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Afton C.': Due Process and Imminent Danger in Child Neglect Proceedings*

By Mark L. Powers**

The New York Court of Appeals case, *Matter of Afton C.*,[1] decided on May 5, 2011, is the most significant pronouncement on child neglect proceedings since the landmark case of *Nicholson v. Scoppetta*, 3 N.Y.3d 357 (2004). The Court of Appeals affirmed the Appellate Division, Second Department's reversal of neglect findings made in Family Court, Dutchess County, based primarily upon a father's status as an untreated level three sex offender,[2] residing in the same household as his five children.[3] The father had previously pleaded guilty to rape in the second degree involving sexual intercourse with a person less than 15 years of age, and patronizing a prostitute in the third degree, which, at the time of conviction, was defined as patronizing a prostitute under the age of 17. Both convictions involved illicit sexual contact with minors.

The Family Court, Dutchess County, had found that, since the father was an untreated level three sex offender—whose crimes had involved a minor—he "posed a risk of harm to the public at large" and that "the mother had failed to protect the children" from the father. The Family Court drew a negative inference against the father after he invoked his Fifth Amendment right to not answer questions about the underlying facts of his conviction involving sexual intercourse with someone below the age of consent. Relative to his conviction for patronizing a prostitute, the father also claimed that he had only first met the victim when she was 18.

The Family Court characterized the father's testimony as showing "a lack of candor, and…obvious attempts to avoid responsibility for the illegal acts involving minors."[4] Although the father had not been required to attend counseling, the Family Court found the father's failure to engage in counseling "demonstrat[ed] an impaired level of parental judgment as to create a substantial risk of harm."[5]

Family Court's disposition of the neglect adjudications included a direction that both parents complete a sex offender relapse program. Additionally, an order of protection was imposed against the father on behalf of the children. The Appellate Division, Second Dept., *Matter of Afton C., (James C.)*, 71 A.D.3d 887 (2d Dept., 2010), reversed, dismissing the trial court's determination.

The Court of Appeals affirmed the Second Department's dismissal of the proceeding, as to both parents, concurring with the Second Department that "[t]he mere fact that a designated sex offender resides in the home is not sufficient to establish neglect absent a showing of actual danger to the subject children." Id. at 888. The high Court held that there is no presumption of neglect solely because a registered sex offender resides in the same household with children.

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Similarly, the Court in Nicholson made clear "more is required for a showing of neglect under New York law than the fact that a child was exposed to domestic abuse against the caretaker."[6]A parent must have failed to take reasonable steps to either prevent the abuse or the child's exposure to it. Nicholson involved a New York City child protective services' policy of removing children from mothers who were victims of domestic violence, or whose children had been exposed to domestic violence. While it is beyond cavil that children exposed to domestic violence may suffer emotional impairment, Nicholson made clear that there must be a connection between a parent's conduct and the actual or imminent danger of harm.

As the concurring opinion of Judge Victoria Graffeo in Matter of Afton C. noted, what else may be required to support a finding "is not an area of law amenable to bright-line rules…"[7] Judge Graffeo pointed out that not much may be required to tip the scales to neglect since even the result in Afton C. might have been different had the respondent refused treatment after it was mandated.

The purpose of this article is to highlight the need to utilize expert testimony to establish neglect, so that a respondent is afforded due process as required under *Nicholson* and *Afton C*.

Imminent Danger

The elements of neglect are relatively simple. The agency must show by a preponderance of evidence that a child's physical, mental or emotional condition has been impaired, or is in imminent danger of becoming impaired, from the actual or threatened harm to the child. Such impairment must be a direct consequence of the failure of a parent or caretaker to exercise a minimum degree of care in providing supervision or guardianship.[8] The statutory definition enumerates specific conduct constituting a parent or caretaker's failure to provide supervision or guardianship. However, the so-called "catch-all" provision referring to "any other acts of a similarly serious nature requiring the aid of the Court" reduces the definition to essentially a two-pronged analysis which experienced practitioners recognize.

First, the child's condition must be "impaired or in imminent danger of becoming impaired," and second, the condition must be "the result of [a] failure of [a] parent or other person legally responsible…to exercise a minimum degree of care."[9] The statute does not define physical impairment; however, "impairment of emotional health" and "impairment of mental or emotional condition" are broadly defined to encompass almost any emotional impairment.

The concept of "imminent danger" is not defined in the statute. However, it is both a standard for determining removal of a child, and a separate legal basis on which to find neglect. The Nicholson court noted, "imminent danger reflects the Legislature's judgment that a finding of neglect may be appropriate even when a child has not actually been harmed" and constitutes "independent and separate grounds on which a neglect finding may be based."[10] A finding is not appropriate merely because of the existence of domestic violence, but rather because a parent was culpable in not preventing it or the child's exposure to it. Ironically, in *Nicholson*, the mother resided separate and apart from her child's father, so that the lesser restrictive measure of an order of protection might have ameliorated the agency's concerns.

The question of when an "impairment" occurs is the issue which bedevils the trial courts leading to inconsistent holdings. The effort is further complicated when attempting to define not just when the harm has occurred, but when there is an imminent danger of it. Nicholson described imminent danger as a kind of harm "which must be near or impending," but this offers little guidance for the practitioner or the trial court. Since a finding of imminent danger does not require a showing of actual harm, the traditional neglect analysis is short-circuited: The focus shifts from an objective empirical showing of harm, to a subjective value judgment by the court that harm is imminent. In certain cases, this becomes less an assessment than a surmise, which calls into question the need for expert testimony.

Post 'Nicholson'/'Afton C.'

In the commentaries to Family Court Act §1012, Professor Merril Sobie alludes to inconsistencies which may arise in determining when domestic violence constitutes neglect. The inconsistency arises because

domestic violence may lead a trial judge to perceive imminent danger, even if no actual harm is shown.

For example, in *Matter of Casey N.*, 44 A.D.3d 861 (2d Dept. 2007), the Second Department reversed a Family Court, Orange County, finding of neglect based upon the mother's admission to incidents of domestic violence in the presence of the children. In reversing, the Second Department found "there was no evidence as to the nature or extent of domestic violence, nor was there any evidence of actual or imminent impairment to the children's emotional or mental condition."[11] Yet, in a case only five months later, the First Department summarily affirmed the lower court's finding that violent acts occurring in the presence of a child "expose the child to an imminent risk of harm, and no expert or medical testimony is required to show impairment or risk thereof" (see *Matter of Elijah C.*, 49 A.D.3d 340 [1st Dept. 2008]).

When imminent danger of harm is alleged—as opposed to actual quantifiable harm—there must be more than just a risk or, merely, the erring on the side of caution. The harm must be identifiable and real. It is not enough to show that the children have been exposed to domestic violence; or that they have been in the presence of a registered sex offender; or even that a parent has used illegal drugs or alcohol to excess. An impairment of the child's condition must be shown as a result of the parent's conduct or the imminent danger must be shown to be more than merely the prospect of harm. When a court finds an imminent danger of harm without a sufficient connection between the perceived danger and actual harm, it does so at the expense of the respondent's due process rights.

Only some eight months after the First Department's holding, came *Matter of Paolo W.*, (56 A.D.3d 966 [3d Dept. 2008]), in which the Appellate Division, Third Department, confronted a parent's acknowledged use of heroin, where the parent maintained that his addiction did not affect his ability to parent. The Department of Social Services conceded that "the children were never in danger and were always well kept, clean, well fed and not at risk."[12] Consequently, the Family Court, Schenectady County, dismissed the petition alleging neglect.

The Third Department reversed based upon the statutory presumption under Family Court Act §1046(a)(iii) providing that where there is "proof that a person repeatedly misuses drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality," such proof shall be prima facia evidence establishing neglect.

In Paolo W., the Third Department found this presumption applicable since the father conceded his heroin use and acknowledged having been unsuccessfully discharged from a treatment program. However, the court did not discuss the concession by the agency that "the children were not in danger and were well cared for" which was the basis upon which the trial court found the presumption to have been overcome. The ultimate question of whether the presumption had been rebutted was left unanswered.

In support of its holding in Paolo W., the Third Department cited the First Department's ruling in *Matter of Stefanel Tyesha C.*, 157 A.D.2d 322 (1st Dept. 1990), stating specifically, "the presumption contained in Family Court Act §1046 (a)(iii) operates to eliminate a requirement of specific parental conduct vis-à-vis the child and neither actual impairment nor specific risks of impairment need be established." However, the Third Department's reliance on Matter of Stefanel Tyesha C. appears misplaced in light of Nicholson. The Family Court Act §1046(a)(iii) presumption, like imminent danger of harm alleged from a child's exposure to domestic violence, requires the court to not only find that a parent or caretaker has failed to exercise a minimum degree of care, but also that the alleged acts by the parent or caretaker are causally related to the child's impairment or imminent danger of impairment.

Expert Testimony

The legislative intent of Article 10 of the Family Court Act is not to require an expert to establish abuse or neglect. However, to ensure due process to respondents, the use of expert testimony may be necessary, especially when imminent danger of harm is

alleged. Indeed, expert opinion may be the only means to establish a sufficient record for a finding. At the very least, expert testimony should be considered where a registered sex offender known to have abused same-sex children denies an attraction to children of the opposite gender; or with regard to a substance abuser who regularly uses, but claims not to use in the presence of his children; or the perpetrator of domestic violence who claims it does not occur in the presence of the children but for which the emotional impact upon the children can be shown by specific behavioral characteristics, within a professional's expertise.

The true legacy of Nicholson and Afton C. may be that it portends the greater use of experts. As the Court in Nicholson noted, "in some cases it may be difficult for an agency to show, absent expert testimony, that there is imminent danger to a child's emotional state." Afton C. is now the logical extension of Nicholson, ensuring due process to respondents in child protective proceedings.

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Endnotes:

1. Matter of Afton C. (James C.), 17 N.Y.3d 1 (Ct. of Appeals, 2011).

2. The Sex Offender Registration Act (SORA) is a classification scheme which purports to systemize offenders according to their current and future risk of recidivism. Specifically, level one offenders pose the least threat and level three the greatest.

3. The age range of the children was 4 to 14. The father was married to the mother and they all resided together as a family unit at the time the allegations arose. However, the mother relocated to Canada with four of the children, who were also alleged to have been impaired by the father's use of excessive corporal punishment.

4. Matter of Afton C. (James C.), 17 N.Y.3d at 8.

5. Id. at 8 (quoting Matter of Shawn X., 300 A.D.2d 772 (3d Dept., 2002).

6. Nicholson v. Scoppetta, 3 N.Y.3d 357, 368 (Ct. of Appeals, 2004).

7. Id., see also F.C.A. §1012(f)(i).

8. F.C.A. §1012(f)(i).

9. F.C.A. §1012(f)(i).

10. Nicholson, 3 N.Y.3d at 369.

11. Matter of Casey N., 44 A.D.3d 861, 863 (2dDept., 2007).

12.Matter of Paolo W., 56 A.D.3d 966, 967 (3d Dept., 2008).

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

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

NEWS BRIEFS

SECOND DEPARTMENT NEWS

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

On October 24, 2011, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. Gary Solomon, Esq., Legal Aid Society, NYC, Juvenile Rights Division, presented ***Case Law and Legislative Update***. Marvin E. Schechter, Esq., Attorney at Law, presented ***Cross Examination of Forensic Experts***. This seminar was held at Brooklyn Law School, Brooklyn, New York.

Tenth Judicial District (Nassau County)

On October 25, 2011, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored the Mandatory Annual Fall Seminar. Randy Hertz, Esq., Director of Clinical and Advocacy Programs, New York University School of Law, presented ***Juvenile Delinquency Motion Practice***. This seminar was held at Hofstra University Law School, Hempstead, New York.

Tenth Judicial District (Suffolk County)

On December 5, 2011, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored the Mandatory Annual Fall Seminar which was held at the Suffolk County Bar Association, Hauppauge, New York. Margaret A. Burt, Esq., Attorney in Private Practice, presented ***Child Welfare Law Update.*** The Hon. Theresa Whelan, Suffolk County Family Court, presented ***An Overview of the Suffolk County Child Welfare Court Improvement Project***.

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

On November 4, 2011, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. Margaret A. Burt, Esq., Attorney in Private Practice, presented ***Child Welfare Law Update.*** Kathleen M. Maloney, Esq., NYC Legal Aid Society-Immigration Law Unit, together with Theo Liebmann, Esq., Clinical Professor and Attorney-in-Charge, Hofstra Child Advocacy Clinic, , and Helen Pundurs, Esq., Director, Legal Services Center-The Door, presented ***Immigration Issues in Family Court - Special Immigrant Juvenile Status***. William Kaplan, M.D., Psychiatrist, Private Practice, together with Joan Gerring, M.D., New York State Office of Children & Family Services, and Iren Valentine, Psy.D., Director, Division of Juvenile Justice and Opportunities for Youth, co-presented ***Psychotropic Medication and Children.***

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

THIRD DEPARTMENT NEWS

Electronic Billing

As of January 1, 2012, all vouchers must be submitted on the E-voucher system. All panel members who are not using the E-voucher by that time must submit a paper interim voucher, for any and all unbilled work by Dec. 31, 2011 and begin using the E-voucher as of January 1, 2012. No paper vouchers will be accepted after December 31, 2011.

Statewide Financial System (SFS) and Vendor ID Numbers

The State of New York has been in the process of implementing a new statewide financial system which includes all vendors doing business with the State of New York, including attorneys for children. All vouchers processed after December 28, 2011, will require a Vendor Identification Number which should have been provided to you by the Office of the New York State Comptroller by now. In order to receive payment on your vouchers, it is imperative that you enter your Vendor ID when using the new system. If you do not have a Vendor ID, you must contact OSC at *helpdesk@sfs.ny.gov* or phone toll free to 855-233-8363.

Advisory Committee

The departmental advisory committee provides oversight to the

operation of the attorneys for children program and shall makes recommendations to the presiding justice with respect to promulgation of standards and administrative procedures for improvement of the quality of representation by attorneys for children in the department. Congratulations to the newly appointed members: Hon. Mark L. Powers, Schenectady County Family Court, Hon. John F. Lambert, Otsego County Family Court, Douglas J. Broda, Esq., Rensselaer County Panel of Attorneys for Children and Kevin Burke, Esq., Schenectady County Attorney's Office who were appointed to the Advisory Committee effective December 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 E-voucher information, 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 2012. Registration information will go out by e-mail to all Third Department panel attorneys six to eight weeks prior to the training dates.

Annual Topical Conference (focusing on Child Welfare) will be held at the Holiday Inn on Wolf Road in Colonie on Friday, April 20, 2012 with the John T. Hamilton, Jr., Esq. Award for Excellence in the Representation of Children to be presented during the lunch hour;

Effective Representation of Children: Part II will be held at the Clarion Hotel (Century House) in Latham on Friday, April 27, 2012;

Children's Law Update '11-12 will be held at the Crowne Plaza Resort in Lake Placid on Friday, May 11, 2012;

Art. 10 Removals - Mock Trial will be held at a date and location to be announced; and

Introduction to Effective Representation of Children, introductory training of new attorneys for children, will be held at the Clarion Hotel (Century House) in Latham on Friday and Saturday, June 1-2, 2012.

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 met in the Fall and will meet again in the Spring, on Thursday, May 10, 2012, 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 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

Video Training Option Now Available

You may now satisfy your AFC Program training requirement by watching at least 5.5 hours of CLE video segments on the Attorneys for Children Program link to the Appellate Division, Fourth Department website at **http://nycourts.gov/ad4.** You may choose the training segments in which you are most interested, but the segments you choose must add up to at least 5.5 hours. If you choose the video option, rather than attending a live seminar, you must correctly fill out an affirmation and evaluation for each segment and forward all forms together to Jennifer Nealon, AFC Program, 50 East Avenue, Rochester, NY 14604 or jnealon@courts.state.ny.us before your training requirement expires. You will receive all your CLE certificates within a few weeks. We are unable to process applications for AFC Program or NYS CLE for less that 5.5 hours credit. There are complete directions on the CLE page of the AFC website.

Spring Seminars/Seminar Times

Fundamentals of Attorney for the Child Advocacy Seminars

Please note that Fundamentals I and II are basic seminars designed for prospective attorneys for children .
Thursday, March 22, 2012

Fundamentals of Attorney for the Child Advocacy I– Juvenile Justice Proceedings

Reidman Building, 45 East Avenue, Rochester, NY, across the street from the M. Dolores Denman Courthouse, Appellate Division, Fourth Department, 50 East Avenue, Rochester, New York

Friday, March 23, 2012

Fundamentals of Attorney for the Child Advocacy II – Child Protective & Custody Proceedings

Reidman Building, 45 East Avenue, Rochester, NY, across the street from the M. Dolores Denman Courthouse, Appellate Division, Fourth Department, 50 East Avenue, Rochester, New York

The Program requires prospective attorneys for children to attend both seminars, unless a waiver is granted. In order to accommodate the commute time of attorneys from counties distant from Monroe County, the seminars will not begin until 9:45 A.M. A light breakfast and box lunch will be provided to all each day.

Seminars for Attorneys for Children

Dates and locations are tentative. You will receive agendas in the semi-annual mailing in January. The agendas also will be available in January under "seminars" at the Attorneys for Children Program link to the Appellate Division, Fourth Department website at http://nycourts.gov/ad4.

March 16, 2012

Update for Attorneys for Children
(half day- possibly full day, budget permitting)
Marriott Rochester Airport
Rochester, NY

This seminar will be taped and available for viewing on the AFC website.

March 30, 2012

Update for Attorneys for Children
(full day)
Center for Tomorrow (University of Buffalo)
Buffalo, NY

This seminar will be taped and available for viewing on the AFC website.

May 4, 2012

Update for Attorneys for Children
Holiday Inn
New Hartford, NY

This seminar will be not be taped and therefore will not be available for viewing on the AFC website.

Your Training Expiration Date

If you need to attend a training seminar or watch at least 5.5 hours of approved videos on the AFC website before April 1, 2012, to remain eligible for panel designation, you should receive a letter to that effect in January 2012. Please remember, however, that it is your responsibility to ensure that your training is up-to-date. Because of the new video option there will be no extensions.

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Paige Tackett, *"I Get by with a Little Help from My Friends": Why Global Cooperation Is Necessary to Minimize Child Abduction and Trafficking in the Wake of Natural Disaster,* 79 UMKC L. Rev. 1027 (2011)

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Lynn Bayes-Weiner, *"Family Broils" and Private Terror: A Gender-Neutral, Psychologically-Based Approach to Domestic Violence and Asylum Law,* 79 UMKC L. Rev. 1047 (2011)

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Joseph O. Oluwole & Preston C. Green III, *Grating Race-Conscious Student Assignment Plans in the Cauldron of* Parents Involved v. Seattle School District, 56 Wayne L. Rev. 1655 (2010)

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Sarah Theodore, *An Integrated Response to Sexting: Utilization of Parents and Schools in Deterrence,* 27 J. Contemp. Health L. & Pol'y 365 (2011)

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Court; Functional Parenthood and the Case of Debra H. v. Janice R., 20 Colum. J. Gender & L. 347 (2011)

Janet Halley, *What is Family Law?: A Genealogy Part 1,* 23 Yale J. L. & Human 1 (2011)

Shani King, *The Family Law Canon in a (Post?) Racial Era,* 72 Ohio St. L. J. 575 (2011)

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FOSTER CARE

A. Rachel Camp, *A Mistreated Epidemic: State and Federal Failure to Adequately Regulate Psychotropic Medications Prescribed to Children in Foster Care,* 83 Temp. L. Rev. 369 (2011)

JUVENILE DELINQUENCY

Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet,* 35 N.Y.U. Rev. L. & Soc. Change 408 (2011)

Michele Benedetto Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court,* 24 Geo. J. Legal Ethics 97 (2011)

Shannon M. Ray, *The Breakdown of a System: The Consequences of Permitting Dangerous Illegal Juvenile Aliens to Reside in Your Community,* 56 Wayne L. Rev. 819 (2010)

NEW LEGISLATION

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The Interstate Compact for Juveniles

Chapter 29 of the Laws of 2011 repeals Chapter 155 of the laws of 1955 - the former Interstate Compact on Juveniles - and codifies the new Interstate Compact for Juveniles in new Executive Law § 501-e. Attorneys and other advocates for children should go to this link for a very useful advocacy kit, which includes the ICF Rules:
(http://www.csg.org/knowledgecenter/docs/ncic/ICJ-ResourceKit.pdf)

The Compact has thirteen Articles: I (Purpose); II (Definitions); III (Interstate Commission for Juveniles); IV (Powers and Duties of the Interstate Commission); V (Organization and Operation of the Interstate Commission); VI (Rulemaking Functions of the Interstate Commission); VII (Oversight, Enforcement and Dispute Resolution by the Interstate Commission); VIII (Finance); IX (The State Council); X (Compacting States, Effective Date and Amendment); XI (Withdrawal, Default, Termination and Judicial Enforcement); XII (Severability and Construction); XIII (Binding effect of Compact and Other Laws).

The Article III "Interstate Commission for Juveniles" "shall be a body corporate and joint agency of the compacting states," which "shall have all the responsibilities, powers and duties set forth herein, and such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this compact." Under Article IV, the Commission's powers and duties include: Providing for dispute resolution among compacting states; Promulgating rules to effect the purposes and obligations as enumerated in this compact, which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact; Overseeing, supervising and coordinating the interstate movement of juveniles subject to the terms of this compact and any bylaws adopted and rules promulgated by the interstate commission; Enforcing compliance with the compact provisions, the rules promulgated by the interstate commission, and the bylaws, using all necessary and proper means, including but not limited to the use of judicial process.

Chapter 29 also adds to the Executive Law: § 501-f (Commissioner for the interstate compact for juveniles); § 501-g (State council for interstate juvenile supervision); and § 501-h (Detention and appointment of an attorney for the child for proceedings under the interstate compact for juveniles).

New § 501-h states:

1. If a juvenile is detained under the interstate compact for juveniles established pursuant to [Executive Law § 501-e], he or she shall be brought before the appropriate court within seventy-two hours or the next day the court is in session, whichever is sooner, and shall be advised by the judge of his or her right to remain silent, his or her right to be represented by counsel of his or her own choosing, and of the right to have an attorney assigned in accord with, as applicable, [FCA § 249] or article eighteen-B of the county law. The youth shall be allowed a reasonable time to retain counsel, contact his or her parents or other person or persons legally responsible for his or her care or an adult with whom the youth has a significant connection, and the judge may adjourn the proceedings for such purposes. Provided, however, that nothing in this section shall be deemed to require a youth to contact his or her parents or other person or persons legally responsible for his or her care. Provided further, however, that counsel shall be assigned immediately, and continue to represent the youth until any retained counsel appears. The court shall schedule a court appearance for the youth no later than ten days after the initial court appearance, and every ten days thereafter, while the youth is detained

pursuant to the interstate compact for juveniles unless any such appearance is waived by the attorney for the child.

2. All youth subject to proceedings governed by the interstate compact for juveniles established pursuant to [Executive Law § 501-e] shall be appointed an attorney pursuant to, as applicable, [FCA § 249] or article eighteen-B of the county law if independent legal representation is not available to such youth.

Chapter 29 also makes conforming amendments to FCA § 249 and FCA § 249-a (waiver of counsel).

Chapter 29 takes effect on June 23, 2011 and expires on September 1, 2013, when the provisions of chapter 155 of the laws of 1955 would be revived.

Excerpts from Sponsors Memo:

This bill would enact the most current Interstate Compact for Juveniles (New ICJ), which governs the management, monitoring, and supervision of juveniles, delinquents and status offenders who are on probation or parole and the return of those who have absconded, escaped or run away to another state; and provide for the return of non-adjudicated juveniles who have run away from home to another state.

New York and other states have entered into several interstate compacts that coordinate state activities affecting other States. In addition to the 1955 ICI, these compacts include the Interstate Compact on the Placement of Children and the Interstate Compact for Adult Supervision. Each compact member state must enact uniform legislation providing for joint and cooperative action among the states regarding the subject matter of that compact.

