Law Guardian Program
Appellate Division, Fourth Department

Cumulative Case Digest

2005-2006

ADOPTION

Determination of Abandonment Affirmed

Family Court determined that the biological mother abandoned her child within the meaning of DRL §111 (2)(a), and thus the court denied her petition for visitation and dispensed with her consent to adoption by the child's stepmother. The Appellate Division affirmed both orders. During the eight months before the mother filed her petition for visitation, her only contact with the child or the child's father concerning the child was a single conversation with the father. Family Court rejected her testimony that the father thwarted her efforts to contact the child, and the Appellate Division perceived no basis in the record to disturb the court's credibility determination.

Matter of Jenny-Beth L. v Bryan C.W., 23 AD3d 1069 (4th Dept 2005)

Grandparents Establish Abandonment

Family Court properly determined respondent had abandoned the children and thus her consent to their adoption was not required. The grandparents established respondent failed to visit with the children for 11 months prior to the filing of the adoption petitions, and that her only contact with the children during that time consisted of a birthday gift sent to one child and sporadic correspondence exchanged with both children. Although respondent was prohibited from visiting during a portion of the six months preceding the filing, nothing prevented respondent from contacting petitioners.

Matter of Brittany S., 24 AD3d 1298 (4th Dept 2005), *lv denied* 6 NY3d 708

Biological Parent Cannot Adopt Child

In a case of first impression, the Appellate Division held that a biological parent of a child born out-of-wedlock is not entitled to adopt the child. The parties were unmarried parents of a child born in 1997 in Texas. According to the respondent mother, two weeks after the child's birth petitioner father was violent toward her and endangered the child's life. Without informing him, respondent left the home with the child and relocated to the Buffalo area, where her father lived. Petitioner's efforts to locate her and the child though a private investigator were unsuccessful, but petitioner obtained a Texas court order awarding him custody in 1997. In December 1997 petitioner sustained catastrophic injuries in a one-vehicle accident, and did not resume the search until 2001, when he located respondent's father, who agreed to accept gifts and cards for the child, and respondent's stepmother, who sent pictures of the child to petitioner. They refused, however, to provide him with the child's whereabouts. The child received the gifts, and the mother knew petitioner sent them. Petitioner ultimately located respondent and the child through a private investigator and in November 2002 filed a petition seeking visitation. In February 2003 petitioner learned that in September 2002

respondent adopted the child, and sought to vacate the adoption. Surrogate's Court failed to grant the relief, and the Appellate Division reversed. Although the Court acknowledged that the express terms of DRL § 110 appeared to permit the adoption, it did not fit the statutory framework or purpose.

Matter of the Adoption of Zoe D.K., 26 AD3d 22 (4th Dept 2005)

Grandparents Establish Abandonment

Family Court properly determined respondent had abandoned the children and thus her consent to their adoption was not required. The grandparents established respondent failed to visit with the children for 11 months prior to the filing of the adoption petitions, and that her only contact with the children during that time consisted of a birthday gift sent to one child and sporadic correspondence exchanged with both children. Although respondent was prohibited from visiting during a portion of the six months preceding the filing, nothing prevented respondent from contacting petitioners.

Matter of Brittany S., 24 AD3d 1298 (4th Dept 2005), *lv denied* 6 NY3d 708

No Jurisdiction Without DSS Consent

Family Court dismissed the adoption petition of the child's great-aunt. The Appellate Division affirmed. Family Court was without jurisdiction to act on the petition because the child was in the custody and care of respondent DSS and under DRL §§ 111 and 112 the adoption application was incomplete without DSS consent. Petitioner could challenge the agency's refusal to consent to the adoption by requesting a fair hearing and could thereafter challenge an adverse ruling by an Article 78 proceeding.

Matter of Savon, 26 AD3d 821 (4th Dept 2006)

Family Court Properly Dispensed With Respondent's Consent

Family Court properly determined that respondent abandoned her child and properly dispensed with her consent to the child's adoption by her stepmother. Respondent did not visit the child from December 2001 through the filing of the petition in 2004 and she had no contact with the child after December 2002, nor did she have any contact with her father or petitioner concerning the child after December 2002. The court rejected respondent's testimony that petitioner and the child's father thwarted her efforts to contact the child and the Appellate Division perceived no basis in the record for disturbing the court's credibility determination. The court also properly granted the adoption petition.

Matter of Kaitlin R., 28 AD3d 1243 (4th Dept 2006), *lv denied* 7 NY3d 706

Petition Properly Dismissed: Biological Father's Consent Required

Surrogate's Court properly confirmed the report of the referee and dismissed the petition seeking to adopt the child. The mother surrendered the child to an authorized agency, which placed him with petitioners two days after his birth. The Surrogate found the credible evidence established that the biological father timely manifested his willingness and ability to raise the child. The father publicly acknowledged his paternity at the outset of the pregnancy, and although he did not pay any expenses in connection with the pregnancy or the birth, the biological mother testified that all of the expenses were covered by Medicaid and she did not request or need his assistance. He commenced a proceeding to establish his paternity prior to the child's birth and a proceeding seeking custody. Although he initiated the custody proceeding beyond the six-month period immediately preceding the child's placement, his action evinced his commitment to undertake his parental responsibility. He also repeatedly expressed willingness and desire to raise the child and attempted to ensure he had a support system in place if the biological mother chose not to raise the child with him. The record supported the finding that the biological father reasonably believed that the biological mother would not surrender the child for adoption, and that she frustrated his efforts to become involved. She admitted she never told him that she intended to place the child because she knew that he would attempt to prevent her from doing so, and she decided to deliver the child at a hospital where the biological father would be unlikely to find her. Two judges dissented and would have reversed.

Matter of Adoption of Matthew D., 31 AD3d 1103 (4th Dept 2006), *lv denied* 7 NY3d 837

Father's Consent Not Required

Surrogate's Court properly held that the father's consent was not required for the adoption of his child. The father did not maintain substantial and repeated contact with the child by providing financial support, visiting with the child or communicating regularly with the child or his maternal grandmother, the person having custody prior to the child's placement for adoption. He was not relieved of that responsibility during the period of incarceration. The record did not support the contention that the mother interfered with the father's attempts to communicate or visit with the child.

Matter of Adoption of Antonio J.M., 32 AD3d 1180 (4th Dept 2006)

APPEAL

Appeal From Temporary Order Moot

The Appellate Division dismissed on ground of mootness an appeal from an order in an article 10 proceeding directing removal of the subject children because the order was superceded by an order of disposition.

Matter of John S., 26 AD3d 870 (4th Dept 2006)

CHILD ABUSE AND NEGLECT

Respondent Did Not "Engage In" Domestic Violence

Respondent appealed from an order determining that her children, aged 18 months and six weeks respectively, were neglected children and removing them from her care for 12 months. The Appellate Division modified by vacating two factual findings upon which the neglect finding was based, and otherwise affirmed. In 1998 respondent used a love seat pushed against the wall as a makeshift crib for her child and found the child dead one morning between the love seat and the wall. An autopsy report indicated the cause of death was sudden infant death syndrome (SIDS), i.e., the sudden death of an apparently healthy infant that remains unexplained after all other causes, including suffocation, are ruled out. The Appellate Division concluded that Family Court erred to the extent that it based its finding of neglect on a finding that the death of that child was "under suspicious circumstances." It also erred in basing the finding of neglect on a finding that respondent "engaged in" an incident of domestic violence in the children's presence. While respondent was holding one of the children, her boyfriend chased her and closed her hand in the bedroom door, breaking her finger, and while respondent was attempting to leave the apartment with the child, her boyfriend picked her up by her head and bit her face and then pushed her over onto the child. The Appellate Division concluded that with respect to that incident, petitioner established only that respondent was the victim of domestic violence and that the children were exposed to the violence.

Matter of Ravern H., 15 AD3d 991 (4th Dept 2005)*, lv denied* 4 NY3d 709

Medical Evidence Established Abuse

The Appellate Division affirmed Family Court's order finding respondent's children to be abused. Medical evidence established that burns sustained by the 14-month-old were inflicted injuries; bruises over much of his body included finger marks on his neck and black eyes indicating he may have been shaken; multiple lacerations to the liver caused by blunt force trauma consistent with force exerted by an adult in a punch or kick; and that with reasonable degree of medical certainly, the child was a victim of abuse. The court also properly determined that respondent's four-year-old, who was in the home during the period of time the other child's injuries occurred, was an abused child.

Matter of Alyssa C.M., 17 AD3d 1023 (4th Dept 2005), *lv denied* 5 NY3d 706

Respondent's Conduct Placed Child at Risk

Family Court found respondent neglected his daughter. The Appellate Division affirmed. Respondent became highly intoxicated, locked himself in his apartment with his two-week-old child, then passed out. Neither the child's mother nor police were able

to rouse him and the police had to force open the door to gain access to the crying child. Respondent's conduct placed the child at obvious risk in the event of emergency and constituted neglect.

Matter of Heather D., 17 AD3d 1087 (4th Dept 2005)

No Proof of Unsanitary or Unsafe Conditions

The Appellate Division reversed a finding of neglect where respondent's residence was in a state of disarray and was generally messy, but there was no evidence of unsanitary or unsafe conditions. The fact that Family Court did not credit the testimony of respondent or the children's mother concerning the reason for the state of disarray of the residence did not obviate the need for affirmative proof of neglect.

Matter of Erik M., 23 AD3d 1056 (4th Dept 2005)

Educational Neglect of Child Under Six

Family Court erred in finding educational neglect with respect to respondent's son because the child did not attain the age of six by December 1 of the 2002-2003 school year and thus attendance was not mandated by article 65 of the Education Law. To find a parent responsible for educational neglect, the parent must have failed to "exercise a minimum degree of care . . . in supplying the child with adequate . . . education in accordance with the provisions of part one of article sixty-five of the education law" (FCA § 1012 [f] [i] [A]). The record supported Family Court's finding with respect to respondent's daughter. Petitioner established she had 61 instances of absence or tardiness between September 2002 and February 14, 2003. After February 14, 2003 she was either absent or present for only one class 15 more times before she was suspended on March 11, 2003.

Matter of Matthew B., 24 AD3d 1183 (4th Dept 2005)

Father Failed to Assist in Ensuring Children's Proper Nourishment

The Appellate Division affirmed a finding of neglect where petitioner established that respondent resided in the same household with the children and their mother for two years during which petitioner attempted to assist the mother in providing the children with adequate nutrition; during that time, respondent was aware mother was unable to provide children with adequate nutrition, and that his assistance was critical to the children's health. Petitioner further established that, despite respondent's awareness, he was reluctant and sometimes unwilling to offer assistance in ensuring that his children received proper nourishment.

Matter of Dustin B., 24 AD3d 1280 (4th Dept 2005)

Extension of Foster Care Affirmed

Family Court properly determined that it was in the best interests of respondent's two children that their foster care be extended. The evidence at the hearing established that respondent failed satisfactorily to address his mental illness and failed to provide a safe and stable residence and means of support for the children.

Matter of Diana M.T., 26 AD3d 758 (4th Dept 2006)

Court May Order Respondent to "Stay Away" Until Children Are 18

Family Court's found that respondent abused his 16-year-old sister-in-law and neglected his sons, and issued orders of protection incorporated in the order on appeal ordering him to stay away from his sons until their 18th birthdays. The Appellate Division affirmed. The evidence established respondent was a person legally responsible for the care of his sister-in-law during the four months she resided with respondent and her sister, i.e., he acted as the functional equivalent of a parent. The evidence established that he abused his sister-in-law: she testified respondent had sex with her while she lived with him and respondent testified he had sex with her. The abuse demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to any child in his care, supporting the finding of derivative neglect of his sons. Further supporting the finding was evidence that respondent kept a loaded shotgun in an area accessible to his sons. Family Court's error in failing to state the grounds of the disposition in the order was harmless because it set forth the grounds in its underlying decision. The court erred in failing to make a finding of the specific sex offense but the Appellate Division made the necessary finding based on the record, which contained the plea minutes of the criminal proceeding in which respondent pled guilty to third degree rape. Finally, the Appellate Division rejected the contention that the court lacked authority to order him to stay away from his sons until their 18th birthdays. Although FCA § 1056 (4) did not apply because he was the boys' father, authority to issue the orders derived from section 1056 (1), under which orders of protection "shall expire no later than the expiration date of, and may be extended with, such other order made under this part," and the order of fact-finding and disposition had no expiration date. Finally, the Appellate Division rejected the contention that the court in effect terminated respondent's parental rights.

Matter of Sheena D. v Darwin F., 27 AD3d 1128 (4th Dept 2006), *aff'd* 8 NY3d 136

Finding Based on One Instance of Excessive Corporal Punishment Affirmed

The Appellate Division affirmed Family Court's finding of neglect. The unrebutted evidence established one instance of excessive corporal punishment where respondent struck his four-year-old grandchild repeatedly with a yardstick, leaving bruises on his back and arms. The evidence also justified the court's finding of derivative neglect with

respect to respondent's other grandchild.

Matter of Steven L., 28 AD3d 1093 (4th Dept 2006), *lv denied* 7 NY3d 706

Incarcerated Respondent's Deficient "Plan" Established Neglect

Family Court properly found respondent neglected his four children where evidence established that, after respondent was arrested and incarcerated, his only plan to care for the four children was to have his 20-year-old stepdaughter, who resided elsewhere, to assist the 14- and 15-year-old children in preparing the 7- and 12-year-old children for school every morning and in providing them with food. Respondent made no economic provisions for the children nor did he provide the purported guardian named by him with any authorization for health care of the children. Family Court erred in permitting a witness to testify with respect to prior complaints concerning respondent that had been filed with petitioner, but the error was harmless. Finally, the proceeding was not barred by res judicata because the dismissal of the prior petition was not on the merits.

Matter of Demetrius B., 28 AD3d 1249 (4th Dept 2006), *lv denied* 7 NY3d 707

Error to Dismiss Summarily Father's Petition to Terminate Placement

The child was born in 1998, and was nine months old when her parents ended their relationship and the father moved to Wisconsin, where he continued to reside. In March 2003, the child was removed from her mother's home and was later adjudicated to have been neglected. The father received no notice of that proceeding. The child was placed in respondent's custody in December 2003, and in March 2004 respondent sought to extend placement and provided the father with notice. He appeared and consented to the extension, which occurred in May 2004, but he also made an oral application for custody. Family Court ordered that a home study be done and that the father take a parenting class, which he completed by August 11, 2004. In December 2004, the father filed a petition seeking to terminate the placement. Family Court erred in dismissing the petition without a hearing. Due process required he be given an opportunity to put respondent to its proof and challenge its justification for refusing to relinquish custody before being deprived of his fundamental right to raise his daughter.

Matter of Amber S., 30 AD3d 1032 (4th Dept 2006)

Child's Out-of -Court Statements Sufficiently Corroborated by Sexual Abuse Validator

Family Court adjudged that respondent neglected his daughter and his girlfriend's daughter and that he sexually abused his girlfriend's daughter. The Appellate Division affirmed. Family Court did not abuse its discretion in determining that the out-of-court

statements of the daughter of respondent's girlfriend were sufficiently corroborated by the testimony of the sexual abuse validator. Although the court erred in admitting in evidence statements concerning prior allegations of abuse inasmuch as the statements were inadmissable hearsay, the error was harmless.

Matter of Christina A.M., 30 AD3d 1064 (4th Dept 2006), *lv denied* 7 NY3d 712

Placement of Children Continued Based on Respondent's Contact With Former Paramour

Respondent appealed from an order that continued the order of placement of her three children with petitioner upon a finding that she willfully violated the order of disposition in the underlying neglect proceeding. The Appellate Division affirmed. Family Court properly found that respondent continued to have contact with her former paramour, a level three sex offender. Although petitioner relied upon hearsay evidence, i.e., the testimony of two caseworkers with respect to the out-of-court statements of respondent's children, the statements of each of the three children tended to support the statements of the others and gave sufficient indicia of reliability. The court did not abuse its discretion in crediting the statements of the children rather than the denial of respondent that she intentionally had contact with her former paramour.

