, DRL §111(1)(d)). The fact that the father is incarcerated does not relieve him of providing support to the extent of his ability. Here, the evidence showed the father's efforts to maintain contact with the child were at best insubstantial and sporadic. The father's testimony regarding financial support was vague and contradicted by the aunt and the court properly found this element of the statute was not satisfied. Additionally, the father admitted he had not seen the child for seven years and had only spoken with him by telephone once, a year earlier. Although he indicated he periodically sent the child cards and letters, the aunt contradicted this testimony. Although the father stated he did not have an address for the child, the aunt testified she had lived in the same home with her husband for more than 20 years and both her address and telephone number were listed in the phone book, and the father could have accessed this information even if he was incarcerated.

Matter of Ysabel M., 137 AD3d 1502 (3d Dept 2016)

CHILD ABUSE AND NEGLECT

Father Neglected Children by Committing Act of DV Against Mother and Hitting Child

Family Court found that respondent father neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence established that the father neglected the children by committing an act of domestic violence against their mother in the children's presence and hitting the oldest child in the head with an iron during the incident. The court properly credited the testimony of a caseworker that she interviewed the two older children separately and that one of them described the fight between the mother and the father and his brother getting hit by the iron while trying to "save" the mother. The caseworker also testified that she observed a wound on the forehead of the oldest child and that he responded affirmatively when she told him she had been informed that the father caused the wound. The children's out-of-court statements were sufficiently corroborated by each other's statements, the caseworker's personal observations, and the Domestic Incident Report. The court properly denied the father's request for an adjournment of the fact-finding hearing. His excuse that he was required to attend a family reunion in another state did not establish "good cause."

Matter of Clarence S., 135 AD3d 436 (1st Dept 2016)

Child at Imminent Danger Due to Father's Inability to Exercise a Minimum Degree of Care

Family Court found that respondent father neglected the subject child and denied his §1028 request to have the child released to him. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. The record showed that the child was subject to actual or imminent impairment of her emotional and mental condition from exposure to repeated incidents of domestic violence committed by respondent against the child's mother, occurring in

respondent's home, in close proximity to the child, which was exacerbated by respondent's excessive alcohol use. The record also showed imminent danger to the child's well-being in that the child appeared unkempt, smelled, and had not been bathed during a period where the mother had been forced from the apartment to seek help from the father's abusive and violent behavior. An appeal from the denial of an application for return of a child removed in an article 10 proceeding is moot when a decision is made with respect to the charges of abuse or neglect. In any event, there was overwhelming evidence here demonstrating that the denial of the father's request to parole the child was warranted.

Matter of Corine G., 135 AD3d 443 (1st Dept 2016)

Respondent Parents Neglected Their Children

Family Court, after a fact-finding hearing, determined that respondent parents medically neglected the middle child and neglected the subject children by failing to supply them with adequate shelter, and that the father neglected the children by misusing drugs. The Appellate Division affirmed. The agency proved by a preponderance of the evidence that the parents medically neglected the middle child. The parents failed to provide or obtain prompt and proper treatment for the child's full-body rash, which was diagnosed as scabies, despite being advised by a doctor to return to the hospital if the child's rash did not improve. A preponderance of the evidence also supported the court's finding of neglect based upon inadequate shelter. The parents' home was dirty, malodorous, and infested with roaches and bedbugs, and it had a gaping hole in the wall. Although the parents complained to the Housing Authority about the infestations and hole, they failed to take steps to address the odor and dirt. A preponderance of the evidence supported the finding of neglect based on the father's misuse of drugs. The father admitted that he used K2, a synthetic form of marijuana, ever other day, and the expert's testimony established that the active ingredient in K2 was a Schedule I controlled substance. The father failed to establish that he was participating in a rehabilitative program.

Matter of Sahairah J., 135 AD3d 452 (1st Dept 2016)

Respondent Sexually Abused Older Child and Derivatively Abused Younger Child

Family Court found that respondent sexually abused the older child and derivatively abused the younger child. The Appellate Division affirmed. The finding that respondent sexually abused the older child was supported by a preponderance of the evidence. The then 10-year-old child's testimony concerning two incidents where respondent asked the child to lock the door, give him a massage and straddle him, while he bounced her up and down near his private parts and kissed her on the mouth, supported the finding of sexual conduct. That the purpose of respondent's conduct was sexual gratification, rather than innocent horseplay, was properly inferred from the conduct itself and the fact that respondent warned the child not to tell the mother. There was no need for corroboration of the child's testimony. The court's assessment of the child's credibility as she related the traumatic events and responded to cross-examination was entitled to deference. The court properly balanced respondent's due process rights with the child's well-being in allowing the child to testify via closed-circuit television. The finding that respondent engaged in sexual abuse of the older child supported the finding that he derivatively abused the younger child.

Matter of Alejandra B., 135 AD3d 480 (1st Dept 2016)

Mother Posed an Imminent Danger of Harm to Her Child

Family Court determined that respondent mother derivatively neglected the subject child. The Appellate Division affirmed. The record demonstrated by a preponderance of the evidence that the mother posed an imminent danger of harm to the child, even though he was not abused by her, because there were prior orders finding that she neglected and derivatively neglected her other children by inflicting excessive corporal punishment upon two of the child's siblings. The instant petition was filed within four months after the court's finding of neglect regarding one of the child's older siblings. The fact that the mother had completed a court-ordered mental health evaluation, parenting skills and anger management programs, and participated in regular visitation with her other children before the instant proceeding was commenced did not preclude the finding

of derivative neglect. The mother's failure to see a psychiatrist and take medication, which was recommended in her service plan, demonstrated that she failed to take appropriate measures to deal with her mental health issues, and her inability to acknowledge previous behavior supported the conclusion that she had a faulty understanding of the duties of parenthood. The court properly discredited the testimony of the mother's therapist that the mother's condition had improved significantly and she did not need medication inasmuch as the therapist never reviewed the mother's mental health record or notes from her colleagues who also treated the mother, and that she did not have a full understanding of the mental health concerns ACS and other mental health providers had regarding the mother.

Matter of Keith H., 135 AD3d 483 (1st Dept 2016)

Child Educationally Neglected and in Imminent Danger Due to Mother's Mental Illness

Family Court determined that respondent mother neglected her child. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding of neglect based on the child's excessive absences from school - 63 of 73 days during the early portion of the 2012 school year. A preponderance of the evidence also supported the court's finding that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's long-standing history of mental illness and resistance to treatment, which affected her ability to recognize that the child required services and schooling to address his severe behavioral issues.

Matter of Derick L., 135 AD3d 499 (1st Dept 2016)

Respondent Abused One Child and Derivatively Abused and Neglected Other Children

Family Court determined that respondent Keno abused Jordan, for whom he was legally responsible, and derivatively abused and neglected the other subject children. The Appellate Division affirmed. The findings of abuse and derivative abuse were supported by a preponderance of the evidence. The evidence established, among other things, that respondent was the primary caretaker for Jordan, then three years old, and the subject children while their mother was at work. When the mother returned home in the evening, respondent told her that Jordan was not feeling well. Later that night, Jordan was found by the mother to be unresponsive. He went into cardiac arrest and was brought to the hospital early the next morning, where he died, despite efforts to resuscitate him. An autopsy revealed that Jordan had bruises and that he sustained blunt force trauma to his abdomen, resulting in crushing and tearing his bowel and mesentery, which led to cardiac arrest. The medical examiner testified that the injuries were not accidental and would have been inflicted hours earlier. After petitioner made its prima facie case of abuse, respondent failed to provide a reasonable explanation for the injuries so as to rebut the presumption that he was responsible for them. The finding of derivative abuse of the other children was warranted by the nature and severity of the direct abuse of Jordan, which demonstrated parental judgment so impaired as to place the other children, for whom respondent was legally responsible, at substantial risk of harm.

Matter of Semenah R., 135 AD3d 503 (1st Dept 2016)

Neglect Finding Supported by Evidence of Father's DV Against Mother

Family Court found that respondent father neglected the subject children. The Appellate Division affirmed. The court's finding of neglect was supported by a preponderance of the evidence, including testimony that the father had engaged in a severe act of domestic violence against the mother by stabbing her multiple times in their apartment while the children were in another room. The evidence showed that the elder child heard the mother screaming for help and the mother was hospitalized for a month as a result of the incident. A single incident of domestic violence can be sufficient to support a finding of neglect where, as here, the father's judgment was strongly impaired and the children were harmed or in imminent danger of being harmed.

Matter of Moises G., 135 AD3d 527 (1st Dept 2016)

Findings of Derivative Severe Abuse Against Respondent Affirmed

Family Court found that respondent father derivatively

severely abused the subject child. The Appellate Division affirmed. The court's determination that the father severely derivatively abused his biological son is supported by clear and convincing evidence. The record supported the court's finding that the father was the primary caretaker for his son and his son's half-siblings, and that he abused one of those children, a three-year-old girl, in a manner so severe that it caused her death. The medical examiner testified that the girl's death was a homicide, caused by a blow to her abdomen powerful enough to rip her bowel, and that she had numerous patterned abrasions on her body indicative of child abuse. The agency thus established a prima facie case of severe abuse and the father failed to offer any evidence or testify as to an explanation. Based upon the finding of severe abuse of the girl, the court correctly determined that the father's son was severely derivatively abused even without direct evidence of injuries sustained by that child.

Matter of George S., 135 AD3d 563 (1st Dept 2016)

Children in Imminent Danger Due to Exposure to Repeated Incidents of DV

Family Court determined that respondent parents neglected the subject children. The Appellate Division affirmed. The findings of neglect were supported by a preponderance of the evidence. The record showed that the children were subject to actual or imminent danger of injury or impairment of their emotional and mental condition from exposure to repeated incidents of domestic violence occurring in respondents' one-room house, in close proximity to the two young children. The out-of-court statements made by the father in front of police officers who had been summoned were properly admitted under the excited utterance exception to the hearsay rule. Also, the father's statements were corroborated by, among other things, the parents' certified hospital records, which showed that the father suffered a stab wound and the mother had bruise marks and human bite marks.

Matter of Naveah P., 135 AD3d 581 (1st Dept 2016)

Petitioner Neglected Children

Family Court determined that respondent, a person legally responsible for the care of the two subject children, neglected them. The Appellate Division affirmed. Petitioner demonstrated, by a preponderance of the evidence, that respondent neglected the children by his admissions that he punched one of the children in the face to extract a loose tooth and by his diagnosis of post-traumatic stress disorder, bipolar disorder and depression, and the testimony of the caseworker about statements by the older children that respondent choked the mother in front of them, threatened to kill the mother, the children, and the caseworker, and that he choked one of the children. The evidence concerning respondent's conduct with respect to the mother and older child was sufficient to support a finding of neglect as to the youngest child.

Matter of Angelina M., 135 AD3d 651 (1st Dept 2016)

Children in Imminent Danger Due to Exposure to Repeated Incidents of DV

Family Court dismissed petitions alleging that respondent father neglected one of the subject children and derivatively neglected the two other children. The Appellate Division reversed, entered findings of neglect and derivative neglect against the father and remanded to the court for a dispositional hearing. The findings of neglect were supported by a preponderance of the evidence. The evidence established that the father intentionally burned one of the children, who was then almost four years old, with a cigarette after he became angry with her for taking a toy from another child. Thus, the father inflicted excessive corporal punishment on the child thereby failing to provide her with proper supervision or guardianship. A daycare worker testified that she noticed a burn mark on the child's arm and when asked about it, the child respondent that her daddy burnt her with a cigarette. An agency caseworker testified that the child said she got the mark from "poppy." The child's out-of-court statements were corroborated by a photo of the mark on the child's arm, as well as the caseworker's testimony about her observations of the injury. The father's testimony, which was credited by the court, that the injury was caused by accidental contact with the cigarette was inherently improbable, because of the location of the burn, the father's varying accounts of how the accident occurred, and his testimony that no mark appeared until the next day and was no larger than a mosquito bite and never as bad as the photo depicted. The fact that the

child's injury was the result of a single instance did not preclude the finding of excessive corporal punishment, though it might be relevant to disposition. The father derivatively neglected the other two children, who were present when he intentionally burned the other child, because the record demonstrated that his parental judgment was so impaired as to create a substantial risk of harm for any child in his care.

Matter of Nataysha O., 135 AD3d 660 (1st Dept 2016)

Determination That Mother Neglected Daughter Reversed; Determination That Daughter Neglected Her Child Affirmed

Family Court determined that respondent mother Maria neglected her daughter Angie and that Angie neglected her child. The Appellate Division reversed the former determination and affirmed the latter. Petitioner failed to demonstrate, by a preponderance of the evidence, that respondent Maria educationally or medically neglected her daughter Angie. The record showed that Maria faced formidable obstacles, including a language barrier and Angie's violent and destructive behavior, which made it very difficult to get Angie to attend school. Further, at the time the petition was filed, Angie was not in imminent danger as a result of Maria's failure to attend to Angie's medical needs. Although Maria did not succeed in getting Angie into a drug treatment program, she believed Angie had stopped using drugs and alcohol during Angie's pregnancy and she attended therapy with Angie to address those and other issues. The evidence of Angie's admitted drug use during pregnancy, including testing positive for marijuana at the time of her child's birth, was sufficient to sustain the neglect finding against her. Additionally, a presumption of neglect was triggered by Angie's substantial history of drug and alcohol abuse, including at least one occasion when she overdosed and blacked out, for which she never sought treatment. Angie failed to rebut this presumption - her participation in therapy with Maria was not a substitute for a drug treatment program, and the lack of harm to Angie's child was irrelevant.

Matter of Chastity O. C., 136 AD3d 407 (1st Dept 2016)

Mother's Untreated Psychiatric Condition Placed Child at Imminent Risk

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence established that there was a substantial probability the mother's untreated psychiatric condition and substance abuse problems would place the child at imminent risk if released to her care. Although evidence of a parent's mental illness alone is not a basis for finding neglect, here it was appropriate, because the mother displayed a lack of insight into the effects of her illness on her ability to care for the child.

Matter of Lakiyah M., 136 AD3d 424 (1st Dept 2016)

Finding of Neglect and Suspension of Visitation Affirmed

Family Court found that respondent mother neglected the three older subject children and derivatively neglected the youngest child. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that the mother neglected her three oldest children by, among other things, excluding her 15-year-old daughter from the house overnight and engaging in bizarre behaviors indicative of paranoid ideation. The mother's behavior toward the three older children demonstrated such a flawed understanding of her parental responsibilities as to support a finding of derivative neglect with respect to the younger child. The court properly suspended supervised visitation with the younger child, given a psychiatric evaluation finding that the mother's prosecutory ideation and functional impairment were strongly suggestive of psychotic disorder and in light of the evidence that the child had nightmares and feared returning to the mother's care.

Matter of Justine N., 136 AD3d 452 (1st Dept 2016)

Father Neglected Child by Inflicting Excessive Corporal Punishment

Family Court determined that respondent father neglected his child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent neglected his children through excessive corporal punishment and misuse of alcohol to the point

where he lost control of himself and injured the child, based upon the testimony of the caseworker and the foster mother concerning the child's statements to them and their observations of bruises on the child, and the testimony of a neighbor who witnessed the incident. The child's out-of-court statements were properly corroborated.

Matter of Dante W., 136 AD3d 473 (1st Dept 2016)

Imminent Risk of Impairment Due to Mother's Mental Condition

Family Court found that respondent mother neglected her child. The Appellate Division affirmed. A preponderance of the evidence showed that the child's physical and mental condition had been impaired or was in danger of becoming impaired as a result of the mother's mental condition. There was evidence, among other things, that the mother did not take her medication on a consistent basis, and that the child's two facial injuries were not adequately explained, as well as diaper rash that became more severe after the mother failed to fill the child's prescription.

Matter of Melanie C., 136 AD3d 512 (1st Dept 2016)

Respondent Sexually Abused Older Child and Derivatively Neglected Younger Child

Family Court found that respondent sexually abused the older child and granted summary judgment to petitioner on the issue of derivative neglect of the younger child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent abused the older child for whom he was responsible. The child's unsworn out-of-court statements were sufficiently corroborated by the expert testimony of a psychotherapist specializing in child sexual abuse. Respondent's expert's testimony was insufficient to rebut the psychotherapist's opinion. The inconsistencies among the child's statements were minor and peripheral. The absence of physical injury to the child was not fatal to the finding. The court was entitled to draw a negative inference against respondent from the fact that he did not testify. There was no issue of fact whether respondent derivatively neglected the younger child, who was born during the proceedings concerning the older child, since the abuse of the older child was proximate in time to the derivative proceeding, and respondent acknowledged that he refused to complete a sex offender program as ordered.

Matter of Skylean A.P., 136 AD3d 515 (1st Dept 2016)

Respondent Neglected Child by Inflicting Excessive Corporal Punishment

Family Court determined that respondent mother neglected her son and derivatively neglected her daughter. The Appellate Division affirmed. A preponderance of the evidence, including the testimony of the son, supported the determination that respondent inflicted excessive corporal punishment upon the son. The punishments ranged from the use of a belt to strike him to forcing him to kneel on rice while naked, resulting in ACS intervention. The mother was arrested after an altercation where she scratched the child, drawing blood, and kneed him in the groin. That evidence, and the evidence that the mother had subjected the daughter to excessive corporal punishment in the past, supported the finding of derivative neglect with respect to the daughter. The evidence also supported the court's determination that the children's best interests were served by releasing them to the custody of their father, even though his apartment was overcrowded, because he was ably attending to their medical, educational and psychological needs.

Matter of Joseph R., 137 AD3d 420 (1st Dept 2016)

Respondent Failed to Address Son's Numerous Long-standing Needs

Family Court determined that respondent mother neglected her child and derivatively neglected her other children. The Appellate Division affirmed. A preponderance of the evidence showed that the mother neglected the child by failing to address his numerous long-standing needs and by failing to comply with the dispositional order in an earlier neglect proceeding against her. The court properly drew a negative inference from the mother's failure to testify. The mother's failure to address the child's problems supported the finding of derivative neglect with respect to the other children. Additionally, two of the other children were having difficulty in school and had

hygiene problems, and there was a prior derivative neglect finding with respect to three of the other children.

Matter of Julio O., 137 AD3d 454 (1st Dept 2016)

Imminent Risk of Impairment Due to Mother's Mental Condition

Family Court found that respondent mother neglected her child. The Appellate Division affirmed. A preponderance of the evidence showed that the mother neglected her child by reason of her untreated mental illness and failure to provide adequate supervision and guardianship, which caused a substantial probability that the child would be at imminent risk of harm in her care. The hospital records and caseworkers' testimony indicated that the mother suffered from paranoid delusions, evidenced by her belief that her neighbors were talking about her and harassing her, and that she was friends with an international pop star. Further, although the child's teeth were visibly decayed, the mother failed to seek dental care for him, demonstrating her failure to provide him with basic dental care. Expert testimony about how the mother's mental illness affected the child was not required.

Matter of Michael P., 137 AD3d 499 (1st Dept 2016)

Child in Imminent Danger After Respondent Became Intoxicated and Assaulted Child and Child's Father

Family Court found that respondent mother neglected her child. The Appellate Division affirmed. Petitioner agency proved by a preponderance of the evidence that respondent neglected her child. She placed the child in imminent danger when she became intoxicated, assaulted the child's father in the presence of the child, and assaulted the child. Her participation in and completion of 12 weeks of intensive outpatient treatment after the neglect petition was filed, while positive, did not warrant a different result on the issue of neglect.

Matter of John S., 137 AD3d 706 (1st Dept 2016)

Respondent Sexually Abused His Stepdaughters

Family Court found that respondent sexually abused his stepdaughters and derivatively abused his five biological children. The Appellate Division affirmed. The record supported the court's determination that respondent was a person legally responsible for the children referred to as his stepdaughters, and that a preponderance of the evidence demonstrated that he sexually abused them. The stepdaughters' out-of-court statements that respondent was inappropriately touching them was sufficiently corroborated by respondent's statements that, although he knew his "roughhousing" was making then uncomfortable, he continued to touch them. The fact that one of the stepdaughters vaguely recanted her statements did not render her initial statements incredible. The fact that the stepdaughters did not have a physical injury or other corroboration did not require a different result. Respondent presented no credible evidence in his defense. A preponderance of the evidence supported the court's determination that respondent derivatively abused his own five children. The caseworker testified that one of respondent's stepdaughters told her that three of the other children were present on the bottom bunk when respondent sexually abused her, thereby demonstrating that he had a fundamental defect in his understanding of his parental obligations. The court providently exercised its discretion in granting the stepdaughters' attorney's motion to quash respondent's subpoena to compel one of the stepdaughters to testify at the hearing, because the letter from the child's psychotherapist and the affidavit of the child's social worker provided evidence regarding the potential psychological harm that testifying would cause the child.

Matter of Lesli R., 138 AD3d 488 (1st Dept 2016)

Parents Medically Neglected Child

Family Court, upon a fact-finding determination that respondent parents neglected the subject child, transferred custody and guardianship of the child to petitioner until the next permanency hearing, and directed the parents to comply with services, consistently visit the child, and keep ACS apprised of their whereabouts. The Appellate Division affirmed. The court properly found that the parents medically neglected the child, who was excessively underweight,

by failing to comply with the recommendations of the child's doctor or seek other medical advice, and by not returning the child for diagnosis and treatment for almost six months. The court also properly found that the child was neglected by reason of the father's mental illness, which was documented by the records of the hospital where he was involuntarily committed for two weeks and which diagnosed him with psychosis. The mother admitted to a caseworker and hospital staff that she was aware that the father was acting strangely, that she did not want him to kiss the child because she was afraid that he might bite the child, and that he engaged in a monologue with himself for two hours, displayed mood instability, and had angry outbursts. The court correctly determined that the child was also neglected by the father's admitted almost daily use of marijuana and his refusal to seek treatment.

Matter of Nadia S., 138 AD3d 526 (1st Dept 2016)

Finding of Derivative Abuse Affirmed

Family Court, after a fact-finding hearing, determined that respondent mother derivatively neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence demonstrated that the mother posed an imminent danger of harm to the child, based upon prior orders finding that she had neglected and derivatively neglected her other children, by admitting that she was aware that her paramour had sexually abused one of her children, but continued to be involved with him. The instant petition was filed less than one year after the court's finding of neglect of the child's older siblings, and thus the prior findings of neglect were sufficiently proximate in time to the instant proceeding. The finding of derivative neglect with respect to the subject child was appropriate because the mother's previous behavior demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in her care. The mother's failure to plan apart from her paramour, and her noncompliance with her service plan, demonstrated that she failed to take appropriate measures to address the issues that led to the prior neglect findings.

Matter of Jaci Robert B. A., 138 AD3d 550 (1st Dept 2016)

Child in Imminent Danger of Impairment As a Result of Mother's Failure to Provide Shelter

Family Court found that respondent mother neglected the subject child as a result of her failure to provide adequate shelter. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. The unemployed mother moved out of her parents' stable home to live in a shelter with her child, then two years old, because she did not want to abide by house rules. She was only able to qualify for shelter placement by obtaining an order of protection against her mother on false grounds. The shelter later discharged the mother because she failed to comply with its rules. For at least a week thereafter, instead of returning to her parents' home, she spent nights with the child riding on subway trains and at the home of a friend, whose last name and address she could not provide. When the mother and child returned to her parents' home, the child's maternal grandfather observed that the child looked "pale," not " well taken care of," and "hungry."

Matter of Anthony B., 138 AD3d 563 (1st Dept 2016)

Parents Failed to Provide a Reasonable and Adequate Explanation for Child's Injuries

The order of disposition, after a dispositional hearing, denied the separate applications of the mother and the father for a suspended judgment. The mother and father both appealed. Their appeals from the order of disposition brought up for review an order of fact-finding of that court dated April 29, 2014, which, after a fact-finding hearing, found that the mother and the father abused the child M. and derivatively abused the child A. Upon reviewing the record, the Appellate Division found that the petitioner established a prima facie case of child abuse. The mother and the father failed to provide a reasonable and adequate explanation for M.'s injuries, and the Family Court properly determined that the mother and the father derivatively abused A. Further, the Family Court did not improvidently exercise its discretion in denying the separate applications for a suspended judgment.

Matter of Angelo S., 135 AD3d 944 (2d Dept 2016)

Corroborating Evidence included Eyewitness Testimony and Photographs

The record supported the Family Court's determinations that the mother abused the subject child A. and derivatively abused A.'s sibling. Among the corroborating evidence was eyewitness testimony as to the mother's physical abuse of A. and photographs of his injuries. Additionally, the court's credibility determinations were supported by the record. Furthermore, the evidence of the mother's conduct toward A., often in the presence of A.'s sibling, demonstrated a fundamental defect in her understanding of the duties of parenthood, such that the Family Court properly found that the mother had derivatively abused A.'s sibling. The Family Court did not improvidently exercise its discretion in granting that branch of the father's petition which was to modify the prior order of custody as to A. The evidence that the mother abused A. and derivatively abused A.'s sibling, as well as the mother's lack of insight into her conduct, provided a sound and substantial basis in the record supporting the court's determination that a change in circumstances required modification of the prior order to protect the best interest of A.

Matter of Deatrus Amir D., 136 AD3d 900 (2d Dept 2016)

Full Evidentiary Hearing Required

In a child protective proceeding, the father moved to prohibit the foster care agency from administering any psychotropic drug to the subject child. At a conference before the Family Court, the father requested a full evidentiary hearing on his pending motion. In the order appealed from, the Family Court denied the father's request for a full evidentiary hearing, stating that the motion would be decided on submission only. Under the circumstances of this case, the Family Court should have granted the father's request for a full evidentiary hearing on his motion in order to make a determination as to whether the proposed treatment of the subject child was narrowly tailored to give substantive effect to the child's liberty interest, taking into consideration all relevant circumstances, including the child's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment, and any less intrusive alternative treatments. Order reversed.

Matter of Isaiah T.F.C., 136 AD3d 687 (2d Dept 2016)

Evidence of Mother's Repeated Misuse of Drugs Supported Finding of Neglect

The order of fact-finding and disposition, upon a decision of that court, made after a fact-finding hearing, found that the mother neglected the subject children. The mother appealed. The Appellate Division affirmed. Here, the petitioner established, by a preponderance of the evidence (*see* FCA § 1046 [b] [i]), that the mother had repeatedly misused a drug or drugs to the extent that such misuse had the effect of producing in her a substantial state of stupor, unconsciousness, disorientation, or incompetence, or a substantial impairment of judgment, and that this constituted prima facie evidence that the children were neglected (*see* FCA § 1046 [a] [iii]). The mother failed to rebut this showing. Accordingly, the Family Court correctly found that the mother neglected the subject children within the meaning of FCA § 1046 (a) (iii).

Matter of Chrystal W., 136 AD3d 835 (2d Dept 2016)

Child's Out-of-Court Statements Sufficiently Corroborated

The Family Court's finding that the respondent sexually abused the subject child was supported by a preponderance of the evidence (*see* FCA §§ 1012 [e] [iii]; 1046 [b] [i]; PL §§ 130.65 [3]; 130.52 [1]). The testimony of the petitioner's expert witness, who was an expert in the field of child sexual abuse, provided sufficient corroboration to support the reliability of the subject child's out-of-court statements regarding the respondent's sexual abuse of her (*see* FCA § 1046 [a] [vi]). Furthermore, the record supported the court's finding that the respondent derivatively neglected four other children, as the respondent's sexual abuse of the subject child demonstrated a fundamental defect in his understanding of his duties as a person with legal responsibility for the care of children.

Matter of Angel R., 136 AD3d 1041 (2d Dept 2016)

Record Did Not Support Dismissal of Petitions; Child's Out-of-Court Statements Sufficiently Corroborated

The petitioner commenced two related child protective proceedings, alleging that the respondent E.G. sexually abused the then four-year-old child N.C. and derivatively abused his son, the child J.G. The petitioner further alleged that the respondent C.J., N.C.'s mother, neglected N.C. by failing to take the child to counseling and failing to administer anti-HIV medication to the child after the discovery of the alleged sexual abuse. Following a fact-finding hearing, the Family Court found that the petitioner failed to prove that E.G. abused N.C. and derivatively abused J.G., and dismissed the petitions. The petitioner appealed. Contrary to the Family Court's determination, the petitioner met its burden of establishing, by a preponderance of the evidence (*see* FCA § 1046 [b] [i]), that E.G. abused N.C. and derivatively abused J.G. (*see* FCA § 1012 [e]). A child's out-of-court statements may form the basis for a finding of abuse if they are sufficiently corroborated by other evidence tending to support the reliability of the child's statements (*see* FCA § 1046 [a] [vi]). Here, the testimony of C.J. regarding her observations of E.G. and N.C. in bed together was sufficient to corroborate the child's statements regarding the acts of abuse. Contrary to the Family Court's determination, the inconsistencies in C.J.'s accounts of her observations did not render her testimony unworthy of belief. Accordingly, the evidence adduced at the hearing established that E.G. abused N.C. and derivatively abused J.G. However, the Family Court properly dismissed the neglect petition against C.J. The hearing evidence did not establish, by a preponderance of the evidence, that C.J. failed to provide child, N.C., with adequate medical care so as to impair the child's physical, mental, or emotional condition or place the child in imminent danger of such impairment. Order modified.

Matter of Christine J.-L., 137 AD3d 781 (2d Dept 2016)

Record Amply Supported Finding of Neglect Based upon Sexual Abuse

Contrary to the father's contention, the evidence adduced at the fact-finding hearing, including the sworn testimony of the subject child F., was sufficient to prove by a preponderance of the evidence that he sexually abused her. Moreover, the father's intent to receive sexual gratification (*see* PL § 130.00 [3]) may be inferred from the nature of the acts committed and the circumstances in which they occurred. Furthermore, while parents have the right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect (*see* FCA § 1012 [f] [i] [B]). A single incident of excessive corporal punishment may suffice to sustain a finding of neglect. Here, the Family Court's finding that the father used excessive corporal punishment against F. and her sibling was supported by a preponderance of the evidence. Moreover, the Family Court properly found that the father's failure to seek medical attention for F.'s gynecological conditions constituted medical neglect. Under the circumstances of this case, the preponderance of the evidence supported a finding that the father derivatively abused and neglected the subject child's two siblings, but did not support a finding that he derivatively abused and neglected another sibling, N., as he turned 18 during the pendency of the fact-finding hearing, and the evidence established that he was not home when the sexual abuse occurred and that the father's conduct did not create a substantial risk of harm to him. As such, there was insufficient evidence to establish that N. was derivatively abused and neglected.

Matter of Shaquan A., 137 AD3d 1119 (2d Dept 2016)

Father's Relocation to Georgia Not a Valid Basis for Dismissing Neglect Petitions

After a fact-finding hearing, the Family Court determined that the petitioner had established neglect by a preponderance of the evidence. However, noting the respondent's relocation to Georgia, the court determined that it could not enter a meaningful order of disposition and dismissed the petitions pursuant to FCA § 1051(c). The petitioner appealed. The Family Court properly determined that a preponderance of the evidence established that the respondent neglected the subject children by engaging in an act of domestic violence against the mother in the children's presence, which created an imminent danger of impairing the children's physical, mental, or emotional condition (*see* FCA §§ 1012[f][i]; 1046[a][vi], [b][i]). However, the Family

Court erred in dismissing the petitions pursuant to FCA § 1051(c). The respondent's relocation to Georgia did not provide a basis for determining that the aid of the court was not required. The respondent is the biological father of one of the children and could return to New York at any time. Moreover, the children were still minors, and the finding of neglect could prove significant in any future court proceeding. The Family Court's determination that it could not enter a meaningful order of disposition under these circumstances was not a valid basis for dismissing the petitions pursuant to FCA § 1051(c), and, in any event, was incorrect as a matter of law (*see* FCA §§ 1052[a]; 1056[1]).

Matter of Zeykis B., 137 AD3d 1121 (2d Dept 2016)

Petitioner Failed to Establish Derivative Neglect

The Administration for Children's Services (hereinafter ACS) commenced two related proceedings alleging that the mother derivatively neglected the subject child, J., and neglected her sibling, a twin. The children were both 15 when the petitions were filed. After a fact-finding hearing, the Family Court found that ACS established by a preponderance of the evidence that the mother neglected J. by inflicting excessive corporal punishment on her. With respect to J's sibling, the court found that the evidence of the mother's use of excessive force to discipline J. was insufficient to support a determination that she derivatively neglected J.'s sibling. It was noted that J.'s sibling did not wish to participate in the neglect proceedings and had not been the subject of any physical attacks. ACS appealed from the order dismissing the petition concerning J.'s sibling. Although FCA § 1046 (a) (i) allows evidence of abuse or neglect of one sibling to be considered in determining whether other children in the household were abused or neglected, the statute does not mandate a finding of derivative neglect. The focus of the inquiry to determine whether derivative neglect is present is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent's understanding of the duties of parenthood. Such flawed notions of parental responsibility are generally reliable indicators that a parent who has abused or neglected one child will place his or her other children at substantial risk of harm. Here, ACS did not establish by a preponderance of the evidence that J.'s sibling was derivatively neglected. Thus, the Family Court properly dismissed the petition.

