NEW YORK CHILDREN'S LAWYER

Published by the Appellate Divisions of the Supreme Court of the State of New York

April 2011 **Volume XXVII, Issue I**

USING CPLR 3122-A TO ADMIT MEDICAL RECORDS, WITHOUT TESTIMONY*

By William Greenberg**

The issues of authenticity and hearsay as they pertain to the admissibility of domestic hospital records are dealt with by CPLR Sections 4518 and 2306. Those provisions specifically authorize receipt into evidence of domestic hospital records which have been properly "certified" and subpoenaed to a New York Supreme Court. In short, the provisions dispense with the requirement of a foundation otherwise required for business records – the testimony of a custodian of the record that it was made, kept and maintained in the ordinary course of business of the hospital facility. See 4518 (c); 2306. Even if the medical facts within the domestic [1] hospital records constitute medical opinions, courts readily admit them as evidence, provided they are "certified" [2] and transmitted pursuant to CPLR 4518(c) by the medical institution directly to the courthouse as subpoenaed records.

However, not all pertinent medical evidence in litigation is contained in domestic hospital records. In the era of medical specialization and a transient population, the client is likely to have important medical information included within office records of multiple physicians in a plethora of specialties located both in and out of New York State, as well as within the records of foreign hospital institutions. Thus to establish a cause of action at issue, the practitioner frequently finds it necessary to prove a myriad of medical facts and medical opinions set forth in physician's office records and out-of-state hospital records – hopefully in an efficient and cost conscious manner.

The only strategy which guarantees the admission of such medical facts and opinions is to call the doctor or his records custodian as a trial witness in order to lay the business record foundation – oftentimes not a very practical or easily accomplished strategy.[3]

Getting Records Admitted

Of course, the CPLR at Rule 3122-a does outline steps to follow so that such records can be admitted into evidence without live testimony from a custodian: (1) subpoena the records to the courthouse; (2) ensure that the certification accompanying the records is in the form of an affidavit subscribed and notarized which attests (a) that the affiant is the authorized custodian of the records, (b) that the records are accurate copies of the originals and are a complete set and (c) that the records were made in the regular course of business by the entity which made and kept the records also in the business regular course;

CONTENTS

(3) give notice of intention to offer the records at trial at least 30 days before trial to the practitioner's adversary ("notice of intention") – and ensure that the adversary is also given an opportunity to inspect the records. If adversary counsel fails to object in a timely fashion, it is presumed that the records satisfy CPLR 4518 and the records will be admitted as evidence unless some explanation – not a likely occurrence – is made by adversary counsel to justify the failure to have made timely objection. See e.g., *Zweng v. DeBellis & Semmens*, 22 A.D.3d 845, 803 N.Y.S.2d 681 (2d Dept. 2005).

A practical method to satisfying the disclosure obligations of CPLR 3122-a – particularly in this age of e-mail and the Internet – is to e-mail as attachments copies of the records at issue to adversary counsel along with the requisite notice of intention, at least 30 days prior to trial. Of course, the proponent must also ensure that the records are in fact subpoenaed to the Supreme Court, along with the appropriate certifying affidavit by the duly authorized records custodian.

Out-of-State Providers

In the case of records subpoenaed from out-of-state providers, production of the necessary records via certification requires the out-of-state facility's cooperation, as out-of-state providers are not actually subject to the subpoena power of a New York court. This may require direct contact with the physician or institution involved to ensure that the appropriate certification accompanies those records that are in fact transmitted to the Supreme Court.[4] Absent cooperation from the out-of-state provider, the only other option available would be to seek an open commission in accordance with CPLR 3108.

For the personal injury practitioner, Section 3122-a (c) is particularly significant. The office records of all treating doctors, even those containing medical opinions of the treating physician are admissible provided such records were in fact made for purposes of diagnosis and treatment – the "business" of the medical practitioner. See e.g., *Wilbur v. Lacerda*, 34 A.D.3d 794, 826 N.Y.S.2d 135 (2d Dept. 2006).

Independent Records

But what of the records contained within the office records of the treating physician arising from other sources, such as for example, MRI reports, lab results, CAT scan reports and medical reports of other physicians? Can such records likewise be admissible through the use of the CPLR 3122-a ? Independent records that have not been made by the physician's office require independent certification from each facility. As such, a provider's certification extends only to those records created and maintained within that specific provider's office and any records from other facilities that are collected by the provider throughout the course of treatment will fail the test for business records set forth at CPLR 4518, and are therefore not admissible – even though the required CPLR 3122-a foundation were to have been faithfully laid.

Thus, the practitioner should endeavor to serve subpoenas on all record makers and give adverse counsel notice of the intention to offer them – following up with the records custodians to ensure that the appropriate certifying affidavit have been prepared and forwarded to the Supreme Court along with certified copies. Then, the entire medical history at issue may be assessed by the jury.

[**]**WILLIAM GREENBERG is a partner at Greenberg & Massarelli, in Purchase. He can be contacted at lawoffices@greenbergmassarelli.com. REBECCA GREENBERG, who is awaiting admission to the New York bar, assisted in the preparation of this article.**

Endnotes

1. It should be noted that although frequently overlooked in practice, the admission of hospital records from institutions outside New York are not sanctioned by CPLR 4518 (c), but theoretically actually require a foundation witness to establish

the business record exception.

2. To be properly "certified", there must be annexed to the records an affidavit of the records custodian attesting to the foundation required for the admission of business records. See NY CPLR 3122-a (a).

3. In some cases, the only alternative might be the laborious taking of the physician's deposition pursuant to an open commission in accordance CPLR 3108.

4. No case has to date invalidated the applicability of 3122-a to records produced voluntarily by out-of-state facilities pursuant to a subpoena duces tecum and it would seem that the legislative policy furthered by the provision – to allow the affidavit of an authorized custodian of the records to serve as foundation for admission, in lieu of requiring burdensome, time-consuming and wasteful trial appearances – is well served by such admission.

New York
Children's Lawyer

Jane Schreiber, Esq., 1st Dept.
Harriet R. Weinberger, Esq., 2d Dept.
Betsy Ruslander Esq., 3d Dept.
Tracy M. Hamilton, Esq., 4th Dept.

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

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

NEWS BRIEFS

FIRST DEPARTMENT NEWS

Your duty to your client requires that you file the papers necessary for them to pursue their right to appeal. It is imperative that when you file a Notice of Appeal on behalf of a client, that (if appropriate) you attach to it a certification seeking Poor Persons Relief. A form for the certification appears on our website.

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

Announcements about upcoming CLE programs will be sent by email.

SECOND DEPARTMENT NEWS

New Website for the Attorneys for Children Program and the Mental Health Professionals Panel

We are pleased to announce that we have a new website for the Attorneys for Children Program. Please go to: http://www.nycourts.gov/courts/ad2/index.shtml and on the left hand side you will see under Ancillary Programs, **"Attorney for the Child"**. Once you click on **"Attorney for the Child"** you will be taken to a web page which contains links highlighted in blue, each of which corresponds to relevant and necessary information, i.e., Administrative Handbook, Family Court Appellate Handbook, Online Voucher System. This website includes a new component of our continuing legal education program which provides you with access to online videos of the Fundamentals of Family Court Advocacy, a pre-requisite for admission to the panel, and the 2010 Mandatory Seminars. DVD's of those seminars are no longer available for distribution at the Family Court Clerk's office. All make-ups for the seminars must now be completed online. For additional information please contact Gregory Chickel at gchickel@courts.state.ny.us

There is also a new website for the Mental Health Professionals Panel. Please go to: http://www.nycourts.gov/courts/ad2/index.shtml , and on the left hand side you will see under Ancillary Programs, a link for **"Mental Health Professionals"**. When you click on **"Mental Health Professionals"** you will be taken to a web page which contains links highlighted in blue, each of which corresponds to relevant and necessary information, including the **Directory of Mental Health Professionals,** a comprehensive list of psychiatrists, psychologists, and social workers, approved for inclusion on the panel pursuant to 22 NYCRR Part 623 and Part 680. For additional information please contact Nancy Matles at nmatles@courts.state.ny.us

Continuing Legal Education

On January 20, 2011, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, the New York State Unified Court System Child Welfare Court Improvement Project, the New York City Family Court, and the New York City Community Alternative Systems Agency (CASA) co-sponsored ***Interstate Compact for the Placement of Children: Information for Practitioners***. The speaker was Melissa A. Wade, Liaison, New York State Unified Court System Child Welfare Court Improvement Project. This lunchtime training was held at the Richmond County Family Court.

On January 31, 2011, the Appellate Division, Second Judicial Department, the Attorneys for Children Advisory Committee, and the Kings County Women in the Courts Committee co-sponsored ***Representing Teenagers in Domestic Violence Proceedings***. The speaker was Stephanie Nilva, Esq., Executive Director,

Day One. This lunchtime training was held at the Kings County Supreme Court.

On February 17, 2011, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, the New York City Family Court, and the New York City Health and Hospitals Corporation (HCC) co-sponsored ***The Use (And Misuse) of Psychiatric Medications in Treating Adolescents Involved in Family Court Proceedings***. This lunchtime training was held at the Queens County Family Court.

On March 3, 2011, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, the New York State Unified Court System Child Welfare Court Improvement Project, the Richmond County Family Court, the New York City Administration for Children's Services, Advocates for Children, and the Legal Aid Society co-sponsored ***Educational Stability for Children in Foster Care***. The speaker was Melissa A. Wade, Liaison, New York State Child Welfare Court Improvement Project. This lunchtime training was held at the Richmond County Family Court. This program was also held at the Queens County Family Court on March 9, 2011.

On March 16, 2011, the Appellate Division, Second Judicial Department, the Attorneys for Children Advisory Committee, and the Kings County Women in the Courts Committee, co-sponsored ***Victims of Intimate Partner Violence and the Courtroom: Striving for Understanding***. The presenters were the Hon. Patricia E. Henry, Integrated Domestic Violence Court - Kings County Supreme Court, and Dawn M. Hughes, Ph.D., ABPP, Clinical and Forensic Psychologist. This lunchtime training was held at the Kings County Supreme Court.

On March 30, 2011, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, the New York State Unified Court System Child Welfare Court Improvement Project, the Queens County Family Court, and the Queens County Family Justice Center co-sponsored ***The Many Faces of Domestic Violence***. The presenters were Melissa A. Brennan, Esq., Sanctuary For Families Immigration Intervention Project; Diane Feniello, Esq., inMotion, Inc.; Atossa Movahedi, Esq., Urban Justice Center Domestic Violence Project; Jessica Spector, Esq.,Urban Justice Center Domestic Violence Project; and Erin Salvatore, LCSW, Sanctuary for Families - Queens County Family Justice Center. This lunchtime training was held at the

On April 14, 2011, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, the New York State Unified Court System Child Welfare Court Improvement Project, and the Queens County Family Court co-sponsored ***The Legal Standard of Imminent Risk: How Does it Differ from Safety?*** The presenters were Gary Solomon, Esq., The Legal Aid Society, Juvenile Rights Practice and Marcia Werchol, M.D., New York City Health and Hospitals Corporation (HCC). This lunchtime program was held at the Queens County Family Court and was repeated On Wednesday, April 27, 2011, with speakers Gary Solomon, Esq., and Nancy Thompson, Esq., Assistant Commissioner and Special Counsel - Administration for Children's Services Division of Family Court Legal Services.

THIRD DEPARTMENT NEWS

2011 Revisions to the *Administrative Handbook*

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

Mileage Rate Change

Attorneys should note that the mileage reimbursement rate was changed to $.51 per mile, effective January 1, 2011.

Website

The Office of Attorneys for Children continues to update its web page located at www.nycourts.gov/ad3/oac. Attorneys have access to a wide variety of resources, including online CLE, the New York State Bar Association Representation

Standards, the latest edition of the Administrative Handbook, forms, rules, frequently asked questions, seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The Publication Order Form allows Third Department panel attorneys to email the Office with any requests for written materials handed out in conjunction with CLE programs.

Training News

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

Effective Representation of Children: Part II will be held at the Clarion Hotel (Century House) in Latham on Friday, April 8, 2011.

Tug of War: Effectively Addressing complex Custodial Issues will be held at the Holiday Inn on Wolf Road in Colonie on Friday, April 15, 2011. The John T. Hamilton, Jr., Esq. Award for Excellence in the Legal Representation of Children will be presented during the lunch hour.

Children's Law Update '10-11 will be held at the Crowne Plaza Resort on Friday, May 6, 2011.

Introduction to Effective Representation of Children, introductory training of new attorneys for children, will be held on Friday and Saturday, June 3-4, 2011 at the Clarion Hotel (Century House) in Latham.

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

Liaison Committee Meetings

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts will meet this Spring, on Thursday, May 5, 2011, in conjunction with the Children's Law Update seminar to be held the next day. The committees were developed to provide a means of communication between panel members and the Office of Attorneys for Children. The Liaison Committees, whose members are nominated by Family Court judges, meet twice annually and will meet again in the Fall of 2011. Additionally, representatives are frequently in contact with the Office of Attorneys for Children on an interim basis. If you would like to know the name of your Liaison Committee representative, it is listed in the Administrative Handbook or you may contact Betsy Ruslander by telephone or e-mail at oac3d@nycourts.gov. If you have any issues you would like brought to the attention of the Office of Attorneys for Children, please contact your county's liaison representative.

FOURTH DEPARTMENT NEWS

County Panel "Pizza" Meetings

This summer the Director will be setting up county lunchtime meetings with attorneys for children (we'll supply the pizza and soft drinks) to discuss issues, areas of concern, Program improvements, etc. The Director will be consulting with Family Court Clerks about the possibility of having these lunchtime meetings somewhere in the Family Court facilities. As soon as a schedule is developed, we will circulate it – and we hope that you will join us !

Mileage Rate Increase

Effective January 1, 2011, the mileage rate is **$.51** per mile. The internet voucher system will calculate this rate automatically.

Internet Voucher System

Vouchers must be billed by file number, not by docket, i.e., if a file number has three dockets; do not bill each docket separately. In instances where one docket is disposed of with the remaining dockets still active, you may bill for the entire case as an interim

voucher and start a new voucher for the remaining dockets in the file.

If you have any internet voucher questions, please contact Amy Klee at 585-530-3173 or aklee@courts.state.ny.us.

Tentative Fall Seminar Schedule

September 9, 2011

Update
Bryncliff Resort & Conference Center
Varysburg, NY

September 23, 2011

Update
Holiday Inn
Auburn, NY

October 21-22, 2011

Resort Seminar
Otsega Resort Hotel
Cooperstown, NY

October 28-29, 2011

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

Congratulations to New Judges

5th Judicial District

Hon. John J. Brennan, Herkimer County Family Court

7th Judicial District

Hon. John Gallagher, Monroe County Family Court

8th Judicial District

Hon. Deborah Chimas, Erie County Supreme Court
Hon. Catherine Nugent Panepinto, Erie County Supreme Court
Hon. Henry Nowak, Erie County Supreme Court

RECENT BOOKS AND ARTICLES

ADOPTION

Jason C. Beekman, *Same-Sex Second-Parent Adoption and Intestacy Law: Applying the* Sharon S. *Model of "Simultaneous" Adoption to Parent-Child Provisions of the Uniform Probate Code,* 96 Cornell L. Rev. 139 (2010)

Andrea B. Carroll, *Reregulating the Baby Market: A Call for a Ban on Payment of Birth-Mother Living Expenses,* 59 U. Kan. L. Rev. 285 (2011)

I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should it Matter?,* 95 Minn. L. Rev. 485 (2010)

David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption,* 48 U. Louisville L. Rev. 441 (2010)

Tiffany Woo, *When the Forever Family Isn't: Why State Laws Allowing Adoptive Parents to Voluntarily Rescind an Adoption Violate the Adopted Child's Equal Protection Rights,* 39 SW. L. Rev. 569 (2010)

ATTORNEY FOR THE CHILD

Kara M. Clunk & Heidi Redlich Epstein, *Notifying Relatives in Child Welfare Cases: Tips for Attorneys,* 29 Child L. Prac. 113 (2010)

Shireen Y. Husain, *A Voice for the Voiceless: A Child's Right to Legal Representation in Dependency Proceedings,* 79 Geo. Wash. L. Rev. 232 (2010)

Claire Shubick, *What Social Science Tells Us About Youth Who Commit Status Offenses: Practice Tips for Attorneys,* 29 Child L. Prac. 129 (2010)

CHILD WELFARE

Rebecca Aviel, *Restoring Equipoise to Child Welfare,* 62 Hastings L. J. 401 (2010)

Naomi Harlin Goodno, *Protecting "Any Child": The Use of the Confidential-Marital-Communications Privilege in Child-Molestation Cases,* 59 U. Kan. L. Rev. 1 (2010)

Symposium, *Corporal Punishment of Children,* 73 Law & Contemp. Probs. 1 (2010)

CHILDREN'S RIGHTS

Dean J. Haas, *"Doctor, I'm Pregnant and Fifteen - I Can't Tell My Parents - Please Help Me": Minor Consent, Reproductive Rights, and Ethical Principles for Physicians,* 86 N.D. L. Rev. 63 (2010)

Colleen D. Holland, *Autism, Insurance, and the IDEA: Providing a Comprehensive Legal Framework,* 95 Cornell L. Rev. 1253 (2010)

Victoria Slade, *The Infancy Defense in the Modern Contract Age: A Useful Vestige,* 34 Seattle U. L. Rev. 613 (2011)

Children's Legal Rights Journal, American Bar Association on Children and the Law, Volume 30, Number 2 (Summer 2010)

CONSTITUTIONAL LAW

Renee Newman Knake, *From Research Conclusions to Real Change: Understanding the First Amendment's (Non)Response to the Negative Effects of Media on Children by Looking to the Example of Violent Video Game Regulations,* 63 SMU L. Rev. 1197 (2010)

Joanna Nairn, *Is There a Right to Have Children? Substantive Due Process and Probation Conditions That Restrict Reproductive Rights,* 6 Stan. J. Civ. Rts. & Civ. Liberties 1 (2010)

Joseph A. Tomain, *Cyberspace is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 Drake. L. Rev. 97 (2010)

COURTS

Amy Fry, *Polygamy in America: How the Varying Legal Standards Fail to Protect Mother and Children From its Abuses,* 54 St. Louis U. L. J. 967 (2010)

John J. Gochnour, *The First Complaint: An Approach to the Admission of Child-Hearsay Statements Under the Alaska Rules of Evidence,* 27 Alaska L. Rev. 71 (2010)

Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion From Leading to a Lifetime of Unintended Consequences for Minors and Young Adults,* 96 Iowa L. Rev. 357 (2010)

Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education,* 6 Stan. J. Civ. Rts. & Civ. Liberties 83 (2010)

Jordan J. Szymialis, *Sexting: A Response to Prosecuting Those Growing Up With a Growing Trend,* 44 Ind. L. Rev. 301 (2010)

CUSTODY AND VISITATION

Bernardo Cuadra, *Family Law - Maternal and Joint Custody Presumptions For Unmarried Parents: Constitutional and Policy Considerations in Massachusetts and Beyond,* 32 W. New Eng. L. Rev. 599 (2010)

Julie Hixson Lambson, *Consigning Women to the Immediate Orbit of a Man: How Missouri's Relocations Law Substitutes Judicial Paternalism for Parental Judgment by Forcing Parents to Live Near One Another,* 54 St. Louis U. L. J. 1365 (2010)

Kim H. Pearson, *Mimetic Reproduction of Sexuality in Child Custody Decisions,* 22 Yale J. L. & Feminism 53 (2010)

Jill E. Tompkins, *Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions,* 81 U. Colo. L. Rev. 1119 (2010)

DIVORCE

Megan L. Randolph, *Let No Man Put Asunder: Divorce, Joint Tenancy, and Notices of Severance,* 47 U. Louisville L. Rev. 607 (2009)

Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases,* 86 N.D. L. Rev. 115 (2010)

DOMESTIC VIOLENCE

Mary Adkins, *Moving Out of the 1990's: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases,* 22 Yale J. L. & Feminism 97 (2010)

Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System,* 100 J. Crim. L. & Criminology, 1255 (2010)

Abigail Browning, *Domestic Violence and Gun Control: Determining the Proper Interpretation of "Physical Force" in the Implementation of the Lautenberg Amendment,* 33 Wash. U. J. L. & Pol'y 273 (2010)

Anne Chandler, *Impedimenta: The Casting of Spells in American Law Against Immigrant Women and Children Fleeing Violence,* 51 S. Tex. L. Rev. 731 (2010)

Paul A. Clark, *Mandatory Arrest for Misdemeanor Domestic Violence: Is Alaska's Arrest Statute Constitutional?,* 27 Alaska L. Rev. 151 (2010)

Elizabeth Coppolecchia et. al., United States v. White: *Disarming Domestic Violence Mesdemeanants Post-*Heller, 64 U. Miami L. Rev. 1505 (2010)

Terry L. Fromson, *Domestic Violence Reform: From Page to Practice and Back Again,* 34 N.Y.U. Rev. L. & Soc. Change 435 (2010)