Matter of Aimee J., 34 AD3d 1350 (4th Dept 2006)

"No Reasonable Efforts" Applies Retroactively

Family Court erred in determining that reasonable efforts to reunite the children with respondent were not required dating back to the date of the filing of the motion, rather than dating back to the order of disposition, and the record established that respondent father subjected the children to aggravated circumstances. FCA § 1039-b should be applied retroactively to the date of disposition. While acknowledging that the stipulation between petitioner and respondents to the disposition should not lightly be disregarded, the Appellate Division noted that petitioner unequivocally reserved its right to move at a later date for the relief sought, and thus, contrary to the contention on appeal of respondent father, the stipulation did not bar the relief sought by petitioner.

Matter of Alexander L., 34 AD3d 1359 (4th Dept 2006)

Colloquy Sufficient to Establish Admission Was Voluntary

Respondent appealed from an order denying her motion to vacate an order of fact-finding and disposition. The Appellate Division affirmed. Family Court properly determined that the colloquy established the voluntariness of the admission, and the admission was sufficient to support the court's finding of neglect. Thus respondent failed to establish the requisite good cause to vacate the order.

Matter of Aaron B., 35 AD3d 1174 (4th Dept 2006)

CHILD SUPPORT

"No Reduction" Affirmed

Family Court properly exercised its discretion in determining that petitioner was not entitled to a reduction in child support with respect to the amount he paid toward the room and board portion of the children's college expenses. At time of entry of the order on appeal, only one of petitioner's two children was enrolled in college, and petitioner received supplemental income from his employer based on that child's enrollment in college in an amount slightly more than petitioner's pro rata share of the child's expenses for room and board. Further, after noting that petitioner failed to preserve for review his contention on appeal that the Family Court judge should have notified the parties that respondent's attorney was the Judge's former law clerk and that the Judge should have recused herself, the Appellate Division concluded that the contention lacked merit.

Matter of Rath v Melens, 15 AD3d 837 (4th Dept 2005)

Court Erred in Making "Findings of Fact" Without a Hearing

Family Court modified an order of the Hearing Examiner entered upon consent, and petitioner appealed. The Appellate Division reversed. Even if the court was empowered to review an order entered upon consent, the court erred in making new findings of fact and reducing respondent's child support obligation from $77.50 per week to $25 per month, a remedy not sought in respondent's objections filed pursuant to FCA § 439. No hearing having been held, there was no record upon which the court could make its own findings of fact. Additionally, it was improper to apply the "unjust or inappropriate" provisions of FCA § 413 (1) (f) without notice or a hearing before the Hearing Examiner. Respondent's remedy was to move to vacate the consent order before the Hearing Examiner.

Matter of McAdams v Pinckney, 15 AD3d 955 (4th Dept 2005)

Modification of Support Order Warranted

Family Court properly awarded petitioner no child care expenses because petitioner failed to meet her burden of proof regarding those expenses. Family Court provided "some record articulation" of its reasons not to apply the child support percentage to the combined parental income over $80,000, and there was no basis in the record for disturbing that choice. The parties' property agreement expressly contemplated partial abatement of respondent's obligation to pay child support during months eldest child attended college as boarding student and Family Court properly determined the amount

of the abatement. The court erred, however, in giving effect to parties' informal understanding that respondent would pay half of eldest child's college expenses in view of provisions in the parties' property settlement agreement.

Matter of Keipper v Trill, 16 AD3d 1044 (4th Dept 2005)

Educational Expenses Proper, but Error to Order Retroactively

Family Court properly ordered respondent to pay half of his daughter's educational expenses, since petitioner was unable to meet child's educational needs and respondent had the ability to pay support. The court erred, however, in ordering that payments for educational expenses be retroactive to date the child began attending college; a child support order may not be made effective prior to date of filing of petition. Because respondent failed to file petition seeking reimbursement for his son's educational expenses, they may not be used as offset against his current obligations.

Matter of Manocchio v Manocchio, 16 AD3d 1126 (4th Dept 2005)

New Hearing Required

The Appellate Division reversed Family Court's order granting the objection of respondent to the order of a support magistrate and denying the petition for upward modification as not supported by the evidence. In making findings, Family Court relied on allegations made by respondent in a cross petition that had previously been dismissed by an order from which no appeal was taken. The court used the findings to justify deviating from the CSSA and restoring respondent's child support obligation to $25 per week. The Appellate Division remitted for a new hearing because petitioner did not provide her most recent tax return or any acceptable reason for failing to do so, and without current financial information, the Appellate Division was unable to determine whether respondent was entitled to consideration of the needs of another child he was supporting, or whether the parties' current income exceeded $80,000.

Matter of Mentor v DeLorme, 17 AD3d 1012 (4th Dept 2005)

Court Failed to Determine Child Support in Compliance with the CSSA

Supreme Court erred in ordering defendant to pay 29% of his gross income, less statutory deductions, up to $80,000, for child support. The court failed to apply each parent's respective portion of the total income to reach the amount of each parent's support obligation. The court also failed to determine the amount of child support for the combined parental income in excess of $80,000.

Flanigan-Roat v Roat, 17 AD3d 1093 (4th Dept 2005)

Prior Order Void Ab Initio

Pursuant to a prior consent order entered in a paternity proceeding, petitioner father would not seek child support from respondent mother. Petitioner, who had joint custody and physical residence of the child, subsequently commenced a proceeding under FCA article 4 seeking child support. Family Court denied respondent's objections to the Hearing Examiner's order requiring her to pay child support and contribute to child care costs. The Appellate Division affirmed. The petition was not untimely. The petition commenced a new proceeding under article 4; it was not an appeal governed by FCA § 1113. Also, the proceeding was not precluded by FCA § 516. The prior order was not an order approving an "agreement or compromise" pursuant to FCA § 516 inasmuch as paternity was judicially determined. Finally, petitioner was not required to establish a basis to set aside or modify the prior order. The prior order did not comply with FCA § 413 (1) (h) because it failed to set forth the presumptive child support amount or the court's reasons for deviating from that amount. The prior order was therefore void ab initio and the court was required to disregard it and to address the child support issue.

Matter of Smith v Mathis-Smith, 17 AD3d 1157 (4th Dept 2005)

"Parker-Type Warnings" Not Required

Family Court found respondent in willful violation of a prior order of child and spousal support, and ordered that he serve six months in jail and that proceedings be commenced by the appropriate state board to suspend his license to practice as a certified public accountant (*see* FCA § 454 [2] [f]; § 458-b). The Appellate Division affirmed. Family Court did not err in failing to give respondent "Parker-type warnings" and conducting the violation hearing in respondent's absence with full participation of his counsel. In any event the summons contained the notice required by FCA § 453 (b), warning respondent that his failure to appear in court might result in, inter alia, his immediate arrest and further warning him that, if the court found that he willfully failed to comply with the prior order, he might be jailed for contempt of court. The Appellate Division also found noteworthy that the summons advised respondent that, pursuant to FCA § 433, he might "qualify to testify" at the hearing by telephone or other electronic means under certain circumstances, and that respondent later claimed to have been working in NYC at the time of the hearing and unable to appear in Monroe County on account of a snowstorm.

Matter of Monroe County Support Collection Unit [Wills] v Wills, 19 AD3d 1019 (4th Dept 2005), *lv denied* 5 NY3d 710

Error to Set Obligation at $25 Per Week

Family Court erred by denying petitioner's objections to an order of the Support Magistrate that, inter alia, set respondent's basic child support obligation at $25 per week. The record established that respondent's adjusted income for the year 2002 was

$18,198, and 17% of that amount resulted in an obligation of $59 per week. Respondent's income remained in excess of the statutory self-support reserve.

Matter of Traber v Bailey, 19 AD3d 1117 (4th Dept 2005)

Petition for Upward Modification Properly Dismissed

Family Court properly denied petitioner's objections to an order of the Support Magistrate dismissing the petition seeking upward modification of child support. Petitioner's proof failed to establish the child's needs were not being met or that an unanticipated and unreasonable changes in circumstances had occurred. The proof established that the child's basic needs were being met, and the increase in respondent's income was not an unanticipated or unreasonable change in circumstances.

Matter of Graves v Ramsey, 19 AD3d 1147 (4th Dept 2005)

Support Obligation Suspended Based on Frustration of Visitation

Family Court properly granted that part of the petition seeking to suspend petitioner father's child support obligation on the ground that respondent mother had "frustrated" visitation between petitioner and the parties' daughter. Petitioner established that respondent, the custodial parent, had unjustifiably frustrated the noncustodial parent's right of reasonable access. The court erred, however, in suspending petitioner's support payments retroactively.

Matter of Colicci v Ruhm, 20 AD3d 891 (4th Dept 2005)

Income Properly Imputed

Family Court properly imputed income of $70,000 to respondent. If the court determines that a parent has reduced resources or income in order to reduce or avoid the obligation for child support, the court may impute income based on former resources or prior employment as well as future earning capacity based upon educational background. The court has considerable discretion to impute income based upon the ability to earn, need not rely on the accounting of the parent, and where the accounting of the parent is not believable, the court is justified in finding a true or potential income higher than that claimed. Income may be imputed where there are no reliable records of actual employment income or evidence of a genuine and substantial effort to secure gainful employment. The court determined the income of respondent based on his pre-1999 income, his education, his experience and his future earning capacity and respondent failed to establish his entitlement to a lower income. Respondent failed to submit evidence of genuine and sustained efforts to secure gainful employment, and the record established that his credibility was impeached and thus the court was entitled to discredit respondent's accounting of his financial resources.

Matter of Monroe County Support Collection Unit v Wills, 21 AD3d 1331 (4th Dept 2005), *lv denied* 6 NY2d 705

Deviation from Standards Affirmed

Defendant appealed from a judgment that adopted the findings of fact and conclusions of law of the JHO directing plaintiff to pay defendant $600 a month in child support. The Appellate Division affirmed, concluding that the JHO set forth his reasons for deviating from the presumptive standard of support calculated pursuant to the CSSA. Because the judgment failed to apportion each party's pro rata share of child care expenses and uncovered health care expenses, however, and the record was not fully developed on the issue, the Court remitted to Supreme Court to determine the matter following a hearing. Finally, the Appellate Division rejected defendant's contention that Supreme Court failed to rule on her application for attorney's fees: the court's failure to incorporate the JHO's determination that each party was solely responsible for his or her attorney's fees was an oversight.

Ignaszak v Ignaszak, 21 AD3d 1408 (4th Dept 2005)

Upward Modification Affirmed

Family Court did not err in denying respondent's objections to the order of the Support Magistrate, who ordered an upward modification of his support obligation, which was first determined by judgment of divorce in 1992 and was recalculated in 1995 based on the parties' stipulation. Contrary to respondent's contention, the court retained jurisdiction to modify a prior order with respect to child support upon a showing that a substantial change in circumstances had occurred, which petitioner established. The Support Magistrate properly considered respondent's present income in determining whether petitioner was entitled to upward modification, and did not err in using the CSSA to determine the new amount.

Matter of Baker-Kelly v Baker, 23 AD3d 1096 (4th Dept 2005)

No Error in Reviewing a Matter Not Raised in Objections, but Support for Findings Must Appear in Record

Petitioner filed two petitions, alleging in one that respondent violated an order of support and seeking in another that respondent be required to make payments through the Support Collection Unit. Petitioner alleged that respondent refused to pay child support and concealed from him the fact that she had found employment, which would have warranted an upward modification of her present child support obligation, which was determined in accordance with her unemployment benefits. In a cross petition respondent alleged that because the younger of the parties' two children now lived with her and the older attended college, petitioner should be required to pay support to

respondent. The Support Magistrate found, after a hearing, that the younger child resided with respondent and dismissed both petitions. Petitioner filed objections and although the order was subsequently amended, Family Court treated the objections as filed with respect to the amended order. In those objections, petitioner did not dispute the finding that the younger child resided with respondent. Family Court found, however, that the younger child remained a resident of petitioner's household, and respondent appealed. The Appellate Division modified. The court did not err in reviewing a matter not raised in the objections, because the court could make its own findings of fact where there was a record, i.e., the transcript of hearing. There was no support in the record, however, for the court's finding that the younger child resided with petitioner: the transcript established that petitioner conceded the younger child had not resided with him since he moved to a new residence in August 2004.

Matter of Baker v Rose, 23 AD3d 1112 (4th Dept 2005)

No Basis Shown for Application of Percentage Over Cap Amount

Family Court properly granted petitioner's application for upward modification, based on a change of circumstances, i.e., the increase in respondent's income as well as an increase in the needs and expenses of the parties' child in her teenage years. Neither the record on appeal nor the court's "record articulation" was sufficient, however, to support the court's application of the CSSA percentage to all of the combined parental income in excess of $80,000.

Matter of Malecki v Fernandez, 24 AD3d 1214 (4th Dept 2005)

Error to Apply Percentage to Income Above Cap

Supreme Court erred in applying the child support percentage to combined parental income over $80,000. Plaintiff's annual income was $150,000 and defendant's was $350,000. Combined parental income was $500,000. Combined parental income over $80,000 was $420,000, and 25% of that amount is $105,000. Plaintiff's share (30%) of $105,000 would be $31,000. Thus, plaintiff's yearly child support obligation would be $6,000 per year (basic child support obligation) plus $31,500, for a total of $37,500. Defendant's income, however, was twice plaintiff's income and the children's standard of living did not improve until after the divorce, when there was a substantial increase in defendant's income. Although one child suffered from developmental delays and received homework assistance from defendant, and although defendant was involved in extracurricular activities with the children, such facts were not sufficient to require plaintiff to pay more that the basic child support obligation. Supreme Court did not err, however, in requiring plaintiff to pay 30% of defendant's reasonable child care expenses.

Betro v Carbone, 24 AD3d 1322 (4th Dept 2005)

Default Not Excusable

Family Court properly denied the objections of respondent to the order of the Support Magistrate that continued in full force and effect a prior order entered upon respondent's default, which granted the petition seeking an upward modification of respondent's child support obligation. The record supported the Support Magistrate's determination that the failure of respondent to receive notice of the proceeding was the result of his decision to ignore notice of certified mail and leave such mail unclaimed at the post office, and thus his default was not excusable.

Matter of Wadlow v Wadlow, 26 AD3d 747 (4th Dept 2006)

Willful Violation Supported by the Record

Family Court properly determined that respondent was in willful violation of an order of child support. Although respondent testified that he was unable to pay because physical disabilities interfered with his ability to maintain employment, he failed to offer competent medical evidence to substantiate that testimony. Further, respondent testified that he was in fact employed as a truck driver and that he failed to report that employment to the CSEU. The record also established that respondent quit that job, not because of his alleged disabilities but because the CSEU discovered he was employed and garnished his wages. Any issue regarding the propriety of the order dismissing respondent's petition seeking downward modification was not properly before the Appellate Division because no appeal was taken from that order.

Matter of Fogg v Stoll, 26 AD3d 810 (4th Dept 2006)

College Expenses After Twenty-One Years of Age Affirmed

Supreme Court did not err in ordering plaintiff to pay undergraduate college expenses incurred after each daughter attained 21 years of age. Plaintiff stipulated at time of divorce that he intended that the children go to college and intended to provide for college costs to the best of his ability and in accordance with any judicial determination. The parties did not place any age limitation on their mutual promises, and given the terms of the stipulation and the knowledge to be imputed to the parties of their daughters' ages at the outset and completion of their undergraduate studies, the court properly construed the stipulation as encompassing an obligation to contribute to the daughters' undergraduate college expenses for the first four consecutive years of study immediately following graduation from high school. The court properly resolved any ambiguity against plaintiff, whose attorney had extemporaneously recited into the record the pertinent items of the stipulation. The court erred, however, in directing plaintiff to pay two thirds of the college expenses, and the Appellate Division modified the order by providing that plaintiff will pay 62% of such costs in accordance with his percentage of the combined parental income.

