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Court of Appeals Declares Facebook 'Private Data' and Other Social Media Subject to Discovery*

The New York Court of Appeals has issued an unequivocal declaration that even materials deemed "private" by a Facebook user are subject to discovery, if they contain material relevant to the issues in controversy in litigation.

By Maurice Recchia**

The New York Court of Appeals has issued an unequivocal declaration that even materials deemed "private" by a Facebook user are subject to discovery, if they contain material relevant to the issues in controversy in litigation. In the decision, the court also reiterates general principles of liberal discovery applicable to all cases and controversies, not just those involving social media material.

Facts and Procedural History

The case is *Forman v. Henkin*, 2018 N.Y. Slip Op 01015, a unanimous decision, issued by the court on Feb. 13, 2018. *Forman* is a personal injury case in which plaintiff claims injuries after she fell from a horse owned by defendant. Plaintiff claims spine and traumatic brain injuries which caused cognitive deficits, memory loss, problems writing, and social isolation.

Plaintiff testified at her deposition that she had had a Facebook account to which she had posted frequently, including photographs of her pre-accident lifestyle, but that she had closed the account some six months after the accident and could not recall whether she had posted any post-accident photographs before it was closed. Plaintiff further testified that she became a recluse after the accident, had trouble using a computer and writing coherently, and that even writing a simple email could take hours.

Defendant sought access to plaintiff's complete "private" Facebook account.

Plaintiff did not provide the demanded discovery and defendant moved to compel production, asserting that the Facebook material was relevant to the issue of the extent of plaintiff's injuries and to her credibility. Defendant cited plaintiff's deposition testimony that she could no longer cook, travel, engage in sports, ride a horse, or go to the movies, and now had difficulty reading, writing, reasoning, and using a computer; defendant asserted that any photographs and messages plaintiff had posted to Facebook would likely contain information relevant to these allegations.

Plaintiff asserted in her opposition that defendant had failed to provide any basis for access to the "private" portion of her Facebook account.

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Plaintiff's attorney did not affirm that she had reviewed plaintiff's Facebook account nor did she allege that any of the "private" Facebook material was privileged, or protected on privacy grounds.

At oral argument, defendant asserted that timestamps on Facebook messages would indicate the amount of time it had taken plaintiff to write a post or respond to a message. The Supreme Court judge had asked if there was a way to produce the timestamp data without revealing the contents of posts or messages and defendant stated that there was, though defendant continued to seek the full content of plaintiff's "private" Facebook material.

The Supreme Court granted the motion, limiting the disclosure, however, to all photographs of herself plaintiff had posted "privately" on Facebook before the accident which she intended to use at trial, all photographs of herself she had posted "privately" on Facebook after the accident but excluding any which may have depicted nudity or romantic relationships, and, for all the post-accident Facebook records which contained timestamp data including the number of characters or words in a message while excluding the content of the messages.

Plaintiff, but not the defendant, appealed to the Appellate Division, First Department. The First Department modified the Supreme Court's order by limiting disclosure to any pre- or post-accident photographs that plaintiff intended to use at trial and, deleting the requirement for plaintiff to provide an authorization for the timestamp data of her Facebook "private" messages.

Court of Appeals' Ruling

The Court of Appeals reversed the Appellate Division and reinstated the order of Supreme Court. In so doing, the court cited general principles of discovery and outlined principles for discovery involving Facebook and other social media material referring first to a litigant's discovery obligations pursuant to CPLR §3101(a).

The court cites its seminal decision in *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y. 2d 403 (1968), stating that the court has emphasized that "the words material and necessary are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." Id. at 406.

The court holds that while New York's liberal discovery rules and law provide a party with broad scope, the right to discovery is not unlimited, noting the CPLR's protection for privileged material, attorney work product, and trial preparation material.

The court further states that interests must be balanced between the litigant's need for discovery and any special burdens being borne by the opposing party providing it, and that discovery requests must be evaluated on a case-by-case basis, keeping in mind New York's "strong policy" of open disclosure.

Applying these general principles to the facts of the case and addressing Facebook's concept of "public" and "private" user data, the court essentially rules that this distinction is irrelevant to discovery issues in litigation, holding that:

[W]hile Facebook—and sites like it—offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute.

The court further holds that the First Department erred in implicitly accepting the Facebook categories of "public" and "private" and in applying a higher threshold for disclosure to Facebook's "private" data, holding that such a rule "effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating 'privacy' settings."

The court holds that by applying a higher threshold rule conditioned on Facebook's "public/private" categories, "disclosure turns on the extent to which some of the information sought is already accessible—and not as it should—on whether it is 'material and necessary' to the prosecution or defense of an action."

Issuing a ruling that addresses general discovery principles and their application to social media materials, the court declares that:

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if

material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holders so-called "privacy" settings govern the scope of disclosure of social media materials.

The court is careful to note that merely starting a personal injury action does not make a person's entire social media data "automatically discoverable" and that parties are protected from "unnecessarily onerous" discovery demands. To protect a party from improper "fishing expeditions," courts should employ the well-established discovery rules and must assess the nature of the case and the injuries claimed when deciding whether relevant evidence can be found in a Facebook account. Courts must balance the usefulness of the information sought against the privacy of the Facebook user and should tailor orders particular to the case while avoiding disclosure of irrelevant material, and also consider whether time limitations on material to be disclosed are appropriate.

The court states that parties can move for a protective order pursuant to CPLR §3103(a) to protect themselves from revealing sensitive or embarrassing material of marginal relevance.

Refuting the plaintiff's assertions that disclosure of social media was an unjustified invasion of privacy, the court states that even assuming that social media is private, "even private materials may be subject to discovery if they are relevant" and cites a personal injury plaintiff's medical records as an example. The court further holds that for the "purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information."

Finally, the court notes that the Supreme Court did not give the defendant access to the content of the plaintiff's messages, and because the defendant did not appeal that ruling, it could not address whether the defendant had made a sufficient showing to get disclosure of that content, leaving that issue open for decision in another case.

Forman v. Henkin is a clearly written, sensibly reasoned decision that will have an impact on discovery disputes in general and on such disputes as they involve social media. By citing a litigant's right to move for a protective order, and in line with its previous holdings regarding discovery, the court clearly stands in favor of liberal discovery in New York litigation.

Defense attorneys and others are already celebrating this decision. Plaintiff attorneys should now be aware, if any haven't been already, that Facebook or other social media material is subject to discovery if it contains, or even may contain, information which is relevant to the issues in controversy in a legal dispute.

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NEWS BRIEFS

ALL DEPARTMENTS NEWS

The hourly rates of compensation for experts has been raised by order of the Administrative Board of the Courts. The hourly rates, effective January 1, 2018, are as follows:

Psychiatrist/Physicians $250
Certified Psychologist $150
Certified Social Worker $75
Licensed Investigator $55

SECOND DEPARTMENT NEWS

Announcement: The Director and staff of the Attorneys for Children Program, Second Judicial Department, extend their heartfelt welcome to the Hon. Alan D. Scheinkman, who was named by Governor Cuomo on January 1, 2018, to serve as Presiding Justice of the Appellate Division Second Department. Presiding Justice Scheinkman, who previously served as the Administrative Judge for the 9th Judicial District, succeeds the Hon. Randall T. Eng, who retired at the end of the year.

Continuing Legal Education Programs

On November 14, 2017, the Appellate Division, Second Judicial Department Attorneys for Children Program , together with the Kings County Family Court DMR/DMC Committee and the Child Welfare Court Improvement Project, presented ***Cultural Competency and Asian Communities***. The speakers were Jia-Lin Liu, doctoral student, International Education, NYU Steinhardt, and Manna Yuen Shan Chan, LCSW, Director of the Social Work Department at Charles B. Wang Community Health Center. The Hon. Illana Gruebel, Kings County Family Court, and the Hon. Lillian Wan, Kings County Family Court, served as co-moderators. This seminar was held at the Kings County Family Court, Brooklyn, New York.

On January 22, 2018, the Appellate Division, Second Judicial Department Attorneys for Children Program , together with the Queens County Family Court, the Child Welfare Court Improvement Project and the Strong Starts Court Initiative, presented ***Evidence Based Infant/Parent Interventions for Court Involved Families***. The speakers were Natalie Brooks Wilson, LCSW-R, Sheltering Arms, Samantha Wilson, LCSW, Sheltering Arms, and Tanya Krien, Child Center of New York. The Hon. Connie Gonzalez, Queens County Family Court, served as moderator. This seminar was held at the Queens County Bar Association, Jamaica, New York.

On February 13, 2018, the Appellate Division, Second Judicial Department Attorneys for Children Program, together with the Assigned Counsel Association of Queens Family Court, presented ***A Practical Overview of the New Raise the Age Legislation***. The speakers were the Hon. Edwina G. Mendelson, Deputy Chief Administrative Judge, Office for Justice Initiatives, and Richard Gutierrez, Esq., Attorney in Private Practice. This seminar was held at the Queens County Bar Association, Jamaica, New York.

On April, 19, 2018, the Appellate Division, Second Judicial Department Attorneys for Children Program, together with the Kings County Family Court DMR/DMC Committee and the Child Welfare Court Improvement Project, will present ***Americans with Disabilities Act***. The speaker will be Professor Katherine Moore, Seton Hall University School of Law. The Hon. Illana Gruebel, Kings County Family Court, will serve as moderator. This seminar will be held at the Kings County Family Court, 22nd Floor Boardroom, Brooklyn, New York.

