

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

Case Digest 2014

Covers January through December 2014 Decision Lists

ADOPTION

Family Court Properly Terminated Post-Adoption Visits But Erred by Failing to Direct That Annual Progress Reports and Photographs be Provided to Petitioner

Family Court terminated post-adoption contact between petitioner and the subject child. The Appellate Division modified by granting the petition in part and directing respondent to comply with that part of the agreement that required her to provide petitioner with annual progress reports and photographs in the event that petitioner provided respondent with annual notice of her address. Petitioner, the biological mother of the subject child, entered into an agreement with respondent, the adoptive mother of the child, which provided for biannual visits with the child as a condition of her judicial surrender of her parental rights. The agreement provided, among other things, that petitioner was entitled to visit the child for a period of two hours in the months of July and December, and that petitioner was obligated to contact respondent by the first Monday of July and the first Monday of December to arrange visits. The parties orally modified the agreement to provide for visitation on the day after Thanksgiving, rather than in December. It was undisputed that petitioner failed to contact respondent in July 2012, and that in November 2012, she did not contact respondent until November 15, rather than on November 5, which was the first Monday of November. Respondent refused to schedule the visit in November 2012. The court properly determined that, although petitioner was ready, willing, and able to visit with the child in November 2012, she breached the agreement based upon her failure to contact respondent for a visit in July and her failure to provide timely notice of the visit in November. Moreover, the court was entitled to credit respondent's testimony regarding the special needs of the child and respondent's opinion that continued visits with petitioner were not in the best interests of the child based upon the child's needs and petitioner's periodic inattention to the child during the two-hour visits. Nevertheless, the court erred by failing to grant the petition to the extent that it sought to enforce that part of the agreement that provided that in the event that visitation was terminated, respondent was required to provide annual progress reports and photographs to petitioner.

Matter of Sapphire W., 120 AD3d 1584 (4th Dept 2014)

ATTORNEYS FEES - AFC

Supreme Court Erred in Failing to Appoint AFC Pursuant to 22 NYCRR Part 36

Supreme Court denied the Attorney for the Children's motion for an award of attorney's fees from defendant. The Appellate Division modified by granting the motion in part, appointing the AFC nunc pro tunc pursuant to 22 NYCRR part 36, directing defendant to pay attorney's fees to the Administrator of the estate of the AFC, and remitted the matter to determine the amount of those fees. There was good cause to appoint the AFC pursuant to 22 NYCRR part 36, which governs the appointments of attorneys for children who are not paid from public funds. Therefore, Supreme Court erred in failing to do so. The court described the case as one of the most contentious and protracted proceedings it had ever presided over. The case included two years of litigation, 32 court appearances, a lengthy trial, and two significant motions before the Appellate Division. Given the unusual and complex nature of the litigation, it was essential that the AFC continue his work on behalf of the children. Thus, the AFC should have been appointed pursuant to 22 NYCRR part 36 nunc pro tunc. Furthermore, the court should have ordered defendant, the monied spouse, to pay the AFC's fees. The dissent concluded that the AFC failed to establish that there was good cause to appoint him as a private pay AFC instead of permitting him to continue representing the children as a state pay AFC, and further failed to submit any reason why such an order should be entered nunc pro tunc despite defendant's lack of record notice that he would be required to pay for the AFC's services.

Stefaniak v Zulkharnain, 119 AD3d 1418 (4th Dept 2014)

CHILD ABUSE AND NEGLECT

Causal Connection Established Between Parents' Conduct and Impairment or Risk of Impairment to Children

Family Court adjudged that respondent mother and respondent father neglected their seven children. The Appellate Division affirmed. The finding of neglect was supported by the requisite preponderance of the evidence. The out-of-court statements of the three oldest children adequately cross-corroborated one another and established that the parents engaged in acts of domestic violence in the presence of the children. The evidence further established that the parents routinely allowed the oldest child, then 10 years old, to supervise and discipline his six younger siblings in the parents' absence. The record also supported the court's finding that the parents coerced the children into not being truthful with persons investigating the allegations against the parents. The parents' contention was rejected that petitioner failed to establish a causal connection between their conduct and any impairment or risk of impairment to the children. Viewed as a whole, the evidence showed that the oldest girl suffered from extreme distress, the source of which was her home environment, and that the physical, mental or emotional condition of all of the children was in imminent danger of becoming impaired due to the parents' pattern of inattention to the children's need for a safe environment.

Matter of Hannah L., 113 AD3d 1137 (4th Dept 2014)

Dismissal of Neglect Petition Reversed; Petition Granted

Family Court dismissed the neglect petition against respondent mother. The Appellate Division reversed, granted the petition, adjudicated respondent to have neglected the subject child, and remitted the matter for a dispositional hearing. The respondent's failure to provide proper supervision was the first basis for neglect alleged in the petition. On the morning of the incident, while the mother was taking a nap, the 3 ½ year old child left the apartment on her own. The child wandered away approximately 1 ½ blocks, and was eventually found by a neighbor, who took the child to her home and then assisted the police in attempting to locate the child's caretaker. Although the hearing court's determinations were entitled to great deference, the court erred in holding that DSS failed to establish, by a preponderance of the evidence, that the single incident at issue was sufficient to constitute neglect. The mother was aware, or should have been aware, of the intrinsic danger of going to sleep without ensuring that the child would remain securely in the apartment. There was no evidence that the mother suffered from any physical ailment that prevented her from properly supervising the child, nor was there any evidence that the mother took proactive steps, such as locking the door, using a child lock, or obtaining a caregiver to prevent the child from leaving the apartment while the mother slept during the day. Therefore, petitioner met its burden of establishing that the imminent impairment of the child's physical, emotional or mental condition was a consequence of the mother's failure to exercise a minimum

degree of parental care. The condition of the mother's apartment was the second basis for neglect alleged in the petition. The evidence at the fact-finding hearing established that there were several garbage bags on the porch, and in the kitchen and living room; there was a mound of toys covering the livingroom floor; and there were dirty dishes both overflowing the kitchen sink and stacked next to the toilet in the bathroom. In addition, the freezer was full of ice; the bottom drawer of the refrigerator contained moldy fruit floating in several inches of dirty water; and the bathroom sink was full of a grayish-brown substance which appeared moldy and gel-like. Moreover, in the living room, where the child slept, cat litter and feces were in and around a large trash can lid that was accessible to the child. There was evidence that the mother previously admitted that the child had been exposed to cat feces in the past and that the mother had been warned about the safety hazards of failing to prevent the child's access to the litter and feces. There was also evidence that the child had access to the large quantities of garbage within the apartment. During one visit by a DSS caseworker, the child was observed wearing no pants or underwear, with a disposable razor cover stuck between her buttocks. Therefore, the court's determination that the unsafe and unsanitary condition of the mother's apartment, on numerous occasions, did not place the child's physical, mental or emotional state in imminent danger of impairment, was not supported by a sound and substantial basis in the record.

Matter of Raven B., 115 AD3d 1276 (4th Dept 2014)

No Basis to Disturb Court's Assessment of Expert Testimony

Family Court determined that respondent father neglected his child. The Appellate Division affirmed. The court's finding of derivative neglect was supported by a preponderance of the evidence. The father's contention was rejected that the court accorded too much weight to a psychological evaluation conducted several years prior to the hearing. The record supported the court's determination that the testimony of petitioner's expert, which was based on an older, but more thorough, evaluation, was more credible than the testimony provided by the father's expert, which was based entirely on the father's self-reported history. Therefore, there was no basis to disturb the court's assessment of the expert testimony.

Matter of Burke H., 117 AD3d 1455 (4th Dept 2014)

Petitioner Entitled to Seek Removal of Child By Way of Revocation of Order of Supervision

Family Court placed the older of the subject children with petitioner following a period of trial placement with the father. The Appellate Division affirmed. The father's contention was rejected that the court abridged his fundamental parental rights and violated his right to equal protection by removing the child from placement with him without requiring petitioner to commence a neglect proceeding pursuant to Family Court Act article 10. By its order to show cause, petitioner sought modification of the placement based upon the father's violation of the additional conditions to which he was bound, which included

providing proof of income sufficient to prove that he had the means to care for the child, obtaining his own residence, prohibiting the child from being left in the care of a certain woman with a criminal history, placing the child in daycare when he worked, allowing petitioner access to his home, and terminating any relationship with a person involved in the “prostitution industry.” The father was subject to the supervision of petitioner and, when he violated the supervision order as modified by the additional conditions, petitioner was entitled to seek removal of the child by way of revocation of the order of supervision. Petitioner established by a preponderance of the evidence that the father violated those additional conditions to which he stipulated to be bound and that his violation was willful.

Matter of Dashaun G., 117 AD3d 1526 (4th Dept 2014)

Finding that Father Sexually Abused Five Year Old Child Upheld

Family Court adjudged that respondent father had abused one of his children and derivatively neglected his other two children. The Appellate Division affirmed. The finding of abuse was supported by the requisite preponderance of the evidence. Although the father was correct that the court failed to comply with Family Court Act Section 1051 (e) by specifying the particular sex offense perpetrated upon the child as defined in Penal Law article 130, the error was technical in nature and harmless. In light of the fact that the child was five years old at the time of the contact, the specific offense could only be sexual abuse in the first degree. The court was permitted to infer the sexual gratification element from the conduct itself if that conduct involved the deviate touching of the child’s genitalia, which was the case in this matter. The finding of derivative neglect with respect to the other two children was supported by a preponderance of the evidence.

Matter of Eden S., 117 AD3d 1562 (4th Dept 2014)

Finding of Derivative Neglect Affirmed

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. The court’s finding of derivative neglect was supported by a preponderance of the evidence. Petitioner established that the neglect of the child’s older siblings was so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still existed, and that the mother failed to address the problems that led to the neglect findings with respect to her other children. The court properly credited the psychologist’s report and opinion, which were based upon numerous visits with the mother and an extensive review of documentation.

Matter of Burke H., 117 AD3d 1568 (4th Dept 2014)

Neglect Finding Affirmed Where Family’s Apartment Unsafe and Unsanitary

Family Court determined that respondent father neglected the subject children. The

Appellate Division dismissed the appeal insofar as it concerned the placement of the children in the custody of their maternal grandmother, upon the father's consent thereto, and affirmed. Family Court's determination that the father neglected his children was supported by a preponderance of the evidence. Where issues of credibility were presented, the hearing court's determination must be afforded great deference. Petitioner presented evidence establishing, among other things, that the family's apartment was unsafe and unsanitary, because of the neglect of the parents. Thus, the court properly determined that the children's health was in imminent danger of impairment because of the father's actions and inaction.