By its terms, the New ICJ became effective in 2008 when the 35th state enacted the new ICJ legislation. Similar to the 1955 ICJ, the primary purpose of the New ICJ is to manage the relationship between states that send and states that receive adjudicated juveniles and status offenders who are on parole or probation regarding the provision of services and supervision. The New ICJ also governs the return of a juvenile who absconds to another state while under supervision or after being accused of a crime. The New ICJ additionally provides for the return of a non-adjudicated juvenile who runs away from his or her state of residence.

The New ICJ creates an Interstate Commission for Juveniles (Commission) to oversee, supervise and coordinate the interstate movement of juveniles. The Commission is made up of "commissioners" who are the Compact administrators or designees from each of the member states. Member states pay dues for the operation and 'staffing of the Commission. Only member states may vote on Commission matters, but nonmember states may attend Commission meetings. The Commission is permanently staffed to perform its duties.

Penal Law: Sexual Abuse in the First Degree

Chapter 26 of the Laws of 2011 amends Penal Law § 130.65 to state that a person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact when the other person is less than thirteen years old and the actor is twenty-one years old or older.

Chapter 26 takes effect on November 1, 2011.

Abuse/Neglect - Central Register Reports/differential Response Programs

Chapter 45 of the Laws of 2011 amends Social Services Law § 427-a to make permanent the legislation permitting social services districts, with authorization from the Office of Children and Family Services, to utilize a differential response program for appropriate reports of abuse and maltreatment, and makes New York City eligible to participate in the program.

Excerpts from Sponsors Memo

SSL § 427-a; enacted by Chapter 452 of the Laws of 2007, permits social services districts outside New York City to implement a family differential response (FAR) program for reports of child abuse and maltreatment with authorization from OCFS. SSL § 427-a establishes criteria to be used by social services districts in determining whether a report shall be referred to the FAR program, and prohibits reports

containing certain serious allegations of abuse and maltreatment from being referred to the FAR program. OCFS was required to evaluate and report on the implementation of the FAR pilot program by January 1, 2011, including making a recommendation on continuing the program, and legislative authorization for the FAR program is set to expire on June 1, 2011.

OCFS submitted its required evaluation and report on the implementation of FAR to the Governor and Legislature on February 1, 2011. Children in families served by FAR were found to be as safe as children served by the traditional CPS approach in relation to new reports of child abuse or maltreatment.

Moreover, significantly fewer Family Court petitions were filed against FAR families when compared with the control group. Additionally, parents served by FAR in five initial pilot counties reported being quite positive about the intervention. For example, one parent explained that the caseworker was instrumental in helping the family to stabilize. Case workers from twelve participating counties were also surveyed. Significantly more FAR caseworkers than traditional CPS workers reported providing referrals to neighborhood organizations and self-help groups in order to help families meet their basic needs.

These results demonstrate that FAR has increased access to appropriate services, especially for the basic family needs of food, housing, and utilities. FAR has broadened the involvement of the community in meeting family service needs by more often referring to nontraditional service providers and self-help groups. Thus, FAR results in families being served more holistically with referrals to additional community supports that can help lessen stressors and promote family and child well-being.

Chapter 45 took effect on June 1, 2011.

Domestic Violence

Chapter 11 of the Laws of 2011 amends Social Services Law § 459-a(1) to include, within the definition of "Victim of domestic violence," victims of aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, and criminal obstruction of breathing or blood circulation, or strangulation.

Chapter 11 also amends § 459-a(2) to include, within the definition of "Family or household members," persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors that may be considered in determining whether a relationship is an "intimate relationship" include, but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship."

Chapter 11 took effect on April 13, 2011.

FEDERAL COURTS

Court Vacates Order of Suppression in Light of *Berghuis*

The Unites States moved for reconsideration and reversal of an order of suppression of child pornography (*Plugh I*) in light of the Supreme Courts decision in *Berghuis v. Thompkins* (130 S.Ct. 2250). Because it determined that Berghuis was an intervening change in controlling law, the Second Circuit vacated the District Court's order of suppression. In *Plugh I*, the Second Circuit determined that defendant's statements - "I am not sure if I should be talking to you" and "I don't know if I need a lawyer" - were ambiguous, but because the unambiguous invocation standard applied only when a defendant claimed that he subsequently invoked previously waived Fifth Amendment rights, suppression was required. Shortly thereafter the Supreme Court announced its decision in *Berghuis v Thompkin* (130 S.Ct. 2250), clarifying that an unambigious statement does control a court's analysis of an initial invocation of both the right to remain silent and the right to counsel and applies where a court evaluates an initial rather than subsequent invocation. Here, defendant did not invoke his Miranda rights through his unequivocal refusal to sign a waiver of rights form. A refusal to waive rights, however unequivocal, is not necessarily equivalent to an unambiguous decision to invoke them. Between an unambiguous invocation of rights, and a knowing and voluntary waiver of rights, there is a middle ground occupied by suspects who are unsure how they wish to proceed. Defendant was in that middle ground. While his refusal to sign the form may have unequivocally established that he did not wish to waive his rights at that time, his concurrent statements - "I am not sure if I should be talking to you" and "I don't know if I need a lawyer" - made equally clear he was not seeking to invoke his rights and cut off all further questioning. At no point did defendant unambiguously state that he wished to invoke his right to remain silent or his right to speak with an attorney, nor was his course of conduct such that the officers should reasonably have been put on notice that no further questioning should occur. Moreover, absent an unambiguous invocation, officers have no obligation to stop questioning or to ask only questions intended at clarifying an ambiguous statement.

United States v. Plugh, 648 F3d 118 (2d Cir 2011)

Simply Bringing Gun to Crime Scene Does Not Show Premeditation

Granting relief in this habeas proceeding, the Second Circuit, applying New York law on depraved indifference murder as it existed at the time petitioner's conviction became final in 2004, concluded that the law of depraved indifference had so fundamentally changed that no point-blank, one-on-one shooting could be depraved indifference murder. A reasonable jury could have found that petitioner plotted his attack in advance, lured the victim to his home on the night of the murder, and then deliberately put a handgun to her head and pulled the trigger. Alternatively, the State now contends that a reasonable jury could have found that, after bringing the gun to his meeting with the victim in an attempt to scare or intimidate her, petitioner accidentally shot her when the gun discharged during a struggle. The State argued that this alternative set of facts would support a conviction for depraved indifference murder because the act of confronting the victim with a loaded weapon, and thereby precipitating a struggle for the gun, was sufficiently reckless. However, the State did not provid, nor was the Court able to find, any case in which a New York appellate court had held that the mere act of bringing a gun to a contentious confrontation, without more, could rise to the level of depraved indifference murder. If there was evidence that petitioner intentionally pulled the trigger of the gun during the struggle, perhaps his conduct might rise to the level of depraved indifference murder. But there was no such evidence.

Rivera v Cuomo, 649 F3d 132 (2d Cir 2011)

Stop and Search Violated Defendant's Fourth Amendment Rights

Police officers were at a stop sign when they saw a gold Crowne Victoria make a left hand turn and begin driving towards them. The car had New Jersey license plates, no exterior markings, two passengers in the back seat and no one in the front passenger seat. The car was operating safely and the officers saw no unusual

behavior. One of the officers had a "hunch" that the car was operating as an unlicensed livery cab and the officers decided to pull the car over. When the car stopped, defendant, who was in the rear passenger side seat, opened the car door and attempted to exit the vehicle. When one of the officers told defendant he did not need to get out of the car, defendant attempted to walk past the officer. The officer claimed that defendant's chest brushed up against his forearm and he felt a heavy metal object that was consistent with a firearm. When the officer asked defendant to stop so he could determine whether defendant had a weapon, defendant kept walking and the officer tackled defendant. The officer recovered from defendant a loaded nine millimeter hi-point semi-automatic pistol. After defendant was arrested he made a motion to suppress, contending that the vehicle stop and subsequent search of his person violated his Fourth Amendment rights. The District Court granted the motion, holding that because the vehicle stop was impermissible, the search of defendant's person and the seizure of the firearm were tainted as fruit of the poisonous tree. The officer's "hunch" that the car was an unlicensed livery cab was insufficient to support reasonable suspicion. Moreover, the seating arrangement alone, or in light of the totality of the circumstances, were insufficient to support reasonable suspicion. The additional facts that the car had New Jersey license plates, that Crowne Victorias were used as livery cabs, and that the car had no signage indicating that it was a licensed livery cab, applied to a large category of presumably innocent travelers.

United States v Bristol, 2011 WL 3882820 (EDNY 2011)

COURT OF APPEALS

Family Court Properly Denied Respondent's Application to Proceed Pro Se

Family Court found that respondent father permanently neglected his children, terminated his parental rights, and changed the children's permanency goals to placement for adoption. The Appellate Division affirmed and the Court of Appeals affirmed. The court did not err in twice denying respondent's attorney's applications to be relieved of representing respondent and respondent's applications to represent himself. Assuming, without deciding, whether a parent in a termination of parental rights proceeding has the same right to proceed pro se as a criminal defendant, the Court determined that respondent failed facially to meet the test in a criminal proceeding to trigger a "searching inquiry" – i.e., whether (1) the request was unequivocal and timely asserted, (2) there had been a knowing and intelligent waiver of the right to counsel, and (3) the defendant had not engaged in conduct which would prevent the fair and orderly exposition of the issues." Although here, respondent's first application was timely because it was made prior to the commencement of trial, it was not unequivocal because respondent did not clearly articulate that he wanted to represent himself. Respondent's second application was not timely because it was made after the commencement of trial. The concurrence would have held that respondent was not entitled to proceed pro se under any circumstances.

Matter of Kathleen K., 17 NY3d 380 (2011)

Reversible Error Where Court Sustained People's Objection to Defendant's Explanation for His Statement That "Possession is Nine-Tenths of The Law"

Police officer observed a vehicle pulling away from a parked position without signaling and noticed excessive smoke coming from the tailpipe. After the officer stopped the vehicle, defendant, who was driving the vehicle and was its sole occupant, exited the vehicle and walked toward a nearby store. The office repeatedly directed defendant to stop, but defendant refused and became belligerent. Defendant was advised that he was under arrest and a subsequent inventory search of the vehicle revealed a loaded handgun under the driver's seat. Defendant was then also charged with criminal possession of a weapon. At trial, the officer testified that after he explained to defendant that he was being charged with possession of a loaded firearm, defendant said "it wasn't armed, but that's okay, possession is nine/tenths of the law." Defendant testified that he told the officer "that I wasn't armed with anything. He said, I don't know what kind of games you playing here. Then I asked him, who is going to be my attorney because I know for a fact that nine/tenths of the law is possession." The court sustained the People's objection to defense counsel question to defendant: "Why did you say if you recall nine-tenths of the law – possession is nine-tenths of the law." After summations, the court instructed the jury on the automobile presumption – that all persons occupying a vehicle are presumed tp possess a firearm found in the vehicle. Defendant was found guilty. The Appellate Division determined that the court erred in sustaining the objection, but held that the error was harmless. The Court of Appeals reversed. The evidence was not overwhelming. It was not defendant's vehicle; he had been driving it for a short time to take someone to the train station; and several different family members had access to the vehicle before defendant used it on this occasion. Therefore, defendant's potentially inculpatory statements about the weapon were the sole evidence tending to establish that he knew the weapon was in the vehicle when he was stopped. Because defendant's explanation of his statements may have created doubt in the jury's mind sufficient to rebut the automobile presumption, the error was not harmless.

People v Robinson, 17 NY3d 868 (2011)

APPELLATE DIVISIONS

ADOPTION

Child's Best Interests Served by Freeing Him For Adoption

Family Court committed custody and guardianship of respondent biological father's child to the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The Appellate Division had previously determined that respondent's consent was not required for adoption of the child. The court's determination that the child should be freed was supported by a preponderance of the evidence. Respondent had not seen the child in years and had little insight into the child's needs. The child was in a stable foster home where his special needs were met and where he wished to remain. Respondent's contention that the court erred in granting an order of protection against him with respect to the child's half brother was unpreserved and, in the event it was reviewed, it would be rejected because respondent was a member of the half brother's household. There was sufficient evidence supporting the order, including statements the half brother made at a hospital regarding respondent's sexual abuse.

Matter of Matthew Niko M., 85 AD3d 544 (1st Dept 2011)

Biological Father Not Consent Father

Family Court determined that respondent biological father forfeited his right to consent to the adoption of the subject child. The Appellate Division affirmed. The court properly determined that the adoption could proceed without respondent's consent. Respondent failed to meet his burden of establishing his right to consent to the adoption. He did not provide any financial support to petitioner mother during the three years preceding the filing of the adoption petition in 2009, had not seen the child since 2006, and failed to communicate with the child or mother from 2006-2008. Respondent's insubstantial and infrequent attempts to contact the mother and child did not constitute substantial and continuous contact and his substance abuse treatment did not provide an adequate excuse.

Matter of Ethan S. 85 AD3d 1599 (4th Dept 2011)

CHILD ABUSE AND NEGLECT

Father's Family Court Act § 1028 Motion Should Have Been Denied

Family Court granted respondent father's Family Court Act § 1028 motion to release his child to his custody on the condition that the child not be left alone with the mother and subject to the father demonstrating to the reasonable satisfaction of ACS that appropriate arrangements were in place to ensure that the child would not be alone with the mother. The Appellate Division reversed. The court must balance imminent risk with the best interests of the child. Here, the record showed the father's disturbing conduct after the birth of the child and at the courthouse prior to the hearing. The father made graphic, profanity-laced death threats to ACS staff and hospital staff within hours of his child's birth. In an affidavit, the child's case planner averred that on the day of the hearing she heard the father say he was going "to kill all the motherfuckers associated with taking his son away from him" and referring to an ACS specialist that he would "gut the pretty one like a fish." The conduct of the father suggested that he may have posed as much of an imminent risk to the child as returning the child directly to the mother.

Matter of Leroy R., 84 AD3d 485 (1st Dept 2011)

Modification of Order Denying Mother's Family Court Act § 1028 Motion Affirmed

Family Court modified a prior order that denied respondent mother's Family Court Act § 1028 motion for the return of her children and conditionally granted the motion. The Appellate Division affirmed. Petitioner failed to show that return of the children posed an imminent risk to their lives or health. The court properly weighed the harm to the children by continued placement in separate foster homes against the harm of returning them to the mother with conditions, including continued individual and family therapy.

Matter of Anny A., 84 AD3d 587 (1st Dept 2011)

Excessive Corporal Punishment Warranted Neglect and Derivative Neglect Findings

Family Court found that respondent father neglected his daughter and derivatively neglected his son. The Appellate Division affirmed. The finding was supported by a preponderance of the evidence that respondent inflicted excessive corporal punishment upon his daughter by beating her and leaving bruises on her arm and under her eye. The out-of-court statement of the child to her teacher was corroborated by the teacher's observations of the child's injuries. Respondent's use of excessive corporal punishment against the daughter supported the finding of neglect with respect to the son.

Matter of Naomi J., 84 AD3d 594 (1st Dept 2011)

Child in Imminent Danger of Becoming Impaired by Reason of Mother's Mental Illness

In a fact-finding determination, Family Court found mother neglected her child and released the custody of the child to non-respondent father. In another order, the court awarded custody of the child to the father. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's mental illness and resistance to treatment. The mother testified to multiple extended hospitalizations for mental illness and the record showed her lack of insight and her repeated relapses due to noncompliance with treatment and medication. The totality of the circumstances established that the award of custody to the father had a sound and substantial basis in the record.

Matter of Naomi S., 84 AD3d 608 (1st Dept 2011)

Finding of Neglect Supported by the Evidence

Family Court found by a preponderance of the evidence that respondent mother neglected her child by leaving the child with an inadequate caretaker and not providing her contact information, as well as respondent's responsibility for a burn on the child's arm and by failing to adequately treat her own mental illness. The Appellate Division affirmed. The child's out-of-court statement that her mother burned her was corroborated by an OCFS intake report. The statement was admissible regardless of the absence of an allegation in the petition that respondent acted intentionally. The court properly admitted hospital records that predated the petition by a few days because they were relevant to respondent's mental health history. The court also properly admitted a prior neglect finding against respondent with respect to her other child because it tended to establish that respondent's inappropriate actions were ongoing.

Matter of Jamoneisha M., 84 AD3d 650 (1st Dept 2011)

Child Protective Investigation Order Reversed for Improper Exercise of Discretion

A child protective investigation of the petitioner's children was improperly ordered in Family Court. The petitioner alleged she had custody of the children as their biological mother since their birth, and served as their primary caregiver. Moreover, the petitioner stated that the children's adoptive mother, the respondent, disappeared nine days before the filing of the custody petition and her whereabouts were unknown. No indication of abuse, neglect, or maltreatment of the subject children was presented. Thus, the court improperly exercised its discretion in ordering the investigation.

Matter of Corrigan, v. Orosco, 84 AD3d 955 (2d Dept 2011)

Maternal Grandmother Neglected Subject Child; Order Dismissing Petition Reversed

The attorney for the child and the petitioner, Administration for Children's Services, separately appealed from an order of the Family Court, which, after a hearing, dismissed the petition against the child's maternal grandmother. The Appellate Division, upon reviewing the record, found that the maternal grandmother had neglected the subject child. The preponderance of the evidence presented at the fact-finding hearing demonstrated that shortly after the maternal grandmother and legal guardian of the subject child had him taken to the psychiatric ward at a nearby hospital, the grandmother was informed that the child was ready to be discharged back into her care. The

grandmother, however, refused to take the child. The petitioner repeatedly attempted to arrange a meeting with the grandmother, but she refused to attend, indicating that she was unwilling to take him home, did not want to have anything to do with the child, and would accept the charges of neglect against her. Thus, by refusing to take the child back into her home or to cooperate with the petitioner in arranging for his appropriate care, the grandmother neglected him. The Family Court's order was reversed and the matter was remitted for a dispositional hearing.

Matter of Jalil McC., 84 AD3d 1089 (2d Dept 2011)

Excessive Corporal Punishment Constitutes Neglect and Derivative Neglect

The Appellate Division affirmed the Family Court's finding of neglect in two related child protective proceedings. The court's finding that the father neglected one child through the use of excessive corporal punishment was supported by a preponderance of the evidence. Such use additionally demonstrated a fundamental defect in the father's understanding of his parental duties, constituting derivative neglect of the second child.

Matter of Abigail G ., 84 AD3d 1235 (2d Dept 2011)

Finding of Neglect Not Supported by Preponderance of the Evidence

Upon review of the record, the Family Court concluded that the petitioner satisfactorily demonstrated by a preponderance of the evidence that her child was not neglected. The evidence presented at the fact-finding hearing established that the mother and father were arguing while the father was carrying their son in a baby carrier. The mother's friend attempted to grab the baby and the baby fell out of the carrier. There was no evidence that the mother and father were involved in a physical altercation. Thus, the preponderance of evidence did not support the Family Court's finding of neglect as to her son, and correspondingly, to the finding of derivative neglect as to her two daughters.

Matter of Amoreih S., 84 AD3d 1246 (2d Dept 2011)

Dispositional Hearing Required Before Custody Placement

The Appellate Division modified the order of the Family Court, deleting the custody provision stating that the mother's children had to be placed in custody of Social Services. The matter was remitted to the Family Court for a dispositional hearing finding that the court erred in failing to grant the mother a hearing in the first instance.

Matter of Kleevuort C., 84 AD3d 1371 (2d Dept 2011)

Finding of Neglect Based Upon Unsanitary Condition of Home and Educational Neglect Affirmed

The Family Court properly found that the respondent mother neglected her two children, thus placing them in the custody of Social Services. The petitioner established by a preponderance of the evidence that the mother maintained the children's home in a deplorable and unsanitary condition, and failed to supply them with an adequate education as demonstrated by excessive school absences without a reasonable justification.

Matter of Mariah C., 84 AD3d 1372 (2d Dept 2011)

Finding of Neglect Based on Inadequate Medical Care Affirmed

The Family Court properly found that the respondent mother neglected her two children. With respect to one child, diagnosed with hydrocephalus shortly after birth, the record showed that the mother failed to schedule or participate in required appointments with the child's team of doctors. The mother's actions placed the child in imminent danger of impairment to his physical condition. With respect to the other child, diagnosed with acute myelocytic leukemia at the age of 2, the record showed that after his admission into a hospital, the mother failed to regularly visit or participate in necessary discharge training resulting in a stay 3 months longer than medically necessary. Thus, the court properly found that such failure constituted neglect of the child's physical, emotional, and mental needs.

Matter of Jamiar W., 84 AD3d 1386 (2d Dept 2011)

Applicability of a FCA § 1028 Hearing Is Not Dependent on Whether the Child Removed Is Placed with Another Parent or Whether the Child Is Placed in Foster Care

In three related child neglect proceedings, the respondent mother appealed from an order denying her application for a FCA §1028 hearing. The Appellate Division noted that the appeal was moot, as while the appeal was pending the Family Court had directed that the children be returned to the mother. Nevertheless, the Appellate Division reviewed the merits of the appeal under the exception to the mootness doctrine. On the merits, the Appellate Division found that the Family Court erred in denying the respondent mother's application for a hearing under Family Court Act § 1028 on the ground that the statute did not apply because the children were placed with the father and paternal grandmother. The Court noted that the statute provides that a hearing shall be held within three days of a child being temporarily removed if requested by the parent who had custody. On its face the statute does not limit a hearing only to parents whose children have been placed in the custody of a governmental agency. A survey of the statutes within article 10 of the Family Court Act shows that the word "removal" or "removed" is used in the context of the State's effectuation of a child's removal from the home; the concept of "removal" is not qualified by any limiting or specifying language. Accordingly, there is no legal distinction between a child's removal from the home and placement in the custody of another parent, and the placement in the custody of a governmental agency. In either case, it is the State acting within its parens patriae power effectuating that transfer and removal. Therefore, the applicability of a Family Court Act § 1028 hearing is not dependent on whether the child removed is placed with another parent or whether the child is placed in foster care. The trigger is that the State has acted to effectuate the removal of the child from the home and placed him or her in the custody of another.

Matter of Lucinda R., 85 AD3d 78 (2d Dept 2011)

Out-of-court Statements Not Corroborated

In two related child protective proceedings, the Administration for Children's Services (hereinafter ACS) appealed from an amended order of the Family Court, which, after a fact-finding hearing, dismissed the petitions alleging that the respondent father, abused one child, and derivatively another child. Upon reviewing the record, the Appellate Division found a lack of support in the record for a finding of abuse. The subject child's sister did not independently provide any detail as to any particular incident of abuse. Thus, the statements of the subject child's sister were insufficiently reliable to corroborate the subject child's out-of-court statements. Besides the out-of-court statements of the subject child's sister, there was no evidence which corroborated the subject child's out-of-court statements. Also, the subject child's medical records did not corroborate her out-of-court statements, particularly her statements that her father had had sexual intercourse with her. Additionally, contrary to ACS's contention, the father's testimony did not contain an admission or statement against interest. The Appellate Division concluded the Family Court did not err in dismissing the petitions because the allegations of abuse were not established by a preponderance of the evidence.

Matter of Jeshaun R., 85 AD3d 798 (2d Dept 2011)

Finding of Derivative Neglect Affirmed

The record revealed that the subject child was born prematurely, and suffered from serious medical complications, including a compromised immune system that required her to remain in the hospital for more than two months following her birth. Shortly after her birth, the subject child was temporarily removed from the mother's care due, in part, to the mother's lack of suitable housing. A petition alleging neglect and derivative neglect was subsequently filed against the mother. After a fact-finding and dispositional hearing, at which the caseworker and the mother testified, the Family Court found that the Department of Social Services (hereinafter the DSS) had established, by a preponderance of the evidence, that the subject child was derivatively neglected. Here, the conduct which formed the basis for the finding of permanent neglect as to the subject child's older sibling occurred only eight

months prior to the subject child's birth. Therefore, the conduct was so proximate in time to the derivative neglect proceeding that it could reasonably be concluded that the condition still existed.