Matter of Jahmya J., 137 AD3d 1132 (2d Dept 2016)

Record Did Not Support Family Court's Finding That Child Was in Imminent Risk of Harm If Left with Mother

In a child protective proceeding, the court is not required to wait until a child has already been harmed before it enters a finding of neglect. A finding may be entered even in the absence of actual harm when a preponderance of the evidence proves that the child's "physical, mental or emotional condition . . . is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care" (*see* FCA § 1012 [f] [I]). Moreover, a neglect finding is proper upon proof of the causal connection between a parent's mental illness and requisite potential harm to the child. Here, the subject child was less than four months old when the mother's serious mental illness presented in the form of paranoia and delusions at a homeless shelter. The mother called the police numerous times to report people outside the shelter threatening her and the child, which the evidence at the hearing established were delusions. A witness at the hearing had observed the child, dressed only in a diaper, shivering by an open window on a cold night while the mother was distracted by these delusions. The mother was hospitalized that night, and the child was removed from her custody. Moreover, the mother's accounts of what she believed she had seen became more vivid and unrealistic over successive recountings. Further, at the fact-finding hearing, it was established that the mother did not follow up in mental health evaluations and it became clear that her condition had not resolved. Under these circumstances, the Family Court's finding that the subject child was not in imminent risk of harm if left with the mother could not be sustained. Accordingly, the order was reversed, the petition was reinstated, the Appellate Division found that the subject child was a neglected child within the meaning of FCA § 1012 (f), and the matter was remitted to the Family Court for a dispositional hearing and a determination thereafter.

Matter of Kiemiyah M., 137 AD3d 1279 (2d Dept 2016)

Father Knew or Should Have Known of the Abuse Inflicted upon the Child by the Mother and Maternal Grandmother, and Failed to Take Any Action to Protect the Child

In September 2010, four-year-old M.P. died while in the care of her mother and maternal grandmother. Based upon the autopsy results, the manner of her death was a homicide, and the cause of death was child abuse syndrome, acute drug poisoning, blunt impact injuries, and malnutrition with dehydration. Thereafter, the Administration for Children's Services (hereinafter ACS) filed petitions against M.P.'s mother and the maternal grandmother, alleging that they abused M.P. and derivatively abused her two siblings, T. and T., and that the father neglected M.P. and derivatively neglected T. and T. ACS further alleged that the father neglected all three children based upon his misuse of marijuana. Subsequently, the maternal grandmother was convicted of manslaughter in the second degree, unlawful imprisonment in the second degree, and endangering the welfare of a child in connection with M.P.'s death. Following her conviction, ACS moved for summary judgment against the maternal grandmother. Her counsel did not oppose the motion. In an order of fact-finding dated July 23, 2012, the Family Court found, inter alia, that the maternal grandmother abused M.P., and derivatively abused T. and T. In an order dated July 8, 2013, after a fact-finding hearing, the court found that the father neglected M.P., derivatively neglected T. and T., and neglected all three children due to his repeated misuse of marijuana. After completing a permanency hearing, the Family Court conducted a dispositional hearing at which the father failed to appear. In an order of disposition dated March 28, 2014, the Family Court directed supervised visitation between the father and T. and T., and placed those children in the custody of the Commissioner of Social Services until the completion of the next permanency hearing. The maternal grandmother appealed from the order of fact-finding dated July 23, 2012, and the order of disposition, and the father appealed from the order of fact-finding dated July 8, 2013, and the order of disposition. Contrary to the maternal grandmother's contentions, she was not deprived of the effective assistance of counsel. The maternal grandmother's criminal convictions during the period of time that T. and T. were present in her home and also being cared for by her demonstrates, that any argument her counsel could have made in opposition to summary judgment on the issue of her derivative neglect of those children, would have had little or no likelihood of success. ACS demonstrated by a preponderance of the evidence that the father neglected M.P., since the father knew or should have known of the abuse inflicted upon M.P. by the mother and maternal grandmother, and failed to take any action to protect M.P. Moreover, given the father's failure to exercise a minimum degree of care as to M.P., ACS also proved by a preponderance of the evidence that he derivatively neglected T. and T. Contrary to the father's contention, the Family Court's finding that he neglected all three children based upon his misuse of marijuana was supported by a preponderance of the evidence (*see* FCA § 1046 [a] [iii]).

Matter of Loretta B.-B., 137 AD3d 1286 (2d Dept 2016)

Evidence Demonstrated Parents Regularly Abused Alcohol

Here, the evidence presented by the agency at the fact-finding hearing demonstrated that the parents regularly abused alcohol to the extent of intoxication. Therefore, pursuant to FCA § 1046 (a) (iii), the agency established a prima facie case of neglect. A caseworker testified that she visited the family's home and personally observed the parents to be intoxicated. The record also reflected that in the past few years prior to the fact-finding hearing, both parents had been admitted to a hospital for severe intoxication, that they had been diagnosed with alcoholism and/or continuous alcohol abuse, and that neither had pursued treatment. In addition, the caseworker testified that the child, who was then 14 years old, informed the caseworker that the parents drank every day, that they regularly became intoxicated, and that she believed they needed help. In light of this evidence, the agency established a prima facie case of neglect, and the Family Court should not have dismissed the petition on the ground that the agency failed to present any evidence of actual harm or risk of imminent harm to the child. Order reversed.

Matter of Vita C., 138 AD3d 739 (2d Dept 2016)

No Error in Rejecting Child's Out-of-Court Recantation

The petitioner established by a preponderance of the evidence that the respondent sexually abused and neglected his daughter E.M. The evidence adduced at the fact-finding hearing established that E.M. made consistent, detailed, and explicit out-of-court statements to a child protective agency caseworker, a detective, and a school social worker, describing incidents of sexual abuse by the respondent. The record supported the Family Court's determination that the testimony of the petitioner's child sexual abuse expert, who concluded that E.M. exhibited behavior indicative of sexual abuse, as well as the respondent's written confession to the police that he sexually abused E.M., sufficiently corroborated E.M.'s out-of-court statements of sexual abuse. Although the respondent and the mother of the subject children disputed the allegations, there was no basis in the record to disturb the Family Court's assessment of the witnesses' credibility. Although E.M. recanted her allegations of sexual abuse, a child's recantation of allegations of abuse does not necessarily require the Family Court to accept the later statements as true because it is accepted that such a reaction is common among abused children. Recantation of a party's initial statement simply creates a credibility issue which the trial court must resolve. The Family Court did not err in rejecting E.M.'s out-of-court recantation, particularly in light of the expert testimony that it was a false recantation, and that E.M. may have been pressured to recant because the respondent was placed in jail after her disclosure.

Matter of Roger I.M., 138 AD3d 747 (2d Dept 2016)

Record Did Not Support Dismissal of Neglect Petition; Allegations of Sexual Abuse Were Sufficiently Corroborated

The order appealed from, after a fact-finding hearing and upon a finding that the petitioner failed to establish that the father abused or neglected M.D., or derivatively neglected K.D., dismissed the petitions. Contrary to the determination of the Family Court, the testimony of the petitioner's expert witness, who was an expert in the field of child sexual abuse, provided sufficient corroboration to support the reliability of M.D.'s out-of-court statements regarding her father's sexual abuse of her and, together with the testimony of the petitioner's caseworker and the mother, established the allegations in the petition by a preponderance of the evidence (*see* FCA § 1046 [a] [vi]). The allegations of sexual abuse were further corroborated by the consistency of M.D.'s out-of-court statements and by the fact that M.D. had age-inappropriate knowledge of sexual matters. Therefore, upon its review of this record, the Appellate Division concluded that the petitioner satisfactorily demonstrated by a preponderance of the evidence that the father abused and neglected M.D. and derivatively neglected her brother, K.D. Accordingly, the Appellate Division reversed the order, reinstated the petition, and found that the father abused and neglected M.D., and derivatively neglected K.D. Under the particular circumstances of this case, the Appellate Division deemed it appropriate to remit the matter to a different Judge for purposes of disposition.

Matter of K.D., 138 AD3d 835 (2d Dept 2016)

Eyewitness Testimony Corroborated Child's Out-of-Court Statements

The order of fact-finding and disposition, after fact-finding and dispositional hearings, found that the father abused the subject child. The father appealed. The Appellate Division affirmed. The record revealed that in September of 2014, the subject child, then 10 years old, told a police officer, who was also a school resource officer teaching a course at her school, that her father had been engaging in sexual conduct with her for the past five or six years. Following a hearing, at which a member of the child's household testified that she had witnessed the abuse on one occasion, the Family Court determined that the petitioner established, by a preponderance of the evidence, that the father had abused the child by subjecting her to sexual conduct as defined in article 130 of the Penal Law (*see* FCA § 1012 [e] [iii]). The Appellate Division concluded, upon its review, that the record supported the Family Court's determination that the father abused the child, where the petitioner presented the testimony of an eyewitness to the abuse to corroborate the child's out-of-court statements. Likewise, the court's credibility determinations were supported by the record.

Matter of Ali T., 138 AD3d 856 (2d Dept 2016)

Father's Conduct Posed Imminent Danger to Children's Physical, Mental, and Emotional Well-Being

The Family Court's determination that the father neglected the subject children was supported by a preponderance of the evidence (*see* FCA § 1046 [b] [I]). The evidence adduced at the fact-finding hearing established that when police officers responded to a call made to the 911 emergency number by one of the children, they found the father, who had been shot in the head and leg, lying on the floor. The children were in the apartment when the father was shot. A gun was found on the floor near the father, there were bullet holes in the door, and shell casings were inside and outside of the apartment. The police officers also found 30 bags of marijuana lying in plain view on the kitchen table. The father told the caseworker for the Administration for Children's Services that he left the marijuana on the table because he knew people were coming to rob him, and he wanted to protect his children, who were in a back room, by not making the robbers have to search the apartment for the marijuana. The court properly concluded that the father's conduct posed an imminent danger to the children's physical, mental, and emotional well-being (*see* FCA § 1012 [f] [I]). Order affirmed.

Matter of Patrick A., 138 AD3d 1115 (2d Dept 2016)

Children Were Placed in Imminent Risk of Harm Due to the Mother's Neglect

In March 2013, the petitioner commenced a proceeding alleging that the mother neglected the subject children, ages one and five, by leaving them unsupervised without employing a safety plan. After fact-finding and dispositional hearings, the Family Court determined that the mother neglected the children, placed the children under the supervision of the county's Department of Social Services for a period of 12 months, and ordered the mother to attend parenting classes, undergo a mental health evaluation, and participate in monthly meetings with the petitioner's caseworker. The mother appealed. The Appellate Division affirmed. Upon its review of the record, the Appellate Division found that the petitioner established that the mother intentionally left the children alone at home, which resulted in one child's decision to leave the home and wander outside unsupervised, only to be safely returned by a concerned neighbor. Therefore, the Appellate Division concluded that the Family Court's determination that the children were in imminent risk of harm due to the mother's neglect was supported by a preponderance of the evidence.

Matter of Kaila G., 138 AD3d 1122 (2d Dept 2016)

Mother's Neglect Responsible for Children's Juvenile Delinquency

Prior to these proceedings, respondent mother had been involved with CPS for more than two years due to her inability to properly supervise her children. Both her sons had previously been adjudicated to be juvenile delinquents and placed in a group home. Respondent was granted unsupervised visits with them until she tested positive for cocaine. Based on these facts as well as allegations that she exposed the children to domestic violence, the agency commenced a neglect proceeding against her. After a hearing, Family Court determined respondent had neglected her children. The Appellate Division affirmed. Respondent's argument that she was not a "person legally responsible" for the children since they were both in custody of the agency had no merit, since pursuant to FCA §1012(g), she was the children's parent and the statute directed that either a "parent or other person legally responsible" for the children's care could be the respondent in such proceedings. Additionally, the court's finding of neglect was supported by a preponderance of the evidence. The evidence showed when respondent met with her children at the group home, she was often irate, yelled and cursed at them and on many occasions, had to be removed from these meetings. The children's misbehavior and incorrigibility stemmed from the mother's failure to exercise a minimum degree of care. Furthermore, respondent was verbally abusive toward her older son, telling him "everything was his fault and verbally and physically threaten[ing] him." Respondent admitted she had hit her older son in the mouth during one of the visits which caused the child to become so upset he had to be restrained. Moreover, she refused to undergo any more drug tests although she was advised she could not have unsupervised visits with her children until the tests showed negative. These findings as well as evidence of the children's exposure to domestic violence, as a result of the abuse inflicted upon

respondent by her paramour, which the children had witnessed on several occasions, showed there was a sound and substantial basis in the record for the court's determination.

Matter of Marcus JJ., 135 Ad3d 1002 (3d Dept 2016)

Respondent's Appeal Deemed Moot

Family Court granted petitioner agency's application to temporarily remove the subject child from respondent parent. Respondent appealed and during the pendency of the appeal, Family Court adjudicated the subject child to be neglected and continued placement of the child with the agency. Given the subsequent order, respondent's appeal was deemed moot.

Matter of Jadalynn HH. 135 AD3d 1089 (3d Dept 2016)

No Exception to Mootness Doctrine Since Order Did Not Result in Severe Stigma Nor Create Enduring Legal and Reputational Consequences

Family Court adjudicated the two subject children to be neglected by the mother and placed the older child with the maternal grandfather. The court order did not provide any visitation between the older child and his non-respondent father, who was incarcerated, and issued orders of protection on the child's behalf against the mother and non-respondent father. The order of protection also directed the father to refrain from communicating with the older child except when supervised by petitioner agency. The father appealed and by the time the appeal was heard, Family Court had issued a subsequent permanency order neither limiting nor awarding the father with visitation. The Appellate Division deemed the matter moot and determined the exception to the mootness doctrine did not apply in this case since the order of protection did not result in a "severe stigma" or create "enduing legal and reputational consequences" for the father. There was no finding of family offense or other negative determination regarding the father, he was not a named respondent in the neglect proceeding and despite being advised of his visitation rights by petitioner agency, he had failed to pursue visitation with the child. Additionally, even if the father's argument had been addressed, it would have been found to be without merit.

Matter of Jazmyne II., 135 AD3d 1090 (3d Dept 2016)

Family Court Has Authority, Sua Sponte, to Change Permanency Goal

Upon the incarcerated mother's consent, the agency took temporary custody of the mother's newborn child. Thereafter, the agency filed a neglect petition against respondent mother and at the fact-finding hearing, respondent waived her right to a full hearing and made substantial admissions. After a combined dispositional and permanency hearings, the court, sua sponte, modified the child's permanency goal from return to parent to placement for adoption and denied visitation to both respondent and the subject child's half sibling. The Appellate Division affirmed determining there was a sound and substantial basis in the record for the court's determination. Family Court had the authority to modify the permanency goal, even in the absence of a request, and a review of the record supported the court's permanency goal modification. Here, respondent testified her earliest release date for her seven-year prison term would be in 2020, with the possibility of an earlier release if she participated in certain programs. The child's father was also incarcerated, serving a five-year prison term. Despite the fact that respondent's relatives had been notified of the pending proceedings, there were no viable custodial resources. The case worker testified that the foster parents were interested in being a long-term placement option for the child. Additionally, it was in the child's best interest to deny visitation to respondent. At the time of the permanency hearing, the child had been three and a half month's old. The distance between his foster home and respondent's correctional facility was more than 300 miles, making it an approximately 12-hour round trip drive. Given the child's tender age and the distance to the prison, there was a sound basis for the court's denial of visitation. Furthermore, given that the infant and his half sibling had never had contact and did not have an existing relationship, it was not an abuse of discretion for the court to deny sibling visitation.

*Matter of Duane FF.,*135 AD3d 1093 (3d Dept 2016)

Father's Acts of Domestic Violence Toward the Mother Supports Neglect Finding

Family Court determined respondent father had neglected the subject children. The Appellate Division affirmed. Here, prior to the neglect proceeding, the father appeared before the Integrated Domestic Violence Court and plead guilty to criminal charges in satisfaction of a number of charges against him, including violation of an order of protection issued in favor of the mother. Thereafter, the father failed to appear at the combined neglect and dispositional hearing although he had been given notice, and he failed to provide any explanation to the court or his attorney for his failure to appear. The court denied respondent's attorney's request for an adjournment, proceeded with the hearing and found respondent had neglected the children. Even though respondent failed to move to vacate the order prior to filing his appeal, given the evidence presented, there was a sound and substantial basis in the record for the court's finding. Testimony from the agency caseworker described the acts of domestic violence witnessed by the children in their home and the mother acknowledged she was the victim of frequent domestic violence at the hands of the father. The mother acknowledged the children had witnessed the violence and that the older child often intervened to protect her. Furthermore, the evidence showed the father was verbally and physically abusive toward the children.

Matter of Cheyenne OO., 135 AD3d 1096 (3d Dept 2016)

A Singe Incident of Excessive Corporal Punishment Sufficient to Show Neglect

Family Court properly determined there was sufficient evidence to show respondent had neglected and derivatively neglected the two subject children due to excessive corporal punishment. A finding of neglect does not require actual injury but only an imminent threat such an injury may result and a single incident of excessive corporal punishment could form the basis for a neglect finding. Here, the subject children informed their grandparents, a state trooper and two caseworkers that respondent had physically abused them. The children were interviewed and were able to provide general as well as detailed description of the physical abuse. The children sufficiently corroborated each other statements, and their allegations were further corroborated by the grandparents. Additionally, the grandmother testified about an incident which occurred in January 2013 when respondent put one of the children in a headlock. The grandmother's description of the abusive incident included a statement made by respondent where he had told one of the children he would "end up killing [the child] if [he] didn't shut up." She further stated respondent "[held the child] down on the floor beating on him," and, when the children's mother intervened, respondent "hit her too … because [she] was interfering"; and the incident ended after the mother "beat on [respondent's] back to get him off of [the child]." The grandfather testified about additional incidents of physical abuse he had observed. This evidence showed respondent's parental judgment was so impaired as to one of the children that it created a substantial risk of harm for any child in his care, and was sufficient to show derivative neglect as to the other child.

Matter of Dylynn V., 136 AD3d 1160 (3d Dept 2016)

Family Court Sufficiently Complied With FCA § 1051(a) to Find Derivative Neglect

In a previous proceeding, Family Court had terminated respondent mother's parental rights with regard to her two older children due to her inability to care for the children by reason of mental illness. The subject child, who was born less than a year after this determination, was removed from respondent's care by the agency. After a fact-finding hearing, the court determined the subject child was derivatively neglected. A combined disposition and permanency hearing were held and the child was continued in the care of the agency with restricted visitation to respondent. Thereafter, the court granted the agency's motion pursuant to FCA §1039-b to terminate the "reasonable efforts to reunite" requirement. The Appellate Division affirmed. Here, although the court did not employ "best practices" in making its neglect determination, there was sufficient compliance with FCA § 1051(a) for the court to find derivative neglect. Respondent's parental rights with regard to her older children had been terminated due to her significant mental health issues, which included bipolar, adjustment and personality disorders, aggressive behavior, angry outbursts and suicidal

ideation. There was evidence to show she had left the older children in many unsafe situations and there was testimony from a psychologist who opined respondent's mental illness rendered her incapable of providing adequate care to the children at present and in the foreseeable future. Furthermore, respondent believed her mental health issues had been resolved even though she had not received mental health treatment because she stated she had started receiving injections for a vitamin B-12 deficiency. Additionally, her in-court demeanor caused Family Court to be concerned about her unaddressed mental health issues.

Matter of Alexisana PP., 136 AD3d 1170 (3d Dept 2016)

Appeal Deemed Moot

Family Court adjudicated respondent parents to have neglected the subject children based on domestic violence and drug use and placed them with the paternal grandfather. Thereafter, the court issued a permanency goal of return to the mother but continued placement of the children with the grandparent. The mother's only argument on appeal was that the court erred in failing to return the children to her, but by the time the appeal was heard, the children were returned to her. Since the rights of the parties were not affected by the appeal, the matter was deemed moot and the issues presented on appeal did not fall within the exception to the mootness doctrine.

Matter of Aiani YY., 136 AD3d 1232 (3d Dept 2016)

Sound and Substantial Basis in the Record to Support Court's Determination

Supreme Court determined respondent father had abused and neglected his stepchildren and derivatively abused and neglected his biological children based on his sexual abuse of the stepchildren. The Appellate Division affirmed and determined there was sound and substantial basis in the record for the court's decision. Here, the court heard testimony from two investigators who interviewed the stepchildren. The children were interviewed separately and each child told the investigators that they had been forced to, among other things, perform oral and anal sex acts on each other, and respondent admitted he had shown the older stepchild pornography. The court properly found the statements of the stepchildren corroborated each other and correctly drew an inference against respondent as a result of his failure to testify at the fact-finding hearing. Additionally, respondent's actions demonstrated such an impaired level of parental judgment that it created a substantial risk of harm to any child left in his care.

Matter of Dylan R., 137 AD3d 1492 (3d Dept 2016)

No Need to Show Respondent Touched Child for His Own Sexual Gratification

Family Court determined respondent, who lived in New York with the children's mother and younger child, had neglected the younger child and derivatively neglected the older child, who lived in California with the paternal grandfather. The Appellate Division reversed the derivative neglect determination, noting that jurisdiction in abuse and neglect proceedings is governed by the UCCJEA and since the older child had been living in California for over a year at the time these proceedings were initiated, New York was not her home state. The court's finding of neglect as to the younger child was affirmed since petitioner agency met its burden of showing, by a preponderance of the evidence, that the younger child had been sexually abused. A State Police investigator who interviewed the child testified the child told him respondent had "touched her vaginal area with his hand, put his finger in her vaginal area and touched her vaginal area with his clothed penis." Additionally, a psychologist who had performed a sex abuse evaluation of the child, testified that according to the Yuille Step Wise Protocol for interviewing alleged victims of sexual abuse, the child's account "was consistent with the accounts of known sexual abuse victims," and this was sufficient to corroborate the child's out-of-court statements. Furthermore, there was no need to show respondent touched the child for his own sexual gratification or that the child was even awake when it happened, since this was not relevant to a finding of neglect.

Matter of Hadley C., 137 AD3d 1524 (3d Dept 2016)

Mother's Conduct Impaired Children's Emotional Condition or Placed Them in Imminent Danger of Such Impairment; Court Properly Awarded Sole Custody to Children's Fathers

In a neglect proceeding, Family Court determined that respondent mother neglected her two children; in related custody proceedings, the court awarded custody of the children to their respective fathers. The Appellate Division affirmed. The court properly determined that the mother's conduct impaired the children's emotional condition or placed them in imminent danger of such impairment. The evidence established that the mother alienated the children from their fathers, with the result that the child Isobella was confused whether her father was her real father. The mother also interfered with the fathers' visitation with the children, and made false allegations against the fathers or their significant others. Isobella was diagnosed with adjustment disorder and had poor behavior in school as a result of the mother's conduct. The evidence also established that the mother forced the child Cameron to lie about his father, and she videotaped the child stating those lies. The determinations to grant the fathers sole custody of the children were supported by a sound and substantial basis in the record, and would not be disturbed. The mother failed to preserve for review her contention that the Attorney for the Child for Isobella should not have substituted her judgment for that of the child or advocated against her wishes. In any event, that contention was without merit inasmuch as Isobella was five and six years old at the time of these proceedings, and the evidence showed that the child lacked the capacity for knowing, voluntary and considered judgment, or that following the child's wishes was likely to result in a substantial risk of imminent, serious harm to the child. Indeed, the evidence established that, if the AFC followed the child's wishes, that would have been tantamount to severing her relationship with her father.

Matter of Isobella A., 136 AD3d 1317 (4th Dept 2016)

Court Erred in Denying Motion to Vacate Order of Fact-finding

Family Court denied respondent mother's motion to vacate an order of fact-finding and disposition, which was entered in the consent of the parties. The Appellate Division reversed, and remitted to Family Court for further proceedings on the motion. The court erred in denying the motion on the sole ground that a direct appeal from that order was pending. It was well settled that no appeal lied from an order entered upon the parties' consent. Indeed, the mother's appeal from the consent order was dismissed for that very reason. Thus, the mother's sole remedy was to move in Family Court to vacate the order, at which time she could present proof in support of her allegations of duress, proof of which was completely absent from the record.

Matter of Annabella B.C., 136 AD3d 1364 (4th Dept 2016)

Court Did Not Err in Refusing to Make Finding of Derivative Neglect

Family Court dismissed the Department of Social Services petition to the extent that it alleged that the subject children were derivatively neglected by respondents. The Appellate Division affirmed. Although the court determined that respondents neglected a sibling of the subject children, and Family Court Act Section 1046 (a)(i) permitted evidence of that neglect to be considered in determining whether the subject children were neglected, the statute did not mandate a finding of derivative neglect, and such evidence typically could not serve as the sole basis of a finding of neglect. There was no evidence in the record that the neglect was repeated or was perpetrated on multiple victims, and it was unclear whether the subject children were nearby when the neglect occurred.

Matter of Madison J.S., 136 AD3d 1404 (4th Dept 2016)

Father's Contention Rejected that Family Court Erred in Basing Its Finding of Neglect on Matters Not Contained in Petition

Family Court found that respondent neglected his daughter. The Appellate Division affirmed. The father's contention was rejected that Family Court erred in basing its finding of neglect on matters not contained in the petition, e.g., on the subject child's failure to thrive while in the father's care. The record established that the court based its finding of neglect on the allegations in the petition, and only noted in a footnote that the child had failed to thrive. The court properly concluded that the subject child was in imminent danger of physical, emotional or mental impairment based on the father's long-standing history of mental illness and

his failure to obtain treatment for it, and his failure to seek treatment for substance abuse issues. The court also found that the father had permitted the child to be cared for by respondent mother, whom the father knew to be an unsuitable caregiver. Further, the court properly relied upon an incident of domestic violence committed by the father as an additional ground for its finding of neglect.

Matter of Trinity E., 136 AD3d 1590 (4th Dept 2016)

Family Court Properly Exercised Jurisdiction Under UCCJEA, But Erred in Admitting into Evidence a 2012 Evaluation of Mother By a Forensic Psychologist Who Did Not Testify at Hearing

Family Court determined that respondent mother neglected the subject child and placed the child in the custody of petitioner. The Appellate Division reversed and remitted the matter for a new fact-finding hearing. The mother's contention was rejected that the court lacked subject matter jurisdiction over the petition under the Uniform Child Custody Jurisdiction and Enforcement Act, which was codified in Domestic Relations Law article 5-A. Shortly before the subject child was born, the mother relocated from New York to Pennsylvania, where she stayed with a cousin until the child was born. Two days after the child was born, petitioner commenced the neglect proceeding. The court properly exercised jurisdiction over the petition on the ground that the child and her family had a significant connection with New York. The mother maintained an apartment in New York while she was at her cousin's residence, she attended mental health counseling and parenting classes in New York before the child was born, and most of her family resided in New York. However, the court erred in admitting into evidence at the fact-finding hearing a 2012 evaluation of the mother by a forensic psychologist who did not testify at the hearing. The report constituted hearsay, and it did not qualify for admission under Family Court Act Section 1046 (a) (iv). The error was not harmless given that the court quoted extensively from the report in its decision and that the determination of neglect was based largely on the findings contained within the report.

Matter of Chloe W., 137 AD3d 1684 (4th Dept 2016)

Affirmance of Finding that Mother Neglected and Derivatively Neglected Her Children

Family Court found that respondent mother neglected her two older children and derivatively neglected her two younger children. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that, among other things, the mother forced the two older children to leave the house for days at a time without planning for their care, which repeatedly resulted in their living in shelters or on the streets with no supervision, thereby placing them in imminent risk of harm. Furthermore, the evidence supported the finding of derivative neglect with respect to the two younger children inasmuch as the impaired level of parental judgment shown by the mother's behavior created a substantial risk of imminent danger to the younger children as well. The mother's actions demonstrated a fundamental defect in her understanding of the duties and obligations of parenthood and created an atmosphere detrimental to the physical, mental and emotional well-being of the younger children.

Matter of Ashley B., 137 AD3d 1696 (4th Dept 2016)

Mother Violated Two Orders of Disposition

Family Court determined that respondent mother violated two orders of disposition in underlying neglect proceedings, and derivatively neglected her youngest child. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that the mother violated the orders of disposition. Pursuant to the orders, the mother agreed, among other things, to not be under the influence of any substance, to complete a mental health assessment, to complete an alcohol and substance abuse evaluation and treatment, and to enforce a stay-away order of protection against the father of two of her children. Petitioner submitted evidence that the mother had consumed alcohol, did not complete a mental health assessment, and did not enforce the order of protection. The court properly found that petitioner established by a preponderance of the evidence that the mother derivatively neglected her youngest child.

Matter of Amariese L., 137 AD3d 1750 (4th Dept 2016)

Order Reversed Where Mother's Right to Due Process Denied

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division reversed and remitted to Family Court. The court erred in relying on a psychological evaluation of the mother that was not received in evidence. Due process required that the decision maker's conclusions must rest solely on legal rules and the evidence adduced at the hearing. Indeed, although the parties expressly stipulated that the evaluation would not be used as evidence in any fact-finding hearing in this matter, or as a basis for seeking to amend the neglect petition, the court relied heavily upon the evaluation in reaching its determination. Further, the court's failure to afford the mother the opportunity to cross-examine a key witness, i.e. a caseworker for the petitioner, constituted a denial of her right to due process, which also required reversal. The matter was remitted for a new hearing on the petition, if warranted. In light of information presented at oral argument, it appeared that a new hearing may no longer be necessary.

Matter of Dominic B., 138 AD3d 1395 (4th Dept 2016)

Affirmance of Finding of Neglect Where Father Chronically Misused Alcohol by Drinking to Point That He Was Intoxicated, Disoriented, Incompetent and Irrational

Family Court adjudged that respondent father neglected his three children and one stepchild. The Appellate Division affirmed. Family Court Act Section 1046 (a)(iii) created a presumption of neglect if the parent chronically and persistently misused alcohol and drugs, which, in turn, substantially impaired his or her judgment while the child was entrusted to his or her care. That presumption operated to eliminate a requirement of specific parental conduct vis-a-vis the child and neither actual impairment nor specific risk of impairment needed to be established. The finding of neglect was supported by a preponderance of the evidence. The father did not dispute the fact that he was driving while intoxicated at 2:00 p.m. on a Monday afternoon, and that he was involved in a motor vehicle accident at that time, and that he was so intoxicated that he was not able to perform the field sobriety tests. Moreover, the evidence at the hearing also established that, on "a couple different instances," law enforcement officers "had to catch the father from falling over or walking into traffic." The corroborated statements of the children established that the father was mean and aggressive when he had been drinking; that he pushed the eldest child to the ground on one occasion when he had been drinking; that there were times when the parents were so intoxicated that the eldest child had to cook for the children; that there were times when the parents were drinking that the eldest child, who had to go to work, made arrangements for the youngest child to go to friends' houses; that there was at least one time when the youngest child hid under furniture when respondents were drinking and fighting; and that the father, who was physically aggressive with one child in particular when the father was drinking, accidently pulled the youngest child's hair while trying to grab the other child. Thus, petitioner established that the father chronically misused alcohol by drinking to the point that he was intoxicated, disoriented, incompetent and irrational. The father's failure to rebut the presumption of neglect obviated the requirement that petitioner present evidence establishing actual impairment or risk of impairment. In any event, the evidence established that the children's physical, mental or emotional conditions were impaired or were in imminent danger of becoming impaired as a result of the father's failure to exercise a minimum degree of care in providing the children with proper supervision and guardianship by misusing alcoholic beverages to the extent that he lost self-control of his actions.

Matter of Timothy B., 138 AD3d 1460 (4th Dept 2016)

CHILD SUPPORT

Father Must Pay One-Half of Children's Private School Expenses

Family Court denied respondent's objections to the support magistrate's order that he pay half the private school expenses at the children's private school. The Appellate Division affirmed. The court properly accorded deference to the support magistrate's credibility determinations, including the finding that the father did not previously object to his children attending private school. Further, the court properly adopted the support magistrate's conclusion that the father had the

financial ability to contribute to the children's private school expenses - that determination was supported by the record, including the terms of the parties' settlement agreement.

Matter of Duning v Singh, 135 AD3d 606 (1st Dept 2016)

Basis For Imputation of Income Unclear

Supreme Court awarded plaintiff mother $6,519.66 per month in pendente lite child support, denied her application for pendente lite maintenance, pendente lite counsel fees, loan interest and fees, and ordered defendant father to pay 51% toward the younger child's educational expenses and both children's unreimbursed medical, camp and sports-related expenses. The Appellate Division modified by vacating the award of pendente lite child support and the directive that the father pay 51% towards other expenses, vacated the denial of the applications for pendente lite maintenance and counsel fees, and remanded for further proceedings, including a proper consideration of the parties' incomes or to clarify its imputation of income to the mother. The basis for the imputation of income to the mother was unclear. The record did not support the court's conclusion that the mother admitted she could pay her undisputed monthly expenses of $27,403, without the father's financial support, which resulted in the court's imputation to the mother of 12 times that amount, $328,860, as income. The mother repeatedly averred that she could not pay her monthly expenses without the father's assistance and that without his assistance she would have to resort to a loan or borrowing from the parties' daughter. Because the mother was not employed, the record suggested that the court imputed income based upon her earnings from a company she and the father founded. However, the mother said the company earned no income, she could not run it without the father, and she was a stay-at-home mother. While the father disagreed, the court's calculation of the mother's income exceeded even what defendant claimed the company earned. To the extent the court may have relied upon an e-mail exchange between the parties where the mother said she paid living expenses for the past few months out of a corporate account, it may have failed to consider that the mother also said that approximately $10,000 was left in the account and asked how the father would contribute to expenses in the future. Because the court's denial of maintenance and interim counsel fees appeared to be based upon the same income determination, on remand the court should reconsider and, if necessary, calculate those awards. Also, because the mother averred that she could no longer meet her financial obligations without a load or borrowing from her 16-year-old daughter, exigent circumstances warranted immediate relief.