Matter of Holly B., 117 AD3d 1592 (4th Dept 2014)

Mother Failed to Preserve Challenge to Voluntariness of Admission

Family Court placed the subject child in the custody of petitioner. The Appellate Division affirmed. The mother's contention was rejected that her admission of neglect was involuntarily entered because she stated during the colloquy that she would do or say anything to get her child back. Because the mother did not move to vacate or withdraw her admission in Family Court, she failed to preserve for review her challenge to the voluntariness of her admission. In any event, before accepting the mother's admission, the court made clear that it did not want her to admit to something that was not true. Thereafter, the mother admitted to the facts underlying the neglect petition.

Matter of Joseph E.K., 118 AD3d 1324 (4th Dept 2014)

Neglect Finding Affirmed Where Mother Failed to Provide Adequate Supervision

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. One of the mother's children severely burned herself with a lighter while the mother's 15-year-old daughter babysat seven of the younger children. The mother testified that she left a lighter in her purse and that she placed the purse in a "purse bucket" in her bedroom, a container that anyone could open. The mother also testified that she believed that her 15-year-old daughter was mature and responsible enough to be left in charge of her siblings. Although she initially testified that she left the 15-year-old with five children on the date of the incident, the mother subsequently testified that her daughter was in fact left in charge of seven children, all under the age of seven. The 15-year-old child admitted to being asleep on the couch when the incident occurred. Furthermore, even after the subject incident, a caseworker arrived at the mother's house and found a 14-year-old child left in charge of the younger siblings. Moreover, as part of the investigation leading up to the instant neglect petition, it was reported that four of the children were seen playing unsupervised near a busy city street for at least five hours. Thus, the mother neglected the children based upon her failure to provide adequate supervision for all of the subject children. Additionally, the court properly found that petitioner established educational neglect for three of the subject children.

Matter of Airionna C., 118 AD3d 1430 (4th Dept 2014)

Neglect Finding Affirmed Where Mother Failed to Provide Adequate Shelter

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division affirmed. There was no fact-finding hearing, and the parties agreed that Family Court's determination would be based solely upon a stipulation that, among other things, the mother had been diagnosed with dysthymic disorder, generalized anxiety disorder, posttraumatic stress disorder, and effective psychosis borderline personality disorder NOS, and the mother was unable to maintain stable housing between June and December 2011. Petitioner failed to establish by a preponderance of the evidence that the child was in imminent danger of becoming impaired as a consequence of the mother's mental condition. However, the finding of neglect based on the mother's failure to provide adequate shelter was supported by a preponderance of the evidence and was, by itself, sufficient to support the finding of neglect.

Matter of Jesus M., 118 AD3d 1436 (4th Dept 2014)

Derivative Neglect Finding Affirmed Where Only Allegation of Misconduct Occurred More Than Two Years Prior to Birth of Subject Child

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division affirmed. The mother's contention was rejected that the evidence was insufficient to support the finding of derivative neglect because the only allegation of misconduct occurred more than two years prior to the subject child's birth and was limited to the abuse of the mother's eldest child by respondent father, the subject child's father. Inasmuch as the paramount purpose of Family Court Act article 10 was the protection of the physical, mental, and emotional well-being of children, and mindful of the particular vulnerability attendant to newborn infants such as the subject child, Family Court's finding of derivative neglect was justified on the record.

Matter of Tristyn R., 118 AD3d 1468 (4th Dept 2014)

Court Erred in Allowing Mother's Attorney to Withdraw and Proceeding in Mother's Absence

Family Court determined that respondent mother neglected the subject children. The Appellate Division reversed and remitted for the assignment of counsel and a new hearing. The court erred in allowing the mother's attorney to withdraw and in proceeding with the hearing in the mother's absence because the attorney failed to provide reasonable notice to the mother that she planned to withdraw. Thus, although the record fully supported the finding that the mother neglected the children, that finding could not stand because the mother was denied due process.

Matter of Joslyn U., 121 AD3d 1521 (4th Dept 2014)

Court Erred in Failing to Adjourn Hearing

Family Court adjudged that respondent mother neglected her children. The Appellate Division modified and remitted to the trial court for a new dispositional hearing. The appeal was not moot. Although the mother consented to a subsequent finding of neglect, the finding of neglect here constituted a permanent and significant stigma that could affect the mother's status in future proceedings. The finding of neglect was supported by a preponderance of the evidence. Any hearsay that was improperly admitted was harmless because the result would have been the same if the hearsay had been excluded. The court erred, however, in denying the mother's attorney's request to adjourn the dispositional hearing because the mother was unable to attend. There was good cause for the request, the proceedings were not protracted, and this was the mother's first request for an adjournment.

Matter of Tyler W., 121 AD3d 1572 (4th Dept 2014)

Court Properly Excluded Stepfather From the Courtroom During Stepdaughter's Testimony

Family Court determined that respondent sexually abused his stepdaughter and derivatively neglected his other stepchildren. The Appellate Division affirmed. The findings of abuse were supported by a preponderance of the evidence. The court did not abuse its discretion in excluding respondent from the courtroom during his stepdaughter's testimony. The court properly balanced the respective interests of the parties and, based upon the hearing testimony, reasonably concluded that the stepdaughter would suffer emotional trauma if she were compelled to testify in open court. Further, the stepfather's counsel was allowed in the courtroom and was given the right to cross-examine the child; therefore, respondent's constitutional rights were not violated. The court's finding of sexual abuse was supported by a preponderance of the evidence. The out-of-court statements of the stepdaughter were sufficiently corroborated by her sworn in-camera testimony describing the incidents of sexual abuse. The consistency of her statements enhanced their reliability. The court did not err in finding derivative abuse of respondent's other stepchildren.

Matter of Lyly M.G., 121 AD3d 1586 (4th Dept 2014)

Neglect Determination Supported by Legally Sufficient Evidence

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. The evidence presented by petitioner provided a sound and substantial basis for the court's finding that the children were in imminent danger of impairment as a result of the mother's failure to exercise a minimum degree of care in providing the children with supervision or guardianship. Even assuming, *arguendo*, that the court did not adequately state the grounds for its determination, any error was harmless because the determination was amply supported by the record.

Matter of Jeromy J., 122 AD3d 1398 (4th Dept 2014)

Insufficient Evidence of Severe Abuse

Family Court adjudged that respondents Matthew E. and the subject children's mother abused and severely abused Zoe L. and derivatively abused and derivatively severely abused Makela L. The Appellate Division modified by vacating the findings that Matthew E. abused Zoe and derivatively abused Makela and by vacating the findings of severe abuse with respect to Zoe and derivative severe abuse with respect to Makela. Petitioner established a prima facie case of abuse with respect to Zoe against the mother. Petitioner also established by a preponderance of the evidence that Makela was derivatively abused by the mother. However, the findings that Matthew abused Zoe and derivatively abused Makela were against the weight of the evidence. Further, there was insufficient evidence that Zoe was severely abused or Makela was derivatively severely abused by the mother or Matthew.

Matter of Zoe L., 122 AD3d 1445 (4th Dept 2014)

CHILD SUPPORT

Child Support Provisions in Judgment of Divorce Modified

Pursuant to a judgment of divorce, Supreme Court awarded defendant mother maintenance and child support. The Appellate Division modified and remitted for further proceedings. The court erred in its calculation of the combined parental income. The judgment was modified by providing that plaintiff's net income was \$953,600.93 and that the combined parental income was \$983,792.93. The record established that the court articulated a proper basis for applying the Child Support Standards Act to the combined parental income in excess of the statutory cap. However, the court erred in failing to order that child support be adjusted upon the termination of maintenance, pursuant to Domestic Relations Law Section 240 (1-b) (b) (5) (vii) ©. Accordingly, the Appellate Division further modified the judgment by providing that there shall be an adjustment of child support upon the termination of plaintiff's maintenance obligation to defendant, and remitted the matter to determine the proper amount of that adjustment. The court properly required plaintiff to maintain a policy of life insurance to secure his child support and maintenance obligations. The court's refusal to require plaintiff to post security was proper.

Martin v Martin, 115 AD3d 1315 (4th Dept 2014)

Judgment of Divorce Modified With Regard to Child Support

Supreme Court entered a judgment of divorce that, among other things, determined plaintiff's child support and maintenance obligations. The Appellate Division modified the judgment by reducing plaintiff's weekly child support obligation from \$254.23 to \$210.85 and reducing his weekly maintenance obligation from \$337.15 to \$290.40. Plaintiff's contention was rejected that the court did not properly calculate defendant's income because it failed to consider funds that she received from land and gas leases. In his own proposed findings of fact, plaintiff stated that defendant's income for support purposes was \$18,334, which was the exact figure determined by the court. Thus, plaintiff's contention was unpreserved for review. However, the judgment provided for a higher award of child support than that set forth in the court's findings of fact, which controlled.

Winship v Winship, 115 AD3d 1328 (4th Dept 2014)

Amount of Father's Annual Income and Amount of Child Support Vacated

Family Court denied the mother's written objections to an order of the Support Magistrate on her petition to modify a prior child support order. The Appellate Division modified by vacating the amount of respondent father's annual income and the amount of child support awarded and remitted to Family Court for further proceedings. It did not appear that the father's 2011 rental income was included in his gross income, and the record was insufficient to determine this amount. On remittal, both rental income and

rental losses were to be considered by the court in determining the proper amount of the father's income for purposes of recalculating his child support obligation.

Matter of Bow v Bow, 117 AD3d 1542 (4th Dept 2014)

Defendant Entitled to Claim Children as Dependents for Tax Purposes

Supreme Court directed defendant to pay maintenance to plaintiff, among other things. The Appellate Division modified by ordering that defendant was entitled to claim the parties' children as dependents for tax purposes, provided that he remained current in his child support and maintenance obligations. There was a vast discrepancy in the incomes of the parties, with plaintiff's sole source of income consisting of Social Security Disability payments.

Myers v Myers, 118 AD3d 1315 (4th Dept 2014)

Parties' Obligation to Maintain Life Insurance Ceased Upon Termination of Their Respective Child Support Obligations

Supreme Court directed plaintiff to cooperate with defendant regarding a life insurance policy on plaintiff's life and ordered both parties to name their children as beneficiaries on their existing life insurance policies. The Appellate Division modified by providing that the parties' obligation to maintain life insurance naming the children as beneficiaries ceased upon the termination of their respective child support obligations. The decision whether to direct the maintenance of a life insurance policy pursuant to Domestic Relations Law Section 236 (B) (8) (a) was within the discretion of the court. The court properly required both parties to name the children as beneficiaries on their individual life insurance policies in order to secure their respective child support obligations. However, the life insurance obligation ceased upon termination of the child support obligation.