Margaret C. Hobday, *Protecting Economic Stability: The Washington Supreme Court Breathes New Life in the Public-Policy Exception to At-Will Employment for Domestic Violence Victims,* 17 Wm. & Mary J. Women & L. 87 (2010)

Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening,* 32 Cardozo L. Rev. 519 (2010)

Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory of Domestic Violence,* 2010 BYU L. Rev. 515 (2010)

Aviva Orenstein, *Sex, Threats, and Absent Victims: The Lessons of* Regina v. Bedingfield *For Modern Confrontation and Domestic Violence,* 79 Fordham L. Rev. 115 (2010)

Myrna S. Raeder, *Thoughts About* Giles *and Forfeiture in Domestic Violence Cases,* 75 Brook. L. Rev. 1329 (2010)

Milena Shtelmakher, *Police Misconduct and Liability: Applying the State-Created Danger Doctrine to Hold Police Officers Accountable for Responding Inadequately to Domestic-Violence Situations,* 43 Loy. L. Rev. 1533 (2010)

EDUCATION LAW

Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline With Developmental Knowledge,* 82 Temple L. Rev. 929 (2009)

Judge Paul Egly, Crawford v. Los Angeles Unified School District; *An Unfulfilled Plea for Racial Equality,* 31 U. La Verne L. Rev. 257 (2010)

Shailini Jandial George, *Do Sexual Harassment Plaintiffs get two Bits of the Apple?: Sexual Harassment Litigation After*

Fitzgerald v Barnstable School Committee, 59 Drake L. Rev. 41 (2010)

Andrew C. Mendrala, *Wasted Money and Insufficient Remedies in Adequacy Litigation: The Case for Extended School Day and Year to Provide Students Access to Constitutionally Mandated Curriculum,* 54 How. L. J. 175 (2010)

Emily Montgomery, *Me and Julio Down by the Schoolyard: An Analysis of School Liability for Discriminatory Peer Sexual Harassment Under Vermont Law,* 35 Vt. L. Rev. 515 (2010)

Samuel J. Philhower, *A Moral and Political Roadblock to Viable Sex Education: How Abstinence Education has Established Itself at the Center of Public Policy,* 31 Women's Rts. L. Rep. 1 (2009)

Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education is it, Anyway?,* 89 Neb. L. Rev. 290 (2010)

Matthew Scott Weiner, *Material Failure and IEP Implementation: How the Ninth Circuit Pulled the Teeth out of The Individuals With Disabilities Education Act,* 39 SW. L. Rev. 541 (2010)

Symposium, *The Future of School Integration in America,* 46 U. Louisville L. Rev. 559 (2008)

FAMILY LAW

Victoria Degtyareva, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent,* 120 Yale L. J. 862 (2011)

Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States,* 62 Fla. L. Rev. 47 (2010)

Ashley Hawley, *Taking a Step Forward or Backward? The 2009 Revisions to the FMLA Regulations,* 25 Wis. J. L., Gender & Soc'y. 137 (2010)

Courtney G. Joslin, *Protecting Child?: Marriage, Gender, and Assisted Reproductive Technology,* 83 S. Cal. L. Rev. 1177 (2010)

Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family,* 32 Cardozo L. Rev. 225 (2010)

Judy Ritts, *Pro Bono Services: A Family Law Experience,* 51 S. Tex. L. Rev. 629 (2010)

Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of* De Facto *Parents,* 38 Hofstra L. Rev. 1103 (2010)

Stephen I. Winter, *Home is Where the Heart is: Determining "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction,* 33 Wash. U. J. L. & Pol'y 351 (2010)

Symposium, *Special Symposium on the Intersection of Family and Criminal Law,* 44 Fam. L. Q. 155 (2010)

FOSTER CARE

Margaret Ryznar & Chai Park, *The Proper Guardians of Foster Children's Educational Interests,* 42 Loy. U. Chi. L. J. 147 (2010)

JUVENILE DELINQUENCY

John C. Lore III, *Pretrial Self-Incrimination in Juvenile Court: Why a Comprehensive Pretrial Privilege is Needed to Protect Children and Enhance the Goal of Rehabilitation,* 47 U. Louisville L. Rev. 439 (2009)

Natalie Pifer, *Is Life the Same as Death?: Implications of* Graham v. Florida, Roper v. Simmons *and* Atkins v. Virginia *on Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders,* 43 Loy. L. Rev. 1495 (2010)

Michael J. Ritter, *Just (Juvenile Justice) Jargon: An Argument for Terminological Uniformity Between the Juvenile and Criminal Justice Systems,* 37 Am. J. Crim. L. 221 (2010)

Grace E. Shear, *The Disregarding of the Rehabilitative Spirit of Juvenile Codes: Addressing Resentencing Hearings in Blended Sentencing Schemes,* 99 Ky. L. J. 211 (2010-2011)

Symposium, *Righting the Wronged: Causes, Effects, and Remedies of Juvenile Wrongful Conviction,* 62 Rutgers L. Rev. 879 (2010)

Symposium, *The Backdoor of Juvenile Courts: Waivers and the Impact of Criminalization,* 71 La. L. Rev. 1 (2010)

PATERNITY

Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth,* 40 U. Balt. L. Rev. 53 (2010)

TERMINATION OF PARENTAL RIGHTS

Elizabeth Mills Viney, *The Right to Counsel in Parental-Rights Termination Cases: How and Clear and Consistent Legal Standard Would Better Protect Indigent Families,* 63 SMU L. Rev. 1319 (2010)

FEDERAL COURTS

No Constitutional Right to Religious Exemption From Child's Vaccination

When plaintiffs sought to register their child CC for preschool they indicated that CC had not been vaccinated on religious grounds. The School District directed plaintiffs to fill out a vaccination exemption request form. They attached to the form a letter from their attorney explaining their religious beliefs. The School District denied the exemption on the ground that plaintiffs did not have a genuine and sincere religious objection to vaccination. The District Court dismissed all of plaintiffs' claims except the state law claim alleging violation of the New York State Health Law. Plaintiffs lacked standing to assert a claim for violation of their Fourteenth Amendment right to counsel in connection with preparing the exemption form. Plaintiffs suffered no harm because rather than being discouraged from employing counsel in completing the exemption form, they responded to the form with a letter drafted by their attorney. The free exercise clause of the First Amendment does not provide a right for religious objectors to be exempt from New York State's inoculation law.

Caviezel v Great Neck Public Schools, 739 F Supp 273 (EDNY 2010)

Complaint Alleging Violation of Father's Constitutional Right to Relationship With Daughter Dismissed

In this § 1983 action, plaintiff father alleged that his ex-wife, his daughter's guardian ad litem, the Family Court Referee, and the Office of the Attorney General, conspired to violate, and did violate, his constitutional rights by denying him a relationship with his daughter. After the Family Court Referee granted plaintiff's ex-wife's family offense petition, ordering plaintiff, among other things, to stay away from his daughter, he commenced this *pro se* proceeding. The District Court granted defendants' motions to dismiss and dismissed the complaint without leave to amend. The claims against the Office of the Attorney General were barred by the Eleventh Amendment, the claims against the Referee were protected by judicial immunity, the claims against the guardian ad litem were protected by quasi-judicial immunity and plaintiff's conclusory allegations about conspiracy did not support his claims against his ex-wife.

Wilson v Wilson-Polson, 2010 WL 3733935 (SDNY 2010)

COURT OF APPEALS

Minor's Inculpatory Statement Was Voluntary

Respondent was 13 years old when his 9-year-old cousin told family members that respondent sexually abused her. Respondent's mother took both children to the hospital where the police were called. Respondent and his mother were taken to a child advocacy center where they were placed in one room and the cousin and the cousin's mother in another room. The cousin described an incident of sexual abuse that occurred that evening and added that she was afraid of respondent because he had sexually abused her on another occasion. The detective took respondent and respondent's mother to a juvenile interview room where the detective explained the allegations against respondent and read him his *Miranda* rights in English. Respondent's mother was read the *Miranda* rights in Spanish. The version read to respondent was in simple terms designed for use by juveniles. Both respondent and his mother responded, without hesitation, that they understood each right. Both signed the *Miranda* waivers. The detective asked respondent's mother for permission to talk with respondent alone and the mother agreed after respondent consented. The detective told respondent if he told her what happened he could get "help" if he needed it. The detective was unsure whether she said help from a lawyer or psychiatric or counseling help. Respondent admitted to a series of sexual contacts with his cousin and wrote a handwritten confession. After a juvenile delinquency petition was filed in Family Court, respondent's motion to suppress his confession was denied. Respondent was found to have committed several acts, which if committed by an adult, would have constituted several sex offenses, he was adjudicated a juvenile delinquent and placed on probation for 18 months, conditioned on cooperation with sex offender counseling. The Appellate Division, among other things, rejected respondent's voluntariness challenge. The Court of Appeals affirmed. The detective's promise of help did not give rise to a substantial risk that respondent might falsely incriminate himself. Respondent was not offered an incentive to lie – there was no merit in making a false confession and receiving psychiatric assistance relating to a crime respondent did not commit. The dissent would have held the confession invalid because the detective's promise of help with legal assistance or psychological counseling was not contingent upon a confession. Respondent was absolutely entitled to an attorney and confessing a criminal wrongdoing is not a condition precedent to access to psychological counseling.

Matter of Jimmy D., 15 NY3d 417 (2010)

Appeal on Issue Whether Minor's Statement Was Attenuated Dismissed

Respondent was 15 years old when he was arrested at his school for theft of credit cards after he made an inculpatory statement without being advised of his *Miranda* rights. Respondent was transported to a precinct, left alone in an adult holding cell, and was questioned by detectives in a sergeant's office rather than a juvenile room. Respondent made a written inculpatory statement after he and his mother were advised of his *Miranda* rights. Family Court precluded respondent's oral inculpatory statement but denied suppression of the written statement. The court determined that the written statement was sufficiently attenuated from the oral statement. Respondent was adjudicated a juvenile delinquent. In a 3-2 decision, the Appellate Division affirmed, finding that the written statement was sufficiently attenuated from the oral statement. The Court of Appeals dismissed the subsequent appeal on the ground that the Appellate Division's dissent did not present a question of law. The dissent would have reached the question of attenuation and would have concluded that an incorrect legal standard was applied. The dissent at the Appellate Division took issue with the legal standard applied by the majority – whether attenuation should be assessed differently where the suspect is a juvenile. Respondent's juvenile status increased the severity of the police misconduct during the unwarned interrogation, decreased the likelihood that he understood the subsequent *Miranda* warnings and impacted the validity of his written statement.

Matter of Daniel H., 15 NY3d 883 (2010)

Appeal Dismissed – Two-Justice Dissent at AD Not on Question of Law

Court of Appeals dismissed JD appeal on the ground that the two-justice dissent at the Appellate Division was not on a question of law (*see Matter of Albert F.*, 74 AD3d 568 [First Department dissent was on the ground that respondent's testimony that a backpack had been in the possession of another youth who had tried on jeans while respondent was in the store, that the jeans were not respondent's size, and that respondent cooperated when asked to open his backpack, did not establish beyond a reasonable doubt that respondent knowingly possessed stolen property.])

Matter of Albert F.,15 NY3d 942 (2010)

Court Lacked Jurisdiction to Remand Minor to Detention

When respondent, then 14 years old, returned home after a four-day absence, she announced she was leaving again. When her mother attempted to block respondent's way, respondent grabbed a knife and said that no one was going to touch her. When her stepfather intervened respondent grazed his shoulder with the knife and bit him on the arm and chest. The stepfather was taken to the hospital where his bite wounds were treated. Family Court adjudicated respondent a juvenile delinquent and during the dispositional hearing respondent said she understood that the court would require respondent to come to court for reports and if she violated her curfew or did not go to school she would be put in detention. The court placed respondent in a program that matched troubled youth with an array of services as an alternative to placement. Less than one month later, when respondent arrived late for her first monitoring hearing, the Probation Report showed that respondent had missed eight days of school out of the 13 school days since she started probation and respondent's mother reported that respondent had stayed out all night and had been home once or twice a week. The court remanded respondent to the Commissioner of Juvenile Justice because respondent failed to comply with the conditions of her probation. Respondent's attorney objected on the ground that the Probation Department had not filed a violation of probation (VOP) petition. The Appellate Division reversed. Although the Probation Department had long since pursued a VOP petition, resulting in a new order of disposition placing respondent in another community- based alternative to placement, the Appellate Division decided the appeal because the issue presented was "substantial and novel" and "likely to evade review." The Court of Appeals affirmed. There was no statutory authority for placement of a juvenile before the filing of a VOP petition. Respondent's acknowledgment at the dispositional hearing that she understood that a poor probation report could result in her detention did not amount to a waiver of a VOP petition, assuming that such a waiver could be obtained from a minor in respondent's situation.
Matter of Jasmin A., 18 NY3d 546 (2010)

Voluntary Consent Attenuated Taint of Illegal Police Action

School officials in the Bronx discovered that a laptop computer was missing. The computer's tracking software led police to an address in the Bronx. Five police officers went to the address, a single-family house, in the middle of the afternoon. They entered the vestibule of the house without ringing the doorbell or otherwise announcing their presence. Inside the vestibule, one of the officers knocked on an inner door separating the vestibule from the rest of the house. Respondent's sister welcomed the officers inside the home, stating "Thank God you're all here." When she was asked whether respondent was home, she answered affirmatively, explaining that her brother had been acting up and cursing at her mother and that she was going to call the police anyway if her brother didn't stop. The sister directed the officers up the stairs and they encountered a youth, not the respondent, in a bedroom with the laptop computer. Respondent entered the room and said the laptop was his and that a friend stole it. Respondent was arrested and charged with committing an act which, if committed by an adult, would constitute the crime of stolen possession of property in the fourth and fifth degrees. Following a suppression hearing, Family Court denied respondent's motion to suppress the evidence obtained at his residence, concluding that the police had the sister's consent to enter the residence and her consent was not coerced. The Appellate Division reversed, concluding that petitioner had not shown that the sister's consent was both voluntary and "sufficiently distinguishable" from the police entry into the vestibule to be purged of

any illegality. The Court of Appeals reversed, concluding that the sister's consent attenuated the taint of the initial illegal entry into the vestibule as a matter of law. The testimony of the officers and the sister established that her consent was volunteered and not given upon request. The fact that the consent was close in time to the illegal entry into the vestibule was not dispositive. Further, the alleged police misconduct – walking through an unlocked front door into a vestibule – was not so flagrantly intrusive on personal privacy that its taint could not be dissipated. The dissent would have held that the sister's consent was not attenuated from the unlawful entry.

Matter of Leroy M., __NY3d__ 2011 WL 5105130 (2011)

APPELLATE DIVISIONS

ADOPTION

Father's Consent to Adoption Not Required

Family Court determined that respondent father's consent was not required for his child's adoption. The Appellate Division affirmed. Respondent failed to meet any of the criteria that would have entitled him to notice as a putative father in the child's adoption. Further, he was not a person entitled to consent to the child's adoption. Respondent admitted that he did not provide financial support for the child other than modest gifts and clothing. The court credited the caseworker's testimony that respondent visited the child twice in 2005-2006, five times in 2007-2008 while the child was with petitioner agency, and inconsistently thereafter while she lived in a foster home.

Matter of Vanessa B., 76 AD3d 912 (1st Dept 2010)

Father's Consent to Adoption Not Required

Family Court determined that respondent biological father's consent was not required for placement of his son for adoption. The Appellate Division affirmed. After providing support for the child for a year, respondent successfully moved to be relieved of that obligation and thereafter failed to provide substantial and continuous financial support other than modest gifts and clothing. The court did not err in refusing to admit into evidence a list allegedly reflecting partial child support payments, because the list was uncertified and respondent's attorney failed to establish a foundation. It was in the child's best interests to be adopted by the foster parent who had provided a stable, loving home.

Matter of Shane Chayann Orion S., 79 AD3d 430 (1st Dept 2010)

Father's Consent to Adoption Not Required

Family Court determined that respondent's consent was not required for the adoption of the subject children. The Appellate Division affirmed. Respondent did not meet the statutory parental responsibility criteria. He was incarcerated for a large portion of the children's life, failed to provide financial support, and did not maintain regular contact with the children. It was in the children's best interests to be adopted by the foster parent, who was also their paternal grandmother.

Matter of Timothy M., 79 AD3d 595 (1st Dept 2010)

Father's Consent Not Required

The appellant appealed from the Family Court's finding that his consent to the adoption was not required. The record established that the appellant did nothing to manifest his parental interest during the six-month period prior to the child's placement for adoption. The appellant argued that he could not manifest his parental interest in a timely fashion because he was prevented through no fault of his own from finding out about the pregnancy until months after the subject child's placement for adoption based on the biological mother's active concealment of the pregnancy. The Appellate Division disagreed. A review of the record revealed a unique set of circumstances from which the Court could not find the appellant's failure to manifest his parental interest during the six-month period preceding the child's placement for adoption to be excusable.

Matter of John Paul B., 77 AD3d 932 (2d Dept 2010)

Clear and Convincing Evidence Mother Had Abandoned Her Child

Mother and paternal grandparents consented to an order of joint custody of mother's child, with primary physical custody of child with grandparents. Thereafter, the mother had no contact with her child for 7 years, and failed to provide him with any financial support. When grandparents filed to waive mother's consent to adopt the child , mother opposed the application and filed modification and violation of custody proceedings. The grandparents again filed a waiver and began adoption proceedings. A hearing was held to determine whether mother's consent was necessary for the adoption to proceed. The Family Court found that grandparents had shown by clear and convincing evidence that mother had abandoned child and held that mother's consent to adoption was not

needed. The Appellate Division affirmed.

Matter of Zachary N., 77 AD3d 1116 (3d Dept 2010)

Court Failed to Determine Whether Enforcement of Post-Adoption Agreement in Child's Best Interests

Family Court granted the motion of respondent adoptive parents to dismiss biological mother's petition to enforce a post-adoption contract. The Appellate Division reversed. The court properly applied principles of contract law in making its determination. The agreement, which was incorporated into the conditional surrender order, provided that it would be voided if the biological mother missed two visits within any 12-month period. The biological mother testified at the hearing on the petition that she missed the June 2008 visit because she was incarcerated and, although the adoptive parents ceased her visitation after August 2008, she would have missed the December 2008 visit as a result of her incarceration. Thus, the biological mother failed to demonstrate that she was ready, willing and able to meet her obligations under the contract. Her incarceration was no excuse because it stemmed from her own conduct. The court erred, however, in failing to determine whether enforcement of the agreement was in the child's best interests. Because the record was insufficient for the Appellate Division to make that finding, the case was reversed and remitted to the trial court.

Matter of Mya V.P., 79 AD3d 1794 (4th Dept 2010)

APPEALS

Contrary to AFC's Contention No Non-Frivolous Issues on Appeal

Family Court granted petitioner's motion for a final order of protection in her and her son's behalf against respondent. On appeal, respondent's assigned appellate counsel moved to withdraw as counsel. The attorney for the child contended that the appeal should be prosecuted on the merits and that the order of protection should be resettled to reflect the court's oral determination that the prohibition against respondent's contacting his son was subject to court-ordered visitation. The Appellate Division affirmed and granted respondent's appellate attorney's motion to withdraw. There were no non-frivolous issues on appeal. The attorney for the child took no position when petitioner reiterated her request for a final order of protection at the conclusion of the hearing before the court. There was no need to conform the order to the court's oral decision because the former clearly reflected the latter and, in any event, any application to modify should have been made to the trial court.

Matter of Perez v Perez, 78 AD3d 433 (1st Dept 2010)

ATTORNEY FEES (CUSTODY)

Improper to Determine Attorneys' Fees on Affirmations

The mother appealed from an order of the Supreme Court, which, after a hearing, inter alia, awarded the father joint custody of the subject child, determined that she was obligated to pay the father's and paternal grandfather's litigation expenses, and directed that the applications for awards of the attorneys' fees be determined by submission of affirmations rather than after a hearing. While the Supreme Court correctly determined that the appellant mother should pay the petitioners' attorneys fees, it was improper to direct that those fees be determined based upon affirmations. Rather, the Supreme Court should have directed a hearing to determine the appropriate amount to award for the attorneys' fees. The mother's remaining contentions were without merit.

Matter of Hobenson v Tarnavsky, 76 AD3d 560 (2d Dept 2010)

CHILD ABUSE AND NEGLECT

Neglect Petition Reversed

Family Court denied respondent mother's motion to vacate her default at a fact finding hearing on a neglect petition against her. The Appellate Division reversed, granted the motion and dismissed the petition. The neglect petition should have been dismissed pursuant to Family Court Act § 1051 (c) because the court's aid was not needed – the court in effect determined that there was no need for supervision or referrals by releasing the child to respondent's custody. It was established that the child was being raised as a model

person and student, wished to remain in the mother's custody, and the domestic violence incident between respondent and her boyfriend was isolated and the mother had ended that relationship. Respondent's motion to vacate her default should have been granted because there was no evidence her absence was willful and she demonstrated a meritorious defense to the neglect petition. The agency's proof that the child felt "scared and anxious" during the isolated domestic violence incident did not establish that respondent failed to exercise a minimum degree of care or that the child's mental or emotional condition was impaired or in imminent danger of becoming impaired.