Souyun Lee v Wei-Yeh Lee, 136 AD3d 470 (1st Dept 2016)

Father Failed to Demonstrate Ground For a Downward Modification of Child Support

Supreme Court denied defendant father's motion for a downward modification of his maintenance and child support obligations and granted plaintiff mother's cross motion for a wage garnishment and counsel fees. The Appellate Division affirmed. The father failed to demonstrate a substantial, unanticipated and unreasonable change in his circumstances warranting a reduction in the child support obligations contained in the parties' stipulation. He failed to fully disclose his assets and income and he failed to show how he purportedly dissipated his assets since the time of his prior motion for a downward modification. Given the father's failure to pay support and his failure to express any intention to comply with his obligations, the court properly determined that the mother was entitled to collect arrears via a wage deduction order. The court also properly awarded counsel fees. Pursuant to the terms of the stipulation, the mother was entitled to counsel fees, given the father's breach and his multiple, unsuccessful attempts to void or rescind the support provisions in the stipulation.

Sonkin v Sonkin, 137 AD3d 635 (1st Dept 2016)

Private School Tuition Constituted Child Support

Supreme Court, among other things, directed defendant father to pay plaintiff mother a sum for reimbursement for tuition payments she made on behalf of the parties' child, which defendant was obligated to pay pursuant to the parties' separation agreement, and counsel fees. A judgment for the monies was subsequently entered. The defendant appealed from the judgment insofar as it

characterized the amount against him as recovery for "unpaid child support." The Appellate Division affirmed. The father contended that the judgment's characterization of the amount awarded to the mother as unpaid child support was error because the order referenced payment for private school tuition payments. Although where there is an inconsistency between an order and the decision upon which it is based and the judgment, the decision controls, here there was no inconsistency. Because the payments at issue were for the child's education and were to be made pursuant to a valid agreement between the parties, the payments fell within the statutory definition of child support as a matter of law.

Brown v Condzal, 137 AD3d 667 (1st Dept 2016)

Court Improperly Ordered Father to Pay Child's Private School Tuition

Supreme Court directed plaintiff father to pay 100% of private school tuition for the parties' child, 100% of the child's expenses for extracurricular, weekend, and summer activities, and to maintain a $1 million life insurance policy for the benefit of the child, and awarded attorneys' fees to defendant mother. The Appellate Division modified by vacating the direction to pay 100% of private school tuition and extracurricular, weekend and summer activity expenses and the amounts of attorneys' fees and reduced the amounts of life insurance policies. Where, as here, the court deviates from the CSSA by ordering a parent to pay for activities over and above basic child support, it must analyze 10 enumerated statutory factors. The court did not articulate any reason for ordering the father to pay for private school, other than informal discussions the parties had about their son's future. Given the parties' brief time living as a family, a standard of living for the child was not established. The court primarily based its award on the conclusion that had the family remained intact, the child, the son of a lawyer, would probably have enjoyed a certain standard of living. That sole factor, together with the court's determination of the parties' financial resources, did not support the addition of unlimited add-on extracurricular expenses. The court properly required the father to obtain a life insurance policy to secure his support obligation in the event of his death, but because the amount of the father's child support was reduced, the amount of the insurance policy was reduced as well. The court improperly based its determination of the amount the father was required to pay for the mother's attorney fees on the affirmation of counsel, despite the father's objections. Therefore, the case was remanded for a hearing to determine the proper amount of the mother's attorney fees.

Michael J.D. v Carolina E. P. 138 AD3d 151 (1st Dept 2016)

Father Responsible For Child Support Until One of Three Events Occurred

Family Court dismissed the father's petition for termination of his child support obligation. The Appellate Division affirmed. The parties' stipulation of settlement provided that petitioner's child support obligation for his disabled child continued until either the child's care was completely covered by a government entitlement program or the child was married or the child's death. Under ordinarily principles of contract interpretation, the stipulation unambitiously expresses the parties' agreement that petitioner's child support obligation continued until the child's death, unless one of the other two events occurs first, without regard to her reaching the age of majority.

Matter of Alan P. v Charlotte E. 138 AD3d 465 (1st Dept 2016)

Matter Remitted for a New Hearing on Mother's Cross-Motion

The parties were divorced by a judgment dated September 28, 2012, which incorporated the terms of a stipulation of settlement. With respect to the college expenses of their two children, the parties agreed that each child would have a 529 account and that each party would be the trustee for one of the accounts. The plaintiff moved for certain relief, and the defendant cross-moved, inter alia, to require the plaintiff to contribute to the children's college tuition and expenses. The defendant asserted that the funds in the older child's college account had been exhausted after the child's first year in college, and that she was therefore requesting that the plaintiff be required to pay his pro rata share of college tuition and expenses for both children "until 23 years old or graduation, whichever comes sooner." The

Supreme Court denied the defendant's cross motion because the stipulation of settlement was "silent as to further funding of the accounts or agreement or willingness by either party to pay for college expenses beyond the maintenance of those accounts." The defendant appealed. When interpreting a stipulation of settlement, the court should give fair meaning to the language used by the parties to reach a practical interpretation of the parties' expressed intent so that their reasonable expectations will be realized. When the intent of the parties is clearly and unambiguously expressed, effect must be given to such intent as indicated by the language used. Here, the stipulation of settlement reflects only that the parties established separate college accounts for the education of their two children. Contrary to the defendant's contention, the terms of the stipulation did not affirmatively require the plaintiff to contribute to the children's college tuition and expenses beyond the amount of the funds already contained in the subject accounts. The defendant alternatively relied on DRL § 240 (1-b) (c) (7), pursuant to which a court may, as justice requires, direct a parent to contribute to a child's postsecondary education, even in the absence of a voluntary agreement. In making a determination pursuant to that statute, a court must consider the circumstances of the respective parties, as well as both the best interests of the child and the requirements of justice. On this record, the Supreme Court had insufficient evidence upon which to make a proper determination in accordance with the statutory requirements. Accordingly, the Appellate Division reversed the order insofar as appealed from and remitted the matter to the Supreme Court for a hearing and, thereafter, a new determination with respect to the defendant's cross motion.

Strugatch v Strugatch, 135 AD3d 848 (2d Dept 2016)

Father's Pro Rata Share of the Child Care Expenses Appropriately Determined

The parties have one child in common. In an order dated May 9, 2014, a Support Magistrate, after a hearing, granted that branch of the mother's petition which was for child care expenses and awarded such expenses retroactive to September 18, 2013. The Family Court denied the father's objections to so much of the support magistrate's order as related to child care expenses. The father appealed. "Where the custodial parent is working . . . and incurs child care expenses as a result thereof, the court shall determine reasonable child care expenses and such child care expenses, where incurred, shall be prorated in the same proportion as each parent's income is to the combined parental income" (FCA § 413 [1] [c] [4]). Here, the Family Court properly denied the father's objections to the Support Magistrate's order regarding the computation of his pro rata share of the child care expenses incurred by the mother while she was working (*see* FCA § 413 [1] [c] [4], and for payment of such child care expenses retroactive to the date of the filing of the child support petition (*see* FCA § 449 [2]).

Matter of Ripley v. Valencia, 136 AD3d 831 (2d Dept 2016)

Mother Willfully Violated Order of Child Support

The father, who was awarded sole physical and legal custody of the parties' child, commenced a proceeding alleging that the mother was in willful violation of an order of child support dated February 14, 2013. Following a hearing, the Support Magistrate made fact-findings that the mother was in willful violation of the order of support and issued an order of disposition recommending that the mother be held in contempt of court and that the court consider a period of incarceration. The Family Court confirmed the Support Magistrate's findings of fact, granted the father's petition, and issued an order of commitment committing the mother to the custody of the Nassau County Correctional Facility for a period of 120 days unless she paid a purge amount of $7,053.08. The mother appealed. The Appellate Division affirmed. Here, the father presented proof that the mother failed to pay child support as ordered. The burden of going forward then shifted to the mother to offer competent, credible evidence of her inability to make the required payments. The mother failed to sustain her burden. Even assuming the truth of the mother's contention that she had been unemployed in her chosen field—a contention that the Support Magistrate reasonably chose not to credit—she failed to present any evidence that she had made a reasonable and diligent effort to secure employment. Thus, the mother failed to meet her burden of presenting competent, credible evidence that she was unable to make payments as ordered, and the Family Court

properly confirmed the determination of the Support Magistrate that the mother willfully violated the order of child support.

Matter of Dezil v Garlick, 136 AD3d 904 (2d Dept 2016)

Family Court Erred in Denying the Mother's Objections

In 2005, the mother commenced a proceeding in the Supreme Court to enforce a Connecticut Superior Court order, which had been filed and entered in New York, and sought arrears for alimony and child support. The matter was subsequently referred, on consent, to the Family Court. On consent of the parties, the Support Magistrate, by order of disposition entered July 5, 2006, fixed the father's arrears at $110,000 plus add-ons in the amount of $13,000 for the period from September 1, 2003, through March 1, 2006. Thereafter, in February 2012, the mother commenced a proceeding to enforce the Superior Court order, asserting that the father was in arrears in excess of $36,000 in basic support and that the father had not paid any additional support, despite being required to pay 35% of the amount of his earnings in excess of $220,000 as additional support. After a hearing, the Support Magistrate granted the mother's enforcement petition only to the extent of directing the entry of a judgment in favor of the mother in the principal sum of $169,513.97. The mother filed objections, and the Family Court denied the objections. The mother appealed. The Appellate Division reversed. The Family Court erred in denying the mother's objections to so much of the amended order of the Support Magistrate as fixed the father's arrears at only $169,513.97 for basic and additional unallocated alimony and child support. The father's position was that he was obligated to pay additional support only after he earned the threshold amount of $220,000 annually and thereafter received a bimonthly paycheck in excess of $9,167. However, while testifying, the father admitted that in a financial disclosure affidavit he submitted in a 2005 enforcement proceeding, he stated that the calculation of his additional support was based on his annual earnings "over $220,000," without qualification. Moreover, the subject provision in the Superior Court order established that in each year the father earned more than $220,000, the mother was entitled to her base unallocated support of $108,000 on the first $220,000 of the father's income plus 35% of the excess. The father's interpretation of the subject provision would not give it full force and effect. Instead, the father's interpretation, adopted by the Support Magistrate, would subject any calculation of additional support due under the provision to potential manipulation, as the amount owed for additional support would not be calculated on the irrefutable total amount of income earned by the father, but instead on the arbitrary amount of each paycheck once the $220,000 annual income threshold was met. Consequently, the father could earn the same total income every year but, since he was a commissioned employee, the amount of additional support to the mother could be a different amount based upon the manner in which the income was paid, on a bimonthly basis, to the father. Accordingly, the Family Court erred in denying the mother's objections.

Matter of Locicero v Mosca, 136 AD3d 921 (2d Dept 2016)

Mother Failed to Make a Complete Financial Disclosure

Upon reviewing the record, the Appellate Division found that the Family Court properly granted the father's objection to the Support Magistrate's order on the ground that the mother failed to provide sufficient evidence of her income to calculate child support under the CSSA. Here, the mother did not submit all of the required financial documentation, including tax returns. Further, the mother's testimony and the financial documents she did submit did not remedy her failure to make complete financial disclosure, since the mother's financial disclosure affidavit was inconsistent with her financial documents, and her testimony was vague and not detailed. Under these circumstances, the Support Magistrate should have adjourned the proceeding until such time as the mother filed the required documents with the court, as authorized by FCA § 424–a[c].

Matter of Dailey v. Govan, 136 AD3d 1029 (2d Dept 2016)

Record Supported Determination That Father Was Intentionally Underemployed

The Family Court order appealed from denied the father's objections to an order of that court, dated February 6, 2015, which, after a hearing, imputed annual income of $62,400 to him and thereupon directed him to pay child support in the sum of $173 per week. The Appellate Division affirmed. The mother filed a petition for an order directing the father to pay child support. Following a hearing, the Support Magistrate imputed an annual income of $62,400 to the father and directed him to pay child support in the sum of $173 per week. The Support Magistrate arrived at that annual income by extrapolating the father's previous hourly wage, $30 per hour, over a 40-hour work week. The father objected to the Support Magistrate's order on the basis that he was currently unemployed, had "never earned $30 per hour on a 40 hour work week basis," and his income for the current tax year was $18,060. The Family Court denied the father's objections. Here, the record supported the Support Magistrate's determination that the father had been intentionally underemployed, and that an annual income of $62,400 should have been imputed to him.

Matter of Abruzzo v. Jackson, 137 AD3d 1017 (2d Dept 2016)

Father's Child Support Obligation Terminated; Mother Actively Interfered with and Deliberately Frustrated His Visitation with the Child

The father and the mother are the parents of a child who was born in December 2004. In 2009, the parties stipulated to an order of support on consent, which provided that the father would pay $123.63 per week in child support to the mother, $30 of which was allocated for child care expenses. The order of support also required the father to continue coverage of the child under his health insurance plan. In 2013, the mother moved with the child to Florida without the father's consent. In March 2014, the father filed a petition seeking to modify the order of support by suspending or terminating his child support obligations on the ground that the mother was interfering with his visitation. In an order dated October 10, 2014, made after a hearing, a Support Magistrate dismissed the petition. In the order appealed from, the Family Court denied the father's objections to the Support Magistrate's order. The Appellate Division reversed. Interference with visitation rights can be the basis for suspension of child support, but such relief is warranted only where the custodial parent's actions rise to the level of deliberate frustration or active interference with the noncustodial parent's visitation rights. Here, the father demonstrated that the mother actively interfered with and deliberately frustrated his visitation with the child by, inter alia, failing to provide him with the child's Florida address, preventing him from seeing the child when he was in Florida, and failing to notify him when the child was in New York. Therefore, the Family Court should have granted that branch of the petition which was to suspend the father's child support obligation. Further, the evidence presented at the hearing established that the mother was no longer incurring child care expenses. Therefore, the Family Court should have granted that branch of the petition which was to terminate the father's obligation to pay for child care expenses. In addition, under the circumstances of this case, the father's obligation to provide health insurance should also have been terminated. The health insurance that the father was providing was ineffective in Florida, and the mother asked the father to cancel his coverage for the child so she could obtain health insurance for the child in Florida. Based upon the mother's actions in unilaterally moving the child and asking the father to cancel coverage for the child under his health insurance plan, the mother should be responsible for future health insurance costs for the child. Accordingly, the Family Court should have granted that branch of the petition which was to terminate the father's obligation to provide health insurance for the child.

Matter of Argueta v. Baker, 137 AD3d 1020 (2d Dept 2016)

Father Failed to Establish That Son and Daughter Were Emancipated

In 2004, the parties entered into a stipulation of settlement, which was incorporated into but not merged with their 2005 judgment of divorce. Subsequently, the mother commenced a proceeding for an upward modification of the father's child support obligation contained in the stipulation. Thereafter, the father commenced a proceeding to be relieved of his obligation

to support the parties' 18-year-old son, on the ground that the son was emancipated within the meaning of the parties' stipulation, as well as the parties' 14-year-old daughter, on the ground of constructive emancipation. After a hearing, the Support Magistrate granted the mother's petition and directed the father to pay child support for the two children in the sum of $775 biweekly, and denied the father's petition. The father filed objections to the order issued by the Support Magistrate, which the Family Court denied. The father appealed. The Appellate Division appealed. The parties' stipulation of settlement provided, in relevant part, that a child would be deemed emancipated if the child reached the age of 18, was employed at least 30 hours per week, and was not a full-time student. Contrary to the father's contention, he failed to demonstrate that, at the time of the hearing, the parties' 18-year-old son was employed at least 30 hours per week. Although the father submitted three pay stubs showing that the son had been employed several months before the hearing, the father concedes that, at the time of the hearing, the son was not working because of a medical condition. Accordingly, the father failed to meet his burden of establishing that the son was emancipated within the meaning of the stipulation of settlement. As to his 14 year old daughter, even accepting the father's testimony that the parties' daughter had voluntarily and without cause rejected his efforts to maintain a relationship with her in an attempt to avoid his parental control, the daughter was not "of employable age," and thus, the father, as a matter of law, could not establish the daughter's constructive emancipation.

Matter of Brinskelle v. Widman, 137 AD3d 1022 (2d Dept 2016)

Father Willfully Violated Order of Child Support

In January 2014, the county's Department of Social Services (hereinafter DSS) commenced a proceeding on behalf of the mother alleging that the father was in violation of an order of support issued in 2012 directing him to pay $75 per week to support his three children. Following a hearing in August 2014, the Support Magistrate found the father to be in willful violation of the order of support, established arrears of $3,225, recommended a period of incarceration, and referred the proceeding to the Family Court for confirmation. After the father paid the arrears, the Family Court confirmed the Support Magistrate's finding that the father willfully violated the order of support. The father appealed. The Appellate Division affirmed. DSS established that the father failed to pay child support as ordered, which constituted prima facie proof of a willful violation of the order of support (*see* FCA § 454 [3] [a]). The burden then shifted to the father to offer competent, credible evidence of his inability to make the required payments. The father failed to sustain his burden. Accordingly, the Family Court properly confirmed the finding that the father willfully violated the order of support. Contrary to the father's contention, the Support Magistrate's findings of fact complied with CPLR 4213 (b). Moreover, the Family Court was not required to hold another hearing prior to confirming the Support Magistrate's finding that the father willfully violated the order of support (*see* Uniform Rules for Family Court 22 NYCRR § 205.43 [i]).

Matter of Department of Social Servs. v Russell, 137 AD3d 1025 (2d Dept 2016)

Father Obligated to Pay Costs of Children's Camp, Summer and Extracurricular Activities

Contrary to the father's contention, the Family Court correctly confirmed the finding of the Support Magistrate that he had willfully violated the terms of the parties' separation agreement by paying the mother only $2,500 in child support from October 2010 through August 2012, in failing to pay the mother any child support from August 2012 through December 2012, and in failing to pay his two-thirds share of the cost of the children's additional childcare expenses. The father's failure to satisfy his child support obligation constituted prima facie evidence of a willful violation (*see* FCA § 454). This shifted the burden to the father to come forward with competent, credible evidence that his failure to pay the support in accordance with the terms of the separation agreement was not willful. The father failed to satisfy this burden. To the contrary, the father testified that he paid other bills during the time that he failed to pay the required child support, including mortgage payments on an accessory apartment in New York City, and that he was able to make an all-cash purchase of real property in Las Vegas. Also contrary to the father's contention, the Family Court correctly

confirmed the findings of the Support Magistrate that he was responsible for two thirds of the costs of the children's dental and orthodontic care expenses, eye care expenses, summer camp expenses, music lessons, martial arts lessons, tutoring expenses, and necessary childcare expenses. The parties' separation agreement expressly obligated the father to pay his two-thirds share of the cost of the children's nonreimbursed medical expenses, camp and summer activities, school expenses, extracurricular activities, and childcare expenses. Contrary to the father's contention, the separation agreement did not make notice of these expenses a precondition of the father's obligation to pay his share. To the extent that the separation agreement provided that the father's obligation to pay his two-thirds share of the costs of the children's camp and summer activities and extracurricular activities was contingent on the father's consent or agreement to these activities, under the circumstances presented, the father acquiesced to the incurrence of these expenses. The record established that the mother had contacted the father in attempts to discuss the children's camp and summer activities and extracurricular activities with him, and that he was aware that the children were enrolled and participating in these activities, but that he did not respond to the mother's attempts to notify him or take any action to object to the children's activities. By failing to do so, the father acquiesced to the children's participation in these activities.

Matter of Yuen v. Sindhwani, 137 AD3d 1155 (2d Dept 2016)

Petition for Upward Modification Denied

In an order dated July 28, 2011, the Family Court directed the mother of the parties' children to pay child support in the amount of $517 per month. In August 2014, the father petitioned for an upward modification of the mother's child support obligation. A Support Magistrate denied the petition, and the father filed objections. In an order dated June 30, 2015, the court denied the father's objections. The father appealed. The record revealed that the Support Magistrate incorrectly stated in her findings of fact that an increase in the noncustodial parent's income alone was not sufficient to permit the court to consider a modification of a child support obligation. Nevertheless, the Support Magistrate properly placed the burden on the father to provide evidence in support of his petition for an upward modification, including specific evidence of both his and the mother's income at the time the original child support order was issued and at the time he filed his petition, and the father failed to satisfy this burden. In considering whether to modify a child support order, a parent's obligation is not necessarily determined by his or her current financial condition, but, rather, is determined by his or her ability to provide support. The custodial parent's financial status is also a proper consideration for the court in making its determination. Here, although there was evidence that the mother's income had increased, she testified at the hearing that her expenses had also increased. Specifically, the mother's financial disclosure affidavit indicated that her monthly expenses actually exceeded her monthly income. Moreover, the father, who is the custodial parent, did not establish an inability to provide for the needs of the children. The father's gross income was approximately $109,000, which was derived from social security and pension benefits, while the mother's gross income was approximately $35,000. Accordingly, the Family Court properly denied the father's objections.

Matter of Thomas v Fosmire, 138 AD3d 1007 (2d Dept 2016)

Supreme Court Erred in Downwardly Modifying Father's Support Obligation

Parents of two children executed a separation agreement which was later incorporated but not merged into their judgment of divorce, which, among other things, required respondent father to make specific, monthly child support payments until each child was 21 and required both parents to share in the costs of the children's college education. Thereafter, the father moved for a downward modification seeking specific termination dates of his support obligation. Supreme Court granted his motion, reduced his support obligation as of the date of the older child's birthday and terminated his obligation altogether upon the 21st birthday of the younger child. The mother cross moved to have the father contribute to the children's college expenses. The court denied her application. She then moved to reargue which was also denied. The Appellate Division reversed and remitted the matter. Here, the father, who was pro se, failed to provide the statutorily

required financial information in support of his motion for a downward modification. He submitted two pay stubs but failed to submit a net worth statement as required by DRL § 236(A)(2). Additionally, Supreme Court incorrectly treated the mother's motion as one to modify instead of an enforcement application. Although the mother's application stated modification, she was seeking to determine each party's share of the child's college expenses.

Strykiewicz v Strykiewicz, 135 AD3d 1030 (3d Dept 2016)

Support Magistrate Erred By Concluding Shared Custody Cancelled Child Support

The Support Magistrate erred by concluding that the parties shared physical custody of twin girls, with each party having custody of one child, cancelled out child support. The CSSA applied to split custody cases and the Support Magistrate should have calculated each parent's respective share for the child in his or her custody. If after such determination it was concluded that such calculation was unjust or inappropriate, a different amount could be awarded after considering the relevant statutory factors. Additionally, the Support Magistrate erred by miscalculating each party's share of uncovered medical expenses. Pursuant to the CSSA, income is generally the gross income reported in the most recent tax return. Here, the father submitted his W-2 and pay stub, and the mother submitted her W-2 and testified she would receive a health insurance buyout benefit consisting of periodic payments which would total $5,200, but the Support Magistrate failed to include the buyout amount as income to the mother. However, the Support Magistrate did not err in ordering the father to pay his proportionate share of uncovered orthodontic expenses. While the issue of orthodontic coverage was decided upon by the parties through an oral agreement, the Support Magistrate only considered this agreement in order to determine whether the father had wilfully violated the support order and did not make any determination as to whether there was in fact any agreement, and thus, the mother was not aggrieved by this order.

Matter of Ross v Manley, 135 AD3d 1104 (3d Dept 2016)

Petitioner Agency Offered Uncontradicted Proof of Respondent's Willful Violation

Family Court determined respondent had wilfully violated an order of support and committed him to jail for six months, purgeable by the sum of arrears he owed in the amount of $36, 667.88. The Appellate Division affirmed. Although respondent's period of incarceration had ended, his challenge to the wilful violation was properly before the Court. Here, petitioner agency offered uncontradicted proof that respondent had not made a single support payment in more than five years and this was sufficient to establish willful violation. Additionally, respondent failed to show inability to pay. Although he testified he had registered with "a bunch of employment agencies," he failed to provide any detail with regard to his employment search and earning capacity. He testified his real estate broker and mortgage broker licenses had expired, he mowed lawns for pocket money and relied on his significant other to pay his living expenses. His argument that petitioner had verbally agreed she would not seek child support if he gave up his interest in the home they once owned was not credible, since the support order was entered, upon consent, six years after the alleged verbal agreement. Moreover, the court did not err by failing to cap respondent's arrears at $500 since he failed to make any application to modify, set aside or vacate the support order.

Matter of Ulster County Support Collection Unit v Oliver, 135 AD3d 1114 (3d Dept 2016)

Court Lacked Authority to Modify Repayment of Retroactive Support to County for Repayment of Public Assistance

The Support Magistrate properly denied respondent's objection to the recoupment of the retroactive support he owed the County for the repayment of public assistance given to his child. Respondent, who was incarcerated, argued the recoupment was from his weekly "program stipend" and he wanted the garnishment to be suspended until he had been released from prison and obtained employment. Contrary to respondent's argument, the court had no authority to modify the repayment schedule. Pursuant to FCA §440 (1)(a), where a child has received public assistance, the local support collection unit, and not the court, had the

authority to enforce retroactive support payments pursuant to an income execution as provided in CPLR § 5241(b), or in such periodic payment amounts as would have been authorized if such an execution had been issued.

Matter of Cordero v Commissioner of Social Services, Support Collection Unit, 136 AD3d 1159 (3d Dept 2016)

No New Facts Offered to Support Motion to Renew

The father moved to reduce his child support obligation in Family Court and soon after, the mother moved in Supreme Court to enforce the father's support obligation. Neither party attempted to consolidate the proceedings. Supreme Court granted the mother's request for a judgment and the father appealed. Pending the appeal, Family Court allowed the father to amend his petition to include allegations relating to his reduction of income which had occurred after the date of the issuance of the Supreme Court order, and issued an order of support. No appeal was taken from the Family Court order. The Appellate Division then affirmed the Supreme Court order. Thereafter, the mother moved to have Family Court reconsider its support order on the basis of the Appellate Division's affirmation of the Supreme Court order. Family Court deemed the mother's request to be a motion for renewal and denied her request. The Appellate Division affirmed. A motion to renew must "be based upon new facts not offered on the prior motion that would change the prior determination," and here, since no ruling was made by the Appellate Division regarding the issue of downward modification, the mother's motion did not establish new facts that would allow a motion to renew to be granted.

Matter of Severing v Servering, 136 AD3d 1182 (3d Dept 2016)

Support Magistrate Exceeded Authority

Respondent filed written objections to the Support Magistrate's determination he had violated a prior support order and owed arrears, arguing that the Support Magistrate had acted inappropriately by actively participating in the hearing. Family Court denied respondent's written objection but the Appellate Division reversed. While Support Magistrates can question witnesses "to insure proper foundation is made for admission of evidence and question..witness[es] in an effort to clarify confusing testimony as well as...facilitate the orderly and expeditious progress of the hearing," they cannot, as was done in this case, provide evidence or ensure certain evidence is introduced.

Matter of Washington v Edwards, 137 AD3d 1378 (3d Dept 2016)

Family Court Properly Imputed Income to Non Custodial Parent

Family Court acted within its discretionary powers in imputing $1,000 per month in income to the non-custodial father, who was the sole owner of a small corporation and resided in a portion of the business property at no personal cost. The father paid no rent and all his living expenses, including utilities, cable, internet, cell phone, groceries and vehicle insurance were paid out of his corporate account. Additionally, the record supported the court's decision to impute income to the father based on his use of increased depreciation. Pursuant to FCA §413 (1)(b)(5)(vi)(A), "any depreciation deduction greater than depreciation calculated on a straight-line basis for the purpose of determining business income" can be attributed to income. Instead of using straight line depreciation, the father used accelerated depreciation for the corporation's equipment and while there was some dispute between the parties' accountants regarding this figure, this was a credibility issue for Family Court to resolve and the record amply supported its decision.

Matter of McKenna v McKenna, 137 AD3d 1464 (3d Dept 2016)

Court Properly Imputed Income to Respondent Father

Family Court denied respondent father's objections to the order of the Support Magistrate, who granted the mother's petition seeking an upward modification of the father's child support obligation. The Appellate Division affirmed. At the hearing, the father testified that he was currently unemployed, but that he had worked for a company "off and on" for over five years, making $10 per hour, and that he did not have any

medical disabilities preventing him from working. Family Court determined that the Support Magistrate imputed income to the father of $20,800 per year. The determination was supported by the record and was based on the relevant factors.

Matter of Taylor v Benedict, 136 AD3d 1295 (4th Dept 2016)

Court Erred in Failing to Consider Respondent's Objections to Support Magistrate's Denial of Her Cross Petition for Downward Modification

Family Court adjudged that respondent mother willfully violated a prior order of child support and denied her cross petition for downward modification of her child support obligation. The Appellate Division modified by reinstating respondent's objections to the Support Magistrate's denial of her cross petition, and remitted for further proceedings. Family Court properly confirmed the finding of the Support Magistrate that respondent willfully violated the child support order. Although respondent presented evidence of a medical condition disabling her from work, that evidence related only to the period after the violation petition was filed, not the two-month period in which respondent failed to comply with the support order before the petition was filed. Thus, respondent failed to demonstrate that she had made reasonable efforts to obtain gainful employment to meet her child support obligation. However, the court erred in failing to consider respondent's objections to the Support Magistrate's denial of her cross petition for a downward modification of child support. Instead of reviewing respondent's objections in accordance with Family Court Act Section 439 (e), the court implicitly dismissed them when it stated on the record that, if the cross petition was denied by the Support Magistrate, respondent "will have to file another one."

Matter of Mandile v Deshotel, 136 AD3d 1379 (4th Dept 2016)

Court Erred in Including Amount of Maintenance Awarded to Defendant in Determining Her Income

Supreme Court directed defendant wife to pay plaintiff husband the sum of $142.53 per week in child support, among other things. The Appellate Division modified the judgment of divorce by decreasing defendant's child support obligation to $25 per month, and remitted the matter for further proceedings. The court erred in including the amount of maintenance awarded to defendant in determining her income for purpose of calculating the amount of child support that she was required to pay plaintiff. When the amount of maintenance was omitted from the calculation of defendant's income, defendant's income fell below the poverty line. Thus, the court erred in directing defendant to pay plaintiff more than the sum of $25 per month in child support. Defendant was entitled to recoupment of her child support overpayments, and the matter was remitted to determine the amount of recoupment that plaintiff owed to defendant. Although there was a strong public policy against recoupment of child support overpayments, recoupment was appropriate under the limited circumstances of this case. The record established that defendant's income was below the poverty line, and that plaintiff held a high-income job.

Weidner v Weidner, 136 AD3d 1425 (4th Dept 2016)

Order Reversed Where Respondent Denied His Right to Counsel

Family Court adjudged that respondent willfully failed to obey a court order of child support and placed respondent on probation for a period of three years. The Appellate Division reversed and remitted the matter for a new hearing. Although the Support Magistrate properly advised respondent that he had the right to counsel, the Support Magistrate failed to make a searching inquiry to ensure that his waiver of the right to counsel was a knowing, voluntary and intelligent choice. Thus, respondent was denied his right to counsel. To the extent that the Court's decision in *Matter of Huard v Lugo* (81 AD3d 1265, 1266, lv denied 16 NY3d 710) required the preservation of a contention that the Support Magistrate erred in allowing respondent to proceed pro se at a fact-finding hearing, that decision was no longer to be followed.

Matter of Girard v Neville, 137 AD3d 1589 (4th Dept 2016)

Appeal From Order Revoking Mother's Suspended Sentence and Committing Her to Jail for Willful Failure to Obey Child Support Order Dismissed as Moot

Family Court revoked respondent mother's suspended sentence and committed her to jail for a period of six months for her willful failure to obey a child support order. The Appellate Division dismissed. In a prior order, the court confirmed the Support Magistrate's determination that the violation of the child support order was willful and imposed a sentence of six months, which it suspended on the condition that respondent paid $75 per month, commencing on a certain date. It was undisputed that respondent failed to make the first monthly payment, but instead made two payments on the date on which the second payment was due. Respondent's contention was moot that the court erred in revoking the suspended sentence and committing her to jail inasmuch as she had served her sentence.

Matter of Brookins v McCann, 137 AD3d 1726 (4th Dept 2016)

Father Willfully Violated Child Support Order

Family Court denied respondent father's written objections to the order of the Support Magistrate finding him in willful violation of a child support order. The Appellate Division affirmed. The father's contention was rejected that petitioner mother was required to provide a written record detailing the missed child support payments. The mother's unequivocal testimony that the father failed to pay any child support from October 1995 to December 2004 was sufficient. The father testified that he paid child support by check during the time period in question, but he failed to submit any documentary evidence in support of that assertion. In light of the Support Magistrate's superior position to assess the credibility of the witnesses, there was no was no reason to disturb the determination that the father willfully violated the child support order.