Gay v Gay, 118 AD3d 1331 (4th Dept 2014)

Fugitive Disentitlement Doctrine Properly Applied

Family Court applied the fugitive disentitlement doctrine and dismissed respondent's petition to vacate various court orders. The Appellate Division dismissed and granted leave to move to reinstate the appeal upon the posting of an undertaking with Family Court in the amount of \$25,000 within 60 days of service of a copy of the order of the Court with notice of entry. Family Court properly determined that the fugitive disentitlement theory applied to respondent's application to vacate an order of the court, entered upon respondent's default, which determined that respondent was in willful violation of a prior support order, and a further order committing respondent to six months of incarceration. Furthermore, the fugitive disentitlement theory also applied to the appeal. Respondent, a California resident, was the subject of an arrest warrant in this State issued by the court. Respondent refused to return to this State. By

respondent's default and absence, he was evading the very orders from which he sought appellate relief and had willfully made himself unavailable to obey the mandate of the court in the event of an affirmance. The amount of the required undertaking, \$25,000, constituted the amount of child support that respondent owed at the time the court determined that he willfully violated the prior support order.

Matter of Shehatou v Louka, 118 AD3d 1357 (4th Dept 2014)

Judgment of Divorce Modified by Increasing Amount of Plaintiff's Child Support Obligation Based on Court's FICA Errors

Supreme Court entered an amended judgment of divorce that, among other things, distributed the marital property. The Appellate Division modified and remitted for further proceedings. Defendant's contentions were rejected that the court abused its discretion in either failing to impute income to plaintiff for the first six months after he was terminated by his company, or in thereafter imputing income to plaintiff of only \$140,000 per year. The record supported the court's determination that plaintiff's termination was not his fault, and thus it was reasonable to thereby allow him six months in which to find other employment. Moreover, when considering plaintiff's education, experience and long-term earning history, it could not be said that the court abused its discretion by refusing to impute income to plaintiff that was greater than \$140,000 per year. However, the court erred in its FICA calculation for 2011 because, after the court imputed income of \$140,000 to plaintiff, it calculated plaintiff's FICA deduction as if he would have paid the social security portion of FICA on the full amount of his imputed income, which was considerably higher than the social security wage limit in 2011. The court also erred in deducting FICA from plaintiff's Canadian income before calculating child support given that those taxes were not paid on the income he earned in Canada. Therefore, the amended judgment was further modified by increasing the amount of plaintiff's child support obligation based on the court's FICA errors, in a sum to be determined upon remittal to Supreme Court.

Belkhir v Amrane-Belkhir, 118 AD3d 1396 (4th Dept 2014)

Defendant Properly Challenged by Motion Child Support Provisions That Merged With Judgment of Divorce

Supreme Court denied defendant's motion to vacate the judgment of divorce. The Appellate Division modified and remitted for further proceedings. Supreme Court erred in denying that part of defendant's motion seeking vacatur of the child support provisions of the judgment of divorce without conducting a hearing. The judgment of divorce specifically provided that the child support provisions of the parties' 2009 Property Settlement and Separation Agreement (Agreement) merged with the judgment of divorce. Although in his motion defendant sought vacatur of the judgment of divorce in its entirety and a determination that the Agreement was unenforceable, defendant conceded at oral argument before the Court that he was seeking to challenge only the child support provisions of the judgment. Inasmuch as the child support provisions of

the Agreement merged into the judgment of divorce, those provisions of the Agreement ceased to exist as a separately enforceable contract. Therefore, defendant was not required to commence a plenary action to challenge those provisions but, rather, properly challenged those provisions of the judgment by motion.

Matter of Bryant v. Carty, 118 AD3d 1459 (4th Dept 2014)

Amended Judgment Modified by Reducing Amount of Life Insurance to Secure Child Support Obligations

Supreme Court entered an amended judgment of divorce that, among other things, directed defendant to pay maintenance and child support. The Appellate Division modified. Defendant's contention was rejected that the court improperly required him to maintain policies of life insurance to secure his child support and maintenance obligations. However, the amount of life insurance the court required defendant to maintain with respect to his child support obligations was excessive. Therefore, the amended judgment was modified by reducing the amount of that life insurance from \$500,000 to \$300,000. Inasmuch as defendant's continuing child support obligation will decline as each of the children of the marriage either becomes emancipated or reaches the age of 21, the amended judgment was further modified by providing that the amount of life insurance defendant was required to obtain to secure his child support obligation may have a declining term that would permit defendant to reduce the amount of life insurance by the amount of child support actually paid, provided that at all times the amount of life insurance was not less than the amount of child support remaining unpaid. The amended judgment was also modified by striking therefrom the provision requiring defendant to name each child of the marriage as irrevocable beneficiary on life insurance and death benefits available to defendant through his employer until each child was emancipated.

Marfone v Marfone, 118 AD3d 1488 (4th Dept 2014)

Father Submitted to Jurisdiction of New York

Family Court denied the objections of respondent father to the order of the Support Magistrate. The Appellate Division affirmed. The court had jurisdiction over respondent because he had appeared before the court previously and admitted that he was the child's father. His voluntary appearance clearly indicated that he consented to New York's personal jurisdiction over him. The Magistrate did not err in failing to calculate respondent's child support obligation based upon 25% of his income. Here, the dispute concerned only one of the children. A court in Virginia previously granted the parties a divorce and directed respondent to pay child support for the parties other child. Later, the mother commenced this proceeding for support of the subject child who was born after the divorce was finalized. Because the Magistrate had no jurisdiction over the support proceeding in Virginia, she properly used the presumptive percentage of 17% in calculating the father's child support obligation and properly determined respondent's annual adjusted gross income after deducting the amount the father was paying for the

other child's support. The Magistrate also properly ordered the father to pay \$155 for child care services and determined that he owed support arrears in the amount of \$10,236.33. The Magistrate did not err in finding respondent in willful violation of the support order inasmuch as he failed to provide full financial documentation.

Matter of Pitka v Pitka, 121 AD3d 1521 (4th Dept 2014)

Father Willfully Violated Child Support Order

Family Court confirmed the determination of the Support Magistrate that respondent father willfully violated an order of child support and sentenced him to a term of incarceration of 60 days. The Appellate Division affirmed. The mother proved that the father failed to pay support as ordered. The father then failed to meet his burden to show competent medical evidence to support his testimony that mental health problems interfered with his ability to obtain gainful employment to meet his child support obligation or establish that he made reasonable efforts to obtain such employment. The father failed to preserve for review his contention that the Magistrate improperly assisted the mother with her testimony and was biased against him. The father's contention that he was denied effective assistance of counsel was rejected because he failed to show the absence of strategic or other legitimate explanations for counsel's alleged shortcomings.

Matter of Reinhardt v Hardison, 122 AD3d 1448 (4th Dept 2014)

CUSTODY AND VISITATION

Award of Physical Residence to Father Had Sound and Substantial Basis

Family Court awarded the parties joint custody of their daughter with primary physical residence to petitioner father. The Appellate Division affirmed. Although several factors militated in favor of awarding custody to the mother, the court's determination that it was in the child's best interests to award primary physical custody to the father was supported by a sound and substantial basis in the record. The father could provide a more stable home environment for the child than the mother. He owned a four-bedroom home and was gainfully employed, while the mother was unemployed and had resided in at least four different apartments since separating from the father. One of the mother's apartments had a problem with mice, and her residence while the proceeding was pending had only one bedroom. In addition, the father had custody of the parties' other child, and there was a preference for keeping siblings together. Furthermore, it was undisputed that, while the child was residing with the mother after the parties separated, the mother ran out of money and food on several occasions and had to ask the father for assistance, and the mother's furniture was repossessed while the proceeding was pending.

Matter of Cross v Caswell, 113 AD3d 1107 (4th Dept 2014)

Dismissal of Former Foster Parents' Custody Petition Affirmed

Family Court granted petitioner's motion to dismiss the custody petition of former foster parents, who were respondents seeking custody of the child of respondent father. The Appellate Division affirmed. At the time that the former foster parents commenced their proceeding, the child was in his father's care and custody, and the former foster parents lacked standing either to initiate their own custody proceeding or to intervene in the custody proceeding initiated by petitioner. The former foster parents also lacked standing to assert, on behalf of the child, the child's right to maintain a relationship with them. Moreover, the Attorney for the Child did not support the position of the former foster parents. The former foster parents' contention was rejected that they had standing to seek custody because of extraordinary circumstances. The court properly concluded that evidence of the father's arrest and incarceration, without more, did not meet the former foster parents' burden of establishing extraordinary circumstances. Inasmuch as the former foster parents failed to make that threshold showing, there was no basis for the court to conduct a hearing and make a determination with respect to the child's best interests. Because the former foster parents had no standing in this proceeding, they lacked standing to seek dismissal of the petition. Therefore, the court properly denied their cross motion to dismiss that petition.

Matter of Washington v Stoker, 114 AD3d 1147 (4th Dept 2014)

Award of Sole Custody to Nonparent Affirmed

Family Court awarded sole custody to petitioner, a nonparent. The Appellate Division affirmed. Respondent father's contention was rejected that there was no showing of extraordinary circumstances. The record established that respondent mother placed the child with petitioner just days after his birth in February 2010. The father disputed that he was the father of the child even after receiving the results of a DNA test confirming paternity. The father did not seek custody of the child until the child was almost one year old, after an order of filiation was entered. The father visited the child for the first time in January or February 2012, and visited only six or seven times before he stopped visiting the child in April 2012, after the site of visitation was changed to petitioner's home. The child had significant medical conditions and special needs requiring various forms of treatment, and the father demonstrated that he had no interest in learning about the child's conditions, needs and treatment. Although not preserved for review, the father's contention was without merit that the court improperly shifted the burden of proof to him when it ordered him to present his proof first. The court's determination established that it was aware that petitioner bore the burden of proof regardless of the order of presentation. There was a sound and substantial basis in the record to support the court's determination that visitation should be supervised because the father was unable to address the child's medical conditions and special needs due to his inability to understand them or his indifference to them.

Matter of Campbell v January, 114 AD3d 1176 (4th Dept 2014)

Dismissal of Petition to Modify Visitation Order Affirmed

Family Court granted respondent father's motion to dismiss without a hearing the petition seeking to modify the existing visitation order. The Appellate Division affirmed. A hearing was not automatically required whenever a parent sought modification of a custody or visitation order. The mother failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing. Moreover, the mother was not aggrieved by the court's failure to amend the order to reflect more accurately the intent of the parties inasmuch as the record indicated that the mother opposed any such amendment to the order during the underlying proceedings.