Matter of Eustace B., 76 AD3d 428 (1st Dept 2010)

Infant in Imminent Danger of Physical Injury

Family Court's finding that the two-month-old infant was in imminent danger of physical injury as a result of respondent father's failure to exercise a minimum degree of case was supported by a preponderance of the evidence. Respondent had a violent physical altercation with the infant's mother, punching her repeatedly in the face and head while she was three feet from the infant, who was receiving oxygen while lying on a bed and connected to a heart monitor.

Matter of Gianna C.E., 77 AD3d 408 (1st Dept 2010)

Neglect Determination Affirmed Based Upon Child's Failure to Thrive

A preponderance of the evidence showed that respondent neglected the child by failing to properly feed him, which led to a medical diagnosis of failure to thrive, and by failing to provide the child with proper medical care for that condition. Although the court erred in refusing to qualify respondent's witness as an expert pediatrician, the error was harmless because the witness did not examine the child until after the neglect petition was filed. The court did not err in refusing to admit irrelevant medical records compiled after the filing. Further, the medical evidence could have been readily understandable to an average finder of fact. The court properly admitted evidence that before the filing respondent failed to ensure that the child received prescribed medical treatment for his failure to thrive.

Matter of Joshua Hezekiah B., 77 AD3d 441 (1st Dept 2010), *lv denied* 15 NY3d 716

Failure of Proof of Educational Neglect But Sufficient Proof of Inadequate Supervision

Family Court found that respondent mother neglected her child and placed the child with the Commissioner of Social Services until the next permanency hearing. The Appellate Division affirmed. Although the agency failed to show educational neglect by a preponderance of the evidence, the record supported the alternative theory of inadequate guardianship and supervision. The child had Downs Syndrome with autistic features, requiring constant care, while respondent had a full scale IQ of about 50. While a parent's mental retardation will not support a finding of neglect per se, here a preponderance of the evidence showed that given the child's intense needs and respondent's limitations, respondent was unable to provide adequate care for her child, thus creating an imminent risk of harm to the child.

Matter of Erica D., 77 AD3d 505 (1st Dept 2010)

AD Had Jurisdiction to Hear Appeal From Intermediate Order in Abuse or Neglect Case

Family Court found that respondent father neglected his child. The Appellate Division affirmed. The agency's contention that the appeal should have been dismissed because the appeal was from a fact-finding order was without merit. The Appellate Division had jurisdiction to hear an appeal from an intermediate or final order in an abuse or neglect case. The finding of neglect was supported by a preponderance of the evidence, which established that the father failed to protect the child from the mother's erratic behavior caused by her mental illness and substance abuse.

Matter of Christy C., 77 AD3d 563 (1st Dept 2010)

Respondent Failed to Plan For Her Child's Future

Family Court found that respondent mother permanently neglected her children. The Appellate Division affirmed. There was clear and convincing evidence that despite petitioner agency's diligent efforts to assist a meaningful relationship between

respondent and her children, respondent failed to plan for her children's future. Petitioner's focus on respondent's issues with respect to health and domestic violence was appropriate and respondent failed to complete these critical components of the service plan.

Matter of Adaliz Marie R., 78 AD3d 409 (1st Dept 2010)

Respondent Failed to Provide Adequate Supervision / One Child Also Educationally Neglected

Upon a fact-finding determination of neglect based upon inadequate supervision with respect to two of respondent mother's children and educational neglect with respect to one of the children, Family Court discharged the children to respondent on a trial basis. The Appellate Division affirmed. Because of respondent's failure to adequately supervise, the children were in imminent danger of becoming impaired. With respect to educational neglect of one of the children, the record showed that in addition to five excused absences from school, respondent allowed the child to have 24 unexcused absences during the 2007-2008 school year. The record supported the court's finding that the child's absences adversely affected her academic performance.

Matter of Annalize P., 78 AD3d 413 (1st Dept 2010)

Child Derivatively Neglected Based Upon Mother's Leaving Other Child Unattended Resulting in Other Child's Drowning

Family Court, upon a fact-finding determination that respondent mother derivatively neglected her daughter, placed the child with the Commissioner of Social Services. The Appellate Division affirmed. Less than two years before the instant filing, there was a neglect finding against respondent based upon her actions in leaving her nine-month-old infant in a bathtub with water running without adequate supervision, resulting in the infant's death. The drowning incident was relatively close in time to the instant proceeding so it could be reasonably concluded that the mother still lacked parental judgment. The court properly found that the mother failed to prove that her lack of judgment did not then exist or would not exist in the foreseeable future. Even if it was improper for the court to admit evidence about prior neglect findings from 2005 and 2006 the error was harmless because the court specifically based its finding of derivative neglect on the 2007 case. Although the mother completed parts of her service plan, she was not willing to exclude the father from the home even though he never completed a parenting course. Even if the mother had not been given proper notice or opportunity to address the claim of her failure to use a proper tub for the drowned child, the error was harmless given the other evidence of the mother's neglect, which was alleged in the petition and addressed at the fact-finding hearing, including leaving the infant alone in a bathtub with water running.

Matter of Brianna R., 78 AD3d 437 (1st Dept 2010), *lv denied* 16 NY3d 702

Mother Neglected All Five of Her Children

Family Court found that respondent mother neglected her five children, including the eldest who was speech impaired and developmentally disabled. The Appellate Division affirmed. The finding was supported by a preponderance of the evidence, which established that the children were at imminent risk of harm due to the mother's inadequate supervision, continued use of marijuana even after the petition was filed, and her failure to bring the children for several scheduled medical appointments. Records at the shelter where the mother and children resided showed that she had, on several occasions, left her children, then ages 14, 11, 6, 5 and 1, unattended at the shelter and allowed them to ride the subway late at night without her. One Justice would have dissented with respect to the eldest child, agreeing with the attorney for the children that the finding with respect to that child should be vacated.

Matter of Lah De W., 78 AD3d 523 (1st Dept 2010)

Finding of Neglect Based Upon Domestic Violence Incident Affirmed

Upon a fact-finding determination of neglect against respondent father, Family Court placed father's children with ACS for twelve months. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence, including that the father engaged in acts of domestic violence against the children's mother and placed two

knives under one child's chin at his throat, while threatening to kill the child.

Matter of Jared S., 78 AD3d 536 (1st Dept 2010), *lv denied* __NY3d__

Children's Neglect Based Upon Mother's Mental Illness Affirmed / Custody to Father

Upon a fact-finding determination of neglect against respondent mother, Family Court released her children to their non-respondent father and in a subsequent order awarded custody of the children to the father. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the children's physical, mental or emotional condition were in imminent danger of becoming impaired as a result of the mother's longstanding history of mental illness and resistance to treatment. Respondent testified to multiple extended hospitalizations for mental illness and stated that she would not resume medication even if that meant her children would not be returned to her. The evidence at the consolidated hearing on the neglect petition and the father's custody petition concerning the mother's failure to address her mental health issues and its effects on the children and that the children were attending school and otherwise doing well while living with their father supported the court's determination that it was in the children's best interests to award custody to the father.

Matter of Christopher R., 78 AD3d 586 (1st Dept 2010)

Court Had Jurisdiction Over Respondent

Family Court determined, after a fact-finding hearing, that respondent father neglected the subject children. The Appellate Division affirmed. The father's contention that the court lacked jurisdiction over him because he did not have custody of the children and was barred from contact with them was without merit. The child need not be in the care or custody of respondent if the court otherwise has jurisdiction. A respondent in a neglect proceeding includes any parent or other person responsible for the child's care. The father was aware that the mother was not properly caring for the children. He testified that when he traveled to Puerto Rico to get one of the children, he was informed that the child was not attending school and the children testified that respondent was present when they visited their paternal grandfather. Neglect includes failure to properly supervise by unreasonably allowing harm to be inflicted on a child. That father was barred from contact with the children did not relieve him of his parental duties

Matter of Erica B., 79 AD3d 415 (1st Dept 2010), *lv denied* ___NY3d___

Court Properly Granted Respondent Return of Her Daughter

Family Court granted respondent mother's petition for the return of her child. The Appellate Division affirmed. Petitioner agency failed to demonstrate that return of the child posed a threat to her life or health. Any imminent risk to the child was eliminated by the court's order that directed an order of protection against the father, directed the mother to reside in a domestic violence shelter, required weekly visits from petitioner agency, and required the mother to avail herself of various services.

Matter of Natalie L., 79 AD3d 487 (1st Dept 2010)

Children in Imminent Danger of Becoming Impaired By Mother's Mental Illness

Upon a fact-finding determination of neglect against respondent mother, Family Court placed her children with petitioner until completion of the next permanency hearing. The Appellate Division affirmed. A preponderance of the evidence supported the finding of neglect. The mother's hospital records demonstrated that the children's physical, mental or emotional condition were in imminent danger of becoming impaired. Respondent was diagnosed with a major depressive disorder, which was recurrent and moderate to severe and she had expressed to hospital staff that she was experiencing increasingly persistent thoughts of killing herself and drowning the children in a bathtub. There was no requirement that there be expert testimony regarding how respondent's mental illness affected her ability to care for the children.

Matter of Jonathan S., 79 AD3d 539 (1st Dept 2010)

Children's Emotional Well-being Impaired

The Family Court properly found that the father neglected his children. The petitioner established by a preponderance of the evidence that the father's course of conduct, which included verbal abuse of the non-respondent mother in the presence of the children, and making numerous unfounded allegations of maltreatment against the mother and her boyfriend, impaired the subject children's mental or emotional well-being, or placed them in imminent danger of such impairment. Order affirmed.

Matter of Kevin M.H., 76 AD3d 1015 (2d Dept 2010)

Dss Not Required to Give Notice to Attorney for the Child

The Appellate Division found that in a child protective proceeding, the Family Court properly denied a motion of the attorney for children to direct the County Department of Social Services (DSS) to refrain from interviewing his clients concerning any issues beyond those related to safety, without 48 hours notice to him. The Court noted that the child who is the subject of a neglect proceeding has a constitutional and statutory right to legal representation, and Rule 4.2 of the Rules of Professional Conduct (22 NYCRR 1200.0), which prohibits an attorney representing another party in litigation from communicating with or causing another to communicate with a child without prior consent of the attorney for the child, applies only to attorneys. Furthermore, DSS has constitutional and statutory obligations toward children in its custody, and has a mandate to maintain regular communications with children in foster care on a broad range of issues that go beyond their immediate health and safety.

Matter of Cristella B., 77 AD3d 654 (2d Dept 2010)

Pattern of Domestic Violence Established

Upon a review of the record, the Appellate Division affirmed a fact-finding order which found that the appellant neglected the subject children. The Court noted that although an isolated incident of domestic violence outside the presence of a child is insufficient to establish neglect, the act of domestic violence in the instant case was neither isolated nor perpetrated outside the presence of the subject children. A pattern of domestic violence was alleged in the petition and supported by the mother's testimony at the fact-finding hearing.

Matter of Elijah J., 77 AD3d 835 (2d Dept 2010)

Mother's Boyfriend Inflicted Corporal Punishment on Children

The Family Court's determination that the mother neglected the subject children was supported by a preponderance of the evidence. Here, the credible evidence demonstrated that, although the mother was aware of an incident in which her boyfriend had inflicted excessive corporal punishment upon two of her children in the presence of her other child, which had resulted in orders of protection directing the boyfriend to stay away from the children and directing the mother to stay out of the home that she and the children had previously occupied with the boyfriend, the mother moved herself and the children back into the boyfriend's home approximately three weeks after the incident. Under these circumstances, the Family Court properly determined that the mother neglected the children by failing to exercise a minimum degree of care in providing them with proper supervision or guardianship, thereby exposing them to an imminent risk of harm by her boyfriend.

Matter of Amelia W., 77 AD3d 841 (2d Dept 2010)

Child's Injuries Could Not Be Adequately Explained

The record revealed that the petitioner's medical expert testified that there was no evidence that the child suffered from a bone disease, and opined that the child's multiple fractures were intentionally inflicted. Moreover, the child was in the mother's care when he suffered the fractures. Accordingly, the petitioner established a prima facie case of child abuse, and the burden shifted to the mother to rebut the evidence of parental culpability. The mother, however, failed to provide a reasonable and adequate explanation for the injuries. The record fully supported the Family Court's determination that her testimony was incredible.

Matter of Jacob B., 77 AD3d 936 (2d Dept 2010)

Child's In Camera Testimony in Article 10 Proceeding May Not Be Sealed For Purpose of Appeal

Family Court found that the father and mother had neglected the parties three sons. Father was found to have sexually abused the mother's daughter and derivatively abused the three sons. During the fact-finding, Family Court heard sworn testimony from the daughter in what was termed a "*Lincoln*" hearing. Respondents were not present during the daughter's testimony but their counsel was and counsel was given the opportunity to cross -examine the child. The transcript of the daughter's testimony was marked confidential by Family Court and forwarded to the Appellate Division under seal for purposes of appeal. Appellant's counsel successfully argued to have the daughter's testimony unsealed for purpose of appeal. The Appellate Division held that unlike "*Lincoln*" hearings in custody cases where the rationale behind maintaining confidentiality and sealing the transcript is to protect children from openly choosing between parents or divulging intimate details of the parent-child relationship, in abuse/neglect proceedings the interests of the child may be adverse to that of the respondent and pursuant to Federal and State Constitutions, the litigant has a fundamental right to confront his or her accuser. The Court further held that sealing such testimony for purposes of appeal would raise fundamental due process concerns because such testimony, sworn or unsworn, can at the very least corroborate the child's out of court statement and support a finding of abuse or neglect.

Matter of Justin CC., 77 AD3d 207 (3d Dept 2010)

Daughter's Out of Court Statements Sufficiently Corroborated

Appellate Court affirmed Family Court's finding of abuse and neglect of children by parents based on preponderance of the evidence. The Appellate Court gave due deference to Family Court's credibility assessments, which found that the daughter's in-court testimony was detailed and credible, sufficiently corroborating her out of court statements of sexual and physical abuse, and Father's "string of denials" undermined his credibility.

Matter of Justin CC., 77 AD3d 1056 (3d Dept 2010)

Substance Abuse and Domestic Violence Constitutes Neglect

Mother and father had joint legal custody of child born in 2003. Parents lived in two different counties with their significant others. In 2008 the child was diagnosed with leukemia. In May of 2009, DSS filed neglect petitions against the mother and her fiancé alleging that their alcohol abuse and domestic violence made their home unfit for the child. At the end of the fact- finding hearing, Family Court found that the mother and her fiancé had neglected the child, placed the child with the father and issued a one year order of protection against the mother on behalf of the child. The mother appealed. The Appellate Division held that the record fully supported the Family Court's conclusion that the mother's actions created an unreasonable risk of imminent danger to the child's health and safety and that mother failed to exercise a minimum degree of care.

Matter of Kaleb U., 77 AD3d 1097 (3d Dept 2010)

Mother's Mental Disorder and Father's Limited Insight Into Mother's Condition Sufficient To Find Neglect

Family Court held that mother's inability to meet her own needs, based on her mental retardation, seizure disorder and other disabilities , and father's inability to comprehend the extent of mother's needs, including testifying that mother could adequately care for child while he was at work and he could "catch the infant if the mother suffered a seizure", was sufficient to find that the child was neglected. The Appellate Division affirmed the decision.

Matter of Tomasa Z., 77 AD 3d 1102 (3d Dept 2010)

Family Court Properly Admitted Testimony of Validator to Corroborate Child's Out-of- Court Statements of Sexual Abuse

DSS filed a neglect and derivative neglect petitions against appellant/father on behalf of his two daughters, based on the father fondling the breasts of their friend during a sleep-over in his home. The friend gave a

detailed description to the school counselor, investigator and validator of appellant fondling her breasts, and putting his hand down her pants. She testified in court as well. The validator testified to using the Yuille protocol in evaluating the child's allegations. After the fact-finding hearing, Family Court granted the petition. Father appealed arguing that the validator's testimony was incorrectly used by Family Court to corroborate child's testimony because the validator, among other factors, departed from the Yuille protocol. The Appellate Division affirmed, noting that Family Court has considerable discretion in making such a finding and that there was adequate evidence to support the validator 's testimony. In a footnote, the Appellate Court noted that the in court testimony of the child was sufficient by itself to corroborate her out-of- court statements.

Matter of Nikita W., 77 AD 3d 1209 (3d Dept 2010)

Family Court Correctly Modified Dispositional Order

Mother consented, without admission, to a finding of neglect and was placed under supervision of DSS for one year. Thereafter DSS moved to modify the dispositional order based on mother's non-compliance. The youngest son had been diagnosed with bipolar disorder, oppositional defiant disorder and attention deficit disorder. DSS alleged that the mother had failed to attend meetings regarding her son, failed to re-schedule meetings with caseworkers, and when the mother was out of town, the child became involved in an incident where, among other things, he tried to harm a 11- year- old girl with a golf ball, bat and knife. When he was restrained by adults, he threw a rock at the girl's father's car and threatened to kill the 11- year-old girl and rape her sister. When the mother was contacted by the caseworker regarding this incident, the mother told the caseworker to tell the child to "shut the f....up". The Appellate Division affirmed Family Court's finding of good cause to modify the order of disposition.

Matter of Kenneth QQ., 77 AD 3d 1223 (3d Dept 2010)

Finding of Neglect Affirmed

Family Court properly held mother had neglected child. The child had substantial, un-excused school absences resulting in her failing her classes; mother lacked credibility in her assertions that child suffered anxiety attacks; mother had mental health issues which included paranoia; mother was unwilling to accept help from others or allow her child to socialize with peers; and, mother and child had an unhealthy relationship evidenced by their need for therapy to deal with being apart from each other**.**

Matter of Regina HH., 77 AD3d 1205 (3d Dept 2010)

Neglect Finding Affirmed Despite Court's Failure to Follow Procedural Requirement

Family Court found appellant had neglected his child and issued a no contact order of protection on behalf of the child. The case was solely based on derivative neglect, evidenced by the previous abuse and neglect findings against him , as well as termination of his parental rights of another two of his children. The father appealed arguing that Family Court's failure to strictly follow the procedural requirements of FCA section 1033-b (1)(b) at his initial appearance was reversible error, and that documentation of his past abuse was insufficient to make a finding of derivative neglect. The Appellate Division affirmed Family Court's determination, stating that as the appellant had been provided with counsel, had notice of future proceedings, and by asking questions demonstrated his knowledge of the petition's contents, there was no reversible error. Additionally the Appellate Court held that the "the extensive documentation of [appellant's] past abuse and neglect" of other children, showed there were fundamental flaws in appellant's understanding of his parenting responsibilities, and as such was sufficient to make a finding of neglect.

*Matter of Michael N.,*77 AD3d 1165 (3d Dept 2010)

Sound and Substantial Basis For Neglect Finding

Appeal by father who was found to have neglected his son. Family Court based its decision on many factors, including, child's positive test for THC**,** child's out-of-court statements against father, father's lack of

supervision of child, his heavy drinking and history of alcohol abuse, and child's 38 un-excused absences from school while in father's care and custody. The Appellate Division affirmed Family Court's decision. However, while the Appellate Court noted that Family Court had sufficient grounds to find neglect, it should not have taken judicial notice of the father's criminal history without affording him an opportunity to challenge its relevancy or accuracy, nor should it have included allegations in its fact-finding decision that were not established at the hearing.

Matter of Dakota CC., 78 AD3d 1430 (3d Dept 2010)

Respondent Mother Failed to Provide Proper Supervision

Family Court adjudged respondent mother's three children to be neglected. The Appellate Division affirmed. The evidence presented at the fact-finding hearing demonstrated that the mother attempted to commit suicide by overdosing on prescription medication causing her to lose consciousness for a prolonged period of time. Because of her voluntarily induced drug stupor, the mother failed to provide the children with proper supervision or guardianship and as a result, the children's physical, mental and emotional condition was in imminent danger of becoming impaired.

Matter of Alexandra J., 77 AD3d 1299 (4th Dept 2010)

Stepdaughter Testified of Sexual Abuse Not Aggrieved by Finding of Abuse

Family Court adjudged that respondent stepfather abused his stepdaughter and derivatively abused his daughter. The Appellate Division affirmed. The stepdaughter's appeal was dismissed. Because the stepdaughter testified at the hearing that she was sexually abused by the stepfather she was not aggrieved by the finding of neglect. Further, even if she were aggrieved, she was not entitled to affirmative relief because she did not take an appeal from the order. The court's determination of neglect was supported by a preponderance of the evidence – DNA evidence establishing stepfather's sperm and seminal material were on the stepdaughter's shorts.

Matter of Zanna E., 77 AD3d 1364 (4th Dept 2010)

Dismissal of Neglect Petition Modified

At the close of petitioner's proof, Family Court dismissed the petition on the ground that petitioner failed to make a prima facie case of neglect against respondent parents. The Appellate Division modified by reinstating the petition against respondent father insofar as the petition alleged that his alcohol abuse impaired his ability to safely care for the child. Petitioner failed to establish by a preponderance of the evidence that the child's physical, mental or emotional condition was impaired or was in imminent danger of becoming impaired by the alleged incidents of domestic violence between the parents. Petitioner established a prima facie case of neglect with respect to the issue of respondent father insofar as the petition alleged that his alcohol abuse impaired his ability to safely care for the child. Petitioner submitted evidence that police intervention was required on several occasions during which the father engaged in violence against the mother while he was intoxicated.