Matter of Richards v Richards, 137 AD3d 1749 (4th Dept 2016)

Reversal of Order Where Respondent Denied His Right to Counsel

Family Court found respondent father in willful violation of a child support order and imposed a suspended sentence of six months of incarceration. The Appellate Division reversed and remitted the matter for a new hearing. The father was denied his right to counsel at the hearing before the Support Magistrate to determine whether he was in willful violation of the support order. Petitioner's contention was rejected that the issue required preservation. At the initial appearance, the Support Magistrate informed the father only that he had "the right to hire a lawyer or talk for himself," asked the father to choose between those options, and conducted no further inquiry when the father chose to proceed pro se. Thus, the Support Magistrate failed to inform the father of his right to have counsel assigned if he could not afford to retain an attorney, and also failed to engage the father in the requisite searching inquiry concerning his decision to proceed pro se in order to ensure that the father had knowingly, intelligently and voluntarily waived his right to counsel.

Matter of Soldato v Caringi, 137 AD3d 1749 (4th Dept 2016)

Court Erred in Dismissing Violation Petition Seeking Revocation of Suspended Sentence and Incarceration of Respondent

Family Court dismissed the mother's violation petition. The Appellate Division reversed, reinstated the violation petition and remitted for further proceedings. The mother commenced a violation proceeding in November 2013, alleging that respondent father had not complied with the terms of an order entered in February 2010, and seeking to have the suspended sentence revoked and the father incarcerated. The court erred in summarily dismissing the petition on the ground that the Support Magistrate's November 2010 order directing that all outstanding arrears were to be reduced to judgment stood in lieu of the suspended sentence inasmuch as the Support Magistrate had entered judgment for the entire amount of arrears. Pursuant to Family Court Act Section 451(1), Family Court had continuing plenary and supervisory jurisdiction over a support proceeding until its directives were completely

satisfied, and the suspension of an order of commitment could be revoked at any time. Moreover, the entry of a judgment for child support arrears was a form of relief that stood in addition to any and every other remedy which could be provided under the law. Thus, an order conditioning a suspended sentence on payments toward accumulated arrears was enforceable even if the arrears were later reduced to judgment. The court's alternative ground for dismissing the petition was also erroneous. The mother made a prima facie showing that the father willfully violated the February 2010 order through her submission of a certified calculation showing that he had not made all of the required payments, and the record failed to establish at this junction that the father's alleged violation of that order was not willful.

Matter of Brumfield v Brumfield, 138 AD3d 1422 (4th Dept 2016)

Order Modified Where There Was No Support in Record for Support Magistrate's Determination Not to Impute Income to Mother

Family Court denied respondent father's written objections to an order of the Support Magistrate that granted the mother's petition seeking to modify the order of support based upon the more that 15% increase in the father's income, and denied his petition seeking a determination imputing income to the mother in the amount of $100,000. The Appellate Division modified and remitted. The father's contention was rejected that the court erred in denying his objections related to the calculation of child support on the amount of income over the statutory cap of $141,000. The Support Magistrate properly considered the disparity in the parties' incomes and the lifestyles the children would have enjoyed had the marriage remained intact in deciding to include income over the statutory cap in determining the child support obligation. Further, the Support Magistrate set forth the basis for her determination not to apply the statutory formula to the amount of income over the statutory cap and related her determination to the Family Court Act Section 413 (1) (f) factors. However, the court erred in determining that the Support Magistrate did not abuse her discretion in imputing annual income to the mother of $20,000, which included $13,164 that she received in Social Security income. There was no support in the record for the determination not to impute income to the mother. The record established that the mother was 65 years old and had not worked since 2007, when she closed a Montessori school that she operated. The record further established that the mother had a bachelor's degree and an MBA, and that she graduated from law school but did not pass the bar exam and was therefore not admitted to the practice of law. The mother testified that, prior to the hearing, she sought only jobs as an attorney, for which she is not qualified. Thus, the mother had not sought employment for which she was qualified since 2007. Income could properly be imputed when there was no reliable records of a parent's actual employment income or evidence of a genuine and substantial effort to secure gainful employment. The record was sufficient to determine that, based upon her education and experience, the mother had the ability to earn income in the amount of $20,000 per year, exclusive of the Social Security income. Therefore, the corrected order was modified accordingly, and the matter remitted for a recalculation the respective child support obligations of the parties and their respective obligations for uninsured medical expenses.

Matter of Muok v Muok, 138 AD3d 1458 (4th Dept 2016)

CUSTODY AND VISITATION

Mother's Decision to Proceed Pro Se Was Knowing and Voluntary

Family Court denied respondent mother's motion to vacate an order granting custody of the subject child to petitioner paternal grandmother on consent of the parties. The Appellate Division affirmed. The court properly denied the mother's motion to vacate the custody order and reopen the underlying custody proceeding. The record of the proceedings demonstrated that the mother's decision to waive her right to counsel and proceed pro se was knowing and voluntary and made after appropriate inquiries by the court.

Matter of Austrolyn O., 135 AD3d 414 (1st Dept 2016)

Appeal of Denial of Visitation Application Mooted by TPR

Family Court denied respondent mother's application to modify an order of disposition to provide increased visitation with the subject child. The Appellate Division dismissed the appeal as moot. The court lacked authority to direct continuing contact between parent and child where, as here, parental rights had been terminated. In any event, the mother did not demonstrate changed circumstances or any other factual basis that would provide good cause to modify the visitation provisions of the dispositional order in the article 10 proceeding.

Matter of D'Elyn Delilah W., 135 AD3d 417 (1st Dept 2016)

Denial of Mother's Motion to Exclude Custody Evaluation Affirmed

Supreme Court denied plaintiff mother's motion to exclude a forensic custody evaluation and appoint a new forensic mental health expert, and granted defendant father's cross motion to modify the interim parental access schedule. The Appellate Division affirmed. The motion court properly denied plaintiff's motion to exclude the forensic report. *Frye* does not require that the report cite specific professional literature in support of the analyses and opinions in the report. Plaintiff could cross-examine the expert about the lack of citations and such omissions would go to the weight to be accorded the evaluator's opinion, not to its admissibility. The forensic report did not rely to a significant extent on hearsay statements. The primary source of the report's conclusions were the evaluator's firsthand interviews with the parties. If any hearsay declarants were not cross-examined, the motion court acknowledged that those portions of the report containing inadmissible hearsay should be stricken. Although the forensic report briefly referred to the parties' initial negotiations, those negotiations did not form the basis for conclusions regarding parental fitness or custody. There was a sound and substantial basis for the motion court's modification of the visitation order. Defendant sufficiently explained, without contradiction, why he missed certain visits with the child and his failure to explain all missed visits did not warrant denial of his cross-motion, particularly where the AFC supported the motion and noted that the child enjoyed spending time with her father.

Straus v Straus, 136 AD3d 419 (1st Dept 2016)

Court Erred in Disqualifying Father's Counsel

Supreme Court granted defendant mother's motion to disqualify plaintiff father's attorney and denied the father's motion for unsupervised visitation and modification of the visitation schedule and to enjoin the mother from smoking inside her apartment. The Appellate Division modified by denying the mother's motion to disqualify the father's attorney. The father retained attorney Kothari to replace prior counsel in this action. The mother only counsel in this action were attorneys Clair and Lesnower of Cohen Clair. Kothari worked at Cohen Clair's predecessor firm from 2008 to 2009 and currently was co-counsel with attorney Lars of Cohen Clair on another, unrelated pending matter. Land and Leshower have abutting offices at Cohen Clair and share the same assistant who works on both matters. The father executed a waiver of conflict of interest in connection with Kothari working on another matter as co-counsel with Cohen Clair, but the mother did not. Because disqualification can affect a party's constitutional right to counsel of his or her own choosing, the burden is on the party seeking disqualification to show that it was warranted. Here, the mother failed to meet her burden and the court improvidently exercised its discretion when it granted the mother's motion to disqualify. Kothari had never represented or consulted with the mother. His status as co-counsel on an unrelated matter with the firm that represented the mother while representing the father did not violate any ethical or disciplinary rule. Rule 1.7 of the Rules of Professional Conduct was not violated because Kothari was not concurrently representing anyone adverse to the interests of his client, the father, who executed a conflict waiver. To impute a conflict of interest to Kothari based upon rule 1.10 was too broad a reading of that rule. There was no appearance of impropriety sufficient to warrant disqualification. The mother did not show that there was a reasonable probability that confidential information would be disclosed to Kothari and her attorneys could ensure that she and Kothari were never scheduled to be in Cohn Clair's offices at the same time and could create an

appropriate wall to ensure confidential information was not leaked. The mother's attorneys could discuss these concerns with the office assistant who worked on both matters to ensure no confidences were breached or they could prohibit the assistant from working on both cases. The court had sufficient information to decide the father's motion for expanded and unsupervised visitation without a hearing. The totality of the circumstances did not warrant modifying the temporary parental access schedule. The court's determination that visitation should be supervised was reasonable, given the father's history of substance abuse and his recent positive drug test results. In view of the mother's agreement to refrain from smoking in any room of the residence in which the child was present, the court properly declined to direct the wife not to smoke in the residence.

Dietrich v Dietrich, 136 AD3d 461 (1st Dept 2016)

Case Remanded For New Hearing Before Different Judge

Family Court awarded sole custody and decision-making authority to respondent father, with limited visitation to petitioner mother and no provision for vacations and school breaks. The Appellate Division modified by vacating the parental access schedule and remanding to the court for reassignment to a different referee or judge, to conduct further proceedings on an expedited basis. The referee's finding that it was in the child's best interests to award full custody and decision-making to the father was supported by a sound and substantial basis in the record, including the parties' testimony. A new hearing concerning parental access was required to determine, based upon updated information, including an interview with the child, the child's best interests with respect to parental access, and to craft a more detailed and comprehensive schedule in an attempt to avoid further conflict.

Matter of Margaret R.-K. v Kenneth K., 136 AD3d 530 (1st Dept 2016)

Sole Legal and Physical Custody to Mother Affirmed

Family Court denied the father's petition for joint custody of the parties' child, granted respondent mother's cross petition for sole legal and residential custody, and required the father to undergo monthly psychiatric monitoring as a component of unsupervised visitation. The Appellate Division affirmed. The record established that joint custody was not appropriate because of the acrimonious nature of the parties' relationship – the father's inability to co-parent, shown by his disdain for the mother, his confrontational style, his refusal to listen to her, and his criticism of her parenting skills. The record showed that the mother displayed good judgment where the child was concerned and was excellent at meeting his developmental and educational needs. The father failed to demonstrate his ability to put the child's needs above his own. The mother also was able to provide greater stability for the child inasmuch as she resided in the same apartment for 10 years and had been in her current employment for at least seven years and maintained a job before that for eight years. The mother also demonstrated that she was a very good primary caretaker and had custody of the child from the time of his birth. Requiring the father to undergo monthly psychiatric monitoring as a component of visitation was not inappropriate given the recommendation of the forensic evaluator and other clinicians. The evaluator's conclusion that the father's failure to disclose his extensive mental health history indicated his denial about his need for treatment, which might significantly limit his ability to parent a five year old, was amply supported by the record.

Matter of Jamel W. v Stacey J., 136 AD3d 552 (1st Dept 2016)

Court Properly Dismissed Petition to Hold Mother in Contempt

Family Court granted respondent mother's motion to dismiss the father's petition to hold the mother in contempt. The Appellate Division affirmed. The referee properly dismissed the petition without holding a full evidentiary hearing because the father failed to state a claim that the mother had violated a 2008 visitation order. Although the father alleged that the mother violated the order by moving to Yonkers without letting him know the new address, there was nothing in the order that prohibited the mother from moving or requiring her to notify the father of the new address, and the father did not allege that the move impeded his visitation in any way. Further, the father did not allege

that he had complied with his own obligations under the order - to contact the mother at the beginning of the month to arrange visitation. He acknowledged that he knew where the child was living by 2011, three year before the contempt petition. He also acknowledged that an order of protection precluded his contact with the mother and child for a two-year period beginning in 2011.

Matter of Nwakibi F. v Sanora W., 136 AD3d 574 (1st Dept 2016)

Motion For Change of Venue Properly Granted

Supreme Court granted defendant mother's motion for a change of venue to King's County. The Appellate Division affirmed. Because in this matter issues were raised about custody of the parties' children and parental access, the court properly exercised its discretion in granting the mother's motion for a change of venue. The children resided with the mother in King's County; during the duration of the marriage the family lived in King's County; although the father commenced the divorce action in New York county, the parties initially agreed in their separation agreement that the action would be commenced in King's County; there was a family offense proceeding pending in King's County; and the parties had no nexus to New York County.

Greenbaum v Greenbaum, 136 AD3d 595 (1st Dept 2016)

Court Lacked Jurisdiction Under UCCJEA

Family Court dismissed with prejudice the mother's emergency petition for temporary custody of the child because of lack of jurisdiction. The Appellate Division affirmed. The court lacked jurisdiction under the UCCJEA. The child lived with respondent father, who was granted custody in 2010, in Puerto Rico. Because the mother conceded that the child was not present in New York, and her allegations regarding an emergency were entirely unsubstantiated, the court properly determined that it could not assert temporary emergency jurisdiction. Further, in the absence of jurisdiction, the court did not err in dismissing the petition with prejudice without conducting a hearing.

Matter of Wilda C. v Miguel R., 136 AD3d 597 (1st Dept 2016)

Relocation Not in Children's Best Interests

Family Court denied petitioner mother's application to relocate with the parties' children. The Appellate Division affirmed. The determination that it was not in the children's best interests to relocate to Florida had a sound and substantial basis in the record. The parties stipulated to joint custody and the father had fully exercised his visitation rights and frequently picked the children up from their school near his house. Although the mother had good reasons for the relocation, any quality-of-life advantage was not necessarily outweighed by the disruption in the children's relationship with the father. The older child's preference to relocate was only one factor for consideration and was not determinative.

Matter of Yamilly M.S. v Ricardo A.S., 137 AD3d 459 (1st Dept 2016)

Custody to Father in Child's Best Interests

Family Court granted the father's petition for custody of the parties' child. The Appellate Division affirmed. The court's conclusion that an award of custody to the father was in the best interests of the child had a sound and substantial basis in the record. Since the child was in the father's care, the father parented appropriately and provided a loving and stable home. Also, the father lived with the child's paternal grandmother and great-grandmother, who provided financial assistance and assisted with the child's care. The mother suffered from mental illness and exhibited violent, threatening and aggressive behavior, including an episode of excessive corporal punishment against the child, leading to a neglect finding against the mother. The court properly credited the testimony of the expert psychiatrist, who diagnosed the mother as suffering from disruptive impulse control and conduct disorder and recommended that she have only supervised visitation.

Matter of Aaron P. v Tamara F., 137 AD3d 485 (1st Dept 2016)

Sanctions Against Father and Father's Parents Vacated in Part

Supreme Court granted plaintiff mother's motion for sanctions against defendant father and granted plaintiff's motion to hold defendant's parents in contempt. The Appellate Division modified by denying plaintiff's motion insofar as she sought to sanction defendant for his delay in paying his share of the forensic evaluator's fee, vacated the fines imposed on defendant's parents for that part of their contempt relating to plaintiff's legal fees incurred in conducting the visitation trial and preparing an addendum to the posttrial memorandum. The court abused its discretion in sanctioning defendant for failing to comply with its order directing him to pay his share of the custody forensic evaluator's fee. Defendant claimed he could not afford the fee. Although the court rejected that excuse because defendant's parents were paying most of defendant's other legal fees, the parents were not legally or contractually obligated to pay the evaluator's fees. Defendant, who was disabled and unable to work, offered to have the fees deducted from his remaining share of his escrowed funds. Although the court rejected that option, ultimately the fees were paid from the proceeds of the marital home, as defendant had proposed months earlier. Defendant's commencement of a special proceeding against plaintiff and the Beth Din for a permanent stay of an arbitration hearing on the religious divorce was frivolous because the action had no legal or factual basis. Even if defendant's parents manipulated him into bringing the proceeding, ultimately it was defendant's decision to pursue those baseless claims for over a year. Plaintiff's legal fees incurred as a result of the special proceeding were the appropriate sanction amount. Defendant's notice of appeal was deemed to include his parents because they had unified and inseverable interests in the judgment's subject matter, which permitted no inconsistent application among the parties. The parents were properly held in contempt of trial subpoenas and court orders when they failed to provide documents at trial. The court properly included plaintiff's legal fees for bringing the contempt motion as part of the fine, but erred in including as part of the contempt fine the legal fees incurred to prepare the posttrial memorandum and those incurred in connection with the trial itself. The conclusion that if the parents had produced certain documents, the visitation trial would have been unnecessary or sharply curtailed, was speculative. Even if defendant's parents had timely produced the documents, access and supervised visitation would have been an issue. The dissent would have affirmed on the grounds that the parents' appeal was not properly before the court and because their defiance of subpoenas and withholding of information might have drastically curtailed or averted an extended trial on defendant's visitation schedule.

Gottlieb v Gottlieb, 137 AD3d 614 (1st Dept 2016)

AFC's Motion to Dismiss Father's Petition to Modify Custody Properly Granted

Family Court granted, without a hearing, the AFC's motion to dismiss the father's petition to modify an order of custody. The Appellate Division affirmed. The court properly declined to hold a hearing before dismissing the father's petition to modify the existing custody arrangement. The father even acknowledged that he failed to make the requisite showing to warrant a hearing. The Referee was not required to meet with the child in camera, and it was proper for the AFC to inform the court of her client's position. The father did not demonstrate that he was denied effective assistance of counsel.

Matter of Antonio Dwayne G. v Ericka Monte E., 137 AD3d 647 (1st Dept 2016)

Relocation Properly Granted But Increased Parenting Time to Father Warranted

Family Court granted respondent mother's petition to allow her and the parties' child to relocate to Tennessee and denied the father's petition to modify a prior custody order to require that the parties' child live in New York State. The Appellate Division modified by granting the father additional parenting time. The court's determination that relocation would serve the child's best interests had a sound and substantial basis in the record. The mother testified regarding the improvement in the child's academic performance in her Tennessee school; the improvement in, and reduced cost of, health care in Tennessee for the mother's younger daughter; and the general improvement in the family's quality of life, including the lower cost of living and housing, and the mother's ability to obtain employment

in Tennessee. In addition, the child wished to remain in Tennessee and the father's failure to pay child support was a factor in support of relocation. In accordance with the child's request, the order should be modified to increase the father's parenting time.

Matter of Nairen McI. v Cindy J., 137 AD3d 694 (1st Dept 2016)

Father's Chose to Proceed Pro Se

Supreme Court awarded primary physical custody of the parties' children to defendant mother with liberal visitation to plaintiff father, awarded the mother child support, and directed the father to pay a portion of the arrears on the former marital apartment. The Appellate Division affirmed. The record did not support the father's claim that he was not given sufficient opportunity to present evidence and cross-examine witnesses and to reserve arguments about disclosure. He also had ample time to review and digest the forensic evaluation report before trial. The record showed that it was the father's choice to proceed pro se.

Battistella v Joyce, 137 AD3d 697 (1st Dept 2016)

Father Better Equipped to Oversee Children's Special Needs

Family Court awarded sole custody and decision-making authority of the parties' children to petitioner father with extensive visitation to respondent mother. The Appellate Division affirmed. Given the children's special needs, the record amply supported the court's finding that the father was better equipped to oversee their care.

Matter of Carlos S. v Ana S., 137 AD3d 700 (1st Dept 2016)

Father Failed to Comply With Prior Order Requiring Authorization From Court Before Filing Proceeding

Family Court dismissed the father's petition for enforcement of an order of custody and denied his motion seeking an order directing that mental health consultants be involved in a child custody evaluation. The Appellate Division affirmed. The court properly dismissed the father's enforcement petition because he failed to comply with a prior court order requiring him to obtain prior written authorization from the court before filing any further proceedings in order to prevent him from engaging in further vexatious litigation. The father did not appeal from that order, which was reaffirmed three years later. The court properly exercised its discretion to deny the father's motion seeking a mental or forensic evaluation of the mother without a hearing inasmuch as he presented no basis for ordering such evaluation. The court was entitled to take judicial notice of its own proceedings and to consider the position of the child as advocated by his attorney.

Matter of Amaury Alfonso N. v Zaida Iris R.., 137 AD3d 713 (1st Dept 2016)

Custody to Father Reversed

Family Court granted the father's petition to modify a prior consent order to the extent of designating the father's home in Manhattan as the children's primary residence with respondent mother having visitation and denied the mother's cross petition to modify the consent order to award her sole custody and allow her relocation to Katonah, NY. The Appellate Division reversed. From 2002-2009, the mother and father lived with the children in a duplex apartment in a building on 32nd street then owned by the paternal grandfather, and then in 2009 they moved to another apartment also owned by the grandfather. In 2010, the parties separated and the mother moved back to the 32nd Street apartment. In September 2010, the parties entered into a stipulation providing them with joint custody of the children, with the mother's home designated as the primary residence, and agreeing to discuss diligently and agree on all matters affecting the children. In October 2010, the grandfather commenced eviction proceedings against the mother and she was evicted in 2011. In 2013, after staying at various friends' houses, the mother settled in Katonah, in Westchester County, asserting that it would be in the children's best interests to attend school in Westchester County. A few months later, the father filed a petition to modify the consent order by granting him sole custody, alleging that there had been a change in circumstances because the mother moved to Katonah. The mother filed a cross petition also seeking sole custody, alleging changed circumstances in that she had been evicted and forced to relocate, requiring the

children to travel to Manhattan for school. The father failed to show a change in circumstances. He failed to demonstrate that he had the same degree of attention to the children's emotional, educational and social needs as the mother. The father, an Ivy League graduate, had never had a meaningful career independent of his father's real estate business. His life was in flux, having recently married the mother of his child. If the children remained in Manhattan, they would have to share a two-bedroom apartment with the father, his new wife and the baby. The evidence at the hearing showed that the mother was the more competent parent. The forensic evaluator emphasized that the children had a stronger emotional attachment to the mother and that she was more attuned to their needs. The children unequivocally stated that they wished to live with their mother and attend school in Katonah. The Referee also erred in not granting the mother's motion to relocate. The relevant factors favored relocation. The AFC supported relocation; the evidence showed that the mother was more attuned to the children's needs; and the mother had sound reasons for relocating and did so only after failing to find affordable housing in Manhattan. Katonah was 45 minutes from the City via MetroNorth and the mother showed a willingness to maintain a visitation schedule that would preserve a positive and nurturing relationship between the children and their father.

Matter of David B. v Katherine G., 138 AD3d 403 (1st Dept 2016)

Custody to Father Affirmed

Supreme Court denied defendant mother's motion to exclude the forensic evaluator's report and restated its award of sole legal custody of the parties' child to plaintiff father. The Appellate Division affirmed. The record fully supported the court's determination that the child's best interests were served by awarding sole custody and decision-making authority to the father. After an 18-day trial, the court found that while both parties had parental deficiencies, the father was more likely to make appropriate decisions, in particular that he would send the child, who was diagnosed on the autism spectrum, to a therapeutic boarding school, which the mother opposed, and would use an appropriate educational consultant. The fact that the mother had been the child's primary caretaker was but one factor for the court to consider, and keeping siblings together, while an important factor, was not determinative. The court properly denied the mother's motion to exclude the forensic report. The sole reason that the report did not cite to the professional literature supporting the evaluator's opinion did not require its exclusion.

Douglas H. v C. Louise H., 138 AD3d 497 (1st Dept 2016)

Sanctions Against Father's Attorney Modified

Supreme Court granted plaintiff mother's motion for sanctions to the extent of directing nonparties attorneys to pay the wife $317,480.67, representing the attorneys' fees incurred by her as a result of the attorneys' misconduct. The Appellate Division modified by vacating the award of $25,412.50 for pursuing a special proceeding and in lieu thereof awarding $10,000 in sanctions; vacating the awards of $78,812 for continuation of the visitation trial and $75,935 for preparation of the posttrial memorandum; vacating the award of $28,135.36 for preparation of the addendum of the postrial memorandum, and in lieu thereof awarding $10,000 in sanctions; and vacating the awards of $28,675 for bringing motion sequence four, $18,510.82, for bringing motion sequence five, and $62,000 for the sanctions hearing. The court had previously awarded the mother attorney fees of $68,587.50 against the father for the entire special proceeding and that award was affirmed on appeal. Thus, the award of attorney's fees for the special proceeding was vacated and in lieu thereof sanctions in the amount of $10,000 were imposed on the attorneys for frivolous conduct. The attorneys did not act frivolously in continuing to litigate the visitation trial after the father's parents advised the attorneys in December 2012, that the husband did not want visitation, because the husband steadfastly maintained that he wanted visitation. Therefore, the attorneys fees for continuing the trial after December 2012, and the preparation of a related posttrial memorandum, were vacated. The court properly determined that the attorneys acted frivolously in making and pursing their untimely and meritless motion to quash subpoenas and in directing the grandparents not to produce the subpoenaed documents, even afer the motion was denied. The attorneys' fees incurred in preparing the addendum to the posttrial memorandum,

to address the significance of the belatedly subpoenaed documents would have been incurred even if the documents had been timely produced. Therefore the attorneys fees of $28,135.36 for preparation of the addendum was vacated and in lieu thereof sanctions in the amount of $10,000 were imposed on the attorneys for frivolous conduct. The award of attorneys fees incurred in making and pursuing the motions for sanctions and in participating in the sanctions hearing were vacated as "fees on fees."

Gottlieb v Gottlieb, 138 AD3d 575 (1st Dept 2016)

Litigant's Pro Se Status Did Not Require a Hearing

The parties are the parents of five children. The father commenced a proceeding seeking to modify a stipulation between the parties so as to be awarded custody of all of the children. The father appeared pro se at the hearing on the petition. During a colloquy at that hearing, the father stated that he was withdrawing his petition except insofar as it pertained to the child M. On April 20, 2010, the Family Court orally announced its decision. The court stated that the petition insofar as it related to the other children was deemed withdrawn and that the petition insofar as it related to M. was being denied. The defendant later moved to strike the report and testimony of the forensic evaluator who testified at the hearing. On February 25, 2014, the court denied that motion. On October 29, 2014, the court so-ordered the decision in the transcript of the April 20, 2010, proceedings. The father appealed. Contrary to the father's contentions, he was not denied a fair hearing due to his status as a pro se litigant. A litigant does not, by appearing pro se, have any greater right than any other litigant. Moreover, a litigant may not use his or her pro se status as an excuse for depriving opposing parties of their own procedural rights. The record did not support the father's contention that the Family Court coerced him to withdraw so much of his petition as related to custody of S. and T. Instead, it demonstrated that the court asked the father which children he sought custody of, that the father vacillated, and that the court insisted upon a clear answer. The Appellate Division likewise rejected the father's contention that the Family Court erred in denying his motion to strike the report and testimony of the court-appointed forensic evaluator. The forensic psychologist reached his conclusion based on his personal observations and experience, and he was not required to conduct formal scientific testing for his opinion to be admissible.

Matter of Chana J.A. v Barry S., 135 AD3d 743 (2d Dept 2016)

Mother's Motion to Relocate with Children Denied

The Appellate Division could find no reason to disturb the determination of the Family Court which denied the mother's motion to relocate, granted the father's petition for custody, and, in effect, denied the mother's petition for custody, as it had a sound and substantial basis in the record. With respect to the relocation, the mother failed to demonstrate, by a preponderance of the evidence, that the children's lives would be enhanced economically, emotionally or educationally by the move. The Family Court expressly determined that both parties had a loving and good relationship with the subject children, but found the mother to be evasive, antagonistic, and wholly incredible. The court found that the mother presented scant evidence that a move to Maryland would benefit the subject children. The court also noted that, during one of the proceedings, the mother had stormed out of the court shouting curses at the court and expressed palpable disdain for the father. The court determined that the mother's actions, which included sending expletive-filled text messages to the father threatening the father and his family, belied her contention that she would maintain a working relationship with the father if the subject children were allowed to relocate. In contrast, the court found that the father was forthcoming and truthful, demonstrated no hostility toward the mother, and maintained a cordial temperament. In addition, the court determined that the father was more likely than the mother to preserve the relationship between the non-custodial parent and the children. The Appellate Division noted that the attorney for the subject children also supported the court's determination to deny relocation and grant custody of the subject children to the father.

Matter of Adegbenle v Perez, 135 AD3d 857 (2d Dept 2016)

Mother's Petition to Vacate Order of Guardianship Denied

In the order appealed from, the Family Court denied the mother's petition to vacate the order of guardianship, granted the paternal aunt's petition to suspend the mother's visitation with the subject child to the extent of limiting the mother's contact with the child to communications via telephone, email, and regular mail, and, in effect, denied the mother's petition to expand her visitation with the child. The court also awarded the paternal aunt custody of the child. The mother appealed. Upon reviewing the record, the Appellate Division agreed with the mother's contention that the Family Court lacked the authority to award custody of the subject child to the paternal aunt, since there was no petition for custody pending before the court (*see* FCA § 651 [b]). However, the Appellate Division disagreed with the mother's contention that the court erred in denying her petition to vacate the order of guardianship. The Appellate Division found that the court properly determined that the paternal aunt sustained her burden of establishing extraordinary circumstances. Additionally, the court's determination that the best interests of the child were served by denying the mother's petition and continuing the order of guardianship was supported by a sound and substantial basis in the record. Further, contrary to the mother's contention, the Family Court's determination that it was in the best interests of the subject child to suspend physical visitation was supported by a sound and substantial basis in the record. Thus, the Appellate Division declined to disturb so much of the order, as granted the paternal aunt's petition to suspend the mother's visitation with the child to the extent of limiting the mother's contact with the child to communications via telephone, email, and regular mail, and, in effect, denied the mother's petition to expand her visitation with the child. The order was, however, modified by deleting the provision which awarded custody of the subject child to the paternal aunt.

Matter of Nancy R.E., 135 AD3d 864 (2d Dept 2016)

Relocation to Florida with Mother Was in the Child's Best Interests

The parties are the parents of the subject child, who was born in December 2006. In 2012, the parties stipulated to joint legal custody, with the mother having physical custody. In May 2013, the mother left the child with the paternal grandmother and traveled to Florida, wherein she later decided to relocate. The father filed a petition for custody of the child. The mother then filed a petition seeking to relocate with the child to Florida. Following a hearing, the Family Court denied the father's petition and granted the mother's petition, allowing the child to relocate to Florida. The father and the child separately appealed. Upon reviewing the record, the Appellate Division found a sound and substantial basis for the Family Court's determination that the mother's relocation with the child to Florida was in the child's best interests. It was undisputed that the mother had been the child's primary caregiver throughout most of the child's life, and that the father had, until recently, been minimally involved in the child's life. Additionally, under the totality of the circumstances, the court properly determined that the best interests of the child were served by maintaining joint legal custody and awarding the mother physical custody of the child. Order affirmed.

Matter of Thomas v Tretola, 135 AD3d 867 (2d Dept 2016)

Mother Knowingly Violated Provisions of Prior Order on Many Occasions

The father petitioned to modify an order of custody and visitation. He alleged that the mother had repeatedly violated the terms and conditions of the parental access schedule. After a hearing, the Family Court found that the mother violated the terms of the prior order and granted the father's petition by limiting the mother's parenting time with the parties' child to the first and third weekends of each month and directing that all exchanges of the child occur at a nearby police station. The mother appealed. The Appellate Division affirmed. Upon reviewing the record, the Appellate Division found that it contained a sound and substantial basis for the Family Court's determination that the mother knowingly violated the provisions of the prior order on many occasions. These violations amounted to a change in circumstances such that modification of the prior order was required to ensure the child's best interests.

Matter of Sachs v. Asotskaya, 136 AD3d 618 (2d Dept 2016)

Order Modified to Provide Mother with Expanded Visitation Schedule

The parties were never married and had one child in common. The mother filed a petition seeking custody of the subject child. After a hearing, the Family Court awarded sole legal and physical custody of the subject child to the father and certain visitation to the mother. The mother appealed. The Appellate Division found that the Family Court's determination that an award of legal and physical custody to the father was in the best interests of the child had a sound and substantial basis in the record. However, under the circumstances of this case, it was appropriate to expand the mother's visitation schedule. The Family Court granted the mother visitation with the child on Sundays from 12:00 p.m. until 6:00 p.m. A more liberal visitation schedule would have fostered the best interests of the child by permitting the continued development of a meaningful, nurturing relationship between the mother and the child. Thus, in addition to the visitation provided by the Family Court, it was appropriate to add an additional period of visitation to the mother, one weekday during the week, from the conclusion of school until 7:00 p.m., upon the parties' consent as to the day of the week and the logistics of such visitation. It was also appropriate to grant the mother a visitation schedule for holidays, birthdays, and vacations, upon the parties' consent. In the event the parties cannot reach an agreement as to the weekday in which the additional visitation is to occur, or the mother's visitation schedule for holidays, birthdays, and vacations, or the logistics of such visitation, the Family Court shall make such determinations. Accordingly, the order was modified and the matter was remitted to the Family Court.