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

THIRD DEPARTMENT NEWS

Presiding Justice Elizabeth A. Garry

Hon. Elizabeth A. Garry was appointed Presiding Justice of the Appellate Division, Third Judicial Department by Governor Andrew M. Cuomo on January 1, 2018. She was sworn in at a ceremony in the Third Department Courtroom in Albany on January 17, 2018. Presiding Justice Garry was elected a New York State Supreme Court Justice for the Sixth Judicial

District in 2006 and was appointed to the Appellate Division, Third Department in 2009. She had previously served as a Town Justice in the Town of New Berlin and worked in private practice with the Joyce Law Firm in Central New York. Presiding Justice Garry began her legal career as a confidential law clerk to the Honorable Irad S. Ingraham, Justice of the Supreme Court. She earned her Bachelor of Arts degree in 1984 from Alfred University and her Juris Doctor degree in 1990 from Albany Law School, both with honors. Congratulations to Presiding Justice Garry!

John T. Hamilton, Jr. Esq. Award for Excellence in the Legal Representation of Children for 2018

On behalf of the Hon. Elizabeth A. Garry, Presiding Justice of the Appellate Division, Third Judicial Department, and the Justices of the Court, the Office of Attorneys for Children is pleased to invite interested individuals to nominate candidates for the 2018 John T. Hamilton, Jr., Esq. Award for Excellence in the Legal Representation of Children. Each year the Court presents this important award to an outstanding Third Department attorney for the child who demonstrates the qualities that the late John Hamilton exemplified during his distinguished career: excellence in legal representation of children and commitment to the well-being of child clients. Mr. Hamilton personified the values and aspirations that lie at the heart of New York's leadership in the legal representation of children. In conferring the Hamilton Award, the Appellate Division, Third Judicial Department honors the achievements of the individual recipient and celebrates the contribution of all attorneys for children to the attainment of these worthy ideals.

Please consider nominating a worthy candidate. To make a nomination, please fill out the nomination form which can be found at http://www.nycourts.gov/ad3/OAC/Alerts/Nomination.pdf and mail it, together with a brief narrative describing the candidate's accomplishments and any additional materials, by Friday, March 30, 2018 to Betsy R. Ruslander - Director, Office of Attorneys for Children Appellate Division, Third Judicial Department, 286 Washington Avenue Extension - Suite 202, Albany, NY 12203 or by email to brusland@nycourts.gov.

All nominations will be reviewed by members of the Court. The award will be presented by a Justice of the Appellate Division at a luncheon attended by Third Department panel attorneys, in conjunction with the Office of Attorneys for Children's Annual Topical Conference on Friday, April 27, 2018 at the Courtyard Marriott located at 47 Excelsior Avenue in Saratoga Springs, NY.

Clinton County Children's Law Office

The Office of Attorneys for Children of the Appellate Division, Third Judicial Department, in consultation with the Clinton County Family Court, invites applications from attorneys to serve as a full-time Staff Attorney in the Clinton County Children's Law Office, located in Plattsburgh, NY. The Children's Law Office serves approximately 60% of the child clients appearing before the Family, Supreme and Surrogate's Courts of Clinton County, in all types of proceedings where representation by an attorney for the child is authorized by law. Admission to the practice of law for five years and substantial experience in the representation of children are preferred. Please check the program's website at nycourts.gov/ad3/oac for this announcement.

Youth Resource Board

The Office of Attorneys for Children of the Appellate Division, Third Judicial Department, held the first meeting of their newly created Youth Resource Board in February. The mission of the Youth Board is to provide young people, who have been court involved, with a voice as a component of the Attorneys for Children Program. Presently, the Youth Resource Board is comprised of five youth members but it is hoped that additional youth will join in the future. Nearly all of the current members have been represented by a panel attorney in the Third Department. The monthly meetings, conducted by a youth coordinator and educator, as well as a practicing attorney for children, will be comprised primarily of the youth in an effort to create an atmosphere that is conducive to candor amongst the youth members. It is hoped that this first successful meeting will be the beginning of having the youth voice as an

intergral part of the program.

Liaison Committee

The Liaison Committee provides a means of communication between panel members and the Office of Attorneys for Children. A department-wide meeting was held on Thursday, October 26, 2017 at the Sagamore Resort in Bolton Landing, and a spring meeting is scheduled for Thursday, May 10, 2018 in Lake Placid, in conjunction with the 2018 Children's Law Update to be held on Friday, May 11, 2018. If you have any questions about the meetings, or have any issues of concern that you wish to be on the meeting agenda, kindly contact your liaison committee representative, whose name can be found in our Administrative Handbook, pp.18-22 and can be accessed by going to our website at http://www.nycourts.gov/ad3/oac/.

Many thanks to former liaison representatives, Chris Pogson from Broome County and Dan Fitzsimmons from Schuyler County, for their many years of service.

Training News

SAVE THE DATES: Training dates for Spring 2018 CLE programs are listed below and additional information can be found on the Third Judicial Department OAC web page located at: http://www.nycourts.gov/ad3/oac/Seminar_Schedule.html.

Introduction to Effective Representation of Children
Thursday, April 12, 2018 and
Friday, April 13, 2018
East Avenue Inn & Suites, Rochester

Tackling Tough Cases & Complex Issues
Friday, April 27, 2018
(Presentation of the Hamilton Award)
Courtyard Marriott, Saratoga Springs

Children's Law Update 2018
Friday, May 11, 2018
Crowne Plaza Resort, Lake Placid
(to be presented again in Binghamton on September 14, 2018 and in Albany on November 9, 2018)

Raise the Age
Thursday, May 31, 2018
Sheraton Syracuse University Hotel

Child Marriage CLE Required

As you know, since July 2017, the law prohibits marriage of minors under age 17. Marriage is permitted for minors ages 17 and 18 with parental consent, but only upon application to, and approval by, a Justice of the Supreme Court or Judge of the Family Court. Under the statute, an AFC must be appointed and in order to accept an assignment of this kind, the AFC must have special training which is available on the Office of Attorneys for Children website at nycourts.gov/ad3/oac/CLE and entitled, "*An Overview and Discussion of the Implications of Chapter 35 of the Laws of 2017: Legislation which Amends DRL § 13-b and 15-a Prohibiting Marriages of Minors Under the Age of 17 and Raising the Age of Consent to Marriage to the Age of 17*".

Web page

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

FOURTH DEPARTMENT NEWS

New Advisory Committee Members

Presiding Justice Gerald J. Whalen has appointed the following new members to the Fourth Department AFC Advisory Committee: Hon. Deborah Haendiges (Supreme Court, Erie County), Hon. John Gallagher, Jr. (Supreme Court, Monroe County, Supervising Judge of Family Courts, Seventh Judicial District), Hon. Brian Dennis (Family Court, Ontario County), Hon. Paul Deep (Family Court, Oneida County), Maria Reed (AFC Monroe County).

New Liaisons

Welcome and thanks to new County Liaisons, Shelley Truex, Niagara County and Ruth Chaffee, Steuben County.

Late Spring Seminar Schedule

April 12-13, 2018

Introduction to Effective Representation of Children
East Avenue Inn & Suites
Rochester, NY

May 3, 2018

AFC Update
Center for Tomorrow
Buffalo, NY

May 31, 2018

Topical Seminar
Raise the Age
Co-Sponsored w/ 3rd Dept.
(seating limited)
Genesee Grande
Syracuse, NY

Tentative Fall Seminar Schedule

September 14, 2018

Update (Half-day)
Mayville, NY

September 26, 2018

Update (Half-day)
Embassy Suites
Syracuse, NY

October 25, 2018

Update
Quality Inn and Suites
Batavia, NY

October 11-12, 2018

Introduction to Effective Representation of Children
Century House
Latham, NY

RECENT BOOKS AND ARTICLES

ATTORNEY FOR THE CHILD

Margaret Drew, *Collaboration and Intention: Making the Collaborative Family Law Process Safe(R)*, 32 Ohio St. J. On Disp. Resol. 373 (2017)

Jill Friedman et. al., *Legal Challenges and Resources for Children with Special Needs,* 308-OCT N.J. Law. 36 (2017)

Robert N. Jacobs & Christina Riehl, *Doing More for Children With Less: Multidisciplinary Representation of Poor Children in Family Court and Probate Court,* 50 Loy. L.A. L. Rev. 1 (2017)

CHILD SUPPORT

John E. B. Myers, *Documentary Evidence in Child Support Litigation,* 29 J. Am. Acad. Matrim. Law. 331 (2017)

CHILD WELFARE

Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship,* 95 Neb. L. Rev. 885 (2017)

Bradley Kaufman, *Protecting Subject Children in Family Court and Beyond: The Necessity to Utilize Identical Confidentiality Measures Between Article 6 Lincoln Hearings and Article 10 Lincoln Hearings,* 33 Touro L. Rev. 1189 (2017)

Kamala London et. al., *Does it Help, Hurt, or Something Else? The Effect of a Something Else Response Alternative on Children's Performance on Forced-Choice Questions,* 23 Psychol. Pub. Pol'y & L. 281 (2017)

Stacia N. Stolzenberg et. al., *Spatial Language, Question Type, and Young Children's Ability to Describe Clothing: Legal and Developmental Implications,* 41 Law & Hum. Behav. 398 (2017)

CHILDREN'S RIGHTS

Michael S. Isselin, *#STOPIMMUNIZING: Why Social Networking Platform Liability is Necessary to Provide Adequate Redress for Victims of Cyberbullying,* 61 N.Y.L. Sch. L. Rev. 369 (2016-2017)

Albert G. Mendoza, *SB 1052: Miranda Rights for Minors,* 48 U. Pac. L. Rev. 801 (2017)

CONSTITUTIONAL LAW

Annette R. Appell, *Gendered Due Process of Juvenile Justice,* 53 Wash. U. J. L. & Pol'y 201 (2017)

Scott W. Gaylord & Thomas J. Molony, *Individual Rights, Federalism, and the National Battle Over Bathroom Access,* 95 N.C. L. Rev. 1661 (2017)