Matter of Alfonzo H., 77 AD3d 1410 (4th Dept 2010)

Finding of Severe Abuse Vacated

Family Court found, among other things, that respondent father severely abused one of his sons and derivatively abused another of his sons. The Appellate Division modified by vacating the findings of severe abuse and derivative severe abuse but affirming the findings of abuse and derivative abuse. The evidence established that the son sustained injuries consistent with shaken baby syndrome and the physician that examined the child opined that some of the hematomas were days old and that the fracture preceded the most recent hematoma. None of the explanations of respondent or the mother were consistent with the extent of the child's injuries. Further, respondent's failure to testify allowed the court to draw the strongest inference against him. There was insufficient evidence of severe abuse because the injured child was also in the care of the mother and grandparents during the time frame at issue. The findings of severe abuse under these circumstances were not supported by clear and convincing evidence that respondent acted under circumstances evincing a depraved indifference to

human life.

Matter of Jezekiah R. A., 78 AD3d 1550 (4th Dept 2010)

Children Neglected By Mother Where One Child Witnessed Domestic Violence

Family Court adjudicated respondent mother's three children to be neglected. The Appellate Division affirmed. Respondent did not move to dismiss the petition on the ground that the evidence was insufficient that any of her children were present during a domestic violence incident and she therefore did not preserve the issue for review. In any event, the record contained sufficient evidence from which the court could have determined that at least one of the children was present during the incident. The domestic violence case worker did not recant her testimony that one of the children was present, but instead clarified the basis for that testimony.

Matter of Syira W., 78 AD3d 1552 (4th Dept 2010)

Neglect Based on Mother's Failure to Protect Affirmed - Other Findings Vacated

Family Court adjudicated respondent mother's three children to be neglected. Respondent's failure to protect the children from their father after she was told that one of the children had been abused by the father demonstrated a fundamental defect in her understanding of the duties of parenthood and created an atmosphere detrimental to the children's well-being. The child's out-of-court statements about the abuse were sufficiently corroborated by, among other things, the testimony of an examining physician who opined that the child's symptoms were consistent with sexual abuse, as well as the testimony of a psychologist who opined that the child's statements made during a videotaped interview were credible. The videotape was properly admitted into evidence. Its accuracy and authenticity was established by the testimony of the case worker during the fact-finding hearing. The evidence was insufficient, however, to support findings that respondent sent the children to school in inappropriate and dirty clothing and failed to give one child medication.

Matter of Annastasia C., 78 AD3d 1579 (4th Dept 2010)

Finding of Father's Sexual Abuse Against Daughter Affirmed

Family Court found that respondent father sexually abused his daughter. The Appellate Division affirmed. The finding of sexual abuse was supported by a preponderance of the evidence. The court properly determined that the child's out-of-court statements were sufficiently corroborated by the testimony of a sexual abuse validator, as well as the child's age-inappropriate knowledge of sexual conduct.

Matter of Sharanae T. L., 78 AD3d 1631 (4th Dept 2010)

Ample Corroboration of Child's Statements of Abuse

Family Court adjudged that respondent father abused his child and placed the child with DSS until completion of the next permanency hearing. The Appellate Division affirmed. There was sufficient corroboration of the child's unsworn out-of-court statements, i.e., statements made by respondent to an investigator employed by the New York State Police, as well as the testimony of a psychologist, who determined that the contextual details of the child's statements were consistent with a description of actual events. Respondent received effective assistance of counsel.

Matter of Alston C., 78 AD3d 1660 (4th Dept 2010)

Petition Reinstated With Respect to Father

Family Court dismissed the neglect petition against respondent parents. The Appellate Division modified by reinstating the petition against the father. The court did not err in refusing to admit evidence of domestic violence incidents from May 2008 through January 2009 because any allegations concerning those incidents were raised or could have been raised in a separate petition previously filed by petitioner in January 2009, in which petitioner alleged that the parents neglected the child. Thus, the evidence was properly excluded on the ground of res judicata. The

court erred, however, in granting that part of the parents' motion to dismiss the petition against the father. Petitioner presented evidence that during a May 2009 altercation between the parents, the father was wielding a knife and pushed the mother onto a bed where the six-month-old child was lying.

Matter of Alfonzo T., 79 AD3d 1724 (4th Dept 2010)

CHILD SUPPORT

Failure of Support Collection Unit to Charge Interest on Arrears Did Not Constitute Waiver

Family Court denied petitioner's objections to a Support Magistrate's order dismissing a supplemental petition to adjust arrears and refund alleged overpayments. The Appellate Division affirmed. Petitioner father and his former wife were divorced in 1976. Because petitioner did not pay any of the ordered support payments and his family was on public assistance, respondent Commissioner obtained money judgments against him in 1985 and 1986 for the respective sums of $51,452.05 and $10,200. The court properly found that a 1992 support order had no effect on the prior money judgments that were incorporated into a single "administrative amount." The fact that the Support Collection Unit did not begin to charge interest on the arrears until after 1993 did not constitute a waiver of the right to recover interest. Because petitioner had made payments through 2008 the statute of limitations had not elapsed. Moreover, the statute of limitations was an affirmative defense and could not be used to reduce arrears.

Matter of Nissim Y. v Commissioner of Social Servs., 77 AD3d 480 (1st Dept 2010)

Failure to Timely File Objections to Order of Support Forecloses Review

Family Court denied petitioner's objections to the Support Magistrate's order of support. The Appellate Division affirmed. Petitioner's contention that the 35-day period for filing objections to the Support magistrate's order of support never began running because the court mailed the order of support to her rather than to her counsel was unpreserved because it was not raised at the trial court. Were the Appellate Division to review the contention it would have found that in the objections to the order of support, petitioner's counsel conceded that the 35-day period applied. The record showed that the court properly denied the objections because they were received by the clerk's office about one week after the expiration of the 35-day period. Based upon the foregoing, the Appellate Division did not reach the merits of petitioner's objections to the order of support.

Matter of Loretta C. W. v Mark A.W., 77 AD3d 588 (1st Dept 2010)

Father Failed to Show Change in Circumstances or Extreme Hardship

Supreme Court denied defendant husband's motion for a downward modification of his child and spousal support obligations and granted plaintiff wife's cross motion to the extent of ordering father to provide evidence of life insurance and pay wife support arrears, granting wife a money judgment for the arrears, and denying wife's motion to hold husband in contempt and requiring him to post security to insure future support payments. The Appellate Division affirmed. The court properly denied, without a hearing, defendant's motion for a downward modification of his support obligations because he did not establish, prima facie, that there had been a substantial, unanticipated, and unreasonable change in circumstances or that continued enforcement of his obligations would create an extreme hardship. The evidence defendant presented about his health had been rejected by the court in earlier proceedings and therefore did not constitute changed circumstances. More significantly, defendant failed to address the imputation of income to him, which had been affirmed by the Appellate Division. The court properly declined to adjudicate defendant in contempt for failing to provide proof of current life insurance and instead directed him to provide proof. The court also properly declined to order defendant to post security for future payments of support and instead directed him to pay the accrued arrears and granted plaintiff a money judgment for the arrears.

Fabrikant v Fabrikant, 77 AD3d 594 (1st Dept 2010)

Pendente Lite Child Support Award Affirmed

Supreme Court directed defendant father to pay $5000 per month in interim child support. The Appellate Division affirmed. Plaintiff mother's contention that the court erred in failing to set forth any analysis of the Child Support Standards Act (CSSA) to explicate the award was without merit. Courts may apply the CSSA standards and guidelines when making pendente lite child support awards but they were not required to do so. Direct application of the CSSA factors would have been difficult because plaintiff aggregated expenses relating to herself, the parties' son and her child by a previous marriage. The court did provide a detailed review of the expense statements before it as well as recognizing defendant's substantial income. The court also took into account the son's reasonable housing needs by directing defendant to guarantee a one-year apartment lease at a monthly rental up to $6500. To the extent the award may be inadequate, the best remedy would be a speedy and plenary hearing on the merits.

Rubin v Salla, 78 AD3d 504 (1st Dept 2010)

Parties' Agreement to Submit to Beth Din Unenforceable to Extent it Required Arbitration of Disputes Beyond Religious Divorce

Supreme Court denied defendant's application to compel arbitration and ordered him to pay $17,000 per month in pendente lite maintenance and child support. The Appellate Division affirmed. The parties' arbitration agreement, which provided that they would submit to beth din for binding decisions in any dispute over issues relating to religious divorce, premarital agreements, or monetary matters was unenforceable to the extent it required arbitration of disputes beyond religious divorce (Domestic Relations Law § 236 [B] [3]). Moreover, the agreement was neither acknowledged or proved in a manner required to entitle a deed to be recorded as required by the statute, nor was it an oral agreement entered on the record during a matrimonial action intended to settle the action. There was no merit to defendant's contention that the action would cease to be a matrimonial action once he asserted a breach of contract counterclaim.

Arabian v Arabian, 79 AD3d 517 (1st Dept 2010)

Reliance upon Same Sex Partner's Promise of Support Was Sufficient to Support Cause of Action

The petitioner's allegations that the respondent, her former same-sex partner, consciously chose to bring the petitioner's biological child into the world through artificial insemination by a donor, and that the child was conceived in reliance upon the respondent's implied promise to support the child, were sufficient to support a cause of action for child support.

Matter of H.M. v E.T., 76 AD3d 528 (2d Dept 2010)

Father Failed to Allege Any Change in Circumstances

The father, in support of his petition which sought to add a therapeutic component to his visitation or, in the alternative, to suspend his obligation to pay maintenance and child support, failed to allege that any change in circumstances occurred since the entry of a prior visitation order in 2008. Rather, he was seeking to address an ongoing situation that had allegedly continued since the parties executed a stipulation of settlement in an underlying matrimonial action in 2005. Moreover, the father did not allege conduct on the part of the mother that, if proven, would have "rise[en] to the level of 'deliberate frustration' or 'active interference' with the noncustodial parent's visitation rights". Order affirmed

Matter of Mazzola v Lee, 76 AD3d 531 (2d Dept 2010)

Support Magistrate Properly Based Child Support Award on Needs of Children

The record supported the Support Magistrate's finding that the father's testimony and the documentation proffered regarding his income were not credible. Since the Support Magistrate was presented with insufficient evidence to determine the father's gross income, it was proper to base the child support award on the needs of the children. Order affirmed.

Matter of Ennis v Pina, 78 AD3d 830 (2d Dept 2010)

Family Court Properly Denied Father's Objections to COLA Order as Untimely

In a child support proceeding, the father appealed from an order of the Family Court which denied his objections to an order of the same court which denied his objections to a cost-of-living adjustment (COLA) order. The Appellate Division found that the Family Court properly denied the father's objections to the COLA order as untimely. The father admitted that he had previously received the notice of the COLA instructions at his residence, one month prior to the date of the COLA order. In addition, the father failed to provide proof of mailing of his COLA objections to the mother and to the support collection unit as required by Family Court Act § 413-a(3)(a).

Matter of Roode v Seckler-Roode, 78 AD3d 951 (2d Dept 2010)

Father's Nonpayment Due to Financial Inability

In two related child support proceedings, the father appeals from (1) an order of the Family Court, dated August 28, 2009, which denied his objection to findings of fact of the same court, dated June 11, 2009, made after a hearing, finding that he willfully violated the support provisions of an order of the same court, dated August 15, 2007, which, upon his failure to appear, directed him to pay child support in the sum of $669 per month, and (2) an order of the same court, dated December 22, 2009, as denied his objections to an order of the same court, dated August 28, 2009, as, after a hearing, directed him to pay child support in the sum of $100 per month and denied that branch of his petition which was to reduce his child support arrears to a maximum sum of $500. The order dated August 28, 2009 was reversed. The Family Court erred in finding that the father willfully violated a 2007 order, which, upon his failure to appear, directed him to pay child support in the sum of $669 per month. The father demonstrated that his nonpayment was the result of his financial inability to comply with the order (See FCA § 455). The order dated December 22, 2009 was affirmed. The Family Court reasonably found that the father has the ability to pay child support in the sum of $100 per month and properly denied that branch of his petition which was to reduce his child support arrears to a maximum sum of $500 (see FCA § 413).

Matter of Julianska v Majewski, 78 AD3d 1182 (2d Dept 2010)

Adoption Subsidy Can Be Deemed Income

Family Court correctly upheld Support Magistrate's decision directing non-custodial mother, to turn over adoption subsidies she received on behalf of her adoptive son to DSS. The Appellate Division held that adoption subsidies can be considered income child for child support purposes, and mother was obligated to reimburse DSS for the cost of the child's care during the time he was placed in foster care. Although the amount of support owed may have been improperly calculated, Family Court rightly concluded that this did not deprive the Support Magistrate of jurisdiction to enter such an order.

Commissioner of Social Services v Smith, 75 AD3d 802 (3d Dept 2010)

Specific Confirmation Recommendation By Support Magistrate's Unnecessary

Support Magistrate found appellant father to have wilfully violated support order and referred matter to Family Court. Family Court found wilfulness, issued a suspended sentence, stating in its order that Support Magistrate had "referred" matter for confirmation pursuant to FCA§ 439(a). Later father violated the Family Court's sentence, and was sent to jail. Father appealed both his incarceration and the wilfulness finding, arguing that there could be no confirmation hearing by Family Court as Support Magistrate had not specifically said *confirmation* in his referral. The Appellate Division held that as father had already served the jail sentence, the issue of incarceration was moot. As for challenging the lifting of the suspension resulting in his incarceration, the Appeals Court held that father was partly challenging the Support Magistrate's wilfulness finding, and as father had neither "failed to file objections to [the] findings of fact" issued by the Support Magistrate, nor had he "received permission to appeal their entry by the Support Magistrate", pursuant to FCA §439(e), he could not do so now. Additionally, the Appellate Division held that nothing in FCA § 439 (a), precludes Family Court from conducting a confirmation hearing "absent such a recommendation" from the Support

Magistrate.

Matter of Sandulescu v Caico, 77 AD3d 1121 (3d Dept 2010)

Father Not Entitled to Invoke $500 Support Arrears Cap

Support Magistrate directed father, whose adjusted income was held to be $13,734**,** to pay $50 to DSS during the period of time his child was in care of county. Father defaulted in his payments and arrears accrued against him in the amount of $1,850.00. Father filed objections with Family Court arguing that although he agreed to the amount of arrears accrued against him, based on his income, arrears against him had to be capped at $500 pursuant to section 413[1][g] of the FCA. Family Court agreed and capped the arrears. The county appealed and the Appellate Division reversed holding that if the father wished to invoke section 413[1][g] arrears cap provision, his remedy was to make an application before the Support Magistrate to modify or set aside the original order determining his income.

*Matter of Cortland County Dept. of Social Servs. v VanLoan***,** 77 AD3d 1135 (3d Dept 2010)

AD Reinstates Respondent's Petition For a Downward Modification of Support Obligation

Family Court denied respondent father's objection to an order of the Support Magistrate that determined respondent to be in willful violation of his child support obligation, sentenced him to a jail term, and dismissed his petition for a downward modification of his child support obligation. The Appellate Division modified by reinstating the petition for a downward modification. Respondent did not seek a stay of the jail sentence, which had expired, and therefore that part of his appeal was moot. There was sufficient support for the finding of a willful violation. Respondent's admission that he had not paid child support as required by the judgment of divorce constituted prima facie evidence of a willful violation and therefore the burden shifted to respondent to present some competent and credible evidence justifying his failure to pay support. Respondent failed to meet that burden. Because the parties' stipulation of settlement, which was incorporated but not merged into the judgment of divorce, provided that respondent could seek a downward modification without showing a change of circumstances, the Support Magistrate and the court applied an improper legal standard in denying respondent's petition on the ground that he failed to show a "substantial and unforseen change of circumstances."

Matter of Lomanto v Schneider, 78 AD3d 1536 (4th Dept 2010)

Undertaking of $5000 or Six Months in Jail For Willful Violation Affirmed

Family Court directed respondent father to make a cash undertaking of $5000 in order to purge himself of a six-month jail sentence for willful violation of a child support order. The Appellate Division affirmed. Petitioner made a prima facie case of a willful violation by asserting respondent's failure to pay, which respondent did not dispute. The burden then shifted to respondent to present some competent and credible evidence justifying his failure to pay support. Respondent failed to meet that burden. The record showed no evidence of respondent's efforts to obtain money he asserted was wrongfully withheld from him by the State of Texas and, in any event, the record established that he had the money to make the child support payments. The court did not abuse its discretion in imposing the maximum term of incarceration, particularly in view of the fact that respondent made no effort to comply with the order.

Matter of Riggs v VanDusen, 78 AD3d 1577 (4th Dept 2010)

CRIMES

Prosecution Failed to Establish Probable Cause for Defendant's Arrest on Charges of First Degree Rape

Contrary to the Supreme Court's determination, the evidence that the defendant was seen near the security booth of an apartment complex, in the vicinity of the location where the rape occurred, did not rise to the level of probable cause, as there was no additional indicia of criminal activity beyond the defendant's presence in the vicinity of the crime scene. The complainant's description of the perpetrator included

only race, height and clothing, but there was no indication of what the defendant was wearing when he was observed near the security booth, nor was there testimony that the defendant engaged in furtive or suspicious conduct when seen, or that the area was deserted or that the defendant was the only individual in the vicinity. Accordingly, the judgment was reversed, on the law, the plea was vacated, the identification testimony was suppressed, and the matter was remitted to the Supreme Court for further proceedings.

People v Bradshaw, 76 AD3d 566 (2d Dept 2010)

Probable Cause Existed for Warrantless Search of Defendant's Vehicle

The record supported the hearing court's determination that probable cause existed for the warrantless search of the defendant's vehicle, based on the arresting officer's detection of the odor of burnt marijuana emanating from the defendant's vehicle, and the defendant's admission that he had earlier smoked marijuana. Accordingly, that branch of the defendant's omnibus motion which was to suppress physical evidence recovered during the vehicle search was properly denied.

People v George, 78 AD3d 728 (2d Dept 2010)

Motion to Suppress Showup Identification Denied

The Appellate Division rejected the defendant's contention that the Supreme Court erred in denying suppression of the showup identification made by the complainant near the scene of the crime. The Court noted that showup procedures are generally disfavored, however, they are permissible where, as in this case, they are employed in close spatial and temporal proximity to the commission of the crime for the purpose of securing a prompt and reliable identification. Moreover, the record supported the Supreme Court's determination that the police had reasonable suspicion to stop and detain the defendant based upon the description, broadcast to police units, of the perpetrator of a burglary, which matched the defendant's description, his close proximity to the site of the crime, and the short passage of time between the crime and the showup.

People v Hicks, 78 AD3d 1075 (2d Dept 2010)

CUSTODY AND VISITATION

Relocation With Mother Not in Children's Best Interests

Family Court awarded custody of the parties two children to respondent father and denied petitioner mother's petition for custody and relocation. The Appellate Division affirmed. Petitioner was the children's primary caretaker from 2002-2007. Thereafter, the children resided with respondent and his parents in a loving, stable home. Respondent was gainfully employed and adjusted his work schedule so he could be with the children in the evenings. He had been actively involved in the children's education and was able to obtain special services to address their special needs. In contrast, petitioner blamed her lack of involvement in the children's lives on respondent despite the fact that she failed to take steps to learn about the children's educational and emotional needs by contacting their schools. Petitioner was employed but failed to provide any financial support for the children and defied a court order prohibiting contact between them and the father of one of her other children. Any benefit of relocation did not outweigh the harm resulting from disruption to the children's relationship with respondent.

Matter of Charmaine L. v Kenneth D., 76 AD3d 910 (1st Dept 2010)

Petitioner Failed to Show Changed Circumstances

Family Court, on its own motion, dismissed mother's petition seeking a change in custody. The Appellate Division affirmed. Petitioner failed to present credible evidence to support her allegations against respondent and the court had sufficient evidence to determine that a change in custody was not in the best interests of the child. In the absence of the necessary evidentiary showing, the court was not required to hold a hearing. Because petitioner refused the court's offers to appoint counsel and she stated that she preferred to retain counsel of her own choice, the court properly declined to assign counsel.

Matter of Sheliah M. v Joesph G., 77 AD3d 420 (1st Dept 2010)

Sound Basis For Determination of Changed Circumstances

Family Court granted petitioner mother's application to modify the court's visitation order. The Appellate Division affirmed. There was a sound basis for the court's determination that the circumstances had changed sufficiently to modify the visitation order. While the daughter still wanted a relationship with respondent father, she did not want to have overnight visits with him because he failed to maintain a sanitary home and to engage with her during their visits. Further, father's comments about daughter's developing body and his physical altercation with her over the use of a cell phone caused the daughter discomfort in his presence. Such conduct by the father justified the court's modification of visitation to eliminate overnight visitation.