Matter of Sanders v. Ballek, 136 AD3d 676 (2d Dept 2016)

Mother Willfully Violated Prior Visitation Orders

The subject child was born to the mother while she was married to an individual (hereinafter the husband) other than the petitioner. On June 20, 2012, an order of filiation on default adjudicating the petitioner to be the father of the subject child (hereinafter the father) was issued by a support magistrate after a paternity proceeding in which the mother and the husband, inter alia, refused to comply with an order for genetic marker testing. The father subsequently commenced a proceeding for custody of the child. While his petition for custody was pending, the father sought to have the Family Court punish the mother for contempt, based on her failure to comply with the Family Court's previous orders of supervised visitation between the father and the subject child. On January 17, 2013, the mother was found to have willfully violated prior visitation orders, held in contempt, and committed to the Dutchess County Jail for a 45-day term, which was subsequently amended to a 30-day term. By amended order dated January 18, 2013, the Family Court awarded the father immediate temporary physical custody of the child. A subsequent amended order dated April 29, 2013, awarded the father temporary sole legal and physical custody and gave the mother supervised visitation with the subject child. Thereafter, in October 2013, the mother filed a cross petition seeking, inter alia, sole custody of the child. By order dated January 14, 2015, the Family Court granted the father's petition for sole legal and physical custody of the subject child, and denied the mother's cross petition for custody. The mother appealed. The Appellate Division affirmed. The mother's contention that the underlying finding of paternity was improperly made by a support magistrate (*see* FCA § 439 [b]), was without merit. The mother's contention that the Family Court improperly held her in contempt, in the order dated January 17, 2013, was not properly before the Appellate Division, as the mother failed to appeal from that order. The Appellate Division concluded that the Family Court's determination had a sound and substantial basis in the record.

Matter of Suitt v. Martos, 136 AD3d 678 (2d Dept 2016)

Relocation with Mother to California Was in the Best Interests of the Children

The parties were married in 2004. They have two daughters together, born in 2006 and 2009. From 2006 to 2011, the parties lived in California. In 2011, they moved to New York, but separated shortly thereafter. The father petitioned for custody and the mother cross-petitioned for custody. The mother later amended her cross petition to seek permission to relocate with the children to California. The Family Court granted the mother custody of the children. However, it also denied

that branch of the mother's amended cross petition which was to relocate with the children to California. The mother appealed. The Appellate Division reversed. Here, the Family Court's determination that the best interests of the children would be served by an award of custody to the mother was supported by a sound and substantial basis in the record. The mother has been the children's primary caretaker and has been actively involved in their education and daily lives. The mother was in the best position to provide for the children's emotional and intellectual development. However, the Family Court's determination that the children's best interests would not be served by the relocation to California was not supported by a sound and substantial basis in the record. The mother established that the relocation would provide an opportunity to improve her and the children's economic situation. The mother expressed a willingness to facilitate visitation and contact between the father and the children. Further, although the relocation will have an impact on the father's ability to spend time with the children, a liberal visitation schedule, including extended visits during the summer and school vacations, will allow for the continuation of a meaningful relationship between the father and the children. Under the totality of the circumstances, the hearing testimony established that the children's best interests would be served by permitting the mother to relocate with the children to California. Accordingly, the Family Court should have granted the mother's amended cross petition which was to relocate with the children to California. The order was reversed, the mother's amended cross petition was granted, and the matter was remitted to the Family Court to establish an appropriate post-relocation visitation schedule for the father.

Matter of Yu Chao Tan v. Hong Shan Kuang, 136 AD3d 933 (2d Dept 2016)

Record Supported Award of Joint Legal Custody and Decision-Making Authority

The order appealed from granted the mother's motion to modify the joint custody provisions of a judgment of divorce dated September 6, 2011, so as to award her primary residential custody of the parties' children, and denied the father's motion to modify the judgment of divorce so as to award him sole decision-making authority with respect to the children. The Appellate Division affirmed. There was a sound and substantial basis for the Supreme Court's determination that it was in the best interests of the children for the mother to be awarded primary residential custody. Particularly relevant in this case were the clearly stated preferences of the children, especially considering their age and maturity (13 and 17 years old), and the quality of the home environment provided by the mother. Moreover, under the circumstances of this case, the Supreme Court did not err in denying the father's motion for an award of sole decision-making authority with respect to the children, and continuing instead the existing provisions of the judgment of divorce, which call for joint legal custody and joint decision-making authority. While ordinarily it is not appropriate to award joint legal custody and decision-making authority where the parties are antagonistic toward one another, in this case, the record supported the court's finding that, despite their antagonism, the parties had been able to agree on most decisions concerning the children. The record supported the court's finding that if either parent were awarded sole decision-making authority, there would be a danger that it would be used to exclude the other parent from meaningful participation in the children's lives. In addition, the court appointed a parenting coordinator, who could assist the parents in resolving any disputes they might have concerning decisions about the children. The Appellate Division rejected the father's contention that the Supreme Court erred in giving the daughter discretion with respect to her mid-week visitation with him. It is true that awarding visitation to a parent conditioned on the child's wishes is disfavored where it tends unnecessarily to defeat the right of visitation. However, in this case, the Supreme Court awarded the father mid-week visitation with the daughter in the weeks before the mother's weekends, with the daughter to have "the option to spend either Wednesday night or Thursday night, or both, at the father's home." Contrary to the father's contention, while the provision confers upon the daughter a limited measure of flexibility regarding the timing and duration of her mid-week visitation with the father, it does not tend unnecessarily to defeat the right of visitation.

Anonymous 2011-1 v. Anonymous 2011-2, 136 AD3d 946 (2d Dept 2016)

Grandparents' Petition for Visitation Granted

Upon reviewing the record, the Appellate Division found that the Family Court providently exercised its discretion in determining that the paternal grandparents had standing to petition for visitation pursuant to the equitable circumstances clause of DRL § 72 (1). Through their testimony and the photographic evidence they submitted, the grandparents established that they had maintained regular contact with the subject child and his siblings for many years before a dispute between the grandparents and the parents led the children's parents to cease permitting such contact. Upon considering the Family Court's assessment of the credibility of the witnesses, the Appellate Division concluded that the Family Court providently exercised its discretion in determining that it was in the best interests of the subject child to grant the grandparents' petition for visitation. Accordingly, the Family Court properly granted the grandparents' petition for visitation with the subject child.

Matter of Fitzpatrick v Fitzpatrick, 137 AD3d 784 (2d Dept 2016)

Mother Made Repeated and Unfounded Allegations of Sexual Abuse Against Father

The record revealed that while the subject child, who was seven years old at the time the order of custody was issued, had lived with the mother since birth, the evidence adduced at the hearing established that the mother made repeated and unfounded allegations of sexual abuse against the father. As a result, the child was subjected to numerous examinations by medical, law enforcement, Administration for Children's Services, and mental health personnel, which had a detrimental impact on the child. These acts of interference with the parent-child relationship were so inconsistent with the best interests of the child so as to raise a strong probability that the mother is unfit to act as custodial parent. Thus, there was a sound and substantial basis in the record for the Family Court's determination, upon its consideration of the totality of the circumstances, that the best interests of the subject child were served by, inter alia, awarding custody to the father.

Matter of Kortright v Bhoorasingh, 137 AD3d 1037 (2d Dept 2016)

Record Supported Award of Custody to Father

At the custody hearing, the father testified that he had been employed by the Long Island Rail Road for 12 years. He testified that both of his parents are retired, and that they help him raise the child. The mother testified that both of her parents are deceased, and her siblings live in Indonesia and Singapore. The mother admitted to leaving the marital residence with the child in December of 2009, and further admitted that she did not contact the father for the next two months to ask if he wanted to see the child. In the interlocutory judgment appealed from, the Supreme Court awarded full custody of the child to the father. The court granted the mother visitation every other weekend from Friday at 6:00 p.m. until Sunday at 8:00 p.m., and dinner on every Wednesday from 6:00 p.m. until 8:00 p.m. On this record, the Appellate Division found that the Supreme Court's determination had a sound and substantial basis in the record.

Matter of Jin C. v Juliana L., 137 AD3d 1061 (2d Dept 2016)

Hearing Required on Father's Petition for Modification

Modification of an existing court-sanctioned custody agreement is permissible only upon a showing that there has been a change in circumstances such that modification is necessary to ensure the best interests of the child. When the allegations of fact in a petition to change custody are controverted, the court must, as a general rule, hold a full hearing. A hearing may not be necessary, however, when the Family Court already possesses adequate relevant information to make an informed determination of the children's best interests. Here, the record did not demonstrate that the Family Court had an adequate basis for determining the petition without a hearing. Accordingly, the matter was remitted to the Family Court for a new determination of the father's petition following a full hearing, including in camera interviews with the parties' two youngest children, and, if necessary, forensic evaluations.

Matter of Fielder v Fielder, 137 AD3d 1129 (2d Dept 2016)

Mother Failed to Demonstrate a Sufficient Change of Circumstances

Contrary to the mother's contention, she failed to demonstrate a sufficient change in circumstances to warrant modifying the court's order to award her sole legal custody and primary physical custody of the child. Although the mother alleged that the father abdicated his parenting role to the paternal grandmother, the record demonstrated that the paternal grandmother had played a significant role in caring for the child even prior to the parties' divorce. The mother was aware at the time that the order was made that the father relied on the paternal grandmother to care for the child while he was at work, and that the paternal grandmother would continue to be the child's primary caretaker during the father's working hours on the days that he had parenting time. While the paternal grandmother additionally participated in the child's life by taking her to medical appointments and attending school activities, there was no evidence that the paternal grandmother's extensive involvement in the child's life negatively impacted the child. Since the mother failed to demonstrate a sufficient change of circumstances, the Family Court properly, in effect, denied the mother's petition to modify the order, inter alia, to award her sole legal custody and primary physical custody of the child. However, under the circumstances presented here, the Family Court should not have modified the order so as to, inter alia, limit the mother's parenting time to alternate weekends and one midweek overnight visit per week. The evidence presented at the lengthy hearing demonstrated the existence of a close bond between the mother and the child, and did not support the conclusion that a reduction in the mother's parenting time was warranted to protect the best interest of the child.

Matte of Dunne v Dunne, 137 AD3d 1275 (2d Dept 2016)

Father and Paternal Grandmother Engaged in a Concerted Effort to Interfere With, and Undermine, the Child's Relationship with the Mother

The mother and the father each filed petitions for sole custody of their child. The Family Court, after a hearing, awarded the mother sole legal and residential custody of the child. The father appealed. Although various considerations in this case may have supported an award of custody to either parent, the Family Court properly gave great weight to the evidence that the father, assisted by the paternal grandmother, engaged in a concerted effort to interfere with, and undermine, the child's relationship with the mother. As the Family Court pointed out, a custodial parent's interference with a child's relationship with the noncustodial parent is so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as custodial parent. Here, the evidence established that the father has been unable to appreciate that his child would be best served by having a strong relationship with both parents. Thus, the Appellate Division concluded that the record contained a sound and substantial basis for the Family Court's determination that the award of sole custody to the mother was in the best interests of the child.

Matter of Carleo v Pluchinotta, 138 AD3d 833 (2d Dept 2016)

Order Dismissing Petition for Failure to Prosecute Reversed

The mother commenced a proceeding seeking custody of her daughter. The daughter resided with her maternal grandmother, who had been appointed the daughter's guardian. The proceeding was adjourned on several occasions to permit the mother to obtain proof of service of the petition on the daughter's father. On March 16, 2015, the mother's attorney was not present in court when the case was called to be heard. Although the mother requested an adjournment for her attorney to appear, the Family Court denied the request and dismissed the petition for failure to prosecute. In her appeal from the dismissal order, the mother argued that her assigned counsel was ineffective. Contrary to the contention of the attorney for the child, viewed in its totality, the record did not establish that the mother received meaningful representation. Despite being reminded of her obligations by the Family Court, and being given several viable options for resolving the issue of service upon the father, the mother's assigned counsel failed to make any efforts to resolve that issue,

leading to dismissal of the petition. Accordingly, the mother's petition should not have been dismissed. Order reversed.

Matter of Drummond v Robinson, 138 AD3d 837 (2d Dept 2016)

Record Supported Modification of Prior Order of Custody

On or about August 3, 2012, the parties entered into an agreement which resulted in a custody order awarding them joint legal custody of their two young daughters, and awarding physical care and control of the children to the mother, subject to the father having physical care and control three out of four weekends and for a period of time each Wednesday. That order was ultimately incorporated into the parties' judgment of divorce with some minor scheduling adjustments. Thereafter, the mother filed a petition, inter alia, for sole custody and suspending the father's visitation. The mother subsequently filed an amended petition. After a hearing, the Family Court, in the order appealed from, inter alia, directed that the father undergo a sex offender evaluation and follow any and all recommendations, and, until he did so, limited his visitation with the parties' children to day time visitation, up to six hours at a time, either in a public place or supervised by a person approved by the mother. The father appealed. Upon reviewing the record, the Appellate Division found that the Family Court's determination, that there had been a change in circumstances such that modification of the prior order of custody and visitation was required to protect the best interests of the children, had a sound and substantial basis in the record. Order affirmed.

Matter of Hargrove v Langenau, 138 AD3d 846 (2d Dept 2016)

Father Was Better Equipped to Provide for Special Needs Child

The Family Court's determination granting the father's petition for sole custody of the subject children and denying the mother's petition for sole custody of the children was supported by a sound and substantial basis in the record. First, considering, inter alia, the past performance of each parent, the record supported the court's finding that the father had the greater ability to provide for the emotional and intellectual development of both children. With regard to the older child, who was seven years old at the time of the hearing, the evidence presented at the hearing established, inter alia, that the father was better equipped to provide for the daily needs and emotional and educational development of this special needs child. Likewise with respect to the younger child, the court was entitled to credit the father's testimony that, prior to the transfer of custody to him, the child, who was five years old at the time of the hearing, had been enrolled in day care, not preschool, and that the father had obtained the funding necessary to enroll her in a Head Start program, where she was clearly thriving. Additionally, there was undisputed evidence of the mother's repeated violent outbursts. Order affirmed.

Moses v Williams, 138 AD3d 861 (2d Dept 2016)

Father Failed to Establish That Mother Wilfully Violated Family Court Order

The father commenced a violation proceeding against the mother, alleging that she violated a prior court order directing her to enroll the subject children in therapy. At a hearing, the mother testified that on the day of the prior court order, she scheduled an intake appointment for the children. She subsequently had the children complete their intake appointment, and scheduled the children's first therapy session. However, the mother asserted that the children, who were teenagers, adamantly refused to attend the therapy appointment. To establish a willful violation of a Family Court order, the petitioner has the burden of proving his or her case by clear and convincing evidence. Under the facts of this case, the Family Court properly found that the father failed to establish by clear and convincing evidence that the mother wilfully violated the Family Court order to have the subject children attend therapy. Accordingly, the Family Court properly dismissed the violation petition.

Matter of Palazzolo v Giresi-Palazzolo, 138 AD3d 866 (2d Dept 2016)

Family Court Did Not Violate Best Evidence Rule

The parties are the parents of one child, a son born in July 2011. The father filed a petition for sole custody of the subject child, alleging, inter alia, that the child was being physically and emotionally abused by the mother. The mother also filed a petition for sole custody of the subject child. After a hearing, the Family Court awarded the father sole legal and physical custody of the subject child and certain visitation to the mother. The mother appealed. Here, the Family Court determined that the father's testimony was credible, while the mother's was not credible, and the Appellate Division could discern no reason to disturb the Family Court's credibility determination. Contrary to the mother's contention, the Family Court did not violate the best evidence rule in admitting into evidence copies of recordings of conversations between the parties. The best evidence rule applies only where a party seeks to prove the contents of a writing, in which case the original must be produced or its absence satisfactorily explained. A proper foundation was laid for the admission of the recordings, as the father, a participant in the conversations, testified that he had personally recorded the conversations, and that the recordings were a fair and accurate representation of those conversations and had not been altered. Although the attorney for the child argued that joint custody would have been in the subject child's best interests, joint custody was inappropriate, as the parties were antagonistic toward each other and demonstrated an inability to cooperate on matters concerning the child. The Family Court did not err in granting the father's petition for sole custody of the subject child. Under the totality of the circumstances, the Family Court's determination was in the best interests of the child.

Matter of Sanchez v Rexhepi, 138 AD3d 869 (2d Dept 2016)

Mother Willfully Interfered with Father's Right to Visitation

The order appealed from confirmed a report of a Referee, recommending, after a hearing, that custody of the subject child be awarded to the father, with visitation to the mother. The Appellate Division affirmed. Here, the mother failed to prove that the father had engaged in domestic violence. In addition, the testimony at the hearing demonstrated that, before custody was temporarily awarded to the father during the proceedings, the mother willfully interfered with the father's right to visitation by failing to make the child available for court-ordered visits. Since the father has had custody, he has consistently made the child available for the mother's visitation. Other evidence adduced at the hearing established that the father has provided a suitable and stable home environment and that the child is thriving under his care. Accordingly, the Family Court's determination that the child's best interests were served by an award of custody to the father was supported by a sound and substantial basis in the record.

Matter of Huaringa v Camargo, 138 AD3d 993 (2d Dept 2016)

Record Supported Suspension of Visitation Between Mother and Children

In 2012, the petitioner commenced proceedings pursuant to Article 10 of the Family Court Act based on allegations that the mother had neglected the subject children. The mother consented to a finding of neglect, and the children were remanded to the custody of the county's Department of Children's Services. In May 2015, after a permanency hearing, the Family Court suspended all visitation between the mother and the children. The Family Court's determination that suspending all visitation between the mother and the children was in the children's best interests had a sound and substantial basis in the record. Although the mother completed parenting training and domestic violence counseling, a caseworker testified that the mother stopped participating in court-ordered mental health treatment. Moreover, the evidence adduced at the hearing demonstrated that the mother had persisted in making disparaging comments to one of the children and that her hostile behavior during a family therapy session adversely affected the children. Order affirmed.

Matter of Jennifer I., 138 AD3d 832 (2d Dept 2016)

Record Supported Supervised Visitation

The parties, who were never married, have one child, who was born in January 2010, and resided with the

mother. The father petitioned for custody of the subject child. Between 2012 and 2014, a custody and visitation hearing was conducted, during which the mother requested custody of the subject child and that the father's visitation be supervised. In an order dated June 2, 2015, the Family Court, upon confirming a report and a supplemental report of a Court Attorney Referee, directed, inter alia, that the father's visitation with the subject child be supervised by a mental health professional. The father appealed. The Appellate Division affirmed. The determination of the Family Court that it was in the child's best interests to require that the father's visitation be supervised by a mental health professional had a sound and substantial basis in the record. The father's contention that the Family Court improperly admitted into evidence testimony and a report from a forensic evaluator was without merit.

Matter of Tecza v Alija, 138 AD3d 872 (2d Dept 2016)

Family Court's Order Permitting Mother to Travel to China with Child Overly Broad; Order Modified

The order appealed from, granted the mother's petition which was for permission to travel to China with the subject child "in the summer of 2016," and permitted her to renew the child's passport without the father's consent. The father appealed. The Appellate Division modified the order. Contrary to the father's contention, the Family Court providently exercised its discretion in permitting the mother to travel to China with the child. Although the parties' stipulation of settlement, which was incorporated but not merged into the judgment of divorce, provided that the mother could not travel to China with the child without the father's consent, the stipulation also provided that the mother could seek a judicial determination if the father unreasonably withheld such consent. Under the circumstances presented here, the court's findings that the father's withholding of consent for the trip was unreasonable, that it was in the child's best interests to visit her relatives in China, and that the mother did not pose a flight risk had a sound and substantial basis in the record. However, the provision of the Family Court's order permitting the mother to travel to China with the child "in the summer of 2016" was overly broad. Therefore, the Appellate Division modified the order to provide that such travel may commence no sooner than August 1, 2016, and that the child shall return to the United States with the mother no later than August 31, 2016. Further, under the circumstances, the Family Court should have conditioned the travel to China on the mother providing the father with copies of round trip airline tickets for both the child and the mother, a detailed travel itinerary including contact information, transportation information, and lodging information for each day of travel, and a method of communicating with the child on a daily basis (once the mother and child have arrived at their destination or destinations) in a manner that complied with the provisions in the parties' stipulation of settlement regarding daily telephone contact. Accordingly, the order was further modified directing that the mother should have satisfied these conditions on or before July 15, 2016.

Matter of Li Ka Ye v Wai Lam Sin, 138 AD3d 994 (2d Dept 2016)

Father's Abusive Behavior Toward Mother Supports Custody to Mother

Family Court granted the mother's application to relocate to North Carolina. The Appellate Division affirmed. Here, prior to the father's application for custody, the mother had moved with the child to North Carolina where she had obtained an order of protection against the father. The mother then cross- petitioned, seeking to relocate with the child. Strict application of relocation factors was not required since this was an initial custody application. The mother's decision to relocate was due to domestic violence. The father was domineering and verbally abusive toward the mother, he focused on her shortcomings rather than his own and failed to recognize and address his anger management issues. The record supported the court's finding that the mother had relocated to escape the domestic violence and be close to her family, who lived in North Carolina. Although the father testified his relationship with the mother was "fine," his testimony was not credible since he also admitted he had hit the mother, verbally abused her and had anger issues related to his OCD and other mental health issues. Additionally, the mother was the child's primary caretaker and the father often left the child with the paternal grandmother when the child was placed in his care. Furthermore, the father tried to produce evidence against the mother by repeatedly photographing the child's naked body after the child had been with the mother and he took him to the doctor

repeatedly for no reason. The child's doctor testified that many of these visits were not medically necessary and she had ended up discharging the child from her practice due to the conflict between the parents. The court properly determined that if the father were awarded custody, he would continue his past behavior of seeking to alienate the child from the mother rather than supporting and encouraging their relationship. Moreover, the mother had married and she and her husband had flexible work hours that permitted them to share the care of the child, while the father worked long hours and was generally unavailable to spend time with the child and thus most of the child's care would be provided by the paternal grandmother. Although the child would be separated from his half siblings in New York, they would be able to see each other during the extended periods of parenting time provided to the father pursuant to the custody order.

Matter of Hill v Dean, 135 NY3d 990 (3d Dept 2016)

Grandmother Failed to Show Extraordinary Circumstances

Family Court modified a prior custody order and granted joint legal custody to the parents with primary physical custody to the mother and limited visitation to the father and paternal grandmother. The paternal grandmother, who had been the primary custodian for three years under the prior custody order, appealed. The Appellate Division affirmed. Here, the mother had allowed the grandmother to care for the child due to alleged acts of domestic violence committed against her by the father and went to stay at a domestic violence shelter, which would not accept children. After leaving the shelter, the mother relocated one hour away from the grandmother and after a period of time, became engaged to a childhood friend and had a child with him. During the three-year period when the subject child lived with the grandmother, the mother tried to establish a stable environment for herself and tried to regain custody of the child. The grandmother was not supportive of the mother's attempts to see her child and made allegations of unfitness against the mother which were later deemed unfounded. Since the mother spent the period of separation from the child trying to regain custody, this period could not be used to support a finding of extraordinary circumstances and thus the court's order was supported by a sound and substantial basis in the record.

Elizabeth SS. v Gracealee SS., 135 AD3d 995 (3d Dept 2016)

Joint Custody Not Feasible Given the Level of Distrust and Animosity Between Parents

After numerous violation and/or modification of custody and visitation petitions filed by the parents of one child, Family Court awarded the father sole legal and physical custody and extended parenting time to the mother. The Appellate Division affirmed. Here, the record as a whole showed joint legal custody would not be feasible given the level of hostility and distrust between the parties which rendered them incapable of making any joint decisions regarding the child. Although both parties were loving parents and had stable homes and resources, they were less then exemplary. Both routinely involved the police or CPS in their custody disputes in a "calculated effort...to gain a tactical advantage over the other." Although there was concern whether the father would foster a meaningful relationship between the mother and the child, the record showed he could provide more stability for the child. The child had consistently lived in the father's home, where she had contact with her half siblings and the paternal grandmother was able to assist in her care. On the other hand, the mother had no family nearby and was a recovering alcoholic who, by her own admission, had relapsed on four or five occasions, and she had attempted suicide. Additionally, while there was conflicting proof regarding the impact of the mother's alcoholism on the child, due deference was given to the court's credibility determinations. Furthermore, even though a Lincoln hearing had not been held, neither of the parties nor the attorney for the child had requested such a hearing.

Matter of Colleen GG. v Richard HH., 135 AD3d 1005 (3d Dept 2016)

Sound and Substantial Basis in the Record to Suspend Mother's Parenting Time With Children

After fact-finding and Lincoln hearings, Family Court modified a prior order and suspended the mother's parenting time with the children. The Appellate

Division affirmed. Here, the "extraordinarily damaged relationship" between the mother and the children was a sufficient finding of a change in circumstances to warrant a consideration of the children's best interests. Deferring to the court's credibility determinations and considering the wishes of the teen-aged children, the court's determination to suspend visitation was in the children's best interests and supported by a sound and substantial basis in the record. In a footnote, the Appellate Division noted that although well-intended, it was error on the court's part to reveal to the parties the substance of the children's communications during the Lincoln hearing, since protecting the children's right to confidentiality was paramount in custody proceedings.

Matter of Rohde v Rohde, 135 AD3d 1011 (3d Dept 2016)

Child's Best Interests to Expand the Father's Parenting Time

Family Court modified a prior order of visitation by expanding the father's parenting time to overnight visits on alternate weekends and holiday visitation. The Appellate Division affirmed. Although the court failed to explicitly find a change in circumstances, the record was sufficiently developed to allow the Appellate Division to make such a finding. Here, the father had a variable work schedule which disrupted his weeknight visits and the parties were unable to meaningfully communicate to resolve the problem. This was a sufficient basis to constitute a change in circumstances. Additionally, it was in the child's best interests to expand the father's parenting time. The father and the child had a good relationship and the prior overnight visits with the father had gone well. The father had a stable home with his girlfriend and their child, and during visits, the subject child shared a room with his half-brother. Furthermore, weekend visitation would allow the subject child to develop a relationship with his half-sisters, who also visited with the father on alternate weekends. Giving due deference to the court's credibility determinations, there was a sound and substantial basis in the record to expand the father's parenting time.

Carr v Stebbins, 135 AD3d 1013 (3d Dept 2016)

Full and Comprehensive Hearing Necessary Before Restricting Mother's Visits With Child

Without conducting a hearing, Family Court modified the mother's visitation from unsupervised to supervised. The Appellate Division reversed. Here, the mother and grandmother had joint legal custody of the child, with primary physical custody to the grandmother. The grandmother alleged the mother was continuing to abuse drugs and moved to restrict or suspend her parenting time with the child. Family Court directed the mother to submit to a hair follicle test. Thereafter, although the mother claimed she had taken the test and had signed the necessary release form, the test result was not provided to the court. At the fourth appearance, the test result was still not forthcoming and the court granted the grandmother's application. The Appellate Division determined the court erred by failing to hold a full and comprehensive hearing and failing to allow the mother an opportunity to be heard. The mother had noted her objections to the test and had requested a hearing. Additionally, although the court made a reference to the mother's history of drug use, without any test results or any record of recent drug use, there wasn't enough information to allow the court to determine that supervised visitation was in the child's best interests.

Matter of Schroll v Wright, 135 AD3d 1028 (3d Dept 2016)

Parties' Failure to Interact With Each Other Civilly Supported Sole Legal Custody Determination

Parties divorced and their written stipulation, which was incorporated but not merged into their judgment of divorce, provided for joint legal custody of the children. Thereafter, among other things, the wife sought to modify custody and after a hearing, Supreme Court awarded the wife sole legal and physical custody of the children and parenting time to the father. The Appellate Division affirmed. Here, the record showed the parties were unable to work together for the benefit of the children and this demonstrated a change in circumstances. The husband engaged in various acts which demonstrated his inability to communicate with the wife, including calling the police in order to remove the children from the wife's home while they were all eating dinner, berating his wife in front of the children

over a minor dispute, arguing that the children should spend Christmas with him even though it contravened their agreement and failing to honor the wife's "right of first refusal" to care for the children when he was unable to care for them during his custodial time. The psychologist, who had evaluated the parties, testified it was "exceedingly difficult for the parties to interact with each other civilly," and both parties agreed they were unable to communicate effectively. Although the parents were loving and capable, there was a sound and substantial basis in the record to support the court's finding that it was in the children's best interests for the mother to have custody. There were numerous examples of the husband not acting in the children's best interests. Additionally, despite the parties' conflict, the wife continued to foster a positive relationship between the husband and children. However, although the psychologist and the parties agreed that a split week parenting time schedule was best for the children, this was not ordered by the court. Since this issue was once again being addressed by Supreme Court as a result of applications made by the father, the matter was remitted for the court to fashion an appropriate parenting time schedule for the father.

Matter of Fermon v Fermon, 135 AD3d 1045 (3d Dept 2016)

Unclear Whether Suspension of Grandmother's Visits Was in Child's Best Interests

Family Court suspended maternal grandmother's supervised visitation with the subject child. The Appellate Division determined while there was sufficient evidence to find a change in circumstances, the record was not fully developed in order to determine whether suspension of visitation was in the child's best interests. Here, the grandmother and the mother had a long history of acrimony regarding the grandmother's visitation rights. Thereafter, the relationship between the grandmother and the father deteriorated. Although Family Court did not make specific findings to determine whether there had been a change in circumstances to modify the grandmother's visitation, the record was sufficiently developed for the Appellate Division to determine the breakdown of the relationship between the father and the grandmother showed the requisite change in circumstances. However, although the grandmother had a poor relationship with the parents, which was described by the court as "poisonous" and "toxic," it was unclear from the record whether another option, such as supervision of the grandmother's visits by a third party, would have been a viable solution instead of suspension of visitation altogether.
Furthermore, the court failed to consider the wishes of the child and based on these factors, the matter was remitted for the court to develop the record and fashion an appropriate order.

Matter of Kathleen LL. v Christopher I., 135 AD3d 1084 (3d Dept 2016)

No Right to Appeal from Default Order

Family Court awarded sole legal and physical custody of the children to the mother, granted her relocation with the children to Virginia and relinquished jurisdiction under DRL § 76(f). The Appellate Division affirmed. Here, the father was given proper notice of the fact-finding hearing but failed to appear. The father's attorney appeared, however, she was unable to account for his absence. The attorneys for the mother and the children moved for a default judgment, which the court granted. After a limited hearing, where the mother testified she and the children had been residing in Virginia since 2013, the court issued its order. Since the father defaulted, he was precluded from appealing the order and his sole remedy was to move to vacate the order.

Matter of Richardson v Fitch-Richardson, 135 AD3d 1091 (3d Dept 2016)

Joint Legal and Physical Custody Appropriate Given Parties Willingness to Work Together and Child's Young Age

Family Court modified a prior order of custody by continuing joint legal custody and made minor adjustment to the existing split physical custody order. The Appellate Division affirmed. Here, the parties lived 90 miles apart, but despite their differences and problems with co-parenting, including the involvement of family members and relatives during custody exchanges and some involvement with law enforcement due to unilateral decision making, the parties acknowledged they needed to work together for the sake

of the child. The decision to continue joint physical custody was also proper since the child was two-years-old when the hearing commenced and not of school age.

Matter of Ryan v Lewis, 135 AD3d 1135 (3d Dept 2016)

Appeal Deemed Moot

Family Court awarded custody of the minor child to the aunt. The mother appealed and during the pendency of the appeal, the mother filed to modify the Family Court order, arguing that the aunt had thwarted her attempts to see the child and sought the return of her child. Family Court continued the prior custody order and the mother once more appealed the court order. Pending the mother's appeal from the court's second order, the Appellate Division reversed the court's award of custody to the aunt, finding there had been no showing of extraordinary circumstances. Since the prior Family Court order was reversed, the current appeal was deemed moot.

Matter of Audra Z. v Lina Y., 135 AD3d 1197 (3d Dept 2016)

Mother's Sabotage of Child's Educational Needs Supports Physical Custody to Father

Family Court issued an order of joint legal custody with primary physical custody to the father and parenting time to the mother. The Appellate Division affirmed, finding the court's determination had a sound and substantial basis in the record. Here, the parties had an informal custodial arrangement and since the child was approximately nine-months-old, she had lived with the mother. The child continued in her mother's care for 12 years but had regular parenting time with the father. Due to problems between the mother and her boyfriend, with whom the mother and child lived, the mother agreed to have the child move in with the father, who lived with his mother and sister. The child continued to reside in her father's home for the following school year. Thereafter, fearing the mother would relocate with the child, the father filed to obtain custody. Both parents were on equal footing in many respects and although there were concerns about the father's alcoholism, evidence showed the mother had committed "acts of sabotage" with respect to the child's education. Although the mother alleged the child did poorly in school while living with the father, evidence showed the child had done poorly while living with the mother. Even though the mother had advanced degrees and was aware of the child's educational struggles, she willingly abdicated responsibility of the child's education to the father. The father was actively engaged in providing educational support for the child and worked with the child's teachers and guidance counselor and arranged for her to receive additional educational help. On the other hand, the mother demonstrated "a complete disregard for the father's role as the custodial parent" by taking the child out of school for at least three days to go on vacation and had allowed the child to miss two final exams. Furthermore, the mother admitted the child was the reason she had broken up with her boyfriend and acknowledged the problems would start up again if she regained physical custody of the child.