Matter of Jamarra S., 85 AD3d 803 (2d Dept 2011)

Error to Dismiss Petition Without a Fact-finding

In the order appealed from, the Family Court, among other things, granted the motion to dismiss the petition without conducting a fact-finding hearing. The petition alleged that the respondent, who was the paramour of the mother of the subject child, lived with and acted as a parent substitute of the child. The petition also stated that the respondent allegedly, on several occasions, committed acts of sexual abuse and sodomy against his nephew, who was then eight years old. The respondent moved to dismiss the petition, contending, inter alia, that the petitioner failed to allege any danger to the subject child based upon the respondent's alleged activity. The Appellate Division found that the Family Court erred when it granted the respondent's motion to dismiss the petition without a fact-finding hearing as the allegations in the petition were sufficient to require a fact-finding hearing.

Matter of Jayann B., 85 AD3d 911 (2d Dept 2011)

Order Denying Father's Application for Return of Child Reversed

The record revealed that the petitioner sought the removal of the child when the father refused to consent to accepting certain services, which were never fully explained to him. Rather than seeking court-mandated services, the petitioner sought immediate removal. Although the Family Court found that the petitioner failed to make reasonable efforts to avoid removal, the court granted the removal based upon bruises and related injuries to the child. At a hearing pursuant to FCA § 1028, evidence was submitted that the child and his father explained that those injuries were accidentally incurred. The explanation that the child incurred bruises while play-fighting with other children was corroborated by the testimony of a school guidance counselor that the child engaged in aggressive play-fighting with his peers. The record further revealed that the petitioner waited over six weeks after bruises were observed on the child's body before commencing the proceeding. In the interim, no new injuries were observed, indicating that the child faced no imminent risk to his life or health. Nevertheless, the Family Court concluded that the return of the child presented "an imminent risk to the child's life or health" (Family Ct Act § 1028 [a]). The Appellate Division found that the record as a whole failed to provide a sound and substantial basis for the Family Court's conclusion that the return of the child presented "an imminent risk to the child's life or health". The order was reversed and the father's application pursuant to Family Court Act § 1028 for the return of the child was granted.

Matter of Alan C., 85 AD3d 912 (2d Dept 2011)

Father Engaged in Domestic Violence Against Mother in Child's Presence

A preponderance of the evidence established that the father neglected the subject child by engaging in an act of domestic violence against the mother in the child's presence that created an imminent danger of impairing the child's physical, mental, or emotional condition (see FCA § 1012 [f] [i] [B]). The record revealed that the father slapped the mother while the mother was holding the child, who was then only a few weeks old, in her arms, thereby creating an imminent risk of impairing the child's physical, mental, or emotional condition. Moreover, additional evidence established a pattern of domestic violence and intimidation perpetrated by the father. Accordingly, the Family Court properly found that the child's physical, mental, or emotional condition was in imminent danger of becoming impaired as a result of the father's failure to exercise a minimum degree of care (see FCA § 1012 [f] [i] [B]).

Matter of Kiara C., 85 AD3d 1025 (2d Dept 2011)

Evidence Established Pattern of Domestic Violence

The evidence established that the father, while holding the subject child, who was then less than two years old, hit, shoved, and screamed at the mother. The evidence further indicated that the father had previously committed acts of domestic violence against the mother, including slapping her, and that some of those incidents—like the subject incident—occurred in the presence of the child. Accordingly, the Family Court

properly found that the petitioner established, by a preponderance of the evidence, that as a result of the father's conduct, the child's physical, mental, or emotional condition was in imminent danger of impairment.

Matter of Ndeye D., 85 AD3d 1026 (2d Dept 2011)

Mother Unable to Care for Child as a Result of Untreated Mental Illness

The record supported the Family Court's finding of neglect. As a result of her untreated mental illness, the mother was unable to care for her child, failed to maintain stable housing for the child, and was forced to rely on relatives to care for the child. Additionally, during the course of the 2007-2008 academic year, when the child was enrolled in the first grade, the mother withdrew the child from school without a legitimate justification or excuse, causing the child to be absent from school for 35 days during that academic year.

Matter of Kira J., 85 Ad3d 1030 (2d Dept 2011)

Evidence Submitted at a FCA § 1028 Hearing Failed to Establish Neglect

Contrary to the petitioner's contention, the Administration for Children's Services (hereinafter ACS), failed to establish its prima facie entitlement to judgment as a matter of law on the issue of neglect with respect to the subject children (see FCA § 1012 [f] [i]). In support of its motion, ACS included the evidence submitted at a hearing held pursuant to FCA § 1028 (hereinafter the 1028 hearing). The evidence submitted at the 1028 hearing failed to establish that the mother neglected her children. Moreover, most of the evidence submitted by ACS at the 1028 hearing was hearsay. The Appellate Division noted that although hearsay evidence is permitted in a 1028 hearing, it is not permitted in a fact-finding hearing (see FCA § 1046 [b] [iii]; [c]). Consequently, hearsay evidence cannot be the basis for granting summary judgment in lieu of a fact-finding hearing.

Matter of N. Children, 86 AD3d 572 (2d Dept 2011)

Mother's Testimony About Domestic Violence Found Credible

The record supported the Family Court's finding that the Department of Social Services (hereinafter DSS) established by a preponderance of the evidence that the father neglected the subject child. The mother's testimony regarding an incident of domestic violence in the home was found to be credible. Furthermore, the Family Court was entitled to draw a strong inference against the father upon his failure to testify at the fact-finding hearing.

Matter of Christiana C., 86 AD3d 606 (2d Dept 2011)

Father Engaged in Acts of Domestic Violence Against Mother in Child's Presence

The subject child's mother testified at the fact-finding hearing that in May 2006, the father hit the mother in the face with such force that she could not move her jaw up and down or chew, and that the child, who was then 2 1/2 years old, was present during this incident and began crying. The mother further testified that in June 2006, while she was holding the child, the father punched the mother in the stomach, cursed at her, and threatened to kill her if she did not leave the apartment. Under these circumstances, the evidence supported the Family Court's determination that the father neglected the subject child by engaging in acts of domestic violence against the mother in the child's presence that impaired or created an imminent danger of impairing the child's physical, emotional, or mental condition (see FCA § 1012 [f] [i] [B]).

Matter of Ajay Sumert D., 87 AD3d 637 (2d Dept 2011)

Family Court Failed to Conduct Proper Inquiry When it Accepted Mother's Waiver to Right to Counsel

The record revealed that the Family Court permitted the mother to change counsel on multiple occasions, cautioned her to retain counsel, and appointed counsel to represent her. Prior to the two permanency hearings at issue, upon the mother's request, the Family Court allowed the mother to proceed pro se and directed the mother's appointed counsel to provide assistance to her in an advisory capacity. However, the Family Court

failed to conduct a "searching inquiry" of the mother in order to be reasonably certain that she understood the dangers and disadvantages of giving up the fundamental right of counsel. As a respondent in a proceeding pursuant to FCA Article 10, the mother had both a constitutional and a statutory right to the assistance of counsel. Accordingly, because the Family Court did not ensure that the mother's waiver of her right to counsel was made knowingly, intelligently, and voluntarily, the Appellate Division reversed the orders appealed from and remitted the matter to the Family Court, for a new permanency hearing and determination.

Matter of Stephen Daniel A., 87 AD3d 735 (2d Dept 2011)

Abuse Finding Affirmed

Supreme Court, Integrated Domestic Violence part, issued an order finding respondent to have sexually abused his child and issued an order of protection on behalf of child. A jury trial then occurred in the same court, convicting respondent of criminal charges stemming from same incident. Respondent argued that the criminal trial should have occurred before the civil matter and that Supreme Court faced a conflict of interest by hearing both cases. The Appellate Division held the issue was not preserved for review and dismissed his argument as well as his claims of ineffective assistance of counsel.

Matter of Hailey JJ., 84 AD3d 1432 (3d Dept 2011)

***Prima Facie* Case of Abuse Un-Rebutted**

DSS filed abuse and neglect proceedings against mother and father on behalf of their two children, ages one year and six-weeks-old. The six-week-old had fractures all over his body, and six broken ribs. The matter was heard in the Integrated Domestic Violence part of Supreme Court. Mother plead to one count of endangering the welfare of child. Thereafter at the Family Court trial, mother failed to testify. The court found mother had abused the six-week-old and derivatively neglected the one year old. The father was found to have neglected both children. Mother appealed from the court's fact-finding order. The Appellate Division held that DSS had made a *prima facie* case of child abuse. The evidence included details of the injuries inflicted upon child, expert medical testimony**,** fact that mother and father were primary care-givers, father's testimony that mother had admitted she had "smacked" the six-week-old, father had observed bruising on the six-week-old, mother was violent towards father and other child, and mother had failed to rebut the evidence.

Matter of Keara MM., 84 AD3d 1442 (3d Dept 2011)

Presumption of Neglect Due To Chronic and Persistent Misuse of Alcohol and Drugs

Father, who was found to have neglected his child, appealed the finding of neglect on the basis that DSS failed to show that his child was ever in any actual or imminent danger while he was caring for child. The Appellate Division stated that a finding of neglect can be based on, "in some circumstances", a presumption of neglect "if the parent chronically and persistently misuses alcohol and drugs which, in turn, ...impairs his...judgment" while child is in his care. In this case, the Court pointed out that not only had father continued to consume alcohol and drugs, he had also failed to properly supervise his four-year-old child, by repeatedly leaving her unsupervised and alone in a room at the shelter where he was living, and this behavior was related to his continued use of alcohol and drugs.

Matter of Chassidy CC., 84 AD3d 1448 (3d Dept 2011)

Neglect Based On Exposure to Domestic Violence

Mother consented to stepfather having custody of child as she was unable to care for him. Step-father was unable to care for child, who was diagnosed with post-traumatic stress disorder and at high risk for assaulting younger children. With mother's consent, step-father placed child with DSS who then placed child in residential treatment facility. DSS filed neglect against mother. Mother admitted to some of the allegations and Family Court found mother had neglected child as she had "allowed him to be exposed to domestic violence". After combined dispositional and permanency hearing, the court continued placement of child in facility and restricted mother's access to child.

Mother appealed court's dispositional order objecting to placement of child with DSS in a residential facility, and to her restricted access. The Appellate Division affirmed, finding that mother had several indicated reports against her, continued to live with man against whom mother's other children had no contact orders of protection. Additionally, child was doing well in facility where he was responding to treatment and counseling. However the Appellate Division held that order restricting mother's access to child should be modified as counselor felt child would benefit from more contact with mother. Finally, the Appellate Division dismissed mother's contention that Family Court was not objective as it had issued a subpoena on its own accord, requested child's school records, and examined witnesses extensively thereby showing it was not impartial. The Appellate Division held this issue was not preserved for review. In a footnote however the Court noted that it did not approve of such practices by Family Court.

Matter of Keaghn Y., 84 AD3d 1478 (3d Dept 2011)

Order Restricting Access Until Child's 18th Birthday Modified

DSS filed derivative neglect petitions against father o/b/o his two children due to his sexual abuse of a relative child. Family Court, after fact-finding hearing, dismissed the petition. The Appellate Division in an earlier opinion, modified the court's order, found derivative neglect, and remitted the matter to Family Court for further proceedings. After dispositional hearing commenced in Family Court, father moved to vacate derivative neglect finding and hold new fact-finding because he alleged victim had recanted. His new evidence consisted of affidavits from himself, mother and paternal grandmother swearing father 's innocence. Family Court denied motion, issued an order of supervision against father, limited his access to children and issued order of protection directing no contact between father and sons until the children were 18. Father appealed. Appellate Division found Family Court had sound and substantial basis to deny father 's motion to vacate as new evidence failed to contain any "indicia of reliability". However the Court stated that as father was related to children, the order of no contact could only be in place for the duration of the article 10 matter pursuant to FCA §1056[4], not their 18th birthday.

Matter of Kole HH., 84 AD3d 1518 (3d Dept 2011)

Disposition and Permanency Affirmed

DSS filed neglect petitions against mother alleging she failed to protect older child from sexual abuse by father and derivatively neglected younger one. Family Court adjudicated mother to have neglected the children and the Appellate Division affirmed. Mother appealed from Orders of Disposition and Permanency issued by Family Court, which continued placement of the two children with DSS, with permanency goal of return to mother but denied her request for visitation**.** Mother alleged she was deprived of her due process rights as court allowed dispositional and permanency hearings to occur at the same time, and argued that court's decision to continue placement and deny her visitation was without sound and substantial basis in the record. The Appellate Division held that mother's due process issue was not preserved for review, but even if it was, the record showed she was afforded " a full and fair opportunity to be heard". As to the merits of the case, the Court affirmed and held that the overwhelming evidence showed mother knew and saw father repeatedly sexually abusing older child but told child not to tell anyone. Mother failed to comply with any of the recommended services, minimized her ongoing relationship with father, failed to understand the harm she caused, was unemployed, lived in unsafe housing without electricity and running water, children wanted no contact with her, and older child continued to be "a child in crisis" and younger child had behavioral issues.

Matter of Telsa Z., 84 AD3d 1599 (3d Dept 2011)

Neglect Affirmed Due to Domestic Violence and Drugs in Home

Father plead guilty to harassment in response to mother's family offense petition, and an order of protection with a one year stay away was issued against father, and parents were given joint legal custody of child with primary physical custody to mother and specific visitation times to father. Father moved back in with mother in violation of order of protection and later choked her and threatened to kill her in presence of child whose screams were heard by neighbor. Police

responded and found marihuana and other drugs in home. Child was removed and both parents were charged with neglect. Mother admitted but father, after fact-finding and dispositional hearing, appealed arguing court had insufficient evidence to find neglect. Pending this matter paternal grandmother filed UCCJEA petition to have temporary custody of child, and court found grandmother not suitable placement for child. Grandmother appealed decision. By the time matter came before Appellate Division, child had been returned to mother therefore Court found grandmother's petition moot. The Appellate Division affirmed Family Court's orders finding that father's violent acts against mother in presence of child coupled with discovering drugs in home, which were within reach of child, were sufficient basis to find neglect.

Matter of Paige AA., 85 AD3d 1213 (3d Dept 2011)

Biting Child and Domestic Violence Sufficient to Find Neglect

DSS filed neglect petitions against parents (later dismissed as to father) on behalf of two children. Family Court found neglect against mother based on her acts of domestic violence against father, her bouts of erratic and uncontrollable anger, biting child on her arm leaving bite marks and causing child's arm to swell, putting arm around child's throat and scaring child, throwing tables and failing to take medication for her mental illness. The Appellate Division affirmed.

Matter of Ariel B., 85 AD3d 1224 (3d Dept 2011)

Wilful Violation of Protective Order Pursuant to Article 10

Child was removed from mother's care upon finding of neglect and placed in care of paternal grandparents. An order of protection pursuant to Family Court Act Article 10 was issued. DSS filed wilful violation petition against mother alleging she had violated order of protection. Family Court found violation and sentenced mother to 60 days in jail. Mother appealed her sentence and argued court had insufficient evidence to establish wilful violation. Appellate Division held as mother had already served her sentence by time of appeal, it rendered her appeal of her sentence moot. The Appellate Division affirmed the wilful violation finding based on mother's use of repeated profane language when referring to caseworker in presence of child, telling child she would have grandparents arrested, and making child "double pinkie promise" to act badly when she was with grandparents so they would not want child anymore. The Court held that mother's efforts to manipulate child in order to undermine relationship with grandparents caused emotional harm to child which violated the protective order issued by court.

Matter of Destiny F., 85 AD3d 1229 (3d Dept 2011)

Neglect Due to Domestic Violence

DSS filed neglect petitions against mother and boyfriend, who lived with mother's two young children and boyfriend's one child, based on repeated domestic violence in home including one incident involving a gun. Testimony from caseworker and sheriff, who had interviewed mother's older daughter, established parties fought frequently and included incident where, in children's presence, boyfriend threatened to hurt mother with gun which he kept on top of refrigerator and he discharged gun numerous times. Evidence showed boyfriend would grab mother's three year old daughter's wrist, show her his pocket knife and threaten to cut off her finger for picking her nose. He also locked this child out of the home at night for crying. Evidence also showed mother refused to participate in preventive services and hesitated when asked who she would choose if asked to choose between boyfriend and children. Family Court found that DSS had shown by preponderance of the evidence that parties had neglected children. The Appellate Division affirmed finding that court had sound and substantial in issuing its order.

Matter of Joseph RR., 86 AD3d 723 (3d Dept 2011)

Sound and Substantial Basis to Limit Father's Parenting Time

Married mother and father of one child separated and stipulated to custody order which provided for joint legal custody with primary, physical custody to mother and parenting time to father. Thereafter child told mother father "likes to rub her pea pea". Mother reported this to DSS and DSS found allegations to be

unfounded. Attorney for child unsuccessfully requested another investigation. Thereafter child informed mother that father had rubbed her vaginal area outside her clothing and complained this area was sore . Mother saw child's vaginal area was red and inflamed, took her to emergency room where child once again told nurse what she had told mother. Mother filed custody modification petition seeking sole custody and requested father's parenting time be supervised. Mother alleged child had made same allegations about father to others and was exhibiting sexualized and self-destructive behaviors. Court held fact-finding and *Lincoln* hearings and determined child's out of court statements of sexual touching by father were sufficiently corroborated and granted mother's petition. Father appealed. The Appellate Division affirmed finding mother had demonstrated sufficient change in circumstances and child's out of statements alleging sex abuse required low degree of corroboration. In this case, child's out of court statement was corroborated by testimony of mother, nurse, child care provider and several relatives. The Appellate Division gave Family Court great deference in its ability to evaluate the testimony and assess the credibility of witnesses and found court had sound and substantial basis in the record to modify custody.

Matter of Kimberly CC. v Gerry CC., 86 AD3d 728 (3d Dept 2011)

Failure to Take Medication Results in Neglect

DSS filed neglect petition against mother of three children based on her failure to take epilepsy medication and due to unsanitary conditions in her home. After hearing, Family Court found mother had neglected children. Testimony from emergency medical worker, caseworker and mother herself showed mother drove with the children in the car without taking her epilepsy medication which caused mother to have a seizure and resulted in car accident. Mother had to be transported to hospital and children were left in care of bank employee until family member could be summoned. Testimony from one of the children's head-start nurse and caseworker also showed mother drove children to school and daycare after having another seizure and mother admitted she had not taken medication. Mother's contention that she had no health care was found not credible as nurse and caseworker testified mother had been given referrals to insurance resources and mother had failed to apply. Additionally, court found unsanitary conditions in mother's home presented danger to children. The Appellate Division held DSS had proven by preponderance of the evidence that mother had placed children in imminent danger of physical harm and affirmed.

Matter o Draven I., 86 AD3d 746 (3d Dept 2011)

Finding of Abandonment Affirmed

DSS obtained custody of baby who was born addicted to drugs. Mother and father made admissions to certain allegations in neglect proceeding and child was found to be neglected. DSS then filed petitions against parents alleging abandonment. After hearing, court found parents had abandoned child. Father appealed. Testimony from caseworker showed father had no contact with child during relevant six month period prior to filing of petition, aside from one phone call where father called to ask caseworker to bring child to his place of work because he didn't like DSS. Father testified that he had called caseworker several times in an attempt to have contact with child. Caseworker denied ever having received such calls. There was no proof that DSS had discouraged or prevented father from visiting child. The Appellate Division deferred to Family Court's assessment of such credibility issues and affirmed.

Matter of Leon CC., 86 AD3d 764 (3d Dept 2011)

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

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

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

Child Neglected Based Upon Derivative Evidence That Mother's Other Children Neglected

Family Court adjudicated the subject child to be neglected by respondent mother. The Appellate Division modified by vacating that part of the order that required the mother to comply with the treatment recommendations of a mental health evaluation. The court properly found the child to be neglected based upon derivative evidence that four of respondent's other children were determined to be neglected children, including evidence that respondent failed to address the mental health issues that led to those neglect determinations. Further, the finding of neglect with respect to one of respondent's other children was entered about two months before the subject child's birth and therefore the prior neglect finding with respect to the other child was so proximate in time that it could reasonably be concluded that the condition still existed. The court erred in including a provision in the dispositional order that required respondent to comply with treatment recommendations of a mental health evaluation report that was not admitted into evidence and was not in the record on appeal. The court did not abuse its discretion in denying respondent's mother's attorney's request for an adjournment so that the mother could testify and so he could subpoena an additional witness.

Matter of Sophia M. G.- K., 84 AD3d 1746 (4th Dept 2011)

***Frye* Hearing Not Required**

Family Court placed respondent father under the supervision of petitioner agency based upon a finding that he sexually abused his daughter. The Appellate Division affirmed. The court did not abuse its discretion in denying respondent's motion for a *Frye* hearing with respect to the admissibility of validation testimony of a court-appointed mental health counselor. Because the Sgroi method used by the counselor in interviewing the child was widely used and the testimony of the counselor was not on a novel topic, a *Frye* hearing was not required. The court properly determined that the out-of-court statements of the child were sufficiently corroborated.

Matter of Bethany F., 85 AD3d 1588 (4th Dept 2011)

Finding of Derivative Neglect Supported by the Evidence

Family Court adjudged that respondent mother derivatively neglected her child. The Appellate Division affirmed. Because the mother failed to object to the admission of postpetition evidence, her challenge on appeal was not preserved for review. In any event, although petitioner should have amended the petition, because the evidence was received without objection, the Appellate Division, in the interests of justice, sua sponte conformed the petition to the evidence. The finding of derivative neglect was supported by a preponderance of the evidence. The mother's neglect of the child was so closely connected with her care of her other children that it could be said to evidence fundamental flaws in her understanding of the duties of parenthood, which justified the finding that the mother derivatively neglected the subject child.

Matter of Angel L. H., 85 AD3d 1637 (4th Dept 2011), *lv denied* 17 NY3d 711

Father Neglected Child by Failing to Protect Him From Sexual Abuse

Family Court determined that respondent father neglected the child by failing to protect him from being sexually abused by his oldest brother and his cousin. The Appellate Division affirmed. Both the child and his brother testified that the father was aware of their sexual activity but took no action to prevent it from continuing. The child was also derivatively neglected as a result of the father's sexual abuse of the father's nephew. The nephew's family shared a house with respondent's family during the relevant time period. The father was the functional equivalent of a parent with respect to his nephew and therefore the nephew was the legal responsibility of the father within the meaning of the Family Court Act.

Matter of Zachary T., 85 AD3d 1663 (4th Dept 2011)

CHILD SUPPORT

Respondent's Claim That He Was Denied Hearing Was Unpreserved and Waived

Family Court found that respondent father willfully violated the court's order regarding child support and placed respondent on probation for six months. The Appellate Division affirmed. Respondent's claim that he was not afforded a hearing was unpreserved for review. In any event, respondent participated in the hearing and therefore waived the claim. Respondent's attorney argued on his behalf at the hearing and presented evidence.

Matter of Commissioner of Social Servs. v Zouhier B., 84 AD3d 438 (1st Dept 2011)

Denial of Respondent's Cross Motion For Downward Modification Reversed

Supreme Court granted plaintiff mother's motion to hold defendant father in contempt for failure to pay, among other things, child support and denied defendant father's cross motion for a downward modification of child support. The Appellate Division reversed. In June 2008, plaintiff brought a contempt motion and five days later defendant made a motion for a downward modification of his support obligations. The court found defendant willfully failed to make support payments and subsequently another Justice denied the motion for a downward modification. In June 2009, plaintiff again moved for an order holding defendant in contempt and the court ordered defendant to pay child support arrears and other obligations. In July 2009, defendant again sought a downward modification of his support obligations, annexing an affidavit asserting that his company sales had plummeted by 50% in the past year and attached an affidavit and report by a forensic accountant containing the opinion that there had been a significant decrease in defendant's compensation and profits. The court summarily held defendant in contempt for failure to pay support obligations and did not allow defendant to present any of his financial expert's documentation and did not hold a hearing. The court denied defendant's cross motion for a downward modification. The Appellate Division reversed. Defendant was entitled to a hearing on the contempt motion. Because defendant presented new financial information and an expert affidavit showing that his financial had worsened, he should have had a hearing to assess the new information on his cross motion for a downward modification of his support obligations.