Schonour v Johnson, 27 AD3d 1059 (4th Dept 2006)

Plaintiff Abandoned 16-Year-Old Motion

Plaintiff moved for trial on a motion made in 1985 that remained undecided, as well as for child support and maintenance arrears. Supreme Court properly denied that part of plaintiff's motion seeking trial on motion made in 1985 on the ground that plaintiff abandoned the 1985 motion. Plaintiff failed for over 16 years to call to the court's attention the fact that the court had not decided the motion, despite multiple opportunities to do so. Supreme Court properly denied plaintiff's claims for child support and maintenance arrears, which were barred by collateral estoppel.

Garner v Sans, 27 AD3d 1165 (4th Dept 2006), *lv dismissed* 7 NY3d 783

Parent With Equal Time and Greater Share of Child Support Obligation is "Noncustodial" Parent

Family Court properly denied respondent's objections to the Support Magistrate's order determining petitioner was the custodial parent for child support purposes and ordering respondent to pay biweekly child support of $75. Where neither parent can be said to have physical custody of the child for a majority of the time, the parent having the greater pro rata share of the child support obligation should be identified as the "noncustodial" parent for child support purposes. Respondent's contention that the Support Magistrate erred in not imputing a higher income to petitioner was not preserved for review, and there was no evidence in the record that she had willfully reduced her earning capacity.

Matter of Moore v Shapiro, 30 AD3d 1054 (4th Dept 2006)

Adjudication of Contempt Affirmed

Respondent appealed from an order finding he willfully violated a prior order of child support and sentencing him to four months in jail. The Appellate Division affirmed. Respondent failed to present evidence establishing that he made reasonable efforts to obtain gainful employment and thus failed to overcome the presumption of his ability to support his children. There was no occasion for Family Court to take additional evidence before adjudicating respondent in contempt because the issue of respondent's ability to pay had been referred to the Support Magistrate for a hearing and determination**.** Respondent's cross petition for a reduction in arrears was properly denied, and the evidence at the hearing belied respondent's contention that the parties' son had been emancipated.

Matter of Hunt v Hunt, 30 AD3d 1065 (4th Dept 2006)

Defendant Obligated to Pay College Expenses Beyond Eight Semesters But Not Medical School

Following the parties' divorce, defendant refused to pay medical school expenses for the youngest son and college expenses beyond eight semesters for the second youngest son. The referee determined that, pursuant to the terms of the parties' stipulation of settlement "annexed" to the judgment of divorce and set forth on the record by counsel, defendant was required to pay medical expenses for the youngest son but not the disputed college expenses for the second youngest son. Supreme Court confirmed the report. The Appellate Division held that defendant was obligated to pay the disputed college expenses because he expressly obligated himself to pay for his sons' "college education" without limitation based on a particular age, number of years or semesters, or consecutive course of study. The Appellate Division noted that the second youngest son's education was interrupted twice by academic difficulties and once by recuperation from serious injuries, and also that defendant expressly agreed to pay for a college "education comparable to those educations which were paid for by the parties for the older children" and that defendant had paid for the older children's additional classes taken during the summer. Defendant was not, however, obligated to pay for the youngest son's medical school expenses because as part of the stipulation defendant's counsel recited that defendant would "obligate himself to pay college education, but not graduate school education." Two justices dissented in part, and would have held that defendant was obligated to pay the medical school expenses because the parties expressly acknowledged that the meaning of a "comparable" education would be left to Supreme Court, and at the time of the stipulation defendant was paying the law school expenses of the older sons.

Attea v Attea, 30 AD3d 971 (4th Dept 2006), *aff'd* 7 NY3d 879

Discrepancies In Record Make Review Impossible

The Appellate Division could not review the Referee's calculation of plaintiff's income in determining the amount of child support because there were discrepancies in the record, due in part to plaintiff's admission that he deposited more than $300,000 in excess of his income into his checking account over a four-year span. The Appellate Division was unable to determine whether the Referee imputed income to plaintiff in determining the amount of child support.

Hoffman v Hoffman, 31 AD3d 1125 (4th Dept 2006)

Respondent 100% Responsible for High School Expenses

Family Court erred by dismissing the petition seeking to hold respondent 100% responsible for the high school educational expenses of the parties' daughter at a suitable private school she wished to attend. The Appellate Division held that

respondent unreasonably withheld consent to enrollment of his daughter, and determined him to be 100% responsible for the expenses. The parties never married and entered into an agreement whereby respondent would be responsible for "all" of the daughter's educational expenses through high school, provided the parties mutually approved the expenses and respondent's prior consent was obtained, which consent "shall not be unreasonably withheld." Respondent did not contend he lacked financial means to pay the expenses; rather, the withholding of his consent was based upon criteria not personal to the interests and circumstances of the child. He declined to become involved in the school selection process despite being specifically invited to do so, and admitted he did no independent investigation of the various area high schools prior to withholding consent.

Matter of Susan A. v Louis C., 32 AD3d 682 (4th Dept 2006)

Stipulated Order Capped Tuition But Not Other College Expenses

While affirming that part of the court's order regarding enforcement of child support provisions of a prior stipulated order, the Appellate Division held that Supreme Court erred concerning defendant's obligation to pay the educational expenses of the parties' child. The stipulated order modified only that part of the parties' prior agreement providing for defendant's obligation to pay tuition, and thus defendant's obligation for tuition was capped at the amount he would have paid for tuition at a New York State University. The stipulated order did not modify defendant's obligation to pay other expenses related to the child's education, i.e., "room, school fees, mandatory charges, books, and reasonable travel to and from school."

Medeiros v Medeiros, 32 AD3d 1234 (4th Dept 2006)

Unclear Whether Income Over $80,000 Was Considered

The Support Magistrate and Family Court erred by failing to consider respondent's contention that application of the statutory percentage to the parties' combined parental income, including the amount in excess of the $80,000, would be unjust and improper under the circumstances because he provided sole support for his teenage son, who resided with him. In addition, the record established that respondent was providing child support for another child as well pursuant to a separation agreement. The record was devoid of any calculation of combined parental income, and there was no indication of the manner in which the Magistrate dealt with the fact that combined parental income was in excess of $80,000. In the absence of appropriate findings and calculations, the Appellate Division was unable to assess whether the Magistrate or the court gave due consideration to the fact that respondent provided sole support for a child in his household, a factor that must be considered pursuant to FCA § 413 (a) (f) (9).

Matter of Caroleitha C. v Samuel David R., 32 AD3d 1301 (4th Dept 2006)

Stipulation Did Not Provide for Annual Review

Respondent appealed from an order denying his objections to an order of the Support Magistrate that, inter alia, determined his child support and pro rata daycare obligations based upon the parties' 2003 incomes. In November 2002, the parties entered into a stipulation that was incorporated but not merged into an order of support entered November 20, 2002. Pursuant to the stipulation, respondent was to pay child support in the amount of $300 per week until May 1, 2003 and, by April 15, 2003, each party was to provide the other with a copy of his or her federal income tax return "so that the parties may recalculate child support pursuant to the New York State Child Support Standards Act, together with their proportionate shares of daycare costs and uninsured medical expenses incurred on behalf of the two children of the parties." In January 2004, petitioner sought modification of the order incorporating the parties' stipulation alleging both "annual review" and "a change of circumstances." In a decision dated July 12, 2004, the Magistrate concluded that petitioner was not entitled to annual review under the terms of the stipulation and had not established a change of circumstances. The Magistrate further concluded that, pursuant to the stipulation, the parties intended to recalculate respondent's child support obligation, effective May 1, 2003, based upon the parties' 2002 incomes. The Magistrate recalculated the obligation and ordered respondent to pay child support in the amount of $311 per week retroactive to May 1, 2003. The Magistrate did not modify respondent's obligation, as set forth in the stipulation, to pay 89% of daycare costs. Petitioner filed objections to the order and the court granted petitioner's objections in part and remitted the matter for recalculation of support based on the parties' 2003 incomes, retroactive to May 1, 2004, and recalculation of day care percentages based on the parties' 2003 incomes. The Appellate Division held that the court erred in granting in part petitioner's objections in and directing the Magistrate to use the 2003 incomes, concluding that the Magistrate properly determined that the stipulation did not provide for annual review, that petitioner failed to establish a change in circumstances and that respondent's child support obligation was $311 per week retroactive to May 1, 2003, based upon the parties' 2002 incomes, as called for in the stipulation. Also, the Magistrate properly declined to modify respondent's pro rata daycare obligation contained in the stipulation.

Matter of Amy B.C. v Lee A.A., 34 AD3d 1183 (4th Dept 2006)

Respondent Properly Ordered to Contribute to Costs of Therapeutic School

Family Court properly ordered respondent to pay 49% of the costs of a therapeutic boarding school for the parties' son, to be financed by a 20-year loan obtained by petitioner's fiancé for which petitioner was liable. Family Court properly determined that placement of the parties' son at the therapeutic boarding school was in his best interests. The son was a drug-addicted runaway who was in poor physical health and suffered from the psychiatric condition known as oppositional defiant disorder, and was thus in need of extraordinary care. Because the son was actually in residence at the school in another state, however, Family Court should have credited child support

payments made by respondent during the period of such residency against his share of the education loan.

Matter of Amy D. v David D., 34 AD3d 1232 (4th Dept 2006)

Order Directing College Expense Contribution Affirmed

Under the terms of the parties' agreement, the amount of their contributions for the children's college expenses was to be determined in the future, "depending upon each party's financial circumstances at the time of the child's need." Supreme Court properly concluded that the child support obligation of defendant affected his financial circumstances and must be considered in determining his obligation to pay college expenses. The court also properly exercised its discretion in refusing to permit the parties to call their eldest daughter as a witness, as she had no relevant testimony to offer. Finally, defendant did not cross-appeal from the order and therefore was not entitled to affirmative relief with respect to health insurance premiums he paid before plaintiff consented to his proposed change in health insurance providers.

*Bennett v McGorry,*34 AD3d 1290 (4th Dept 2006)

Issue of Child Support Not Expressly Referred to Family Court

Respondent appealed from an order dismissing his objections to an order of the Support Magistrate determining that Family Court had subject matter jurisdiction to enforce provisions of the parties' stipulation, incorporated in the parties' judgment of divorce, requiring respondent to pay one-half of certain marital debt to petitioner. The Support Magistrate determined that overpayment of Social Security benefits received on behalf of the parties' child was related to the support of the child and that Family Court therefore had subject matter jurisdiction to enforce the judgment of divorce insofar as it concerned that marital debt. With respect to credit card debt, the Support Magistrate reserved petitioner's right to establish that the debt was related to support of the child. Because the order, however, did not direct respondent to pay any sums with respect to the marital debt, the Appellate Division dismissed the appeal on the ground that respondent was not aggrieved. The Court noted, however, that Supreme Court did not expressly refer the issue of child support to Family Court, so that if it had considered the merits, it would agree with respondent that Family Court lacked subject matter jurisdiction to determine whether marital debt was related to support of the child and to enforce the judgment of divorce accordingly.

Matter of Lisa M.H. v Gerald C.H., 35 AD3d 1188 (4th Dept 2006)

COURTS

Respondent Failed To Establish Support Magistrate Lacked Authority to Sign

Order

The Appellate Division rejected respondent's contention that the support order was invalid because the Support Magistrate retired prior to signing it; as party seeking to invalidate the order, respondent failed to meet his burden of establishing the Support Magistrate's lack of authority to sign it. The record was silent on issue whether Support Magistrate retired and, if so, when.

Matter of Manocchio v Manocchio, 16 AD3d 1126 (4th Dept 2005)

Family Court Lacked Jurisdiction to Modify or Enforce Unregistered Foreign Order

Petitioner applied in Family Court to enforce a Tennessee judgment of divorce, which had been modified twice by Tennessee courts. The Support Magistrate set respondent's obligation and calculated arrearages in part by interpretation of an unregistered Tennessee order. The Appellate Division reversed. Family Court lacked jurisdiction to modify or enforce an unregistered Tennessee support order. Both Federal Full Faith and Credit for Child Support Orders Act (28 USC § 1738B) and UIFSA (FCA § 580-101 *et seq*.) grant "continuing exclusive jurisdiction over" child support order to the issuing state. Tennessee lost jurisdiction when parties and children moved to New York, and a New York court, as court of nonissuing state, could modify a judgment or order if it was registered in New York.

Matter of Paskuly v Lowenkron, 17 AD3d 1007 (4th Dept 2005)

Family Court Had Jurisdiction Over Respondent Based on Allegation in Petition

In a proceeding commenced under FCA article 8, Family Court granted respondent's motion to dismiss the petition based on lack of jurisdiction. The Appellate Division reversed. The court had jurisdiction over respondent based on the allegation in the petition that the parties had a child in common (*see* FCA § 812 [1] [d]). A pending paternity proceeding did not divest the court of jurisdiction.

Matter of Christine D. v Timothy N., 17 AD3d 1037 (4th Dept 2005)

No Jurisdication Based on DRL § 76-a (1)(a)

Supreme Court properly dismissed plaintiff's application to modify custody provisions of the judgment of divorce based on lack of subject matter jurisdiction (*see* DRL § 76-a [1][a]). The children had resided in Florida for six years and the events underlying the alleged change in circumstances occurred in Florida. Although plaintiff had commenced several proceedings in New York since the judgment of divorce, no testimony was ever taken, a law guardian was never appointed, the children and parties were never

evaluated by psychologists, and all prior proceedings were resolved upon the parties' consent. Even assuming New York had jurisdiction pursuant to DRL § 76-a (1), Florida was the more appropriate forum. In addition to the children having resided in Florida for six years, plaintiff's allegations with respect to the alleged change of circumstances derived from statements made by the children to him concerning incidents that occurred in Florida. Relevant evidence would be expected from witnesses residing in Florida and thus Florida was the more convenient forum.

Clark v Clark, 21 AD3d 1326 (4th Dept 2005)

Court Did Not Lack Jurisdiction

The Appellate Division rejected the contention that Family Court lacked subject matter jurisdiction over a proceeding seeking enforcement of a prior order of Cortland County Family Court determining issues of custody and visitation with respect to the parties' child. Petitioner resided with the parties' child in Seneca County at the time she commenced the proceeding and thus the proceeding was properly commenced in Seneca County. In any event, she waived any objection by choosing the venue.

Matter of Michelle A.S. v Samuel G.F. Jr., 27 AD3d 1189 (4th Dept 2006)

CUSTODY AND VISITATION

Plaintiff's Submissions on Relocation Application Warranted Hearing

Supreme Court erred in summarily denying plaintiff's application seeking permission to relocate with the children to Ohio. Generally, determinations affecting custody and visitation should be made following a full evidentiary hearing, and the submissions of plaintiff in support of the application established the need for a hearing on the issue whether her relocation was in the best interests of the children.

Liverani v Liverani, 15 AD3d 858 (4th Dept 2005)

Provision for "Automatic" Reversion to Joint Custody Vacated

Family Court properly determined that the parties' acrimonious relationship and inability to communicate warranted a change from joint to sole custody and that the best interests of the children would be served by awarding sole custody to petitioner. The Appellate Division vacated that part of the order, however, that provided for an automatic change back to joint custody if respondent completed counseling, on the ground that no one factor is determinative of whether there should be a change in custody.

Matter of Rhubart v Rhubart, 15 AD3d 936 (4th Dept 2005)

Plaintiff's Relocation to Rochester Not Substantial Change in Circumstances

Supreme Court properly denied plaintiff's motion seeking to modify an order entered less than two months earlier, determining that it was not in the best interests of the children to relocate with plaintiff to Arizona and granting physical placement of the children to defendant. The children had been residing with defendant in the Rochester area for more than one year during the pendency of the proceedings, and plaintiff had been residing in Arizona during that time. Contrary to the contention of plaintiff, Family Court properly determined that her relocation from Arizona to the Rochester area did not constitute a substantial change in circumstances sufficient to warrant a hearing on her present motion seeking placement of the children with her. The Appellate Division agreed with plaintiff, however, that the court erred in imputing income to her based on information obtained during the relocation hearing. The parties provided the court with current financial information and there was no allegation that plaintiff reduced her income in order to avoid her child support obligation.