Matter of Consilio v Terrigino, 114 AD3d 1248 (4th Dept 2014)

Petition Reinstated Where Petitioner Denied Right to Counsel

Family Court dismissed without a hearing the mother's petition to modify an existing custody order. The Appellate Division dismissed the appeal insofar as it concerned the parties' older child, who had reached the age of 18 during the pendency of the appeal, reversed, reinstated the petition and remitted the matter for further proceedings. Petitioner was denied the right to counsel when Family Court sua sponte dismissed her petition in the absence of her attorney. The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding was a denial of due process and required reversal, without regard to the merits of the unrepresented party's position.

Matter of Bly v Hoffman, 114 AD3d 1275 (4th Dept 2014)

Family Court Properly Denied Respondent's Request for Adjournment

Family Court granted sole custody of the parties' child to petitioner father. The Appellate Division affirmed. The court did not abuse its discretion in denying respondent mother's request to adjourn the evidentiary hearing, and in proceeding with the hearing in her absence, where the mother failed to demonstrate that the need for the adjournment to arrange transportation was not based on a lack of due diligence on her part.

Matter of Grice v Harris, 114 AD3d 1276 (4th Dept 2014)

AFCs Properly Substituted Judgment

Family Court awarded sole custody to petitioner father. The Appellate Division affirmed. Respondent mother's contentions with respect to the court's denial of a motion by the Attorney for the Child to withdraw from representing one of the subject children were not before the Court on the appeal. The appeal was limited by the mother's notice of appeal, which did not include this issue. In addition, the record on appeal did not contain the AFC's motion to withdraw. The mother, as the appellant, submitted the appeal on an incomplete record and must suffer the consequences. The mother's contentions were unpreserved for review that the AFC representing the other subject child failed to advocate for the child's position regarding custody and visitation, and thus failed to provide him with effective representation. In any event, the mother's contention that both AFCs failed to provide the subject children with effective representation was without merit. Although an AFC must zealously advocate the child's position, an exception existed where, as here, the AFC was convinced that following the child's wishes was likely to result in a substantial risk of imminent, serious harm to the child. Both AFCs noted for the court that they were advocating contrary to their respective clients' wishes, and both amply demonstrated the substantial risk of imminent, serious harm, including the mother's arrest for possession of drugs in the children's presence, the numerous weapons that had been seized from the mother's house, and the credible evidence establishing that the mother's husband assaulted one of the subject children who attempted to intervene when the husband attacked the mother with an electrical cord. The record supported the court's conclusion that the mother repeatedly violated the court's orders directing her not to discuss the litigation with the children, as well as the orders awarding temporary custody of the children to the paternal grandfather. Based on those violations and the dangers to the subject children, the court's determination with respect to custody, limited visitation, and supervised contact was in the best interests of the children.

Matter of Lopez v Lugo, 115 AD3d 1237 (4th Dept 2014)

Supreme Court Improperly Delegated Authority to Child's Counselor

Supreme Court denied that part of defendant's motion seeking access to the subject child "until the child's counselor agrees that it would be appropriate." The Appellate Division modified by vacating the provision conditioning defendant's access to the child upon the agreement of the child's counselor, and remitted to Supreme Court for a determination of that part of defendant's motion seeking access with the child. Supreme Court improperly delegated to the child's counselor the court's authority to determine issues involving the best interests of the child.

Camacho v Camacho, 115 AD3d 1327 (4th Dept 2014)

Order Denying Permission to Relocate Affirmed

Family Court denied the father's petition seeking permission for the parties' child to relocate from New York to Maryland. The Appellate Division affirmed. The father failed to demonstrate by a preponderance of the evidence that it was in the best interests of the child to relocate to Maryland, where the father wished to live with his new wife. The father's primary motivation for relocating was financial, and he testified that he obtained an offer of a full-time teaching position at a middle school in Maryland. However, the father failed to offer any proof of that job offer, and the court made it clear that it had doubts whether the offer actually existed. Moreover, the father did not diligently seek teaching positions in the surrounding counties, and his wife, a teacher in Maryland, made no efforts to find employment in New York. The father's wife, who had no children of her own, had ties to New York, having graduated from the State University of New York at Oswego, where she met the father. Finally, a relocation to Maryland would make it difficult for the child to maintain a meaningful relationship with his mother and two brothers, who resided in central New York. The court's determination had a sound and substantial basis in the record.

Matter of Yaddow v Bianco, 115 AD3d 1338 (4th Dept 2014)

Award of Custody to Nonparent Affirmed

Family Court awarded sole custody of respondent's son to a nonparent. The Appellate Division affirmed. Respondent's contention was rejected that there was no showing of extraordinary circumstances. The record established that respondent had a history of alcohol, substance and prescription drug abuse; that he used heroin during the period of time that he had custody of the child; and that he ultimately lost custody of the child because of his drug use. At the time of the hearing, the respondent had custody of a teenage son from another relationship, and the respondent admitted that his son also had substance abuse issues. Despite a court order granting him weekly visitation, respondent visited the child only three or four times during a nearly two-year period. Further, the child had significant mental health issues and the respondent demonstrated that he had no interest in learning about the child's conditions and needs and how to treat them. The record supported the court's determination that the award of custody to petitioner was in the best interests of the child. Petitioner provided the child with a safe and stable home environment, the child was doing well in petitioner's

care, and the child enjoyed a close and loving relationship with his half sister, who also resided with petitioner.

Matter of Komenda v Dininny, 115 AD3d 1349 (4th Dept 2014)

Appeal Mooted By New Order

Family Court dismissed two petitions alleging violations of a prior custody order, and a modification petition, for lack of jurisdiction, because a divorce action was pending in Supreme Court. The Appellate Division dismissed the appeal as moot. While the appeal was pending, the parties and the Attorney for the Child entered into a stipulation modifying the parties' custody and visitation arrangement in "full satisfaction of all petitions." Upon consent of the parties, the court awarded petitioner primary physical custody, with visitation to respondent, and ordered that all prior orders were thereby vacated. Because the stipulation resulted in a new order that superceded the order being appealed, the appeal was moot.

Matter of Salo v Salo, 115 AD3d 1368 (4th Dept 2014)

Award of Custody to Grandmothers Affirmed

In each of two appeals, Family Court granted the parties joint legal custody of the subject child, with primary physical custody to petitioner. The Appellate Division dismissed the appeals insofar as they concerned the best interests of the child, and affirmed. In appeal No. 1, respondent mother appealed from an order determining that her three-year-old son's paternal grandmother, the petitioner therein, established extraordinary circumstances in seeking custody of him. In appeal No. 2, the mother appealed from an amended order determining that her one-year-old daughter's maternal grandmother, the petitioner therein, established extraordinary circumstances based upon the testimony of the paternal grandmother with respect to her petition in appeal No. 1. Following Family Court's finding in each case of extraordinary circumstances, the mother consented to findings that it was in the best interests of each child that the mother and the respective grandmother share joint custody of the child at issue and that the physical placement of the child shall be with the respective grandmother. In light of the mother's consent, the best interests portions of the order were not appealable. However, the mother's consent to the custody disposition did not eviscerate the right to contest the finding of extraordinary circumstances. With respect to the petition of the maternal grandmother in appeal No. 2, Family Court was not required to hold a hearing on the issue of extraordinary circumstances because it possessed sufficient information to render an informed determination on that issue based upon the evidence presented at the hearing in connection with the paternal grandmother's petition in appeal No.1. The paternal grandmother testified that, during the period from January 2011 to September 2011, the mother moved with the children six times after being evicted from her apartment. The mother lived with friends and in motels during that period, and the paternal grandmother observed extremely dirty living conditions in the various locations. Furthermore, the paternal grandmother testified

that, at one location, the mother's friends threw the mother's and grandson's belongings into the street, and that the mother failed to obtain necessary medical care for the grandson. Moreover, the grandmother observed a negative change in her grandson's demeanor and behavior. Therefore, Family Court properly determined that the paternal grandmother in appeal No. 1 and the maternal grandmother in appeal No. 2 established that the mother's unstable and unsanitary living conditions rendered her unfit, and thus established that extraordinary circumstances existed to warrant a hearing to determine the best interests of the children.

Matter of Braun v Decicco, 117 AD3d 1453 (4th Dept 2014)

Family Court Properly Awarded Physical Residency to Mother Notwithstanding Mother's Relocation With Children to Maine Without Father's Permission

Family Court awarded the parties joint custody of their children, with physical residency to respondent mother. The Appellate Division affirmed. Inasmuch as the case involved an initial custody determination, it was not properly characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* need be strictly applied, notwithstanding the mother's relocation to Maine with the children without the father's consent. The court's determination to award the mother primary residency of the children had a sound and substantial basis in the record. The mother had been the children's primary caretaker since their birth and was more involved in the children's lives than the father. Although the children's relocation arguably had a negative impact on the children's relationship with the father, relocation was not a proper basis upon which to award primary physical custody to the father inasmuch as the children would need to travel between the parties' two residences regardless of which parent was awarded primary physical residency.

Matter of Quistorf v Levesque, 117 AD3d 1456 (4th Dept 2014)

Grant of Custody to Nonparent Reversed

Family Court granted sole custody of the subject children to petitioner, a nonparent. The Appellate Division reversed. Family Court deprived a biological parent of custody of her children without the requisite evidentiary hearing on the issues of extraordinary circumstances and best interests. Instead of conducting the hearing on the date it was to begin, the court asked the parents what witnesses would be called on their behalf. When the parents responded that they would be testifying but that they had no other witnesses, the court stated that it found no triable issues of fact and granted the nonparent's petition for custody. Thus, the court failed to place the burden of proof on the nonparent to prove that extraordinary circumstances exist. Additionally, the home study on which the court relied was potentially out of date when the court granted the petition.

Matter of Griffin v Griffin, 117 AD3d 1570 (4th Dept 2014)

Appeal Mooted by New Information Submitted by AFC

Family Court dismissed three petitions that the mother filed against the father with respect to the mother's visitation with the parties' daughter. The Appellate Division affirmed, noting that although the mother filed a notice of appeal with respect to all three orders, the only issues raised in her brief concerned the visitation order in appeal No. 2. Accordingly, the mother was deemed to have abandoned any issues concerning the orders in appeals Nos. 1 and 3. With respect to appeal No. 2, the Attorney for the Child submitted new information obtained during the pendency of the appeal, indicating that the order of visitation had been superceded by a subsequent order. Therefore, the mother's challenge to the order in appeal No. 2 was rendered moot, and an exception to the mootness doctrine did not apply.