Paige N. Johnson, *Wading Through the Federal Thicket of School Dress Code Jurisprudence: How the Supreme Court Can Protect Students' Rights Control Their Appearance,* 55 U. Louisville L. Rev. 229 (2017)

COURTS

Sarah Cullum & Mackenzie Shearer, Brooke S.B. v. Elizabeth A. C.C.: *A Long-Overdue Victory for Estranged Same-Sex Parents in New York's Highest Court,* 26 Tul. J. L. & Sexuality 163 (2017)

Allison E. Davis, *Roadway to Reform: Assessing the 2015 Guidelines and New Federal Rule to the Indian Child Welfare Act's Application to State Courts,* 22 Suffolk J. Trial & App. Advoc. 91 (2016-2017)

Angela Nascondiglio, *The Cost of Comfort: Protecting a Criminal Defendant's Constitutional Rights When Child Witnesses Request Comfort Accommodations,* 61 N.Y.L. Sch. L. Rev. 395 (2016-2017)

CUSTODY AND VISITATION

Jordyn L. Bangasser, *Missing the Mark: Alienation of Affections as an Attempt to Address Parental Alienation in South Dakota,* 62 S.D. L. Rev. 105 (2017)

Hilary Vesell, *Parental Alienation and Reconciliation Therapy: Moving Toward Healthy Families,* 88 Pa. B.A. Q. 185 (2017)

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Susan Saab Fortney, *Collaborative Divorce: What Louis Brandeis Might Say About the Promise and Problems?,* 33 Touro L. Rev. 371 (20170

DOMESTIC VIOLENCE

Kate Ballou, *Failure to Protect: Our Civil System's Chronic Punishment of Victims of Domestic Violence,* 31 Notre Dame J. L. Ethics & Pub. Pol'y 355 (2017)

Margaret Groban, *The Federal Government's Role in Securing Justice in Domestic Abuse Cases,* 69 Me. L. Rev. 235 (2017)

Lauren Oppenheimer, *Untangling the Court's Sovereignty Doctrine to Allow for Greater Respect of Tribal Authority in Addressing Domestic Violence,* 76 Md. L. Rev. 847 (2017)

EDUCATION LAW

Stephanie D. Ashley, *New York's Persistent Denial of New York City Educational Rights: Ten Years After Campaign for* Fiscal Equity v. New York, 47 Seton Hall L. Rev. 1045 (2017)

Elizabeth A. Beal, *Not Just Horsing Around: Providing a Free and Appropriate Public Education by Deeming Hippotherapy to be the "Basic Floor of Opportunity" for Children With Cerebral Palsy,* 9 Ky. J. Equine, Agric. & Nat. Resources L. 101 (2016-2017)

Ava L. Ferenci, *Quasi-State Actor: How the Application of State Action Doctrine Can Fill a Regulatory Gap in New York Charter School Legislation,* 20 N.Y.U. J. Legis. & Pub. Pol'y 555 (2017)

Aaron Lawson, *Straight Outta Compton: Witness the Strength of Disability Rights Taking One Last Stand for Education Reform,* 67 Syracuse L. Rev. 551 (2017)

L. Kate Mitchell, *"We Can't Tolerate That Behavior in This School!": The Consequences of Excluding Children With Behavioral Health Conditions and the Limits of the Law,* 41 N.Y.U. Rev. L. & Soc. Change 407 (2017)

Yasser Arafat Payne & Tara Marie Brown, *"It's Set Up For Failure... And They Know This!": How the School-to-Prison Pipeline Impacts the Educational Experiences of Street Identified Black Youth and Young Adults,* 62 Vill. L. Rev 307 (2017)

Katherine M. Portner, Tinker's *Timeless Teaching: Why the Heckler's Veto Should Not be Allowed in Public High Schools,* 86 Miss. L. J. 409 (2017)

Rachel Rubenstein, *Sex Education: Funding Facts, Not Fear,* 27 Health Matrix 525 (2017)

Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District,* 111 Nw. U. L. Rev. 945 (2017)

Ariel G. Sin.er, *Dressing to Impress? A Legal Examination of Dress Codes in Public Schools,* 57 Santa Clara L. Rev. 259 (2017)

Sue Swenson, *Taking Intellectual Disability Seriously Shows us That Education is a Human Right,* 42 Hum. Rts. 18 (2017)

Sam Williamson, C.G. Ex Rel. Grimm v. Gloucester County School Board: *Broadening Title IX's Protections for Transgender Students,* 76 Md. L. Rev. 1102

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Molly F. Anderson, *Evidence-Based Public Health is the Answer to Increasing American Childhood Vaccination Rates, Not Legislative Fortitude,* 10 St. Louis U. J. Health L. & Pol'y 293 (2017)

L. Morgan Eason, *A Bone to Pick: Applying a "Best Interest of the Family" Standard in Pet Custody Disputes,* 62 S.D. L. Rev. 79 (2017)

Alexis Jablon, *Legislative Update: Helping Families in Mental Health Crisis Act,* 37 Child. Legal Rts. J. 178 (2017)

Kate Jamruk, *The Weight Game: Fighting Childhood Obesity With Childhood Video Technology,* 37 J. Legal. Med. 175 (2017)

Kierstin Jodway, *Pumping 9 to 5: Why the FLSA'S Provisions Provide Illusory Protections for Breastfeeding Moms in the Workplace,* 4 Belmont L. Rev. 217 (2017)

Tara R. Melillo, *Gene Editing and the Rise of Designer Babies,* 50 Vand. J. Transnat'l L. 757 (2017)

Angela Onwuachi-Willig, *Extending the Normativity of the Extended Family: Reflections on* Moore v. City of East Cleveland, 85 Fordham L. Rev. 2655 (2017)

Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage,* 92 Notre Dame L. Rev. Online 87 (2017)

Carol Strickman, *Gender and Incarceration - Family Relationships and the Right to be a Parent,* 39 W. New Eng. L. Rev. 401 (2017)

Frej Klem Thomsen, *Childhood Immunization, Vaccine Hesitancy and Provaccination Policy in High-Income Countries,* 23 Psychol. Pub. Pol'y & L. 324 (2017)

IMMIGRATION LAW

Vanessa Martinez, *Family Detention: Why the Decision in* R.I.L.-R v. Johnson *Fails to Address the Consequences of Family Detention and the Need to Implement Alternatives,* 18 Rutgers Race & L. Rev. 145 (2017)

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Brittney E. Ciarlo, State v. Hand, 43 Ohio N.U. L. Rev. 593 (2017)

Christina M. Dines, *Minors in the Major Leagues: Youth Courts Hit a Home Run for Juvenile Justice,* 31 Notre Dame J. L. Ethics & Pub. Pol'y 175 (2017)

Ashley N. Longcor, *Juvenile or Adult? Lost in Interpretation: The Split of Interpreting a "Prior Record" Under the Federal Juvenile Delinquency Act,* 38 Mitchell Hamline L.J. Pub. Pol'y & Prac. 3 (2017)

Farah Rahaman, *Utilizing Judicial Discretion to Address Disproportionate Minority Contact,* 18 Rutgers Race & L. Rev. 181 (2017)

Hillela B. Simpson, *Parents not Parens: Parental Rights Versus the State in the Pre-Trial Detention of Youth,* 41 N.Y.U. Rev. L. & Soc. Change 477 (2017)

TERMINATION OF PARENTAL RIGHTS

Rachel N. Shute, *Disabling the Presumption of Unfitness: Utilizing the Americans With Disabilities Act to Equally Protect Massachusetts Parents Facing Termination of Their Parental Rights,* 50 Suffolk U. L. Rev. 493 (2017)

FEDERAL COURTS

Hague Convention Petition Properly Dismissed Where Retention Occurred Before Convention Entered Into Force Between Two Countries

The father filed a Hague Convention petition for the return of the children to Thailand on September 9, 2016, within one year of the date the mother advised him that she and the children would not be returning to Thailand. The mother moved to dismiss the petition, arguing, among other things, that any wrongful retention of the children took place before the Convention entered into force between the United States and Thailand. The district court granted the motion to dismiss. "Retention" was a singular and not a continuing act, and retention occurred on October 7, 2015, when the mother sent an email to the father advising that she and the children were not returning to Thailand. The Convention did not enter into force between the United States and Thailand until April 2016, after the United States accepted Thailand's accession to the Convention. Therefore, retention occurred before the Convention entered into force between the two countries. The Second Circuit affirmed. "Retention" was a singular act that occurred on a fixed date and not a continuing act. The Convention did not "enter into force" until a ratifying state accepted an acceding state's accession, and applied to removals and retentions taking place after the Convention had entered into force.

Marks v. Hochhauser, 876 F.3d 416 (2d Cir. 2017)

COURT OF APPEALS

Petitions Alleging Willful Violations of Two Temporary Orders Properly Sustained Notwithstanding Dismissal of Family Offense Petition

Family Court determined that petitioner had presented insufficient evidence to sustain the family offense petition, but that she had proven respondent's willful violations of two temporary orders through email communications unrelated to the child's visitation or any emergency. The court dismissed the family offense petition, but sustained the violation petition, and issued a one-year final order of protection. The Appellate Division affirmed, with one justice dissenting on the ground that the court lacked jurisdiction to issue a final order of protection because the family offense petition had been dismissed. The Appellate Division certified to the Court of Appeals the question of whether its order was properly made. The
Court of Appeals affirmed. While FCA § 812 provided jurisdiction over specified family offenses, and the violation of a temporary order of protection did not necessarily involve a family offense, FCA §
115 (c) stated that the court had such other jurisdiction as was provided by law. Family Court Act §§ 846 and 846-a provided that jurisdiction, and contained no language tying the court's authority to impose penalties for the willful violation of a temporary order of protection to the court's disposition of the family offense petition. The statutory scheme also made clear that conduct constituting a violation of the order of protection did not necessarily need to constitute a separate family offense in order for the court to have jurisdiction over the violation. Allowing the court to retain jurisdiction over the violations reinforced the goals of protecting victims and preventing domestic violence and of resolving intra-family disputes in Family Court without the need to resort to the criminal forum, where harsher sanctions, such as lengthier incarceration periods, could be imposed for criminal contempt.