Matter of Celenia M. v Faustino M., 77 AD3d 486 (1st Dept 2010), *lv denied* 16 NY3d 702

Custody to Mother In Children's Best Interests

Supreme Court awarded plaintiff mother legal and primary residential custody of the parties' two children and modified defendant father's access schedule to withdraw Tuesday overnight visitation. The Appellate Division affirmed. Notwithstanding the father's prior neglect finding, father did not appreciate the extent of the emotional harm that his conduct caused the children and he continued to seek to alienate the children from their mother and he remained unable to distinguish between his own interests and those of his children.

Dodson v Dodson, 77 AD3d 564 (1st Dept 2010)

Modification of Visitation Reversed

Family Court modified a March 2009 order of visitation to the extent of requiring petitioner father to travel to Pennsylvania to pick up his child for visitation and directing all future issues of custody and visitation to be determined by the state of Pennsylvania. The Appellate Division reversed and remanded for further proceedings. The court erred in modifying the March 2009 order of visitation without first conducting a full evidentiary hearing to ascertain the child's best interests and to determine if there had been a change of circumstances. Additionally, there was no petition for modification of the visitation provisions of the prior order properly before the court. The court also erred in failing to determine whether it had exclusive continuing jurisdiction. It was improper to refer subsequent issues regarding custody and visitation to Pennsylvania because such determination must await an actual controversy.

Matter of Richard W. v Maribel G., 78 AD3d 480 (1st Dept 2010)

Suspension of Visitation With Father Affirmed

Family Court granted the petition to the extent of suspending visitation between respondent father and his under-18-year-old son. The Appellate Division affirmed. The determination of the best interests of a child in custody and visitation matters is within the discretion of the trial court and will not be disturbed unless it lacks a sound and substantial basis. There was an evidentiary basis for the court's finding that unsupervised visitation would have a negative impact on the child's well-being. Respondent refused an offer of supervised visitation and therefore the court providently exercised its discretion in suspending the father's visitation.

Matter of Arelis Carmen S. v Daniel H., 78 AD3d 504 (1st Dept 2010)

Modification of Custody Reversed

Family Court granted the father's petition to the extent of directing that the subject children reside primarily with father when they attained the age of four and awarded final decision-making authority to father concerning the children's education, extracurricular activities and medical care. The Appellate Division reversed and remanded for further proceedings. The parties met through a Website advertisement placed by respondent mother seeking a man with whom to conceive a child. The parties agreed to try to conceive through artificial insemination and that father would be an active parent. Since the subject twins were born in 2007, the parties shared custody with the mother as

primary custodian. Shortly after the twins were born, the father commenced the instant proceeding seeking primary custody of the children. The parent seeking a change in custody has the burden to show that the change is in the child's best interests. There was no support in the record for the conclusion that the relative advantage of giving the father primary custody was so great that it justified moving four-year-old children from the primary custody of their mother, who had been their primary caregiver since birth. Neither past deficiencies in the mother's conduct with respect to a cooperative attitude toward father nor the Referee's speculation that because the children had a nontraditional family background, they would more easily fit in with other children in father's West Village neighborhood than mother's neighborhood in Queens, warranted the change in custody.

Matter of Lawrence C. v Anthea P., 79 AD3d 577 (1st Dept 2010)

Grandmother Awarded Additional Visitation

A prior order of visitation was entered on consent of the parties, awarding the maternal grandmother supervised visitation with her two granddaughters every other month. However, it was undisputed that visitation pursuant to this order occurred on only one occasion. Thereafter, the maternal grandmother filed a petition seeking to modify the prior order of visitation so as to increase visitation to once per month, and for additional visits to make up for those visits that she was deprived of in abrogation of the prior order of visitation. Based upon these facts, the Appellate Division held that the grandmother established a change in circumstances warranting a modification, and found it was in the grandchildren's best interests to have once monthly supervised visitation with the grandmother.

Matter of Peralta v Irrizary, 76 AD3d 561 (2d Dept 2010)

Family Court Erred in Relinquishing Jurisdiction to State of Connecticut

Although the Family Court erred in relinquishing jurisdiction over the issue of visitation and dismissing the mother's petition to modify a prior visitation order to award her specified periods of visitation with the parties' youngest child, the Appellate Division affirmed the order appealed from due to the lapse of time and the occurrence of subsequent events. In this case, the subject child moved to Connecticut to live with his father only three months before the mother's modification petition was filed, and the record revealed that, at that time, the child retained a significant connection to New York, and that substantial evidence was available in this state regarding his then present and future welfare. In addition, although the Family Court communicated with the Connecticut Superior Court, and ascertained that the Connecticut court was willing to exercise jurisdiction before dismissing the modification petition, it erred in failing to provide the parties with an opportunity to participate in its communication (see Domestic Relations Law § 75-I [2]). However, the Appellate Division noted that more than 18 months had elapsed since the Family Court relinquished jurisdiction and dismissed the modification petition, and the attorney for the child had advised the Court that, in the interim, the Connecticut Superior Court entered a judgment of divorce awarding custody of the child to the father with "reasonable," but unspecified, visitation to the mother. The Connecticut Superior Court's visitation determination was entitled to full faith and credit, and could not be modified by a court of this state unless the Connecticut court no longer had jurisdiction to modify such determination, or had declined to exercise jurisdiction to modify such determination (see 28 USC § 1738A [h]). Since the Connecticut court had retained jurisdiction to modify the visitation determination, and had not declined to exercise such jurisdiction, the Appellate Division affirmed the Family Court's order.

Matter of Wnorowski v Wnorowski, 76 AD3d 714 (2d Dept 2010)

Mother Failed to Demonstrate Sufficient Change of Circumstances

The Supreme Court properly denied that branch of the mother's motion which was to change residential custody of the parties' children from the father to her without conducting a hearing. The mother failed to demonstrate that there had been a sufficient change of circumstances since the parties had entered into a stipulation of settlement regarding custody, nor that it would be in the children's best interests to change

residential custody of the parties' children from the father to her. Moreover, the mother failed to make an evidentiary showing sufficient to warrant a hearing.

Jurgensen v Jurgensen, 76 AD3d 995 (2d Dept 2010)

Mother Continuously Interfered with the Father-child Relationship

The mother appealed from an order of the Family Court which awarded the father sole custody of the parties' child. The record revealed ample evidence which demonstrated the mother's continued interference with the father-child relationship. Thus, the Family Court's determination to award sole custody of the parties' daughter to the father had a sound and substantial basis in the record.

Matter of Jules v Corriette, 76 AD3d 1016 (2d Dept 2010)

Mother Committed Acts of Domestic Violence Against Father

An order of the Supreme Court awarding the father custody of the parties' two children was affirmed. The Appellate Division found that the acts of domestic violence committed by the mother against the father demonstrated that the mother was ill-suited to provide the children with "moral and intellectual guidance".

Costigan v Renner, 76 AD3d 1039 (2d Dept 2010)

Mother Made Unfounded Reports of Child Abuse Against the Father

The Family Court's determination that there had been a sufficient change in circumstances since the issuance of its prior custody order such that it would have been in the best interests of the child to award the father sole custody had a sound and substantial basis in the record. Although the prior custody order awarded the mother sole custody of the child, the Family Court had warned her that continued attempts to prevent the father from fostering a relationship with the child could result in a change of custody. The hearing testimony demonstrated that after the issuance of the prior order, the mother nevertheless interfered with the father's visitation rights by repeatedly failing to bring the child to scheduled visitations and to accommodate court-ordered phone contact between the father and the child. There was also evidence that the mother made unfounded reports of child abuse against the father, and that she continued to be uncooperative and unsupportive of his efforts to foster a relationship with the child. This conduct was so inconsistent with the child's best interests that it per se raised a strong probability that the mother was unfit to act as a custodial parent.

Matter of McClurkin v Bailey, 78 AD3d 707 (2d Dept 2010)

Mother Failed to Ensure That Children Attended School

The Family Court's determination that there had been a change in circumstances since the issuance of a prior custody order, and that it was in the children's best interests to award sole custody to the father, was supported by a sound and substantial basis in the record. The evidence presented at the hearing established, among other things, that the mother interfered with the father's visitation rights and failed to ensure that the children attended school on time as required by the court's prior order. Moreover, the Family Court's determination was consistent with the recommendation of the court-appointed forensic evaluator, and the position of the attorney for the children, which were entitled to some weight.

Matter of Caravella v Toale, 78 AD3d 828 (2d Dept 2010)

Mother Failed to Make an Evidentiary Showing Sufficient to Warrant a Hearing

The Family Court properly dismissed, without a hearing, the mother's petition for a change of custody of the subject child or expanded visitation rights with respect to the subject child. In this case, the mother failed to make an evidentiary showing sufficient to warrant a hearing. Further, contrary to the mother's contentions, the Family Court did not err in directing her to cooperate with the father in securing the renewal of the subject child's passport and not to unreasonably withhold consent to the father's requests to travel with the child.

Matter of Arroyo v Agosta, 78 AD3d 938 (2d Dept 2010)

Mother's Supervised Visitation Increased

The Appellate Division found that the Family Court correctly held a hearing on the issue of whether sole custody of the parties' son should be transferred to the father, as the father demonstrated a change in circumstances since the time of the stipulation based on the mother's unfounded allegations that he was abusing their child. Contrary to the mother's contention, there was a sound and substantial basis in the record for the Family Court's determination that the child's best interests were served by transferring sole custody of the child to the father and awarding her supervised visitation. However, the Appellate Division modified the orders to increase the mother's supervised visitation. Although it was error to admit the report of the forensic psychologist into evidence over the mother's objection, since there was a sound and substantial basis for the Family Court's determination without consideration of the report, that error was harmless.

Matter of Scala v Evanson, 78 AD3d 954 (2d Dept 2010)

Father Not Prejudiced by Alleged Error

The Supreme Court's determination to award sole custody of the subject children to the mother had a sound and substantial basis in the record. The father argued that the Supreme Court erred in considering portions of the forensic report and the forensic expert's testimony regarding recordings allegedly made by the mother of the father's conversations with the children. The Appellate Division found it unnecessary to address this contention since the Supreme Court possessed sufficient information to reach a determination as to the best interests of the children without resorting to that evidence and, thus, the father was not prejudiced by the alleged error.

Ekstra v Ekstra, 78 AD3d 990 (2d Dept 2010)

Father Directed to Pay Mother's Attorney's Fee

In a custody proceeding, the mother's motion for an award of an attorney's fee was granted and the father was directed to pay the mother's attorney's fee in the sum of $13,000. The Appellate Division affirmed. In this case, considering the relative financial circumstances of the parties and the circumstances of the case, the Family Court providently exercised its discretion in granting the mother's motion for an award of an attorney's fee in the sum of $13,000 (see DRL § 237 (b)).

Matter of Dempsey v Dempsey, 78 AD3d 1179 (2d Dept 2010)

Record Supported Custody to Father

Father and mother had two children. The parties moved to South Carolina, where the mother underwent in-patient substance abuse treatment. Father and children, with the mother's approval, moved to Albany for father's new job. Thereafter, mother and father unsuccessfully attempted reconciliation. Father filed for custody and mother cross-petitioned. Family Court found that both parents were willing to foster a relationship between the children and the other parent, but as father had been primary caregiver, as children had continued stability with the father and as the mother continued to need substantial support towards her rehabilitation, custody should remain with the father. Appellate Division affirmed Family Court's determination. Mother's contention that Family Court failed to give enough weight to the psychologist's testimony was found unpersuasive as psychologist's testimony was inconsistent and somewhat contradictory.

Matter of White v White, 77 AD3d 1073 (3d Dept 2010)

Supreme Court Correctly Granted Mother's Petition to Relocate With Child Based Upon Father's Domestic Violence Against Mother and Neglect of Child

Father and mother had one child in common. Previous proceedings pursuant to FCA sections 6 and 10 had found father to have neglected the parties' child, the mother's son and the father's daughter. Father was given one hour, supervised visit with the parties' son. Mother petitioned to relocate based on the father's continuing domestic violence against her. Mother sought to move to South Carolina where members of

father's family resided, including the father of her other son, who was the brother of the father in this proceeding. Supreme Court found mother had a sound and substantial basis for the move. The court held that the father's main reason for opposing the move was to continue harassing the mother and having control over her and her life. The Appellate Division affirmed the decision.

Matter of Sara ZZ. v Matthew A., 77 AD 3d 1059 (3d Dept, 2010)

Extraordinary Circumstances Warrant Award of Custody to Third Party

Mother's abuse of alcohol and drugs, mental health issues, medical neglect of child, suicidal threats, anger problems and continued relationships with abusive men was sufficient evidence to find existence of extraordinary circumstance for friend of family, who had cared for the child since she was one month old, to pursue custody of child who was a special needs child. Family Court held and the Appellate Division affirmed that, based on totality of circumstances, it was in the child's best interest to have custody awarded to third party.

Matter of Tennant v Philpot, 77 AD3d 1086 (3d Dept 2010)

Child's Difficulty Adjusting to Mid-Week Custodial Transfers Constitutes Change in Circumstances Warranting Modification

Attorney for the Child appealed from a decision by Family Court holding that there was no substantial change in circumstances warranting a change in custody and visitation. Parents had consented to joint legal and physical custody of the child, with a mid-week exchange. Since the custody order had been issued, the child had been diagnosed with several developmental disorders. He was also regressing in his educational performance, and the father had moved out of the child's school district, resulting in a 25 minute drive to school every day when the child stayed with the father. The Appellate Division held that the child's recent psychological diagnosis, combined with his poor educational performance was sufficient to find a substantial change in circumstances, and, since the mother had taken more of an active role in the child's therapy it would be in the child's best interest for mother to have primary physical custody with parenting time to the father. The Appellate Division noted while a child's wishes are not determinative, consideration should be given to the fact that the child's preference was to live with his mother.

Matter of Slovak v Slovak, 77 AD3d 1089 *(*3d Dept 2010)

Order of Custody Vacated as Mother Never Consented to Order

Mother lived in Georgia and appeared twice by telephone to resolve transportation issue in New York Family Court proceeding. On the adjourned date to resolve the matter, mother failed to appear by telephone and mother's attorney in NY advised the court that she had not been able to speak with her client. Nevertheless, the attorney for the child proposed to circulate a proposed order, and as there were no objections the Court agreed and later entered the order. Mother appealed. The Appellate Division vacated the order finding that the mother had not given her consent, and remanded the matter back to Family Court for an evidentiary hearing. Mother 's allegation that she lacked effective assistance of counsel was found to be without merit as counsel had attempted to contact mother several times but mother had failed to give counsel her contact information, counsel had made necessary objections on the record and requested and obtained additional time for mother to review the proposed orders.

Matter of Reid v Rorie, 77 AD3d 1091 (3d Dept 2010)

Children's Academic and Behavioral Problems Caused by Animosity Between Parents

Father filed custody modification and violation petitions against the mother alleging that the current custodial arrangement was resulting in the children's poor academic performance, and behavioral problems. He also alleged that mother, in violation of the Family Court order, continued to have *My Space* accounts for the children. The Family Court found, based on testimony from the parties, the psychological evaluation, and the *Lincoln* hearing, that the children's

behavior was the result of long- standing animosity between the parents not the custodial situation, and that the mother had not violated any court order. The Appellate Division concurred.

Matter of Fitzpatrick v Fitzpatrick, 77 AD3d 1108 (3d Dept 2010)

Family Court Did Not Err When It Denied Visitation to Third Party

DSS filed neglect petitions against mother and maternal grandfather. Appellant, a family friend, had initially filed for custody of two of the children in this matter, but withdrew her custody petition when DSS placed first one, then the other child with her, initially giving her intervener status under Article 10, and then continuing placement of the children with her after a neglect finding against mother. The permanency goal was return to the mother. Thereafter, Family Court held that mother had complied with all services, had made tremendous progress, and the children were returned to her. Appellant filed for visitation with the children and Family Court held it was up to the mother to decide whether or not appellant could visit with the children and dismissed her petition. On appeal, the Appellate Division affirmed giving Family Court great deference and held that "case law makes clear that a non-biological parent does not have standing to request visitation when a biological parent is fit and opposes visitation."

Matter of Hayley PP., 77 AD3d 1133 (3d Dept 2010)

Record Supports Granting Custody to Father

Mother left Father and children to move in with her boyfriend. Both parents filed custody petitions. The Family Court issued a temporary order granting father sole custody but before fact-finding, both parents withdrew their petitions and the matter was dismissed. The mother filed a custody modification proceeding alleging father was an unfit parent. The father then filed two petitions alleging mother's unfitness. At the fact-finding hearing, Family Court used a "change of circumstances" analysis in issuing its decision. The court granted father sole custody with visitation rights to the mother. Family Court also, by separate order, directed both parents to attend parent education classes. Mother appealed from both orders and the Attorney for Child appealed from the order granting mother visitation. The Appellate Division held that Family Court should have used the "best interest" analysis to make its determination as the petitions that gave rise to the temporary 2006 order were withdrawn. However, based on the evidence presented, the Appellate Court found that the record was sufficient to make an initial custody determination, and upheld the decision by the Family Court. The court however, held that the Attorney for the Child had not rebutted the presumption that visitation with the non-custodial parent would be in the children's best interest.

Matter of Moore v Fink, 77AD3d 1204 (3d Dept 2010)

Dismissal of Father's Violation and Modification of Visitation Petitions Affirmed

Mother obtained sole custody and incarcerated father was given visitation based upon agreement of the parties. Father filed a visitation modification petition as he had been moved to another correctional facility, and a violation petition alleging that mother had failed to comply with the visitation schedule and other matters. Family Court dismissed the petitions without a hearing. Father appealed. The Appellate Division upheld the Family Court's dismissal, finding that father's modification petition was moot as father had been released from prison, and the Family Court custody order granted father the right to reapply for parenting time upon release. Also, since the visitation order allowed visits as parents can agree, and as there was no agreement, there was no violation.

Matter of Miller v Miller, 77 AD3d 1064 (3d Dept 2010)

Sound and Substantial Basis for Re-location

Mother filed a re-location petition, seeking to move with the child from NY to Florida. The father cross-petitioned, and after fact -finding and *Lincoln* hearings, the Court granted re-location. Family Court kept primary physical custody with the mother, modified the father 's visitation schedule and retained jurisdiction. The father appealed. The Appellate Division affirmed the court's decision, holding that Family Court had given due consideration to all relevant facts and

circumstances, with emphasis on what would likely most serve the child's best interests. The Appellate Court noted that previously father had failed to exercise regular visits with the child, and the current order would give the father more time with the child.

Matter of Vargas v Dixon, 78 AD3d 1431 (3d Dept 2010)

Mother's Criminal Conduct and Lies Constitute Substantial Change in Circumstances

After a five-day hearing, father successfully moved to modify joint custody to sole custody to him and limit the children's contact with the mother. Mother was unsuccessful in her cross petition which alleged father abused alcohol and committed acts of domestic violence against her. Family Court found that mother had failed to exercise her visits with the children and failed to give information about her residence or her employment. The evidence also showed that the mother had hired someone to strike her in the face, lied that the father had assaulted her and lied that their child had witnessed this incident. There was also evidence that mother had falsely stated to a prospective employer that she had a Ph.D in psychology. Based on mother's criminal conduct, lies and the parents acrimonious relationship, Family Court found an award of joint legal custody would not be possible and gave sole legal custody to the father. The Appellate Division affirmed the finding.

Jeker v Weiss, 77 AD 3d 1069 (3d Dept 2010)

Father Not Entitled To Appeal Consent Order

Father filed three custody modification petitions, seeking to change the previous order which granted sole custody to mother. Both parties were *pro se* at the hearing. At the end of father's case, mother and attorney for the child moved to dismiss father's petitions based on his failure to show a change in circumstances. Father consented to the dismissal and Family Court dismissed his petition. Father then appealed the dismissal arguing he did not knowingly consent to the dismissal. The Appellate Division held that as father had consented to the dismissal, he cannot now appeal from that order. His recourse would be to file a motion to vacate in Family Court.

Matter of DeFrancesco v Mushtare, 77 AD3d 1079 (3d Dept 2010)

Not An Abuse of Discretion To Condition Custody on Relocation

Children in this case lived all their lives, except for two years, in Clinton County. The appellant/mother lived with them until for two years and father surrendered his parental rights. A permanent neglect finding was made against mother and a suspended sentence was entered. After two permanency hearings, Family Court held that the children could be returned to the appellant provided she moved to Clinton County. On appeal, the Appellate Division affirmed, holding that Family Court has considerable discretion in crafting orders with conditions that best serves the interests of the children. The Appeals Court found that Family Court had considered the children's troubled history, the fact that they were now in beneficial counseling relationships in Clinton County, and had lived most of their lives in this county, their lengthy relationship with their caseworkers, their very supportive educational environment, their meaningful relationship with another sibling who lived in the same county, mother did not have to remain in Vermont as she was unemployed, and her husband was in the military, deployed overseas.

Matter of Laura L., 79 AD3d 1193 (3d Dept 2010)

Sound and Substantial Basis To Award Custody To Father

The Appellate Division affirmed Family Court's decision that based on the totality of circumstances, physical custody of the parties' two children should be with the father. While the father had been homeless in the past and while the mother alleged he had committed acts of domestic violence against her, the evidence of domestic violence was not "entirely credible". The mother on the other hand had knowingly left the parties' daughter alone with her son, the daughter's half brother, who on one occasion had burned the daughter and on another occasion had sexually abused her. The mother had also failed to seek medical help for the daughter.