Matter of Kirkpatrick v Kirkpatrick, 117 AD3d 1575 (4th Dept 2014)

Denial of Request to Appoint Separate AFC Affirmed

Family Court awarded petitioner father sole custody of the parties' two children, with liberal visitation to respondent mother. The Appellate Division affirmed. The mother's contention was rejected that Family Court erred in failing to appoint separate attorneys for the children when, during the trial, the parties' son expressed a desire to reside with the mother, which was not consistent with the daughter's expressed wishes. Both children had previously informed the AFC that they wanted to continue to reside with the father, who had been granted temporary custody. However, during the trial, the AFC advised the court that the son, age nine, wanted to live with his mother because, at her house, "he can stay up late and he doesn't get into trouble." The AFC further stated that, in his view, the son's position was "immature and thus not controlling" upon the AFC. Following a *Lincoln* hearing, the court denied the mother's request to appoint a new AFC for her son. At the conclusion of the trial, the court awarded custody of both children to the father, as advocate by the AFC. Based upon the Appellate Division's review of the transcript of the *Lincoln* hearing, during which the court interviewed the son at length, the court properly denied the mother's request to appoint separate counsel for the son. Although the reasons could not be stated given the confidential nature of the *Lincoln* hearing, the AFC on appeal asked the Appellate Division to affirm, thereby indicating that the son did not object to the court's failure to appoint separate counsel on his behalf. Additionally, there was a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award sole custody to the father, and thus, the determination was not disturbed.

Matter of Shaw v Bice, 117 AD3d 1576 (4th Dept 2014)

Family Court Properly Determined that Factors Set Forth in Domestic Relations Law Section 76-f (2) Favored New York Retaining Jurisdiction

Family Court awarded sole legal custody of the parties' children to respondent father. The Appellate Division affirmed. In October 2011, the parties agreed to a stipulated

order that, among other things, gave them joint legal custody of their children, with the father having primary physical custody and the mother having liberal visitation. At the time, the father lived in North Carolina and the mother was in the process of relocating to North Carolina. However, the mother returned to New York and filed a petition in January 2012 seeking to enforce the stipulated order, and a subsequent petition seeking primary physical custody of the children. After a hearing, the court granted the father sole legal and primary physical custody of the children and granted the mother liberal visitation. The father's contentions were rejected that the stipulated order vested jurisdiction in the North Carolina courts. The stipulated order merely allowed either party to petition a North Carolina court to modify visitation; it did not require a party to do so. Moreover, the parties could not, by agreement, confer jurisdiction on either state. The court did not err in denying the father's motion to stay the mother's enforcement petition and to transfer the proceeding to North Carolina on the ground that New York was an inconvenient forum. The record supported the court's determination that the factors set forth in Domestic Relations Law Section 76-f (2) favored New York retaining jurisdiction. In particular, the record established that the children had not resided in North Carolina for very long; the father had more financial resources than the mother to enable him to travel to New York for court proceedings; and the New York courts have had prior involvement with the parties. Moreover, the court allowed the father to present the testimony of several witnesses via telephone. The court's custody determination had a sound and substantial basis in the record.

Matter of Abbott v Merritt, 118 AD3d 1309 (4th Dept 2014)

Denial of Modification Petition Affirmed

Following a hearing, Family Court denied father's petition to modify a prior custody order that granted sole custody of the parties' daughter to respondent mother. The Appellate Division affirmed. Family Court did not specifically address whether the father established a change in circumstances. However, its determination that the father failed to establish that sole custody should be granted to him, rather than to the mother, was the product of careful weighing of the appropriate factors, and had a sound and substantial basis in the record.

Matter of Gugino v Tsvasman, 118 AD3d 1341 (4th Dept 2014)

Seven-Year-Old with Down Syndrome Lacked Capacity for Knowing, Voluntary and Considered Judgment

Family Court modified the parties' judgment of divorce by transferring primary physical custody of the parties' child from respondent mother to petitioner father. The Appellate Division affirmed. There was a sufficient change in circumstances to warrant a modification of the existing custody arrangement; specifically, the mother moved several times, including one move three hours away from the father. The court's determination to award primary physical custody to the father was in the child's best interests and supported by a sound and substantial basis in the record. The mother's

various relocations were made to further her own interests, rather than to benefit the child. There was testimony that the child, who had Down syndrome, would benefit from a stable home environment, which the father could better provide. Although unpreserved for review, the mother's contention lacked merit that the Attorney for the Child improperly substituted her judgment for that of the child. The record supported the finding that the child, who was seven years old at the conclusion of the hearing and functioned at a kindergarten level, lacked the capacity for knowing, voluntary and considered judgment.

Matter of Eastman v Eastman, 118 AD3d 1342 (4th Dept 2014)

Record Established Change in Circumstances

Family Court awarded petitioner father primary residential custody of the parties' child, among other things. The Appellate Division affirmed. The father established the requisite change in circumstances. The record established that respondent mother repeatedly took away the child's cell phone, thereby preventing the father from communicating with the child by telephone, and that, on one such occasion, the mother made a video recording of the child's tearful response. The record also supported the court's determination that, although the child had been outgoing in nature with a sunny disposition, she became withdrawn, sad and subject to emotional outbursts after the mother moved in with her current boyfriend and his three children. In addition, while not dispositive, the court properly considered the preference of the child to alter the existing custody arrangement in determining whether there had been a change in circumstances.

Matter of Cheney v Cheney, 118 AD3d 1358 (4th Dept 2014)

Split Custody in Children's Best Interests

Family Court awarded the parties joint physical custody of their younger son, awarded respondent father sole physical custody of the older son, and established a visitation schedule. The Appellate Division affirmed. Split custody was warranted in the best interests of each son, and the visitation schedule afforded the siblings substantial time together. The parties were able to share physical custody of their younger son because he was not yet enrolled in school, and thus alternating weekly residency was in his best interests. The award of sole physical custody of the older son to the father permitted that son to remain in school where he was enrolled and performing well.

Matter of Miller v Jantzi, 118 AD3d 1363 (4th Dept 2014)

Family Court Properly Terminated Father's Visitation

Family Court terminated respondent father's visitation with the subject child until further order of the court. The Appellate Division affirmed. The father's contention was rejected that petitioner mother failed to establish a change in circumstances sufficient to

justify modification of the prior custody order, which granted supervised visitation to the father. Among other things, the mother established that the father allowed a man he met in jail to have sexual intercourse on multiple occasions with his older daughter, who was then 16 years old, in return for drugs. The mother also established that the father, a two-time convicted felon, smoked crack cocaine in the presence of his older daughter. Although the father's conduct in this regard occurred before the prior custody order was entered, the mother asserted without contradiction that the father's conduct was not known by her or the court when the prior order was entered upon stipulation. The mother's newfound awareness of the father's prior conduct constituted a sufficient change in circumstances to modify the father's visitation rights. Moreover, the mother established a change in circumstances that arose after entry of the prior order inasmuch as, since the prior order was entered, the father experienced visual and auditory hallucinations and paranoia. Thus, there existed compelling reasons and substantial evidence showing that continued visitation with the father would be detrimental to the child, and that the court's determination was in the child's best interests.

Matter of Frisbie v Stone, 118 AD3d 1471 (4th Dept 2014)

Order Reversed Where Petitioner Denied Right to Counsel

Family Court awarded petitioner father sole custody of the subject child. The Appellate Division reversed and remitted for a new hearing. Respondent mother was denied her right to counsel. The mother was entitled to representation based upon her status as a respondent in a Family Court Act article 6 proceeding and a person alleged to be in willful violation of a court order. Family Court's inquiry concerning her decision to proceed pro se was insufficient to enable the court to determine whether she knowingly, intelligently and voluntarily waived her right to counsel.

Matter of Seifert v Pastwick, 118 AD3d 1503 (4th Dept 2014)

Order Reversed Where Mother Made Sufficient Evidentiary Showing to Warrant Hearing

Family Court dismissed the mother's custody modification petition. The Appellate Division reversed, reinstated the petition and remitted the matter. Family Court erred in dismissing the petition without conducting a hearing. The mother made a sufficient evidentiary showing of a change in circumstances to warrant a hearing. The mother's allegations that the father imposed excessive and inappropriate discipline on the subject children, including corporal punishment, were sufficient to warrant a hearing, as were the mother's allegations that the father had refused to permit her to exercise visitation with the subject children for four weeks.

Matter of Isler v Johnson, 118 AD3d 1504 (4th Dept 2014)

Reduction in Father's Weekend Access to Children Affirmed

Family Court awarded respondent mother sole legal and physical custody of the parties' children and reduced petitioner father's weekend access to the children. The Appellate Division affirmed. The father failed to demonstrate a change in circumstances sufficient to modify the existing custody order. The mother made a sufficient showing of changed circumstances for the purpose of adjusting the visitation schedule based on, among other things, the parties' inability to reach an agreement regarding certain aspects of the visitation schedule, the mother's work schedule, the fact that the mother's former boyfriend was no longer providing childcare for the children in her home where Friday afternoon exchanges occurred, and the extra time required to get the children prepared for an upcoming week of school on Sunday evening. The adjusted visitation schedule was in the best interests of the children.

Matter of Jones v Laird, 119 AD3d 1434 (4th Dept 2014)

Mother Could Not Raise Issue That Judge Should Have Recused Himself After Consenting That Judge Hear Case

Family Court dismissed the mother's amended petition for a modification of custody. The Appellate Division affirmed. The mother's contention was rejected that the Family Court Judge presiding over the case should have recused himself. The Judge informed the parties that he and respondent father had a mutual friend and that he had met the father one or two times prior to the proceeding. The Judge further stated that he was not a friend of the father and that he did not believe there was any reason to recuse himself. The mother was given the opportunity to discuss the matter with her attorney, and the mother's attorney, after conferring with her client, waived any objection. Therefore, the mother could not raise the issue on appeal after consenting that the Judge hear the case. The court properly dismissed the amended petition. The mother's contention was rejected that she made a showing of the requisite change in circumstances with evidence of a change in her work schedule. At the hearing on the amended petition, the mother admitted that her new work hours did not reduce the amount of time she could spend with the children during her scheduled visitation period.