Fuss v Fuss, 15 AD3d 949 (4th Dept 2005)

No Jurisdiction Under UCCJEA

Petitioner sought visitation with and custody of his children. Family Court dismissed the petition. The Appellate Division affirmed, concluding that the court lacked jurisdiction under the UCCJEA, based on the complete absence of the children from the statue for approximately seven years: the children had resided in California since 1996 and no visitation had occurred since October 1997. Even if jurisdiction existed under DRL § 76-a, the Appellate Division would have concluded that the court did not abuse its discretion in declining to exercise such jurisdiction under section 76-f.

Matter of King v King, 15 AD3d 999 (4th Dept 2005)

Sanction of Preclusion of Witnesses' Testimony Proper

Respondent appealed from an order that directed respondent to return to New York State with the parties' child and awarded petitioner sole custody in the event respondent failed to do so. The Appellate Division affirmed. Family Court did not abuse its discretion in precluding testimony of two witnesses who treated the parties' child in North Carolina after respondent failed to comply with order compelling discovery with respect to those two witnesses. The court thereafter reserved decision on respondent's motion seeking to vacate the order granting preclusion until completion of a court-ordered independent evaluation of the parties and the child, and when respondent refused to bring the child to New York for evaluation, the court denied respondent's motion. The sanction was commensurate with the particular disobedience; it was imposed to punish and went no further. Respondent and the child's former pediatrician testified with regard to the child's behavioral problems and developmental delays and the pediatrician testified that in her opinion the child would receive more effective

treatment in North Carolina. Thus, respondent was not denied the opportunity to present evidence necessary for the court to determine the best interests of the child.

Matter of Arcidino v McCarthy, 16 AD3d 1132 (4th Dept 2005)

Court Has No Authority To Order Visitation After Termination of Parental Rights

The Appellate Division reversed a Family Court order granting respondent supervised visitation with her two children after terminating her parental rights on the ground of permanent neglect. The court lacked authority to issue a such an order. Visitation is authorized only where parental rights are surrendered voluntarily, in which case pursuant to SSL § 383-c (3) (b), the judge must inform the parent of the consequences of the surrender, including informing the parent that the parent is giving up all rights to visit with the children forever, unless the parties have agreed to different terms.

Matter of Livingston County Dept. of Soc. Servs. (Jamie T.) v Tracy T., 16 AD3d 1133 (4th Dept 2005)

Court Erred in Finding New York to be an Inconvenient Forum under UCCJEA

Supreme Court erred in granting cross motion to dismiss application for sole custody of parties' two children and in directing immediate return of the children to Georgia on the ground that New York was an inconvenient forum. The court failed to comply with DRL § 76-f , which provides that if the court determines this State is an inconvenient forum, it shall stay the proceedings upon condition that a custody proceeding be promptly commenced in another designated state. The court further erred in determining that New York was an inconvenient forum. Evidence available in Georgia with respect to the children's best interests could be submitted by depositions or testimony by telephone, audiovisual means, or other electronic means. The Law Guardian and attorneys for the parties were familiar with the facts and circumstances of the litigation, and the court failed to consider the limited financial resources of the parties and expenses related to litigation in another forum. Although the children had lived in Georgia for over 3 years, they had extensive periods of visitation in New York, and New York courts had more familiarity with the facts and issues.

DeJac v DeJac, 17 AD3d 1066 (4th Dept 2005)

Extraordinary Circumstances Threshold Met

Family Court did not err in awarding sole custody of petitioner's child to respondent, petitioner's sister. Because petitioner sought sole custody, the issue of custody to any party was properly before the court. The threshold test of extraordinary circumstances was satisfied by hearing testimony establishing that petitioner was unfit to care for the child. She admitted she was diagnosed as delusional and that she received social security disability benefits based on her mental illness. She discontinued her

medication without physician's advice and did not intend to take medication again; nor at time of the hearing was she under any treatment. She refused to acknowledge the mental health issues of her child and indicated that she would discontinue his medication if she were awarded custody and would take him to church but not pursue medical treatment for him. Custody to respondent was in the child's best interests: she recognized the child's special needs and was prepared to obtain special treatment for him.

Matter of Miller v Orbaker, 17 AD3d 1145 (4th Dept 2005), *lv denied* 5 NY3d 714

Petition to Modify Properly Denied

Family Court denied the petition seeking the transfer of custody of the parties' three children from respondent mother. The Appellate Division affirmed. Petitioner failed to preserve his contention that the court's taking his testimony by telephone deprived him of due process and equal protection, and petitioner received effective assistance of counsel notwithstanding his attorney's isolated alleged deficiency in failing to object. On the merits, the court properly determined that petitioner was less fit than respondent and less able than she to provide for the children's stability and well-being.

Matter of Longo v Wright, 19 AD3d 1078 (4th Dept 2005)

Custodial Determination Proper But Error to Restrict Visitation

Supreme Court did not err in awarding custody of the parties' children to plaintiff. At trial, defendant stipulated to an award of custody to plaintiff, and the court denied his subsequent request to withdraw the stipulation. The stipulation pertained to custody, not equitable distribution, and thus was not subject to the requirements of DRL § 236 (B) (3), but was binding pursuant to CPLR 2104. In addition, the court allowed the parties to submit evidence on the issue of custody and determined that the best interests of the children warranted an award of custody to plaintiff, a determination that had substantial basis in the record. There was no basis in the record, however, for restriction of plaintiff's visitation with the children to New York unless plaintiff agreed in writing to permit defendant to remove the children from New York, and the Appellate Division therefore modified the order by vacating that ordering paragraph.

Kelly v Kelly, 19 AD3d 1104 (4th Dept 2005), *appeal dismissed* 5 NY3d 847, *rearg denied and lv dismissed and denied* 6 NY3d 803

Conditions Imposed on Resumption of Visitation Improper

Family Court suspended petitioner's supervised visitation with the parties' children until he participated in counseling, took all prescribed medication for at least six months, and received a favorable recommendation from his counselor. The Appellate Division vacated the conditions imposed on resumption of supervised visitation, and otherwise

affirmed. Suspension of visitation was proper in view of Family Court's determination that visitation was detrimental to the children's welfare: the court credited testimony that petitioner verbally and physically abused respondent during the parties' exchanges of the children for the previously ordered supervised visits. Family Court erred, however, in ordering visitation could not resume until petitioner participated in counseling and took all prescribed medication for at least six months, and improperly delegated to a counselor the court's authority to determine issues involving the best interests of the children, i.e., whether visitation should resume, and if so, when.

Matter of Hameed v Alatawaneh, 19 AD3d 1135 (4th Dept 2005)

Law Guardian's Contention Based on Children's "Right to Practice Their Religion" Rejected

Family Court denied the petition to continue a stipulated provision of the parties' judgment of divorce that respondent mother not allow her boyfriend to sleep overnight in her residence for one year. The Law Guardian appealed on behalf of the children, contending that by denying the petition, the court violated the rights of the children and petitioner to practice their religion. The Appellate Division affirmed. Petitioner failed to establish a change in circumstances warranting modification of the judgment. When the parties entered into the stipulated provision, petitioner assumed that respondent and her boyfriend would be married within the first year after the parties' divorce, but petitioner admitted his assumption was not founded upon any representation respondent made, and also failed to establish that continuing the provision would be in the children's best interests.

Matter of Hight v Hight, 19 AD3d 1159 (4th Dept 2005)

Summary Award of Custody Affirmed Based on Respondent's Incarceration

Family Court properly granted petitioner sole custody of the parties' two children without a hearing. Respondent was incarcerated and thus incapable of fulfilling the obligations of a custodial parent. The court erred, however, in adding the condition that respondent provide proof that his mental health issues had stabilized prior to refiling. Petitioner's attorney did not move for dismissal on that ground, and the court's oral decision granting petitioner's motion did not include the condition. The inclusion of the condition in the written order therefore conflicted with the court's decision, and where there is a conflict between a decision and an order, the decision controls. Further, despite numerous allegations that respondent had mental health issues, there was no evidence in the record to support such a determination.

Matter of Van Orman v Van Orman, 19 AD3d 1167 (4th Dept 2005)

Termination of Respondent's Parental Rights Rendered Grandmother's Appeal

Moot

Petitioner appealed from two orders dismissing her petitions seeking custody of her grandson. Immediately after the orders were entered, Family Court terminated the parental rights of the child's father, respondent in appeal No. 1, freed the child for adoption, and committed custody and guardianship of the child to the respondent in appeal No. 2. The Appellate Division held that the termination of parental rights rendered appeal No. 1 moot, and in view of the termination of the father's parental rights and commitment of the child's custody and guardianship to respondent in appeal No. 2, that the court properly dismissed the petition in appeal No. 2.

Matter of Mu'min v Mitchell, 19 AD3d 1116 (4th Dept 2005)

Court May Not Revisit "Extraordinary Circumstances" in Subsequent Modification Proceeding

In a case of first impression, the Appellate Division held that once extraordinary circumstances have been judicially determined and parental preference lost, the appropriate standard in addressing modification of the prior order is whether there has been a change in circumstances requiring modification in the best interests of the child; the court may not revisit the issue of extraordinary circumstances, find they no longer exist, and award custody of the child to the parents as a matter of right without considering the child's best interests. In this case, Family Court previously awarded joint custody of the now six-year-old child to petitioners, the paternal aunt and uncle, and respondents, the child's birth parents, with primary physical custody to the aunt and uncle, and liberal visitation to the parents. Thereafter, petitioners and respondents sought to modify the prior order based on changed circumstances and obtain sole custody. After six days of testimony, the court determined that, because extraordinary circumstances no longer existed, the child must be returned to her birth parents. Petitioners appealed, and having stayed that part of the order directing transfer of sole custody, the Appellate Division reversed and remitted for a new hearing.

Matter of Guinta v Doxtator, 20 AD3d 47 (4th Dept 2005)

Grandfather's Petition for Visitation Properly Dismissed

Supreme Court properly dismissed the petition by which petitioner sought visitation with his grandchildren over the objections of respondent mother. The evidence established that there is no existing relationship between the children and petitioner, their paternal grandfather, and there is deep antipathy between petitioner and respondent.

Matter of Follum v Follum, 20 AD3d 886 (4th Dept 2005), *appeal dismissed* 5 NY3d 880*, lv dismissed* 6 NY3d 759, 891,*cert denied* 549 US 888

Suspension of Visitation Error Without Support From Expert Testimony

Family Court erred in implicitly suspending respondent's visitation and in granting respondent limited telephone contact with the child. The record was insufficient to determine whether visitation with respondent father, an inmate in a correctional facility, would be detrimental to the child's welfare. The opposition of petitioner mother and the Law Guardian, unsupported by testimony regarding the psychological health of the child and whether she would be harmed by visitation in prison was insufficient to support suspension of visitation. In addition, the remedy fashioned by the court with respect to telephone contact with the child violated 7 NYCRR 723.3 (a) and (e) (12).

Matter of Crowell v Livziey, 20 AD3d 923 (4th Dept 2005)

Visitation Properly Delayed Three Years

Family Court properly determined, following a hearing, that it was in the best interests of the children to delay visitation with petitioner until three years from the date of the order, when the children would be eight and nine years old respectively, so that the children could continue to grow and develop before commencing visitation. Petitioner was incarcerated and had no contact with the children for at least three years and, from their perspective, had no relationship with them. The court did not err in rendering its decision without psychological evidence, which neither the parties nor the Law Guardian requested, when there was sufficient testimony from the parties for the court to resolve the matter.

Matter of Mc Cullough v Brown, 21 AD3d 1349 (4th Dept 2005)

Any Error in Precluding Children's Hearsay Statements Regarding Abuse Harmless

Family Court properly dismissed the petition seeking to modify a prior order by suspending respondent's visitation with the parties' children. Petitioner failed to establish at the hearing that respondent's continued visitation posed any risk or would be detrimental to the children. Even assuming the court erred in precluding petitioner from introducing hearsay statements made by the children concerning petitioner's allegations that respondent abused the children, the error was harmless because the substance of the hearsay statements was otherwise before the court. Family Court lacked jurisdiction to appoint a new law guardian for the children inasmuch as the motion was made more than two months prior to commencement of the proceeding, and the court did not abuse its discretion in determining that the 11-year-old child could not give sworn testimony. The court erred, however, in sua sponte determining that petitioner was liable for all legal fees of respondent arising from the petition and in directing petitioner to pay those fees to the assigned counsel program.

Matter of Andrews v Coryea, 21 AD3d 1350 (4th Dept 2005)

Retention of Custody Affirmed in Relocation "Within 200 Miles"

Family Court properly granted respondent's cross petition seeking to retain custody of the parties' child upon the relocation of respondent's residence to within "200 miles driving distance" of petitioner's residence. Based on the record, the Appellate Division concluded that Family Court properly determined petitioner was less able than respondent to provide for the child's stability and well-being.

Matter of Barbato v Proskurenko, 21 AD3d 1351 (4th Dept 2005)

No Error in Refusing to Admit Unfounded Report or Testimony Concerning Report

Family Court awarded sole custody and physical residence of the parties' children to petitioner, with visitation to respondent under specified conditions. The Appellate Division affirmed. Family Court did not err in refusing to admit evidence of an unfounded report of sexual abuse of the parties' daughter, which no statutory provision allowed respondent to introduce. Because the report was inadmissable, the court also did not err in refusing to permit its author to testify concerning it. Respondent waived any contention concerning the admissibility of an "evaluation team report" for one of her husband's children from a previous marriage inasmuch as her attorney stated she had no objection to the report when it was admitted. The Appellate Division also rejected the contention that testimony of a school guidance counselor concerning communications made to her by the child should have been stricken from the record: the school guidance counselor was not a certified social worker and thus CPLR 4508 did not apply. The court did not abuse its discretion in refusing to order psychological evaluations of all the parties after the hearing was well under way. Finally, Family Court's error in awarding temporary custody of the parties' children to petitioner without conducting a hearing did not warrant reversal because the subsequent hearing record fully supported the court's determination following the hearing.

Matter of Humberstone v Wheaton, 21 AD3d 1416 (4th Dept 2005)

Child's Diagnosis Supports Change in Circumstances

Defendant appealed from an order awarding the parties joint custody of their child with primary physical residence with plaintiff. The Appellate Division affirmed. Even assuming the JHO erred in conducting a de novo hearing on custody and should have treated the matter as a modification proceeding, plaintiff established a change of circumstances. Following the parties' recent agreement with respect to issues of custody and visitation, the child was diagnosed with major developmental delays requiring aggressive treatment, and plaintiff established that all major treatment

providers recommended that treatment be provided in one location. Thus the existing custodial arrangement, wherein plaintiff would have the child for one month in New York and defendant would have the child for two months in Georgia, was no longer in the child's best interests, and there was no basis in the record to disturb the JHO's determination that it was in the best interests of the child to reside with plaintiff in New York.

Yohon v Yohon, 23 AD3d 988 (4th Dept 2005)

Extraordinary Circumstances Shown; Matter Remitted for Best Interests Hearing

Respondent began providing petitioner's son with daycare a few weeks after his birth and, within a few more weeks, petitioner began leaving her son with respondent overnight. Soon thereafter, petitioner's son stayed full time with respondent, who obtained an order awarding her custody, apparently on consent of petitioner, and petitioner did not commence the proceeding seeking custody until approximately five years later. Family Court granted sole custody of petitioner's son to petitioner. The Appellate Division reversed, concluding that the court erred in determining that extraordinary circumstances did not exist and in granting the petition without conducting a hearing to determine best interests. Respondent met her burden of establishing extraordinary circumstances and thus a hearing was required. Respondent presented evidence that petitioner voluntarily surrendered physical custody of her child to respondent, that she had no established household, that she took no steps to regain custody for approximately five years after respondent gained custody, and was precluded from presenting evidence on best interests. The Appellate Division remitted for a hearing on best interests, noting that petitioner had physical custody of her son since January 2005 and, pending a new determination, should retain physical custody; and that if the parties were unable to agree upon visitation, application could be made to Family Court for an appropriate order.