Matter of Micah NN.v Kristy NN., 79 AD3d 1188 (3d Dept 2010)

Motion to Enforce Post-Termination Visitation Reversed

Petitioner, the birth mother of the infant who was adopted by respondents, sought to enforce the terms of a visitation agreement entered at the time of the child's surrender. The agreement provided for visitation between the birth mother and child for six hours once a month and in the event respondents relocated less than 250 miles from petitioner's home at the time of the adoption, petitioner would pay the cost of transportation to visitation, but in the event the respondents relocated more than 250 miles they would pay petitioner's transportation and lodging costs for visitation six times each year for six hours over a two day period. The court determined that there was a combined means of public transportation that was less than 250 miles from petitioner's residence, but it would be difficult to make the trip in one day, and thus petitioner would be allowed two six-hour visits over a two-day period six times each year. The Appellate Division reversed and remitted. The court erred in its interpretation of the agreement, which was ambiguous to the extent that it failed to provide for a method of computing the 250-mile provision. The court, in computing the distance, erred in relying on extrinsic evidence that was neither submitted by the parties nor included in the record. Further, the court erred in altering the unambiguous visitation terms set forth in the agreement insofar as they concerned the length and frequency of visitation.

Matter of Dustin K. R., 76 AD3d 794 (4th Dept 2010)

Father's Modification Petition Properly Denied, AFC's Petition Properly Granted

Family Court dismissed father's petition to modify a custody order and granted the Attorney for the Child's petition to modify visitation. The Appellate Division affirmed. The father failed to show a significant change in circumstances to warrant a change in the custodial arrangement. Even assuming, arguendo, that father showed changed circumstances, the record demonstrated that it would not be in the best interests of the child to change custody. The Attorney for the Child established that since entry of the prior visitation order, the father relocated from Virginia to Texas and the requirement in the visitation order that the child spend six weeks with the father in the summer presently interfered with the child's increasing participation in social and extracurricular activities at her primary residence. The 15-year-old child's desire to limit the time she spent away from her primary residence, while not determinative, was entitled to great weight. The court did not err in holding an in camera hearing with the child before further evidence was presented at the hearing. The evidence presented following the in camera interview did not raise new issues.

Matter of VanDusen v Riggs, 77 AD3d 1355 (4th Dept 2010)

Award of Custody to Mother Affirmed

Family Court awarded sole custody of the parties' child to mother with supervised visitation to father and granted mother an order of protection. The Appellate Division affirmed. The court properly weighed the relevant factor in making a custody determination and concluded that those factors weighed heavily in the mother's favor. The court did not abuse its discretion in granting supervised visitation with the father. The record established that the father committed acts of domestic violence against the mother, often in the children's presence, and that he threatened to kill the mother and leave with the child. Father also was unable to control his behavior at the hearing. A fair preponderance of the credible evidence supported the determination that the father committed acts constituting the family offense of harassment in the second degree, which warranted the order of protection.

Matter of Chilbert v Soler, 77 AD3d 1405 (4th Dept 2010), *lv denied* 16 NY3d 701

Respondent Failed to Establish Change in Circumstances

Family Court denied respondent mother's cross petition for primary physical custody and continued the existing award of primary physical custody with petitioner father. The Appellate Division affirmed. Respondent failed to establish the requisite countervailing circumstances to warrant such change. Although the prior custody order specified that a change in schooling could constitute a change in circumstances, it further specified that the decisive factor was the best interests

of the child. The court's determination that it was in the child's best interests to continue primary physical custody with the father was supported by a sound and substantial basis in the record. Further, both parties have other children and thus an award of custody to either party would necessarily separate the child at issue from some of his siblings.

Matter of Slade v Hosack, 77 AD3d 1409 (4th Dept 2010)

Family Court Erred in Failing to Set Forth Sufficient Facts

Family Court granted the parties joint custody of their child. The Appellate Division reversed. The court erred in failing to set forth its findings of fact essential to its decision. Effective appellate review, particularly in child custody cases, required that the court make appropriate factual findings, because it is best able to make credibility determinations. Upon remittal, the focus must be on the best interests of the child.

Matter of Bradbury v Monaghan, 77 AD3d 1424 (4th Dept 2010)

Petition for Sole Custody Properly Dismissed

Family Court dismissed mother's petition, which sought to modify a prior order of joint custody for sole custody of the parties' child. The Appellate Division affirmed. The prior order was entered after a lengthy hearing and petitioner failed to show the requisite change in circumstances. An existing custody arrangement will not be altered because of a change in marital status, economic circumstances or improvements in moral or psychological adjustments absent a showing that the custodial parent is unfit or perhaps less fit.

Matter of Dormio v Mahoney, 77 AD3d 1464 (4th Dept 2010), *lv denied* 16 NY3d 702

Order Granting Relocation Affirmed

Family Court granted petitioner father's motion to relocate with the parties' children to New Jersey. The Appellate Division affirmed. The best interests of the children would not be served by granting respondent mother's petition for joint custody with primary physical custody with her. The court properly considered the *Tropea* factors in determining that the children's best interests would be served by granting father's petition.

Matter of Harnanto v Gandasaputra, 78 AD3d 1527 (4th Dept 2010)

Dismissal of Modification Petition Affirmed

Family Court dismissed father's petition for modification of custody with prejudice. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination that the father did not make a sufficient showing of change in circumstances to warrant an inquiry into whether the best interests of the child would be served by a change in custody.

Matter of Jackson v Beach, 78 AD3d 1549 (4th Dept 2010)

Court Erred in Imposing Condition Precedent to Visitation

Family Court dismissed mother's petition for a modification of custody of the parties' child. The Appellate Division reversed. In her petition, mother sought communication, including telephone contact and visitation, with the parties' child. The court erred in dismissing the petition on the ground that petitioner failed to complete her alcohol and drug assessment and psychological assessment as a condition precedent to further visitation with the child. The court lacked authority to impose conditions precedent to the resumption of a parent's contact and visitation with a child.

Matter of Bray v Destevens, 78 AD3d 1564 (4th Dept 2010)

Father Met Burden of Showing a Change in Circumstances

Family Court granted father's petition to modify custody by granting him sole custody. The Appellate Division affirmed. Petitioner met his burden to show a change in circumstances. Respondent mother, who had

primary physical custody of the children, moved four times between 2004-2009, and as a result one of the children changed schools five times during that time period. Further, respondent testified that she was planning to move again in the near future, which would require the children to change schools yet again. Thus, it was in the best interests of the children to modify the custody arrangement by granting petitioner sole physical custody of the children.

Matter of Moore v Moore, 78 AD3d 1630 (4th Dept 2010), *lv denied* ___NY3d___

Visitation With Incarcerated Father Not in Child's Best Interests

Family Court denied father's petition, which sought visitation with his child. The Appellate Division affirmed. The father was sentenced in 2002 to 27 2/3 years to life based upon his arson and intimidating a witness convictions. Although the court failed to apply the proper burden of proof in denying the petition, the record was sufficient for the Appellate Division to determine that visitation was not in the child's best interests. The record demonstrated that the father failed to establish a meaningful relationship with the child. The father had been incarcerated since the child was two years old, his last visit with the child took place when the child was three or four years old, and the father waited at least five years thereafter to file a petition for visitation. The child had no memory of the father. Moreover, in view of the father's sentence, the father will remain in prison long after the child reaches maturity and the child suffers from severe car sickness and visiting the father would require a long car ride with paternal grandparents with whom the child has no relationship.

Matter of Butler v Ewers, 78 AD3d 1667 (4th Dept 2010)

Primary Physical Custody to Father Reversed

Family Court awarded primary physical custody of the parties' children to respondent father. The Appellate Division reversed. The court erred in failing to set forth its findings of fact and the reasons for its custody determination. The court's conclusory statements in its decision did not enable the Appellate Division to provide effective appellate review. Although the record was sufficient for the Appellate Division to make its own findings of fact, it declined to do so because the trial court was best able to measure the credibility of the witnesses.

Matter of Rocco v Rocco, 78 AD3d 1670 (4th Dept 2010)

AFC's "New Information" on Appeal Results in Vacating Order

Family Court modified an order of custody by awarding petitioner father primary physical custody of his three children with visitation to the grandmother. The Appellate Division vacated the order and remitted the case to the trial court. The Attorney for the Children submitted new information during the pendency of the appeal indicating that the father no longer wished to pursue the petition. Although that information was not in the record, the Appellate Division could take notice of new information and allegations to the extent that they indicated the record was no longer sufficient to determine a party's fitness and the right to custody.

Matter of Nichols v Nichols-Johnson, 78 AD3d 1679 (4th Dept 2010)

Award of Sole Custody to Father In Child's Best Interests

Family Court granted petitioner father sole custody of the parties' child. The Appellate Division affirmed. The mother did not challenge the court's finding of a change of circumstances and thus the only issue was whether sole custody to the father was in the best interests of the child. Although the court failed to state the findings it deemed essential to its award of custody, the record was sufficient for the Appellate Division to so. There was no basis to disturb the court's determination because it was based upon the court's credibility determinations and because it had a sound and substantial basis in the record.

Matter of Dubuque v Bremiller, 79 AD3d 1743 (4th Dept 2010)

Father's Relocation From Federal to State Prison Not Sufficient Change in Circumstances

Family Court dismissed father's petition seeking to modify the visitation provision of the parties' divorce judgment by awarding him visitation with the parties' daughter at the facility where he was incarcerated. The father's relocation from a federal prison to a state prison did not constitute a sufficient change in circumstances warranting modification of the judgment. The allegations in the petition were insufficient to warrant an evidentiary hearing. The court did not err in failing to appoint an attorney for the child and petitioner received effective assistance of counsel

Matter of Frazier v Frazier, 79 AD3d 1746 (4th Dept 2010)

Petition for Leave to Relocate Properly Denied

Family Court denied mother's petition for leave to relocate with the child to California. The mother failed to establish that her daughter's life and her own life would be enhanced economically, emotionally and educationally by the relocation. Further, the court properly determined that the relationship with respondent father and other supportive relatives would be adversely affected by the move. The mother also failed to establish that there was a visitation arrangement that would be conducive to the maintenance of a close relationship between father and child.

Matter of Webb v Aaron, 79 AD3d 1761 (4th Dept 2010)

Determination That New York Was Inconvenient Forum Reversed

Family Court granted the motion of respondent mother to transfer the instant custody proceeding to Alabama. The Appellate Division reversed. The record failed to establish that the court considered all the requisite statutory factors in determining that New York was an inconvenient forum. Further, although the parties disputed whether the court lacked jurisdiction pursuant to Domestic Relations Law § 76-a, there was no indication in the record that the court based its decision on that ground. The case was thus remitted for a determination whether the court had jurisdiction and, if so, whether New York would be an inconvenient forum based upon the applicable statutory factors.

Matter of Wilson v Linn, 79 AD3d 1767 (4th Dept 2010)

Court Erred in Dismissing Violation Petition

Family Court dismissed mother's petition alleging that respondent father violated a prior order that awarded father custody and established a visitation schedule for the mother. The Appellate Division reversed. The statement of the court that the violation petition was the 11th petition filed by the mother during a 7-year period and its observation that the mother's latest modification petition was then pending on appeal did not reflect bias on the part of the court. The court erred, however, in dismissing the petition without holding a hearing because the petition alleged sufficient factual and legal grounds to establish a violation of the prior order.

Matter of Warrior v Beatman, 79 AD3d 1770 (4th Dept 2010)

Denial of Petition For Sole Custody Reversed

Family Court denied mother's petition seeking sole custody of the parties' children. The Appellate Division reversed. Modification of an existing joint custody arrangement is warranted where, as here, the relationship between the parents so deteriorates that they are wholly unable to cooperate in making decisions affecting their children. The court abused its discretion in sanctioning the mother upon determining that she filed her petition frivolously because the court failed to afford her a reasonable opportunity to be heard.

Matter of Kramer v Berardicurti, 79 AD3d 1794 (4th Dept 2010)

Denial of Incarcerated Father's Petition for Visitation in Children's Best Interests

Family Court denied father's petition seeking visitation with the parties' children. The Appellate Division affirmed. The court properly determined that it was not in the children's best interests to grant father visitation.

The parties' son had psychiatric diagnoses and the court properly credited the testimony of the son's treating therapist that visitation in prison would be detrimental to the son's emotional and psychological welfare. The court properly determined, without the benefit of psychological evidence, that the parties' daughter should be allowed to grow and develop before any in-person visitation with the father. Neither the parties nor the attorney for the children requested any psychological evaluations and the court did not err in failing to order such evaluations sua sponte where, as here, there was sufficient evidence from the parties for the court to resolve the issue.

Matter of Lando v Lando, 79 AD3d 1796 (4th Dept 2010)

Permission to Relocate Properly Granted

Family Court granted father's petition for permission to relocate the parties' children to Maryland. The Appellate Division affirmed. Petitioner met his burden of establishing by a preponderance of the evidence that the proposed relocation was in the children's best interests. The father demonstrated an economic necessity for the move and while no single *Tropea* factor is dispositive, economic necessity may present a particularly persuasive ground for allowing the move. Although the attorney for the children indicated on her brief on appeal that the children no longer wished to move to Maryland, those wishes were not determinative.

Matter of Thomas v Thomas, 79 AD3d 1829 (4th Dept 2010)

EFFECTIVE ASSISTANCE OF COUNSEL

Birth Father Received Effective Assistance of Counsel

Family Court granted the petition to terminate the parental rights of the child's mother and transferred custody of the child to the Commissioner of Social Services for the purpose of adoption and denied respondent the opportunity to withhold consent to such adoption. The Appellate Division affirmed. Respondent's contention was without merit that he was denied effective assistance of counsel based upon his attorney's concession that respondent was a "notice" father, without requesting a hearing specifically on his entitlement to withhold consent under Domestic Relations Law § 111-a. Respondent's attorney, after investigation and assumably after discussing the matter with respondent, made a strategic, conscientious decision not to request a hearing on the issue of consent. In any event, the evidence established that any effort to establish that respondent was a "consent" father would have been unsuccessful. He never maintained the requisite contact with the child as required by statute and his incarceration did not absolve him of his responsibility for supporting the child and maintaining regular communications.

Matter of Bryant Angel Malik J., 76 AD3d 936 (1st Dept 2010)

FAMILY OFFENSE

Determination That Respondent Committed Family Offences Affirmed

Family Court found that respondent committed the family offences of disorderly conduct and harassment in the second degree and issued an order of protection on behalf of petitioner. The Appellate Division affirmed. A preponderance of the evidence supported the court's determination that respondent committed the family offenses thus warranting the order of protection. Any error in admitting hearsay testimony that respondent abused his younger sibling was harmless because the court expressly limited its decision to respondent's actions toward petitioner.

Matter of Lisa S. v Raymond S., 77 AD3d 557 (1st Dept 2010)

Boyfriend of Respondent's Sister and Friend of Respondent Not "Intimate Relationship"

Family Court dismissed petition seeking an order of protection against respondent, who was the sister of petitioner's girlfriend. Petitioner's claim that he was the boyfriend of respondent's sister and a friend of respondent was insufficient to establish an "intimate relationship" within the meaning of Family Court Act § 812 (1) (e) and, therefore, the court did not have jurisdiction over the matter. Even assuming the court

had jurisdiction, petitioner failed to establish that respondent committed the family offense of harassment in the first degree because petitioner's alleged fear that respondent would harm him was not objectively reasonable. Respondent's remarks that "things could get ugly" if petitioner did not return her property could not be reasonably interpreted to be a threat, especially given that they had been friends, that petitioner had dated respondent's sister, and that he socialized with respondent even after he filed the instant petition.

Matter of Tyrone T. v Katherine M., 78 AD3d 545 (1st Dept 2010)

Wife's Default Was Not Willful

In family offense proceeding involving a petition filed against the wife, it was error to deny the wife's motion to vacate an order of protection as circumstances did not establish genuine default by the wife. She appeared in the Family Court with a new attorney, intending to fully participate in the proceeding, and the wife's attorney of record was present when the matter was called. In any event, the wife moved to vacate the final order of protection on the same day it was issued, and her explanation that she and her attorney were in the process of filing family offense and custody petitions on her behalf when the matter was called was a reasonable excuse for her failure to appear. The wife's default was not willful, and her affidavit in support of her motion to vacate was sufficient to demonstrate the existence of a potentially meritorious defense to the husband's petition, and to the issuance of a final order of protection effectively excluding her from the marital residence.

Matter of Dos Santos v Dos Santos, 76 AD3d 1013 (2d Dept 2010)

Mother Properly Commenced Proceeding on Behalf of Her Three Children

The mother commenced a family offense proceeding alleging, inter alia, that the respondent, who was her husband and the father of their three children, committed specific family offenses against her and the children during an incident that occurred on April 10, 2009. At a hearing on the petition, after the mother rested her case on behalf of herself and the children, the Family Court determined that the subject children had not been named as parties to the petition, and, therefore, did not consider the sufficiency of the evidence as to family offenses committed by the father against the children. The Family Court further determined that the evidence failed to establish, prima facie, that a family offense was committed by the father against the mother, and dismissed the petition. The attorney for the children appealed. The mother did not appeal. Upon reviewing the record, the Appellate Division found that the mother properly commenced the proceeding on behalf of herself and the three children (see FCA §§ 821, 822). Thus, the Family Court erred in failing to consider the evidence of the family offenses committed against the children. The matter was remitted to the Family Court to give the father an opportunity to present evidence on his behalf, if he were so advised, and then for a determination by the Family Court of so much of the petition as was brought on behalf of the children.

Berg v Mantia, 77 AD3d 827 (2d Dept 2010)

Record Supported Finding of Aggravating Circumstances

The Appellate Division agreed with the appellant that the Family Court erred in admitting evidence at the dispositional hearing concerning an incident that was not "relatively contemporaneous". However, its finding of aggravating circumstances was based on numerous other factors, including its own observation of the appellant's "wildly erratic and inappropriate behavior and affect in the courtroom," that were sufficient to support the finding, even without the incident of domestic violence that occurred three or five years prior to the filing of the family offense petition (See FCA § 827). There was no merit to the appellant's argument that he was subjected to double jeopardy when the petitioner filed a criminal complaint regarding an alleged violation of the temporary order of protection issued by the Family Court, and was then permitted to testify about the alleged violation during the dispositional hearing. The Court noted that double jeopardy concerns were not relevant in this case since the petitioner was merely seeking an order of protection, a remedy which was not punitive and at such stage did not involve incarceration.

Pearlman v Pearlman, 78 AD3d 711 (2d Dept 2010)

Family Offense Petition Improperly Dismissed on Public Policy Grounds

Appellant, a married woman who lived with her husband and her 16 year old daughter, filed a family offense petition against her on again off again boyfriend in Family Court. While the Court found that appellant had standing to pursue the family offense petition, it also found, for reasons of public policy of keeping the family unit intact, that it could not entertain such an application. The Appellate Division reversed holding that the purpose of the recent legislative amendment to Article 8 was to expand the protective reach of Family Court's jurisdiction over victims of domestic violence and Family Court has no right to "add or take away from [the statute's plain] meaning" and apply its own perception of what is equitable.

Matter of Jessica D. v Jeremy H., 77 AD3d 87 (3d Dept 2010)

Hot Line Threats Sufficient to Support Finding of Harassment

Father filed family offense petition on behalf of child against Mother alleging Mother harassed them by taping windows in their home shut, sealing outlets and, on one occasion, urinating in the cooking pot. Family Court held while these allegations failed to establish a course of conduct sufficient to find harassment, Mother's repeated threats to report Father for parental misconduct was sufficient to make a finding of harassment. The Appellate Division gave deference to Family Court's findings and affirmed .

Matter of Chadwick F. v Hilda G., 77 AD3d 1093 *(*3d Dept 2010)

Loud Threatening Statement Violated Order of Protection

Family Court issued an Order of Protection on behalf of petitioner directing appellant/ respondent to, among other things, stay at least 1,000 feet away from her and refrain from communicating with her or intimidating her. Later, both parties were in court and respondent came within 15 feet of petitioner, pointed his finger at her while speaking to her in a loud tone. Petitioner filed a violation petition alleging respondent had violated the Order of Protection. After the hearing, Family Court found that respondent had wilfully violated the Order of Protection by communicating to petitioner in a "loud and threatening tone with gestures" and, based on his court history, sentenced him to 6 months in jail. On appeal, the Appellate Division gave due deference to Family Court's findings and affirmed. Appellant's contention that the sentence imposed was too harsh was dismissed as moot as he had already completed his jail sentence.

Matter of Chastity F. v Ernest G., 77 AD3d 1112 (3d Dept 2010)

Prior Bad Acts Should Have Been Considered in Family Offense Proceeding

Mother filed family offense petition on behalf of her children against the step-father, alleging harassment in the second degree. Mother alleged that step-father had followed the children walking home from school in his car. After fact-finding hearing, Family Court dismissed the petition. Mother appealed arguing that Family Court would not allow her to testify about the history she and one of the children had with the step father, and she should have been allowed to play the child's "panicked" phone call to her when the incident occurred. The Appellate Division agreed, finding Family Court should have allowed mother to testify about the relationship with step-father, as this would have gone towards the issue of his "intent", and the parties history was admissible under "prior bad acts". However, the issue of child's cell phone call, while admissible under excited utterance exception to hearsay, was not preserved for appeal.