Bergman v Bergman, 84 AD3d 537 (1st Dept 2011)

Child Support Award And Unreimbursed Expenses Order Modified

Supreme Court directed that plaintiff father pay, among other things, basic child support of $6,625 per month and 100% of the child's unreimbursed expenses. The Appellate Division modified by reducing the child support obligation to $4,333 per month and plaintiff's share of unreimbursed expenses to 65%. The court erred in not attributing income to defendant mother in calculating her pro rata share of support obligations. It should have used defendant's 2009 income and the maintenance award in its calculation of the combined parental income and of each party's share of the child support obligation and unreimbursed expenses.

Pankoff v Pankoff, 84 AD3d 690 (1st Dept 2011)

Father Obligated to Pay 50 % of Child's Health Care Premiums

Family Court denied respondent father's objections to the Support Magistrate's order directing him to pay 50 % of the health insurance premiums for the parties' child. The Appellate Division affirmed. The parties' stipulation of settlement provided that petitioner mother had the responsibility of enrolling the child in a medical plan and that the parties would share 50/50 any of the child's unreimbursed medical expenses. At the time of the stipulation the mother was enrolled in dental school and obtained health care coverage for the child at no cost, but when she completed school and became employed, the health care coverage was no longer free. Unreimbursed medical expenses in the stipulation included the payment of health care premiums for the child.

Falguni P. v Pinakin P., 85 AD3d 635 (1st Dept 2011)

Child Support Calculation Resulted in Double Shelter Allowance

Under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in it imputing an annual income to the defendant in the sum of $52,000 for the purpose of calculating his child support obligations. However, in calculating the child

support award, the Supreme Court's direction that the defendant pay both child support and half of the carrying charges on the marital residence resulted in an improper double shelter allowance. Thus, the matter was remitted to recalculate the child support award "taking into account the shelter costs incurred by the defendant in providing housing to the plaintiff and the minor children".

Mosso v Mosso, 84 AD3d 757 (2d Dept 2011)

Child's Actions Did Not Constitute Abandonment

The father appealed from an order of the Family Court which denied his motion to vacate a child support order. The father's sporadic and inconsistent attempts to contact the subject child were insufficient to establish that the child abandoned him. While the subject child had, at certain times in the past, limited contact with her father by withholding her current address, and allegedly seeking an order of protection against him, such reluctance did not constitute an abandonment, particularly since it was undisputed that the child responded to at least some of the father's telephone calls and text messages during the relevant time period, and the child repeatedly emphasized in her testimony that she had never wanted to eliminate contact with her father altogether.

DeLuca v Strear-DeLuca, 84 AD3d 801 (2d Dept 2011)

MBA Degree Provided Parent with Enhanced Earning Capacity

The Supreme Court properly determined that the defendant's MBA degree provided him with an enhanced earning capacity subject to equitable distribution. While the MBA degree may not have been an actual prerequisite to the defendant's employment in various finance positions in the cable television industry, there was ample evidence, including expert testimony, to support the finding that the attainment of this degree made him a more attractive candidate.

Huffman v Huffman, 84 AD3d 875 (2d Dept 2011)

Income Imputed to the Mother Was Supported by the Record

The Supreme Court providently imputed $200,000 per year in income to the former wife for child support purposes. Here, given the former wife's education, experience, and salary history, the imputed sum was supported by the record. Further, the court properly considered the statutory factors in capping the combined parental income at $300,000 for child support purposes, and there was no basis in this record for disturbing its determination (see DRL § 240 [1-b] [c] [3]; [f]).

Charap v Willett, 84 AD3d 1000 (2d Dept 2011)

Family Court's Adjudication of Willful Violation Reversed

Since the Support Magistrate never made any specific findings as to the amount of the father's income, it was improper for the Family Court to conclude that the father's failure to pay $365 per week in child support was willful. Accordingly, the Family Court should have denied the mother's petition to adjudicate the father to be in willful violation of a prior child support order. It was noted that since the father already served the term of incarceration imposed upon him in connection with the mother's petition, the Appellate Division was constrained to dismiss his appeal from the order of commitment as academic.

Matter of Shvetsova v Paderno, 84 Ad3d 1095 (2d Dept 2011)

Stipulation Defining "Emancipation" of Child Did Not Preclude Child's Own Support Petition

Contrary to the mother's contention, the Family Court's determination that the subject child was emancipated pursuant to the terms of the parties' stipulation which defined the emancipating event as including the child's "permanent residence away from the residence of the wife," did not preclude the subject child from filing his own support petition. The terms of a separation agreement between a husband and wife, like any other contract clauses, are binding only on the parties to the agreement. The child, on the other hand, is not bound to the terms of the agreement. Here, since the subject

child moved from his mother's residence to the father's residence with his parents' consent, the subject child was entitled to adequate support from his mother.

Matter of Wakefield v Wakefield, 84 AD3d 1256 (2d Dept 2011)

Provisions of Settlement Violated CSSA

The Supreme Court properly granted that branch of the plaintiff's cross motion which was to vacate the child support provisions of the judgment of divorce and the parties' stipulations of settlement. Those provisions violated the Child Support Standards Act (hereinafter the CSSA) because they failed to articulate the reason or reasons the parties chose to deviate from the CSSA guidelines. Consequently, such child support provisions were invalid and unenforceable (see Domestic Relations Law § 240 [1-b] [h]). Moreover, the Supreme Court properly directed the plaintiff to pay temporary child support in the sum of $153.62 per week pending a hearing and a de novo determination of the plaintiff's child support obligation (see Domestic Relations Law § 240 [1-b] [h]).

Facompre v Facompre, 84 AD3d 1304 (2d Dept 2011)

Family Court Erred in Denying Father's Petition for Downward Modification

The father made a prima facie showing of a substantial unanticipated and unreasonable change in circumstances by submitting a termination of employment packet and testifying that he was laid off from his position in March 2010 through no fault of his own. He further demonstrated his diligence in seeking new employment by submitting a detailed list of positions that he applied for, e-mails that he sent to potential employers, and responses from potential employers. Despite these efforts, the father was unable to find work. In denying the father's petition, the Family Court erroneously relied on the father's admission that at the time that he signed the stipulation of settlement which set his child support obligation, he had been changed from a salaried employee making $60,000 per year to an employee working strictly on commission with earnings of no more than $49,894 and concluded that this established that the loss of income was not unanticipated. However, there was no allegation or concomitant showing on this record that the father had any problems meeting his child support obligation notwithstanding his decreased income or that he had petitioned for a downward modification prior to being laid off.. Furthermore, contrary to the Family Court's finding, the fact that the father attempted to find new or additional employment more than a year prior to being laid off showed that the father was being proactive once he sensed that his employer was experiencing financial difficulties. The evidence did not sufficiently prove that the father knew, at the time that he executed the stipulation of settlement or the court entered the judgment of divorce, that he was going to be laid off.

Matter of McAndrew v McAndrew, 84 AD3d 1281 (2d Dept 2011)

Father's disability retirement was not an unanticipated change in circumstances

Pursuant to the parties' judgment of divorce, entered in January of 2009, the father was required to pay basic child support in the amount of $800 per month. The mother later moved for an upward modification to require him to pay certain child care expenses - that motion was settled in March of 2010 with a stipulation which required the father to pay certain expenses in addition to the $800 per month in basic support. In June of 2010 the father moved for a downward modification of his basic support obligation, arguing that he had been forced by the NYPD to retire in April of 2010 and was now collecting a disability pension that was much lower than his original salary. The Appellate Division concluded that the forced retirement was not an unanticipated change in circumstances, since the NYPD had begun proceedings to force the father to retire in December of 2009. Those proceedings, which concluded with the father's retirement in April of 2010, were nearing completion when the parties entered into their stipulation in March of 2010. The father argued that the March 2010 stipulation was not the relevant date for determining whether there was an unanticipated change of circumstances, since that stipulation did not modify his basic child support, but the court rejected that contention, noting that the parties agreed in the stipulation that he would continue to pay his basic support obligation of $800 per month.

Matter of Ramirez v Bobe, 85 AD3d 929 (2d Dept 2011)

Income imputed where father failed to explain why employment was terminated

Since the father could not give a reason why his employment had been terminated, the Support Magistrate providently exercised her discretion in finding that his loss in income was based on his own actions, and imputed income to him based on his past employment history.

Matter of Suffolk County Dept. of Social Services v Myrick, 85 AD3d 1041 (2d Dept 2011)

Error to base support on CSSA standards where parties knowingly and properly opted out

While the Supreme Court properly awarded the mother child support retroactive to the date of her pendente lite motion, and properly credited the father for payment of carrying charges on the marital residence, it erred when it calculated the amount of retroactive support based on the CSSA guidelines, since the parties had entered into a binding stipulation in open court in which they knowingly and properly opted out of the provisions of the CSSA.

Fredericks v Fredericks, 85 AD3d 1107 (2d Dept 2011)

Sufficient evidence provided of a diligent search to obtain employment

A party seeking a downward modification of support based on loss of employment has the burden of demonstrating that he or she diligently sought to obtain employment commensurate with his or her earning capacity. Here, the father left his job at a hotel after the hotel "significantly" cut back his hours, and found employment at a pizzeria. However, he was then let go from his position at the pizzeria. He testified in detail that he then sought work at various specified restaurants and supermarkets, went to an employment agency, looked for employment in newspapers, and explored job leads acquired by word of mouth. Under those circumstances, the Support Magistrate's finding that he did not satisfy his burden of establishing an inability to pay support was not supported by the evidence. The evidence also did not support the Support Magistrate's finding that the father had the means, resources, and ability to pay child support, but chose not to do so.

Matter of Ceballos v Castillo, 85 AD3d 1161 (2d Dept 2011)

Support where combined income exceeds $80,000

When calculating the proper support amount where the combined parental income exceeds $80,000, the court has the discretion to apply the applicable percentage set forth in Family Court Act § 413(1)(b)(3), or the factors set forth in Family Court Act § 413(1)(b)(3), or both, to the parents' combined income over $80,000.

Matter of Koutrakos v Margiano, 85 AD3d 1184 (2d Dept 2011)

Parties' son not emancipated

A child under the age of 21 becomes emancipated when the child is economically independent through employment and is self-supporting. Here, the parties' son was not emancipated, enough though he worked full time, paid for his own car insurance, and paid for his own cell phone, because his mother still paid for his food, shelter, clothing, and health and dental insurance.

Matter of Smith v Smith, 85 AD3d 1188 (2d Dept 2011)

Order Denying Father's Petition for Downward Modification Modified

In a child support proceeding, the father appealed from an order of the Family Court, which denied his petition for a downward modification of his child support obligation. The record revealed that it was undisputed that the child care expenses had decreased significantly since the order of support had been issued, due to the child attending school full time. Accordingly, the father was required to pay his share of the child care expenses actually incurred by the mother commencing January 7, 2010, the date that the father filed his petition for a downward modification of his child support obligation. The Appellate Division rejected the father's argument that the costs of the after-school program and summer camp in which the child was

enrolled did not qualify as child care expenses. The father offered no evidence to refute the mother's contention that these programs provided care for the child while she was at work. Accordingly, those programs qualified as child care expenses consistent with the purpose of FCA § 413. Order modified.

Matter of Scarduzio v Ryan, 86 AD3d 573 (2d Dept 2011)

Dismissal Due to Failure to File Proof of Service Affirmed

Family Court dismissed father's Objections to wilful violation order issued by Support Magistrate based on father's failure to file proof of service with the court pursuant to Family Court Act §439(e) . Father's motion to re-argue was heard by court but after reconsideration, court affirmed its prior determination. Appellate Division affirmed holding it was not an abuse of discretion for court to require strict adherence to statutory requirements of Family Court Act § 439(e).

Matter of Riley v Riley, 84 AD3d 1473 (3d Dept 2011)

Not Abuse of Discretion To Deviate From Statutory Amount

Parents of two children commenced divorce action and mother moved for temporary custody and child support and father cross-moved for temporary custody. Supreme Court issued order of temporary joint legal custody, set specific parenting times and referred child support matter to Support Magistrate. After hearing, magistrate issued order finding mother was primary care-giver, determined the amount of child support father would have to pay, found that father's share of child support was unjust or inappropriate and accordingly reduced amount of child support. Both parents appealed. Appellate Division affirmed magistrate's determination that mother was primary caregiver as children spent significantly more time with her. Father's contention that the number of nights not the number of hours children spent with parent should be considered in determining who is primary caregiver, was dismissed. As to issue of reducing father's support obligation, the Court held that there was basis for deviation as mother earned significantly more than father, and testimony revealed father made non-monetary contributions towards children. Under these circumstances the Appellate Division held it was not an abuse of discretion for magistrate to reduce father's support obligation.

Riemersma v Riemersma, 84 AD3d 1474 (3d Dept 2011)

No Unanticipated and Unreasonable Change To Modify

Mother and father entered into separation agreement resolving issues of custody and child support. The agreement was incorporated but not merged into their divorce judgment. One month later, mother filed show cause order in Family Court, requesting a *de novo* calculation or in the alternative, an upward modification of child support. Father moved to dismiss and Support Magistrate granted father's motion. Mother filed objections and Family Court affirmed, and also granted father's motion for attorney's fees. Mother appealed. Appellate Division affirmed finding that mother had failed to show support agreement was unfair or inequitable when it was entered into, or that unanticipated and unreasonable change in circumstances had occurred. Mother's allegation that father's income has increased was known during parties' divorce and support amount had been increased accordingly. Mother's allegation that father has undisclosed income was not supported by evidence and mother's allegation that child's behavioral needs had worsened did not show how current support amount failed to meet those needs. Considering all the factors the Appellate Division held award of attorney's fees was not an abuse of discretion.

Matter of Malone v Malone, 84 AD3d 1674 (3d Dept 2011)

No Unreasonable or Unanticipated Change Shown

Divorced father and mother of two children agreed to joint legal custody, with primary physical to mother and substantial parenting time to father, stipulated to child support, and waived CSSA provisions. Thereafter the parties modified custody to shared physical custody and both tried unsuccessfully to modify the child support amount. Little over a year later the parties again modified custody and father filed to eliminate his

support obligation, arguing he was now the "custodial parent" for child support purposes. The support magistrate dismissed father's application and father appealed. The Appellate Division held that where a child support order arises out of an agreement or stipulation, the person seeking to modify must show either the stipulation was unfair when entered into or that there has been an unanticipated and unreasonable change in circumstances. In this case, the Court held it was unclear which parent actually had more time with the children and even if father were to show he had more time than mother, this does not constitute an unreasonable or unanticipated change as the parties' divorced judgment makes clear that father had extensive parenting time to begin with and this was one of the factors which prompted parties to waive strict application of the CSSA.

Matter of Hunt v Bartley, 85 AD3d 1275 (3d Dept 2011)

Order of Commitment Reversed

Support Magistrate found respondent to have wilfully violated support order based on non-payment. Family Court issued 30 day jail term, but suspended sentence on condition respondent comply with support payments. DSS filed to revoke suspended sentence due to respondent's non payment. Family Court issued warrant for respondent's arrest. When respondent appeared at courthouse , he was taken away by state police on another matter and did not appear before Family Court. Despite his absence and absence of his lawyer, court entered an order of commitment sentenced him to 30 days in jail. Respondent appealed. The Appellate Division reversed finding that court abused its discretion by revoking suspended jail sentence without affording respondent an opportunity to be heard.

Matter of Conlon v Kortz, 86 AD3d 670 (3d Dept 2011)

Respondent Father Denied His Right to Counsel

Family Court confirmed the Support Magistrate's determination that respondent father willfully failed to obey an order of the court and sentenced him to six months in jail. The Appellate Division reversed. The court erred in allowing respondent to proceed pro se at the hearing. The court failed to make the requisite searching inquiry of respondent's awareness of the dangers and disadvantages of proceeding without counsel.

Matter of Commissioner of Social Servs. v Jones, 87 AD3d 1275 (4th Dept 2011)

CUSTODY AND VISITATION

Mother Not Entitled to Visitation With Child During Pendency of TPR Proceeding

Family Court denied respondent mother's motion for immediate visitation with her child and suspended visitation pending the final determination of a TPR proceeding against the mother. The Appellate Division affirmed. In 2007, the child was removed from the mother when mother left a homeless shelter to sleep in a park so she could spend time with her boyfriend. Immediately thereafter, ACS sought a determination that mother had neglected the child. Based on her nonappearance mother was found to have neglected the child. The child was placed in foster care with his paternal aunt and uncle and they planned to adopt the child. In 2009, ACS instituted a TPR proceeding. For two years, the mother, who is illiterate and mentally retarded, failed to visit the child. The foster parents do not intend to permit post-adoption visitation with the mother. Therefore, the court properly found that it was not in the child's best interests to grant mother visitation during the pendency of the TPR proceeding.

Matter of Carlos G., 84 AD3d 629 (1st Dept 2011)

Petitioner Showed Changed Circumstances – Incarcerated Father Was Transferred to Various Prisons For Serious Infractions

Family Court granted respondent mother's petition to modify a prior visitation order and terminated the child's visits with petitioner father. The Appellate Division affirmed. Circumstances changed sufficiently to modify the visitation order. The incarcerated father behaved in a threatening and inappropriate manner in court and he had been transferred to various maximum security facilities for what prison authorities viewed as serious infractions. Moreover, the mother had

unsuccessfully attempted to find an adult to accompany the child on a 16-hour trip to visit the father in prison. The father's due process rights were not violated because he was allowed to participate in the visitation proceedings via videotape, given the father's conduct, the court's concern for safety, the fact that the father's attorney was present during the proceedings, and the father's opportunity to question the mother.

Matter of Earl B.G. v Shenette T., 84 AD3d 672 (1st Dept 2011)

Relocation in Child's Best Interest

Father and mother of one child divorced and stipulated to custody with mother and visitation with father. Mother eventually remarried and had child with second husband. Mother's husband unsuccessfully tried to get job in New York but was unable to do so and obtained job in California. Father filed modification petition seeking sole custody of child. Mother then filed petition to relocate. Before hearing, father withdrew his petition. Hearing consisted of testimony from the parties. Family Court found relocation to be in the child's best interest. The court took almost one year to issue its decision. During this time the child had been living with father. After decision, child moved to live with mother. The Appellate Division affirmed the court's decision finding that the court had considered all the ″ relevant facts and circumstances ...with predominant emphasis being placed on what outcome ..[would]..most likely serve the best interests of the child as outlined in *Tropea v Tropea*. In this case, father was constantly unemployed, mother had more stable home, step-father had steady job, child had half-brother in California, the schools in California were as good as if not better than the New York school and attorney for the child was in support of relocation. Father had no ties to New York and could easily move to California. Mother was willing to foster relationship between father and child and was willing to pay for child's visits with father.

Matter of Alaire K.G. v Anthony P.G., 86 AD3d 216 (1st Dept 2011)

Relocation with Father Not in the Child's Best Interests

The Family Court properly awarded custody of the parties' child to the respondent mother and denied petitioner father's petition for custody and relocation. The court's determination had a sound and substantial basis in the record.

Matter of Milius v. Costello, 84 AD3d 810 (2d Dept 2011)

Best Interests of Child Determination Outweighs Application of the Exclusionary Rule

The Family Court properly awarded sole custody of the parties' children to the father. The court did not err in denying the mother's motion to suppress certain evidence which she alleged was illegally obtained. Application of the exclusionary rule in this case would have a detrimental impact upon the fact-finding process and the State's interest in protecting the welfare of the children. Moreover, the determination of best interests is within the discretion of the trial court and will not be disturbed unless it lacks a sound and substantial basis in the record.

Matter of Young v. Young, 84 AD3d 972 (2d Dept 2011)

Modification of Custody Affirmed

The Supreme 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 established that the mother failed to promote a positive relationship between the children and the father, failed to participate in the children's extracurricular activities, and did not provide the same stability in the home as the father provided. Additionally, the children had primarily resided with the father since 2007, during which time they thrived academically and emotionally. The Supreme Court's determination was further consistent with the position of the attorney for the children.

Matter of White Jr. v. Mazzella-White, 84 AD3d 1068

(2d Dept 2011)

Order for Medical Examination Affirmed

The Family Court properly granted that branch of the motion of the attorney for the children which was for a forensic examination of the paternal grandmother. Although forensic examinations should not be ordered in every case, the court correctly exercised its discretion in concluding that the circumstances of the instant matter warranted a forensic examination to aid in its custody determination.

Matter of Najaf D.,84 AD3d 1080 (2d Dept 2011)

Sole Custody Award to Mother Affirmed

The Family Court granted the mother's petition to modify existing custody and visitation arrangements, awarding her sole legal and physical custody of the parties' child and allowing the child to relocate to Florida where the mother was living at the time. The Appellate Division affirmed. The court's determination was in the best interests of the child and had a sound and substantial basis in the record.

Matter of Francois Jr. v. Grimm, 84 AD3d 1082 (2d Dept 2011)

Order Permitting Relocation of Custodial Parent Affirmed

The Family Court properly granted the mother's petition to relocate with the parties' child to North Carolina. The mother met her burden of establishing by a preponderance of the evidence that the relocation was in the child's best interests. The court's determination properly considered the *Tropea* factors and had a sound and substantial basis in the record.

Matter of Harding v. Harding, 84 AD3d 1086 (2d Dept 2011)

Grandmother Failed to Establish Extraordinary Circumstances

The Family Court properly found that the maternal grandmother failed to establish the existence of extraordinary circumstances to warrant a hearing regarding the children's best interests, where credible evidence established that, although the children resided with the grandmother for the majority of their lives, the mother did not relinquish the care and control of her children, lived with them for significant periods of time, visited when possible during the periods of time that she did not live with them, and provided the grandmother with financial support. Order affirmed.

Matter of Richards v Williams, 84 AD3d 1241 (2d Dept 2011)

Although Grandmother Established Extraordinary Circumstances, Family Court Erred in Dismissing Mother's Petition; Remitted for Continued Hearing on the Best Interests of the Child as Mother Demonstrated a Change in Circumstances

Contrary to the mother's contention, the Family Court's finding, after a hearing, that the paternal grandmother demonstrated the existence of extraordinary circumstances had a sound and substantial basis in the record. As the paternal grandmother demonstrated that she had supported and cared for the child since the child's birth, without significant contribution from the mother during the first two years of the child's life, the paternal grandmother established an " 'extended disruption of custody' " during which the mother "voluntarily relinquished care and control of the child". However, the Family Court erred by, in effect, granting the motion of the paternal grandmother, the father, and the Attorney for the Child, made at the close of the mother's case at a separate hearing on the issues of the best interests of the child and change of circumstances, to dismiss the mother's petition to modify the custody order dated February 25, 2008. Contrary to the Family Court's conclusion, the mother's evidence adequately demonstrated a change of circumstances which might warrant modification of custody in the best interests of the child. In particular, the mother made a showing that she had maintained sobriety for a prolonged period, that she had obtained full-time employment, that she had been active in obtaining certain medical treatment for the child and had attended the child's medical appointments and meetings at school when advised of them, and that the child had developed a bond with her and with her other daughter, of whom the mother had custody. In light of this evidence, the Family Court erred in dismissing the mother's petition at the close of the mother's case. Therefore, the matter was remitted

to the Family Court for a continued hearing as to whether a change in circumstances existed which required a modification of custody to ensure the continued best interests of the child.

Matter of Ruiz v Travis, 84 AD3d 1242 (2d Dept 2011)

Judicial Hearing Officer Erroneously Allowed the Attorney for the Child to Refer to Matters That Were Not in Evidence

The Appellate Division found, in a custody proceeding, that the Judicial Hearing Officer erroneously allowed the Attorney for the Child to refer to matters that were not in evidence, and compounded its error by refusing to allow the father to proffer documentary evidence to contradict the assertions of the Attorney for the Child. The Court further found, viewing the totality of the circumstances, that it was in the child's best interests to remain with his father and to continue attending school in Tennessee pending a hearing and determination on the issue of temporary custody or a final determination of custody by the Family Court. Order reversed.