Matter of Ruggieri v Bryan, 23 AD3d 991 (4th Dept 2005)

Joint Custody Innappropriate and Transfer of Custody of Affirmed

Family Court transferred sole custody of one of the parties' two children to petitioner. A prior order had awarded respondent custody of the children upon stipulation of the parties. The Appellate Division affirmed. Although the court erred in determining that the "change in circumstances" requirement was inapplicable because the custody and visitation arrangement was pursuant to stipulation, remittal was not necessary because the court made extensive findings of fact that were supported by the record and demonstrated the requisite significant change in circumstances. The Appellate Division rejected the contention that the award was not in the best interests of the children: a custody arrangement based on stipulation is entitled to less weight than a disposition after a plenary trial, and the record established that the parties were incapable of cooperating with each other and thus an award of joint custody, as proposed by

petitioner, was inappropriate. The child at issue expressed her desire to live with petitioner and her half-siblings, and because both parties had other children, an award of custody to either party would necessarily separate the child from some of her siblings. Respondent failed to preserve her contention that the children had conflicting interests and should not have been represented by the same law guardian. Finally, the court did not err in finding respondent violated a prior order by willfully interfering with petitioner's visitation. According to her own testimony she refused to allow petitioner to have visitation after she and petitioner had an altercation on a scheduled visitation day.

Matter of Brown v Marr, 23 AD3d 1029 (4th Dept 2005)

Summary Award of Temporary Custody Reversed

Supreme Court erred, inter alia, in awarding temporary custody of the parties' children to plaintiff during the pendency of the divorce action without conducting an evidentiary hearing. The Appellate Division reversed and remitted for a hearing and a new determination with findings of fact.

Femia v Femia, 23 AD3d 1073 (4th Dept 2005)

No Error in Dismissing Petition Seeking Visitation Without a Hearing

Family Court did not err in summarily dismissing the petition seeking visitation because the court possessed sufficient information to render an informed decision consistent with the child's best interests. Petitioner was incarcerated shortly before his daughter's birth in 1993 and had never seen her. His prison term was lengthy, and he admitted in an affidavit he would be deported upon his release.

Matter of Marmolejo v Calabrese, 23 AD3d 1122 (4th Dept 2005)

"Every Other Month" Access Plan Not in Child's Best Interests

The Appellate Division agreed with respondent that it was not in the child's best interests to reside with petitioner in North Carolina during the odd months of the year and with respondent in New York during the even months of the year. The Appellate Division agreed with the Law Guardian and awarded primary physical placement of the child to respondent and secondary physical placement to petitioner. It also agreed with the Law Guardian that petitioner's secondary physical placement should be comprised of liberal visitation. In reaching its determination, the Appellate Division stated it considered factors including the disruption to the child of alternating households by month, the great geographical distance between residences, the child's young age and medical needs, the separation from his half sister every other month, the need to alter the arrangement when the child entered school, and the parties' financial situations. The Appellate Division remitted to Family Court to determine visitation following further hearing if necessary.

Matter of McAuley v Martin, 24 AD3d 1254 (4th Dept 2005)

Error to Condition Resumption of Visitation on Substance Abuse Evaluation and Report

Family Court properly suspended visitation of respondent with the parties' child: the evidence established that continuing visitation would be detrimental to the child's welfare. The court erred in conditioning resumption of supervised visitation upon respondent's getting a full evaluation from an alcohol or other substance abuse provider and upon the court's receipt of the provider's report containing a recommendation for and course of treatment. The court also erred in conditioning unsupervised visitation upon a showing of significant progress in treatment over a period of time with reports from providers.

Matter of Kathleen M.K. v Brian S.R., 24 AD3d 1273 (4th Dept 2005)

Custody Petition Should Have Been Considered in Dispositional Phase of TPR

Petitioner sought custody of his grandchildren, who were freed for adoption by a prior order. The petition was filed during pendency of the proceedings to terminate the rights of the biological parents. The Appellate Division held that Family Court erred in failing to resolve the custody petition before freeing the children for adoption: the petition should have been considered in the context of a dispositional hearing conducted on the termination petition. Petitioner was not prejudiced, however, because the dispositional orders in the termination proceedings were explicitly made without prejudice to the custody proceeding and because the court ultimately resolved the custody petition on its merits upon a determination of the children's best interests. The record supported the court's determination that it was in the best interests of the children to remain in the custody of the County DSS and the prospective adoptive parents.

Matter of Carl G. v Oneida County Dept of Social Servs., 24 AD3d 1274 (4th Dept 2005)

Summary Dismissal of Grandparent's Petition for Visitation Affirmed

Family Court properly dismissed without a hearing the maternal grandmother's petition for visitation. In support of her motion to dismiss, respondent mother submitted an affidavit alleging petitioner had abused her and her sister. As a result of a reconciliation during respondent's pregnancy, respondent allowed petitioner to have contact with the child for approximately seven months after birth. In January 2003 respondent terminated all contact after petitioner continued to refuse to seek mental health treatment. Petitioner commenced the proceeding approximately one year later. According to respondent, petitioner's only contact with respondent's family until commencement of the proceeding was a series of telephone messages in which petitioner threatened to seek an order permitting visitation. Also in support of her

motion, respondent submitted an affidavit from her husband and an unsworn letter from her sister, both corroborating respondent's allegations. In opposition, petitioner submitted an affidavit refuting the underlying allegations of abuse and the basis for respondent's termination of contact. She conceded, however, that she had no contact with the child since January 2003 and failed to allege that she made any attempts to contact the child after that time. Petitioner failed to establish either an existing relationship or an attempt to establish such a relationship, and therefore lacked standing.

Matter of Deborah P. v Kimberly B., 24 AD3d 1289 (4th Dept 2005)

Twenty-Five Mile Relocation Not in Children's Best Interests

Supreme Court did not err in granting the parties joint custody with primary physical custody to defendant. Plaintiff did not meet her burden of demonstrating her relocation with the children was in their best interests. The parties had shared physical custody with equal amounts of time with each parent and the children were attending school within two miles of each party's home. Plaintiff was building a new home 25 miles from defendant's residence and sought primary physical custody so she could enroll the children in the school district near her home. The court's decision established it considered the relevant factors and the court was not required to state that it had considered those factors. The court did not err in failing to enforce the parties' separation agreement to the extent that it granted her permission to move with the children. The separation agreement was a relevant factor but was not dispositive. The court did not err in determining that plaintiff was not the children's primary care giver. The record supported the determination that both parties contributed equally to parenting duties. Finally, the Appellate Division held that plaintiff's contention regarding appointment of a new law guardian was moot in light of the affirmance.

Petroski v Petroski, 24 AD3d 1295 (4th Dept 2005)

No Hearing on Custody Required Based on Parent's Incarceration

Family Court did not abuse its discretion in granting custody of the parties' younger child to petitioner without conducting a hearing. The court had sufficient information before it: as a result of incarceration, respondent was incapable of fulfilling the obligations of a custodial parent. The contention that respondent was denied her right to visitation was not preserved for review.

Matter of Woodruff v Adside, 26 AD3d 866 (4th Dept 2006)

Relocation to Indiana Not In Children's Best Interests

Petitioner sought to modify a prior custody order by awarding her primary custody of the children, thereby permitting the children to relocate with her to Indiana. Family Court

properly determined that petitioner failed to meet her burden of establishing that the relocation was in the children's best interests. In considering the *Tropea* factors, the court properly determined that the children's relationship with respondent would be adversely affected, and that petitioner failed to show the children's lives would be enhanced. The sole factor that arguably supported the relocation was her desire for a "fresh start" in her new marriage, which was insufficient, standing alone, to warrant the relocation.

Matter of Jones v Tarnawa, 26 AD3d 870 (4th Dept 2006), *lv denied* 6 NY3d 714

Permission to Relocate and Admission of "Indicated" Report Proper

Family Court properly granted the petition seeking to modify a prior custody order by awarding sole custody of the parties' child to petitioner and permitting him to relocate with the child to Alabama. The prior custody order awarding sole custody to respondent upon petitioner's default was properly vacated, and the record supported the award of sole custody to petitioner, who established that the relocation was in the child's best interests. Family Court did not err in precluding respondent from presenting in evidence the "unfounded" report of alleged child abuse and mistreatment against her boyfriend and in admitting the "indicated" report of inadequate guardianship against respondent. Respondent failed to preserve her contention that the court erred in allowing two witnesses to testify regarding alleged abuse of the child by her boyfriend.

Matter of Brockington v Alexander, 26 AD3d 884 (4th Dept 2006)

Change in Circumstances Established

Under a prior order entered upon stipulation, the parties had joint custody of their children, with petitioner having primary physical custody of the son and respondent having primary physical custody of the daughter. Each sought primary physical custody of both children. Family Court granted respondent's petition. The Appellate Division affirmed. Petitioner admitted he would not allow respondent to have visitation with their son, and his conceded interference with respondent's visitation rights was sufficient to establish a change in circumstances. Regarding best interests, the record established that petitioner was not supportive of the son's relationship with respondent, whereas respondent recognized the importance of petitioner's relationship with both children. Petitioner refused to submit to a court-ordered drug test and, when he was finally tested, the results were positive for opiates. Although he testified that he had three years earlier filled a prescription and had taken the prescription drug just prior to the drug test, resulting in a positive finding, that explanation was not credible. Family Court did not abuse its discretion in reopening the hearing two weeks after its conclusion based on new information.

Matter of Tyrone W. v Dawn M.P., 27 AD3d 1147 (4th Dept 2006), *lv denied* 7 NY3d 705

Petitioner Adequately Apprised Custody Was At Issue

Petitioner commenced the proceeding seeking to enforce the visitation provisions of a prior order and hold respondent in contempt based on her failure to participate in court-ordered counseling and her failure to allow visitation. Petitioner did not seek a change in custody, but the court informed respondent prior to the hearing that she could lose sole custody of her son. Following the hearing, the court sua sponte amended the petition and transferred sole custody of the parties' son to petitioner. The Appellate Division affirmed. Respondent was adequately apprised prior to the hearing that custody was at issue, and had sufficient opportunity to present relevant testimony and evidence on the issue of custody. Numerous witnesses, including respondent, testified with respect to issues bearing on the son's best interests. The court did not transfer custody to petitioner as a sanction for respondent's violation of the visitation provision in the prior order, but carefully weighed all the evidence.

Heintz v Heintz, 28 AD3d 1154 (4th Dept 2006)

Permission to Relocate to Florida Affirmed

Family Court granted the application of the child's mother and maternal grandmother, joint legal custodians of the child, to modify a prior custody order by permitting them to relocate with the child to Florida. The Appellate Division affirmed. Petitioners met their burden of establishing the proposed relocation was in the child's best interests. Petitioners demonstrated an economic necessity for the move. Further, the record established respondent had no accustomed close involvement in the child's everyday life, and thus the need to give appropriate weight to preserving the relationship between the noncustodial parent and child did not take precedence over the need to give appropriate weight to the economic necessity for the relocation.

*Matter of Cynthia L.C. v James L.S.,*30 AD3d 1085 (4th Dept 2006)

Law Guardian's Adoption of Position Not "Bias"

Family Court properly denied petitioner's application to modify a prior order in which the court denied the petitioner visitation with his daughter at the correctional facility where he was incarcerated, on the ground that petitioner did not allege a sufficient change in circumstance warranting modification, and thus properly denied the application without a hearing. The court properly refused to replace the Law Guardian based on the Law Guardian's alleged bias. The fact that the Law Guardian, whose role is to be an advocate for and represent the best interests of the child, adopted a position unfavorable to petitioner during prior proceedings, did not establish bias. Petitioner established no basis for the court's mandatory disqualification or recusal, and petitioner's allegations were too speculative to warrant the conclusion that the court abused its discretion in refusing to recuse itself.

Matter of Jason A.C. v Lisa A.C., 30 AD3d 1110 (4th Dept 2006*)*

Extraordinary Circumstances Determined on the Record

Family Court modified a prior order and awarded primary physical custody of petitioner's son to respondent, the child's great aunt. The Appellate Division affirmed. Although Family Court erred in considering the child's best interests without first determining that extraordinary circumstances existed, the record was sufficient for the Appellate Division to determine that extraordinary circumstances were present based on the extended disruption of custody that occurred when petitioner relocated to another state for personal reasons, his voluntary relinquishment of physical custody to respondent, and his failure to establish that he obtained the mental health treatment that had previously been ordered. Family Court properly determined that an award of physical custody to respondent was in the child's best interests. The record established that petitioner was less fit than respondent and less able to provide for the child's stability and physical, medical, educational, moral and emotional well-being.

*Matter of Vincent A.B., v Karen T.,*30 AD3d 1100 (4th Dept 2006)*, lv denied* 7 NY3d 711

Due Process Violated: Referee's Order Reversed Pending New Hearing

The Appellate Division reversed an order granting sole custody of respondent father's two children to their maternal aunt on the ground that respondent was denied due process. The referee relied on information taken at two hearings at which respondent was not present and was not represented by knowledgeable counsel, and there was no indication in the record that respondent had notice. Pending the new determination, petitioner would retain custody of the children.

Matter of Deborah J.B. v Jimmie Lee E., 31 AD3d 1146 (4th Dept 2006)

Change of Circumstances Established

Family Court modified the custody and visitation provisions of the parties' judgment of divorce, to which the parties had stipulated, by awarding respondent father primary physical custody of the parties' daughter. The Appellate Division affirmed. The record established the requisite change of circumstances: petitioner was in the midst of moving to a new home and the child would have to change school districts, respondent had remarried, petitioner was about to remarry, and the parties' employment schedules had changed.

Matter of Amy L.M. v Kevin M.M., 31 AD3d 1224 (4th Dept 2006)

Petitioner Not Entitled to Invoke Equitable Estoppel

Petitioner, an inmate serving a sentence of 25 years to life imprisonment, sought to

enforce a visitation order entered on consent of the parties. During the course of the proceeding, it was brought to the attention of Family Court that there were two orders of filiation regarding the child, naming petitioner and another man as the father. Genetic testing excluded petitioner, and the Appellate Division concluded that Family Court properly dismissed the petition. Petitioner stipulated to the testing and thus waived his right to contend on appeal that the court erred in directing it. The Law Guardian elected not to invoke the doctrine of equitable estoppel, and the court did not err in determining that petitioner was not entitled to invoke the doctrine under the circumstances.

Matter of James Jerome C. v Mary Elizabeth J., 31 AD3d 1184 (4th Dept 2006)

Petition Properly Dismissed

Family Court properly dismissed the petition by which petitioner sought to modify a consensual joint custody order insofar as the order awarded primary placement of one the parties' children to respondent, because the court properly determined that petitioner failed to make a showing of a change in circumstances reflecting a real need for change to ensure the best interest of the child.

Matter of Dianna L.H. v Ernest C., Jr., 31 AD3d 1200 (4th Dept 2006), *lv denied* 7 NY3d 718

No Error in Refusing Visitation Summarily

Family Court properly determined, without conducting a hearing, that petitioner was not entitled to visitation because it was clear from the record that the court possessed sufficient information to render an informed determination in view of petitioner's lengthy incarceration and virtually nonexistent previous relationship with the child.

Matter of David S. v Nicole U., 31 AD3d 1206 (4th Dept 2006)

Willful Violation of Visitation Order Established

Family Court properly determined that respondent willfully violated a prior order of visitation and imposed a jail term of three days, although the court suspended that sentence. Respondent's willful violation had a sound and substantial basis in the record. She testified she had informed petitioner in telephone conversations on the dates in question that she would not open the door when he arrived to pick up the children for visitation until he had complied with an order of discovery issued in a pending support matter.