Matter of Lisa T. v. King E. T., 30 NY3d 548 (2017)

Board Could Consider YO Adjudication When Assessing Offender's Risk Level Under Sex Offender Registration Act

Defendant was convicted of first-degree rape, which he committed at the age of 19. He thereby became subject to the sex offender registration requirements of New York's Sex Offender Registration Act (SORA), N.Y. Correction Law § 168 et seq. Pursuant to the guidelines, the State Board of Examiners of Sex Offenders (Board) gave defendant a score of 115 points on the Board's Risk Assessment Instrument, including 25 points for defendant's "criminal history" factors, based solely on his Youthful Offender adjudication for third-degree criminal possession of stolen property, committed when he was 17 years old. Based on the total risk factor score, the Board assessed defendant a Level III (high) risk to reoffend and did not recommend a departure from this risk assessment. Without the additional 25 points derived from his YO adjudication, defendant's score would have placed him in the Level II category. Supreme Court designated defendant a Level III sex offender. The Appellate Division affirmed. The Court of Appeals affirmed. The Board could consider a Youthful Offender adjudication when assessing an offender's risk level under SORA. The legislature intended to allow the Board to consider the full spectrum of an offender's prior unlawful conduct. Criminal Procedure Law § 720.35(2) provided the Board with access to YO-related documents. The legislature intended to prevent those who commit youthful transgressions from carrying the stigma accompanying a conviction, not from suffering the consequences that flow from any subsequent acts committed as adults. Although the legislature made a policy choice to give a class of young people a distinct benefit, using a YO adjudication in assessing points did not violate the CPL, and defendant's arguments were for the legislature and the Board to consider.

People v. Francis, __ NY3d ___, 2018 WL 827439 (2018)

APPELLATE DIVISIONS

ADOPTION

Father Notice Parent Only

Family Court determined that respondent father's consent was not required for the child's adoption. The Appellate Division affirmed. Clear and convincing evidence supported the determination that the father failed to maintain substantial and continuous or repeated contact with the child. There was no basis to disturb the finding that the father's unsubstantiated accounts of financial support were not credible and, even by his own account, his contact with the child was minimal. Therefore, there was no need for the court to determine whether the father forfeited his right to consent to the adoption.

Matter of Aniyah G., 154 AD3d 536 (1st Dept 2017)

Father's Consent to Adoption Not Required

Family Court found that respondent father's consent was not required for the child's adoption, and, in the alternative, that he abandoned the child, and terminated his parental rights. The Appellate Division affirmed. Clear and convincing evidence supported the finding that respondent's consent was not required for the child's adoption. His testimony that he paid child support between 2007 and 2010 was insufficient to show that he was a consistent source of support for the child inasmuch as he also testified that he paid no support between 2012 and the 2014 petition. Clear and convincing evidence also supported the alternative finding that even if respondent was a consent father, he abandoned the child because the foster mother's testimony, as well as his own, established that he did not attempt to contact the child or the agency during the relevant statutory period. The court was not required to hold a dispositional hearing after it entered the alternate finding of abandonment.

Matter of Gabriella Kamina M., 154 AD3d 600 (1st Dept 2017)

Father's Consent to Adoption Not Required

Family Court found that respondent father's consent was not required for the child's adoption, and, in the alternative, that he abandoned the child, and granted the petition to transfer and commit the custody and guardianship of the child to petitioner and the Commissioner of Social Services. The Appellate Division affirmed. Respondent failed to maintain substantial and continuous or repeated contact with the child by paying towards the child's support and either visiting the child monthly or communicating with him regularly. Respondent was gainfully employed while at liberty and did not provide meaningful support for the child. Respondent's claims that he bought clothes for the child and gave the mother a debit card were unsubstantiated. There was clear and convincing evidence that respondent abandoned the child. He failed to establish that the hardship from his incarceration during the six months preceding the filing of the petition so permeated his life that contact with the child was not feasible.

Matter of Jayden N.H., 156 AD3d 543 (1st Dept 2017)

Father Whose Consent to Adoption Not Required Was Not Aggrieved by Order of Disposition

Family Court approved petitioner agency's permanency goal of adoption. The Appellate Division dismissed the appeal. Respondent father, whose consent was not required for the child's adoption, indisputably received the required notice and opportunity to be heard regarding the child's best interests, and therefore, was not aggrieved by the order of disposition. Even if consideration of the appeal were proper, the agency met its burden of proving, by a preponderance of the evidence, that adoption was in the child's best interest. The child was thriving in her foster care home, where she had been living with her half-sister for two years, had bonded with her pre-adoptive foster parents, and was receiving treatment for her special needs. The father had virtually no relationship with the child, limited financial resources, and an untreated mental illness.

Matter of Natalia R., 156 AD3d 576 (1st Dept 2017)

Consent of Biological Father Not Required

Family Court determined that respondent was not a father whose consent to the adoption of the subject children was required. The Appellate Division affirmed. A child born out of wedlock may be adopted without the consent of the child's biological father, unless the father showed that he maintained substantial and continuous or repeated contact with the child, as manifested by: (I) the payment by the father toward the support of the child..., and either (ii) the father's visiting the child at least monthly when physically and financially able to do so..., or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so. Here, it was undisputed that the biological father made no child support payments since 2012, despite an order directing him to pay at least $50 per month, and that he was thousands of dollars in arrears. Thus, regardless whether he regularly communicated and visited with the child the court properly determined that he was a notice father. Further, the court's determination that the father failed to visit or communicate with the child regularly was supported by clear and convincing evidence.

Matter of Kolson (Janna A. – Michael T.), 154 AD3d 1665 (4th Dept 2017)

Abandonment of Child Not Established by Clear and Convincing Evidence

Family Court dismissed a petition filed by the father and his spouse seeking to adopt the child together, and awarded the mother visitation with the child. The Appellate Division affirmed. A parent's consent to adoption was required unless that parent evinced an intent to forego his or her parental rights and obligations by failing for a period of six months to visit the child, or to communicate with the child or the person having legal custody of the child, although able to do so. Where the person having custody of the child thwarts or interferes with the noncustodial parent's efforts to visit or communicate with the child, a finding of abandonment was inappropriate. The mother testified that she repeatedly sent messages to the father and his spouse seeking to reestablish her relationship with the child and that, each time she did so, they ignored her messages or the father merely insisted that she agree to the adoption. Inasmuch as the evidence established that the father and his spouse thwarted or interfered with the mother's efforts to visit or communicate with the child, abandonment of the child was not established by clear and convincing evidence.

Matter of Lydia A.C. v Gregory E.S., 155 AD3d 1680 (4th Dept 2017)

ARTICLE 78

No Error for Administrative Law Judge to Admit Child's Hearsay Testimony

Petitioner commenced a CPLR Article 78 proceeding to review a determination of the OCFS, which partially denied petitioner's application to have a report maintained by the Central Register of Child Abuse and Maltreatment, amended to be unfounded and expunged. The petitioner had been accused of sexually abusing his fiance's two daughters which resulted in an indicated report of child abuse and maltreatment. After an administrative review and hearing, OCFS partially granting petitioner's application, finding that it had not been established by a preponderance of the evidence that petitioner had sexually abused the younger of the two children. However, the preponderance of the evidence established that petitioner had sexually abused the older child, and both children had been mistreated. The Administrative Law Judge found to be credible, the hearsay testimony of the older child which consisted of video taped interviews between a CPS caseworker and the older child, wherein the older child detailed the sexual abuse by petitioner. The ALJ also found that the petitioner's testimony lacked credibility, particularly where his testimony included unbelievable claims of abuse of the children by their mother.

Matter of Michael NN., 155 AD3d 1463 (3d Dept 2017)

ATTORNEY CLIENT RELATIONSHIP

Appellate Counsel Relieved from Representing Appellant Where Appeal Deemed Frivolous

Counsel for the appellant made a motion to be relieved as the appellant's attorney because the appeal did not involve any non-frivolous issues. The appellant was the

petitioner in an family offense proceeding in Family Court which was dismissed when the appellate failed to have the petition personally served, arguing that he did not have the respondent's mailing address. While the appellant appealed the dismissal of his petition, the Court agreed with the appellant's attorney, that appellant's appeal was frivolous, and as such, the attorney was relieved as appellate counsel.

Matter of David ZZ. v. Thomas ZZ., 155 AD3d 1289 (3rd Dept 2017)

CHILD ABUSE AND NEGLECT

Father Neglected Two Older Children and Derivatively Neglected Youngest Child

Family Court determined that respondent father neglected the subject children A and JS, and derivatively neglected the subject child JB. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the father neglected the children A and JS by failing to provide proper supervision, sufficient food, and inflicting excessive corporal punishment on them. The caseworker testified that both A and JS told her that the father left them alone for extended periods, did not provide sufficient food, and hit them with a belt when they did not clean or refused to panhandle, and that they were afraid of him. The children's out-of-court statements were partly corroborated by the mother's testimony that she found them alone in the father's residence, without food, and she had seen the father slap A and had seen marks on A's body. The children's statements were sufficient to support a finding of excessive corporal punishment, beyond what was reasonable to discipline the children. The court properly drew a negative inference against the father for his failure to testify and providently exercised its discretion to deny the father's application to compel the children to testify. The evidence of the father's neglect of the older children demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to any child in his care, thus supporting the finding that he derivatively neglected JB.