Matter of William BB. v Melissa CC., 136 AD3d 1164 (3d Dept 2016)

Mother's Serious Lack of Judgment Supported Custody to Father

There was a sound and substantial basis in the record for Family Court's issuance of an order of joint legal custody, with physical custody of the parties' seven-and-eight-year-old children to the father and parenting time to the mother. Prior to the issuance of the custody order, a neglect finding had been made against the mother for allowing her 16-year-old daughter from another relationship, to have sex with a 22-year-old. Additionally, a second neglect petition had been filed against her for allowing another daughter, who was 15, from having sex with her 16-year-old boyfriend. Furthermore, at the time the custody petition was filed by the father, the mother was unemployed and living in a hotel with the children. Moreover, since the neglect determination had been made against the mother, the father had taken on a more active role in the subject children's lives. He had been employed at the same job for nearly six years and had a stable home with adequate room for the children, whereas the underlying neglect adjudication reflected a serious lack of judgment on the mother's part.

Matter of Lawton v Lawton, 136 AD3d 1168 (3d Dept 2016)

Prolonged Separation as Basis for Extraordinary Circumstances Determination Only Applicable to Grandparents

Family Court awarded custody of the subject child to a non-grandparent third party. The Appellate Division reversed. Family Court erred by relying on DRL § 72(2) in determining that prolonged separation of at least 24 months between the mother and the subject child supported its finding of extraordinary circumstances. This alternate type of extraordinary circumstance only applied to grandparents. Additionally, the record showed that the third party failed to prove the existence of extraordinary circumstances. Here, the mother and the subject child had come to live with the third party when the mother was pregnant with another child and in a difficult situation**.** The third party allowed the mother to stay with her until she got back on her feet. Thereafter, upon the third party's request, the mother consented to move out and live elsewhere, although she briefly came back for three months, so that the third party could obtain social services benefits for the subject child. Throughout this time, the mother remained substantially and actively involved in the child's life. She took steps to stabilize her life by getting a job, having the child stay with her on days when she wasn't working and spent most of her non working hours with the child. Moreover, she actively remained in the child's life in many ways
and did not abdicate her parental rights and responsibilities. Absent a finding of neglect or unfitness, there was no basis for a finding of extraordinary circumstances.

Matter of Brown v Comer, 136 AD3d 1173 (3d Dept 2016)

Prison Visitation With Father Not in Child's Best Interests

Family Court awarded sole legal and physical custody to the grandmother, granted incarcerated father written and telephonic contact with the child, but determined in-person prison visitation was not in the child's best interests. The Appellate Division affirmed. While visitation with a non custodial parent is presumed to be in the child's best interests, this can be rebutted if it proved that such visitation would be harmful to the child's welfare or not in the child's best interests. Here, the father expected the child, who was then seven-years-old, to travel from her home in Ulster County to his prison in Franklin County. His sole suggestion as to how she could do this was for her to find her way to New York City, then make a 15-hour round trip to the prison on a bus. He failed to understand the toll this long trip would have on the child and was unable to name anyone who could accompany the child.

Matter of Coley v Mattice, 136 AD3d 1231 (3d Dept 2016)

Not in Child's Best Interest to Grant Maternal Grandmother Visitation Given the Nature and Quality of Her Relationship With Child

Petitioner, maternal grandmother, had de facto custody of the subject child for two years until the child was removed from her care by CPS. Family Court adjudicated the child to be neglected, issued an order of protection directing petitioner to stay away from the child and refrain from all communication or contact with her. Thereafter, the court awarded article 6 custody of the child to the paternal grandparents with supervised visitation to petitioner. However, due to the lack of a supervisor, little or no visitation occurred between petitioner and the child. Some months later, petitioner filed for visitation with the child and after a hearing, the court dismissed her petition. The Appellate Division affirmed. Here, there was no dispute that petitioner had standing to bring the petition since she had been the child's de facto custodian for two years. However, given the nature and quality of petitioner's relationship with the child, there was a sound and substantial basis in the record to support the court's determination that it was not in the child's best interests to grant petitioner visitation with the child. The child's therapist testified the child suffered from PTSD arising from events that occurred while she was living with petitioner, including repeated exposure to domestic violence and possible instances of inappropriate sexual conduct in the child's presence. Additionally, petitioner had used dolls in her home to frighten the child. The child thought dolls to be "evil" and the therapist had to hide all the dolls in her office so that the child would

not be traumatized by them. Other witnesses also testified the child had frequently been exposed to verbal and physical violence in petitioner's home as well as sexual contact, and there was testimony that petitioner had told the child the dolls had spirits and the child believed the spirits haunted her at night. Moreover, the grandmother failed to understand the child's emotional needs and lacked insight into the reasons for the child's removal from her home. Finally, the evidence showed petitioner had difficulty maintaining successful relationships, violated court orders and engaged in criminal activities.

Matter of Velez v White, 136 AD3d 1235 (3d Dept 2016)

Mother's Excess Alcohol Consumption and Inadequate Guardianship of Child Supports Sole Custody to Father

Family Court modified a prior stipulated order of joint custody and awarded the father sole legal and primary physical custody of the child with supervised parenting time to the mother. The Appellate Division affirmed finding there was a sound and substantial basis in the record for the court's order. Here, child protective reports regarding the mother's excess consumption of alcohol and inadequate guardianship of the child and her half siblings was sufficient evidence to support a showing of a change in circumstances. Additionally, it was in the child's best interests to live with the father. The attorney for the child advised the court the child wished to live with the father, the father had a stable home and did not have any CPS or criminal history. Although the mother had been the primary care giver, her inability to supervise the child, and her lack of insight into her own behavior resulted in ongoing CPS involvement in her life and had led to loss of custody of all her children.

Matter of Bush v Miller, 136 AD3d 1238 (3d Dept 2016)

Using Child As Fact Witness Not Necessary or Appropriate

After a hearing, Family Court modified a prior order by reducing the mother's visitation with the child and limited her access to the child's medical and school records. The Appellate Division affirmed finding there was sound and substantial basis in the record. The breakdown of the mother-child relationship constituted a change in circumstances. It was in the child's best interest to limit her contact with her mother due to, among other things, the mother's physical attacks on the child which called into question the mother's fitness as a parent and the child was fearful of being harmed by the mother. Furthermore, the mother was not deprived of meaningful representation as a result of her attorney's failure to formally move to reopen the case after two indicated child protective reports against the mother were reversed. The underlying incidents were explored in full during the testimony of the child protective caseworker and through the mother's own testimony. However, the Appellate Division noted the court erred in holding what Family Court termed a "mixed proceeding" where the child was used as a fact witness. This was not necessary or appropriate in a custody case and especially true in this case since both the child's therapist and a child protective caseworker testified about the child's concerns and as well as certain relevant events, as did the parties themselves. Also, the "mixed proceeding" went well beyond factual events to directly questioning the child about her preferences concerning visitation. While the record of the proceeding was partially sealed, in that the parties were precluded from having a copy of the transcript or the proceeding being relayed in verbatim by their attorney, this format did not adequately protect the child's right to confidentiality or foster the primary purpose of a Lincoln hearing, which was to allow the child to openly share his or her concerns with the court.

Matter of Gonzalez v Hunter, 137 AD3d 1339 (3d Dept 2016)

Appointment of Attorney for the Child Is the Preferred Practice

Based on the allegations raised by the pro se mother in her custody and visitation modification petition, Family Court ordered a FCA §1034 investigation of the father's household, and thereafter, sua sponte and without holding a fact-finding hearing, dismissed the mother's petition. The Appellate Division reversed. The mother raised serious factual allegations in her petition, including allegations that the father abused alcohol and the children lacked stable housing, adequate food and

adequate medical care. If established after a hearing, these factual allegations could have afforded a basis for granting the relief the mother sought. Additionally, there is a "presumption that visitation with the non custodial parent is in the children's best interests" and unless it could be shown that such visitation is inimical to the children's welfare, the court is required to provide a parenting time schedule with frequent and regular access between the non custodial parent and the children. Here, the record failed to contain any information regarding the basis for the denial of visitation and the court should not have left the issue of visitation to the father's authority and discretion. Finally, although the court was not required to appoint an attorney for the child in such matters, in light of the serious allegations raised by the mother and the ages of the children, appointment of an attorney for the child is the preferred practice.

Matter of Harrell v Fox, 137 AD3d 1352 (3d Dept 2016)

Father's Acts of Domestic Violence Supports Sole Legal and Physical Custody to Mother

Family Court modified a prior order of custody and awarded sole legal and physical custody to the mother and supervised parenting time to the father. Thereafter, the father moved to renew, requested a new hearing and also requested the Judge to recuse himself. The court denied his motions. The Appellate Division affirmed both the court's order and its denial of the father's motions. Here, although the court did not make an express finding of a change in circumstances, the record was developed sufficiently in order for the Appellate Division to make the determination that the parties' inability to communicate about the children without conflict, and their hostility toward each other, which sometimes required police intervention, supported this showing. Additionally, it was in the best interests of the children to live with their mother. The record showed evidence of domestic violence by the father toward the mother and the children. Several witnesses testified about the times they had seen the father behave aggressively or violently toward the children, and the mother testified about the violent acts he had committed against her and the children. Evidence through testimony of several witnesses also showed the children thought the father was mean and often hit them, and they did not want to visit him. Although the father and his girlfriend contradicted the testimony regarding his violent behavior, deference was given to the court's credibility determinations which were supported by a sound and substantial basis in the record. Furthermore, the court did not err in denying the father's motions. Even though the father argued the court improperly relied on an indicated report against him for improper guardianship, which was subsequently overturned in an administrative hearing, the hearing was held after the court proceeding and constituted newly-discovered evidence. Moreover, the father did not meet his burden by showing that the results of the court proceeding would have been different if the reversal had been introduced at the hearing since the report only played only a "de minimus, secondary role" in the court's determination. Finally, there was no abuse of discretion in the court's denial of the father's motion for renewal and a new hearing, nor did the court abuse its discretion in refusing to recuse itself.

Matter of Kylene FF. v Thomas EE., 137 AD3d 1488 (3d Dept 2016)

Grandmother Had Standing But It Was Not in Child's Best Interests to Allow Visitation

After a hearing, Family Court dismissed maternal grandmother's visitation petition. The Appellate Division affirmed. While the maternal grandmother established she had standing to seek visitation since she had cared for and developed a relationship with the child during the early months of her life, and thereafter, had made repeated efforts to continue that relationship, it was not in the child's best interest to allow visitation. The record clearly showed that the relationship between the grandmother and the mother had broken down and the one attempt made to resolve their differences nearly led to a physical altercation. While the existence of animosities was not, in isolation, sufficient to support denying visitation, witnesses testified the grandmother had a quick temper, used foul language in the presence of her grandchildren and often made disparaging or demeaning comments about various members of her family, including the children. Additionally, although the mother stated she was not opposed to the grandmother having limited and supervised visits, the court was not required to direct such visitation.

Matter of Vandenburg v Vandenburg, 137 AD3d 1498 (3d Dept 2016)

Family Court Abused its Discretion by Abruptly Terminating Court Proceedings

Family Court abused its discretion by dismissing the mother's petitions to modify and enforce a prior custody order, which awarded the maternal grandmother sole legal custody of the subject children. Here, the court held a Lincoln hearing after which the mother presented her case and the court scheduled a continuation date for the grandmother to go forward with her case. However, prior to the continuation date, the court issued a written decision finding that the grandmother had established extraordinary circumstances and it was in the children's best interests to remain with her. The court's abrupt termination of the proceeding was not supported by a sound and substantial basis in the record. While the mother had been permitted to call witnesses and testify, she was not afforded a full and fair opportunity to be heard. Even if the grandmother could rely on the mother's own testimony and "extended disruption of custody" provisions under DRL § 72 to establish extraordinary circumstances, there was no meaningful best interests analysis. Additionally, even if the mother failed to move to reopen the case, this did not excuse the court's failure to conduct a comprehensive hearing in the first place as it pertained to the grandmother and there was no proof submitted with regard to the best interest factor. Moreover, the record clearly showed the parties expected to return to court for a continuation of the hearing and the mother could have reasonably anticipated exploring issues on cross-examination of the grandmother or offered additional testimony to rebut the grandmother's proof. However, the court did not err in failing to appoint separate attorneys for the subject children. While differing positions of siblings could warrant separate representation, under the circumstances of this case, there was no reason to do so.

Smith v Anderson, 137 AD3d 1505 (3d Dept 2016)

Father's Parenting Time Should Not Have Been Reduced

Family Court modified a prior order of joint legal custody to sole legal custody to the mother and reduced the father's parenting time. The Appellate Division affirmed the custody determination but found there was no basis to reduce the father's parenting time. Here, the record showed the parties were unable to communicate effectively with one another for the sake of the children and this demonstrated the requisite change in circumstances. With regard to the best interest analysis, the court properly determined the mother was able to provide the children with more stability. The father did not have a driver's license due to his driving while intoxicated convictions and relied on the mother for transportation issues. Additionally, he exhibited "questionable judgment" by traveling in a car with the children without placing them in their car seats. He also allowed them to remain atop a roof while he was doing repairs. However, although the visitation schedule needed to be modified since the children were school age and the current schedule of midweek visitation was confusing to them and made them anxious, there was no basis in the record to reduce the father's parenting time. The father consistently saw the children and had developed a significant relationship with them and the mother agreed the children liked to spend time with their father. Based on this, the Appellate Division increased the father's alternate weekend parenting time so as to provide him with roughly the same amount of hours each week with the children.

Matter of Knox v Romano, 137 AD3d 1530 (3d Dept 2016)

Court Erred in Conditioning Resumption of Visitation Upon Mother's Completion of Evaluations and Compliance with All Treatment Recommendations

Family Court awarded petitioner father sole custody and placement of the parties' child and suspended visitation between the mother and the child. Family Court's determination to suspend the mother's visitation was supported by a sound and substantial basis in the record inasmuch as the evidence presented at the hearing established that such visitation was detrimental to the child's welfare. However, the court lacked authority to condition the resumption of visitation upon the mother's completion of mental health and drug and alcohol evaluations and compliance with all treatment

recommendations. Therefore, the order was modified accordingly.

Matter of Waite v Clancy, 136 AD3d 1287 (4th Dept 2016)

Order Denying Mother's Modification Petition Reversed; Mother's Modification Petition Granted Where Father Resorted to Excessive Physical Discipline of Parties' Three-Year-Old Daughter

Family Court denied the mother's petition for modification of a prior consent order. The Appellate Division reversed, granted the petition, and remitted the matter to Family Court to fashion an appropriate visitation schedule. The court erred in determining that the mother failed to establish a sufficient change in circumstances to warrant an inquiry into the best interests of the children. The record established that the father telephoned the mother to ask that she pick up the parties' three-year-old daughter from his residence in Pennsylvania because he was unable to handle her alleged misbehavior. Upon retrieving the child, the mother observed and photographed extensive bruising on the child's body, as well as scrapes on her knees, which the father later attributed to the child's increasingly serious tantrums that began while she was in his care. The daughter's injuries were observed by a Child Protective Services (CPS) investigator, and the daughter disclosed to the investigator that the father struck her with a belt and that she sustained the scrapes on her knees from kneeling on a "cat scratcher" as a form of punishment. The son's statements to the investigator corroborated the daughter's account of the corporal punishment. In addition, the father admitted that he once spanked the daughter with a belt and made her kneel on the "cat scratcher." Although the father testified that each of those types of physical discipline was a one-time occurrence, the records of the daughter's medical examination documenting that the daughter had multiple bruises all over her body in different stages of healing, as well as the son's statements with respect to the frequency of the father's physical discipline, supported the finding that the father repeatedly inflicted excessive corporal punishment on the daughter. Thus, there was a sufficient change in circumstances to warrant an inquiry into the best interests of the children. Although the court determined that the mother failed to establish a sufficient change in circumstances warranting an inquiry into the best interests of the children, it nevertheless determined that it was in the children's best interests to continue joint legal custody and primary physical placement with the father. The court's custody determination lacked a sound and substantial basis in the record. The record established that the father resorted to excessive physical discipline of the daughter, which resulted in an indicated CPS report, and the court erred in discounting that report in favor of an unfounded report by a Pennsylvania investigator who closed his case because the children had been removed to New York. The record also established that the father struck the son with a belt as punishment, and exposed him to a home environment wherein he witnessed the excessive corporal punishment directed at the daughter. The record established that the mother's involvement with the son's schooling was not significantly different from that of the father. In addition, the son's wish to reside with the father was not determinative in light of his young age. Moreover, the court improperly focused on the mother's past sexual behavior and relationships despite the absence of any showing that such conduct may have adversely affected the welfare of the children. To the extent that the court found that the mother's relationship and pregnancy affected the children's living arrangements at the mother's residence, those conditions were not significantly different from those at the father's residence.

DeJesus v Gonzalez, 136 AD3d 1358 (4th Dept 2016)

Award of Sole Legal and Physical Custody to Mother Upheld Where Father Interfered With Mother's Relationship With the Child

Family Court awarded petitioner mother sole legal and physical custody of the subject child, with visitation to the father. The Appellate Division affirmed. Even assuming, arguendo, that respondent father was correct that the mother was required to establish that a significant change in circumstances occurred since the entry of the custody order, rather than from the date of the court appearance upon which the order was based, the mother established the requisite change in circumstances subsequent to the entry of the prior order. The evidence at the hearing established that the parties hadve an acrimonious relationship and were not able to communicate effectively with respect to the needs and

activities of their child, and it was well settled that joint custody was not feasible under those circumstances. The court properly considered the appropriate factors in making its custody determination. The record supported the court's determination that the mother had attempted to foster a relationship between the father and the child, while the father interfered with the mother's relationship with the child by, among other things, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, repeatedly telling the child that the mother was irresponsible and unintelligent, and limiting the mother's access to the child or placing absurd restrictions on such access. It was well settled that a concerted effort by one parent to interfere with the other parent's contact with the child was so inimical to the best interests of the child that it, per se, raised a strong probability that the interfering parent was unfit to act as a custodial parent.

Ladd v Krupp, 136 AD3d 1391 (4th Dept 2016)

Court Properly Denied Father's Post-Divorce Application to Modify Custody

Supreme Court denied plaintiff father's post-divorce application seeking, among other things, modification of the parties' agreement concerning custody of their three children. The Appellate Division affirmed. There was a sound and substantial basis in the record for the court's determination that the father failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the children's best interests warranted modification of the existing custody arrangement. In any event, the record also supported the court's further determination that continuation of the existing custody arrangement served the best interests of the children. Each of the children expressed a preference to maintain the existing arrangement. While not controlling, the express wishes of the children were entitled to great weight, particularly where their age and maturity would make their input particularly meaningful. The record supported the court's determination that defendant mother had taken steps to address the children's school attendance problems, and there was no evidence that the mother's financial difficulties placed the children in jeopardy. Finally, the record did not support the father's contention that the court was biased in favor of the mother.

Gizzi v Gizzi, 136 AD3d 1405 (4th Dept 2016)

Mother Failed to Establish Child's Life Would Be Enhanced Economically, Emotionally and Educationally by Proposed Relocation

Family Court dismissed the mother' petition seeking permission to relocate with the parties' child to Florida. The Appellate Division affirmed. The court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) in determining that the mother failed to meet her burden of establishing by a preponderance of the evidence that the proposed relocation was in the child's best interests, and the court's determination had a sound and substantial basis in the record. The mother failed to establish that the child's life would be enhanced economically, emotionally and educationally by the proposed relocation. The mother failed to present any proof of her purported job offer and, moreover, she failed to establish that any employment she was offered in Florida would be anything more than temporary. The mother failed to offer any proof from which the court reasonably could conclude that the Florida school system was a significant improvement over the school system in New York. In addition, compared to the support the mother and child received by residing with the maternal grandmother in New York, the mother failed to establish that she and the child would receive similar support in Florida, where the nearest family member would be over an hour away. Respondent father had failed to fully avail himself of his visitation rights. Nevertheless, the mother lacked a feasible plan for preserving the relationship between the father and the child inasmuch as her proposed visitation arrangement upon relocation was unlikely to materialize given her uncertain employment and the lack of financial resources necessary to facilitate the child's transportation to New York.

Matter of Hirschman v McFadden, 137 AD3d 1612 (4th Dept 2016)

Referee Did Not Err in Denying Father's Oral Request that Matter be Heard By Family Court Judge

Family Court directed that respondent shall continue to have sole legal and physical custody of the subject child. The Appellate Division affirmed for the reasons stated in the decision at Family Court, and added that petitioner father's contention was rejected that the Court Attorney Referee did not have jurisdiction to hear and determine the matter. The parties and their attorneys signed a stipulation in 2012 setting forth that a judicial hearing officer or court attorney referee would hear and determine the custody matter and "all future modifications/ violation proceedings concerning this action." Thus, the Referee did not err in denying the father's oral request that the matter be heard by a Family Court judge.

Matter of Johnson v Prichard, 137 AD3d 1614 (4th Dept 2016)

Award of Custody to Petitioner Father Affirmed Where Family Court's Errors Were Harmless

Family Court awarded custody of the subject child to petitioner father. The Appellate Division affirmed. Although the court erred in referencing during its bench decision its own out-of-court observations of the mother, the error was harmless because the decision was fully supported by facts within the record. The court's decision properly set forth the grounds for its determination. A concerted effort by one parent to interfere with the other parent's contact with the child was so inimical to the best interests of the child as to, per se, raise a strong probability that the interfering parent was unfit to act as custodial parent. There was a sound and substantial basis in the record for the court's conclusion that the mother interfered with the father's relationship with the child by, among other things, denying the father access to the child. The court erred in admitting in evidence status update reports relating to the father's completion of a court-ordered drug and alcohol evaluation inasmuch as there was no indication that the records were certified to comply with CPLR 4518 pursuant to CPLR 3122-a. Nonetheless, the error was harmless.

Matter of Saletta v Vecere, 137 AD3d 1685 (4th Dept 2016)

Court's Error, If Any, in Admitting Evidence Was Harmless

Family Court modified the existing visitation arrangement by directing that respondent mother have supervised visitation with the parties' child, and dismissed her petition seeking a determination that petitioner father violated a prior order. The Appellate Division affirmed. The court did not err in admitting testimony concerning the child's out-of-court statements under the excited utterance exception to the hearsay rule. In any event, any error in admitting the statements was harmless, inasmuch as there was a sound and substantial basis in the record for the court's determination, without consideration of the statements, that it was not in the child's best interests to have unsupervised contact with the mother. The father established that the relationship between the child and the mother had deteriorated significantly since the last order allowing the mother unsupervised visitation, to the point where the child no longer wanted to have visitation with the mother. Even assuming arguendo, that the court erred in admitting the mother's medical records, the court did not rely on the records in its decision, and there was a sound and substantial basis in the record for the court's determination to order supervised visitation.

Matter of Kirkpatrick v Kirkpatrick, 137 AD3d 1695 (4th Dept 2016)

Affirmance of Award of Sole Custody to Father

In the context of a divorce proceeding, Supreme Court entered an order that, among other things, granted custody of the parties' child to defendant father and dismissed the mother's family offense petition (appeal No. 1), and entered a further order that denied the mother's motion for leave to renew with respect to the prior order (appeal No. 2). The court also granted a judgment of divorce that awarded sole legal custody of the parties' child to the father (appeal No. 3). The Appellate Division dismissed the appeal from that part of the order in appeal No. 1 that awarded custody of the parties' child to the father, and also dismissed appeal No. 2, because the right of appeal from those orders

terminated upon entry of the final judgment. The issues in those appeals were bought up for review on appeal from the final judgment in appeal No. 3. That part of the order in appeal No. 1 that dismissed the mother's family offense petition constituted the final resolution of that petition, and thus was properly before the Court. However, the mother's contention was rejected that Supreme Court erred in dismissing her family offense petition. The determination whether the father committed a family offense was a factual issue for the court to resolve, and the court's determination regarding the credibility of witnesses was entitled to great weight and would not be disturbed. In appeal No. 3, and the parts of all of the other appeals that were brought up for review on appeal from the final judgment, the mother's contention was rejected that the court erred in awarding custody of the parties' child to the father. The court's determination was supported by the evidence in the record, including that the mother placed the child in a home schooling program in order to permit the mother to relocate with the child in contravention of the court's prior orders, and that the mother was only home schooling the child a maximum of one day per week. In addition, there was no reason to overturn the court's determination not to credit the mother's version of the events underlying her claims of domestic violence and sexual abuse.

Cunningham v Cunningham, 137 AD3d 1704 (4th Dept 2016)

Court Abused Its Discretion in Denying Mother's Request That It Conduct Lincoln Hearing Before Ruling on Father's Motion to Dismiss

On respondent father's motion at the close of the mother's case, Family Court dismissed the mother's amended petition seeking to modify a prior order on the ground that the mother failed to establish a sufficient change in circumstances to warrant an inquiry into the best interests of the child. The Appellate Division reversed and remitted for further proceedings and a new determination on the mother's amended petition. The court abused its discretion in denying the mother's request that it conduct a *Lincoln* hearing before ruling on the father's motion. Such a hearing could be conducted during or after fact-finding, and could be used to support an allegation of a change in circumstances. The decision whether to conduct such a hearing was discretionary, but it was often the preferable course to conduct one. The child was 14 year old at the time of trial and expressed a preference to live with the mother, the Attorney for the Child did not oppose a *Lincoln* hearing, and many of the changed circumstances alleged by the mother concerned matters within the personal knowledge of the child but not that of the mother or her witnesses. A *Lincoln* hearing would have provided the court with significant pieces of information it needed to make the soundest possible decision.

Matter of Noble v Brown, 137 AD3d 1714 (4th Dept 2016)

Court Properly Modified Judgment of Divorce By Awarding Father Primary Physical Residence and Awarding Mother Visitation

Family Court granted the father's petitioner seeking modification of the custody and visitation provisions of the parties' judgment of divorce. The Appellate Division affirmed. The mother's contention was rejected that the court erred in considering events predating the divorce judgment in determining whether there was a significant change in circumstances to warrant an inquiry into the best interests of the child. The parties' oral stipulation regarding custody was incorporated into the judgment of divorce nine months later. Where a party sought modification of a custody order entered upon the parties' stipulation, the party was required to demonstrate a change in circumstances from the date of the stipulation. The court properly concluded that there was a sufficient change in circumstances whether measured from the date of the oral stipulation or the date of the judgment of divorce. While the child's wishes were not dispositive, the Attorney for the Child advised the court of her client's strong preference to live with her father. In addition, the mother's efforts to undermine the father's relationship with the child and his participation in decisions concerning the child's welfare constituted a sufficient change in circumstances to warrant inquiry into the child's best interests. There was a sound and substantial basis in the record for the court's determination that it was in the child's best interests to award the father primary physical residence and to award visitation to the mother. Although the court found that both parents were fit and had the financial

resources to support the child, the court determined that the mother's ability to foster the child's intellectual and emotional development was called into question by her lack of awareness of or concern for the child's declining performance in school. Most significantly, the court determined that the mother attempted to undermine the father's relationship with the child, while the father did not engage in such behavior.

Matter of Tuttle v Tuttle, 137 AD3d 1725 (4th Dept 2016)

Court Properly Modified Prior Consent Order By Directing that Respondent Mother Have Limited Supervised Visitation

In a proceeding pursuant to Family Court Act article 6, Supreme Court modified a prior consent order by directing that respondent mother have limited supervised visitation with the parties' child, and otherwise continued joint custody and primary physical residence with petitioner father. The Appellate Division affirmed. The mother did not challenge the determination that there was a significant change in circumstances, thus the only issue addressed by the Court was whether the custody and visitation determination was in the child's best interests. It was in the child's best interests that the father retain primary physical residence and the mother have limited supervised visitation. The mother admitted that she had been on probation following a conviction of endangering the welfare of a child for leaving the child unattended, that she smoked marihuana while on probation, and that she was arrested for possessing marihuana after the police responded to a disturbance that occurred when the mother went to the father's residence in violation of an order of protection. The mother also admitted that she pleaded guilty to harassment following a "road rage" incident that resulted in a physical altercation outside the vehicle while the child was in the back seat. In addition, the record established that the mother was unable to maintain a stable and safe home environment inasmuch as she moved frequently, and she resorted to heating an apartment with an open stove. Moreover, although the mother often volunteered in the child's preschool classroom and visited him during lunch, school staff members testified that the mother was disruptive and argumentative during some of the visits, and that there were instances of inappropriate treatment of the child. The record established that the father also engaged in various forms of improper conduct, often involving mistreatment of the mother. However, the mother's behavior consistently placed the child at risk, whereas the father provided a more stable home environment and was better able to provide for the child's emotional and intellectual development.

Matter of Brandon v King, 137 AD3d 1727 (4th Dept 2016)

Court Properly Granted Father Sole Custody and Mother Supervised Visitation, But Erred in Fashioning Schedule and Terms of Supervised Visitation

Family Court granted respondent father's cross petition by awarding him sole custody of the parties' children, with supervised visitation to petitioner mother. The Appellate Division modified and remitted. The court properly granted the father's cross petition. The father established the requisite change in circumstances. The mother's contention was rejected that the court's evidentiary rulings with respect to the audio recordings made by a police detective contemporaneously with his investigation of allegations of a sexual assault against one of the children violated her Sixth Amendment Confrontation Clause and Due Process rights under the New York and United States Constitutions. Family Court matters are civil in nature, and the Confrontation Clause applies only to criminal matters. Although the mother failed to preserve for review her contentions that the court erred in admitting hearsay evidence in the form of a detective's audio recording containing, among other things, statements by the mother, in any event, that contention was without merit. The court erred in admitting the audio recording of the confession of the perpetrator of a sexual assault against one of the children. However, the error was harmless. The requirement that visitation be supervised was supported by a sound and substantial basis in the record. The mother obstructed law enforcement efforts to investigate a sexual assault against one of the children, attempted to sabotage the father's relationship with the children, and placed her own needs above those of the children. The contention of the mother and the Attorney for the Children was accepted that the provisions of the order

limiting the mother's visitation to supervised telephone access one day per week for a maximum of 20 minutes, and to a minimum of three hours of supervised visitation per month was unduly restrictive and thus not in the best interests of the children. Therefore, the order was modified by vacating the visitation schedule and the matter was remitted to determine a more appropriate supervised visitation schedule. In addition, the court improperly delegated its authority to the father to determine the location of the supervised visitation, the person or persons to supervise the mother's visitation, and whether any additional family members could attend visitation with the mother. The order was further modified by vacating those provisions, and remitted for the additional purpose of determining the location of supervised visitation, the supervisor or supervisors of the visitation, and whether additional family members, if any, could accompany the mother to visitation.

Matter of Guillermo v Agramonte, 138 AD3d 1767 (4th Dept 2016)

FAMILY OFFENSE

Court Erred in Denying Motion For Adjournment to Amend Petition

Family Court denied the mother's petition for an adjournment to amend a family offense petition and settled the matter over objection by entering a final six-month order of protection. The Appellate Division reversed. The court improvidently exercised its discretion in denying petitioner's request for a short adjournment to amend the petition and to enable newly appointed counsel could familiarize herself with the case. Leave to amend should be freely granted if the amendment is not plainly lacking in merit and there would be no prejudice to the nonmoving party. Here, at petitioner's third appearance and her first with counsel, because she had only been informed of her right to counsel at the prior proceeding and despite the court's earlier indication of its willingness to allow an amendment if petitioner obtained counsel, the court perfunctorily denied the request for an adjournment to amend and assessed whether the matter could be disposed of without a fact finding hearing. In so doing, the court noted that respondent was paying retained counsel. Where, as here, there was no indication of an attempt to unduly prolong the proceedings, a party's payment for counsel's representation was not the type of significant prejudice warranting denial of an otherwise sufficient motion for leave to amend. The court also improvidently exercised its discretion when, over petitioner's objection and without conducting a fact finding hearing, it abruptly settled the matter sua sponte by extending the permanent order of protection for only six months. Petitioner should have been given the opportunity to prove the alleged family offenses, which had they been established, would have entitled her to a three-year order of protection.

Matter of Shazzi T. v Ernest G., 135 AD3d 410 (1st Dept 2016)

Referee Properly Did Not Consider Children's Statements During In Camera Interview

Family Court dismissed the petition for an order of protection on behalf of petitioner mother and her children against respondent father. The Appellate Division affirmed. The motion to dismiss was properly granted because petitioner failed to establish by a fair preponderance of the evidence that respondent's alleged conduct established a family offense. Petitioner's allegations that the father improperly touched one or more of the children were unsupported by admissible evidence, but only by inadmissible hearsay testimony by petitioner and her mother. There was no basis to disturb the referee's determination that their testimony, and the testimony of the children's maternal great-aunt about an incident she observed four years early, was not credible. The referee properly determined that it would not consider statements made by the children during in camera interviews because in this article 8 proceeding the parties' due process rights would be compromised.

Matter of Joyesha J. v Oscar S., 135 AD3d 557 (1st Dept 2016)

Court Properly Dismissed Motion to Vacate Order of Protection

Family Court dismissed the petition to vacate a two-year consent order of protection that had been issued in petitioner's favor against respondent and set the matter down for a hearing on the allegations in the family offense petition. The Appellate Division affirmed.

Petitioner failed to show good cause to vacate the order of protection. She had the burden to establish that her consent to the order of protection was not knowingly and/or voluntary, in that it was given because of fraud, collusion, mistake, accident or some other similar ground. Petitioner acknowledged that she was not impaired and consented to the order of protection on the day it was entered and her subsequent claims that her judgment was impaired because of medication and the extreme stress of being in the courtroom with respondent were insufficient to warrant vacating the consent order of protection.