Matter of Michael A.C. Jr. v Kari Lynn C., 32 AD3d 1173 (4th Dept 2006)

Proposed Relocation Alone Insufficient for Change in Custody

Family Court properly determined that petitioner's proposed relocation to Illinois with the children would not be in the children's best interests, but the court erred in granting the cross petition for modification of the judgment of divorce by awarding respondent primary physical custody of the children. The sole change in circumstances established in the record was petitioner's proposed relocation, which did not by itself justify altering the existing custody arrangement, inasmuch as petitioner agreed to remain in the area in the event that her petition was denied.

Matter of Jennifer L.B. v Jared R.B., 32 AD3d 1174 (4th Dept 2006)

Appellate Division Finds Extraordinary Circumstances

Family Court erred in dismissing, without a finding of extraordinary circumstances, the petition of the child's mother to modify a prior order based on consent of the parties, which, inter alia, granted custody of the child to the paternal grandparent. The Appellate Division made the finding itself, however, concluding that petitioner was unfit to care for the child. Petitioner was delusional during parts of her testimony and many of her answers were nonsensical and incredible. It was apparent she suffered from a mental illness, which she denied having, and she testified she was not seeking treatment or medication. Her testimony also raised concerns about the child's safety during visitation with her. The record supported the court's determination that the best interests of the child would be served by continuing the custodial arrangement.

Matter of Katherine D. v Lawrence D., 32 AD3d 1350 (4th Dept 2006), *lv denied* 7 NY3d 717

Custody Arrangement Properly Modified

Family Court properly modified the existing custody arrangement to which the parties had stipulated by awarding petitioner primary physical custody of the parties' son. Petitioner made the requisite showing of a change in circumstances, which reflected a real need for change to ensure the best interests of the child. Further, the court did not err in failing sua sponte to order psychological examinations of the parties.

Matter of George E.L., II v Tina M.L.W., 34 AD3d 1232 (4th Dept 2006)

Prison Visitation Properly Eliminated

Family Court properly denied the petition to enforce a prior consent order calling for respondent to facilitate "occasional" prison visits between petitioner and the parties' two children, and properly granted respondent's cross petition to modify the prior order by eliminating such visits. The court appropriately credited the testimony of the court-appointed psychologist that visitation would be detrimental to the emotional and psychological well-being of the children. The court's reliance on that opinion did not

constitute an improper delegation of the court's authority.

*Matter of Frank P. v Judith S.,*34 AD3d 1324 (4th Dept 2006)

Joint Custody Proper Based on Parties' Conduct During Pendency of Action

While recognizing that joint custody is generally reserved for "relatively stable, amicable parents behaving in mature civilized fashion," the Appellate Division concluded that Supreme Court's award of joint custody was proper. With professional guidance, the parties established a joint custodial arrangement during the pendency of the action, and showed they were capable of placing the well-being of their daughter above their own needs. It was in the child's best interest that joint custody continue, despite the fact that each party sought sole custody. The Appellate Division vacated, however, as arbitrary and contrary to the concept of joint parental decision-making, a provision granting decision-making authority to one party in even-numbered years and to the other in odd-numbered years in the event the parties were unable to agree on issues concerning their daughter.

Fiorelli v Fiorelli, 34 AD3d 1216 (4th Dept 2006)

No Evidence of Change in Circumstances

Petitioner appealed from an order denying his petition for modification of an order of visitation and again referring the parties to the Catholic Charities Therapeutic Supervised Visitation Program. The Appellate Division affirmed. Insofar as petitioner sought a hearing on the issue whether visitation should be transferred to the Salvation Army Supervised Visitation Program, Family Court properly denied the petition without a hearing. Some evidentiary showing sufficient to warrant a hearing was required, and petitioner failed to provide any evidence to demonstrate a change of circumstances that would warrant the nontherapeutic supervised visitation at the Salvation Army sought by him rather than the therapeutic visitation at Catholic Charities deemed appropriate by the court.

*Matter of Richard R.G. v Rebecca H.,*34 AD3d 1312 (4th Dept 2006), *lv denied* 8 NY3d 804

Error to Condition Visitation on Child's Request

Family Court erred when it modified a prior order by providing that during any period in which petitioner was incarcerated, visitation between petitioner and his child shall occur at the child's request. The Appellate Division remitted for a new hearing to determine whether visitation was in the best interests of the child, and if so, to fashion an appropriate schedule.

Matter of Jeffrey T. v Julie B., 35 AD3d 1222 (4th Dept 2006)

Refusal to Terminate Grandparents' Visitation Affirmed

The Appellate Division agreed with the Law Guardian that petitioner failed to establish that termination of visitation between his son and respondents, his son's maternal grandparents, would be in the best interests of petitioner's son because of animosity between petitioner and respondents. Petitioner did not establish that the animosity was negatively impacting his relationship with his son, and the record established that respondents had developed a meaningful relationship with their grandchild.

Matter of Danial R.B. v Ledyard M., 35 AD3d 1232 (4th Dept 2006)

EVIDENCE

Error to Admit Psychologist's Report

Family Court granted the petition seeking to modify a prior order of custody and awarded sole custody of the parties' son to petitioner. The Appellate Division held that Family Court erred in admitting into evidence the report of a court-appointed psychologist. The report was not submitted by the psychologist under oath and the psychologist was not present and available for cross-examination, as required by 22 NYCRR 202.16 (g) (2). The Appellate Division affirmed, however, on the ground that the court's determination was supported by admissible evidence without consideration of the improperly admitted report, and concluding that there was substantial evidence in the record that the best interests of the child were served by granting petitioner custody.

Matter of Kranock v Ranieri, 17 AD3d 1104 (4th Dept 2005), *lv denied* 5 NY3d 709

Seven-Year-Old Competent to Testify Under Oath

In each appeal, respondent appealed from an order of disposition that adjudicated him a juvenile delinquent based on respective findings that he had committed acts that, if committed by an adult, would constitute sexual abuse in the first degree and sexual abuse in the second degree. In appeal no. 1, Family Court did not abuse its discretion in allowing the seven-year-old complainant to give sworn testimony: the responses of that complainant during voir dire indicated that she knew the difference between telling the truth and a lie, the importance of telling the truth, and that she could be punished for telling a lie. Corroboration of the complainant in appeal no. 2 was not required because she was properly sworn.

Matter of James N., 19 AD3d 1047 (4th Dept 2005)

Hearsay Statements Relating to Abuse Admissible in Custody Proceeding

Family Court properly admitted hearsay statements in an article 6 custody proceeding

under the "well-settled" exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in FCA § 1046 (a) (vi), where, as in this case, the statements were corroborated. The Appellate Division also noted, however, that the statement of the child to petitioner and his wife as well as statements made by a nurse to petitioner's wife were not offered for the truth of the matter asserted but were offered to explain actions taken by petitioner and his wife, and thus the statements and the testimony fell within an exception to the hearsay rule.

Matter of Mateo v Tuttle, 26 AD3d 731 (4th Dept 2006)

FAMILY OFFENSE

Error to Issue Order of Protection Without Conducting a Hearing

In a family offense proceeding, Family Court granted an order of protection against respondent father in favor of his minor child until February 14, 2008. In a PINS proceeding, Family Court issued another order of protection and found the minor child to be a person in need of supervision. The Appellate Division dismissed the appeal insofar as it concerned the order of protection in the PINS proceeding on the ground that the order had expired. The Appellate Division agreed with the father that Family Court erred in issuing the order of protection in the family offense proceeding without conducting a hearing pursuant to FCA §§ 832 and 833, and that the court further erred in setting the duration of the order in excess of two years without finding on the record the existence of aggravating circumstances. Finally, the Appellate Division concluded that the remaining allegations in the family offense petition were insufficient to constitute a family offense within the meaning of FCA § 812 (1).

Matter of Donna Marie M. v Timonthy A.M., 30 AD3d 1012 (4th Dept 2006)

Appeal From Order Dismissing Petition Mooted by Subsequently Filed Judgment of Divorce

Family Court dismissed for lack of jurisdiction a petition for an order of protection pursuant to FCA article 8. On appeal, petitioner contended Family Court erred because at time of the dismissal she and respondent's stepson were still married inasmuch as their judgment of divorce had not yet been filed. The Appellate Division dismissed the appeal on the ground that a judgment of divorce had since been filed.

Matter of Svetlana A.S. v Eileen F., 30 AD3d 1042 (4th Dept 2006)

JUVENILE DELINQUENCY

Family Court Properly Considered Evidence

Respondent appealed from an order of disposition placing him for 12 months in the custody of OCFS. The Appellate Division affirmed. Family Court properly considered the evidence presented at the dispositional hearing, including the probation report and the mental health evaluation, in determining that placement was the least restrictive alternative that provided both for the best interests of respondent and for the protection of the community.

Matter of Michael L., 15 AD3d 1010 (4th Dept 2005), *lv denied* 4 NY3d 709

Respondent Did Not Waive Her Constitutional Right to be Present at Hearing

The Appellate Division reversed Family Court's order adjudicating respondent a juvenile delinquent. Respondent did not voluntarily and knowingly waive her constitutional right to be present at the fact-finding hearing: Family Court advised her of her "duty" to be present, but failed to advise her of her "right" to be present, or of the consequences of her failure to appear.

Matter of Arielle B., 17 AD3d 1056 (4th Dept 2005)

Violation of Probation Petition Properly Filed After 18th Birthday

Respondent appealed from an order placing her on probation for 12 months. The Appellate Division affirmed. Petitioner met its burden of establishing respondent violated the conditions of her probation by failing to pay restitution. Additionally, Family Court had authority to issue a dispositional order placing respondent on probation for an additional one-year period after the original period of probation would have expired. The violation petition was timely filed before the original period of probation expired, thereby interrupting that period of probation pending the court's final determination on the violation petition. Finally, the court did not err in denying respondent's motion seeking dismissal of the violation petition on the ground that it was filed after her 18th birthday. Respondent remained under the court's jurisdiction pending expiration or termination of the period of the order of probation, which extended beyond her 18th birthday. The court was thus authorized to make a determination on the violation petition and to order an appropriate disposition after respondent turned 18.

Matter of Carliesha C., 17 AD3d 1057 (4th Dept 2005)

Court Need Not Try Lowest Form of Intervention

The Appellate Division affirmed Family Court's order placing respondent with OCFS in a limited secure facility. Although respondent was accepted to a nonsecure facility, the court was not required to try the lowest form of intervention. Respondent had a history of violent and unlawful behavior; and a professional in the child services field testified that not all nonsecure facilities were equal and that responded needed a very strict environment, had the propensity to be a follower, and needed behavior modification

programming.

Matter of Stacy S., 17 AD3d 1146 (4th Dept 2005)

Respondent Denied Fair Trial When Court Took on Appearance and Function of an Advocate

Family Court adjudicated respondent a juvenile delinquent and placed him with OCFS. The Appellate Division reversed. Respondent was denied a fair trial by the court's intrusive conduct during fact-finding. The court took on the function and appearance of an advocate by extensive examination of certain witnesses.

Matter of Yadiel Roque C., 17 AD3d 1168 (4th Dept 2005)

Order of Disposition Reversed Based on Fatally Defective Allocution

On appeal from an order of disposition placing respondent in the custody of OCFS for 12 months, respondent contended that his admission to the allegations of the petition was fatally defective because the court failed to comply with the nonwaivable provisions of FCA § 321.3 (1). Petitioner correctly conceded that the allocution failed to comply, and the Appellate Division therefore reversed the order of disposition and remitted for further proceedings on the petition.

Matter of Zachary H., 19 AD3d 1023 (4th Dept 2005)

Petitioner Not Entitled to Reimbursement

Respondent's son was adjudicated a juvenile delinquent and placed in the custody of petitioner from May 16, 2002 until January 14, 2003. Petitioner filed a petition on April 3, 2003 seeking reimbursement for expenditures in connection with the placement. Family Court properly determined that petitioner was not entitled to reimbursement from respondent for expenditures made on behalf of respondent's son prior to the date the petition was filed because the child was no longer in receipt of public assistance when the petition was filed. Pursuant to the express terms of FCA § 234 (a) and (b), petitioner may seek support for a child placed in petitioner's care; however, the statute does not permit petitioner to seek support when petitioner is no longer expending funds for the child's care.

Matter of Onondaga County Dept. of Social Servs. v Smith, 19 AD3d 1066 (4th Dept 2005)

Adjudication Reversed Based on Defective Allocution; Preservation Not Required

Noting that it disagreed with the Second Department that preservation is required in a

juvenile delinquency proceeding with respect to the contention that the allocution, and thus the admission, was defective, the Appellate Division agreed with respondent that his allocution was defective inasmuch as the court failed to advise him of his right to remain silent and to advise him of certain other constitutional rights. Further, the court failed to ascertain that respondent and his parents were aware of "all possible dispositional alternatives." Also lacking was a statement of the court's reasons for consenting to entry of the admission. Because the period of respondent's placement had expired, the Appellate Division dismissed the petition.

Matter of Sean R.P., 24 AD3d 1200 (4th Dept 2005)*, lv denied* 6 NY3d 711

Petition Not Jurisdictionally Defective

The Appellate Division rejected the contention of respondent that the petition was jurisdictionally defective: the petition and supporting deposition sufficiently alleged that respondent committed acts that if committed by an adult would constitute the crime of criminal trespass in the third degree. Respondent's contention that Family Court erred in denying her motion to withdraw her admission pursuant to FCA § 311.2 (3) was unpreserved because she sought to withdraw her admission on a different ground, and in any event the contention was without merit.

Matter of Briana J., 24 AD3d 1274 (4th Dept 2005)*, lv. denied* 6 NY3d 710

Family Court Act Requirements Do Not Apply in Removal Situation

Respondent pled guilty in adult criminal court in anticipation of removal of the criminal action to Family Court for adjudication as a juvenile delinquent. On appeal, respondent contended that County and then Family Court reversibly erred by failing to advise him of his right to remain silent and of the possible dispositional consequences of his admission, and in failing to conduct a proper allocution of respondent's father. The Appellate Division affirmed. FCA § 320.3 requires that when respondent first appears before Family Court, he and his parent or other person legally responsible for his care must be advised of respondent's right to remain silent. FCA § 321.3 (1) (c) requires that Family Court conduct an allocution before accepting an admission. These procedural requirements apply only in Family Court, and in Family Court the matter properly proceeded directly to the dispositional phase, so there was no occasion for Family Court to comply with the requirements.

Matter of Marquis K.S., 26 AD3d 756 (4th Dept 2006)

Respondent's Move Did Not Support Modification of Dispositional Order

Family Court properly denied the motion of DSS pursuant to FCA § 355.1 seeking to modify the order of disposition with respect to respondent, who had previously been adjudicated a juvenile delinquent. Although respondent moved from one house to

another across a county line, he did not change his legal address, nor was there a change in his custody, and thus there was no "substantial change of circumstances."

Matter of Zachary T.D., 26 AD3d 801 (4th Dept 2006)

No Error in Failing to Consider More Intensive Probation Program

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act constituting the crime of unlawful possession of a weapon by a person under 16, an act that occurred while he was on probation as a result of a prior juvenile delinquency adjudication. Family Court did not err in failing to consider a more intensive probation program before placing him with OCFS: the record at the hearing established that probation had not been successful. The record also established that no private placements were available because of respondent's high-risk behavior and that OCFS had appropriate resources and programs to address his needs. Respondent failed to preserve for review the contention that the court should have ordered a mental health evaluation for respondent before determining that he should be placed with OCFS.