Matter of Antonio S., 154 AD3d 420 (1st Dept 2017)

Father Neglected Child by Engaging in DV in Child's Presence

Family Court determined that respondent father neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the father neglected the child. The mother testified that the father committed acts of domestic violence against her on at least two occasions, while the child was in close proximity, thus subjecting the child to actual or imminent risk of physical impairment. The court drew the strongest negative inference against the father for his failure to testify. The mother's detailed testimony about the acts of domestic violence was corroborated in part by the caseworker's testimony, photos documenting the injuries, and medical records relating to yet another incident of domestic violence. Moreover, based upon the mother's testimony that the father was never sober, used drugs every day, and smoked marijuana while caring for the child, a prima facie showing of neglect was established. The father failed to defeat the finding inasmuch as he failed to demonstrate that he was voluntarily and regularly participating in a recognized rehabilitative program.

Matter of Zelda McM., 154 AD3d 573 (1st Dept 2017)

Dismissal of Neglect Petition Reversed

Family Court dismissed the neglect petition with respect to J. The Appellate Division reversed, entered a finding that respondent father neglected J, and remanded the matter for a dispositional hearing. The mother testified that the father choked her in the presence of the six-year-old child I and a couple of feet from where four-month-old J was sleeping in his crib. The mother's testimony was supported by shelter records and the father did not testify. The court found that the mother's testimony supported a finding of neglect with respect to I. The same evidence also supported a finding of neglect with respect to J. J was in imminent danger of physical impairment due to his close proximity to the violence. The father's assertions that J was "somewhere else" in the one room residence at the time of the attack was unsupported by the record.

Matter of Isabella S., 154 AD3d 606 (1st Dept 2017)

Father Neglected Child by Engaging in DV in Child's Presence

Family Court found that respondent neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the respondent neglected the children, including that respondent engaged in acts of domestic violence against the mother while the children were in the home and that they were affected by what they witnessed.

Matter of Elijah T., 154 AD3d 635 (1st Dept 2017)

Father Abused Three-Month-Old Child

Family Court found that respondent father abused and neglected the subject child. The Appellate Division affirmed. Petitioner proved by a preponderance of the evidence that respondent neglected and abused the child. Medical evidence and testimony established that the almost three-month-old child's injuries were the result of an abusive head trauma sustained when the child was in respondent's exclusive care. Respondent failed to rebut petitioner's case with any credible evidence about the child's condition. The court properly rejected respondent's expert's theory that the child's injuries were the result of benign enlargement of the subarachnoid spaces inasmuch as that diagnosis did not explain the child's retinal hemorrhages or other symptoms.

Matter of Jeremiah D., 155 AD3d 414 (1st Dept 2017)

Respondent Parents Neglected Child by Failing to Provide Adequate Nutrition

Family Court found that respondent parents neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent parents neglected the child, who had severe physical and neurological anomalies, by failing to provide her with adequate nutrition, by missing appointments with medical professionals and specialists, and by being lax in their day-to-day oversight of her care and safety.

Matter of Izabela S., 155 AD3d 446 (1st Dept 2017)

Father Neglected Child by Failing to Plan For Child's Future

Family Court determined that respondent father neglected the subject child. The Appellate Division affirmed. The court erred in making a finding of neglect based upon abandonment because the petition did not allege abandonment and the petition was never properly amended to include that allegation. There was sufficient proof to sustain the original petition without considering the new allegations of abandonment. The father repeatedly indicated no desire to have contact with the child, failed to visit the child, and failed to plan for the child's care. He had no permanent home and failed to provide proof of any verifiable income. The father's abdication of parental obligations placed the child at imminent risk of harm. The father's failure to testify permitted the strongest inference against him that the opposing evidence in the record allowed.

Matter of Malachi B., 155 AD3d 492 (1st Dept 2017)

Father Sexually Abused Stepdaughter

Family Court found that respondent ES sexually abused his stepdaughter W. The Appellate Division affirmed. Respondent's attempt to seek review of the court's earlier ruling under *Frye* was not reviewable because respondent did not appeal from that order. Respondent's contention that petitioner's expert's testimony lacked a proper foundation was without merit. The expert provided detailed information about the guidelines she used to interview the child, as well as her analysis of the interview using Sgroi's framework. A proper foundation did not require general acceptance in the scientific community, but, as here, could be properly laid by the expert based on her personal knowledge acquired through professional experience. Any alleged deviations from established protocols went to the weight of the expert's testimony. In any event, the record supported that the expert adhered closely to the protocols, in that she refrained from using leading or suggestive questions, considered alternative hypotheses, and endeavored to promote an objective, neutral stance in conducting the evaluations. The court did not abuse its discretion in relying upon the expert's testimony as providing sufficient validation and corroboration for the child's out-of-court statements. Given the reliability and admissibility of the expert's

testimony, the court's finding of sexual abuse was supported by a preponderance of the evidence. In addition to the expert's testimony, the child's spontaneous, repeated, unrecanted descriptions of the abuse and the lack of any motive to fabricate the allegations, also supported the finding. Respondent did not testify and his case rested on the testimony of his expert, who did not interview the child and could not provide an opinion whether the child was abused.

Matter of Wendy P., 155 AD3d 515 (1st Dept 2017)

Vacatur of Neglect Finding Not Authorized Under Family Court Act

Family Court denied respondent mother's motion to modify the order of disposition. The Appellate Division affirmed. Modification of the dispositional order and vacatur of the neglect finding was not authorized under the Family Court Act inasmuch as that statute allowed only dismissal at the fact-finding stage. Modification and vacatur were not warranted under Family Court Act § 1061 because the mother failed to demonstrate good cause that the relief sought promoted the best interests of the child. The mother neither sought a hearing at which she might testify, nor submitted an affidavit in support of her motion. She had a history with child protective proceedings, including two neglect proceedings involving the subject child. The record did not reflect evidence of remorse, acknowledgment of her past parental deficiencies, or amenability to correction.

Matter of Frankie S., 155 AD3d 559 (1st Dept 2017)

Amended Family Court Act §1051 (e) Not Retroactive

Family Court found that respondent JC abused and severely abused Angel and derivatively abused and severally abused Diamond. The Appellate Division modified by vacating the finding of severe abuse as to Angel. The court's determination that respondent was a person legally responsible for Angel was supported by a preponderance of the evidence. However, the court could not make a finding of severe abuse as to Angel because he was not that child's parent. The now amended Family Court Act 1051 (e), which became effective after the fact-finding order was entered, could not be retroactively applied inasmuch as nothing in the legislative history established that it was intended to have retroactive effect, and the amendment stated that it was not to take effect until 90 days after it was signed. A preponderance of the evidence demonstrated that respondent abused Angel. The child's out-of-court statements, as recounted by his step-mother, the ACS caseworker, and the examining doctor, were sufficiently corroborated by their observations of the child's injuries and his hospital records. Clear and convincing evidence demonstrated that respondent's actions constituted derivative abuse and derivative severe abuse of respondent's biological child Diamond, inasmuch as his actions evinced depraved indifference to Angel's life, and resulted in serious and protracted disfigurement.

Matter of Angel P., 155 AD3d 569 (1st Dept 2017)

Mother's Mental Condition Resulted in Imminent Danger to Child

Family Court, upon a finding of neglect, placed the child in the custody of the Commissioner of Social Services until the next permanency hearing, and directed that respondent mother, among other things, comply with her mental health services. The Appellate Division affirmed. The court's finding of neglect was supported by a preponderance of the evidence. There was no basis to disturb the court's determination 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. At the time the petition was brought, the child was about 14 months old. The record reflected that the mother had a history of mental illness, including two involuntary hospitalizations that occurred after the birth of the child. The mother told her caseworker that the child resided with the maternal grandmother while she was hospitalized, but did not know how he got there. Agency records showed that the mother missed appointments, resisted filling out paperwork, and engaged in inappropriate behavior, including screaming in hallways and threatening staff.

Matter of Tyzavier M., 155 AD3d 578 (1st Dept 2017)

Respondent Half-Brother Sexually Abused Child

Family Court found that respondent was a person legally responsible for the subject child when he abused

her. The Appellate Division affirmed. Respondent failed to preserve for review his contention that he was not a person legally responsible for the subject child when he sexually abused her and the AD declined to consider it. If the contention were considered, the record supported the determination that respondent, the child's older half-brother, was a person legally responsible for the child. The child testified that respondent repeatedly sexually abused her over a period of nearly four years, and that her mother did not believe her when she disclosed, which resulted in a neglect finding against the mother. Although respondent was a minor when he began abusing his half-sister, who was five years younger than he, minor siblings can fall within the ambit of a "person legally responsible." Further, respondent reached the age of majority when some of the acts of sexual abuse occurred.

Matter of Giannis F., 156 AD3d 446 (1st Dept 2017)

Mother Neglected Children by Exposing Them to Domestic Violence

Family Court found that respondent mother neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the respondent neglected the children. The children were subject to actual or imminent danger of injury or impairment to their emotional and mental condition as a result of exposure to repeated acts of domestic violence between the mother and other family members, including the father of one of the children. In each of the incidents, the children were in the apartment and were in imminent danger of physical impairment because they were in close proximity to violence directed against a family member, even absent evidence that they were aware of or emotionally impacted by the violence. The court also properly found neglect based upon the mother's failure to provide adequate shelter inasmuch as she took no steps to remedy the condition of the room she shared with the children, which was cluttered with boxes and plastic bags containing the children's laundry, which she said she had not washed for one year.

Matter of Andru G., 156 AD3d 456 (1st Dept 2017)

Father's Conduct Constituted Neglect

Family Court found that respondent father neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent neglected the subject child. The testimony established that respondent's focus on his unfounded belief that he was being watched as part of a conspiracy against him affected his ability to exercise a minimum degree of care and caused the child to become impaired and threatened to further impair the child's physical, emotional and mental conditions. As a result of the irrational belief, respondent socially isolated the child by keeping him confined to an unsanitary room in a shelter. The child was unkempt and without the resources to bathe for over one month. Respondent's actions resulted in the child becoming extremely distraught, anxious and angry, to the point of attempting to cause injury to himself. A preponderance of the evidence also established that respondent educationally neglected the child by failing to promptly enroll him in school, provide him with the required instruction elsewhere, and provide a reasonable justification for the child's school absences.