Matter of Mahmuda U. v Mohammed S. I., 137 AD3d 534 (1st Dept 2016)

Family Court Erred in Dismissing Mother's Petition

The mother commenced a proceeding alleging that the father violated the terms of an order of protection dated January 3, 2013, by communicating with her by mail. Specifically, instead of making his child support payments through alternate means, she alleged that the father knowingly and intentionally mailed to her seven checks for child support and that, on three of the checks, he had written offensive remarks in the memo portion. After a hearing, the Family Court stated that the memos on three checks "may be offensive." Yet the court, without explanation, found that the memos did not constitute a violation of the order of protection, and dismissed the petition. The mother appealed. The Appellate Division reversed. The Family Court erred in dismissing the mother's petition. The mother established by a fair preponderance of the evidence that the father, by mailing the child support checks, three of which contained offensive comments to the mother, willfully violated the order of protection, which expressly prohibited any form of communication by the father with the mother, including the use of mail (*see* FCA § 846-a). The father admitted at the hearing that he had communicated with the mother by mail, despite being aware that the order of protection prohibited such communication. Moreover, under the circumstances of this case and the history between the parties, the statements in the memo portion of three checks, as stated previously, were offensive.

Matter of Clovis v. Clovis, 136 AD3d 669 (2d Dept 2016)

Criminal Court's Issuance of an Order of Protection Did Not Negate Petitioner's Motion to Extend Family Court Order of Protection

The Family Court denied the petitioner's motion to extend an order of protection, holding that because the petitioner had already been granted a two-year order of protection in Criminal Court, the goal behind FCA § 842 was accomplished and, thus, the petitioner had not demonstrated good cause to extend the order of protection. The petitioner appealed. The Appellate Division reversed. Contrary to the Family Court's conclusion, the Criminal Court's issuance of an order of protection did not negate or otherwise render superfluous the petitioner's request for an extension of her Family Court order of protection. A victim of domestic violence may commence a proceeding in either or both Family Court and Criminal Court and each court has the authority to issue temporary or final orders of protection. Therefore, the Criminal Court's issuance of an order of protection did not preclude the Family Court from extending the order of protection it had previously issued. Moreover, had the respondent successfully appealed the criminal matter, the Criminal Court's order of protection would have been vacated. Thus, it was entirely proper for the petitioner to seek an extension of the Family Court order of protection. Section 842 of the Family Court Act provides, in pertinent part, that a court "may ..., upon motion, extend [an] order of protection for a reasonable period of time upon a showing of good cause or consent of the parties." Here, the record revealed that the petitioner stated that, because they have a child in common, the parties continue to interact. They come into contact during litigation over custody and visitation issues and when they exchange the child at the drop-off location at the police station. The respondent also has a history of assaulting the petitioner, and their on-going discord continues. There was no evidence in the record to suggest that the petitioner's more serious allegations were contrived. Moreover, it was undisputed that, since the entry of the subject order of protection, the respondent had pleaded guilty in the Criminal Court to disorderly conduct, and the Criminal Court had issued a two-year order of protection in favor of the petitioner. Therefore, it was clear from the record that the petitioner's fear that the

respondent might stalk, harass, or attack her was well-founded, and that the unavoidable interactions between the parties might subject her to a reoccurrence of violence. Accordingly, there was good cause to extend the order of protection. As to the length of the extension, under these circumstances, the Appellate Division concluded that five years was a reasonable period of time to extend the order of protection.

Matter of Molloy v. Molloy, 137 AD3d 47 (2d Dept 2016)

Commencement of Matrimonial Action Was Not a Ground to Dismiss Family Offense Proceeding

The petitioner appeared in court and stated that she intended to file for divorce. Thereafter, in July 2014, her attorney told the Family Court that there was a matrimonial action pending. The court suggested that the petitioner apply in the Supreme Court for an order of protection, because the Supreme Court could provide a prompt hearing. The Family Court adjourned the matter for two weeks to give the petitioner an opportunity to make such an application, and warned that "I may dismiss [this proceeding] because there's a matrimonial pending, and I'm adjourning the matter to allow the parties ample time to make this application in Supreme Court pursuant to the Domestic Relations Law." On the next court date, the respondent moved to dismiss the petition on the ground that there was a pending matrimonial action in Supreme Court. The petitioner opposed the motion to dismiss, arguing that there was no statutory requirement that the matter be dismissed on the ground that there was a matrimonial action pending in the Supreme Court. The Family Court granted the motion, dismissed the petition, and vacated the temporary order of protection. DRL § 252 (1) provides that in a matrimonial action, both the Supreme Court and the Family Court "shall" entertain applications for orders of protection. Where a matrimonial action is pending in the Supreme Court, the Family Court continues to have jurisdiction over a family offense proceeding, although the Supreme Court in a matrimonial action may also adjudicate whether a spouse has committed a family offense. Here, the commencement of the matrimonial action was not a ground to dismiss the family offense proceeding commenced in the Family Court, which should have been adjudicated on the merits, since it was commenced in a proper forum. Order reversed.

Matter of Hassan v Habib, 137 AD3d 910 (2d Dept 2016)

Family Court Erred in Issuing Mutual Orders of Protection

Parents of three children filed family offense petitions against each other. On its own motion, Family Court issued mutual orders of protection and included, in the terms of the orders, provisions to which the mother had expressly objected. The Appellate Division reversed. While a court could issue a temporary order of protection on its own motion and was not "required to follow all of the ordinary procedural requirements" pursuant to FCA § 154-c(3), no final order of protection could be issued unless there is a finding of fact by the court, judicial acceptance of an admission by the party against whom the order was issued, or the party against whom it is issued has given "knowing, intelligent and voluntary consent to its issuance." Here, the mother clearly indicated she did not consent to the order containing the terms adopted by the court in its order or admit to any of the allegations set forth in the father's family offense petition. The court failed to conduct a factual examination of the allegations or make a finding that the terms being objected to by the mother were "reasonably necessary" to protect the children. Accordingly, the order was vacated.

Matter of Daniel W. v Kimberly W., 135 AD3d 1000 (3d Dept 2016)

Appeal Deemed Moot

Family Court granted respondent's motion to dismiss petitioner's application to modify or terminate a two-year order of protection. By the time the appeal was heard, the order had expired by its own terms and since no extensions were granted, the appeal was deemed moot.

Matter of Tim BB. v Malcolm AA., 137 AD3d 1433 (3d Dept 2016)

Father's Family Offense Petition and Violation Petition Reinstated; Order of Protection Granted in Favor of Mother Reversed

In the first of two orders on appeal, Family Court dismissed respondent father's family offense petition, and denied, without making any findings of fact, his violation petition. In the second order on appeal, the court entered an order of protection directing the father to refrain from, among other things, harassing petitioner mother, his former wife. The Appellate Division modified the first order by reinstating the family offense petition and the violation petition of the father, and remitted the matter for further proceedings. The record established that the father testified to conduct by the mother that could support a determination that she committed a family offense. Given the conflicting versions of the same events offered by the parties at the hearing, the credibility of the parties as witnesses would be crucial to the resolution of the father's family offense petition. With respect to the denial of the father's violation petition, the court failed to set forth those facts essential to its decision. In the second appeal, the Court reversed the order of protection and dismissed the mother's petition. The court failed to specify the particular family offense under Family Court Act Section 812 (1) that the father allegedly committed. Nonetheless, remittal was not necessary because the record was sufficient for the Court to conduct an independent review of the evidence. The evidence was not legally sufficient to support a finding by a fair preponderance of the evidence that the father committed any of the enumerated family offenses upon which an order of protection could be predicated.

Matter of Langdon v Langdon, 136 AD3d 1580 (4th Dept 2016)

Mother's Family Offense Petition Reinstated

In the first order on appeal, Family Court dismissed the mother's family offense petition against respondent father. In additional orders on appeal, Family Court denied the mother's petitions seeking custody of the subject children, and granted the father's petitions to modify a prior order by directing that the mother's visitation be supervised. With regard to the appeal from the custody and visitation orders, the Appellate Division affirmed. The father established a sufficient change in circumstances to warrant inquiry into whether the prior order should be modified, and the Judicial Hearing Officer's determination that it was in the children's best interests to impose supervised visitation was supported by a sound and substantial basis in the record. The evidence established, among other things, that the mother's mental health issues resulted in several incidents of erratic behavior that negatively affected the children and jeopardized their well-being, and that the mother failed to adequately address those issues. With respect to the appeal from the dismissal of the mother's family offense petition, the Appellate Division reversed, reinstated the petition and remitted the matter. The court erred in adopting the JHO's report to dismiss the petition without providing the parties with notice of the filing of the report and affording them an opportunity to object to it. The record established that the JHO was authorized only to hear the matter and issue a report inasmuch as the mother did not consent to the referral to the JHO for a final determination on her petition.

Matter of Gibson v Murtaugh, 137 AD3d 1574 (4th Dept 2016)

Order of Protection Reversed Where Evidence of Intent Legally Insufficient

Family Court issued an order of protection upon a finding that respondent committed a family offense by engaging in conduct that would constitute the offense of harassment in the second degree. The Appellate Division reversed and dismissed the petition. The evidence of intent was legally insufficient, thus, petitioner did not meet her burden of establishing by a fair preponderance of the evidence that respondent's conduct constituted the alleged offense. The Referee found that respondent committed the family offense based upon the Referee's conclusion that respondent told petitioner during a lengthy telephone call that he did not know what he would do if he saw her with another man, sent her two or three text messages stating that he hoped to reconcile with her, and then left on petitioner's car several mementos that petitioner had given him along with the message that he would "never forget [her], bye." Notwithstanding the Referee's implicit finding that petitioner was upset by the communications, her reaction was immaterial in establishing respondent's intent. Furthermore, although

the requisite intent could be inferred from the surrounding circumstances, the circumstances failed to establish that respondent acted with the requisite intent. Such conduct was comprised of relatively innocuous acts that were insufficient to establish that respondent engaged in a course of conduct with the intent to harass, alarm or annoy petitioner.

Matter of Shephard v Ray, 137 AD3d 1715 (4th Dept 2016)

Order of Protection Affirmed; Decision that Respondent Committed Other Family Offenses Vacated

After a fact-finding hearing, and upon a related decision, made after the hearing, Family Court issued an order of protection upon a finding that respondent committed family offenses against petitioner. The Appellate Division affirmed the order of protection and vacated the underlying decision that respondent committed the family offenses of harassment in the first degree and aggravated harassment in the second degree. The evidence was legally insufficient to establish that respondent committed the family offense of harassment in the first degree. Petitioner did not sustain her burden of establishing by a preponderance of the evidence that respondent intentionally and repeatedly harassed another person by following such person in or about a public place or places; therefore, the finding was vacated. The finding that respondent committed the family offense of aggravated harassment in the second degree was also vacated insofar as that finding was premised on former subdivision (1) of Penal Law Section 240.30, inasmuch as the Court of Appeals has declared that Penal Law Section 240.30 (1), as it existed at the time of the decision on the petition, was unconstitutionally vague and overbroad. However, the proof was legally sufficient to establish that respondent committed the family offense of aggravated harassment in the second degree as defined in former subdivision (2) of Penal Law Section 240.30. Petitioner testified that, after she ended their relationship and asked respondent to cease communicating with her, respondent called her, sent her text messages, and left her voicemail messages in an excessive manner. She further testified that respondent threatened her and was verbally abusive during certain telephone calls.

Matter of Whitney v Judge, 138 AD3d 1381 (4th Dept 2016)

Order of Protection Affirmed; Finding in Underlying Order Vacated that Respondent Committed the Family Offense of Stalking in Fourth Degree

Family Court issued an order of protection upon a determination that respondent committed acts constituting the family offenses of disorderly conduct and stalking in the fourth degree against petitioner. The Appellate Division affirmed the order of protection and vacated the underlying order that respondent committed the family offense of stalking in the fourth degree. Respondent's contention was rejected that the court did not have subject matter jurisdiction because the parties were no longer in an intimate relationship. Both parties testified that they started dating before they moved to New York in February 2012, and that they remained a couple until September 2012. Additionally, although their sexual relationship ended in the fall of 2012, the parties continued to live together on-and-off until the petition was filed in March 2013. Thus, the court properly determined that the parties' relationship fitted within the plain terms of the statute. The evidence was legally sufficient to support a finding that respondent committed the family offense of disorderly conduct, thus warranting the issuance of an order of protection. Petitioner testified that respondent screamed at her in a harassing and obscene manner in her place of business on December 20, 2012, in the presence of customers and employees. Moreover, respondent admitted that he screamed at petitioner at her place of business in the presence of customers. However, the evidence was legally insufficient to establish that respondent committed the family offense of stalking in the fourth degree. Therefore, the finding was vacated in the underlying fact-finding order that respondent committed the family offense of stalking in the fourth degree.

Matter of Tucker v Miller, 138 AD3d 1383 (4th Dept 2016)

JUVENILE DELINQUENCY

Denial of Request For ACD Affirmed - Dissent Would Have Granted ACD

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would have constituted the crime of false personation, and placed her on probation for a period of 13 months. The Appellate Division affirmed. Respondent, then 14 years old and a runaway child from Harlem, gave a false name, age, and address to the police, who approached her as a possible abandoned child. She continued her false assertions after being warned by the police that providing false information subjected her to criminal liability. The court properly denied respondent's motion to suppress her statements to police inasmuch as the police had probable cause to believe respondent was a runaway. The finding that respondent committed false personation was supported by legally sufficient evidence and was not against the weight of the evidence. The court properly exercised its discretion when it denied respondent's request for an ACD. Given her history, which included violent behavior toward her family, while in placement, in school, and in the streets, aggressive behavior toward facility staff, a threat to kill a fellow student, truancy, promiscuity, and drug and alcohol abuse, a 13-month period of supervision was warranted. The dissent concluded that the imposition of a supervised ACD would have been the least restrictive alternative available consistent with her needs and those of the community given that this was the first offense of a troubled teenager who had no prior delinquency adjudication and was doing better at home and in therapy at the time of the dispositional hearing.

Matter of Christy C., 135 AD3d 468 (1st Dept 2016)

Second Degree Sexual Abuse Lesser Included Offense

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted the crimes of sexual abuse in the first, second and third degrees, and placed him on probation for 12 months. The Appellate Division modified by vacating the finding as to second degree sexual abuse. The finding was based upon legally sufficient evidence and was not against the weight of the evidence. The evidence supported an inference that at least one of the purposes of respondent's sexual attack on the victim was sexual gratification. The second degree sexual abuse finding was a lesser included offense.

Matter of Mikalo D., 136 AD3d 590 (1st Dept 2016)

Evidence Supported Elements of Third-degree Menacing

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would have constituted the crime of menacing in the third degree, and placed him on probation for 18 months. The Appellate Division affirmed. The court's finding was supported by legally sufficient evidence and was not against the weight of the evidence. The victim's testimony that respondent, while acting in concert with others, chased the victim and demanded money from him, causing him to reasonably fear an attack, supported the elements of third-degree menacing.

Matter of Tione M., 137 AD3d 443 (1st Dept 2016)

Court Erred in Dismissing JD Petitions on Speedy Trial Grounds

Family Court dismissed, on speedy trial grounds, JD petitions filed against respondents. The Appellate Division reversed and reinstated the petitions. The court improvidently exercised its discretion in dismissing the petitions instead of finding special circumstances and adjourning the proceedings until the following morning, after granting an adjournment for good cause to day 90. The court allotted only two hours to complete the suppression hearing, hold an independent source hearing if needed, and commence fact-finding in December 2013. Among other things, the presentment agency could not have anticipated respondents' attorneys' prior need to cut the proceedings short in September 2013 because of their hearings in other parts. It also could not have anticipated that the court, upon granting the motion to suppress, would not allow the independent source hearing to proceed at 4:00 p.m., when the presentment agency noted that the complainant was available and it was ready to proceed.

Matter of Kaliek G., 137 AD3d 570 (1st Dept 2016)

JD Petition Supported by Sworn Depositions

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would have constituted the crime of sexual abuse in the third degree, and placed him in the custody of ACS for 12 months. The Appellate Division affirmed. The petition was legally sufficient - it was fully supported by sworn depositions from two adults. Respondent's placement for a period of 12 months was the least restrictive dispositional alternative given the seriousness of respondent's sex offenses against his much younger brother and the opinions of two clinical psychologists. The court's use of a "crossover" procedure, which allowed for the sharing of records between this proceeding and a related neglect proceeding did not prejudice respondent. Any conflict of interest was promptly avoided by assignment of new counsel.

Matter of D'Andre R., 137 AD3d 652 (1st Dept 2016)

Record Supported Family Court's Fact-Finding Determinations

While standing on the roof of a parking garage located adjacent to a seven-story multi-unit apartment building (hereinafter the subject building), the respondent allegedly attempted to open the window of a second-floor apartment from the outside. The respondent was arrested and charged with, inter alia, committing acts which, if committed by an adult, would have constituted the crime of attempted criminal trespass in the second degree. A fact-finding hearing was conducted, and at the close of the presentment agency's case, the respondent moved to dismiss the petition, contending that the presentment agency had failed to make a prima facie case. The Family Court denied the respondent's motion to dismiss. The respondent then moved for a missing witness inference with respect to a porter who worked in, and two tenants who lived in, the subject building, all of whom did not testify at the hearing. The Family Court denied that branch of the respondent's motion which was for a missing witness inference as to the tenants, and granted that branch of the respondent's motion which was for a missing witness inference as to the building porter. Thereafter, the court determined that the respondent had committed acts which, if committed by an adult, would have constituted the crime of attempted criminal trespass in the second degree. The respondent was adjudicated a juvenile delinquent and placed on probation for a period of seven months. The respondent appealed. Upon reviewing the record, the Appellate Division found that there was legally sufficient evidence to prove that the respondent was attempting to open a window of the subject building and that he did not have a license or privilege to enter the building. Moreover, the Appellate Division was satisfied that the Family Court's fact-finding determinations were not against the weight of the evidence (*see* FCA § 342.2 [2]). Further, the Appellate Division found that the Family Court providently exercised its discretion in denying the respondent's request for a missing witness inference as to the tenants of the subject building because the respondent failed to demonstrate that the witnesses were available to the presentment agency to testify at the fact-finding hearing. Order affirmed.

Matter of Arel J., 136 AD3d 913 (2d Dept 2016)

Family Court Providently Exercised its Discretion in Permitting 7 Year Old Complainant to Testify

The Family Court adjudicated the respondent a juvenile delinquent upon determining, after a fact-finding hearing, that the respondent committed acts which, if committed by an adult, would have constituted the crimes of criminal sexual act in the first degree (PL § 130.50 [3]) and sexual abuse in the first degree (PL § 130.65 [3]). The respondent appealed. The Appellate Division affirmed the order of disposition. Contrary to the respondent's contention, the Family Court providently exercised its discretion in allowing the complainant, then age seven, to testify as a sworn witness. After a hearing at which the court considered the ability of the witness to understand the difference between truth and falsity, the legal and moral consequences of lying, and the importance of telling the truth at the proceeding, the court determined that the witness could do so. The respondent argued that the Family Court's fact-finding determination was against the weight of the evidence. Upon reviewing the record, the Appellate Division was satisfied that the Family Court's fact-finding determination was not against the weight of the evidence (*see* FCA § 342.2 [2]).

Matter of Daniel J., 136 AD3d 915 (2d Dept 2016)

Least Restrictive Available Alternative Requirement Not Satisfied; ACD Warranted

In an order of disposition, the Family Court adjudicated the respondent a juvenile delinquent upon his admission that he committed acts which, if committed by an adult, would have constituted the crime of arson in the fifth degree, a misdemeanor (PL § 150.01), and placed him on probation for a period of 12 months. The respondent appealed. The Appellate Division reversed. The respondent, who was 13 years old at the time of the underlying offense, admitted that on February 5, 2014, he committed an act which, if committed by an adult, would have constituted the crime of arson in the fifth degree, a misdemeanor. An honor student, the respondent had no prior criminal history and no problems in his foster home or at school, notwithstanding prior physical abuse and neglect by his biological parents. There was no indication that he ever used drugs or alcohol, or was affiliated with a gang. By all accounts, he was a friendly, cooperative young man. Both his therapist and a fire marshal who conducted an intervention after the incident described him as remorseful and at low risk for reoffending, and he continued to receive services and monitoring in connection with his foster placement. At the dispositional hearing, the respondent requested an adjournment of the proceeding in contemplation of dismissal pursuant to FCA § 315.3 (1). The Family Court denied the request, adjudged him to be a juvenile delinquent, and placed him on probation for a period of 12 months. Although the term of the probation had already expired, in view of the possible collateral consequences resulting from the adjudication of delinquency (*see* FCA § 381.2 [2]), the appeal was not rendered academic. The Family Court was required to impose the least restrictive available alternative consistent with the needs and best interests of the respondent and the need for protection of the community (*see* FCA § 352.2 [2] [a]). This "least restrictive available alternative" requirement compels the Family Court to balance the needs of the juvenile and the need for the protection of the community. Upon a finding that the respondent committed an act which would constitute a misdemeanor if committed by an adult, the least restrictive dispositional alternative available to the Family Court in this juvenile delinquency proceeding was the imposition of an adjournment in contemplation of dismissal (*see* FCA § 315.3 (1) [2]). Here, the Family Court improvidently exercised its discretion in imposing a period of probation. Given the respondent's many positive characteristics, his lack of prior criminal or behavioral issues, the services and support he was already receiving as a result of his placement in foster care, and the minimal risk that he posed to the community, an adjournment in contemplation of dismissal was warranted.
Matter of Nigel H., 136 AD3d 1033 (2d Dept 2016)

Record Did Not Support Family Court's Fact-Findings

The respondent was adjudicated a juvenile delinquent on the basis of the Family Court's finding that she committed acts which, if committed by an adult, would have constituted the crimes of aggravated cruelty to animals in violation of Agriculture and Markets Law § 353-a (1), and overdriving, torturing, and injuring animals in violation of Agriculture and Markets Law § 353. The respondent argued that the findings of the Family Court were against the weight of the evidence. The Appellate Division agreed with this contention. At the fact-finding hearing, the presentment agency called a witness who testified that she observed the then 12-year-old respondent toss a kitten underneath the wheels of an oncoming vehicle. She was the only witness who identified the defendant as the perpetrator, and her identification was not corroborated by any other evidence in the record. However, the reliability of the witness's identification of the respondent was called into doubt by several factors. An examination of her testimony reveals that the witness had only a limited opportunity and ability to observe the perpetrator because the incident occurred over a relatively short period of time, and there was a distance of a minimum of 10 feet between the witness and the perpetrator during their interaction. The witness was also admittedly excited and upset during the incident. In addition, the witness's description of the perpetrator lacked specificity, and did not include body shape, height, weight, facial features, skin tone, accent, or any distinctive characteristics. Further, the incident occurred in the late afternoon near the time that students were being released from several neighborhood schools, that the perpetrator was dressed in a school uniform similar in type to the uniforms worn by students at those

schools, and that the witness's description of the school uniform worn by the perpetrator did not match the respondent's school uniform. Under these circumstances, the witness's identification of the respondent was not convincing when balanced against the substantial evidence submitted by the respondent in her own defense. In her own defense, the respondent denied any involvement. Her testimony was corroborated by objective evidence in the record, including that her school uniform did not match the perpetrator's uniform as described by the witness. In addition, although the witness testified that the perpetrator was accompanied by several friends at the time of the incident, the testified that she walked home from school by herself every day. The respondent's testimony in this regard was consistent with the fact that she was stopped the following day by an investigator as she was walking home alone. She also presented the testimony of the assistant principal of her school, a disinterested witness, who testified that the respondednt was always compliant with the dress code, which required her to wear pants of a color different from those worn by the perpetrator. The assistant principal further testified that the respondent's reputation among her teachers was that of an "obedient and peaceful" student who was "never in trouble." The respondent's babysitter and mother further attested to her good character. Based upon all the credible evidence, a different fact-finding would not have been unreasonable. Weighing the relative probative force of the witness's testimony against the respondent's witnesses' testimony, and the relative strength of conflicting inferences that may be drawn from the testimony, the Appellate Division found that the Family Court's fact-finding determination was against the weight of the evidence. Accordingly, the order of disposition was reversed, the fact-finding order was vacated, the petition was dismissed, and the matter was remitted to the Family Court for further proceedings pursuant to FCA § 375.1.

Matter of Shannel P., 137 AD3d 1039 (2d Dept 2016)

Respondent Not Entitled to ACD

The order of disposition adjudicated the respondent a juvenile delinquent, upon an order of fact-finding of that court dated August 19, 2014, made upon his admission, finding that he had committed acts which, if committed by an adult, would have constituted the crime of grand larceny in the fourth degree, and placed him on probation for a period of 12 months. The respondent appealed. The Appellate Division affirmed. The appeal from the order of disposition which placed the respondent on probation for a period of 12 months had been rendered academic, as the period of placement had expired. However, because of the possible collateral consequences resulting from the adjudication of delinquency, the appeal was not been rendered academic (*see* FCA § 783). The Family Court did not improvidently exercise its discretion in adjudicating the respondent a juvenile delinquent (*see* FCA § 352.1), rather than directing an adjournment in contemplation of dismissal (*see* FCA § 315.3). The respondent was not entitled to an adjournment in contemplation of dismissal merely because this was his first encounter with the law, or in light of the other mitigating circumstances. The record established that the imposition of probation was the least restrictive alternative consistent with the respondent's best interests and the need for protection of the community (*see* FCA § 352.2 [2] [a]), particularly in light of, among other factors, the seriousness of the offense, the respondent's poor record of attendance and disciplinary issues at school, and his need for increased supervision.

Matter of Elijah G., 138 AD3d 839 (2d Dept 2016)

Respondent Failed to Demonstrate That Showup Procedure Was Unduly Suggestive

The order appealed from adjudicated the respondent a juvenile delinquent on the basis of the Family Court's finding that he committed acts which, if committed by an adult, would have constituted the crimes of robbery in the second degree, menacing in the third degree, attempted assault in the third degree, and criminal possession of stolen property in the fifth degree, and denied the respondent's motion which was to suppress identification testimony. Here, the presentment agency met its initial burden of establishing the reasonableness of the police conduct and the lack of undue suggestiveness. In opposition, the respondent failed to satisfy his burden of demonstrating that the showup procedure was unduly suggestive and subject to suppression. Accordingly, the Family Court properly denied the respondent's motion.

Matter of Shan M., 137 AD3d 1144 (2d Dept 2016)

Appeal Deemed Moot

Upon respondent's consent, Family Court adjudicated respondent to be a juvenile delinquent and determined he had committed an act which, if committed by an adult, would constitute the crime of criminal sexual act in the first degree. After a dispositional hearing, respondent was placed with DSS in a non secure placement which specialized in sex offender treatment. Respondent argued that the court's dispositional order violated his plea agreement by placing him outside his home and was not the least restrictive available alternative. However, his appeal was deemed moot since by the time it was heard, the dispositional order had expired.

Matter of William G., 136 AD3d 1178 (3d Dept 2016)

Court Did Not Violate Respondent's Right to Speedy Trial

Family Court adjudicated respondent to be a juvenile delinquent and placed him in the custody of DSS. The Appellate Division affirmed. Respondent's allegation that the court violated his statutory right to a speedy trial (see FCA § 340.1(4)), was unpreserved and affirmatively waived by him. Respondent, who was not detained, consented to or requested adjournments, which caused the fact-finding hearing to take place more than 60 but less than 90 days after the initial appearance and the record did not establish that counsel lacked a legitimate strategy for delaying the hearing. Additionally, respondent's argument that the court erred in failing to order a diagnostic assessment of him on the basis that he had an IQ of 74 was unpreserved. Even it this issue was preserved, given respondent's history and the circumstances of this case, the court did not abuse its discretion by failing to order the assessment. Furthermore, the court's decision to place him in the custody of DSS for twelve months was the least restrictive option and not an abuse of discretion. Respondent's mother was unable or unwilling to offer him the support he needed given his needs and his escalating and violent behavior, and the evidence showed he failed to respond well in a less-restrictive educational setting.

Matter of Daniel TT., 137 AD3d 1515 (3d Dept 2016)

ORDER OF PROTECTION

Court Erred in Imposing Restrictions on Respondent's Ability to Use or Possess Firearms During Pendency of Order of Protection

Family Court issued a two-year order of protection upon its determination that respondent willfully violated a prior order of protection issued in favor of petitioner. The Appellate Division modified by vacating the provision directing that respondent was not to use or possess firearms nor hold or apply for a pistol permit during the pendency of the order. The evidence supported the court's determination that respondent willfully violated the prior order of protection, which directed respondent not to communicate with petitioner except by text message regarding the health, safety and welfare of their children. It was undisputed that respondent contacted petitioner via text message regarding matters unrelated to their children during the pendency of the order of protection. However, the court erred in imposing restrictions on respondent's ability to use or possess firearms during the pendency of the order. Under Family Court Act Section 846-a, the court could revoke a license to carry and possess a firearm if the court determined that the willful failure to obey a protective order involved violent behavior constituting the crimes of menacing, reckless endangerment, assault or attempted assault. Here, no such determination was made. Moreover, restriction of respondent's right to use or possess firearms was not warranted under Family Court Act Section 842-a, inasmuch as the court did not find, and could not find based on the evidence at the hearing, that the conduct which resulted in the issuance of the order of protection involved (i) the infliction of physical injury..., (ii) the use or threatened use of a deadly weapon or dangerous instrument..., or (iii) behavior constituting any violent felony offense, or that there was a substantial risk that the respondent may use or threaten to use a firearm unlawfully against the person or persons for whose protection to order of protection was issued.

Schoenl v Schoenl, 136 AD3d 1361 (4th Dept 2016)

Court Erred in Issuing Order of Protection Without Adhering to Procedural Requirements of Family Court Act Section 154-c (3)

In appeal No. 1, Family Court issued a two-year order of protection against respondent mother. The Appellate Division reversed and dismissed the petition. Although the mother's challenges to the order were not preserved for appellate review, the Court exercised its power to review those challenges as a matter of discretion in the interest of justice. The court erred in issuing an order of protection without adhering to the procedural requirements of Family Court Act Section 154-c (3). The court did not make a finding of fact that petitioner father was entitled to an order of protection based upon a judicial finding of fact, judicial acceptance of an admission by the mother or judicial finding that the mother had given knowing, intelligent and voluntary consent to its issuance. The evidence was insufficient to establish any of the family offenses alleged in the petition, and thus the petition should have been dismissed on that ground. In appeal No. 2, the court granted the father's amended petition to modify the custody and visitation provisions of the divorce judgment and subsequent order of custody and visitation. There was a sound and substantial basis in the record for the court's determination that there had been a change in circumstances which reflected a real need for change to ensure the best interests of the children. Evidence of the mother's efforts to alienate the children from the father and her unstable and erratic behavior supported the award of physical custody to the father.

Matter of Hill v Trojnor, 137 AD3d 1671 (4th Dept 2016)

PATERNITY

Court Properly Dismissed Paternity Petition on Equitable Estoppel Grounds

Family Court dismissed the Commissioner of Social Services' paternity petition. The Appellate Division affirmed. The court providently exercised its discretion in dismissing the paternity petition on equitable estoppel grounds. Although the 16-year-old child was told by her mother when she was approximately five years old that respondent was her biological father, she considered the mother's husband to be her father and she had maintained a parent-child relationship with him since she was about six months old. Although the AFC consented to genetic marker testing, he equivocated at the hearing, and there was no evidence that the child herself, now 17 years old, wanted to have respondent declared her biological father and establish a father-child relationship with him.

Matter of Commissioner of Social Servs. v Rafael V., 137 AD3d 516 (1st Dept 2016)

Paternity Determination Supported by Clear and Convincing Evidence

Family Court determined that respondent was the father of the subject child, directed respondent to pay child support, and dismissed the family offense petition against petitioner. The Appellate Division affirmed. The court's finding that respondent was the biological father of the subject child was supported by clear and convincing evidence. The genetic marker test showed a 99.99% chance that respondent was the child's father. The circumstantial evidence respondent relied upon was not sufficient to rebut the presumption of paternity where a genetic marker test shows that the probability of paternity is greater than 95%.

Matter of Jennifer W. v Dwayne P., 137 AD3d 671 (1st Dept 2016)

Order of Filiation Reversed

Family Court declared and adjudged petitioner to be the father of the subject child. The Appellate Division reversed. The support magistrate prematurely ordered the parties to take a genetic marker test to determine whether petitioner was the father of the subject child. Respondent mother, acting without counsel, did not object to DNA testing or expressly raise an "equitable estoppel" issue, but she informed the court that another man had formally acknowledged paternity and that the child's birth certificate was being amended to reflect that the child's surname had been changed to that man's name. Regardless whether the acknowledgment of paternity was effective, these facts raised an issue concerning the child's best interests, which is the paramount concern in cases involving paternity. Therefore, the support magistrate erred in ordering

DNA testing without transferring the matter to a Family Court Judge to conduct a hearing to determine the issues of equitable estoppel and the child's best interests.