Matter of Phillip D., 27 AD3d 1126 (4th Dept 2006)

Petition Properly Dismissed: Corroboration of Non-Hearsay Statements of Accomplices Required

Family Court dismissed a juvenile delinquency petition as facially defective because the statements of the correspondents were not corroborated. The Appellate Division affirmed. FCA § 311.2 requires the petition to be supported by non-hearsay allegations, and FCA § 343.2 requires corroboration of accomplice testimony. The requisite corroboration must be alleged in a delinquency petition or the supporting depositions since these documents represent the only formal statement of charges and should be based on competent legal evidence sufficient to establish, if believed, that respondent committed the acts charged.

Matter of Ethan S., 28 AD3d 1165 (4th Dept 2006)

"Least Restrictive Alternative" Properly Considered

In placing respondent with OCFS, Family Court did not fail to consider the "least restrictive alternative." The record established that respondent refused to live at home, failed to cooperate with the Probation Department during the pendency of this and two earlier proceedings, tested positive for drugs, and failed to make more than a minimal effort to participate in drug treatment programs or to attend school. Family Court was not required to state on the record its reasons for placing respondent in the custody of OCFS, and properly set forth the reasons in the order. Respondent failed to preserve for review the contention that the court erred in denying him the opportunity to present

additional evidence inasmuch as he failed to seek a continuance and did not object when the court continued with the dispositional phase.

Matter of Michael A.M., Jr., 31 AD3d 1183 (4th Dept 2006)

Lack of Resources, Not Lack of Procedure, Dictated Placement

After adjudicating respondent a juvenile delinquent and holding dispositional proceedings over five dates, Family Court found that respondent, who was mentally retarded, required supervision and placement in an environment that provided intensive treatment for juvenile sexual offenders. Only one agency, DDSO, was able to provide the necessary treatment, but the agency had no available space, and no facilities that contract with or are approved by the DSS had an available opening. The Court therefore placed respondent with OCFS, the only available option other than continued secure detention. The Appellate Division affirmed. The law guardian failed to preserve the contention that no sworn testimony was presented and no documentary evidence was admitted at the dispositional hearing. Although the contentions were supported by the record, the Appellate Division concluded that the record, including the probation report and the juvenile offender risk assessment, amply supported the disposition. The Appellate Division noted that it shared the court's concern that the court was unable to balance equally the needs of respondent and the community, but the issue was lack of resources, not the fact that sworn testimony was not presented and documentary evidence was not admitted in evidence. The Court therefore perceived no reason to reverse the order for a procedurally proper evidentiary hearing. The court protected the community and invited an application to modify the placement if a more suitable one could be found.

Matter of Timothy C., 31 AD3d 1222 (4th Dept 2006)

Findings Based on Sufficient Evidence

Family Court's findings that respondent committed acts that if committed by an adult would constitute the crimes of robbery in the third degree, criminal possession of stolen property in the fifth degree, and attempted assault in the second degree were supported by legally sufficient evidence. The evidence established that respondent was the person who pushed or threw the victim into a fence and took the victim's bicycle. Although both a witness to the incident and the victim described the perpetrator based solely on his height and clothing, they both were able to identify respondent in the courtroom. The victim's mother identified respondent as the person she observed riding her son's bicycle approximately one hour after the incident. Respondent's height and clothing matched that described by the victim and the witness. The victim's mother testified that she had never seen a bicycle similar to that taken from her son and that the store from which she purchased the bicycle did not carry another like it. After respondent was arrested and the victim's mother retrieved the bicycle from the police, the serial number confirmed that the bicycle belonged to her son.

Matter of Kenneth J., 32 AD3d 1205 (4th Dept 2006)

Defective Allocutions Conceded

As petitioner correctly conceded, Family Court failed to comply with the nonwaivable provisions of FCA § 321.3 in conducting the allocutions at issue. The Appellate Division therefore reversed the order of disposition, vacated the fact-finding orders, and remitted for further proceedings on the petitions.

Matter of Andres S., 34 AD3d 1340 (4th Dept 2006)

Adjudication Affirmed

Respondent was adjudicated a juvenile delinquent based on findings that she committed acts that, if committed by an adult, would constitute the crimes of criminal mischief in the third degree and unauthorized use of a vehicle third degree. Family Court's findings were not against the weight of the evidence. The weight of the evidence of identification is a question primarily for the factfinder, unless it is incredible as a matter of law, and in this case the identifying witness was not incredible as a matter of law. The evidence was legally sufficient to establish criminal mischief in the third degree. The evidence, viewed in the light most favorable to the presentment agency, was sufficient to establish that respondent intended to damage the vehicle in front of her when she drove her vehicle into it.

Matter of Kayla C., 35 AD3d 1187 (4th Dept 2006)

ORDER OF PROTECTION

Wilful Violation Affirmed Based on Respondent's Spinning Tires

Family Court found that respondent willfully violated the order of protection directing him to refrain from intimidating petitioner. The Appellate Division affirmed. Petitioner testified that, after returning the parties' child from visitation, respondent spun the tires on his vehicle so that she and the child were struck by stones and that stones flew into her house. Respondent admitted he had spun the tires and that he knew it was wrong. Petitioner testified that she felt threatened and intimidated. Finally, because respondent had served the sentence imposed, his contention that the sentence was unduly harsh and severe was rendered moot.

Matter of Julie A.C. v Michael F.C., 15 AD3d 1007 (4th Dept 2005)

Order of Protection Proper

Family Court properly issued the order of protection based on a finding that respondent

committed acts constituting harassment in the second degree, which was supported by a preponderance of the evidence. Although respondent denied ever striking or shoving petitioner, Family Court credited petitioner's testimony regarding the incident, and the Appellate Division saw no reason to disturb the credibility determination.

Matter of Arlene E. v Ralph E., 17 AD3d 1104 (4th Dept 2005)

Evidence of "Physical Injury" Insufficient, but "Aggravating Circumstances" Supported on Other Grounds

Family Court properly found that the respondent father committed an act that would constitute harassment in the second degree, and thus properly found that he committed a family offense. Evidence established that respondent bit his older son with the requisite intent to harass, annoy or alarm him. Family Court was not precluded from finding, following the dispositional hearing, that the child sustained a physical injury, despite the fact that it found that the evidence adduced at the fact-finding was insufficient to establish a physical injury, because parties are entitled to submit additional evidence at the dispositional hearing on the issue of aggravating circumstances. No additional evidence was adduced, however, and thus Family Court erred in relying on the existence of a physical injury to support the finding of aggravated circumstances in the order of protection. Nevertheless, in its bench decision the court properly found the existence of an aggravating circumstance: evidence at the dispositional hearing established that respondent exhibited violent behavior toward the children and toward petitioner in their presence. The Appellate Division vacated the provision ordering visitation "as the children desire" on the ground that it tended to defeat the right of visitation, and remitted for further hearing on visitation.

Matter of Kristine Z. v Anthony C., 21 AD3d 1319 (4th Dept 2005), *lv denied* 6 NY3d 722

Stay-Away Until Sons 18 Years of Age Affirmed

Family Court ordered respondent to stay away from his sons until their 18th birthdays. The Appellate Division affirmed. Although FCA § 1056 (4) did not apply because respondent was the boys' father, authority to issue the orders derived from section 1056 (1), under which orders of protection "shall expire no later than the expiration date of, and may be extended with, such other order made under this part," and the order of fact-finding and disposition had no expiration date.

Matter of Sheena D. v Darwin F., 27 AD3d 1128 (4th Dept 2006), *lv granted* 7 NY3d 781, *aff'd* 8 NY3d 136

Petitioner Failed to Allege or Present Evidence of Domestic Violence or to Establish Willful Violation

Family Court issued an order of protection directing that respondent's daughter pick up and drop off the parties' children for visitation purposes and that respondent not be present during the exchange. One month later petitioner commenced a proceeding alleging that respondent had violated the order on various occasions inasmuch as he was observed across the street from the arranged location during the exchange. Family Court properly determined, following a hearing, that petitioner failed to establish respondent's willful violation. Although petitioner contended on appeal that the court erred in failing to consider her allegations of domestic violence, the Appellate Division noted that the record was devoid of evidence of domestic violence and that there were no allegations of domestic violence in the petition.

Matter of Diane G.B. v Bryan L.B., 31 AD3d 1185 (4th Dept 2006)

PATERNITY

JHO Without Authority to Dismiss Petition

The Appellate Division reversed an order dismissing a petition commenced under FCA article 5, reinstated the petition and remitted the matter. The record contained no order of reference nor did it indicate that the parties consented to submit the proceeding to a JHO. Thus, the JHO was without authority to dismiss the petition.

Matter of Ryon J.G. v Carlton D.S., 23 AD3d 1042 (4th Dept 2005)

Petitioner Must Establish Fraud Before Court Orders Testing

Petitioner sought to vacate an acknowledgment of paternity more than five years after he signed it, asserting that respondent had perpetrated a fraud on him, and moved for an order directing DNA or genetic marker testing. The Law Guardian moved to dismiss the petition and respondent joined in the motion. Family Court denied petitioner's motion and granted the motion to dismiss, concluding that petitioner could not establish he was induced by fraud to sign the agreement. On appeal, petitioner contended that the testing should have been ordered before any determination was made concerning fraud. The Appellate Division affirmed, concluding that a party seeking to challenge an acknowledgment of paternity more than 60 days after execution of the acknowledgment must establish fraud, duress or material mistake of fact before the court is required to order testing. Petitioner failed to make that showing. The statements made by petitioner in the affidavit in support of the motion for genetic testing, which could be considered on the motion to dismiss, established that he did not justifiably rely on respondent's purportedly fraudulent statements when he signed the acknowledgment. The Appellate Division also noted that at the first court appearance petitioner acknowledged to the court that he knew he was not the father when he signed the acknowledgment.

Matter of Demetrius H. v Mikhaila C.M., 35 AD3d 1215 (4th Dept 2006)

Court Must Appoint Law Guardian and Hold Hearing Before Vacating Order of Filiation

Respondent DSS obtained an order of filiation in 1994 determining that petitioner was the child's father and directing him to provide support. Based on a privately arranged DNA test that excluded him as father, petitioner commenced a proceeding seeking an order determining that he was not the biological father and suspending all support obligations. Family Court granted the petition upon default of the mother, whereupon respondent moved to "reopen the paternity and support proceedings" and the court denied the motion. The Appellate Division reversed. Although the court properly determined that there was a reasonable excuse for the default, the court also should have determined that respondent provided a meritorious defense, based on the court's failure to appoint a law guardian and to conduct a best interests hearing before determining whether to grant the petition. If a determination by Family Court has the potential to prejudice the child's interests, appointment of a law guardian to represent the best interests of the child is necessary. Further, a hearing must be conducted to determine the child's best interests prior to vacating an order of filiation.

Matter of Troy D.B. v Jefferson County Dept. of Soc'l Servs., 42 AD3d 964 (4th Dept 2007)

PINS

Constitutional Issue Unpreserved; No Hearing Required Pursuant to FCA § 778

Family Court extended respondent's placement following her admission that she violated a prior order of placement resulting from an adjudication that she was a person in need of supervision. On appeal, respondent contended that her right to due process was denied when Family Court failed to afford her an opportunity to present evidence at a dispositional hearing. The Appellate Division affirmed, concluding that respondent failed to preserve her contention for review because, although she requested a hearing, her contention concerning due process was raised for the first time on appeal. The Appellate Division noted, however, that no hearing was required pursuant to FCA § 778.

Matter of Vanessa S., 20 AD3d 924 (4th Dept 2005)

Court Failed to Advise of Right to Remain Silent

Family Court found respondent failed to comply with the terms and conditions of an order of disposition and suspended judgment. The Appellate Division reversed and remitted for further proceedings on the ground that the court failed to advise respondent of his right to remain silent before accepting his admission.

Matter of Marquis K.S., 26 AD3d 756 (4th Dept 2006)

Order Extending Placement Affirmed

Family Court did not abuse its discretion in granting the petition seeking to extend respondent's placement for a period of 12 months. The evidence at the hearing established that, although the conduct of respondent had improved in certain areas during her initial placement, she continued to have problems at school and at her residence, and that she required additional treatment and supervision in order to enable her to return safely to her home.

Matter of Chasity B., 28 AD3d 1191 (4th Dept 2006)

No Error in Finding Good Cause for Late Filing and Granting Petition for Extension of Placement

After a six-month placement of the subject child, DSS sought an additional placement of 12 months. Family Court did not err in finding good cause for late filing of the petition, which was filed only 11 days late. DSS established that the filing was delayed because it did not initially believe that an extension would be necessary. The petition was filed on February 7, 2006, and it was not until meetings between respondent and her mother in December 2005 and January 2006 that DSS concluded that it would not be in respondent's best interests to return home at the end of the existing placement. Further, Family Court did not abuse its discretion in granting the petition. Although respondent made improvements in behavior, she still needed to work on her relationship with her mother and to address her mental health issues. The evidence established that placement in a group home setting, a lower level of care than the residential setting, would allow respondent to continue working on her problems while learning independent living skills.

Matter of Natalie B., 32 AD3d 1323 (4th Dept 2006)

TERMINATION OF PARENTAL RIGHTS

Permanent Neglect Finding Affirmed

The Appellate Division affirmed Family Court's order terminating respondent's parental rights and freeing his three children for adoption. Petitioner met its burden of establishing by clear and convincing evidence that respondent's children were permanently neglected. Petitioner established that respondent failed to take responsibility for his past inappropriate sexual behavior and aggressive tendencies, thus preventing any assurance that the children would be safe if returned to the home. Respondent's contention that the court erred in admitting psychological and sexual assessment reports because the reports constituted hearsay were without merit because the reports were business records and as such were within an exception to the hearsay rule. In any event, hearsay evidence is admissible at a dispositional hearing as

long as it is material and relevant.

Matter of Ricky A.B., 15 AD3d 838 (4th Dept 2005)

Respondent Not Precluded from Presenting Defense

Respondent appealed from an order terminating his parental rights on the ground of abandonment. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that respondent had no contact with the child or petitioner for six months prior to the filing of the abandonment petition. Respondent was not precluded from presenting the defense that he was unable to visit or communicate with the child. Although Family Court refused to permit respondent's attorney to question a caseworker with respect to conduct of respondent that occurred outside the six-month period, the court properly allowed respondent's attorney to elicit testimony concerning respondent's ability and efforts to contact the foster parent and the caseworkers during the six-month period.

Matter of Breanna K.J.W., 15 AD3d 880 (4th Dept 2005)

Incarceration Not "Reasonable Excuse" for Failure to Communicate

Family Court terminated respondent's parental rights on the ground of abandonment. The Appellate Division affirmed. Respondent failed to show that his educational, financial and language difficulties constituted good reason for failing to visit or otherwise contact the child, and respondent's incarceration during the final two months of the six-month period did not constitute a reasonable excuse for his failure to communicate with this child during that period.

Matter of Rosalinda R., 16 AD3d 1063 (4th Dept 2005), *lv denied* 5 NY3d 702

Respondent Communicated with Others and Failed to Use Petitioner's Services

Family Court terminated respondent's parental rights on the ground of abandonment. The Appellate Division affirmed. Respondent made no attempt to contact his daughter or to learn the child's whereabouts or condition for a period of six months prior to the filing of the petition. The Appellate Division rejected the contention of respondent that his financial condition prevented him from contacting his daughter; the record established that he communicated by phone and mail with others during the same period and that he did not attempt to use any of the services that petitioner made available to incarcerated parents.

Matter of Lindsey B., 16 AD3d 1078 (4th Dept 2005)

Respondent Allowed Contact with Father, Violating Provision of Suspended

Judgment

Respondent appealed from a Family Court order that revoked a suspended judgment and terminated her parental rights based on violation of the condition that she prohibit the child's father from having any contact with the child. The Appellate Division affirmed. The suspended judgment was entered upon respondent's consent to an adjudication of permanent neglect, and the condition was included based on the fact that the child's father previously had severely beaten the child. Petitioner established by a preponderance of the evidence that respondent allowed the child's father to see the child and thus violated the condition. Family Court did not err in allowing hearsay testimony concerning respondent's violation of the condition, and in any event, the court gave little weight to that testimony.