Matter of Angelos F., 156 AD3d 506 (1st Dept 2017)

Father Sexually Abused Daughter; Finding of Derivative Neglect of Son Vacated

Family Court found that respondent father abused his daughter and derivatively neglected his son. The Appellate Division modified by vacating the finding of derivative neglect of the son. The court also granted the mother's petition seeking to modify a prior custody order to the extent of setting a visitation schedule for the father and otherwise marking the matter "settled." The Appellate Division modified by vacating the settled marking and remanded for a hearing on the mother's relocation. The court's determination that respondent sexually abused his daughter was supported by a preponderance of the evidence. The child's in-court testimony regarding the sexual abuse was sufficient to support the abuse finding. Inconsistences in the child's testimony were minor and peripheral. The child's inability to recall certain details of the abuse, which occurred six years before, was insufficient to render the whole of her testimony incredible. The court properly drew a negative inference from the father's failure to

testify, notwithstanding the ongoing criminal investigation. However, the court's determination that respondent derivatively neglected his son was not supported by a preponderance of the evidence. The neglect finding was based entirely on the father's alleged sexual abuse of the daughter, which occurred six years before. The children were differently situated such that respondent's conduct toward his daughter was insufficient to demonstrate that the son was at risk of harm. There was no evidence that the father's sexual abuse of the daughter was ever directed at the son, who was much younger than the daughter, or that he was aware of the abuse. There was no evidence that the son was ever at risk of becoming impaired, though he had supervised and unsupervised visitation with respondent, during the six years following the abuse. The court should not have deemed the mother's relocation petition settled. That issue required a hearing. The mother unilaterally moved to Florida, before there was a hearing on the petition, and without judicial or respondent's approval.

Matter of Demetrius C., 156 AD3d 521 (1st Dept 2017)

Mother Severely Abused Daughter

Family Court granted petitioner agency's motion for summary judgment on the issue of severe abuse of the subject child. The Appellate Division affirmed. The agency established prima facie that the child was severely abused by submitting respondent's criminal conviction of second-degree assault with respect to another of her children and a prior order of the court granting the agency's motion to excuse it from making diligent efforts, which respondent did not appeal. In opposition, respondent failed to raise a triable issue.

Matter of Alexander H., 156 AD3d 561 (1st Dept 2017)

Evidence Supported Finding That Mother Derivatively Severely Abused Child

The Family Court properly granted that branch of the petitioner's motion which was for summary judgment on the issue of whether the father derivatively severely abused the child A. The father's conviction of manslaughter in the second degree in connection with A.'s sibling's death established, prima facie, that he derivatively severely abused A. (*see* SSL § 384-b [8] [a] [iii]; FCA § 1051 [e]). The Family Court also properly found that the mother derivatively severely abused A. (*see* FCA § 1012 [e] [ii]). The evidence at the fact-finding hearing established that A.'s sibling, who was two months old (at the time of her death), sustained a rib fracture approximately two weeks before her death. The petitioner also presented evidence that the decedent child sustained retinal hemorrhages, a subdural hemorrhage, and a skull fracture with a severe brain injury, likely caused by nonaccidental head trauma with acceleration injuries, while in the exclusive care of the mother and the father. The medical examiner concluded that the child's death was a homicide, and that the injuries could not have been sustained spontaneously. The petitioner submitted the father's criminal conviction as evidence. The medical examiner testified that the injuries could have been inflicted as early as three days before the child was brought to the hospital, and that child would have shown immediate symptoms of her injuries, such as lethargy, limpness, vomiting, and fever. This evidence was sufficient to establish, by clear and convincing evidence, that the mother acted recklessly under circumstances evincing a depraved indifference to human life (*see* SSL § 384-b [8] [a]; *see* FCA § 1051 [e]).

Matter of Ying L., 153 AD3d 1408 (2d Dept 2017)

Family Court Erred in Granting Mother's Motion to Dismiss Petitions

The subject child I.L. was born on September 16, 2015, and tested positive for cocaine. At the time of the child's birth, the mother also tested positive for cocaine, as well as marijuana. Thereafter, the petitioner filed petitions alleging, inter alia, that the mother neglected I.L. and his four older siblings. The matter proceeded to a fact-finding hearing, and at the close of the petitioner's case the Family Court granted the mother's motion to dismiss the petitions for failure to establish a prima facie case. The petitioner appealed. The Appellate Division reversed. Contrary to the Family Court's determination, viewing the evidence in the light most favorable to the petitioner and affording it the benefit of every favorable inference which could be reasonably drawn from the evidence, the petitioner presented a prima facie case of neglect. At the fact-finding hearing, the evidence demonstrated that I.L.

tested positive for cocaine at the time of his birth, and that the mother tested positive for cocaine and marijuana at that time. Additionally, the mother admitted to the petitioner's caseworker that she had been using drugs since she was a teenager, and that she had never attended any drug treatment program. The mother, who had been suffering from depression since she was a teenager, reported that in the four months preceding I.L.'s birth, she stayed in bed all day until about 10:00 p.m., and barely interacted with her children. She further told the caseworker that shortly before I.L.'s birth, she started using cocaine to help her get out of bed, and smoking marijuana to help her appetite. She also admitted that she used cocaine three days prior to I.L.'s birth. This evidence established a prima facie case of neglect pursuant to FCA § 1046 (a) (iii) and, therefore, neither actual impairment of the children's physical, mental, or emotional condition, nor specific risk of impairment, needed to be established. Accordingly, the Family Court erred in granting the mother's motion to dismiss the petitions. Since the court terminated the proceedings at the close of the petitioner's direct case upon an erroneous finding that a prima facie case had not been established, a new hearing, and thereafter a new determination of the petitions, was required.

Matter of Terry C., 154 AD3d 697 (2d Dept 2017)

Record Supported Determination That Respondent Was a Person Legally Responsible for Child

In November 2014, the Administration for Children's Services (hereinafter ACS) commenced a proceeding alleging that the respondent neglected the subject child. After a fact-finding hearing, the Family Court found that the respondent was a person legally responsible for the child, and that he derivatively neglected the child. In an order of disposition, made after a hearing, the court, inter alia, placed the respondent under the supervision of ACS for a period of six months. The respondent appealed. The Appellate Division affirmed. The Family Court properly determined that the respondent, who was the boyfriend of the mother of the subject child, was a person legally responsible for the child (*see* FCA § 1012 [g]). The respondent, when before the court, referred to the child as his son, and testified at the fact-finding hearing that he visited the child's mother on a regular basis and interacted with the child during those visits. An ACS caseworker testified at the fact-finding hearing that, during one of her visits to the mother's home, she had heard the respondent refer to the child as his son and had observed him caring for the child.

Matter of Devonne W., 154 AD3d 723 (2d Dept 2017)

Record Supported Determination That Petitioner Failed to Establish That the Father Neglected His Children

The petitioner commenced related child protective proceedings alleging that the father neglected the subject children by perpetrating acts of domestic violence against the mother in their presence and by the misuse of alcohol. Following a fact-finding hearing, the Family Court determined that the petitioner failed to establish that the father neglected the children, and dismissed the petitions with prejudice. The petitioner appealed. The Appellate Division affirmed. The Family Court properly determined that the petitioner failed to establish by a preponderance of the evidence that the father neglected the children by perpetrating acts of domestic violence against the mother in their presence. Contrary to the petitioner's contention, evidence that the children witnessed an isolated incident of domestic violence was insufficient to establish that the physical, mental, or emotional condition of the children had been impaired or was in danger of becoming impaired. The Family Court also properly determined that the petitioner failed to establish by a preponderance of the evidence that the father neglected the children by misusing alcohol. There was insufficient evidence that the father misused alcoholic beverages to the extent that he lost self-control of his actions (*see* FCA § 1012 [f] [i] [B]), or that the physical, mental, or emotional condition of the children had been impaired or was in imminent danger of becoming impaired. Accordingly, the Family Court properly dismissed the petitions with prejudice.

Matter of Lavon D., 154 AD3d 849 (2d Dept 2017)

Respondent Acted as a Functional Equivalent of a Parent in a Familial or Household Setting for the Subject Children

During the summer of 2015, two of the subject children

(hereinafter together the older children) lived with their mother and her boyfriend, the respondent. Two other children of the mother and the respondent, half-siblings of the older children (hereinafter together the younger children), also resided in the home. The older children reported incidents to the petitioner, where the respondent would come home drunk and hit the mother or them, and one of them stated that the respondent repeatedly hit him with a belt. The older children each stated that they were afraid of the respondent. The petitioner filed neglect petitions against the respondent with respect to the four children. The Family Court dismissed the neglect petitions with prejudice, finding that the petitioner had not established that the respondent was a person legally responsible for the older children or that he had derivatively neglected the younger children. The petitioner appealed. The Appellate Division reversed. The Family Court erred in determining that the respondent was not a person legally responsible for the older children. The evidence here showed that the respondent, as the long-term live-in boyfriend of the mother of the older children, had frequent contact with the older children, as they all lived in the same home for a period of several weeks during the summer of 2015. The respondent is also the father of the two younger children, who also lived in the same home. The evidence further established that the respondent exercised control over the older children, supervising them when the mother was not present, mediating arguments between the siblings, and disciplining them. Accordingly, the respondent acted as the functional equivalent of a parent in a familial or household setting for the subject children. The Family Court also improperly determined that the respondent did not neglect the older children and did not derivatively neglect the younger children. The petitioner established, by a preponderance of the evidence, that the respondent committed acts of domestic violence against the mother in the presence of the older children which frightened them, and that the respondent inflicted excessive corporal punishment on one of the older children. Thus, the petitioner established by a preponderance of the evidence that the respondent neglected the older children and derivatively neglected the younger children. Accordingly, the Appellate Division reversed, reinstated the petitions with respect to the older children and the younger children, made findings that the respondent neglected those children, and remitted the matter to the Family Court for a dispositional hearing and determinations thereafter.