Matter of Augustine A. v Samantha R. S., 138 AD3d 458 (1st Dept 2016)

Doctrine of Equitable Estoppel Did Not Apply

Upon petitioner, putative father's request, Family Court ordered a DNA test. The attorney for the twin girls (then ten-years-old), applied for a stay of the order, arguing equitable estoppel, which was granted. The Appellate Division affirmed, determining the doctrine of equitable estoppel did not apply in this case. Here, the evidence showed petitioner was involved in the children's lives until they were eight-years-old at which point the mother had allegedly cut off all contact between them. Although the twins' therapist testified the girls did not recognize petitioner as their father, there was no one else that had played such a role in their lives. While the mother and the therapist testified the children identified a number of individuals as "father figures", this only established that a paternity finding would in no way disrupt an existing parent-child relationship. The evidence showed petitioner had been involved in the children's lives, except for brief periods when he left or was incarcerated. He testified he had helped care for them on a regular basis after their birth and even when he was incarcerated, he had continued to speak with them on a twice weekly basis. Although the mother agreed petitioner had phone contact with the children, she contented his role in their lives had been minimal. Despite the attorney for the child's concern on behalf of the children based on the therapist's testimony, and the father's criminal background, there was no prima facie case for equitable estoppel and thus the burden did not shift to petitioner to establish that DNA testing would be in the children's best interests. Even if there had been a basis to make a "best interests" inquiry, petitioner had a long-standing relationship with the children and it was difficult to discern the negative impact of formally identifying him as the father.

Matter of Patrick A. v Rochelle B., 135 AD3d 1025 (3d Dept 2016)

Court Properly Declined to Apply Doctrine of Equitable Estoppel

The mother became pregnant during a period when she and her husband were separated, and thereafter the parties reconciled. Four days after the child's birth, the child was placed in foster care and the parties were found to have derivatively neglected him. Within six weeks of the child's birth, petitioner commenced a paternity proceeding. The husband moved to dismiss on the grounds of equitable estoppel. The court ordered genetic marker tests which showed 99.99% likelihood that petitioner was the father and eventually, after a hearing, the court rejected the husband's arguments and declined to apply the doctrine. The Appellate Division affirmed, although noting that the court should have held the hearing on the issue of equitable estoppel before ordering genetic marker tests. Here, the child had been in foster care since he was four days old and although the husband had provided the child with food, clothing, toys and affection and the child referred to him as "daddy," he admitted the child never spent nights at his residence and he only saw the child during supervised visits which never totaled more than 10 hours per week. Even if the child, who at this time was 2 ½ -years-old, had developed some measure of reliance on the husband's representation of paternity, petitioner did not acquiesce in the development of this relationship and initiated paternity proceedings just six weeks after the child's birth. Therefore, the husband and child were not in a recognized parent-child relationship.

Matter of John J. v Kayla I., 137 AD3d 1500 (3d Dept 2016)

SPECIAL IMMIGRANT JUVENILE STATUS

Record Did Not Support SIJS Finding

The record revealed that the petitioner commenced a proceeding seeking to be appointed guardian of the child, and moved to obtain an order declaring that the child was dependent on the Family Court with specific findings that she was unmarried and under 21 years of age, that reunification with one or both of her parents was not viable due to abandonment, and that it would not be in her best interests to be returned to Belize, her previous country of nationality and last habitual

residence, so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (SIJS). In the order appealed from, the Family Court found, after a hearing, that the child was under 21 years of age, unmarried, dependent on the Family Court, and that it would not be in her best interests to return to Belize, but that reunification of the child "with one or both of her parents is a viable option." The Family Court granted the guardianship petition, but denied the SIJS motion. The Appellate Division found that the Family Court erred with respect to the element of "reunification". The law does not require a finding that reunification with neither of the child's parents is viable, but that reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law (*see* 8 U.S.C. § 1101[a][27][J] [I]). Nevertheless, upon making an independent factual review, the Appellate Division found, contrary to the petitioner's contention, that the record did not support a determination that the child's reunification with one or both of her parents was not viable due to abandonment. Order affirmed.

Matter of Leslie J.D., 136 AD3d 902 (2d Dept 2016)

TERMINATION OF PARENTAL RIGHTS

Mother Violated Terms of Suspended Judgment

Family Court found that respondent mother violated the terms of a suspended judgment, terminated her parental rights, and committed custody and guardianship of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent violated the terms of the suspended judgment. She failed to move to New York to obtain suitable housing, to maintain a steady income, and to visit the child regularly. A preponderance of the evidence supported the determination that it was in the child's best interests to be freed for adoption by the foster mother, who had cared for him for more than three years. The court properly denied respondent's request for an adjournment of the dispositional hearing inasmuch as her explanation for not being present, that she missed her train, was unsupported, and she had a history of failing to appear at visitations and other meetings.

Matter of Naethael Makai A., 135 AD3d 438 (1st Dept 2016)

Despite Diligent Efforts Mother Repeatedly Relapsed Into Substance Abuse

Family Court found that respondent mother permanently neglected the subject child, terminated her parental rights, and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The court's finding that the mother permanently neglected the child was supported by clear and convincing evidence that, despite diligent efforts by the agency to encourage and strengthen the parental relationship, the mother failed to plan for the future of the child. The agency arranged visitation and monitored the mother while she participated in various drug treatment programs. Despite these efforts, the mother repeatedly relapsed into substance abuse, resulting in the child being removed from her care following a trial discharge. A preponderance of the evidence supported the determination that it was in the child's best interests to terminate respondent's parental rights. The child had lived most of her life with her foster mother, who wanted to adopt her and with whom she had a positive relationship.

Matter of Senaya Simone J., 136 AD3d 434 (1st Dept 2016)

TPR in Child's Best Interests

Family Court, upon respondent mother's admission of permanent neglect, terminated her parental rights and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. A preponderance of the evidence supported the finding that it was in the child's best interests to terminate respondent's parental rights. The child had bonded with her foster mother, who wished to adopt her, and respondent failed to show that she ameliorated the living conditions that led to the child's placement.

Matter of Lesliana L., 136 AD3d 549 (1st Dept 2016)

TPR Based Upon Permanent Neglect Affirmed

Family Court determined that respondent mother permanently neglected the subject child, terminated her parental rights, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services. The Appellate Division affirmed. Clear and convincing evidence supported the finding of permanent neglect. The agency exerted diligent efforts to reunite mother and child by referring the mother to programs for anger management and parenting skills for special needs children, for mental health therapy, and by scheduling visitation and providing her with a visitation coach to improve the quality of the visits. Despite those efforts, the mother did not sufficiently focus on her mental health problems, controlling her anger, and on the child's needs. The caseworker testified that the quality of the visits varied and the mother often directed her attention to her younger children, leaving the subject child to her own devices. The mother was chronically late, keeping the child waiting for as much as two hours, and she made no effort to contact the child's therapist or teachers. A preponderance of the evidence supported the finding that it was in the child's best interests to terminate respondent's parental rights to free the child for adoption. The child was in the same loving foster home for four years, where her needs were met, and where the foster mother wanted to adopt her.

Matter of Alexandria D., 136 AD3d 604 (1st Dept 2016)

TPR Based Upon Mental Illness Affirmed

Family Court determined that respondent mother suffered from mental illness, terminated her parental rights, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The determination was supported by clear and convincing evidence that the mother, by reason of mental illness, was then and for the foreseeable future unable to provide proper and adequate care for her child. The mother admitted that less than two years before the subject child was born, she killed her three older children by slitting the oldest child's throat and drowning the three of them in the bathtub. In response to the criminal charges, she pleaded not responsible by reason of a mental defect or disease and she had resided since in a forensic psychiatric center. An expert psychologist diagnosed her with schizoaffective and antisocial disorders, which were persistent and severe, and which rendered her unable to adequately care for the child.

Matter of Donovan Jermaine R., 137 AD3d 448 (1st Dept 2016)

Mother Failed to Plan For Her Child's Future

Family Court determined that respondent mother permanently neglected the subject child. The Appellate Division affirmed. Despite the agency's diligent efforts, respondent failed to plan for the return of the subject child. Although respondent completed a parenting skills course and participated in individual therapy, the quality of her visits with the subject child was poor because she actively favored her son to the detriment of the subject child, and she demeaned both children's physical appearance. Also, respondent refused or rejected the agency's assistance in completing the remaining services offered to her, including anger management and vocational training.

Matter of Nawasilya Nyairah R., 137 AD3d 675 (1st Dept 2016)

Father Permanently Neglected His Child

Family Court determined that respondent father permanently neglected the subject child, terminated his parental rights, and committed her care and custody to New York City Children's Services and the New York Foundling Hospital for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence supported the finding of permanent neglect. The agency expended diligent efforts for almost two years to strengthen the parental relationship by referring the father to anger management and parenting skills programs and by sending him over 25 letters and/or emails asking him to engage in services and providing him with the caseworker's contact information. After the court directed the father to take additional anger management and parenting skills classes because of respondent's acting out in court, he refused to do so, even though the child refused to visit him because of his

angry demeanor. Clear and convincing evidence also demonstrated that respondent permanently neglecting the child by failing to plan for her future, because during the relevant period, he failed to take any steps toward correcting the conditions that prevented her from being placed in his care. Although the father contended that the agency should have forced the child to engage in family therapy with him, he did not address the fact that the child's therapist believed such therapy would be harmful to the child.

Matter of Lawanna M., 138 AD3d 408 (1st Dept 2016)

Mother Abandoned Children

Family Court found that respondent mother abandoned the subject children, terminated her parental rights, and committed custody and guardianship of the children to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence supported the finding of abandonment. The mother failed to communicate with the agency during the six months immediately preceding the filing of the petition. The mother's minimal and insubstantial contacts with the agency during this period were insufficient. Although the children relocated to Delaware with their foster parents, the mother continued to have an obligation to maintain contact with the agency, and her failure to do so showed her intent to forgo her parental obligations. Petitioner was not required to show that it made diligent efforts; rather, it was the mother's burden to show that she had been in contact with the agency or that the agency prevented or discouraged her from doing so.

Matter of Nadine Nicky McD., 138 AD3d 495 (1st Dept 2016)

Change in Permanency Goal to Adoption Was in Child's Best Interests

Family Court, after a hearing, changed the permanency goal of the subject child from reunification to placement for adoption. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the change in permanency goal was in the child's best interests. Notwithstanding the agency's reasonable efforts to assist the mother in accomplishing the permanency goal of reunification, the mother failed to cooperate. The mother failed to sign releases and maintain contact with the agency or caseworkers. Also, the mother was rejected by the State of Indiana, where the child was living in a kinship foster home, for approval as a resource for the child in Indiana, in connection with the Interstate Compact on Placement of children, because of her failure to disclose her income and street address, as well as an incident at the child's school that resulted in an outstanding felony warrant against the mother for trespass. The court did not violate the mother's due process rights by refusing to grant her an adjournment of the proceedings. The mother's physical absence was due to her failure to respond to an outstanding warrant and her inability to participate by phone was due to her persistent and obstreperous conduct during the proceedings.

Matter of Josee L. H., 138 AD3d 545 (1st Dept 2016)

Father Failed to Plan for Child's Future Despite Petitioner's Diligent Efforts

Here, the Family Court properly found that the father permanently neglected the subject child. The petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship. These efforts included facilitating visitation, providing referrals for mental health counseling and substance abuse programs, and repeatedly advising the father of the need to attend and complete such programs. Despite these efforts, the father failed, for a period of more than one year following the date that the child came into the agency's care, to plan for the child's future, although physically and financially able to do so. Order affirmed.

Matter of Mohammed A., 135 AD3d 744 (2d Dept 2016)

Record Supported Finding of Abandonment

In 2012, the petitioner commenced proceedings to terminate the father's parental rights to the subject children on the ground of abandonment. After a hearing, the Family Court found that the father had abandoned the children, terminated his parental rights, and transferred guardianship and custody of the children to the County's Department of Social Services for the purpose of adoption. The father appealed. An order

terminating parental rights may be granted where the petitioner has established, by clear and convincing evidence, that the parent abandoned the subject children for the six-month period before the petition was filed (*see* SSL § 384-b [3] [g] [i]; [4] [b]). An intent to abandon a child is manifested by the parent's failure to visit the child or communicate with the child or the agency although able to do so and not prevented or discouraged from doing so by the agency. The burden rests on the parent to maintain contact, and the agency need not show diligent efforts to encourage the parent to visit or communicate with the child. Here, although an order of protection prohibited the father from contacting the children directly, the father was still obligated to maintain contact with the petitioner, which had legal custody of the children. The fact that the father was incarcerated also did not excuse him from contacting the petitioner. To the extent that there was evidence that the father was in contact with the petitioner during the relevant time frame, the Family Court did not err in holding that such contact was too minimal, sporadic, and insubstantial to defeat the showing of abandonment. Accordingly, the Family Court properly found that the father abandoned the children.

Matter of William J., 135 AD3d 760 (2d Dept 2016)

Termination of Parents' Parental Rights Was Not in Child's Best Interests

The petitioner commenced a proceeding to terminate the parental rights of the parents of the child A. After fact-finding and dispositional hearings, the Family Court found that the parents had permanently neglected the child, terminated the parental rights of the parents, and committed the guardianship and custody of the child jointly to the petitioner and the Commissioner of Social Services for the purposes of adoption. The child appealed. The Appellate Division reversed. At the conclusion of a dispositional hearing on a petition for the commitment of the guardianship and custody of a child upon an adjudication of permanent neglect, the court must enter an order dismissing the petition, suspending judgment, or committing the guardianship and custody of the child (*see* FCA § 631). The order of disposition must be made solely on the basis of the best interests of the child. There is no presumption that such interests will be promoted by any particular disposition. Here, despite the fact that the parents defaulted at the dispositional hearing and had failed to complete the agency's service plan, they did make efforts towards reunification and visited with the child consistently. The child, who was almost 11 years old at the time of the hearing, was strongly opposed to adoption and wanted to maintain her relationship with her parents. As there was no viable person or persons to adopt the child, under the circumstances presented, the Family Court erred in finding that termination of parental rights was in the child's best interest. As over a year had passed since the dispositional hearing, the matter was remitted to the Family Court for a new dispositional hearing and a new disposition thereafter.

Matter of M.J.S., 135 AD3d 764 (2d Dept 2016)

Mother Failed to Plan for Return of Child Despite Petitioner's Diligent Efforts

In April 2014, the petitioner commenced a proceeding pursuant to SSL § 384-b, alleging that the mother permanently neglected the subject child. After fact-finding and dispositional hearings, the Family Court determined that the mother permanently neglected the child, terminated her parental rights, and freed the child for adoption by the foster mother. The mother appealed. The Appellate Division affirmed. The petitioner established, by clear and convincing evidence, that it exercised diligent efforts to strengthen the parent-child relationship by, inter alia, scheduling visits between the mother and the child, providing referrals for court-ordered programs, and advising the mother of the importance of complying with the court's directives. Despite these efforts, the mother failed to plan for the return of the child by not regularly attending the individual therapy and therapeutic visitation with the child, which was recommended in the forensic parenting evaluation with which the mother was required to comply. Although the mother completed several of the required programs, she never obtained safe and suitable housing for her and the child. Partial compliance with the court-ordered programs was insufficient to preclude a finding of permanent neglect. Accordingly, the Family Court properly determined that the mother had permanently neglected the subject child. The Family Court also properly determined that it was in the child's best interests to terminate the mother's parental rights, rather than to enter a suspended judgment, and to free

the child for adoption by the foster mother (*see* FCA § 631).

Matter of Kiara D., 135 AD3d 770 (2d Dept 2016)

Mother Failed to Plan for Child's Future Despite Agency's Diligent Efforts

Contrary to the mother's contention, the agency established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen her relationship with the subject child, which, were specifically tailored to the mother's individual situation (*see* SSL § 384-b [3] [g]; [7]). These efforts included, inter alia, making numerous referrals to mental health programs and parenting services, following up with those programs and others suggested by the mother, encouraging the mother's compliance with the programs, informing the mother of the child's special needs and progress in services, and facilitating visitation (*see* SSL § 384-b [7] [f]). Despite these efforts, the mother failed to plan for the child's future. The mother failed to successfully complete a mental health program or gain insight into her previous behavior and the need for services, and missed numerous supervised visitations with the child. In this proceeding based on permanent neglect, the testimony of a psychiatrist or psychologist was not required (*see* SSL § 384-b [6] [c], [e]). There was clear and convincing evidence of the mother's permanent neglect of the child (*see* SSL § 384-b [3] [g]). Moreover, the Family Court properly determined that termination of the mother's parental rights, rather than the entry of a suspended judgment, was in the child's best interests (*see* FCA § 631).

Matter of Deborah A., 135 AD3d 935 (2d Dept 2016)

DSS Failed to Demonstrate it Exercised Diligent Efforts to Strengthen the Parental Relationship Between Father and Children

The order, after fact-finding and dispositional hearings, found that the father permanently neglected the subject children, terminated his parental rights, and transferred the guardianship and custody of the children to the county's Department of Social Services (hereinafter DSS) for the purpose of adoption. The Appellate Division reversed. Here, DSS failed to meet its initial burden of demonstrating that it exercised diligent efforts to strengthen the parental relationship between the father and his children (*see* SSL § 384–b[7][a]). DSS's evidence demonstrated that its caseworkers' focus was on the mother's relationship with the children, as she was the initial subject of the proceedings and the father was not a party thereto. Further, although the evidence adduced at the fact-finding hearing showed that the DSS caseworkers advised the father to seek unsupervised visitation with the children since the supervised visits were positive, the evidence also showed that DSS did not support such unsupervised visitation and was aware that the father's access to the children was limited by an order of protection. Moreover, although DSS scheduled supervised visits between the father and the children and provided the father with notices of regularly scheduled permanency hearings and service plan reviews, it did little more to determine the particular problems facing the father with respect to the return of his children and did not make affirmative, repeated, and meaningful efforts to assist him in overcoming these handicaps before it commenced proceedings to terminate his parental rights. Further, DSS's evidence demonstrated that the father satisfied all requests that DSS made of him, which included attending a parenting class and marriage counseling, and showed himself to be a loving and appropriate parent at the supervised visitation sessions. Accordingly, the Family Court erred in adjudicating the children permanently neglected by the father and terminating his parental rights.

Matter of Gabriel B.S.P., 136 AD3d 619 (2d Dept 2016)

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

The mother, who has schizoaffective disorder, bipolar type, and a long history of psychiatric hospitalizations, gave birth to the subject child in June 2010. The child was removed from the mother's care and placed in foster care several days after he was born because the mother was behaving erratically. An order of neglect was entered against the mother on consent in October 2011. In November 2012, the petitioner commenced a proceeding pursuant to SSL § 384-b, alleging that the mother's parental rights should be terminated on the ground of mental illness. A fact-finding hearing was conducted in November 2013. At the hearing, a clinical psychologist testified that the mother could not safely

and effectively care for the child due to her mental illness. The mother also testified at the hearing. She acknowledged her diagnosis of schizoaffective disorder, but denied that she had symptoms as often as the psychologist had averred and asserted that she could care for the child. The Family Court determined that the mother suffered from a "mental illness," as defined by the Social Services Law, and terminated the mother's parental rights. The mother appealed. The Appellate Division affirmed. The petitioner established that the mother is presently, and for the foreseeable future, unable by reason of mental illness to provide proper and adequate care for the child (*see* SSL § 384-b [4] [c]). A psychologist who interviewed the mother and reviewed her relevant medical records testified that she suffered from schizoaffective disorder, bipolar type, a chronic condition with which the mother had been diagnosed more than 16 years earlier. The psychologist also testified that, even though the mother fully complied with her psychiatric treatment regimen and was generally stabilized, she continued to exhibit symptoms, including hallucinations, mood lability, and disturbed thinking, which would place the child at risk of neglect if he were placed in the mother's care. Accordingly, the Family Court's determination was supported by clear and convincing evidence.

Matter of Abijah C.P., 137 AD3d 791 (2d Dept 2016)

Mother Was Unable, by Reason of Mental Impairment, to Provide Proper and Adequate Care for Her Children

The county's Department of Social Services (hereinafter DSS) commenced proceedings to terminate the mother's parental rights. After a fact-finding hearing, the Family Court determined that pursuant to SSL § 384-b (4) (c) the mother was presently and for the foreseeable future unable to care for the subject children, terminated her parental rights, and placed the subject children in the custody of DSS for the purpose of adoption. The mother appealed. The Appellate Division affirmed. Here, the uncontroverted testimony of two psychologists revealed that the mother had sub-average intellectual functioning that originated in childhood, impaired adaptive functioning, impaired parental capacity, and that, because of her mental condition, the subject children would be in danger of becoming neglected if they were returned to her care. Contrary to the mother's contention, the Family Court correctly found that there was clear and convincing evidence that she is presently and for the foreseeable future unable to provide proper and adequate care for the subject children, and terminated her parental rights (*see* SSL § 384-b [6] [b]).

Matter of Kaylee Y.B., 137 AD3d 901 (2d Dept 2016)

Mother Failed to Plan for Child's Return Despite Agency's Diligent Efforts

In 2010, the subject child was placed in the care of the county's Department of Social Services (hereinafter the agency) following a finding that the mother had neglected him. At that time, the permanency goal for the child was to return to the mother. The agency was working with the mother to accomplish that goal by setting up visitation, planning conferences, and making referrals to various programs. The agency began to work with the father in March 2012 and set up visitation with the child. In January 2013, the agency filed a petition seeking to terminate the mother's and the father's parental rights on the ground of permanent neglect. After fact-finding and dispositional hearings, the Family Court found that the mother and the father permanently neglected the child, terminated their parental rights, and transferred guardianship and custody of the child to the agency for the purpose of adoption. The mother and father both appealed. The Appellate Division affirmed. The Family Court properly found that the agency established by clear and convincing evidence that it made diligent efforts to reunite the mother with the child by providing services and other assistance aimed at ameliorating or resolving the problems preventing the child's return to her care. Despite these efforts, and although she participated in the services offered by the agency during the several years that the child was in foster care, the mother failed to successfully deal with the issues she faced that prevented reunification, namely, her inability to control her anger and emotions, and her inability to avoid violent interactions with various people. Thus, the mother failed to plan for the child's safe return, by, inter alia, failing to learn and benefit from the programs arranged for and attended by her (see SSL § 384-b [7] [c]). The Family Court also properly found, based on clear and convincing evidence, that the father

permanently neglected the child by failing to plan for that child's return following his placement into foster care. The record established that the agency made diligent efforts to assist the father with complying with his service plan, which required him to regularly visit the child and attend clinical evaluations, but that the father failed to appear for the vast majority of them.

Matter of Omarie S.B., 137 AD3d 902 (2d Dept 2016)

Mother's Partial and Belated Compliance with Service Plan Found Insufficient

In two orders of fact-finding and disposition, made after fact-finding and dispositional hearings, the Family Court found that the mother permanently neglected the subject children and terminated her parental rights. The mother appealed. The Appellate Division affirmed. The record supported the Family Court's determination that the petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the subject children (*see* SSL § 384-b [7]). These efforts included meeting with her to review her service plan, discussing the importance of compliance, providing referrals for parenting classes, mental health evaluations and housing, and scheduling weekly visitation with the children. The mother's partial and belated compliance with the service plan was insufficient to preclude a finding of permanent neglect. Accordingly, the Family Court properly found that the mother had permanently neglected the subject children. The Family Court also properly determined that it was in the children's best interests to terminate the mother's parental rights, rather than to enter a suspended judgment, and to free the children for adoption by the foster mother (*see* FCA § 631).

Matter of Shaquanna L., 138 AD3d 743 (2d Dept 2016)

Mother Failed to Establish a Reasonable Excuse for Her Default

The three subject children were removed from the mother's care in March 2010 following an incident of domestic violence between the mother and her husband, who is the father of the two youngest children. The children were placed in foster care and the mother was allowed supervised visitation. In March 2012, the petitioner commenced a proceeding pursuant to terminate the mother's parental rights. In July 2013, the mother admitted that she had permanently neglected the children, and the Family Court entered a suspended judgment for a period of one year. On May 23, 2014, the petitioner moved to revoke the suspended judgment on the ground that the mother had violated the terms and conditions of the suspended judgment, and to terminate her parental rights. A hearing was held, however, the mother failed to appear and the hearing proceeded without her. The court thereafter revoked the suspended judgment and terminated the mother's parental rights. The mother subsequently moved to vacate her default. The court denied that motion on the ground that the mother failed to present a reasonable excuse for her failure to appear. The mother appealed. The Appellate Division affirmed. Contrary to the mother's contention, the Family Court providently exercised its discretion in denying her motion to vacate her default in appearing at the violation hearing. The determination of whether to relieve a party of a default is within the sound discretion of the Family Court. A parent seeking to vacate an order entered upon his or her default in a termination of parental rights proceeding must establish that there was a reasonable excuse for the default and a potentially meritorious defense to the relief sought in the petition (*see* CPLR 5015 [a] [1]). Here, the mother failed to present a reasonable excuse for her default. Although the mother claimed that she could not take public transportation to the hearing because she had injured her ankle approximately three months earlier, the record reflects that she was able to attend her medical and physical therapy appointments, and she was observed walking outside more than two months before the hearing. Moreover, the mother failed to explain why she did not contact her attorney or the petitioner to explain that she was unable to attend the hearing. The issue of whether she presented a potentially meritorious defense was not considered as the mother failed to establish a reasonable excuse for her default.

Matter of In re Kimberly S.K., 138 AD3d 853 (2d Dept 2016)

Mother Was Unable to Provide Proper and Adequate Care Due to Mental Illness

At the fact-finding hearing, the petitioner sought to have the entire forensic report admitted into evidence. The mother objected to the admission of the forensic report which contained the psychiatrist's description of the collateral data. However, the Family Court overruled the mother's objection and the forensic report was admitted into evidence in its entirety. At the conclusion of the fact-finding hearing, the Family Court found that the mother was presently, and for the foreseeable future, unable to provide the subject child with proper and adequate care due to the existence of a mental illness. The court terminated the mother's parental rights and transferred guardianship and custody of the subject child to the county's Department of Social Services (hereinafter DSS). The mother appealed. The Appellate Division agreed with the mother that some parts of the forensic report constituted inadmissible hearsay, and determined that the Family Court erred in admitting those parts into evidence. However, under the circumstances, the error was harmless. The testimony of the psychiatrist was admissible since his expert opinion was primarily based upon his direct knowledge derived from his personal evaluation of the mother. After testing and interviewing the mother, the psychiatrist testified that the mother suffers from bipolar disorder, and that, in his opinion, because of, inter alia, her inability to properly care for her children, her failure to take her medication as prescribed, her lack of insight into the limitations caused by her bipolar disorder, her frustration in dealing with her children, her lack of basic parenting skills, and her ongoing homelessness, the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child. The Family Court also heard testimony from the mother and foster care worker, which confirmed and supported the psychiatrist's testimony and opinion. Thus, there was clear and convincing evidence to support the court's determination that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child (*see* SSL § 384-b [4] [c]).

Matter of Bruce P., 138 AD3d 864 (2d Dept 2016)

TPR Supported by Sound and Substantial Basis in Record

Family Court determined respondent father had seriously abused and abused the three subject children based on repeated acts of sexual and physical abuse and thereafter, terminated his parental rights. The Appellate Division affirmed. The sole contention on appeal was whether the court's order supported the children's best interests. The evidence showed two of the children were thriving in their foster homes with foster parents who wished to adopt them. The third child was in an inpatient psychiatric ward and remained fearful of his father, who had forced him to perform oral sex and had anally raped him. Given these circumstances, there was a sound and substantial basis in the record for the court's decision.

Matter of Antoinette LL., 135 AD3d 1015 (3d Dept 2016)

Appeal Deemed Moot

Subject child was removed from the mother's care and placed in the kinship foster home of maternal grandmother due to the mother's hospitalization based on her mental health issues. The putative father, who did not receive notice of these proceedings, was thereafter adjudicated to be the child's father and moved to terminate placement. After a hearing, Family Court denied his motion, continued the child and his sibling's placement with the grandmother, continued the permanency goal of return to parent and expanded the father's parenting time with the children. The father appealed but by the time the appeal was heard, Family Court had issued a subsequent order, with the father's consent, granting him joint legal and primary physical custody of the children. Therefore, the father's appeal was deemed moot.

Matter of Angelo FF, 135 AD3d 1082 (3d Dept 2016)

Court's Decision to Change Goal to Adoption Lacked a Sound and Substantial Basis in the Record

Family Court changed the permanency goal of the subject children from return to parent to adoption. The Appellate Division reversed finding the record lacked a sound and substantial basis in the record. The court's

determination changing the permanency goal to adoption did not reflect any age-appropriate consultation with the children, and while not dispositive, this error was compounded by other gaps in the record including the caseworker's testimony that respondent mother had not been provided any contact with the children during the many months prior to the change of the goal to adoption. Additionally, the caseworker had very limited knowledge as to whether mandated services had been provided to either the children or the mother since the prior permanency hearing. No real inquiry was made into respondent's current situation or her willingness or ability to correct the conditions that led to the initial removal of the children. Rather, Family Court relied upon "the full history of the case," and considered a permanency hearing report which contained irrelevant information and testimony concerning respondent's older child, rather than the subject children, in making its determination. However,
continuing the children in the agency's care and custody was warranted due to the length of time they had been separated from respondent.

Matter of Desirea F., 136 AD3d 1074 (3d Dept 2016)

Not an Abuse of Discretion to Determine Sibling Visitation Not Warranted

Family Court continued the permanency goal of return to parent for the subject child and denied respondent father's request for the child to have visitation with her half-sibling, who was newly born. The Appellate Division affirmed. Here, respondent father, who was incarcerated, appealed from a permanency order and not an Article 6 sibling visitation order. The evidence at the permanency hearing showed the subject child and the half sibling had never met and did not have an existing relationship. Therefore, it was not an abuse of discretion for the court to determine such visitation was not warranted.

Matter of Justyce HH., 136 AD3d 1181 (3d Dept 2016)

Family Court Erred in Failing to Conduct Balancing Test Before Engaging in Age-Appropriate Consultation With Children

The Appellate Division determined, in a previous decision, that Family Court had erred in changing the permanency goal of respondent's children to adoption. That earlier decision rendered the appeal from this order by Family Court, which continued the permanency goal of adoption, moot. However, the Appellate Division expressed concern that respondent continued to appear pro se in these proceedings without any information in the record as to why she was allowed to continue without counsel. Additionally, the court should not have conducted "age-appropriate consultation" with the subject children with only the attorney for the child present. Respondent had objected to such a consultation. Although the children wished to speak to the court outside of respondent's presence, the court should have engaged in the required balancing test between respondent and the children's interests. Furthermore, it was error for the court to advise the children that the statements they made during the consultation would remain confidential.

Matter of Desirea F., 137 AD3d 1519 (3d Dept 2016)

Court Did Not Abused Its Discretion in Denying Respondent's Recusal Request

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The father's contention was rejected that the court abused its discretion in denying his recusal request. The father's request was based on his allegation that the court presided over the prosecution of the father for the sexual abuse of his daughter that formed the basis for the instant proceeding, and on the father's contention that the court obtained information in violation of the father's attorney-client privilege. The father's brief did not address the alleged violation of his attorney-client privilege, and thus he abandoned that contention. Where there was no allegation that recusal is statutorily required, the matter of recusal was addressed to the discretion and personal conscience of the Judge whose recusal is sought. The fact that the same jurist presided over the proceeding in Family Court as well as the criminal prosecution was not a statutory basis for recusal, and there was no abuse of discretion.

Matter of Christopher D.S., 136 AD3d 1285 (4th Dept 2016)

Where Father Agreed that Court Could Take Judicial Notice of Past TPR Proceedings, it Was Again Concluded That Petitioner Met Its Burden

Family Court terminated the parental rights of respondent father. The Appellate Division affirmed for the reasons stated at Family Court, and added that the testimony at the hearing established that nothing concerning the father's mental health had changed since the affirmance of an order terminating his parental rights with respect to another child on the ground of mental illness. Inasmuch as the father agreed that the court could take judicial notice of those past proceedings, it was again concluded that petitioner met its burden of demonstrating by clear and convincing evidence that the father was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child.

Matter of Brayden R., 136 AD3d 1320 (4th Dept 2016)

Affirmance of Termination of Parental Rights on Ground of Permanent Neglect

Family Court terminated the parental rights of respondent mother on the ground of permanent neglect. The Appellate Division affirmed. Although the mother participated and progressed in some of the services offered by petitioner, petitioner established that the mother did not complete any of those services and failed to address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return. The mother failed to preserve her contention that the court abused its discretion in not imposing a suspended judgment. In any event, a suspended judgment was not warranted inasmuch as any progress made by the mother in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child's unsettled familial status.

Matter of London J., 138 AD3d 1457 (4th Dept 2016)

YOUTHFUL OFFENDERS

Court Failed to Put on Record Reasons for Denying Defendant Youthful Offender Status

The record revealed that prior to sentencing, the Supreme Court stated that the defendant was not being afforded youthful offender status. The court did not place on the record any reason for not adjudicating the defendant a youthful offender, and there was nothing in the record to indicate that it independently considered youthful offender treatment. Accordingly, under these circumstances, the sentence was vacated and the matter was remitted to the Supreme Court to determine whether the defendant should have been afforded youthful offender treatment.

People v Eric P., 135 AD3d 882 (2d Dept 2016)