Matter of Gross v Gross, 119 AD3d 1453 (4th Dept 2014)

Court Erred in Failing to Hold Hearing on Mother's Relocation Motion

Supreme Court, among other things, denied defendant mother's motion to relocate outside the Lewiston School District. The Appellate Division modified and remitted to the court for a hearing. In this divorce action, the mother sought permission to relocate with the parties' children from Lewiston to Grand Island, a distance of about 17 miles. The court erred in failing to consider whether the relocation was in the children's best interests. Defendant's submissions in support of her motion, including her sworn statements that she was unable to find appropriate, affordable housing or a suitable teaching position in the high-priced Lewiston area, established the need for a hearing. Further, although plaintiff disputed some of defendant's factual assertions, he did not

assert that the relocation would be detrimental to the children or to his relationship with the children. There was no indication in the record that the quality of education in Grand Island was inferior to the education available in Lewiston. Contrary to the contention of defendant, however, plaintiff made a sufficient evidentiary showing of a change in circumstances to require a hearing on whether the existing custody order should be modified. Plaintiff asserted that there had been a complete breakdown in communication between the parties, defendant had him arrested on baseless grounds, filed a false child protective services report against him, and failed to discuss important decisions concerning the children's health, education, and counseling.

Lauzonis v Lauzonis, 120 AD3d 922 (4th Dept 2014)

Petition for Modification of Stipulated Order Awarding Custody to Grandparents Properly Dismissed

Family Court dismissed the father's amended petition for modification of custody. The Appellate Division affirmed. Pursuant to a stipulated order, respondents, the children's maternal grandparents, had joint legal custody of the children long with the father and respondent mother, and the grandparents had primary physical residence of the children with visitation to the father. The court erred in failing to conduct the threshold inquiry whether extraordinary circumstances existed to warrant the continuation of primary physical residence with the grandparents. The nonparent had the burden of establishing that extraordinary circumstances existed even where, as in the instant case, the prior order granting custody of the child to the nonparent was made upon consent of the parties. However, the record was adequate to conduct the threshold inquiry. There were extraordinary circumstances here based upon the father's history of domestic violence, including an incident that occurred in the presence of one of the children and resulted in at least three orders of protection and incarceration, the father's history of substance abuse, and his sporadic contact with the children. Nevertheless, the father failed to demonstrate a change in circumstances to warrant an inquiry into the best interests of the children on the issue of custody because the record did not support his contention that there was a deterioration in the parties' relationships and that the grandparents interfered with his scheduled visitation or telephone access. Moreover, the father's contention was rejected that the court erred in refusing to retain jurisdiction over a subsequent modification petition. There was a sound and substantial basis in the record to support the court's determination that Vermont was the more appropriate forum.

Matter of McNeil v Deering, 120 AD3d 1581 (4th Dept 2014)

Not in Child's Best Interests to Visit Incarcerated Father

Family Court denied the father's petition to modify a prior order of custody and visitation with respect to the parties' eight-year-old son. The Appellate Division affirmed. The father was sentenced in 2006 to a determinate sentence of 20 years incarceration on

his conviction of rape in the first degree and criminal sexual act in the first degree. The court properly determined that although there had been a change in circumstances, based upon evidence presented at the hearing, including the testimony of the child's psychologist that visitation would be detrimental to the child, it was not in the child's best interests to have visitation with the father at the correctional facility. The record demonstrated that the father failed to establish a meaningful relationship with the child. He had been incarcerated since the child was in utero, he had never met the child, and the child indicated that he did not want to visit the father. Thus, there was a sound and substantial basis for the court's determination.

Matter of Fewell v Ratzel, 121 AD3d 1542 (4th Dept 2014)

Nonparent Established Extraordinary Circumstances

Family Court granted mother and nonparent (Cole) joint custody of the subject child, designated Cole as the primary residential parent and granted the mother unsupervised visitation. The Appellate Division affirmed. The AFC's contention that the mother's appeal was moot in light of a subsequent order in the case was rejected. The finding that there were extraordinary circumstances could have enduring consequences for the parties. The court properly determined that Cole met her burden of establishing extraordinary circumstances warranting consideration of the best interests of the child. The mother continually demonstrated her unwillingness or inability to place the child's best interests above that of the mother's husband, who had various mental health issues and refused treatment and medication.

Matter of Van Dyke v Cole, 121 AD3d 1584 (4th Dept 2014)

Father Failed to Show Changed Circumstances

Family Court denied father's petition seeking to modify a prior order of custody and visitation by, among other things, providing increased visitation with his son. The Appellate Division affirmed. The order of visitation could not be modified unless there was a sufficient change in circumstances since the prior order that, if not addressed, would have an adverse effect on the child's best interests. The father failed to demonstrate such a change in circumstances. The record did not support the father's contention that the court drew a negative inference against him for his failure to testify.

Matter of Miller v Pederson, 121 AD3d 1598 (4th Dept 2014)

Suspension of Mother's Visitation Lacked Sound and Substantial Basis

Family Court granted that part of stepmother's petition seeking to terminate petitioner mother's physical visitation with the subject child. The Appellate Division vacated the directive terminating mother's physical visitation with the child and remitted for determination of an appropriate visitation schedule. The stepmother established a change in circumstances since entry of the guardianship order sufficient to warrant

reexamination of the visitation arrangement. The record established that the relationship between the child and mother had deteriorated significantly to the point where the child did not want to visit with the mother. However, the court's suspension of the mother's physical visitation with the child lacked a sound and substantial basis. The record lacked substantial evidence that visitation with the mother was detrimental to the child's welfare. Although the child did not wish to visit with the mother, her wishes were not determinative.

Matter of Tuttle v Mateo, 121 AD3d 1602 (4th Dept 2014)

Father Required to Undergo Sex Offender Risk Assessment Before Visitation Considered

Family Court dismissed father's petition for visitation with the parties' two-year-old daughter. The Appellate Division affirmed. Although there was a rebuttable presumption that visitation with the noncustodial parent was in the child's best interests, the court may deny visitation to parties who refuse to submit to examinations. Here, the record reflected that the father was a level one sex offender who was convicted of rape in the third degree for having sexual intercourse with the child's then-underage mother and that the child was the product of the rape. The father admitted that he failed to complete the court-ordered sex offender risk assessment and he failed to accept fault for the rape of the mother. The court did not err in ordering the father to undergo another sex offender risk assessment with an objective evaluator before reapplying for visitation.

Matter of Cardwell v Mighells, 122 AD3d 1293 (4th Dept 2014)

Sole Custody of Child to Father Affirmed

Family Court dismissed the mother's petition for modification of an order of custody and visitation. The Appellate Division affirmed. The court erred in dismissing the petition upon respondent father's motion to dismiss. Accepting the mother's proof as true, she established that she successfully completed a substance abuse program and thus, in accordance with a provision of the prior consent order, she satisfied the requisite significant change in circumstances to allow the court to consider whether a change in custody was in the child's best interests. Further, the mother and maternal grandmother testified about the child's marked change in behavior since residing with the father and the mother presented evidence of a significant bruise on the child's back that she believed was inconsistent with the child's explanation for the injury. However, based upon the Appellate Division's review of the entire record, it concluded that it was in the best interests of the child to award sole custody of the child to the father. The father presented evidence that the mother had made numerous unfounded reports of alleged physical abuse of the child to CPS and the police. The father also presented evidence from a neighbor, who was a mandated reporter and who had a close relationship with the child, regarding the child's behavior and demeanor while living in the father's house. The record also supported the court's determination that given the acrimonious relationship of the parties, a change in joint custody to sole custody to the father was in

the child's best interests.

Matter of Gelster v Burns, 122 AD3d 1294 (4th Dept 2014)

Primary Residential Custody of Child to Mother Affirmed

Supreme Court denied the father's motion, made during the pendency of the divorce action, to modify the existing custody arrangement by transferring primary residential custody of the parties' child from the mother to him. The Appellate Division affirmed. Although it was undisputed that there were sufficiently changed circumstances to justify the court's reexamination of the stipulated custody arrangement, there was a sound and substantial basis in the record for the court's determination that it was in the child's best interests to retain primary residential custody with the mother. The court did not err in summarily denying the father's motion to reduce his child support obligation because the father failed to provide an updated statement of net worth in support of his motion. Given the wealth disparity between the father and mother, the court did not err in awarding counsel fees to the mother.

Rech v Rech, 122 AD3d 1286 (4th Dept 2014)

Sole Custody of Child to Father Affirmed

Family Court awarded petitioner father sole custody of the subject children. The Appellate Division affirmed. The court's determination in awarding sole custody to the father was based upon a first-hand assessment of the parties' credibility and was entitled to great weight. Here, there was a sound and substantial basis in the record for the court's determination. Even assuming, *arguendo*, that the court erred in transferring temporary custody of the children to the father, reversal was not required because the court subsequently conducted the requisite evidentiary hearing and the record of the hearing fully supported the court's determination.

Matter of Van Court v Wadsworth, 122 AD3d 1339 (4th Dept 2014)

Relocation in Children's Best Interests

Family Court awarded petitioner father custody of the subject children. The Appellate Division affirmed. The court properly determined that relocation was in the best interests of the children after considering all the relevant factors, even though the father had already relocated with the children. While removal of the children without seeking permission should not be encouraged, an award of custody must be based upon the children's best interests and not a desire to punish a recalcitrant parent. Although the mother made a showing of changed circumstances and there were several factors that favored an award of custody to her, a review of all the relevant factors supported the court's determination. Even assuming, *arguendo*, that the children were aggrieved by the issue raised on appeal by the AFC, the issue was not properly before the Court because the AFC did not file a notice of appeal.

Matter of Baxter v Borden, 122 AD3d 1417 (4th Dept 2014)

FAMILY OFFENSE

Respondent Committed Family Offense of Harassment

Family Court issued a two-year order of protection against respondent father on behalf of his 17-year-old daughter following its determination that respondent committed the family offense of harassment in the second degree. The Appellate Division affirmed. Respondent's contention was rejected that the order must be vacated because petitioner, the child's mother and respondent's ex-wife, failed to prove by a preponderance of the evidence that he harassed his daughter. Respondent's daughter testified that he punched her in the face, grabbed her arms and shoved her onto a couch. At the time, petitioner had been awarded sole custody of the child and respondent's visitation was supervised. The incident took place in petitioner's residence, and respondent did not have permission from anyone to be there. Respondent testified that he grabbed his daughter in an attempt to take her cell phone from her as a form of punishment, but he denied punching her. Accepted as true, the daughter's testimony that respondent punched and grabbed her was sufficient to establish that he committed the family offense of harassment. Although the court did not explicitly find that all of the daughter's testimony was true, the court likewise did not explicitly reject any of her testimony. The record supported the court's finding that the testimony of both parties established respondent's commission of the family offense.