Matter of Swinson v Brewington, 84 AD3d 1251 (2d Dept 2011)

Mother Established That Relocation was in the Children's Best Interests

The Appellate Division reversed a Family Court order which denied the mother's cross petition to modify a prior custody order by permitting her to relocate with the subject children to Maryland. The mother established that the children's best interests would be served by permitting the requested relocation. In seeking to relocate with the subject children from Brooklyn, New York to Laurel, Maryland, the mother testified that she wanted to provide them with a "better life". The mother stated that she wanted to move the children away from the gun violence and drug-dealing occurring in her Brooklyn neighborhood. In Maryland, the mother rented a two-bedroom apartment in a complex that included amenities such as a swimming pool, volleyball court, and soccer and barbeque areas. Her apartment was only a short distance from an elementary and middle school that her children could attend, and the middle school was equipped to handle the older child's special needs. Currently, the older child is attending a school that requires him to travel up to four hours round trip. The mother testified as to past instances where the father struck her and the older child, which the court credited. In addition, the position of the Attorney for the Children that relocation was in the children's best interests, which was not contradicted by the record, was entitled to some weight. Although the mother's relocation would inevitably have an impact upon the father's ability to spend time with the children, a liberal visitation schedule, including extended visits during summer and school vacations, would allow for the continuation of a meaningful relationship between the father and the children.

Matter of Jennings v Yillah-Chow, 84 AD3d 1376 (2d Dept 2011)

Supreme Court Erred in Failing to Have a Hearing on Best Interests of the Child

In a matrimonial action in which the parties were divorced by judgment, the defendant appealed from an order of the Supreme Court, which, without a hearing, granted the plaintiff's motion to modify the visitation provisions of a stipulation of settlement, which was incorporated but not merged into the judgment of divorce. The Appellate Division noted that a custody or visitation order may be modified only "upon a showing that there has been a subsequent change of circumstances and modification is required". The paramount concern in any custody or visitation determination is the best interests of the child, under the totality of the circumstances. Here, the Supreme Court erred in granting the plaintiff's motion without conducting a full evidentiary hearing as to whether her request for increased visitation was in the best interests of the subject child.

Galanti v Kraus, 85 AD3d 723 (2d Dept 2011)

Supreme Court Should Have Directed a Hearing to Determine Whether Mother Violated Custody Order

In a matrimonial action in which the parties were divorced by judgment, the plaintiff father appealed from an order of the Supreme Court which denied, without a hearing, his motion to hold the defendant

mother in civil and/or criminal contempt. The record revealed that after the parties' older child left the father's home to live with his mother, the father moved to hold the mother in civil and/or criminal contempt for violating the clear and unequivocal mandate contained in the custody order in effect at the time, pursuant to which the father had "sole legal and residential custody" of the parties' children. The father alleged, inter alia, that the mother had permitted the child to move back into her home in violation of the Supreme Court's prior custody order, and then proceeded to file "yet another false allegation of abuse" against the father wherein she and the child called the police and child protective services that same day. Under the circumstances, the Supreme Court should have directed a hearing to determine whether the mother violated the custody order then in effect by allegedly continuing to undermine the father's relationship with the child and defeating the father's rights pursuant to the order.

McGrath v McGrath, 85 AD3d 742 (2d Dept 2011)

Although Both Parents Were Fit to Care for Child, it Was in Child's Best Interests to Remain with Mother

In awarding the father custody, the Family Court failed to afford sufficient weight to the child's need for stability, and the impact of uprooting her from her current home and transferring her to a different school. The record revealed that both parents were caring and affectionate and that neither party was more fit to parent than the other. There was no showing that either party could not financially provide for the child. However, there was evidence in the record that the mother would have provided more direct care to the child due to her work schedule. Furthermore, the evidence adduced at the hearing established that the mother was capable of continuing to foster the child's relationship with her father, as she has done in the past, to the benefit of the child's emotional and intellectual development. Under the circumstances, the Appellate Division concluded that the interests of the child would best be served by preserving the status quo, and leaving the child in the custody of her mother where, by all accounts, she was thriving.

Matter of Moran v Cortez, 85 AD3d 795 (2d Dept 2011)

Award of Custody to Father Was in the Child's Best Interests

Upon reviewing the record, the Appellate Division found that the determination of the Family Court that it was in the child's best interests to award sole custody to the father, was supported by a sound and substantial basis in the record. Further, that determination was consistent with the recommendation of the court-appointed forensic evaluator, and the position of the attorney for the child, which are entitled to some weight.

Matter of Lynch v Velella, 85 AD3d 1032 (2d Dept 2011)

Father Demonstrated Change of Circumstances; Mother Interfered with the Father's Visitation Rights

The Family Court's determination that the father satisfied his burden of demonstrating that there existed a change of circumstances warranting a change of custody 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 inform the father of important matters regarding the child, such as her proposed impending relocation with the child to Newburgh, New York and her unilateral decisions regarding the child's schooling. Accordingly, the Appellate Division declined to disturb the Family Court's determination.

Matter of Cadet v Lamour, 86 AD3d 538 (2d Dept 2011)

Joint Custody No Longer Appropriate; **Father Awarded Sole Custody**

Contrary to the mother's contention, a review of the record indicated numerous examples of hostility and antagonism between the parties, indicating that they were unable to put aside their differences for the good of the child. Thus, there was a sound and substantial basis for the Family Court's determination that joint custody was no longer appropriate. Contrary to the mother's contention, the Family Court's determination to modify the parties' custody arrangement by awarding

sole custody to the father had a sound and substantial basis in the record. The evidence presented at the hearing established, inter alia, that the father was more willing than the mother to assure meaningful contact between the child and the other parent, particularly in view of the mother's false allegations that the father sexually abused the child.

Matter of Maritinez v Hyatt, 86 AD3d 571 (2d Dept 2011)

Record Did Not Support Family Court's Award of Supervised Visitation

The Family Court's determination that there had been a change in circumstances since the issuance of a prior order of custody and visitation, and that it was in the child's best interests to award sole custody to the mother, was supported by a sound and substantial basis in the record. However, the Family Court erred by awarding the father only supervised visitation with the parties' child. The Appellate Division noted that while the Family Court's credibility assessments are entitled to great weight, the Family Court improperly disregarded the unequivocal conclusions and recommendations of the court-appointed forensic examiner, and placed undue emphasis on the wishes of the child that visitation be supervised, especially in light of his maturity level and the clear potential for manipulation, as identified by the forensic examiner. Further, the record indicated that the father had liberal, unsupervised visitation with the subject child throughout most of the child's life, and that the child wanted to see the father.

Matter of Ross v Ross, 86 AD3d 615 (2d Dept 2011)

Overnight Visitation with Father Was in the Children's Best Interests

The Family Court's determination that a change from joint legal custody to sole legal custody of the subject children to the mother was supported by a sound and substantial basis in the record. However, the Family Court improvidently exercised its discretion to the extent that it granted that branch of the mother's cross petition which was, in effect, for an award of sole residential custody of the children and, accordingly, discontinued the father's weekday overnight visitation. The children clearly expressed a desire to maintain the status quo with respect to the parents' schedule. The, as they were 14 and 12 years of age, respectively, at the time of the hearing on the petition and cross petition and were, thus, sufficiently mature to express that desire. Furthermore, the Appellate Division agreed with the father's contention, that the Family Court's restriction of his overnight weekday visitation with the children, upon its award of sole residential custody to the mother, would actually cause more disruption in the children's lives. There will be more travel back and forth between the parties' homes under the visitation schedule imposed by the Family Court. In addition, there was no support in the record for the implied conclusion reached by the Family Court that the children would benefit from spending less time with the father. The record contained no reports that the children were in any danger when they spent time with the father, or that the children have ever been deprived of their basic needs of daily living while with the father.

Matter of Nell v Nell, 87 AD3d 541 (2d Dept 2011)

Paternal Grandmother's Petition for Custody Properly Denied

In two related proceedings pursuant to SSL § 384-b to terminate parental rights on the ground of permanent neglect, in which the paternal grandmother was granted leave to intervene on the issue of custody, the paternal grandmother appealed from an order of the Family Court which dismissed her petition for an award of custody of the subject children. Upon reviewing the record, the Appellate Division found that the Family Court properly determined that continuing the subject children's placement and releasing the children for the purpose of adoption by the foster mother and father was in the children's best interests.

Matter of Vanisha J., 87 AD3d 696 (2d Dept 2011)

Award of Custody to Non-parent Upheld

In a custody proceeding, where the child's mother was deceased, after an initial hearing, the Family Court awarded temporary sole custody to the father with visitation to E. Savage, the child's half-sister's biological father. Two weeks later, following an in

camera hearing with the child, Family Court rescinded its interim order and awarded temporary sole custody to E. Savage with visitation to the father. The fact-finding and *Lincoln* hearings were conducted several months later, at the conclusion of which the Family Court found the existence of extraordinary circumstances sufficient to permit the court to intervene in the father's relationship with the child and then, further, that the child's best interests would be served by an award of sole custody to E. Savage. The father, who was granted visitation on alternate weekends and such additional periods of time as the parties and the child may agree, appealed. The record indicated that prior to the mother's death, the father failed to play any significant role in the child's life, visited inconsistently throughout the child's life, and failed to attend to the child's emotional needs. The Family Court credited a psychologist's testimony and opinion that the father had emotionally abandoned the child by his neglect of her and had demonstrated a fundamental lack of understanding of her needs. These findings were fully supported by the record. Additionally, the Family Court's conclusion that the father abdicated his parental responsibilities was supported by the testimony of several witnesses that the father frequently missed scheduled visits with the child and often left the child with other adults even when he did pick her up for visits, and by undisputed testimony that the father did not attend the child's school conferences or special education meetings until after the mother's death, did not know her teachers' names and never helped her with homework, although he testified that he knew she needed special assistance. Even while this matter was pending, the father failed to appear for a scheduled meeting with the child's teacher and guidance counselor, for reasons unexplained. Testimony further revealed that the father had failed to provide for the child's basic needs during her time with him—he had not provided her with enough food during past visits, nor did he supply her with essentials such as soap or deodorant. When the child sustained an injury while performing physical work for the father's brother, neither the father nor his brother furnished appropriate medical care. There was further disturbing testimony—which Family Court found to be credible—that the father knew that his brother had ""badgered" the child about her desire to live with E. Savage, and that the brother had threatened the child that his conduct should not be mentioned in court; despite this knowledge, the father did not intervene or seek to protect the child. Family Court also found that the period in which the father had custody of the child after the mother's death "did not go well," noting that during this vulnerable period, the child felt isolated from her other family contacts and had limited interaction with them—at a time when any responsible parent or caretaker should have readily recognized that such support was essential. The court further found that the father lacked credibility regarding his previous conviction for attempted rape in the third degree of a person under 17, and his failure to complete sex offender treatment thereafter. The Appellate Division found that there was a sound and substantial basis in the record supporting the determination of extraordinary circumstances. The Appellate Division could find no reason to disturb Family Court's best interests analysis and award of custody to E. Savage, which was also fully supported by the record and was properly addressed only after the court's finding of extraordinary circumstances.

Matter of Pettaway v Savage, 87 AD3d 796 (2d Dept 2011)

Supervised Visitation Affirmed

Father and Mother of daughter stipulated to joint legal and physical custody. They then modified the terms of physical custody three times in a year period before father filed petition for sole custody. Pending the proceedings, court issued a temporary order of sole custody to father. Mother filed petition alleging violation of temporary order by father. After fact-finding and *Lincoln* hearings, court awarded sole custody to father, supervised visitation to mother and dismissed mother's violation petition. Mother appealed objecting to visitation being supervised. The Appellate Division affirmed finding that court had sound and substantial basis in issuing its order. Mother had allowed convicted felon to be around daughter in violation of court order, allowed her older male child by another man to be around daughter in violation of court order, and male child attempted to strike daughter with stick. Additionally, mother denigrated father in presence of child, lied to others about father sexually abusing child, told child to call her boyfriend "daddy ", and left child alone with maternal grandmother who had CPS history.

Matter of Beard v Bailor, 84 AD3d 1429 (3d Dept 2011)

Failure To Communicate Sufficient To Modify Joint To Sole

Divorced parents of three children agreed to joint legal custody, with mother having parenting time with children most week-days and father having children most week-ends. This schedule continued for many years until a series of disagreements resulted in mother filing family offense and custody modification petitions seeking sole legal custody. Mother alleged parties were unable to communicate because father yelled his demands at her, taped conversation where father made angry, threatening profanity-laced comments to her, alleged father used marihuana, to which father later admitted, and accused him of committing family offenses and violating temporary order of protection . After hearing, Family Court awarded mother sole custody, reduced father's parenting time, issued order of protection against father , determined he had violated temporary order of protection, and awarded counsel fees to mother. Father filed motion to renew/reargue which was denied. The Appellate Division held court had sound and substantial basis to grant sole custody to mother . Parents were not able to communicate effectively, and there was sufficient proof father had committed the family offense of aggravated harassment based on taped phone call. The Court found that father's accusatory e-mail to mother's sister was in violation of the no contact temporary order of protection order as he knew "or intended that, by sending the e-mail to.. mother's family, it would reach..mother.". No abuse of discretion in denying motion to renew. However, father's parenting time should not have been reduced as court failed to state how this would be in children's best interest, and children wanted to keep original visitation schedule with father. Also, father should not have been ordered to pay counsel fees as court made this ruling before determining the parties' financial circumstances or value of services rendered.

Matter of Jennifer G. v Benjamin H., 84 AD3d 1433 (3d Dept 2011)

Children's Preferences Not Given Sufficient Weight

Parents of two children divorced and their separation agreement provided for joint legal and physical custody, with week-to-week alternating schedule. Few years later, mother filed in Family Court to modify agreement based on, among other factors, children's needs and location of her home which was an hour away from school. After fact-finding and *Lincoln* hearings were held, court found it was in children's best interest to live with father. Attorney for children appealed contending that court gave insufficient weight to children's preferences and that court breached the children's right to confidentiality by revealing their preferences, not only through their in-camera interview, but also through letter allegedly written by younger child to the court. This letter was later lost. Family Court stated in its decision that it placed little weight on children's position because their position was equivocal. The Appellate Division reversed , finding that position of older child was not equivocal and that younger child may have changed his preference in letter but that letter was lost and this issue was not further developed by court or the child's attorney through another *Lincoln* hearing. Additionally, court failed to explore why the position of one or more of the children changed, whether another attorney for the child needed to be appointed, and as parents ability to care for children was more or less equal, court's decision lacked sound and substantial basis to modify.

Rivera v LaSalle, 84 AD3d 1436 (3d Dept 2011)

Sound and Substantial Basis to Modify

Parents of one child separated and consented to order of joint legal custody with physical custody to mother and parenting time to father. Year or so later order was modified upon stipulation, providing father specific parenting time. Thereafter, hearing based upon mother's family offense petition resulted in modification of father's parenting time in custody order . Parents divorced and previous orders of Family Court were incorporated but not merged into the divorce decree. Mother then filed to modify custody order seeking sole custody of the child, which after a hearing, court granted based upon best interest of the child. Father appealed arguing that in determining whether there was change in circumstances, court should not

have gone as back as parties custody stipulation. The Appellate Court disagreed with father, noting that less weight is afforded to consensual agreements of custody than to orders after full court hearing. In this case, family court was well within its discretion in considering evidence as far back as the "stipulation....as the fact-finding hearing under review...was the [first]full plenary hearing on the issues of custody and visitation since" that order. Father's contention that he was denied effective assistance of counsel was dismissed.

Matter of Rosi v Moon, 84 AD3d 1445 (3d Dept 2011)

Father Precluded From Seeking Visitation

Incarcerated father, in prison for failing to register as sex offender, filed petition for joint legal custody and visitation in county of children's residence. At the same time, Family Court in county where children had previously resided, had issued an order of protection barring father from having any contact with children as result of neglect determination. In response to father's custody petition, court allowed father to write letters to children first to be reviewed by children's attorney, and directed children's attorney to send occasional pictures of children to father. Father appealed. Appellate Division affirmed court's decision, finding that protective order precluded relief sought and father had failed to state whether he had challenged protective order.

Matter of William O. v John A., 84 AD3d 1447 (3d Dept 2011)

To Exercise Visits With Children, Father Pays for Mother's Round Trip Plane Fare

Father and mother had four children, but case only involved two of the children**.** Father moved to Florida but the two respective children remained with mother in New York. For five years, father traveled to New York to visit with children and on two occasions mother traveled to Florida with children so they could visit father. Father filed to have additional time with children. After fact-finding and *Lincoln* hearings, court ordered that children travel to Florida once a year with mother, to have visitation with father. Father was ordered to pay all costs incurred in connection with trip. Father appealed objecting to having only one visit per with children, having mother accompany them and having to pay for mother's expenses. The Appellate Division noted Family Court has broad discretion to make visitation schedules, and in this case, the order was affirmed as to older child as evidence showed she felt "disconnected" from father, threatened to harm herself if forced to make trip without mother, and child's anxiety about court and visits and recollections of past violent confrontations between parents have resulted in professional counseling . However the evidence showed that no such concerns were raised for younger child, so matter was remitted to Family Court to determine whether younger child should visit father more often and without mother's accompaniment. With respect to mother's costs, the Appellate Division held that father's financial responsibility to mother would be limited to a round trip ticket to Florida.

Matter of Molina v Lester, 84 AD3d 1462 (3d Dept 2011)

Insufficient Basis for Visitation Modification

Parents of child divorced and were awarded joint legal custody with primary physical custody to mother and parenting time to father. Eight years later, mother filed violation petition alleging father smoked in child's presence in violation of court order, and mother also filed modification petition seeking to relocate with child to California as she had re-married and new husband had obtained employment in California. After hearing, court dismissed both violation petition and petition to relocate as mother had failed to show that such move would be in child's best interest. However, court held as mother had refused to move to California to be with husband if her petition not granted, court modified visitation schedule allowing mother extensive parenting time with child so she could take her to California and be with husband. Both parents appealed. Appellate Court affirmed court's dismissal of the violation and modification petitions. With regard to court's revision of visitation schedule, the Appellate Division held court had authority to find mother's husband's relocation to California "constituted a significant change in circumstances which, in turn, required a modification of the existing visitation schedule to meet the child's best interest". However Court held visitation modification was extensive and

without sufficient factual basis to determine whether it was in child's best interest to do so, therefore matter remitted.

Matter of Munson v Fanning, 84 AD3d 1483 (3d Dept 2011)

Custody To Father as Mother Put Own Interests Ahead of Children

Mother and father of three children separated and mother remained in parties' home with children and her boyfriend. The parents each filed for custody of children. The matters were heard in Supreme Court, Integrated Domestic Violence Part. Father filed motion alleging mother had violated temporary order of protection that prohibited her from allowing children to have contact with her boyfriend. After hearing, court granted father sole custody, supervised visitation to mother, to be supervised by DSS, and no contact with children until their 18th birthday except for supervised visitation through DSS. Mother appealed. Appellate Court affirmed giving due deference to Supreme Court's credibility assessments and determination of what was in children's best interest, and held that mother and boyfriend had engaged in "inappropriate conduct in their relationship....including instances of domestic violence, and each had mental health issues." Mother failed to acknowledge the risk of harm boyfriend, who had substance abuse issues and disciplined children inappropriately, posed to her children, putting her own interests ahead of her children. In a footnote the Appellate Division noted that the father had recently been charged with sexual abuse in the second degree, but according to attorney for the child, a FCA §1034 investigation did not find any evidence to warrant removal of children from father's care.

Matter of Hissam v Hissam, 84 AD3d 1513 (3d Dept 2011)

Grandmother Showing of Change in Circumstances Resulted in Increased Visits

Paternal grandmother filed for visitation with grandchild after child's father died, and was awarded therapeutic visits with child once a month. Grandmother then sought to modify visits based on counselor's opinion that therapeutic visits need not continue. After hearing, Family Court increased visits to four hours a week. Mother appealed. Initially Appellate Division dismissed attorney for the child's position that appeal was moot as subsequent, temporary consent order of supervised visitation was issued with the goal of implementing unsupervised visitation order because temporary order had expired. With regard to merits of case, Court held that grandparent and mother agreed there had been change in circumstances and this, in conjunction with best interest of child analysis, supported Family Court's decision.

Matter of Terwilliger v Jubie, 84 AD3d 1520 (3d Dept 2011)

Sound and Substantial Basis to Support Custody Determination

Mother and Father of four year old child filed custody and family offense petitions against each other. Family Court awarded father temporary order of protection and custody of child and mother was given supervised visits. After custody hearing, father was given sole custody and mother's supervised visits were continued. Mother appealed. Appellate Division held Family Court had sound and substantial basis to award sole custody to father as mother's home was cluttered and dirty, with "tobacco and drug paraphernalia strewn about and a bathroom covered with feces". Additionally, mother had allowed convicted sex offender to live in her home and was also facing criminal charges due to striking child and falsely reporting incidents against father. Father, on the other hand, was an appropriate caregiver.

Matter of Jolynn W. v Vincent X., 85 AD3d 1217(3d Dept 2011)

Chaotic Home Situation and Children's Failing Grades Supported Change in Custody

Mother and father divorced and had joint legal custody of their two children, with mother having primary physical custody and father, parenting time. Father successfully petitioned to modify order alleging he was unable to contact children because children's guidance counselor had told him mother had moved out of state with children, mother had been evicted from home,

mother had changed residences five times within five years and children were failing in school. Family Court's decision was based on mother's poor judgement and decision making ability, her unstable and chaotic living situation and inability to ensure that children's educational needs were met. Father on the other hand, had stable employment and lifestyle and children's grades had improved while in father's care. The Appellate Division affirmed.

Matter of Gasparro v Edwards, 85 AD3d 1222 (3d Dept 2011)

Sufficient Change in Circumstances to Modify Custody

Parents of one child entered into custody agreement, with joint legal custody, primary physical custody to mother, and visitation to father. Thereafter father filed modification petition, mother filed violation petition and father filed violation petition. Family Court held father had proven violation of order as well as significant change in circumstances and ordered sole custody to father. Court's decision was based on evidence that mother had moved 42 miles away from father without his consent, moved child away from his school and hindered father's access to child. Mother also berated father in front of child during exchange of child for visitation purposes, arrived two hours late sometimes for drop off or pick up of child**,** promoted her boyfriend as substitute father for child. Father however was willing to foster relationship between mother and child and encouraged relationship between child and his half brother, who was living with the mother. Appellate Division accorded deference to Family Court's credibility determinations and affirmed**.**

Matter of Keefe v Adam, 85 AD3d 1225 (3d Dept 2011)

Extraordinary Circumstances Results in Third Party Custody

Parents had one child. Mother had custody. Mother placed child and his two half siblings in care of petitioners who were not related to child. DSS filed neglect petitions against parents. Petitioners filed for Article 6 custody, mother consented but father objected as to his one child and requested hearing. After hearing, Family Court held petitioners had shown extraordinary circumstances and gave custody of child to petitioners. Father appealed. The Appellate Division affirmed finding that father had made no effort to stay in contact with child, who had been in care of petitioners for 19 months. Father saw child once in 14 months, wrote him three letters and spoke with him three times on the phone. Father kept changing his address without providing notice to DSS or petitioners and failed to appear for court appearances, including custody hearing and advised caseworker he wanted to be taken off the case except for being advised of court proceedings.