*Matter of Patricia H. v Richard H.,*78 AD3d 1435 (3d Dept 2010)

Order of Protection Affirmed

Family Court granted petitioner's order of protection against respondent "ex-partner." The Appellate Division affirmed. Respondent's contention that the court lacked subject matter jurisdiction because the alleged acts giving rise to the finding of harassment underlying the order of protection occurred before the

effective date of the amendment to Family Court Act § 812 (1), which expanded the definition of term "member of the same family or household," was without merit. The date of entry of the order of protection controlled rather than the date of respondent's actions underlying the order. The court properly determined that the parties had been in an intimate relationship within the meaning of Family Court Act § 812 (1). The evidence established that the parties had been in a sexual relationship, that petitioner was pregnant with respondent's child, that petitioner had previously given respondent a key to her apartment, and petitioner described respondent as her "ex-partner."

Matter of Lavann v Bell, 77 AD3d 1422 (4th Dept 2010)

Record Inadequate For Meaningful Appellate Review

Family Court dismissed petitioner's family offense petition. The Appellate Division reversed. Because the transcript of the hearing included only one page of petitioner's direct testimony, meaningful appellate review of the pivotal basis for the court's determination, i.e., that petitioner was not credible, was not possible. The order was reversed and the case remitted for a new hearing.

Matter of Alessio v Burch, 78 AD3d 1620 (4th Dept 2010)

Mother Committed a Family Offense

Family Court found that respondent mother committed a family offense and issued an order of protection directing respondent to refrain from offensive conduct against petitioner father and the parties' child. The Appellate Division affirmed. Petitioner met his burden of showing that the mother committed the family offense of reckless endangerment in the second degree by lurching her car forward and stopping within inches of petitioner and the parties' child, thus warranting the issuance of an order of protection.

Matter of Kobel v Holiday, 78 AD3d 1660 (4th Dept 2010)

JURISDICTION (FAMILY OFFENSE):

Family Court Had Subject Matter Jurisdiction over Family Offense Proceeding Where Alleged Acts Occurred in Anguilla

In a case of first impression, the Appellate Division held that the Family Court has subject matter jurisdiction over family offense proceedings where the alleged acts occur in another state or country. The Court could found nothing in the New York State Constitution, the governing statute, or legislative history that would require the predicate acts of family offense to have occurred in a particular county, state, or country for the Family Court to possess subject matter jurisdiction. Furthermore, although a family offense proceeding could be commenced in either or both the Family Court and Criminal Court, the geographic or territorial limitation on the jurisdiction of the Criminal Court does not also limit the jurisdiction of the Family Court (See McKinney's Const. Art. 6, § 13(b)(7); McKinney's Family Court Act § 812(1)). Thus, in consideration of the plain meaning of Family Court Act § 812, and the legislative history of that statute, the Appellate Division found that the Family Court properly exercised jurisdiction over the parties' respective petitions, despite the fact that the family offenses were alleged to have occurred in Anguilla. As to the three orders of protection appealed from, which directed the appellant to stay away from each of the respondents and to refrain from assaulting, stalking, and similar conduct, each was affirmed. In addition, the Appellate Division affirmed the Family Court's orders of dismissal which dismissed the appellant's three petitions for orders of protection against the respondents.

Richardson v Richardson, 80 AD3d 32 (2d Dept 2010)

JUVENILE DELINQUENCY

Court Properly Denied Respondent's Suppression Motion

Family Court adjudicated respondent to be a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of attempted burglary in the second and third degrees, attempted assault in the third

degree, attempted criminal trespass in the second degree and menacing in the second and third degrees and placed him on probation for 18 months. The Appellate Division affirmed. The court properly denied respondent's suppression motion. The showup occurred in close temporal proximity to the incident and it was not rendered unduly suggestive because the identifying witness was told she would be viewing a potential suspect because any person of ordinary intelligence would have drawn that inference or by the fact of the presence of officers on either side of respondent, which was justified as a security measure. The evidence supported the inference that respondent, either personally or as an accomplice, attempted to force his way into an apartment for the purpose of assaulting an occupant against whom one of his companions had a grudge, and that he displayed what appeared to be a firearm and that he attempted to assault the targeted victim's wife. Enhanced supervision probation was the least restrictive alternative consistent with respondent's needs and the need for protection of the community.

Matter of Victor M., 77 AD3d 427 (1st Dept 2010)

JD Adjudication Affirmed

Family Court adjudged respondent to be a juvenile delinquent upon a fact-finding determination that he committed acts, which, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of a weapon in the fourth degree, criminal possession of stolen property in the fifth degree, and menacing in the second and third degrees and also committed an act of unlawful possession of a weapon by a person under 16 and placed him with OCFS for 18 months. The Appellate Division affirmed. The court's finding was based upon legally sufficient evidence and was not against the weight of the evidence. Even though the victim's identification was based upon factors other than facial recognition, the circumstances, viewed as a whole, established beyond a reasonable doubt that respondent was one of the group of boys who robbed the victim.

Matter of Sergio G., 77 AD3d 473 (1st Dept 2010)

Court Properly Denied Respondent's Suppression Motion

Family Court adjudged respondent to be a juvenile delinquent, upon a fact-finding determination that he committed an acts, which, if committed by an adult, would constitute the crimes of robbery in the second degree and criminal possession of stolen property in the fifth degree and imposed a conditional discharge for a period of 12 months. The Appellate Division affirmed. The showup occurred with close temporal proximity to the incident and it was not rendered unduly suggestive because the victim was told he would be viewing a potential suspect because any person of ordinary intelligence would have drawn that inference or by the fact that respondent and his companion were visibly in police custody, which was justified as a security measure. The identification was not the product of an unlawful seizure because respondent and his companion were detained on the basis of a description that was sufficiently specific, given the temporal and spatial factors, to provide reasonable suspicion.

Matter of Terron B., 77 AD3d 499 (1st Dept 2010)

Insufficient Evidence to Establish Menacing

Family Court adjudged respondent to be a juvenile delinquent, upon a fact-finding determination that he committed an acts, which, if committed by an adult, would constitute the crime of menacing in the third degree and placed him on probation for 12 months. The Appellate Division reversed. The court's finding was based upon insufficient evidence. According to the complainant's testimony, while respondent's companion made physically menacing gestures and stated "Get out of my face before I cut you, you Mexican," respondent merely told the complainant to "swim back to [his] county." Respondent's offensive comment, by itself, was insufficient to support the charge of menacing, which requires "physical menace." Even assuming respondent's companion committed acts constituting third-degree menacing, the evidence did not support an inference that respondent shared his companion's intent to place the complainant in fear of harm or intentional aided his companion in doing so.

Matter of Jacob S., 77 AD3d 523 (1st Dept 2010)

Finding Based Upon Legally Sufficient Evidence And Not Against Weight of Evidence

Family Court adjudicated respondent a juvenile delinquent upon a fact finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and attempted assault in the third degree and placed him on probation for 18 months. The Appellate Division affirmed. The court's finding was based upon legally sufficient evidence and was not against the weight of the evidence. The evidence warranted the inferences that respondent shared his companions' intent in all respects, including the intent to injure the victim and to deprive him of property. The evidence did not support the inference that respondent merely intended to temporarily separate the victim from his property.

Matter of Yahya Sabree W, 77 AD3d 596 (1st Dept 2010)

Conditional Discharge Least Restrictive Dispositional Alternative

Family Court adjudged respondent to be a juvenile delinquent, upon his admission that he committed an act, which, if committed by an adult, would constitute the crime of petit larceny and imposed a conditional discharge for a period of 12 months. The Appellate Division affirmed. The court properly exercised its discretion in denying respondent's request for an adjournment in contemplation of dismissal. Given the seriousness of the underlying incident, respondent's history of school disciplinary problems, and the very short duration of any supervision that an ACD would have provided, the court adopted the least restrictive dispositional alternative consistent with respondent's needs and those of the community.

Matter of Mamadiou D., 78 AD3d 417 (1st Dept 2010)

Evidence Supported "Lewd Manner" Element of Public Lewdness

Family Court adjudicated respondent a juvenile delinquent upon a fact finding determination that he committed an act which, if committed by an adult, would constitute the crimes of public lewdness and placed him on probation for 18 months. The Appellate Division affirmed. The allegations in the petition and the evidence were sufficient to establish the "lewd manner" element of public lewdness because respondent did not just expose his private parts, but did so in an offensive manner.

Matter of Carlos R., 78 AD3d 461 (1st Dept 2010)

No Basis For Disturbing Court's Determination on Identification

Family Court adjudicated respondent a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the third degree and attempted assault in the third degree and placed him with OCFS for up to 18 months. The Appellate Division affirmed. There was no basis to disturb the court's determination regarding identification. The victim made a prompt and reliable identification, which was corroborated by respondent's actions evincing a consciousness of guilt, as well as observations by the arresting officer that warranted inference that respondent possessed and discarded the victim's property. The observations of the arresting officer also supported the inference that when respondent hit the pursuing victim, he did so for the purpose of forcibly retaining the property he had just stolen from her.

Matter of Taquan A., 78 AD3d 476 (1st Dept 2010)

Family Court Erred in Failing to Grant Adjournment of Fact-Finding

The Family Court erred in failing to grant an adjournment of the fact-finding hearing based upon the respondent's failure to appear and in refusing to issue a warrant, despite evidence that issuance of a warrant would be necessary to secure his appearance (see FCA § 312.2). Therefore, the Family Court's dismissal of the proceeding for failure to timely commence a fact-finding hearing was improper.

Matter of Trequan T., 78 AD3d 958 (2d Dept 2010)

Order Modified; Appellant Placed on Probation

The record revealed that both the New York City Department of Probation and the presentment agency recommended that the appellant be placed on probation. In light of these recommendations, as well as the appellant's relatively stable home environment and support from her immediate and extended family, the lack of evidence of any prior contact with the police or the courts, the lack of evidence that the appellant's parents were unable or unwilling to supervise her, the appellant's regular attendance at school, and the lack of evidence of significant disciplinary problems at school or of any use of alcohol or drugs, placement in a limited-secure residential facility was not the least restrictive alternative consistent with both the appellant's best interests and the need for protection of the community. Order modified.

Matter of Genny J., 78 AD3d 1181 (2d Dept 2010)

Identification Was Sufficiently Contemporaneous to Arrest

The petition was supported with the sworn statement of a named undercover police officer who asserted, inter alia, that he observed the subjects of the petition and an adult male punch, kick, and attempt to rob a male victim, causing him to fall to the ground, and to continue the attack while the victim was lying on the ground. The victim sustained an abrasion under his eye, which was bleeding. Contrary to the appellant's contention, the officer's identification of the appellant as one of the perpetrators "occurred at a place and time sufficiently connected and contemporaneous to the arrest itself as to constitute the ordinary and proper completion of an integral police procedure".

In re Devon A., 78 AD3d 1171 (2d Dept 2010)

Defendant's Request for Youthful Offender Treatment Should Have Been Granted

The defendant appealed from a judgment of the Supreme Court convicting him of attempted robbery in the second degree. The Appellate Division agreed with the defendant's contention that, under the circumstances, his request for youthful offender treatment should have been granted. The judgment was reversed, and as a matter of discretion in the interest of justice the conviction was deemed vacated and replaced with a finding that the defendant was a youthful offender (see CPL 720.20 [3]).

People v David S., 78 AD3d 1205 (2d Dept 2010)

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed an act which, if committed by an adult, would constitute the crime of manslaughter in the first degree. The Appellate Division affirmed. After a dispositional hearing, the court determined that respondent required a restrictive placement and the court ordered an initial placement with OCFS for three years. In placing respondent in a restrictive placement the court properly considered the seriousness of the crime, respondent's need for extensive treatment, the need to protect the community, and the aggressive behavior of respondent towards himself and others.

Matter of Joseph G., III, 78 AD3d 1700 (4th Dept 2010)

PATERNITY

Question of Equitable Estoppel Could Not be Resolved Without Psychiatric Evaluation

Family Court denied the petition insofar as it sought to vacate the acknowledgment of paternity of the subject child. The Appellate Division reversed and remanded for a new hearing before a different judge. Petitioner testified that when the child was approximately three years old, the child would cry during visits with petitioner and say that petitioner was not his father; that his relationship with the child appeared to be "going backwards"; and that the child indicated he did not want to be with petitioner. The court erred in determining that the question of equitable estoppel could be resolved without a psychiatric evaluation of the parties and the child. Further, the court erred in precluding cross-examination of respondent mother with respect to the child's living situation at the time of the hearing. The question whether another person was acting as a father was relevant to the issue of the best interests of the child.

Matter of Troy VG v Tysha M. McG., 79 AD3d 606 (1st

Dept 2010)

Putative Father Provided No Explanation for Why He Waited until Child Was 10 Years Old Before Seeking to Establish Paternity

Contrary to the putative father's contentions, the Family Court properly granted the mother's motion to dismiss the petition on the ground of equitable estoppel. The putative father, who is serving a sentence of 32 years of imprisonment, waited until the subject child was 10 years old before seeking to establish his paternity and provided no explanation for the delay. He admittedly had no contact with the subject child since at least 2003 and had not provided financial support for the subject child. Additionally, the attorney for the child met with the subject child and observed that the subject child considered the mother's fiance, with whom he and the mother have resided since 2003, to be his father. The putative father also failed to identify the benefit that would accrue to the subject child if his petition was granted.

Matter of Willie W., 78 AD3d 958 (2d Dept 2010)

Hearing Not Necessary to Determine Father Equitably Estopped From Pursuing Paternity

Mother had sexual relations with appellant as well as her boyfriend during the time she conceived her child. Appellant was then incarcerated and found out about child right after her birth. Over ten years later, appellant filed a paternity petition, alleging that his discovery that DNA had excluded boyfriend as father of the child had prompted him to file. Mother filed motion to dismiss on grounds of equitable estoppel. Family Court dismissed appellant's petition without a hearing. The court found that mother had been living with boyfriend since child's birth, mother and boyfriend had two other children in common, boyfriend had supported child all along and child looked upon boyfriend as father. The appellant however, had been in and out of jail throughout the child's life and offered nothing to refute the allegations in mother's motion. On appeal, appellant argued that there should have been a hearing. The Appellate Division disagreed, finding that there was no showing of benefit to the child if appellant was allowed to pursue paternity, and Family Court had sufficient information to render a decision based on the child's best interest without the necessity of a hearing.

Matter of Edward WW. v Diana XX., 79 AD3d 1181 (3d Dept 2010)

TERMINATION OF PARENTAL RIGHTS

Termination in Children's Best Interests

Upon findings of permanent neglect against respondent mother, Family Court terminated her parental rights to the subject children for purposes of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that respondent failed to plan for the children's future despite petitioner agency's diligent efforts. The agency provided respondent with referrals for a mental health evaluation, made arrangements for regular visitation, and met with respondent to review her service plan and discuss the importance of compliance, but respondent visited the children only sporadically and failed to timely comply with the agency's referrals. A preponderance of the evidence established that termination of respondent's parental rights was in the children's best interests. A suspended judgment was not warranted because there was no evidence that respondent had a realistic, feasible plan to care for the children.

Matter of Toyie Fannie J., 77 AD3d 449 (1st Dept 2010)

Finding of Permanent Neglect Supported by Clear And Convincing Evidence

Upon findings of permanent neglect, Family Court terminated respondent mother's parental rights to her seven subject children and committed the children's guardianship and custody to petitioner agency for purposes of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. Although respondent attended the programs recommended by the agency, she failed to correct the conditions that led to the placement of the children in foster care. She continued to reside with the father, who was twice adjudicated a child abuser and continued to deny his sexual abuse of respondent's children, even though three of her children complained of the abuse over an extended time period.

The agency established that it would be in the children's best interests to terminate parental rights to facilitate the children's adoption. All the children were in stable and supportive foster homes and freeing them for adoption provided them with a realistic opportunity to free themselves from a troubled past.

Matter of Prince McM., 77 AD3d 582 (1st Dept 2010)

Termination on Ground of Permanent Neglect Affirmed

Family Court terminated respondent mother's parental rights with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The record established that petitioner agency made diligent efforts to encourage and strengthen the parental relationship, including developing a service plan; scheduling multiple service plan reviews; scheduling visitation; repeatedly attempting to encourage respondent's compliance with the service plan; and making referrals for services. Respondent failed to complete the requisite drug treatment program, tested positive and refused to submit to drug screening on multiple occasions, missed the majority of scheduled visits with the children and failed to complete a parenting skills program.

Matter of Aniya Evelyn R., 77 AD3d 593 (1st Dept 2010)

Respondent Unable to Meaningfully Comply With Terms of Suspended Judgment

Family Court found respondent mother in violation of suspended judgment, terminated her parental rights, and placed the children with the Commissioner of Social Services for purposes of adoption. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that respondent violated the terms of her suspended judgment and that termination of her parental rights was in the children's best interests. Notwithstanding respondent's efforts to comply with the terms of the suspended judgment, her emotional and cognitive limitations rendered her unable to comply with the terms and goals of the suspended judgment, including cooperating with the agency towards a reunification with the children, advocating for the children's special needs, and acquiring the skills necessary to ensure that her special needs children would be safe in her care.

Matter of Christian Anthony Y.T., 78 AD3d 410 (1st Dept 2010)

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

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The record established that petitioner agency made diligent efforts to encourage and strengthen the parental relationship, including providing referrals to parenting skills and drug rehabilitation programs, scheduling visitation, and scheduling mental health evaluations, but respondent failed to participate in and complete the required programs; was inconsistent in her visitation; failed to appear for her mental health evaluations; engaged in an incident that required a police response; and failed to obtain adequate housing. A preponderance of the evidence, including that the child has spent her entire life in a stable kinship foster home, established that termination of respondent's parental rights was in the children's best interests. A suspended judgment was not warranted.

Matter of Ganesha B., 78 AD3d 500 (1st Dept 2010)

Mother Failed to Show Excuse For Default

Family Court denied respondent mother's motion to vacate orders that, upon her default, terminated her parental rights to her children on the ground of abandonment. Respondent's moving papers failed to show a reasonable excuse for her absence from the court proceeding or a meritorious defense. Given that respondent failed to appear at two prior court proceedings and that the court notified her attorney that should she fail to appear at the March 2009 hearing, the court would proceed with an inquest, the court was within its discretion to proceed in spite of respondent's guardian ad litem's request for an adjournment. Respondent's counsel's bare assertions that he would

have had the opportunity to cross-examine the agency's witnesses and would have presented evidence countering the allegations of abandonment were insufficient to establish a meritorious defense. The contention of respondent that the court lacked jurisdiction because the Cherokee Indian tribe was not given the opportunity to intervene was without merit because respondent had the burden to provide sufficient information to put the court or Department on notice that the child may be an "Indian child" within the meaning of the ICWA.

Matter of Cain Keel L., 78 AD3d 541 (1st Dept 2010)

Appeal of Termination Dismissed

Family Court, after a fact-finding hearing, terminated respondent father's parental rights and held that he was not a parent whose consent was required before freeing the child for adoption and, in the alternative, that he abandoned the child. The Appellate Division affirmed. A proceeding to terminate parental rights on the ground of abandonment may be brought only against a parent whose consent to the child's adoption is required under the Domestic Relations and Social Services Laws. Because respondent challenged only the finding of abandonment on appeal, he abandoned any challenge to the determination that his consent was not required, thus obviating the need to address the challenge to the finding of abandonment.

Matter of Spencer Isaiah R., 78 AD3d 561 (1st Dept 2010)

Respondent's Duty to Plan Did Not Abate With His Incarceration

Family Court, upon a finding of permanent neglect, terminated respondent father's parental rights to his child and committed the child's custody and guardianship to the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence supported the court's determination that respondent permanently neglected his son. Although respondent was required to maintain contact with the child through consistent and regular visitation, respondent did not offer a viable excuse for his failure to visit his son from June 2006 until respondent's incarceration in October 2006. Moreover, respondent's incarceration did not relieve him of his responsibility to communicate with his son

Matter of Devontae, 78 AD3d 610 (1st Dept 2010)

Termination in Children's Best Interests By Reason of Mother's Mental Illness

Upon a finding of mental illness, Family Court terminated respondent mother's parental rights to the subject child for purposes of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that by reason of respondent's mental illness, she was then and for the foreseeable future unable to provide proper and adequate care for her special needs daughter. The record demonstrated that mother had a long history of mental illness, which was diagnosed as schizoaffective disorder, bipolar type, and borderline personality disorder, and that the child was diagnosed with autism, spinal dysplasia, and a serious developmental disorder. The psychologist who interviewed the mother and reviewed her records opined that the child would be at risk of being neglected if placed in the mother's care because of the child's special needs and the mother's occasional symptomatic displays of paranoia and combativeness.