Matter of Engerys J., 154 AD3d 939 (2d Dept 2017)

Record Supported Finding of Neglect Based upon Excessive Corporal Punishment

The petitioner commenced a proceeding alleging that the mother had neglected the subject child. After making a finding of neglect against the mother, in an order of disposition dated September 13, 2016, the Family Court, inter alia, placed the subject child in the custody of the petitioner until the completion of the next permanency hearing. The mother appealed from the order of disposition. The Appellate Division affirmed. A preponderance of the evidence supported the Family Court's finding that the mother neglected the subject child by inflicting excessive corporal punishment on her. Contrary to the mother's contention, the child's out-of-court statements were sufficiently corroborated by the caseworker's hearing testimony regarding her observations of the child, as well as the child's medical records. Additionally, the Family Court providently exercised its discretion in drawing a negative inference from the mother's failure to testify.

Matter of Sharon M.M., 155 AD3d 629 (2d Dept 2017)

Family Court Erred in Making a Finding of Derivative Neglect Based upon an ACD

In July 2015, the county's Department of Social Services (hereinafter DSS) filed a neglect petition against the mother and father concerning the mother's child, who resided with the mother and father but was not his biological child. In September 2015, the Family Court made a finding of neglect against the mother, and granted an adjournment in contemplation of dismissal (hereinafter ACD) against the father based on his admission that he failed to provide a stable home for the child, who was not his biological child. The court also required the father to attend court-mandated substance abuse and mental health treatment. On April 15, 2016, the Family Court granted a pre-petition temporary removal of the mother and father's biological child, D., who was born in April 2016. DSS then filed a petition alleging derivative neglect against the parents, based

upon the court's prior finding of neglect against the mother and the ACD against the father, and upon both parents' noncompliance with conditions set forth by the court in September 2015. In the order appealed from, dated July 29, 2016, after a fact-finding hearing, the court made a finding of derivative neglect against both parents. Its finding against the father was based upon the ACD and his noncompliance with the conditions set forth by the court in September 2015. The father appealed. The Appellate Division reversed. The Family Court did not enter a finding of neglect against the father in 2015. Instead, it entered an ACD against him based on his admission that he failed to provide a stable home for the child. Moreover, DSS did not seek to reopen the earlier proceeding to establish the father's neglect based on his failure to comply with the conditions set forth by the court. Under these circumstances, the court erred in entering a finding of derivative neglect against the father. Accordingly, the Family Court should have denied the petition and dismissed the proceeding insofar as asserted against the father.

Matter of Richard D., 155 AD3d 723 (2d Dept 2017)

Record Did Not Support Derivative Finding of Abuse

The Administration for Children's Services (hereinafter ACS) commenced proceedings alleging, inter alia, that the father abused and neglected Ny. and derivatively abused and neglected Na. At a fact-finding hearing, ACS presented evidence that on August 9, 2015, Ny., who was then less than one month old, was admitted to the hospital with seizures and a history of vomiting. He was found to have sustained subdural hematomas and bilateral retinal hemorrhages. An expert in pediatrics testified that the cause of these injuries was "non-accidental trauma" indicative of a forceful motion or shaking of the child's head sustained sometime between the evening of August 6 and August 8, 2015. In addition, a bone survey revealed a fracture to Ny.'s lower left tibia. The expert testified that the leg fracture also was caused by "non-accidental trauma" and was sustained some time between August 1 and 4, 2015. ACS also presented evidence that at the time Ny. sustained the leg injury, he was under the care of his mother and the father, but when he sustained the head injuries, his mother was hospitalized and the father was his primary caretaker. The father presented the testimony of a physician, who testified that she had interviewed the father, and that he had admitted "vigorously" shaking Ny. in order to get him to stop crying. The physician further testified that this vigorous shaking was the cause of Ny.'s brain and eye injuries. In an order dated July 14, 2016, the Family Court, inter alia, made a finding of abuse against the father with respect to the head injuries sustained by Ny. and a finding of neglect against the father with respect to the leg injury sustained by Ny. The court also found that ACS failed to establish that the father derivatively abused or neglected Na. and dismissed the amended petition relating to that child insofar as asserted against the father. The court reasoned that Na., who was three years old at the time of the incident, was "beyond the age where the [father] could cause him those types of injuries by shaking him." The father appealed, and ACS cross-appealed. The Appellate Division modified. ACS established a prima facie case that the father abused Ny. (*see* FCA § 1012 [e]). Rather than rebutting ACS's case, the evidence submitted by the father confirmed that he had vigorously shaken Ny., causing his brain to bleed and his eyes to hemorrhage. Thus, the Family Court properly found that the father abused Ny. ACS also established a prima facie case that the father neglected Ny. (*see* FCA § 1012 [f] [i] [B]). Contrary to the father's contention, ACS was not obligated to prove that Ny. was exclusively in the father's care at the time that the leg injury occurred. Once ACS established that Ny. sustained an injury which would ordinarily not occur absent an act or omission of his parents or caretakers, and that the father was a caretaker of Ny. at the time that the injury occurred, the burden of explanation shifted to the father. The father, who declined to testify at the hearing, failed to provide a reasonable explanation for Ny.'s injuries, or establish that the injuries took place when the child was in the exclusive care of someone other than himself. Accordingly, the Family Court properly found that the father neglected Ny. Contrary to the contention of ACS, the Family Court properly found that ACS failed to establish that Na. was derivatively abused by the father (*see* FCA § 1012 [e] [ii]). However, ACS established, by a preponderance of the evidence (*see* FCA § 1046 [b] [i]), that the father derivatively neglected Na. (*see* FCA § 1012 [f] [i]).

The father's physical abuse of Ny. demonstrated a fundamental defect in his understanding of parental duties relating to the care of children, placing Na. in imminent danger of impairment of his physical, mental, or emotional condition (*see* FCA § 1012 [f] [I]). Accordingly, the court should have made a finding that the father derivatively neglected Na.

Matter of Vernon J., 155 AD3d 730 (2d Dept 2017)

Record Supported Denial of Mother's FCA § 1028 Application

The petitioner alleged that the mother failed to exercise a minimum degree of care after an incident in which one of her children was given the responsibility of escorting three of her siblings to school in Brooklyn from a shelter, and two of the children became lost. Six of the children were removed from the mother's care after this incident and placed in the care of their maternal grandmother. The mother made an application pursuant to FCA § 1028 to have those six children returned to her. The court denied that branch of her application which was for the return of the subject children. The mother appealed. The Appellate Division affirmed. The Family Court properly denied the mother's application which was for the return of the subject children. An application pursuant to FCA § 1028 (a) for the return of a child who has been temporarily removed shall be granted unless the court finds that the return presents an imminent risk to the child's life or health. There must be evidence that the harm or danger is imminent, that is, near or impending, not merely possible. The Family Court's determination had a sound and substantial basis in the record, as there was evidence that a return of those children to the mother would present an imminent risk to their lives or health. Additionally, the court's determination as to the mother's credibility was supported by the record.

Matter of Karen A., 156 AD3d 631 (2d Dept 2017)

Record Supported Finding of Neglect Based upon Use of Excessive Corporal Punishment

The order appealed from found that the father neglected the child M.B. and derivatively neglected the child C.B. The Appellate Division affirmed. The Family Court's finding of neglect was supported by a preponderance of the evidence. Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the welfare of the child (*see* PL§ 35.10 [1]), the use of excessive corporal punishment constitutes neglect (*see* FCA § 1012 [f] [i] [B]). Here, the evidence demonstrated that on more than one occasion, the father engaged in excessive corporal punishment of M.B. by acts which included repeatedly slapping her across the face, knocking her to the ground, hitting her once she was on the ground and punching her in the face with a closed fist, kicking her in the ribs while she was on the ground, and throwing a can of soda at her, which struck her on the forehead. M.B.'s out-of-court statements were sufficiently corroborated by the caseworker's observation of bruises on M.B.'s face, the father's admission to slapping M.B. and throwing her to the floor, hospital emergency room records, and out-of-court statements of C.B. The evidence that the father used excessive corporal punishment to discipline M. B. was sufficient to support the Family Court's determination that he derivatively neglected C.B. (*see* FCA § 1046 [a] [I]).

Matter of M.B., 156 AD3d 784 (2d Dept 2017)

Record Supported Finding of Neglect Based upon Mother's Mental Illness

The order appealed from found, inter alia, that the mother neglected the subject child on the ground that she suffered from a mental illness that impaired her ability to provide a minimum degree of care and supervision for the child. The Appellate Division affirmed. The Family Court's finding that the mother neglected the child was supported by a preponderance of the evidence, which demonstrated 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. The evidence demonstrated that the mother had a long history of psychological disturbances and hospitalizations, and that she did not comply with recommended medications and psychotherapy. The evidence also showed that the mother's bizarre behavior directly involved the child and created dangerous conditions within the household.