Matter of James GG. v Bamby II., 85 AD3d 1227 (3d Dept 2011)

Modification of Custody Reversed

Divorced parents of two children agreed to joint legal custody with primary physical custody to mother and parenting time to father. Thereafter father filed modification petition alleging mother had allowed male friend, a convicted sex offender, to engage in "improper contact" with one of the children. Family Court, after many appearances and what it termed a *Lincoln* hearing, issued an order modifying the order of custody and awarded father primary, physical custody despite mother's attorney's objections to the issuance of the order without holding a hearing. Appellate Court reversed and remitted the case for further proceedings. The Court held that although mother responded "for now" when Family Court asked her if she agreed to modification of the custody order, Family Court failed to ensure that mother understood she had right not to consent and right to hearing. Appellate Court further held that Family Court incorrectly referred to the *in camera* interviews with children as *Lincoln* hearing as *Lincoln* hearings are to be held during or after fact-finding hearing to corroborate testimonial or documentary evidence and cannot be used as substitute for fact-finding hearing.

Matter of Spencer v Spencer, 85 AD3d 1244 (3d Dept 2011)

Mother's Alienating Behaviors Factor in Modification

Father and mother of daughter and son stipulated to custody to father and 10 hours of visits to mother per month. Thereafter mother filed modification petition seeking sole custody of daughter and joint legal custody of son. Father then filed petition seeking suspension of mother 's visits with both children. After daughter made false allegations of sexual abuse against father, with encouragement from mother, father consented to mother having custody of daughter. Fact-finding and *Lincoln* hearings were held with regard to son and Family Court awarded father sole custody of son, and mother a four- hour visit with son per month unless son requested more. Mother appealed. Appellate Division affirmed finding that even though less weight is given to stipulation than order issued after hearing, in this case, father had shown change in circumstances based on parties' toxic relationship, mother's long child protective history and evidence that son was thriving academically and socially in father's care. Mother's claim that father had alienated son against her was not credible and it was mother who had supported daughter in making false claims of abuse against father.

Matter of Hayward v Thurmond, 85 AD3d 1260 (3d Dept 2011)

Sex Abuse Allegations Insufficient to Exercise Temporary Emergency Jurisdiction

Mother left Texas and came to New York with two children, thereby preventing paternal grandmother from exercising visitation with children. Father and paternal grandmother obtained temporary custody order of children from Texas and moved to register order in New York. Mother did not object to registration but petitioned New York to obtain temporary emergency jurisdiction over children, alleging sexual abuse of children by grandmother. Family Court found mother's allegations to be unfounded and granted enforcement of Texas order. Mother appealed. The Appellate Division affirmed Family Court's order finding that the court had conducted an adequate investigation into mother's allegations and had found them to be without support.

Matter of Segovia v Bushnell, 85 AD3d 1267 (3d Dept 2011)

Grandmother Has No Standing to Seek Visitation

Maternal grandmother filed petition to exercise visitation with grandchild. Family Court applied "extraordinary circumstances" standard and found grandmother had no standing. Grandmother appealed arguing court used incorrect standard in determining whether she had standing. Appellate Division agreed basis for standing is whether grandmother showed "conditions exist which equity would see fit to intervene", and relevant considerations include "nature and extent of..grandparent-grandchild relationship", and nature and basis of parent's objection to visitation. In this case Family Court's consideration of factors included grandmother's inconsistent history of visitation with grandchild, mother's objections to visitation based on grandmother's use of crack-cocaine, grandmother's threatening behavior towards mother and her brother, and grandmother's long term drug use. Appellate Division held although court had used incorrect standard in denying petition, court considered relevant factors and therefore its decision was affirmed.

Matter of Van Nostrand v Van Nostrand, 85 AD3d 1352 (3d Dept 2011)

Significant Change in Circumstances Shown

Mother and father of daughter stipulated to joint legal custody with primary, physical custody to mother and parenting time to father. Few years later mother filed to modify seeking sole custody based on allegations that father was drugging child with Benadryl late at night and taking nude photos of her when she was in his care. After fact-finding and *Lincoln* hearings, Family Court granted mother sole custody and limited father's visitation rights. Father appealed. The Appellate Division affirmed finding mother had demonstrated sufficient change in circumstances to modify order, based on, among other factors, father's admission he drugged and undressed child, child came home after visits with dirty greasy hair, dirty clothing, bad breath, smelt of urine and feces and there were stains in her underwear. Additionally, the Court noted that as prior order was upon stipulation, it required less weight than an order issued after hearing.

Matter of Eunice C. v Michael G., 85 AD3d 1339 (3d Dept 2011)

Court Lacked Sound and Substantial Basis

Father and mother are unmarried parents of one child. Parties were both residents of Ohio where child was born and where they lived on and off together for several years. Father was convicted of felony and after serving time in jail was put on probation requiring he re-locate to Essex county. Later mother and child joined him in New York. Thereafter father petitioned for custody which resulted in a New York order granting joint legal custody with primary physical custody to mother and visitation to father. Mother then took child back to Ohio and father filed to modify custody. After hearing, court's order directed mother could retain physical custody if she came back with child, but if mother chose not to come back, father would have physical custody. Mother appealed. The Appellate Division noted that when father filed his original custody petition, child had not resided in New York state for six months. Therefore, Family Court had no subject matter jurisdiction to entertain father's initial custody petition. Accordingly the Court treated the father's modification petition as an initial custody application, with strict application of relevant factors as outlined in *Tropea v Tropea* . Considering that mother had been primary care giver and involved in child's school where father was not, father suffered from "explosive disorder" for which he receives counseling, father's domestic violence against mother, significant ties between parties and Ohio including many of father's family and his other child who resided there, child's close relationship with her half-sibling, and other relevant factors, Family Court lacked sound and substantial basis to issue its order and it was in child's best interest for custody to be with mother. Additionally, the Court noted had it not been for father's felony conviction, the parties and child would have not have come to New York.

Matter of Baker v Spurgeon, 85 AD3d 1494 (3d Dept 2011)

Visitation Rights Should Not be in Sole Control of Children

Divorced parents of two children consented to court order of primary, physical residence with mother and parenting time to father every other weekend, with father and children attending counseling every other week and parenting time with children one night per week on those weeks where they did not have counseling. Children began to spend very little time with father, and mother failed to compel children to see father. Father filed violation petition against mother alleging she had violated terms of consent order. Attorney for children filed modification petition on children's behalf arguing any visitation should be at sole discretion of children. Mother supported children's position. Fact-finding hearing was held and children testified under oath, at an *in-camera* hearing where parents were not present but their attorneys were and the children were subject to cross-examination. Family Court issued order finding mother in violation of order based on her doing "little to nothing to encourage the relationship between ...father and... children" and directed she pay father's attorneys fees. Court also modified visitation doing away with father's weekday visits with children. Attorney for children appealed arguing court did not go far enough in reducing visitation and court failed to consider best interests of children. The Appellate Division held that there is a strong presumption that visitation with non-custodial parent is in child's best interest and in order to overcome this presumption, there has to be showing that visitation would be detrimental to child's welfare. In this case, giving children sole discretion to decide whether or not to visit father would result in termination of father's visitation. And evidence showed children considered visitation with father to be nothing more than an inconvenience or annoyance, and such feelings were fostered by mother. Therefore, although Family Court's decision to continue visitation with slight reduction is supported by sound and substantial basis in record, the Appellate Division remanded the case directing court to go further in modifying order. Based on mother's failure to support visitation and father's poor parenting and poor judgment, both parents need to be in counseling, parents needed new therapist, and parents needed to engage in parent education program.

Matter of Brown v Erbstoesser, 85 AD3d 1497 (3d Dept 2011)

Family Court Violated Father's Due Process Rights

Parents of one child shared joint legal and physical custody. Father filed violation and modification

petitions alleging mother had failed to allow him parenting time for about a year, requested sole custody with supervised parenting time to mother. Mother filed modification petition seeking sole custody and parenting time to father. Before fact-finding hearing, the only petition left was mother's modification petition. During hearing, parties agreed to take witnesses out of order, and while mother was able to give direct testimony, father was not afforded an opportunity to cross-examine her. The child then testified in open court. After child's testimony, court *sua sponte*, decided it did not need mother to be cross-examined or hear any testimony from the father to render its decision. Court granted mother sole custody and suspended father's parenting time. Father's request for reconsideration was denied. Father appealed arguing he was denied the right to procedural due process. The Appellate Division agreed with father, stating that a custody modification proceeding requires a "full and comprehensive hearing" , with each parent being afforded the right to a "full and fair opportunity to be hear". Matter was remanded for another Judge to hear the matter, and Court directed a temporary hearing be held within fourteen days from entry of order to determine father's parenting time .

Matter of Middlemiss v Pratt, 86 AD3d 658 **(**3d Dept 2011)

Grandmother Sanctioned for Wilful Violation

Paternal grandmother was given custody of three -year-old child and mother was awarded parenting time. Mother then filed modification petitions seeking custody and requested grandmother be held in contempt for failing to comply with parenting time provisions. After hearing, mother was granted temporary custody and grandmother was ordered to produce the child at next court date. Grandmother took child out of state and appeared by telephone at next court date. Family Court advised grandmother "repeatedly and in no uncertain terms" that she produce child at next court date. Grandmother failed to appear or produce child at next court date and court awarded mother sole legal custody with visitation to father. Three years later the grandmother was located and mother regained custody. Mother then commenced violation proceeding against grandmother and father. After hearing and upon application of child's attorney, court dismissed violation petition, finding mother had failed to establish grandmother was served with or had knowledge of order to produce child. Mother appealed. The Appellate Division reversed and remitted matter, deciding that in order to find civil contempt for violating court order it must be shown that "there was a lawful court order in effect.... that the person who allegedly violated the order had actual knowledge of its terms, and...her actions or failure to act defeated, impaired, impeded or prejudiced a right of the moving party". In this case, Court held although it cannot be proven grandmother had actual knowledge of written order, grandmother had actual knowledge of court's directive to return child, the order was placed on the record and transcribed into minutes of the proceeding which is a court mandate and "may form the basis for contempt". Grandmother then secreted child for three years, prejudicing mother's parental rights. Therefore, grandmother 's conduct established a wilful violation of the court order.

Matter of Lagano v Soule, 86 AD3d 665 (3d Dept 2011)

Known Sex Offender Boyfriend Has No Standing to Pursue Custody

Mother surrendered parental rights to her three children after admitting she had violated terms of the no contact order issued by Family Court, and allowed her children to have contact with her boyfriend, a known sex offender. Boyfriend then filed petitions for custody of the children. Family Court dismissed his petitions finding he lacked standing and granted DSS a one year order of protection on behalf of the three children against boyfriend. Boyfriend appealed. Appellate Division affirmed. Court held while generally the standard for determining whether a third party has standing requires establishing extraordinary circumstances**,** in this case "it would be antithetical...to grant standing in spite of the existence of the no contact order", and boyfriend's inappropriate behavior with children.

Matter of Thomas X., 86 AD3d 668 (3d Dept 2011)

Mother Has Right To Hearing in Modification Matter

Father and mother are parents of four children. Mother was incarcerated and court awarded sole custody to father with mother having access to children via bi-weekly phone calls. After mother's release from prison, she filed a modification petition. Court referred parties to mediation, which was unsuccessful. The court then conducted *"in camera"* interviews with children, and without any other proceedings, granted mother certain visits but refused to change custody. Mother appealed. Appellate Court reversed and remitted case, stating that while not every proceeding under Article 6 is entitled to a hearing, generally a modification petition should have hearing unless the party seeking a hearing fails to make a
proper evidentiary showing. In this case mother's petition, "liberally construed", had sufficient allegations to warrant a hearing.

Matter of Giovanni v Hall, 86 AD3d 676 (3d Dept 2011)

Sound and Substantial Basis

Married parents of one child moved in with father's employer, and father soon began to have an affair with employer and encouraged mother to have an affair with employer's guest. Later a physical confrontation between mother and father led to employer evicting mother from her home. Father filed for custody and mother cross-petitioned. After hearing, court ordered joint legal custody with primary physical to mother, and extensive and detailed parenting time to father. Father appealed arguing court's decision was arbitrary. The Appellate Division affirmed finding court took into consideration all relevant factors, including stability of parties' homes, in determining best interest of child. Giving due deference to court's credibility assessments, including evidence that employer did not testify on behalf of father and support of order by child's attorney, the Court found sound and substantial basis for decision.

Matter of Rundall v Rundall, 86 AD3d 700 (3d Dept 2011)

Procedural Error Results in Dismissal

Father and mother had one child and each had child from previous relationships. Father was convicted of manslaughter in the death of mother's child from previous relationship, and Family Court issued order of disposition under Article 10 of the Family Court Act, finding father had derivatively neglected parties child and issued order of protection on behalf of child until child's 18th birthday. Protective order provided father could have visitation with his child "as arranged and approved by" mother. Father then filed to modify a previous custody order issued by the court with regard to child. Family Court held father was basically seeking to modify the Article 10 dispositional order and dismissed petition on grounds that father had failed to establish "good cause" to modify. Father appealed. The Appellate Division affirmed, but stated that its basis for dismissal was due to father's procedural error in filing a Family Court Act article 6 petition instead of a petition pursuant to § 1061 of the Family Court Act, to modify the order of disposition and protection.

Matter of Jesse QQ. v Holly RR., 86 AD3d 727 (3d Dept 2011)

Failed to Demonstrate Sufficient Change in Circumstances

Married parents of three children divorced and mother was awarded custody. Later by consent, father was awarded custody of oldest child. Father then filed custody modification petition seeking custody of two younger children. After hearing, court dismissed petition based on ground that father had failed to show sufficient change in circumstances and father appealed. The Appellate Division affirmed. The testimony presented by father and his current wife failed to support their position that younger two children's failing school performances were due solely to mother's conduct. Much of the evidence presented established both parents were to blame for this. Additionally, father's concerns about mother co-mingling medication and failing to provide eye-glasses for children had already been resolved. Additionally, older child's testimony regarding mother's parental short comings were already known prior to entry of current order and therefore could not be used as basis for showing changed circumstances.

Matter of Bowens v Bowens, 86 AD3d 731(3d Dept 2011)

Family Court Properly Considered What was in Child's Best Interest

Unmarried parents of one child separated and entered into consent order of joint legal and physical custody. Thereafter parents, upon mutual agreement, modified order without reducing it to court order. Later, order was modified on father's petition, continuing joint legal custody but with provision that in the event mother re-located, father would have primary, physical custody. Mother did not re-locate. Mother then filed petition to modify requesting primary physical custody and parenting time to father. After fact-finding and *Lincoln* hearings, court continued joint legal custody and modified child's parenting time with each parent by laying out specific parenting time provisions, including a comprehensive holiday and summer schedule. Mother appealed. The Appellate Division affirmed finding sound and substantial basis for court order. Family Court properly determined what was in child's best interest by taking into consideration all relevant factors, including child's wishes, need for stability, home environments of parents, each parent's past performance, their fitness to provide for child's development and child's relationship with parents and their extended families.

Matter of Whitcomb v Seward, 86 AD3d 741 (3d Dept 2011)

No Change in Circumstances

Mother filed for sole custody of parties' one child. Parents were unmarried and father was incarcerated. Father answered petition, seeking joint legal custody. Parties consented to order of sole custody with mother and telephone and mail contact for father. The order also provided father could seek modification when he was released from prison. While still incarcerated father filed to modify, seeking joint legal custody and alleging mother had prevented him from having any contact with child. Family Court dismissed petition and father appealed. The Appellate Division affirmed finding there was no showing of change in circumstances which would ensure child's best interest.

Matter of Anthony v Jones, 86 AD3d 745 (3d Dept 2011)

No Showing by Clear and Convincing Evidence to Support Violation Petition

Father filed violation petition alleging mother wilfully violated visitation order. Following a fact-finding hearing, Family Court held there was no showing, by clear and convincing evidence, that mother had wilfully violated court order. Father appealed. The Appellate Division affirmed finding the evidence presented showed child refused to visit father, became agitated when compelled to do so and this was supported by neighbor and mental health professional working with family. Additionally, there was no evidence that mother encouraged this conduct .

Matter of Shannon v Brandow, 86 AD3d 752 (3d Dept 2011)

Lack of Evidentiary Support to Require Hearing

Parents of one child and maternal grandmother were involved in many custody disputes, in different states. For some time, child lived with grandmother, but after hearing in Florida, father was awarded custody. Order was modified by New York and mother was awarded visitation one weekend per month. Mother then filed petition for custody. Family Court dismissed petition without hearing. Mother appealed. The Appellate Division affirmed finding mother's petition, which alleged child would like to live with her and is basically unhappy, "lacked sufficient specificity or evidentiary support to require a hearing".

Matter of Marquis v Washington, 86 AD3d 753 (3d Dept 2011)

Award of Custody to Non-Parent Based on Extraordinary Circumstances

Father and mother of one child stipulated to joint legal custody with primary, physical custody to mother and visitation to father. Child lived with mother and half-siblings. Thereafter mother died and father filed for custody. Attorney for child filed to have sole custody awarded to non-parent, father of one of child's half-sibling**.** Initially court awarded father temporary sole

custody but after *in camera* hearing, court rescinded order and gave temporary sole custody to non- parent. After *Lincoln* and fact-finding hearings, court found extraordinary circumstances existed and awarded sole custody to non-parent and visitation to father. Father appealed. The Appellate Division held that an extraordinary circumstances "analysis must consider the cumulative effect of all issues present in a given case and not view each factor in isolation". In this case, among other factors, father had failed to play significant role in child's life, visited inconsistently, failed to respond to child's emotional needs, left child with other adults when he did visit with child, failed to attend child's special education meetings until after mother's death, never helped with homework, didn't know her teachers names, didn't provide her with sufficient food or other essentials, like soap or deodorant when she was with him, was aware of his brother threatening child to tell court she wanted to live with father but did nothing to stop him and had been convicted of attempted rape. Non-parent on the other hand had formed close relationship with child. The Appellate Division held court had sound and substantial basis in the record to support its determination and affirmed.

Matter of Pettaway v Savage, 87 AD3d 796 (3d Dept 2011)

Award of Sole Custody to Father Affirmed

Family Court granted sole custody of the parties' child to petitioner father. The Appellate Division affirmed. Petitioner made a sufficient evidentiary showing of changed circumstances. Respondent mother admitted that she withheld the child from the father and the record established that she made numerous unfounded allegations of sexual abuse against the father. It was in the child's best interests to award the father sole custody. In addition to the mother's admissions about her unfounded allegations of sexual abuse against the father, the record established that the mother subjected the child to unnecessary medical examinations.

Matter of Howden v Keeler, 85 AD3d 1561 (4th Dept 2011)

Change in Physical Custody to Father Affirmed

Family Court transferred physical custody of the parties' children to father. The Appellate Division affirmed. The father established the requisite changed circumstances to warrant modification of the custody arrangement. The evidence established that the mother moved four times in the year prior to filing the petition and that she sometimes stayed in a residence for only two or three weeks and that the conditions in the mother's new residence were not suitable for the children. The father had a stable residence with appropriate beds and he was fully employed.

Matter of Carey v Windover, 85 AD3d 1574 (4th Dept 2011), *lv denied* 17 NY3d 710

Dismissal of Petition for Modification of Custody Reversed

Family Court dismissed mother's pro se petition for modification of a prior order custody of her child entered upon consent. The Appellate Division reversed. The prior order awarded mother and respondent grandmother joint custody of the child and awarded the grandmother primary physical custody of the child. The court erred in dismissing mother's petition without first receiving a report from the Referee and providing the mother an opportunity to object to it. The Referee was authorized only to hear the matter and issue a report – there was no evidence that the parties consented to referral to the Referee for a final determination. Further, the Referee's failure to advise the mother of her right to counsel constituted reversible error.

Matter of Howard v Howard, 85 AD3d 1587 (4th Dept 2011)

Award of Joint Custody Affirmed

Family Court granted respondent father's cross petition for joint custody of the parties' child, with primary physical custody with the father. The Appellate Division affirmed. Because there was no prior order determining custody, respondent was not required to establish changed circumstances. The court's determination following a hearing on the best interests of the child was entitled to great deference and the record established that the court weighed the proper

factors. The mother failed to preserve for review her contentions regarding the lack of a *Lincoln* hearing and, in any event, in view of the child's young age, there was no abuse of discretion in the court's failure to conduct such hearing.

Matter of Thillman v Mayer, 85 AD3d 1624 (4th Dept 2011)

Award of Primary Physical Custody to Father in Child's Best Interests

Family Court granted father's petition to modify the custody and visitation provisions of the parties' judgment of divorce and awarded primary physical custody of the parties' child to the father. The Appellate Division affirmed. The mother did not challenge that a change in circumstances existed and the court's best interests determination was supported by a sound and substantial basis in the record. The child had no siblings and in view of her age any expressed desire concerning custody was of little significance. The father was better able to provide for the child financially. Although both the parties relied upon government benefits ands loans for day-to-day support, the mother's financial stability was significantly dependant on her boyfriend, who paid her housing cost, shared the cost of food, and watched the child while the mother was at work. The father lived in a home owned by his father and grandparents, and his parents lived four miles from the father, transported the child to and from preschool and took care of the child while the father was at school. The mother waived her contention that the court erred in proceeding without the original attorney for the child because she consented to the substitution of a new attorney for the child. In any event, the child's interests were fully protected by the substituted attorney.

Matter of Clime v Clime, 85 AD3d 1671 (4th Dept 2011)

Denial of Relocation Reversed

Family Court denied respondent mother's cross petition for permission for the child to relocate with her to Pennsylvania. The Appellate Division reversed. The record reflected that the court did not adequately, if at all, consider the financial considerations underlying the requested relocation. The mother requested permission to relocate because she and her husband lost their jobs within a relatively short period of time and the husband's health insurance and severance pay ran out thereafter. The couple depleted their savings and their house was placed into foreclosure. The couple were unable to find jobs in Western New York and the husband accepted a job in Pennsylvania out of economic necessity. The court based its determination on its conclusion that relocation would "qualitatively affect" the relationship between father and child. That factor does not take precedence over economic necessity. In any event, the record established that given the mother's and husband's testimony regarding how they would facilitate visitation and contact between father and child, the proposed relocation would not have a substantial impact on the visitation schedule.

Matter of Butler v Hess, 85 AD3d 1689 (4th Dept 2011), *lv denied* ___ NY3d ___

Child Did Not Have Significant Connection With New York

Family Court dismissed the petition of mother alleging that respondent father was in violation of a prior order pursuant to which the parties had joint custody of their youngest child and the mother had primary physical custody. The mother alleged that the father was keeping the child in South Carolina and refusing to allow her to bring the child back to New York. The Appellate Division affirmed. The parties and the child moved to South Carolina in 2007, and the father, with the mother's consent, had primary physical custody of the child since 2007. The mother did not move back to New York until about the time she filed the instant petition in 2010. Thus, the child did not have a significant connection with New York and substantial evidence concerning the child's care was no longer available in New York.

Matter of Maida v Capraro, 86 AD3d 924 (4th Dept 2011)

Father May Take Two-Year-Old Child to Italy

Family Court granted petitioner father permission to travel to Italy with the parties' child. The Appellate

Division modified by vacating the restriction that the trip shall occur in the spring of 2011. The court failed to set forth the facts it deemed essential in allowing the child to travel to Italy, but the record was sufficient to enable the Appellate Division to make those findings. Although the father's visitation with the child was limited to a maximum of 48 hours at a given time, the father had a close bond with the child and, during visitation, he prepared her meals, bathed her, administered medication when necessary, and took her out on outings. The mother did not express any concerns that the father would abscond with the child, but rather opposed the trip because the two-year-old child had never been away from the mother for more than 48 hours and would be in an unfamiliar environment with unknown relatives. The mother's concerns did not warrant denial of the father's request. It would be in the child's best interests to travel to Italy to meet her extended family.

Matter of Russo v Carmel, 86 AD3d 952 (4th Dept 2011), *lv denied* ___ NY3d ___

Court Properly Granted Sole Custody to Mother

Family Court granted petitioner mother sole custody of the parties' children and denied the cross-petition of father for sole custody. The Appellate Division affirmed. Contrary to the attorney for children's contention the court properly granted mother sole custody of the children. The court's determination, based on its assessment of the character and credibility of the parties, was entitled to great weight and would not be disturbed where, as here, the determination was the result of a careful weighing of appropriate factors and had a sound and substantial basis in the record.