Matter of Megyn J.B. v Cory A.D., 113 AD3d 1086 (4th Dept 2014)

JUVENILE DELINQUENCY

JD Adjudication Affirmed

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that he committed acts that, if committed by an adult, would constitute the crimes of forcible touching and endangering the welfare of a child. The Appellate Division affirmed. Even assuming, arguendo, that respondent preserved the issue of legal sufficiency, the evidence was legally sufficient. Upon the exercise of its independent power of factual review, the Appellate Division was satisfied that the court properly credited the testimony of the two principal witnesses and that the court's findings were not against the weight of the evidence. Respondent's contention that the court's extensive questioning of the witnesses deprived him of a fair trial was not preserved and was without merit. His contention that he was entitled to a new trial because his appearance ticket did not conform to the Family Court Act was unpreserved and was not reached in the interests of justice. Respondent was not denied effective assistance of counsel.

Matter of Shannon F., 121 AD3d 1595 (4th Dept 2014)

JD Adjudication Modified to PINS Finding

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that she committed an act that, if committed by an adult, would constitute the crime of assault in the third degree. The Appellate Division modified by substituting the JD adjudication for a finding that respondent was a PINS. The court abused its discretion in denying respondent's motion, pursuant to the Family Court Act, to substitute a finding that she was a PINS for a finding that she was a JD, inasmuch as she demonstrated no danger to the community at large and could have received the same placement under a PINS disposition. Under the circumstances here, respondent's conduct was consistent with PINS behavior, not with juvenile delinquency.

Matter of Kayla F., 122 AD3d 1399 (4th Dept 2014)

JD Adjudication Based Upon Manslaughter Affirmed

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that he committed an act that, if committed by an adult, would constitute the crime of manslaughter in the second degree. The Appellate Division affirmed. There was legally sufficient evidence to support the finding that respondent caused the death of the victim. The evidence established that, while participating in a "game" called "knockout," respondent and his accomplice each struck a blow to the victim's head. Respondent's accomplice struck the first blow and respondent struck the second blow, after which the victim collapsed. The Medical Examiner opined to a reasonable degree of certainty that the second blow was the cause of death.

Matter of Ander G., 122 AD3d 1447 (4th Dept 2014)

ORDER OF PROTECTION

Objections to Motions Not Preserved for Review

Family Court dismissed the petition seeking modification of an order of protection. The Appellate Division affirmed. Petitioner contended that the court erred in dismissing the petition because the Attorney for the Children and respondent failed to make written motions to dismiss. Petitioner further contended that the AFC and respondent failed to comply with other requirements of the CPLR with respect to motions. Petitioner failed to object to the motions on the grounds asserted on appeal. Therefore, petitioner did not preserve his contentions for appellate review.

Matter of Brianna C., 114 AD3d 1149 (4th Dept 2014)

Willful Violation of Order of Protection Affirmed

Family Court determined that respondent father violated an order of protection. The Appellate Division affirmed. Petitioner mother established by clear and convincing evidence that respondent willfully violated the terms of the order of protection directing him to stay away from the mother and the parties' child except during scheduled visitation. The father's challenge to his commitment to jail for a term of six months was moot inasmuch as it had expired by its own terms.

Matter of Ferrusi v James, 119 AD3d 1379 (4th Dept 2014)

TERMINATION OF PARENTAL RIGHTS

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent father's and respondent mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of proving by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the parents and children. Among other things, petitioner provided the parents with the opportunity to obtain appropriate housing, provided supervised visitation with the children, and provided the parents with counseling. Despite petitioner's diligent efforts to reunite them with the children, the parents chose to obtain different housing and then denied petitioner access to their home after one visit. Moreover, the visits with the children did not go well and were stressful for the children. Additionally, the parents failed to make progress in counseling due to their refusal to acknowledge the sexual abuse inflicted on the children and to take responsibility for their failure to protect the children. Thus, petitioner established that the parents failed to successfully address the problems that led to the removal of the children and continued to prevent the children's safe return. Although not preserved for review, the court did not abuse its discretion in simply restating petitioner's position following an overly broad question posed by the father's attorney that would have merely elicited repetitive testimony. The mother's contention was rejected that her attorney was ineffective in failing to object to the qualification of certain witnesses as experts and in failing to call as a witness the mother's new counselor, whom she did not start seeing until after the diligent efforts period. There was no denial of effective assistance of counsel arising from a failure to make a motion or argument that had little or no chance of success.

Matter of Kelsey R.K., 113 AD3d 1139 (4th Dept 2014)

Mother Not Denied Effective Assistance of Counsel

Family Court terminated respondent mother's and respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed the termination of the mother's parental rights. The mother's contention was rejected that she was denied effective assistance of counsel. The mother's attorney provided meaningful representation at the hearing on the petition alleging that she violated the terms of the suspended judgment and at the dispositional hearing. The mother's contention otherwise was impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on her behalf. Moreover, reversal was not warranted based upon her attorney's alleged conflict of interest with a witness called by petitioner. The testimony was of a trivial nature, and in any event, the record reflected that the mother, upon inquiry by the court, indicated that she understood the relationship between the witness and her attorney and was not concerned about her attorney questioning the witness.

Matter of Jada G., 113 AD3d 1138 (4th Dept 2014)

AFC's Contention Rejected that Court Should Have Imposed a Schedule for "Winding Down" Relationship with Respondent

Family Court adjudged that respondent father violated the terms of a suspended judgment and terminated his parental rights on the ground of permanent neglect. The Appellate Division affirmed. The court properly determined that petitioner established by a preponderance of the evidence that respondent violated one or more terms of the suspended judgment. Moreover, the court properly determined that the children's best interests would be promoted by transferring guardianship and custody to petitioner notwithstanding the fact that the children were not in preadoptive homes. The Attorney for the Child's contention was rejected that the court should have imposed a schedule for the "winding down" of the relationship between the father and the children. There is no legal authority for such a schedule.

Matter of Jada G., 114 AD3d 1148 (4th Dept 2014)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the child. Petitioner arranged for a psychological evaluation of the father, facilitated supervised visitation between the child and the father both before and during the father's incarceration, recommended various services and followed up with the father to remind him of those services. The court properly determined that respondent failed to plan for the future of the child. Although the father claimed that he took parenting classes while in prison, he told his caseworker that the classes were "stupid" and that he did not believe that he had learned anything in them. The father did not engage in mental health counseling, substance abuse treatment, or a domestic violence program as recommended by petitioner and the psychologist who evaluated him. Further, the record established that the father's only plan for the child was that the child remain in foster care until the end of the father's term of incarceration. The evidence supported the court's determination that termination of the father's parental rights was in the best interests of the child, and that the father's negligible progress in addressing the issues that initially necessitated the child's removal from his custody was not sufficient to warrant any further prolongation of the child's unsettled familial status. Moreover, petitioner established that the child was thriving in his foster placement and that the child's foster parents, his maternal great aunt and great uncle, intended to adopt him.

Matter of Alex C., 114 AD3d 1149 (4th Dept 2014)

Revocation of Suspended Judgment Affirmed

Family Court revoked a suspended judgment and terminated respondent mother's parental rights. The Appellate Division affirmed. Petitioner established by a

preponderance of the evidence that the mother violated the terms and conditions of the suspended judgment. Petitioner established that the mother failed to obtain suitable housing until after the violation petition was filed and that she withdrew or limited releases for information from programs that she attended. Although the mother testified that she completed several programs, she failed to provide verification that she completed the programs and admitted that she did not know whether petitioner had approved those programs. Additionally, petitioner established by a preponderance of the evidence that the mother continued to live at her parents' house. Petitioner had been denied access to the mother's parents' house to make an assessment of whether it would be an appropriate home for the child to visit. The court's determination was entitled to great weight that the mother's testimony that she was living in the apartment that she rented was not credible. The record supported the court's determination that termination of the mother's parental rights was in the best interests of the child.

Matter of Alisa E., 114 AD3d 1175 (4th Dept 2014)

Request to Vacate Grant of Access to Posttermination Photographs Not Properly Before the Court

Family Court determined that respondent mother violated the terms of a suspended judgment and terminated the mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The record belied the mother's contention that the court failed to consider whether termination of her parental rights was in the best interests of the child, and the court agreed that termination was in the child's best interests. Petitioner's contention that parts of the order should be vacated that grant the mother access to posttermination photographs of the child was not properly before the court inasmuch as petitioner did not cross-appeal from the order.

Matter of Treyvone C., 115 AD3d 1246 (4th Dept 2014)

Record Sufficient for Appellate Review Notwithstanding Failure of Recording Device

Family Court revoked respondent father's suspended judgment, terminated his parental rights with respect to his five oldest children, and determined that he derivatively neglected his youngest child. The Appellate Division affirmed. The father's contention was rejected that he was denied adequate appellate review because several parts of the transcript of the proceedings were missing due to apparent failures in the recording device. The father failed to seek a reconstruction hearing with respect to the missing parts of the record. Moreover, he stipulated to the accuracy of the record on appeal. In any event, the record as submitted was sufficient for the court to determine the issues raised on appeal. The father's further contention was rejected that the terms of the suspended judgment were too restrictive because that contention was in fact a challenge to the terms of the suspended judgment, which was entered on consent of the father. Thus, it was beyond appellate review.

Matter of Mikel B., 115 AD3d 1348 (4th Dept 2014)

Court Did Not Abuse Discretion in Refusing to Extend Suspended Judgment

Family Court refused to extend the suspended judgment and terminated the parental rights of respondent father. The Appellate Division affirmed. The father's contention was rejected that Family Court should have extended the suspended judgment for another year, notwithstanding the fact that it was not disputed that the father violated the terms and conditions of the suspended judgment. The father failed to demonstrate that exceptional circumstances required extension of the suspended judgment. Thus, the court did not abuse its discretion in refusing to extend the suspended judgment.

Matter of Cornelius L.N., 117 AD3d 1487 (4th Dept 2014)

Father Knowingly, Voluntarily and Intelligently Agreed to Finding of Permanent Neglect

Family Court revoked the suspended judgment and terminated the parental rights of respondent father on the ground of permanent neglect. The Appellate Division affirmed. The father failed to preserve for review his contention that his consent to the entry of the finding of permanent neglect was not given knowingly, voluntarily and intelligently. In any event, the contention was without merit. Although the record reflected that the father initially hesitated and indicated that he did not wish to admit any wrongdoing, he relented and agreed to permit the court to make a finding of permanent neglect and to enter a suspended judgment based on that finding. The proof did not show that the consent was given under compulsion or threat, or against the father's free will, or based upon fraudulent statements. Indeed, the record established that the father was represented by counsel at the time of his admission, and the father stated that he understood all the proceedings because they were translated into Spanish, his native language. Thus, the father knowingly, voluntarily and intelligently agreed to the entry of a finding of permanent neglect.