Matter of Alyssa Genevieve C., 79 AD3d 507 (1st Dept 2010)

Finding of Permanent Neglect Supported by Clear And Convincing Evidence

Upon a fact-finding determination of permanent neglect, Family Court terminated respondent mother's parental rights to her child and committed the children's guardianship and custody to petitioner agency for purposes of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The agency satisfied its statutory duty of making diligent efforts by arranging regular visits, referring the mother to parenting skills classes for special needs children, a CPR course, and individual therapy. Respondent's assertion that the child's injuries may have occurred in another's care was inconsistent with the medical evidence, which showed that as a result of "shaken baby syndrome," the child's injuries, including

subdural hematomas, retinal hemorrhages and broken ribs, were inflicted on more than one occasion. Given the unusually demanding requirements of a caring for a medically fragile child and the mother's failure to gain insight into the cause of the injuries, the finding was supported by the record. Given the excellent care given the child by the foster mother, who wished to adopt the child, and the mother's lack of insight, a preponderance of the evidence established that terminating mother's parental rights was in the child's best interests.

Matter of Joaquin Enrique C., 79 AD3d 548 (1st Dept 2010)

Termination on Ground of Permanent Neglect Affirmed

Family Court terminated respondent mother's parental rights with respect to her child on the ground of permanent neglect. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that respondent failed to plan for her child's future despite the agency's diligent efforts to encourage and strengthen the parental relationship. The record established that petitioner agency formulated a realistic service plan that was tailored to respondent's needs and addressed the problems that caused the child's removal. Respondent failed to adhere to the service plan and to submit to drug testing and she tested positive for illegal drugs during the statutory period. A preponderance of the evidence established that the best interests of the child would be served by terminating respondent's parental rights to facilitate the child's adoption by her foster mother, who was also the child's paternal aunt. A suspended judgment was not warranted. The dissent would have concluded that Social Services Law § 384-b (7) (a) required a failure to stay drug free for a more protracted period than one established in this case.

Matter of Destiny S., 79 AD3d 666 (1st Dept 2010)

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

Contrary to the mother's contention, the Family Court properly found that the presentment agency exercised diligent efforts to strengthen the parent-child relationship and to reunite the family by, among other things, facilitating visitation with the child, developing a plan for the return of the child, holding numerous meetings with the mother to review that plan, referring the mother for substance abuse treatment and individual counseling, giving the mother prior notice of the child's medical and therapeutic appointments, and advising her of the necessity of attending these appointments in order to learn about the child's special needs. Following an appropriate finding of permanent neglect as to the child, the Family Court properly determined, contrary to the mother's further contention, that it was in the child's best interest to terminate her parental rights as to the child, thus freeing the child for adoption. Order affirmed.

Matter of Elijah P., 76 AD3d 631 (2d Dept 2010)

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

Contrary to the father's contention, the Family Court properly found that St. Vincent's Services, Inc. (hereinafter the agency), exercised diligent efforts to strengthen the relationship between father and child by, inter alia, scheduling weekly visits with the child and referring the father to parenting and anger management classes. Notwithstanding the agency's efforts, the father failed to plan for his child's future (see Social Services Law § 384-b[7][c]). In addition, although the father attended the required classes, he never gained any insight into why he needed to attend them. Accordingly, the Family Court correctly found that the child was permanently neglected. Additionally, the Family Court properly determined that the best interests of the child would be served by terminating the father's rights and freeing the child for adoption by his foster parent, with whom he had been living for many years.

Matter of Daniel A.G., 78 AD3d 831 (2d Dept 2010)

Incarcerated Father Was Unable to Plan for Care of Child

The record revealed that the child had bonded with her foster mother who wished to adopt her, that the father was not able to care for the child due to his incarceration, and that the father had no plan for the care of the child. Based on these facts, the Family

Court properly found that the best interests of the child would be served by terminating the father's parental rights and freeing the child for adoption by the foster mother.

Matter of Xiomara M., 78 AD3d 836 (2d Dept 2010)

Mother Failed to Comply with Three Conditions of Suspended Judgment

The Family Court properly found, by a preponderance of the evidence, that the mother had failed to comply with three of the conditions of the suspended judgment, and it thus properly granted the petition to revoke the suspended judgment and terminate the mother's parental rights. The record revealed that the mother failed to complete a parenting skills program, that she attended only two out of six psychiatric counseling appointments, and that she missed at least three of her scheduled visitations with her son.

Matter of Nicholas S., 78 AD3d 841 (2d Dept 2010)

Dropping In and Out of Child's Life Does Not Defeat Finding of Abandonment

Child's mother found to have permanently neglected child, and abandonment proceedings began against father who had sporadic contact with child year before abandonment proceedings began. Although there was contradictory testimony concerning father's knowledge that child was in foster care, the Appellate Division gave great deference to Family Court's credibility assessment during trial, and Family Court's determination that any contact between father and child had been insubstantial, and had occurred before the 6 month statutory period required for filing abandonment. The Appellate Court disagreed with father's contention that even a single contact during the critical statutory period is sufficient to defeat a finding of abandonment absent such specific language in SSL section 384-b.

Matter of Dior H., 77 AD3d 1066 (3d Dept 2010)

Mother's Dishonesty and Failure to Plan Supported Permanent Neglect Finding

Children were adjudicated, upon consent, to be neglected and remained in custody of DSS. More than a year later, DSS commenced permanent neglect proceedings against mother. After a hearing, Family Court found permanent neglect and issued a suspended sentence. Mother appealed and the Appellate Division affirmed the Family Court order. Appellate Court found that DSS had made diligent efforts to encourage and strengthen relationship between mother and children. Mother's contention that more efforts could have been made to reunite her with her children is undermined by evidence that mother repeatedly lied and failed to plan for the future of her children . Mother continued to have a relationship with abusive, drug- addicted boyfriend, who had abused both her and the children, despite repeated directions to her that continuing such a relationship was an impediment to her gaining custody of her children.

Matter of Ronnie P., 77 AD3d 1094 (3d Dept 2010)

Parent Failed to Prove She Could Care For Children In Foreseeable Future

Mother with severe mental health issues was found to have neglected her children, and the children were placed in DSS custody . More than a year later, mother's parental rights were terminated based on determination that she could not care for her children due to her borderline personality disorder, factitious disorder, depressive disorder, posttraumatic stress disorder and borderline intellectual functioning made. Mother argued that while she cannot now provide adequate care for her children due to her mental illness, DSS had failed to show that she cannot adequately care for her children in the foreseeable future. Family Court disagreed based on, among other factors, testimony of the psychologist who had conducted a comprehensive psychological exam of mother and testified that mother's "borderline personality disorder is an enduring, lifelong condition." and it's unlikely she will ever accept or follow through with treatment. The Appellate Division affirmed.

Matter of Kasja YY., 77 AD3d 1100 (3d Dept 2010)

Parent Who's Rights Have Been Terminated, Has No Standing To Appeal Permanency Order

Appellant father's parental rights were terminated post fact-finding and dispositional hearings. The Appellate

Division affirmed the Family Court's findings. Thereafter, Family Court entered a permanency order on behalf of the child. Appellant appealed from the permanency order. The Appellate Division held that as appellant's parental rights had been previously terminated and, as this Court had affirmed the termination, appellant had no standing to either participate in or challenge the permanency order.

Matter of Sierra C., 77 AD3d 1132 (3d Dept 2010)

Violation of A Suspended Judgment Does Not Automatically Result in TPR Without Best Interest Analysis

Upon neglect adjudication, parents agreed to a suspended judgment which required them to, among other things, cooperate with substance abuse treatment, allow random drug screening and attend every scheduled visitation with the children. DSS moved to revoke the judgment and after a hearing, Family Court revoked the judgment and terminated their parental rights. Upon appeal the Appellate Division reversed and remitted the matter back to Family Court for a dispositional hearing. The Appeals Court found that Family Court had failed to take into consideration the best interests of the children in making its decision. The lower court had not allowed testimony concerning the children's status while in placement, it had failed to consider that parents' counsel had advised the parents not to take the drug tests, and there was evidence that DSS had failed to provide services or assistance to the parents once the permanent neglect petitions had been filed.

Matter of Krystal B., 77 AD3d 1110 (3d Dept 2010)

Family Court TPR of Incarcerated Parent Affirmed

Father was imprisoned shortly after child's birth. Thereafter father had very little, if any, contact with the child, both during the times he was incarcerated and during the times he was released. Mother's rights were later terminated upon consent, and Family Court terminated the father's rights after a fact-finding and disposition hearing, finding he had failed to plan for the child's future. Father appealed, arguing he should have post-termination visitation with child, as the child could be psychologically harmed if all contact is cut off. The Appellate Division wasn't swayed by his argument as it found that there wasn't much of a parent-child relationship in the first place, and additionally, the court noted that nothing in the dispositional order necessarily prohibited the father from seeing the child as long as the foster/adoptive mother agreed to such visitation based on what was best for the child.

Matter of Xionia VV., 78 AD3d 1452 (3d Dept 2010)

TPR Based on Permanent Neglect and Severe Abuse Affirmed

Child was placed in the care and custody of DSS based on neglect by parents. Thereafter the father murdered the mother. Many Family Court proceedings were held in this matter, including visitation, custody and adoption petitions filed by the paternal grandparents. Family Court found DSS had made diligent efforts to reunite father and child prior to father's incarceration and based on his murder of the child's mother, Family Court found permanent neglect and severe abuse against the father. The Appellate Division affirmed the decision and also noted that Family Court had correctly denied the grandparents' petitions as they, among other things, refused to believe their son had harmed or killed the child's mother.

Matter of Brendan N., 78 AD3d 1175 (3d Dept 2010)

No Clear and Convincing Evidence of Permanent Neglect

Child was removed from parents after a finding of neglect and placed in the care of DSS. The mother made no effort to participate in services offered by DSS but the father made a conscious effort to stabilize his life. DSS brought permanent neglect petitions against both parents, seeking to terminate their rights. After a hearing, Family Court found that the child had been permanently neglected by her parents and father appealed. The Appellate Division reversed, finding that DSS had not met its burden of showing appellant had failed in his efforts to substantially plan for the future of the child because it had set unrealistic goals for the father to meet. The Appellate Court held that while Family Court had considered the father's failure to begin anger management and parenting classes until

more than one year after the child's initial placement date, it had failed to consider all the meaningful steps he had taken, and Family Court had also failed to consider the conduct and commitment of the father to reunite with his child during the period of time between the end of the one year period, to the filing of the permanent neglect petition.

Matter of Tatianna K., 79 AD3d 1184 (3d Dept 2010)

No Need for DSS to Make Reasonable Efforts to Re-unite Prior TPR

This appeal is by parents whose parental rights with regard to their other children had been terminated by Family Court and affirmed on appeal. This proceeding involved a Family Court TPR finding against the appellants, based on permanent neglect of their remaining child. The appellants' argued that DSS failed to make reasonable efforts to re-unite parents and child, and that it was in the child's best interest to be with the parents. The Appellate Division rejected their argument and affirmed the Family Court finding that as appellants other children had been involuntarily terminated, DSS did not have to make reasonable efforts to re-unite unless parents could show it would be in child's best interest. Additionally, parents had failed to comply with or meaningfully benefit from the services provided by DSS, and the mother had failed to plan for the child's future.

Matter of James U., 79 AD3d 1191 (3d Dept 2010)

TPR Based on Clear and Convincing Evidence of Mental Illness

Mother, who suffers from bipolar disorder with psychotic features, had regular supervised visits with her child who had been in care of DSS since her birth. Visits ranged from one hour supervised per week, to 3 nights unsupervised, back to 2 hours supervised per week. DSS moved to terminate the mother's rights based on permanent neglect due to mental retardation and mental illness. DSS offered evidence from two psychologists who determined that mother's mental illness made her incapable of full-time custodial parenting now or in the near future. Mother offered contradictory evidence from her psychologist. Family Court terminated the mother's rights due to a finding by clear and convincing evidence that mother's mental illness made her unable to provide adequate care for child. The Appellate Division affirmed Family Court's finding.

Matter of Niya X., 79 AD3d 1196 (3d Dept 2010)

Insubstantial Contact With Child Insufficient To Set Aside Abandonment Finding

Incarcerated father, upon being advised that his daughter was in foster care, contacted the caseworker requesting information about his daughter's placement and future planning for the child. Thereafter caseworker began to send the father monthly status letters as well as permanency reports concerning his daughter. However, the father did not contact the caseworker again until the filing of the TPR petition against him, on the basis of abandonment. Family Court held, and the Appellate Division affirmed, that as there had been no contact between the father and DSS for six months previous to the filing of the petition, the father had abandoned the child. The father's contention that he had read the caseworker's letters and permanency reports sent to him during this time, and that he had requested personally and through his counsel information about the child, was found to be minimal and insubstantial contacts, insufficient to set aside the finding of abandonment.

Matter of Le'Airra CC., 79 AD3d 1203 (3d Dept 2010)

TPR Based on Abandonment and Permanent Neglect

Appellate Division affirmed Family Court's finding of abandonment against the mother on behalf of one child and permanent neglect and abandonment with regard to the other child. At a very young age, the children, twin girls, were placed in the custody of the maternal aunt. The aunt surrendered care of one of the girls, who had serious medical problems, to DSS. The caseworker made repeated attempts to contact the mother to no avail, and although the mother was aware that her child was in the custody of the DSS, and she was undergoing major medical procedures, she failed to contact the caseworker or any of the medical providers about her daughter's condition. Family Court found that mother had abandoned the child. The other child remained

with the aunt and later went to live with her mother. The mother's substance abuse and other issues resulted in the second child being placed with DSS, and despite diligent efforts by DSS to strengthen and re-unite mother and child, the evidence showed that the mother had made little or no effort to cooperate and prior to six months before filing the abandonment petition, the mother had made no effort to contact the child.

Matter of Alexa L., 79 AD3d 1290 (3d Dept 2010)

Appeal of Order TPR Untimely

Family Court found that appellant had permanently neglected her child, and issued an order terminating her parental rights. Family Court mailed copies of the executed order to Appellant and her counsel on August 24, 2009. The appeal was not filed until January 6, 2010. The Appellate Division held that pursuant to the provisions of the CPLR, appellant had 35 days from the mailing of the order to her by the clerk of the court, to file a notice of appeal. Even though appellant argued that her counsel did not receive the order until November 30, 2009, the appeal was still held to be untimely.

Matter of Deandre GG., 79 AD3d 1384 (3d Dept 2010)

Sufficient Proof to Find That Child Had Been Abandoned

The appellant was in a PINS placement when she gave birth. Shortly thereafter, the appellant ran away from the PINS placement, leaving her child behind. The child was in foster care for almost three years before DSS filed an abandonment petition against the appellant. Family Court held that the appellant had abandoned her child. The court found that during the crucial 6 month period preceding filing of the petition, the appellant made no attempt to contact the child, or ask how the child was doing, and in fact moved to Louisiana without telling the caseworker where she was going or supplying her with any contact information. The Appellate Division affirmed the decision.

Matter of Gabriella I., 79 AD3d 1317 (3d Dept 2010)

TPR Violated Appellant's Due Process Rights

Appellant's children were placed in the care of DSS and a year or so later, DSS filed an abandonment petition against the appellant. At this time, the appellant was incarcerated in a facility in Pennsylvania. Even before appointing an attorney for the appellant, Family Court advised him at the arraignment that he could not participate at the hearing *via* telephone, and informed him that the Court's decision would be based on the evidence submitted by the County. Additionally, although the court assigned counsel to represent the appellant, the attorney tacitly waived his client's right to be present, cross-examined witnesses without getting his client's input or requesting adjournments to review the transcripts of the testimony with his client prior to cross-examination. Additionally, appellant's counsel did not present any evidence on his client's behalf and the record showed that appellant was the only witness who could testify on his behalf. The Appellate Division reversed finding appellant's due process rights were violated, entitling him to a new trial with new counsel.

Matter of Eileen R., 79 AD3d 1482 (3d Dept 2010)

Respondent Failed to Maintain Contact or Plan for the Future

Family Court terminated respondent father's parental rights with respect to his children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it fulfilled its duty to exercise diligent efforts to encourage and strengthen respondent's relationships with his children. Petitioner was not required to guarantee that the parent succeed in overcoming their predicaments: the parent must assume a measure of initiative and responsibility.

Matter of Whyteni B., 77 AD3d 1340 (4th Dept 2010)

Respondent Unable to Provide Adequate Care Because of Her Mental Illness

Family Court terminated respondent mother's parental rights with respect to her son on the ground of mental illness. The Appellate Division affirmed. Petitioner established by clear and convincing evidence 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. Neither the fact that some of the records upon which the court appointed psychologist relied to form his opinion of the mother's mental health were six years old rendered the evidence insufficient, nor did the fact that the psychologist prefaced his opinion by noting that it was based only on the mother's records and that he could not provide a diagnosis without a full examination. The possibility that the mother might be capable of caring for the child at some indefinite point in the future did not warrant denial of the petition.

*Matter of Deondre M.,*77 AD3d 1362 (4th Dept 2010)

Finding of Permanent Neglect Affirmed

Family Court terminated respondent mother's parental rights with respect to her youngest child on the ground of permanent neglect. The Appellate Division affirmed. Contrary to respondent's contention, where, as here, a parent admits to permanent neglect, there was neither the need for the petitioning agency to put forth evidence, nor was it necessary for the court to determine whether petitioner exercised diligent efforts to strengthen the parental relationship.

Matter of Eleydie R., 77 AD3d 1423 (4th Dept 2010)

TPR Affirmed

Family Court terminated respondent mother's parental rights with respect to her child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of showing, by clear and convincing evidence, that it exercised diligent efforts to encourage and strengthen the parental relationship and to reunite mother and child. Petitioner provided mental health and parenting services for the mother, family counseling for the mother and child, and supervision and transportation for visitation when needed. The record supported the court's determination that termination of respondent's parental rights, while allowing the mother to have post-termination contact with the child, was in his best interests.

Matter of Ayodeji W., 78 AD3d 1563 (4th Dept 2010), *lv denied* ___NY3d___

Mother's Motion Seeking to Vacate Default Order Properly Denied

Family Court terminated respondent mother's parental rights with respect to her children on the ground of permanent neglect. The Appellate Division affirmed. The court properly terminated respondent's parental rights to her daughters. Petitioner established that respondent did not successfully complete substance abuse and domestic violence counseling and continued to use drugs after she stipulated to the finding of permanent neglect. The court did not abuse its discretion in denying respondent's motion seeking to vacate the default order terminating her parental rights with respect to her son. She failed to appear on the petition and she failed to establish a reasonable excuse for the default or a meritorious defense to the petition.

Matter of Mikia H., 78 AD3d 1575 (4th Dept 2010), *lv denied* ___NY3d___

Motion Seeking to Vacate Default Order Properly Denied

Family Court denied respondent mother's motion to vacate an order of fact-finding. The Appellate Division affirmed. Respondent failed to appear at the second day of the fact-finding hearing on termination of her parental rights on the ground that she permanently neglected her child. The court conducted the hearing in respondent's absence and immediately thereafter conducted a dispositional hearing and determined it was in the child's best interests to award custody and guardianship of the child to petitioner. Thereafter, the mother moved to vacate the default order, asserting that she misunderstood the court's statement about the continuation date of the fact-finding hearing. The court denied that part of the motion regarding the finding of permanent neglect but in effect granted the part of the motion with respect to the dispositional hearing by reopening the dispositional hearing to afford the mother the opportunity to testify and present evidence. After the mother testified the court adhered to its prior determination. Both the mother and her attorney were notified of the continuation date of the fact-finding hearing and therefore mother's attorney was not ineffective for failing to do more to ensure the mother's presence on that date. Mother's attorney did attempt to provide the requisite meritorious defense in support of

the motion and the court's determination that it was not meritorious did not establish that mother's attorney was ineffective.

Matter of Charity W., 79 AD3d 1722 (4th Dept 2010)

Amendments to Social Services Law Not Retroactive

Family Court terminated the parental rights of respondent mother on the ground of permanent neglect. The Appellate Division affirmed. Because recent amendments to Social Services Law § 384-b were not remedial in nature they were not retroactive and did not apply at the time the instant order was entered. Petitioner made diligent efforts to encourage and strengthen the mother's relationship with the child and it was in the best interests of the child to terminate respondent's parental rights. The mother failed to complete her service plan despite ample opportunity to do so, made minimal efforts to visit the child, had no viable plan for the child's future, and was generally indifferent toward the child.

Matter of Yasiel P., 79 AD3d 1744 (4th Dept 2010)

TPR on Ground of Mental Illness Affirmed

Family Court terminated respondent's parental rights with respect to her son on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of demonstrating by clear and convincing evidence that respondent was then and for the foreseeable future unable by reason of mental illness to provide proper and adequate care for the child. Post-termination visitation would be contrary to the child's best interests.

Matter of Sean S., 79 AD3d 1760 (4th Dept 2010)

Testimony Supported TPR on Ground of Mental illness

Family Court terminated respondent father's parental rights with respect to his children on the ground of mental illness. There was an adequate foundation for the opinion that respondent suffered from schizophrenia and had borderline intellectual functioning. That testimony, together with the testimony of caseworkers who supervised the father's visitation with the children, provided the requisite clear and convincing evidence that the father was then and for the foreseeable future unable by reason of mental illness to provide proper and adequate care for the children.

Matter of Devonte M.T., 79 AD3d 1818 (4th Dept 2010)

N O T E S