Matter of Canfield v Canfield, 87 AD3d 1272 (4th Dept 2011)

Biological Parents Not Entitled to Post-Adoption Visitation Despite Contract

Family Court denied petitions of biological parents to enforce a visitation provision in the post-adoption contract agreement with respect to their biological children who had been adopted by respondents. Pursuant to Domestic Relations Law § 112-b (4) a court should not enforce an order incorporating a post-adoption contract agreement unless such enforcement was in the child's best interests and here there was a sound and substantial basis for the court's determination that visitation was not in the children's best interests. Moreover, petitioners were expressly warned before they signed the judicial surrenders that the post-adoption contract agreement was subject to modification. The court properly granted respondent's cross petition seeking an order requiring the biological father to stay away and refrain from contact with respondents and the children. Because this proceeding was in the nature of a visitation proceeding, the court had the authority to issue an order of protection setting forth reasonable conditions. Because the court did not state an expiration date for the order the Appellate Division modified by directing that the stay away provision be in effect until the youngest child turned eighteen.

Matter of Kristian J.P. v Jeannetter I.C., 87 AD3d 1337 (4th Dept 2011)

Court Properly Granted Sole Custody to Father

Family Court granted sole custody of the parties' child to petitioner father with visitation to respondent mother. The Appellate Division affirmed. The father met his burden to show changed circumstances. The petition was prompted by an incident where the mother left the six-year-old child alone in a casino hotel for three hours while the mother gambled. A hotel patron found the child crying in a hallway and the police were called. As a result, the mother was arrested, the child missed her first day of first grade, and CPS issued an indicated report for inadequate guardianship and lack of supervision. After the casino incident the mother and child stayed overnight at the home of a man unknown to the child. The man and the mother went out for drinks, leaving the child in the care of the man's daughters. Additionally, the father, stepmother, and a social worker testified that the child had poor hygiene when in the care of the mother and during the time the mother had sole custody, the child's teeth decayed to the point that she required 11 extractions and the placement of stainless steel crowns. The award of sole custody to the father was in the child's best interests because the father was better able to meet the child's financial, emotional and educational needs.

Matter of Grybosky v Riordan, 87 AD3d 1339 (4th Dept 2011)

Petition Alleging Violation of an Order of Visitation Properly Dismissed

Family Court dismissed the father's petition alleging that respondent mother violated a prior order of visitation with respect to the parties' son. The Appellate Division affirmed. A hearing on the petition was not required even where a factual dispute exists if the allegations in the petition are insufficient to support a finding of contempt. Here, the father failed to indicate how the mother allegedly violated the order, and as the court noted, the order was ambiguous.

Matter of Fewell v Koons, 87 AD3d 1405 (4th Dept 2011)

FAMILY OFFENSE

Respondent Willfully Violated All Purpose Short Order

Family Court found that respondent mother willfully violated an all purpose short order. The Appellate Division affirmed. The record showed that the mother violated the order by contacting and communicating with the father's family on more than one occasion. The order expressed an unequivocal mandate that the mother neither contact nor communicate with the father's family. The mother's contentions to the contrary were based upon matters outside the record. It was not reversible error that the court did not appoint an attorney for the child.

Avolio v Fontecchio, 84 AD3d 611 (1st Dept 2011)

Record Supported Finding of Reckless Endangerment

The record revealed that the petitioner wife testified at a hearing that the husband left his gun on the kitchen table while he took a shower. During this time, the parties' five-year-old son handled the gun. Although the gun was unloaded, the bullets were left next to the gun. When the husband returned to the kitchen, he showed the child how to load the weapon with the ammunition. Under the particular circumstances of this case, the petitioner's testimony sufficiently established, by a preponderance of the evidence, that the husband committed the family offense of reckless endangerment in the second degree (see FCA § 812 [1]; PL §120.20). Accordingly, the Family Court properly issued the order of protection to remain in effect for a period of two years (*see* FCA § 842).

Matter of Lamparillo v Lamparillo, 84 AD3d 1381 (2d Dept 2011)

In Spite of Errors Family Court Properly Granted Husband's Petition to Dismiss

In a family offense proceeding, the wife appealed from an order of disposition of the Family Court, which, upon granting the husband's motion, made at the close of her case, to dismiss the petition based upon her failure to establish a prima facie case, dismissed the petition. In deciding the husband's motion to dismiss the petition for failure to establish a prima facie case, the Family Court employed an incorrect standard, finding that the wife failed to prove the allegations in the petition by clear and convincing evidence. Additionally, the Family Court erred in making credibility determinations. In spite of these errors, however, the Family Court properly granted the husband's motion. The wife, in effect, alleged in her petition that the husband committed the family offense of harassment in the second degree, however, accepting the evidence as true and giving her the benefit of every reasonable inference, the wife failed to demonstrate, prima facie, that the husband, in committing the act alleged, acted with an "intent to harass, annoy or alarm". Order affirmed.

Matter of Mamantov v Mamantov, 86 AD3d 540 (2d Dept 2011)

No Finding of Aggravated Circumstances Nor Basis to Limit Father's Access to Children

Divorced parents of two children shared joint legal custody with primary physical custody to mother and parenting time to father. Mother filed family offense and custody modification petitions against father alleging father had followed her and children, screamed and spat at her for keeping children from him, was becoming increasingly aggressive towards her and had

stopped taking his anti-psychotic medication. Father filed petition to increase parenting time. Family Court issued stay away temporary order of protection which was then amended to allow father supervised visitation. Father filed to modify temporary order of protection and mother filed violation of order of protection. Family Court consolidated petitions and after hearing, found father had committed multiple family offenses against mother, issued 3 year order of protection and limited father's access to children to times when he had unsupervised visitation. Family Court also modified custody to sole with mother and reduced father's unsupervised parenting time, but it dismissed mother's violation petition. Father appealed. Appellate Division affirmed issuance of Order of Protection but it reduced the 3 year order of protection, which required a finding of aggravated circumstances and which family court had not done, to a 2 year order. Additionally, the Appellate Division remitted the issue of father's access to children as family court had given no reason for limiting father's access to children to visitation times only and court had failed to speak to the issue of how increasing or decreasing father's parenting time with children affected their best interest.

Matter of Jodi S. v Jason T., 85 AD3d 1239 (3d Dept 2011)

Mother Failed to Establish Father Committed Family Offense

Family Court dismissed mother's family offense petition. The Appellate Division affirmed. The court did not err in taking sworn testimony from the mother before issuing a temporary order of protection. The court properly dismissed the family offense petition because the mother failed to meet her burden of establishing by a fair preponderance of the evidence that the father committed the family offense of harassment in the second degree. The court was entitled to credit the testimony of the father over that of the mother.

Matter of Helles v Helles, 87 AD3d 1273 (4th Dept 2011)

Respondent Committed a Family Offense

Family Court determined that respondent committed a family offense against petitioner and ordered respondent to stay away from petitioner. The Appellate Division affirmed. The record supported the court's determination that petitioner established by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree. Respondent verbally abused and threatened petitioner throughout a single day and left numerous threatening messages on petitioner's cellular phone that were played in court. The prior experience of petitioner with respect to respondent's assaultive behavior made the threats credible. Although obscenities alone will not constitute criminal conduct, the verbal acts made in the context described by petitioner were not constitutionally protected.

Matter of Beck v Butler, 87 AD3d 1410 (4th Dept 2011)

JUVENILE DELINQUENCY

Conditional Discharge Not Least Restrictive Alternative

Family Court adjudged respondent to be a juvenile delinquent upon his admission that he committed an act, which, if committed by an adult, would constitute the crimes of possession of graffiti instruments and possession of marihuana in the fifth degree and imposed a conditional discharge for a period of 12 months. The Appellate Division reversed. A conditional discharge was not the least restrictive available alternative. Respondent was 13 years old at the time of the adjudication, the underlying offenses were minor, this was respondent's first offense, and respondent had not been receiving his psychiatric medication. Respondent's mother was actively involved in his home and school life and she recognized and addressed her son's need for psychiatric treatment before court intervention. At the time of the hearing respondent was receiving appropriate medication and therapy. Supervision provided by an ACD was sufficient.

Matter of Tyvan B., 84 AD3d 462 (1st Dept 2011)

Conditional Discharge Not Warranted – Dissent Would Reverse

Family Court adjudged respondent to be a juvenile

delinquent, upon her admission that she committed an act, which, if committed by an adult, would constitute the crime of assault in the third degree and placed her on probation for a period of 12 months. The Appellate Division affirmed. Respondent and a friend followed the victim and said they were going to jump the victim and get her iTouch and cell phone. Respondent grabbed the victim's hair and her friend punched the victim. Respondent and her friend tried to pull the victim's backpack from her and unzip it. Respondent and her friend ran when a police car approached. The petition alleged that respondent committed acts that would constitute many crimes. Thereafter, respondent admitted to assault in the third degree and the other charges were dismissed. The court properly denied respondent's request for a conditional discharge. Respondent admitted to associating with negative peers; missed 34 days of school and was late 74 times; was not involved in outside activities; admitted that her relationship with her mother was strained because of her poor attitude; did not express remorse; and admitted cutting herself several years ago. Respondent's mother had a DWI conviction and an arrest for robbery and her father had been in prison for attempted murder since before respondent was born. Thus, it was unlikely respondent would be properly supervised. The contention that the court mistakenly relied on its belief that respondent drank socially was unpreserved and was not reached in the interests of justice. Although the record showed that it was the mother who admitted drinking, the court rendered its disposition for the reasons indicated by petitioner and the reasons did not include an allegation that respondent drank. The dissent would have imposed an ACD because, among other things, the court gave weight to its mistaken belief that respondent was a habitual drinker.

Matter of Lameka P., 85 AD3d 675 (1st Dept 2011)

Family Court's Disposition Reversed and Remitted for New Hearing

Respondent admitted to committing an act of Juvenile Delinquency and the parties, based on the pre-dispositional report agreed to probation for 2 years. Family Court did not accept the disposition, called as its witness the author of the report, and upon the proof it gathered, ordered that respondent be placed with DSS. Respondent appealed. The Appellate Division reversed finding that the court's disregard of the parties agreement and the probation department's recommendation, by crafting its own disposition based solely on the evidence the court elicited is a "practice with which [the Appellate] Court previously has expressed its disapproval".

Matter of Kyle FF., 85 AD3d 1463 (3d Dept 2011)

Finding of Willful Violation of Conditional Discharge Reversed

Family Court found that respondent willfully violated an order of conditional discharge and placed her with OCFS. The Appellate Division reversed and dismissed the petition. The court erred in revoking an order of conditional discharge based on its finding that respondent violated a condition directing her to enroll in a specified private facility for troubled youth. Petitioner's own evidence at the hearing established that respondent took the steps required of her but was unable to enroll in the program because her mother could not afford the fees.

Matter of Rhea L. W, 85 AD3d 1613 (4th Dept 2011)

Court Did Not Act as "Second Prosecutor"

Family Court adjudged respondent to be a juvenile delinquent based on the finding that she committed the crime of unlawful possession of weapons by persons under 16 and committed an act which, if committed by an adult, would constitute the crime of assault in the second degree. The Appellate Division affirmed. Respondent's contention that the petition should have been dismissed because the acts alleged occurred outside New York State was without merit. The evidence established that the acts in question were committed at a gas station in Monroe County. Respondent failed to preserve for review her contention that the court acted as a "special prosecutor" and, in any event, although the court questioned several witnesses, the questioning was nonadvesarial and served only to clarify prior testimony. Any error in admitting or excluding certain evidence was harmless.

Matter of Dominique M., 85 AD3d 1626 (4th Dept 2011)**,** *lv denied* 17 NY3d 709

PERMANENCY HEARINGS

Permanency Goal Modified

Family Court adjudged that the permanency goal for the subject children was adoption. The Appellate Division modified. The court erred in determining that the permanency goal for the two brothers was adoption but did not err in determining that adoption was the permanency goal with respect to the sister. Petitioner met its burden of establishing by a preponderance of the evidence that its determination to change the permanency goal of the brothers from adoption to placement in another planned permanent living arrangement (APPLA) was in the children's best interests. At the time of the permanency hearing the brothers were 16 and 15 years old respectively; there was uncontroverted evidence that both brothers had been adamantly opposed to adoption for many years; the brother executed adoption waivers after consultation with their attorney for children; and they were very loyal to their birth family. A psychological evaluation report recommended that petitioner honor the brothers' wishes not to be adopted. Further, the record established that the brothers' foster parent signed permanency pacts with them, where he agreed to be a permanent resource for the brothers as long as they needed him. The absence of the brothers from the permanency hearing was not a rational reason for rejecting the permanency goal of APPLA where the Referee had sufficient information to make a determination. Neither petitioner nor the attorney for the children requested a change in the permanency goal with respect to the sister and therefore the attorney for the children's contention that the sister's permanency goal should be changed to APPLA was not considered by the Appellate Division.

Matter of Sean S., 85 AD3d 1575 (4th Dept 2011)

Permanency Goal Modified

After a permanency hearing, Family Court ordered that the permanency goal for the subject child was placement for adoption. The Appellate Division modified by changing the permanency goal to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parents. The court's determination regarding the child's permanency goal lacked a sound and substantial basis in the record. Petitioner met its burden of establishing by a preponderance of the evidence that its recommendation to modify the permanency goal from adoption to APPLA was in the child's best interests. At the time of the permanency hearing the child was 14 years old; the uncontroverted evidence was that depite petitioner's diligent efforts to counsel the child regarding adoption, the child refused to consent to adoption and wished to remain with his foster parents. Petitioner submitted evidence that the child's placement with his foster parents allowed the child to have continued contact with his older brother, with whom he was very close and that he resided in a home in which he was safe and happy. Also, under the APPLA, the child would have access to family and friends who lived in the same area as the foster parents. The child expressly wished to remain with the foster parents. Further, the foster parents were willing to be a permanency resource for the child. They unequivocally stated their willingness to serve as an ongoing resource for the child.

Matter of Jose T., 87 AD3d 1335 (4th Dept 2011)

PERSONS IN NEED OF SUPERVISION

Best Interest Analysis Affirmed in PINS Proceeding

The appellant appealed from an order that adjudicated him to be a person in need of supervision and placed him on probation, upon his admission that he had violated a condition thereof, and placed him in the custody of Social Services. The appellant contended that the Family Court should have granted his request to be placed in the custody of an aunt, which was a less restrictive alternative than placing him in custody of the Department of Social Services (DSS). The Court affirmed the Family Court's ruling that the appellant's needs and best interests were best served by placing him in the custody of DSS.

Matter of John R., 84 AD3d 1384 (2d Dept 2011)

Ineffective Counsel Claim Dismissed

Respondent was charged as a JD but upon her consent, the matter was converted to a PINS and she was given the disposition of a year's probation, out patient

treatment and an order of protection against her on behalf of the victim. Respondent appealed arguing her consent was not obtained prior to the conversion or disposition. The Appellate Division affirmed, finding no merit in the appeal as it was Respondent's attorney who initiated and proposed the conversion and the disposition, and as respondent had consented to the proposal after the court explained the process to her in detail, in accordance with FCA §§ 741 (a). Respondent's admissions to the allegations were made after the court advised her of her rights pursuant to the requirements set by *Matter of Steven Z.,* 19 AD3d 783 (3rd Dept 2005). Additionally, respondent's argument of ineffective counsel was denied as court held her attorney provided meaningful representation.

Matter of Karis OO., 84 AD3d 1495 (3d Dept 2011)

TERMINATION OF PARENTAL RIGHTS

Parents Abandoned Their Child

Upon findings that respondent parents abandoned their child, Family Court terminated their parental rights and committed custody and guardianship to the agency for purposes of adoption. The Appellate Division affirmed. The parents admitted that they did not have any contact with the child during the six-month period prior to the filing of the termination petition. The parents contended that the agency had previously arranged visits and referrals for the mother's older child that compelled the mother to have contact with a man who fathered that child through rape. While the agency may have shown poor judgment, the parents failed to show their intention to assume parental obligations toward the subject child. In any event, in the abandonment context, diligent efforts by the agency were not required. Custody was properly committed to the foster mother with whom the child had resided since birth, who wished to adopt the child and his siblings, and who was meeting the child's need. A suspended judgement would be available only after a finding of permanent neglect.

Matter of Shavenon Edwin N., 84 AD3d 444 (1st Dept 2011)

Finding of Permanent Neglect Supported by Clear And Convincing Evidence

Upon a finding of permanent neglect, Family Court terminated respondent mother's parental rights to the 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 of respondent's failure to plan for the children's future, notwithstanding the agency's diligent efforts. The agency developed a service plan, scheduled visitation, repeatedly attempted to encourage the mother's compliance with the service plan's requirements and provisions for referrals. The mother did not complete a drug treatment program despite several referrals, stopped mental health therapy, and failed to plan for the child's future by not availing herself of the requisite services.

Matter of Megan Victoria C-S., 84 AD3d 472 (1st Dept 2011)

Termination on Ground of Permanent Neglect Affirmed

Family Court terminated respondent mother's parental rights with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The record established that petitioner agency made diligent efforts to encourage and strengthen the parental relationship by referring respondent for appropriate therapy and a parenting skills class in her native language. Respondent, a non-offender coping with sexual abuse, elected to ignore the court's directive that she be referred for counseling with a therapist trained in sexual abuse cases and instead selected a therapist with limited training in that area. She also chose to attend a parenting skills class in English, although she needed a Spanish translator in court. The children's best interests would be served by freeing them for adoption. All the children stated that they did not want contact with respondent, who had adopted them. Three of the children wanted to be adopted by their foster parents, who wanted to adopt them, and the fourth child who was 17 and had reestablished a relationship with her biological family wanted to remain in the foster home

until she reached her majority.

Matter of Chelsea C., 84 AD3d 504 (1st Dept 2011), *lv denied* 17 NY3d 705

Mother Failed to Address Criminal And Violent Tendencies

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 by providing respondent with a service plan and referrals tailored to her needs, and required her to complete anger management training, parenting skills training and therapy. Notwithstanding respondent's progress, she was convicted of attempted murder and arrested for assaulting the child's father after attending two anger management programs. She was also arrested for prostitution. Respondent conceded that she regularly missed visits with the child, cancelled at the last minute, arrived late and left early. A preponderance of the evidence demonstrated that the child's best interests were served by terminating respondent's parental rights. The child had been living in a well-kept and safe home with a foster mother who attended to his needs since 2008. Respondent's request for a suspended judgment was unpreserved and unwarranted.

Matter of Anthony P., 84 AD3d 510 (1st Dept 2011)

Respondent Failed to Plan For His Children's Future

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 Khalil A., 84 AD3d 632 (1st Dept 2011)

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

Family Court found that as a result of respondent mother's mental illness, her ability to care for her infant was impaired, and terminated her parental rights. The Appellate Division affirmed. Clear and convincing evidence, including medical records and uncontroverted expert testimony, supported the determination that respondent was presently and for the foreseeable future unable to provide proper and adequate care for her child. Respondent's contention that the psychiatric evidence was insufficient was unpreserved and, in any event, given the psychiatrist's unrebutted testimony, the lapse in time between the psychiatric evaluation and the fact finding hearing did not warrant a different result.

Matter of Jamiah Sharang C., 85 AD3d 453 (1st Dept 2011)

Respondent Unable to Financially or Emotionally Care For His Children

Family Court terminated respondent father's parental rights to his children and committed the children's custody and guardianship to the Commissioner of the Administration of Children's Services for the purpose of adoption. The Appellate Division affirmed. The court's determination that it was in the children's best interests to be freed for adoption was supported by a preponderance of the evidence. Respondent was unable to financially or emotionally care for his children and the children had thrived in their foster home.

Matter of David Goliath G., 85 AD3d 473 (1st Dept 2011)

Respondent Permanently Neglected Her Child

Family Court, upon a finding of permanent neglect, terminated respondent mother's parental rights to her 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 finding that, despite the agency's diligent efforts, respondent permanently neglected her son. Respondent failed to maintain contact with the child through consistent and regular visitation. The court's finding that termination of respondent's parental rights was in the child's best interests so he could be freed for adoption by his kinship foster mother was supported by a preponderance of the evidence. Because respondent failed to make any strides towards creating a relationship with her child, or making a plan for his care, a suspended judgment was not appropriate.

Matter of Calvario Chase Norall W., 85 AD3d 582 (1st Dept 2011)

Respondent Failed to Plan For Her Children's Future

Family Court, upon a finding of permanent neglect, terminated respondent mother's parental rights to her 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 her son. The agency met with respondent to review her service plan and discuss the importance of compliance; referred respondent to parenting skills training, mental health therapy and housing assistance agencies; and scheduled regular visits with the child that accommodated respondent's schedule. Despite these diligent efforts, respondent failed to attend therapy, obtain suitable housing or visit the child on a consistent basis. The court's finding that termination of respondent's parental rights was in the child's best interests was supported by a preponderance of the evidence. A suspended judgment was not appropriate given that the child was thriving in a loving foster home where his special needs were being met.

Matter of Fernando Alexander B., 85 AD3d 658 (1st Dept 2011)

Permanency Finding Remanded

Family Court found mother mentally ill within the meaning of Social Services Law § 384-b (4) (c) and (6) (a), and held she was presently and for the foreseeable future, unable to care for child. Appellate Division held that court's determination was supported by clear and convincing evidence as DSS had met its burden "in its totality". Family Court's decision to free child for adoption without requiring father's consent was also affirmed as father had failed to form a relationship with child and failed to assume parental responsibilities pursuant to Domestic Relations Law § 111(1)(d), while pre-adoptive foster parents provided stability for child, were attentive to her special needs and eager to adopt her.

Matter of Phajja Jada S., 86 AD3d 438 (1st Dept 2011)

Lack of Clear and Convincing Evidence That Mother Was "Presently and for the Foreseeable Future" Unable to Provide Proper and Adequate Care for the Subject Children

The Department of Social Services (hereinafter DSS) established, by clear and convincing evidence, that the mother failed for a period of at least one year substantially and continuously or repeatedly to maintain contact with or plan for the future of her son, although physically and financially able to do so, notwithstanding DSS's diligent efforts to encourage and strengthen the parental relationship. The Family Court properly found that the mother failed to maintain contact with her son since she had not visited him for several months prior to the filing of the petition. However, the Family Court erred in finding that DSS met its burden of establishing, by clear and convincing evidence, that the mother was "presently and for the foreseeable future" unable, by reason of her mental illness, to provide proper and adequate care for the subject children. DSS's expert testified that the mother had taken her medication so that the symptoms of her mental illness were, at least temporarily, under control. In addition, while the expert set forth that "at the present time" the mother suffered from a mental condition such that, if the children were placed in her care, they would be in danger of becoming abused or neglected, she also testified that she could not conclude with any degree of medical certainty whether the mother could, within the foreseeable future, address the major issue which placed the children at risk.

Matter of Shawn G., 84 AD3d 957 (2d Dept 2011)

Forensic Evaluation Admitted into Evidence Included Inadmissible Hearsay, However, Error Held Harmless

As a threshold matter, the Appellate Division agreed with the mother's contention that the Family Court erred in admitting into evidence, in its entirety, the forensic psychological evaluation prepared by the court-appointed psychologist who evaluated her as it included some inadmissible hearsay. However, under the circumstances, such error was harmless. Further, there was clear and convincing evidence to support the Family Court's determination that the mother is "presently and for the foreseeable future" unable, by reason of mental illness, to provide proper and adequate care for the subject children. In particular, after testing and interviewing the mother and reviewing certain of her records, the court-appointed psychologist testified that the mother suffers from schizoaffective disorder, bipolar type, and that, in his opinion, inter alia, due to the chronic nature of the illness, serious and enduring deficits in her ability to parent, her lack of insight about her illness and ability to parent, her need for consistent mental health intervention, and the inability of her symptoms to be managed to the point that she can properly and adequately care for the children, the mother is "presently and for the foreseeable future" unable, by reason of mental illness to provide proper and adequate care for the subject children. The foregoing evidence supported the Family Court's determination.