Matter of Xavier O.V., 117 AD3d 1567 (4th Dept 2014)

Termination of Parental Rights on Ground of Permanent Neglect Affirmed

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Although the father participated in the services offered by petitioner, he did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return. The court properly denied the father's request for a suspended judgment.

Matter of Makayla S., 118 AD3d 1312 (4th Dept 2014)

Parental Rights Properly Terminated on Ground of Abandonment

Family Court terminated the parental rights of respondent father on the ground of abandonment. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that the father abandoned his child. Petitioner's caseworker testified that the father was required to contact her prior to any visitation with the child. The visitation was to be supervised by the child's grandfather. The father contacted the caseworker before visits that took place commencing in October 2011, but last contacted her concerning a visit in May 2012. The father did not contact the caseworker again before petitioner filed the abandonment petition in December 2012. In addition, the father failed to appear at court proceedings with respect to the child during the relevant time period, although he had notice of those proceedings. The father's testimony that he visited with the child during the relevant time period and that he believed that only the grandfather was required to contact the caseworker concerning the visits merely raised a credibility issue that Family Court was entitled to resolve against the father.

Matter of Noah G., 118 AD3d 1355 (4th Dept 2014)

Termination of Parental Rights Proper Where Respondents Abandoned Children

Family Court granted petitions filed in April 2011 and June 2011, which terminated respondents' parental rights on the ground of abandonment. The Appellate Division modified by dismissing the petitions filed in April 2011. Family Court properly granted the June 2011 petitions and terminated the parental rights of respondents upon determining that petitioner established by clear and convincing evidence that respondents abandoned their children. Although respondents were prohibited from contacting their children during the six months prior to the filing of the June 2011 abandonment petitions based on an order of protection, it was well settled that the parent who has been prohibited from direct contact with the child, in the child's best interests, continued to have an obligation to maintain contact with the person having legal custody of the child. During the six-month period prior to the June 2011 petitions, respondents' sole contact with petitioner was at a uniform case review meeting that was arranged by petitioner. However, the court erred in granting the petitions filed in April 2011. The record established that respondents contacted petitioner about the children numerous times during October and November 2010. Therefore, petitioner failed to establish that respondents evinced an intent to forego their parental rights and obligations during the six-month period immediately prior to the filing of the April 2011 petitions.

Matter of Miranda J., 118 AD3d 1469 (4th Dept 2014)

Termination of Parental Rights Affirmed

In the first of two orders from which respondent mother appealed, Family Court terminated her parental rights with respect to her daughter on the ground of permanent neglect. In the second order, Family Court revoked a suspended judgment and terminated the mother's parental rights to her son. The Appellate Division affirmed both

orders. The Attorney for the Children's contention was rejected that the appeals must be dismissed because the orders were entered upon the mother's default. Inasmuch as the mother's attorney appeared at and participated in the hearing until the mother left the courtroom, there was no default. Family Court properly determined that the daughter was a permanently neglected child and properly terminated the mother's parental rights. Although the mother participated in the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return. The court properly determined that petitioner established by a preponderance of the evidence that she violated a condition of the suspended judgment by failing to attend scheduled visits with her son and that it was in her son's best interests to terminate her parental rights.

Matter of Savanna G., 118 AD3d 1482 (4th Dept 2014)

Parental Rights Properly Terminated on Ground of Abandonment

Family Court terminated the parental rights of respondent father on the ground of abandonment. The Appellate Division affirmed. The father's contention was rejected that Family Court applied an incorrect standard in determining that he abandoned his daughter. As the court properly determined, petitioner established by clear and convincing evidence that the father abandoned his child by failing to visit or to communicate with her or petitioner, although able to do so, during the six-month period immediately preceding the filing of the petition. The father then failed to rebut the presumption, inasmuch as he failed to establish that he was unable to maintain contact with his daughter, or that he was prevented or discouraged from doing so by petitioner. A court order required the father to pay child support in the amount of \$25 per month, but the order suspended that obligation during the father's incarceration. Although the father testified that "twenty percent" had been deducted from his inmate account to pay child support, petitioner presented evidence that it never received any payment of child support from the father or the correctional facility where he was incarcerated. Assuming, arguendo, that child support was deducted from the father's inmate account, under the circumstances of the case, the deduction of such funds did not constitute communication with the child or petitioner sufficient to defeat an otherwise viable claim of abandonment.

Matter of Melerina M., 118 AD3d 1505 (4th Dept 2014)

Parental Rights Properly Terminated on Ground of Mental Illness

Family Court terminated the parental rights of respondent father on the ground of mental illness. The Appellate Division affirmed. Petitioner presented clear and convincing evidence establishing that the father was presently suffering from a mental illness that was manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if the child was placed in the custody of the father, the child would be in danger of becoming a neglected child. The father's contention was rejected that petitioner undermined his relationship with the child by limiting his

visitation time and thus failed to establish that it made diligent efforts to strengthen and encourage his relationship with his child. Unlike a case where parental rights were terminated due to permanent neglect, no such showing was required when the ground for termination is mental illness.

Matter of Zachary R., 118 AD3d 1479 (4th Dept 2014)

Termination of Parental Rights Reversed Where Child Was Neither Destitute Nor Dependant

Family Court terminated respondent father's parental rights, and committed guardianship and custody of the child to petitioner mother, and authorized the mother to consent to the adoption of the child without the consent of, or further notice to, the father. The Appellate Division reversed and granted the father's motion to dismiss the petition. It was undisputed that the subject child was neither a destitute nor a dependent child. Social Services Law Section 384-b was thus inapplicable to the child and could not be invoked by either the mother or DSS as a means to terminate the father's parental rights. The Court's determination did not leave the mother without a remedy. She could seek to dispense with the father's consent to adoption pursuant to Domestic Relations Law Section 111 (2) (a).

Matter of Anastasia I., 118 AD3d 1480 (4th Dept 2014)

DSS Made Requisite Diligent Efforts

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of proving by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and children. Among other things, petitioner referred the father for mental health counseling, parenting classes, and a drug and alcohol evaluation, but he did not pursue these opportunities. DSS also assisted the father with obtaining housing, arranged for weekly visitation with the children prior to the father's incarceration, and arranged for one visit while he was incarcerated. DSS had previously paid the father's rent for an entire year even though he was working at the time and one of the children was receiving Social Security disability benefits. Although DSS may have contemplated adoption as an eventual outcome for the children shortly after they were removed from the father's care, DSS was allowed to evaluate and plan for other potential future goals where reunification with a parent was unlikely.

Matter of Anastasia S., 121 AD3d 1543 (4th Dept 2014)

Mother Did Not Waive Right to Appeal by Stipulating to Permanent Neglect

Family Court terminated respondent mother's parental rights on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner agency. The Appellate Division affirmed. Although the mother stipulated to the finding

of permanent neglect, she did not thereby waive her right to appeal from the court's determination terminating her parental rights. However, the evidence supported the court's determination that termination was in the child's best interests. The mother's short-term progress was not sufficient to warrant the prolongation of the child's unsettled familial status.

Matter of Taleeya M., 121 AD3d 1583 (4th Dept 2014)

TPR Based Upon Father's Mental Illness Affirmed

Family Court terminated the parental rights of respondent father on the ground of mental illness. The Appellate Division affirmed. Petitioner presented clear and convincing evidence establishing that the father was presently suffering from a mental illness that was manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if the child was placed in the custody of the father, the child would be in danger of becoming a neglected child. The court-appointed psychologist testified that the father had schizophrenia, which caused him to experience hallucinations that interfered with his ability to care for the child. The father failed to take his medication, which further exacerbated his symptoms. The psychologist's testimony was supported by the testimony of the father's caseworker who supervised his visitation with the child.

Matter of Star C., 121 AD3d 1597 (4th Dept 2014)

Court Did Not Abuse Discretion in Refusing to Extend Suspended Judgment

Family Court terminated the parental rights of respondent mother. The Appellate Division affirmed. Petitioner met its burden of proving by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and child. The mother was in foster care at the time of the child's birth pursuant to a PINS order and, among other things, petitioner provided the mother with referrals to parenting classes and with placements that would have given her needed structure. The mother did not comply with her service plan and she fled placements on a number of occasions, each time missing visits with the child. The court did not abuse its discretion in refusing to enter a suspended judgment. The mother's negligible progress in addressing the issues that necessitated the child's removal did not warrant the prolongation of the child's unsettled familial status.

Matter of Sapphire A.J., 122 AD3d 1296 (4th Dept 2014)

TPR Based Upon Mother's Mental Illness Affirmed

Family Court terminated the parental rights of respondent mother on the grounds of mental illness and permanent neglect. The Appellate Division modified by dismissing the petition based upon permanent neglect. Petitioner presented clear and convincing evidence establishing that the mother was presently and for the foreseeable future

unable, by reason of mental illness, to provide proper and adequate care for the child. The court-appointed psychologist testified that the mother suffered from paranoid schizophrenia, which caused her to have delusions and grossly erroneous beliefs. According to the psychologist, the mother was unable to care for the child because of her illness and, because of the child's special needs, he would be in even greater danger if placed with the mother. Although a psychologist who had met with the mother once, testified that she saw no evidence that the mother suffered from a major mental illness, she also testified that she was not advocating that the child be placed with mother presently because there were issues. The mere possibility that the mother's condition might improve in the future was insufficient to vitiate the court's determination. The court erred in terminating the mother's parental rights on the ground of permanent neglect. The mother could not be mentally ill to a degree warranting termination of her parental rights and at the same time be found to have failed to plan for the child's future although physically and financially able to do so.

Matter of Joseph E.K., 122 AD3d 1373 (4th Dept 2014)

Court's Determination to Revoke Suspended Judgment Reversed

Family Court revoked a suspended judgment and terminated the parental rights of respondent mother. The Appellate Division reversed. Petitioner established by a preponderance of the evidence that the mother failed to comply with the terms of a suspended judgment. Nevertheless, based upon new facts and allegations that the Appellate Division could properly consider, it was not clear that termination of the mother's parental rights was in the children's best interests.

Matter of Darlenea T., 122 AD3d 1416 (4th Dept 2014)

TPR Based Upon Mother's Mental Illness Affirmed

Family Court terminated the parental rights of respondent mother with respect to the subject children on the ground of mental illness. The Appellate Division affirmed. The appeal was dismissed insofar as it concerned the older child because she had attained the age of majority. Petitioner presented clear and convincing evidence establishing that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the remaining children. The testimony of petitioner's witnesses, including a psychologist, established that the mother was so disturbed in her behavior, feeling, thinking and judgment that, if the remaining children were returned to her, they would be in danger of becoming neglected children.

Matter of Delia S., 122 AD3d 1416 (4th Dept 2014)