Matter of N.R.W., 16 AD3d 1099 (4th Dept 2005), *lv denied* 5 NY3d 702

No Dismissal "With Prejudice" in Termination Proceeding

Family Court properly terminated respondents' parental rights on the ground of mental retardation, which petitioner established by clear and convincing evidence. Contrary to respondent's contention on appeal, petitioner was not required to show that it made "diligent efforts." Respondent mother was not denied effective assistance of counsel when her counsel declined the court's offer to dismiss the petition upon petitioner's request for adjournment: dismissal would not have been "with prejudice" because such a dismissal would have the effect of forcing children to remain in foster care until they reach majority.

Matter of Michael F. Jr., 16 AD3d 1116 (4th Dept 2005)

One Meeting with Petitioner Insufficient to Defeat Termination on Ground of Abandonment

The Appellate Division affirmed Family Court's termination of respondent's parental rights on the ground of abandonment. Respondent was prohibited from contacting his child during the six months prior to the filing of the petition by an order of protection, and petitioner established by clear and convincing evidence that respondent had no contact with petitioner during that time. The testimony of respondent that he had a meeting with two representatives of petitioner during the six-month period merely presented a credibility issue. Even assuming Family Court erred in failing to credit respondent's testimony, the Appellate Division would have concluded that respondent's contact with petitioner was "minimal, sporadic or insubstantial" and insufficient to defeat the petition.

Matter of Joseph E., 16 AD3d 1148 (4th Dept 2005)

Petitioner Not a Guarantor of Respondent's Success

Family Court properly determined respondent's child to be permanently neglected and terminated respondent's parental rights. Petitioner established it made diligent efforts to encourage and strengthen the relationship by providing services and other assistance aimed at ameliorating or resolving the problems preventing the child's return to respondent, but petitioner was not a guarantor of respondent's success. Respondent's failure to complete any of the classes or other programs and services provided by petitioner did not invalidate petitioner's diligent efforts. The record supported the court's determination that a suspended judgment was not in the child's best interests.

Matter of Geoffrey N., 16 AD3d 1167 (4th Dept 2005)

Termination Reversed and Case Remitted for New Dispositional Hearing and New Law Guardian

Family Court terminated respondent's parental rights to five of her children and freed them for adoption. The Appellate Division concluded that Family Court abused its discretion in terminating with respect to the eldest child, who was 17 years old and residing in a residential facility. At the time of the dispositional order, the child had no prospective adoptive home and an independent living plan was being developed for her. Termination with respect to her would result in "legal orphanage." The Appellate Division remitted for a new dispositional hearing and for appointment of a new law guardian. The Law Guardian, who represented all five children, acknowledged at oral argument that he never met the child. The Guidelines for Law Guardians in the Fourth Department provide, inter alia, that before the initial appearance on behalf of a child over age three, the law guardian should arrange to visit and interview the child in an age-appropriate manner to ascertain the child's wishes and needs, and, at the dispositional hearing, should present a plan to the court and inform the court of the child's wishes. The Law Guardian Representation Standards of the NYS Bar Association's Committee on Children and the Law also contain similar standards that were violated.

Matter of Dominique A.W., 17 AD3d 1038 (4th Dept 2005), *lv denied* 5 NY3d 706

Suspended Judgment Not Appropriate

Family Court properly terminated respondent's parental rights on the ground of permanent neglect. Respondent admitted he permanently neglected the child, and the evidence at the dispositional hearing established that he lacked a realistic, feasible plan for the child's future care. The evidence also established that the best interests of the child would be served by allowing the adoption process to move forward. Thus, a suspended judgment would not have been appropriate.

Matter of Saafir M., 17 AD3d 1100 (4th Dept 2005)

Termination Not Based on Status as Mentally Ill Person

Family Court did not unconstitutionally apply SSL § 384-b in terminating respondent's parental rights. Termination was not based on her status as a mentally ill person, but on testimony that she was unable by reason of her mental illness to care for her children presently and in the foreseeable future. Family Court based its decision on those portions of the testimony of the court-appointed psychologist and respondent's treating psychiatrist in which the two experts agreed: both agreed that a major psychotic episode would occur if respondent stopped taking her medication. Based on that testimony, and on the fact that respondent was previously convicted of manslaughter in the first degree for her role in the death of her other child, the Appellate Division concluded the court properly terminated her parental rights.

Matter of Justice T., 19 AD3d 1079 (4th Dept 2005), *lv denied* 5 NY3d 707

Termination Affirmed

The Appellate Division affirmed Family Court's termination of respondent's parental rights with respect to their two children. Petitioner met its burden of establishing it made diligent efforts and also met its burden of establishing that each respondent "failed . . . to plan for the future of the children. . . ." Neither parent succeeded in overcoming the problems that initially endangered the children and prevented their safe return. The record did not support the contention that Family Court erred in relying upon documents not in evidence and any alleged error was harmless because the dispositional determination was supported by admissible evidence.

Matter of Nathaniel W., 24 AD3d 1240 (4th Dept 2005)*, lv denied* 6 NY3d 711

Respondent Refused Telephone Participation; Due Process Not Violated

Family Court terminated respondent's parental rights on the ground of abandonment. At the time of the hearing respondent was incarcerated in another state; he participated in the first two court appearances by telephone, but thereafter refused to participate by telephone. The Appellate Division affirmed. After noting that the order was incorrectly titled a "default" order of disposition since respondent's counsel appeared at and participated in the hearing, the Appellate Division rejected the contention of respondent that he was denied his right to due process when Family Court proceeded in his absence. Petitioner established that respondent failed to communicate with the child or petitioner during the relevant time period.

Matter of Danielle M., 26 AD3d 748 (4th Dept 2006)*, lv denied* 7 NY3d 703

Visitation Rights Extinguished by Termination of Parental Rights

Respondent appealed from an order terminating her parental rights with respect to her son Saafir and from an order dismissing her petition seeking visitation with him. The Appellate Division affirmed. Respondent could not challenge a prior order granting in part and denying in part her motion to vacate a dispositional order entered upon her default. The Appellate Division had affirmed the prior order insofar as it denied the motion with respect to a half sister and respondent was not aggrieved by that part of the order granting her motion with respect to Saafir. The record supported the termination of rights in Saafir's best interests, and the termination extinguished respondent's rights to seek visitation and rendered her appeal from the second order moot.

Matter of Saafir A.M., 28 AD3d 1217 (4th Dept 2006)

Incarcerated Respondent's Proposals Unrealistic Alternatives to Foster Care

Family Court properly adjudicated respondent's children to be permanently neglected and terminated his parental rights. Because respondent was incarcerated and not eligible for parole until 2027, petitioner was not required to provide services and other assistance so that the problems preventing the children's discharge from care could be resolved or ameliorated. Petitioner established that it explored the planning resources suggested by respondent and kept respondent apprised of the children's progress. Although respondent maintained consistent contact with petitioner and the children, he failed to plan for the children's future in that the resources he proposed were not realistic alternatives to foster care. Given the circumstances, petitioner provided what services it could.

Matter of Jaylysia S.-W., 28 AD3d 1228 (4th Dept 2006)

Termination Based on Mental Illness Affirmed

Following the Appellate Division's determination that Family Court properly terminated respondent's parental rights to another child of respondent on ground of mental illness, petitioner moved for summary judgment in this proceeding. The court denied the motion without prejudice, on the ground that respondent should be allowed to cross-examine the court-appointed expert, who had issued a new evaluation. Family Court did not err in considering petitioner's renewed motion for summary judgment at the conclusion of the expert's testimony, and did not err in determining that the only evidence respondent was allowed to present was evidence from expert witnesses who would contradict the testimony of the court-appointed expert. The court did not abuse its discretion in denying his request for an adjournment to enable him to call his expert to testify: the child had been in foster care for 2 ½ years, petitioner's motion had been made almost a year earlier, at which time the only opposition of respondent to the motion was that he should be allowed to cross-examine the court-appointed expert, and respondent was unable to give any indication that the testimony of his expert would be favorable to him.

Matter of Clarence S., 28 AD3d 1253 (4th Dept 2006), *lv denied* 7 NY3d 706

Custody Petition Properly Considered During Dispositional Hearing

Family Court dismissed the petition seeking to terminate respondent's parental rights with respect to her son and daughter and granted the petition of the daughter's paternal great-aunt seeking custody of the daughter. On appeal by the Department, the Appellate Division held that Family Court did not err in considering the custody petition during the dispositional hearing: where a non-parent relative petitions for custody during pendency of a permanent neglect proceeding, custody should be considered in the context of a dispositional hearing conducted on the underlying permanent neglect petition. The record supported the determination that it was in the daughter's best interests to be placed with her great-aunt rather than commit guardianship and custody of the daughter to the Department for adoption by her foster parents.

Matter of Gordon B.B., 30 AD3d 1005 (4th Dept 2006)

Respondent Lacked Standing to Challenge Permanency Orders

Family Court properly terminated respondent's parental rights to two of her children on the ground of mental retardation and committed their care and custody to petitioner. Petitioner established by clear and convincing evidence that respondent suffered from subaverage intellectual functioning that originated during her developmental period and is associated with impairment in adaptive behavior to such an extent that if the children were placed in or returned to her custody, they would be in danger of becoming neglected. Because her parental rights had been terminated, respondent lacked standing to challenge related permanency hearing orders.

Matter of April C., 31 AD3d 1200 (4th Dept 2006)

No Error in Refusing to Enter Suspended Judgment

Family Court terminated respondent's parental rights and committed the care and guardianship of the children to petitioner, freeing the children for adoption. The Appellate Division affirmed. The court did not abuse its discretion in refusing to enter a suspended judgment. The court determined after a hearing that a suspended judgment was not appropriate in view of respondent's lack of consistent visitation or any meaningful participation in the children's counseling, even if originally hampered by transportation and financial concerns. The transportation and financial concerns were insufficient to warrant additional time to correct the underlying problems and reunite the family.

Matter of Danielle N., 31 AD3d 1205 (4th Dept 2006)

Suspended Judgment Reversed and Respondent's Rights Terminated

After determining respondent permanently neglected her child, Family Court entered a suspended judgment following a dispositional hearing. The Appellate Division reversed and freed the child for adoption. Although the sole issue at the hearing should have been the best interests of the child, Family Court, in an effort to give respondent a "final chance," erroneously relied solely on factors concerning respondent's attempts to remain drug free in issuing the suspended judgment. As Family Court properly found, the foster parents planned to adopt, respondent had a long history of drug abuse and relapse, and there was no evidence that respondent had a stable home or employment. The Appellate Division found in addition that the child's behavior deteriorated markedly after overnight visitations with respondent and that the foster parents provided the child with a caring and nurturing home since the child was two days old.

Matter of Brian C., 32 AD3d 1224 (4th Dept 2006), *lv denied* 7 NY3d 717

Respondent Violated At Least One Term of the Suspended Judgment

Family Court properly revoked a suspended judgment and terminated respondent's parental rights. Although Family Court Act §§ 631 and 633 allow a court to suspend judgment for up to one year, providing a brief grace period designed to prepare a parent, previously found to have permanently neglected his or her child, to be reunited with the child, in this case the court properly found that respondent violated at least one of the terms of the suspended judgment.

Matter of Nikkias T., 32 AD3d 1220, *lv denied* 7 NY3d 716

"Some Progress" Insufficient

Family Court properly adjudicated respondent's children to be permanently neglected and terminated respondent's parent rights. Respondent failed to comply with the requirements of his service plan that he successfully complete substance abuse counseling, mental health treatment, and domestic abuse counseling and comply with the conditions of his parole. Although respondent made some progress after the filing of the petition, the record established he was still abusing drugs, had anger issues, and had no employment or stable housing. Thus, any progress was not sufficient to warrant the further prolongation of the children's unsettled familial status.

Matter of Jose R., 32 AD3d 1284 (4th Dept 2006), *lv denied* 7 NY3d 718

Respondent Unlikely to Change Behavior

While noting that respondent failed to preserve her contention on appeal that Family

Court abused its discretion in failing to issue a suspended judgment, the Appellate Division concluded that a suspended judgment would not have been in the children's best interests because the evidence at the dispositional hearing established that respondent was unlikely to change her behavior. Further, the court did not err in refusing to award custody to petitioner grandmother: the evidence supported the court's determination that it was in the best interests of the children to remain in the custody of DSS to allow adoption by the children's foster parents.

Matter of Bryce R.W., 32 AD3d 1312 (4th Dept 2006)

Post-termination Contact Now Possible

The Appellate Division affirmed that part of Family Court's order that terminated respondent's parental rights on the ground of mental illness, and rejected the contention that the court was required to hold a separate dispositional hearing, but in an apparent break with previous decisions, remitted for a hearing on whether some form of posttermination contact with respondent was in the child's best interests. Recognizing that termination results in an abrupt and complete cessation of contact between a child and the parent, and that psychological harm may result from severing the bond between a child and biological parent, particularly where the child is older and has strong emotional attachments to the birth family, the Appellate Division held that in the event that parental rights are terminated on the ground of mental illness or mental retardation, or after a finding of permanent neglect, Family Court may exercise its discretion in determining whether some form of posttermination contact with the biological parent is in the best interests of the child. The court may consider, among other things, the ages of the children, the bond between respondent and the children, and the likelihood of adoption. To the extent previous decisions hold otherwise, they are no longer to be followed.

Matter of Kahlil S., 35 AD3d 1164 (4th Dept 2006), *lv dismissed* 8 NY3d 977

Termination Based on Abandonment Affirmed

Respondent's parental rights were properly terminated. Petitioner established by clear and convincing evidence that respondent abandoned her children by failing to visit them or communicate with them or petitioner during the six-month period immediately preceding the filing of the petition. Neither respondent's incarceration nor the participation of respondent in an inpatient drug rehabilitation program during portions of the six-month period excused her failure to communicate with the children or petitioner. Family Court properly determined that respondent's filing of a visitation petition near the conclusion of the six-month period did not preclude a finding of abandonment.

Matter of Anthony T., 35 AD3d 1201 (4th Dept 2006), *lv denied* 8 NY3d 809

“Some Progress” Insufficient: Termination Affirmed

Family Court terminated respondent’s parental rights and freed the children for adoption. The Appellate Division affirmed. The court did not abuse its discretion in declining to enter a suspended judgment. Although the record established that respondent made some progress with his substance abuse treatment while he was incarcerated, the progress was not sufficient to warrant further prolongation of the children’s unsettled status.

Matter of Arella D.P.-D., 35 AD3d 1222 (4th Dept 2006), *lv denied* 8 NY3d 809

No Denial of Due Process Based on Respondent’s Absence

Family Court properly adjudicated respondent’s child to be permanently neglected and terminated respondent’s parental rights. Respondent was not denied due process when the court conducted fact-finding and dispositional hearings in her absence. A parent’s right to be present is not absolute and when faced with the unavoidable absence of a parent, a court must balance the respective rights and interests of both parent and child in determining whether to proceed. The court providently exercised its discretion in respondent’s absence. Respondent and the father of her two children kidnaped the children from foster care and fled to Puerto Rico. While there, the father murdered one of the children and, at the time of the hearings at issue, respondent was serving a term of incarceration in Puerto Rico imposed upon her plea of guilty arising from her failure to protect the murdered child.

Matter of Giovannie M.-V., 35 AD3d 1244 (4th Dept 2006)

Matter Remitted for Hearing on Post-termination Contact

On appeal from an order terminating her parental rights on the ground of mental illness, respondent contended that Family Court should have provided for posttermination contact. Based on the evidence at the hearing, the Appellate Division concluded that posttermination contact might be appropriate under the circumstances, and remitted to Family Court to determine, following a further hearing if necessary, if contact was in the child’s best interests.

Matter of Thomas B., 35 AD3d 1289 (4th Dept 2006), *lv dismissed* 8 NY3d 936