Matter of Dominique Larissa Blue M., 84 AD3d 962 (2d Dept 2011)

Family Court's Finding of Permanent Neglect Was Supported by the Record

The Family Court found that the mother had permanently neglected the child, terminated the mother's parental rights, and placed the child in the custody of the Department of Social Services (hereinafter DSS) for the purpose of adoption. The record revealed that the subject child was born on July 15, 2008. At birth, the child tested positive for both opiates and methadone, and he was placed in foster care immediately upon his discharge from the hospital. The Family Court directed the mother to undergo a mental health evaluation, to attend a drug treatment program, and to participate in psychotherapy, substance abuse training, and parent effectiveness training. Although the mother completed a parent effectiveness training course, she never received mental health treatment on a regular basis. Moreover, she failed to complete numerous outpatient substance abuse programs, and admitted using heroin even after DSS filed its petition to terminate her parental rights in December 2009. The Family Court properly concluded that it was in the child's best interests to terminate the mother's parental rights and free him for adoption by his foster parents, with whom he has lived virtually his entire life.

Matter of Jonathan B., 84 AD3d 1078 (2d Dept 2011)

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

Contrary to the father's contentions, the Family Court properly found that the agency exercised diligent efforts to strengthen the parent-child relationship and to reunite the father and child by, among other things, scheduling regular and meaningful visits with the child and referring the father to programs providing domestic violence counseling and substance abuse treatment. Although the father maintained contact with the child, completed many of the services offered to him, and established suitable housing, he failed to gain insight into the problems that caused the child's removal and were preventing the child's return to his care. The father's assigned caseworkers and a substance abuse counselor testified that the father was uncooperative, hostile, reluctant to undergo treatment, and often missed treatment sessions, they smelled alcohol on his breath on several occasions while he was enrolled in a substance abuse program, and the father was discharged from his first substance abuse program without completing his treatment. Despite a previous order finding that he had neglected the child due to ongoing domestic violence between him and the child's mother, the father never acknowledged his responsibility for the removal of the child and continued to have contact with the child's mother, whom he claimed was violent and a drug abuser, thus showing his inability or unwillingness to provide a safe home for the child. Indeed, almost a year after the removal of the child, the father was arrested following a domestic dispute with the mother. Under these circumstances, the Family Court correctly found that, despite diligent efforts by the agency, the

father failed to adequately plan for his child's future and, therefore, the child was permanently neglected.

Matter of Zechariah J., 84 AD3d 1087 (2d Dept 2011)

Mother Failed to Complete Necessary Programs and to Acquire Necessary Housing

Contrary to the mother's contention, the Family Court properly found that she permanently neglected the subject child. The petitioner established by clear and convincing evidence that it made diligent efforts to assist the mother in maintaining contact with the child and planning for the child's future. These efforts included facilitating visitation, repeatedly providing the mother with referrals for drug treatment programs and mental health evaluations, repeatedly advising the mother of the need for her to attend and complete such programs, and advising the mother on how to secure adequate housing for herself and the child. Despite these efforts, the mother failed to plan for the child's future by failing to complete the necessary programs and failing to take steps to acquire appropriate housing. Accordingly, the Family Court correctly found that the child was permanently neglected.

Matter of Beyonce H., 85 AD3d 1168 (2d Dept 2011)

Sufficient Diligent Efforts By DSS

Respondent mother was found to have neglected her child based on multiple alcohol-related incidents of domestic violence between mother and father. Mother appealed and in an earlier decision, the Appellate Division affirmed. DSS then filed permanent neglect petition against mother, and after hearing, Family Court adjudicated child was permanently neglected and terminated mother's rights. Mother appealed arguing, among other things, that DSS failed to make diligent efforts to re-unite mother and child, and that visits with child were missed due to heart surgery and birth of another child. The Appellate Division affirmed finding that DSS had referred mother to mental health and couples counseling to address DV issues, arranged supervised visitation and transportation, addressed mother's problem areas with her, and referred her to services for chemical dependancy and parental education. The Court further found that while surgery and giving birth could excuse mother for some of the visits she missed with child, the majority of visits missed with child could not be attributed to those excuses and DSS established by clear and convincing evidence that mother had permanently neglected child.

Matter of Tyler LL., 84 AD3d 1465 (3d Dept 2011)

Diligent Efforts and Failure to Plan Resulted in TPR

DSS removed three children from parents home following allegations of neglect. Parents consented to finding of neglect and after a dispositional hearing, children were placed in custody of DSS. Thereafter, DSS initiated permanent neglect petitions on behalf of the younger two children as eldest child was over 18. After fact-finding and dispositional hearings, court found permanent neglect, issued suspended sentence on behalf of daughter who would be 18, terminated parental rights to younger child and freed him for adoption. The parents appealed. The Appellate Division affirmed finding that DSS had made diligent efforts to reunite. DSS had provided parent aide services to help with parties' financial management, provided mental health counselor, parent education classes, scheduled visitation and provided transportation for visitation, allowed flexibility in scheduling appointments due to father's work and mother sleeping in. In contrast, Court held parents failed to plan for their children's future, failed to cooperate with DSS, and failed to address conditions that led to having children removed . Additionally, court noted children became stressed and anxious and their behavior regressed after seeing parents.

Matter of Nicole K., 85 AD3d 1231 (3d Dept 2011)

TPR in Best Interests of Children

Mother was adjudicated as permanently neglecting her two children and court issued suspended sentence directing her to, among other factors, co-operate with DSS, continue mental health counseling and follow treatment recommendations, and have "no contact" with her former boyfriend who had abused her children. DSS then filed petition alleging mother had violated order by having contact with former boyfriend, was inconsistent in attending counseling and had made little progress. After hearing, Family Court found mother

had violated order and terminated her parental rights. The Appellate Division affirmed, finding evidence was sufficient to establish violation, gave deference to Family Court's credibility assessments and noted "while respondent's failure to comply with....suspended judgment does not compel termination.....termination is, in fact, in the best interests of the children..." as they had been in care of DSS for over 3 years, were in a pre-adoptive home and doing well and any contact with mother made them highly anxious and stressed and their behavior regressed.

Matter of Ronnie P., 85 AD3d 1246 (3d Dept 2011)

Sound and Substantial Basis to Terminate

Mother's two children, toddler and infant, were removed from her care by DSS after it was discovered she left them alone in apartment on more than one occasion, alleging a neighbor monitored them through a baby monitor. Thereafter DSS filed permanent neglect petitions against mother seeking to terminate her parental rights. Mother consented to the finding, and after dispositional hearing, mother's rights were terminated. Mother's only issue on appeal was that court should have granted her a suspended judgment instead of terminating her rights. The Appellate Division held the sole issue to consider in this instance is the best interest of the child and based on the evidence presented, which included, among other factors, mother 's repeat incarcerations, her repeated associations with violent individuals, her own tendencies towards unlawful behavior, her mistrust of caseworkers and service providers, harassing the foster parents which resulted in a stay away order of protection, her children's close relationship and healing behaviors as a result of living with the same foster family for over 20 months, and the foster family 's intent to adopt them, Family Court had sound and substantial basis to terminate mother's rights.

Matter of Kellcie NN., 85 AD3d 1251 (3d Dept 2011)

Mother's Failure to Admit DV, Address Medical and Mental Health Problems Supported TPR

Mother's four children were removed from her care after domestic violence incident between mother and her boyfriend who was father of two of the children. The two youngest children were found wandering in street. Mother consented to finding of neglect and children were placed in care of DSS. Nearly 18 months later, DSS filed permanent neglect petition against mother. After hearing, court found DSS had proven its petition by clear and convincing evidence and terminated mother's rights. Mother appealed. The Appellate Division affirmed finding that DSS has provided diligent efforts to mother, with counseling and therapy referrals, family team meetings, encouraging and providing regular visits with child, transportation and more. Mother on the other hand had, among other factors, failed to plan for children's future, was still seeing abusive boyfriend despite claiming to have ended relationship with him, denied there was dv in household, and had significant medical and mental health issues for which she failed to address. Additionally children had been in pre-adoptive foster home for two years, were thriving and foster parent intended to adopt them.

Matter of Nazelle RR., 85 AD3d 1253 (3d Dept 2011)

TPR Affirmed Due to Mother's Mental Illness

Respondent mother of one child consented to finding of neglect and ten months later DSS filed to terminate her rights based on mental illness. Mother failed to appear at hearing and her rights were terminated by reason of mental illness. Mother appealed arguing proof was inadequate to terminate her parental rights. Appellate Division affirmed court's decision, giving deference to Family Court's credibility assessments and found court had clear and convincing evidence to terminate mother's rights. Evidence included testimony from mother's evaluating psychologist who testified that mother suffered from paranoid schizophrenia, including delusions and hallucinations, was unable to sustain stable relationships, had disorganized thought patterns, was unable to understand another person's needs and was focused solely on gratifying her own needs, posed a risk of violence to and neglect of child, was unable to provide basic needs for child such as food, medical care and shelter. Caseworker testified mother informed him she took her medications only when she felt like it, was aggressive towards child during visitation with child, blamed child for his placement in foster care, accused him of lying. Additionally, child was living in pre-adoptive foster

home and expressed his desire to be adopted.

Matter of Corey UU., 85 AD3d 1255 (3d Dept 2011)

Mother's Failure to Plan Supports TPR

DSS removed four children from mother's care and placed them in custody of maternal grandmother as a result of mother's drug and alcohol abuse, her action in leaving her two-and-a-half year old child alone in the home for an undetermined period of time, and other factors. Two years later, DSS filed to terminate mother's parental rights based on mother's failure to plan. After fact-finding and dispositional hearings, mother's rights were terminated. Mother appealed arguing that she should have been granted suspended judgment. The Appellate Division affirmed Family Court's order, finding that DSS had made diligent efforts to strengthen parent-child relationship by providing, among other things, referral to substance abuse programs, arranging for psychological evaluation, assisting mother in securing suitable housing, affording her regular visitation with children including transportation or financial support to enable such visitation. Despite these efforts, Court held mother failed to plan for the children's future. Although she completed substance abuse programs, she failed to make progress, missed many group sessions, tested positive for cocaine four times thereafter, failed to secure adequate housing and continued relationship with man who had drinking problem although she recognized that her relationship with him posed barrier to her children's return. Granting suspended sentence, based on mother's lack of progress and relapses after this length of time, was not in children's best interest.

Matter of Crystal JJ., 85 AD3d 1262 (3d Dept 2011)

Father Failure to Plan Supported TPR Finding

Father was incarcerated and mother surrendered her parental rights to child after DSS removed child and her half-sibling from mother 's care . Some time later DSS filed to terminate father's rights. After fact-finding and dispositional hearing, Supreme Court terminated father's rights. Father appealed. The Appellate Division affirmed finding DSS had made diligent efforts to strengthen parent-child relationship by arranging visitation between father and child, communicating with father about service plans, and investigating various relatives as resource for placement. Three months after TPR petition was filed, father's suggestion of his girlfriend who was not certified as foster parent, or his sister who had lost her job working with elderly after being hot-lined, or various other relatives who lived three hours away and had no established contact with child, as resources for child supported court's conclusion that father had failed to plan for child. Additionally it was in child's best interest to be freed for adoption as child was living with half-sibling in foster home where foster parents were interested in adopting both children.

Matter of Hailey ZZ., 85 AD3d 1265 (3d Dept 2011)

Mother's Failure to Plan Supports Permanent Neglect Finding

Child removed from mother's home after seeing his younger sibling die from crawling into hot oven, which fell on top of child. Mother was asleep at the time. Few years later maternal grandmother filed for custody of child and DSS filed permanent neglect petition against mother. After fact-finding and dispositional hearing, mother's rights were terminated . Mother and grandmother appealed. Court found DSS had made diligent efforts to strengthen parent-child relationship. DSS had offered counseling, which mother resisted, set up bi-weekly visitation with child and transportation, but mother failed to be consistent with visitation. Mother, against advice from DSS, continued to live with felon who had history of domestic violence and drug abuse and ended up marrying him, making her home unsafe for child. Court held mother's actions showed little initiative and responsibility for planning for child's future**.** Court also held grandmother's custody petition, which was heard at the dispositional phase, did not take precedence over prospective adoptive parent selected by DSS. In this case, child who had special needs, had been living with pre-adoptive parents for over two years, had close relationship with them and child's therapist testified he needed stability in his life after trauma of witnessing brother's death. Family Court's determination terminating mother's rights and denying grandmother's custody petition was supported by sound and substantial basis and was in child's best interest. Grandmother's claim that court improperly delegated its

authority to child's therapist to determine her post-termination visitation was dismissed as grandmother never requested visitation, only custody.

Matter of Sharon V. v Melanie T., 85 AD3d 1353 (3d Dept 2011)

Improper Foundation Results in Reversal of TPR

Married parents of three children had order of supervision entered against both of them after mother was found to have neglected two of the children. A year later children removed by DSS after 5 year old was found wandering in nearby park alone. Mother admitted she had left child outside, alone and unsupervised. Children remained in DSS care for almost two years, then were returned to parents. Child again, this time 7 years of age, left home unsupervised and for several hours thereafter neither parent reported him missing. Children were once again removed from home and both parents were held to have violated order of supervision. Parents admitted to permanent neglect and order was issued finding parents had permanently neglected children with judgment suspended for one year. During the period of suspension, DSS filed TPR against father, not because he had violated any provisions, but due to allegations that he suffered from mental illness which prevented him from providing proper care for children. During pendency of termination proceeding, DSS filed an extension of suspended judgment. After trial, Family Court terminated father's parental rights due to his mental illness. Father appealed. The Appellate Division held that parental rights may be terminated on basis of mental illness if there is proof, by clear and convincing evidence, of parent's underlying condition and testimony from "appropriate medical witnesses particularizing how the parent's mental illness"... affects his present and future ability to care for child. In this case, there was testimony concerning father's present and future inability, as result of mental illness, to care for children from two psychologists who had examined father. Father argued both psychologists' reports and testimony contained references to statements made by witnesses who did not testify at court, nor were such references admitted into evidence or found to be exception to hearsay rule. The Appellate Division held that proper foundation was not laid for admission of either psychologist's testimony and without such testimony, court's decision was not supported by clear and convincing evidence. The Appellate Division reversed Family Court's order and directed that petition to extend suspended judgment filed by DSS was no longer moot but pending. The Court was concerned that the TPR had been filed during the time the suspended judgment was in place and there were no allegation of violation of the terms.

Matter of Anthony WW., 86 AD3d 654 (3d Dept 2011)

No Basis for Filing TPR

This appeal was more or less based on same facts and circumstances as the above appeal, and was initiated by mother of the three children, against whom DSS filed TPR. The Appellate Division restated the same reservations about this case, noting that DSS had not presented evidence that mother had violated any of the terms of the suspended judgment, "or engaged in any conduct that would justify the commencement of this proceeding". Therefore order was reversed and remanded.

Matter of Anthony WW., 86 AD3d 662 (3d Dept 2011)

TPR in Child's Best Interest Due to Severe Abuse

Based upon father's criminal convictions of assault in the second degree and aggravated assault upon his 5 year old child, Family Court held child was abused and relieved DSS of its obligation to make reasonable efforts to re-unite father with child. DSS then filed TPR petition, and moved for summary judgment requesting adjudication of child as severely abused. Father, who had appealed his criminal conviction, cross-moved to stay the proceedings pending outcome of his appeal. Family Court granted summary judgment motion, found child to be severely abused and after dispositional hearing, terminated father's rights. Father appealed. The Appellate Division affirmed finding moot father's argument that court should have waited for outcome of his appeal as his conviction had already been affirmed. Furthermore, once finding of severe abuse is made, a dispositional hearing must be held to determine what is in child's best interest. Father 's argument that suspended judgment should have been entered was dismissed as child was doing well in foster home and foster parents wished to adopt her. By

contrast father had twice been incarcerated for physically abusing child and would be incarcerated until at least 2014. Additionally, child had stay away order of protection against him until her 18th birthday.

Matter of Alicia EE., 86 AD3d 663 (3d Dept 2011)

Clear and Convincing Evidence To Support TPR

Respondent mother and father are parents of one child. Child was removed from parents home and neglect petitions were filed against them as a result of "ongoing and acute dangerous behavior problems" of child that placed him and others at risk of harm. Parents admitted neglect. Over a year after his removal, DSS filed permanent neglect petitions against parents. Father surrendered his rights and after fact-finding and dispositional hearings, court found child to be permanently neglected and terminated mother's parental rights. Mother appealed. The Appellate Division found DSS had established by clear and convincing evidence that it had made diligent efforts to reunite. Among other things, DSS had provided ongoing services, encouraged and assisted in visitation, scheduled family team meetings, made repeated attempts to have respondent obtain professional help for her mental illness, which were a significant underlying cause of her neglect. However, Court found mother had failed to plan for child's future by failing to "correct the conditions that led to the removal of the child". She refused to meaningfully participate in mental health treatment necessary to address the problems that led to removal, and failed to appreciate the mental health needs of son. Although he had severe mental health needs she blamed others for his condition and undermined his treatment.

Matter of Tailer Q., 86 AD3d 673 (3d Dept 2011)

Sporadic and Insubstantial Contact Insufficient to Defeat Abandonment Finding

DSS removed three children from mother's care and mother consented to finding of neglect against her. Nearly two years after removal, DSS filed TPR petition against mother on grounds of permanent neglect and abandonment. After fact-finding hearing, Family Court found mother had abandoned children, terminated her parental rights and dismissed permanent neglect petition as moot. Mother appealed arguing proof was insufficient to show abandonment. The evidence showed that mother had failed to communicate or visit with children during the relevant 6 month period prior to filing of the petition. The caseworker testified that mother contacted her twice, once to request admission into de-tox program and the second to schedule meeting at the shelter where she was staying. Although she asked about the children she did not ask to visit them. The Appellate Division held that "such sporadic and insubstantial communications were wholly insufficient to defeat..[DSS's] claim of abandonment".

Matter of Lamar LL., 86 AD3d 680 (3d Dept 2011)

Suspended Judgment Not Warranted

Family Court terminated respondent father's parental rights on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner agency. 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 relationship with the child. A suspended judgment was not in the child's best interests. Respondent did not ask for post-termination contact with the child and such contact was not in the child's best interests.

Matter of Mya B., 84 AD3d 1727 (4th Dept 2011), *lv denied* 17 NY3d 707

Dismissal of Termination of Parental Rights Petition Affirmed

The attorney for the child appealed from an order of Family Court dismissing the neglect petition against respondent father. The Appellate Division affirmed. Petitioner failed to establish that it made diligent efforts to strengthen the parent-child relationship. Respondent's child, who was 18 years old, had severe Down's syndrome and petitioner failed to tailor its efforts to the needs of this particular parent and child.

Matter of Colinia D., 84 AD3d 1755 (4th Dept 2011)

Suspended Judgment Properly Revoked

Family Court revoked a suspended judgment and terminated respondent mother's parental rights with respect to her children. The Appellate Division affirmed. Because a hearing on a petition alleging the violation of a suspended judgment is part of the dispositional phase of a permanent neglect proceeding, the court properly allowed petitioner to introduce evidence at the hearing about the children's best interests. A preponderance of the evidence supported the court's determination that respondent violated numerous terms of the suspended judgment and that it was in the children's best interests to terminate her parental rights.

Matter of Keyon M., 85 AD3d 1560 (4th Dept 2011), *lv denied* 17 NY3d 709

Suspended Judgment Not in Child's Best Interests

Family Court terminated respondent mother's parental rights with respect to her child. The Appellate Division affirmed. A suspended judgment was not in the child's best interests. Respondent did not ask for post-termination contact with the child and such contact was not in the child's best interests. The child had resided with her foster family for almost her entire life and the evidence established that there was no bond between mother and child.

Matter of Jane H., 85 AD3d 1586 (4th Dept 2011), *lv denied* 17 NY3d 709

Mother Permanently Neglected Her Children

Family Court terminated respondent mother's parental rights to her children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it exercised diligent efforts to strengthen the mother's relationship with the children by providing counseling, scheduling regular visitation, and providing services to overcome the problems that prevented discharge of the children into mother's care. Although the mother moved to Louisiana shortly after the children were placed in foster care, petitioner regularly updated mother on the children's progress, encouraged her to return to New York, and provided her with contact information for counseling in Louisiana. Despite those efforts, the mother failed to substantially and continuously or repeatedly plan for the future of the children. The mother was not denied due process when the dispositional hearing was held in her absence. After an adjournment of the hearing based upon mother's other child's medical condition, mother failed to appear at the rescheduled hearing and her attorney provided no documentation to justify her absence. In view of the amount of time the children spent in foster care and the fact that mother's attorney vigorously represented her at the hearing, the court did not abuse its discretion in conducting the hearing in mother's absence.

Matter of La' Derrick J. W., 85 AD3d 1600 (4th Dept 2011), *lv denied* 17 NY3d 709

Father Abandoned His Child

Family Court terminated the parental rights of respondent father. The Appellate Division affirmed. Petitioner established that for six months before filing the petition, father failed to visit the child and to communicate with the child or petitioner, although able to do so and not prevented or discouraged from doing so by petitioner. Although the court erred when it applied a disjunctive reading of the statute by referring to the father's "failure to visit or communicate" with the child or petitioner, the error was of no moment because the evidence established that petitioner met its burden under the statute.

Matter of Kevon S., 85 AD3d 1624 (4th Dept 2011)

Petitioner Properly Relieved of Reasonable Efforts Requirement

Family Court terminated respondent's parental rights with respect to her son on the ground of permanent neglect. The Appellate Division affirmed. The court properly granted petitioner's motion to be relieved of the requirement that it make reasonable efforts to reunite the mother and son. Petitioner established by clear and convincing evidence that the mother's parental rights had been terminated with respect to the son's half sibling and that she repeatedly failed to cooperate with programs to address her alcohol, drug use and mental health issues. The mother failed to establish that requiring reasonable efforts would be in

the child's best interests and would likely result in reunification.

Matter of Jacob E., 87 AD3d 1317 (4th Dept 2011)

Social Services Law Did Not Implicate Family Court's Subject Matter Jurisdiction

Family Court terminated respondent mother's parental rights with respect to her son upon a finding of permanent neglect and freed the child for adoption. The Appellate Division affirmed. The mother was not denied effective assistance of counsel because the attorney counseled the parent to admit the allegations in the petition and there was no demonstration that mother's attorney's alleged failure to request a suspended judgment or post-termination contact resulted in actual prejudice. Instead, the evidence established that a suspended judgment or post-termination contact was not in the child's best interests. The mother's contention was without merit that the court lacked jurisdiction over the proceeding because it failed to comply with Social Services Law § 384-b (3) (c-1), which applies where one Family Court judge presides over a prior permanency hearing and a termination of parental rights petition involving the same child is assigned to a different Family Court judge. That statute did not implicate subject matter jurisdiction, but rather concerned venue which, as was the case here, if not raised is waived. Further, the statute contained a preference for the same judge to hear the most recent proceeding, not a mandate.

Matter of Sean W., 87 AD3d 1318 (4th Dept 2011)

Mother's Unexplained Failure to Appear Constituted a Default

Family Court denied respondent mother's motion to vacate a prior order revoking a suspended judgment and terminating her parental rights with respect to her five children. The Appellate Division affirmed. The mother failed to appear at the hearing on the revocation of the suspended judgment and although her attorney was at the hearing he did not participate. The unexplained failure to appear at the hearing constituted a default and the Appellate Division therefore dismissed that appeal. In terms of the appeal from the order denying mother's motion to vacate the default, the court properly exercised its discretion in denying the motion. The mother's incarceration at the time of the hearing was not a reasonable excuse for her default because she failed to provide a credible explanation for her failure to advise her attorney, the court, or petitioner of her unavailability and she failed to demonstrate a meritorious defense.

Matter of Lastanzea L., 87 AD3d 1356 (4th Dept 2011)

NOTES