Matter of Tamika Q., 156 AD3d 786 (2d Dept 2017)

Single Incident of Excessive Corporal Punishment Did Not Establish Neglect

The petitioner alleged, inter alia, that the mother neglected the subject child, A., by inflicting excessive corporal punishment on her, and derivatively neglected her two other children as a result of the excessive corporal punishment inflicted upon the subject child. A., who was 13 years old at the time of the incident at issue, told the police and a caseworker that, as a result of a dispute over A. putting bleach in a load of dark-colored laundry, the mother struck her in the face, threw bleach in her face, and scratched her arm. At a fact-finding hearing, the mother testified that after she scolded A. for putting bleach in the dark-colored laundry, A. cursed at her. The mother admitted that she reacted by pouring bleach from the bottle onto A.'s clothing. This escalated into a physical altercation during which A. punched the mother and twisted her arm. The mother admitted that during the altercation she slapped A. a couple of times in the face. After the fact-finding hearing, the Family Court found that while the preponderance of the evidence established that the mother engaged in a physical altercation with A. during which the mother threw bleach toward A.'s face and A.'s arm was scratched, this single incident of excessive corporal punishment did not sufficiently establish that the mother neglected A. and derivatively neglected the other children. The petitioner appealed and the children separately appealed. The Appellate Division affirmed. The petitioner failed to establish by a preponderance of the evidence that the mother neglected A. and derivatively neglected the other children. Although a single incident of excessive corporal punishment may sometimes suffice to sustain a finding of neglect, the record here did not support such a finding. Given A.'s age and size, the provocation, and the dynamics of the incident, the mother's acts did not constitute neglect. Thus, the petitioner also failed to establish by a preponderance of the evidence that the other children, who did not even witness the incident, were derivatively neglected.

Matter of Khadine S., 156 AD3d 889 (2d Dept 2017)

FCA § 1028 Applies Where Father Was Excluded from Home

The petitioner, Administration for Children's Services (hereinafter ACS) filed five separate petitions against the father, alleging that he had sexually abused his 14 year-old niece on an unspecified date and that his five children were derivatively abused and/or neglected. The Family Court entered a temporary order of protection excluding the father from the residence where the children lived and from having contact with the children, and subsequently denied the father's motion for a prompt hearing pursuant to FCA § 1028 to challenge the propriety and necessity of the exclusion. In its written decision and order denying the father's motion for a FCA §1028 hearing, the court reasoned that such hearings are only appropriate where a child or children have been physically removed from their residence, a circumstance which was not present in this case. The father appealed. The Appellate Division reversed. Since the removal of a child from the family home and the exclusion of a parent from that same home require equal showings of imminent risk, and both result in similar infringements on the constitutionally protected parent-child relationship, both trigger the same due process protections. Where no “imminent risk” hearing is held before the parent is excluded from the household and the parent-child relationship is thereby severed, the holding of an expedited hearing within three court days pursuant to Family Court Act § 1028, upon the parent's request, is mandated so that the question of reunification of the parent and child pending resolution of the proceeding may be determined. Due process requires the parent's prompt, full, and fair opportunity to contest his or her exclusion from daily interaction with his or her children in this manner.

Matter of Elizabeth C., 156 AD3d 193 (2d Dept 2017)

Similar Testimony by All Five Children Served as Adequate Corroboration of Children's Hearsay Statements

The parents of five children appealed a decision of Family Court after a fact-finding hearing, wherein Family Court correctly determined that three of the five children were neglected by the parents. Much of the

evidence of neglect consisted of out-of-court statements made by the children, which Family Court appropriately found to have been sufficiently corroborated because they essentially mirrored one another as well as the testimony of the parents. The three children, ages 12, 10 and 5, told a DSS caseworker of an incident where the father became upset with the children after learning that they had cut their clothes with scissors. The children explained that the father separated them, screamed at them and rubbed his knuckles against their heads. The children found the father's behavior to be so frightening, that all three of them lost bladder control and wet themselves. The parents then attempted to interfere with the oldest child's attempt to obtain counseling services from their school. Consequently, Family Court appropriately determined that the parent's actions posed an imminent risk of emotional harm to the children, thereby warranting a finding of neglect against them.

Matter of Janan II., 154 AD3d 1082 (3d Dept 2017)

Children's Testimony About Father's Sexual Abuse and Alcohol Abuse Was Sufficient for Finding of Abuse, Derivative Abuse and Neglect

In a proceeding pursuant to Article 10 of the Family Court Act, the preponderance of the evidence demonstrated that the father abused and neglected his daughter, and neglected and derivatively abused his two sons. A proceeding was commenced by DSS as a result of the daughter's revelation to a rape crisis hotline, that the father had sexually abused her. While the father claimed that the daughter's out-of-court statements were not sufficiently corroborated and her testimony was not credible, Family Court found otherwise, noting that the child's account of the sexual abuse that she relayed to her caseworker, was consistent with her sworn testimony which Family Court also found to be credible. In light of the finding of abuse and neglect as pertained to the daughter, Family Court also correctly determined the father's two sons were derivatively abused. Family Court also correctly found that the father neglected all three children by abusing alcohol. The children's caseworker testified that the children reported seeing the father drink alcohol, with the daughter recounting that the father drank nearly every day and on occasion, would drive a car with one of his sons after he had been drinking alcohol. The daughter also explained that she believed the father to be under the influence when he sexually abused here, which resulted in the daughter experiencing bouts of depression and anxiety. The father himself admitted to a caseworker and to police that he drank approximately six beers per day. Consequently, the aforementioned evidence constituted *primia facia* proof that the father neglected his children.

Matter of Kylee R., 154 AD3d 1089 (3rd Dept 2017)

Mother's Violation of Safety Plan and Order of Protection Was Evidence of Neglect

The mother was appropriately adjudicated by Family Court to have neglected her three children (the father consented to a finding of neglect as relates to the child that he had with the mother) based upon an incident of domestic violence that occurred between the parents, as well as the mother's subsequent violations of court orders. In March of 2015, the mother called the police after a domestic violence incident with the father, which occurred at the home they shared. The mother told the responding officers that the father choked and punched her in close proximity to child they had in common. Upon a search of the residence, a marijuana growing operation was discovered and several pounds of the drug were confiscated. An order of protection was issued, directing the father to stay away from the mother and both parents consented to a safety plan that required the mother to keep the father away from the child. A violation petition was then filed against the parents when it was discovered that the mother allowed the father into the home. After a hearing on the neglect and violations petitions, the evidence of domestic violence in close proximity to the subject child, and the existence of the marijuana growing operation in the home, Family Court made the finding of neglect against the mother which was an appropriate exercise of discretion. As for the violation petition against the mother, Family Court also correctly found the mother to have violated the prior court orders which required her to keep the father from the subject child and further, for the mother to complete a drug treatment program. The mother did neither of these things and Family Court properly found that the mother was aware of the content of all court orders associated with the neglect

proceeding.

Matter of Kieran XX., 154 AD3d 1094 (3rd Dept 2017)

Where Child's Wounds Almost Fatal, Finding of Severe Neglect Warranted

In a proceeding pursuant to Article 10 of the Family Court Act, upon a cross-appeal by DSS and the attorney for the children, Family Court erred in failing to find the youngest child severely abused by her father. However, Family Court did make proper findings of abuse and neglect and derivative abuse and neglect against the children's caretaker and their mother. The father had joint legal custody of his two children with the mother, and primary physical custody of the children with limited parenting time to the mother. The father relied upon another individual to provide care for the children who Family Court referred to as the children's "caretaker." DSS sought to have the father, the mother and the caretaker adjudicated to have abused and/or neglected the youngest child and derivatively abused and/or neglected the oldest child. These findings were the result of multiple incidents that occurred in March and May of 2015 while the children, particularly the youngest child, were in the caretaker's care. In March, 2015, while the children were in their caretaker's residence, the youngest child suffered a spinal fracture of her left tibia. In May, 2015, the youngest child sustained numerous serious injuries that were almost fatal. After an extensive fact-finding hearing, Family Court adjudicated the youngest child to have been abused and neglected by the father and the caretaker and further found the youngest child to have been neglected by the mother. Family Court also adjudicated the oldest child to have been neglected and derivatively abused by the father, derivatively neglected and derivatively abused by the caretaker and derivatively neglected by the mother. As pertained to the abuse and neglect petitions against the father and caretaker, Family Court correctly determined that there was more than enough evidence to support the finding of abuse and neglect against them. After the March, 2015 incident, where the youngest child broke her leg, the father had ever reason to believe that the caretaker was abusing the youngest child and every reason to believe that there would be additional abuse of her by the caretaker. Nevertheless, the father continued to allow the caretaker to care for the children which made the May, 2015 incident foreseeable. As for the May, 2015 incident, it was the caretaker who called emergency medical personnel, who arrived to find the caretaker frantic and holding the child on the front lawn of her home. Upon arrival, the youngest child was not breathing, did not have a pulse, and had extensive bruising on her abdomen, back, arms and legs. Upon admission to the hospital, the youngest child was found to have been the victim of head trauma, had blood in her mouth and nose and bruises of varying vintage all over her body. This necessitated the youngest child being air lifted to the intensive care unit of yet another facility. The child's treating doctors opined that the injuries could have been fatal. The child was diagnosed with a subdural hematoma, bilateral retinal hemorrhages and bruises all over her body. Family Court found the father's and caretaker's explanation about how the child sustain these injuries to be inadequate, incredible and insufficient to rebut the evidence presented by DSS. As for the findings against the mother of having neglected the younger child and derivative neglected the older child, Family Court providently made these findings after considering the fact that the mother had two six hour visits with the children after the March incident and prior to the May incident. During these visits, the mother observed a number of bruises and other abnormalities on the child's body which should have prompted the mother to seek medical attention for the child. Instead, the mother simply told the father what she observed. Given the totality of the circumstances, Family Court was appropriate in their findings against the father, caretaker and mother with the exception of their findings against the father, which should have been severe abuse of the youngest child opposed to just abuse.

Matter of Logan C., 154 AD3d 1100 (3rd Dept 2017)

Neglect Against Father Warranted Despite No Serious Injuries to Child

In a neglect proceeding, while Family Court properly dismissed the petitions filed against the mother and the mother's boyfriend after a fact-finding hearing, the court erred in dismissing the neglect petition filed against the father. The filing of the neglect petitions

emanated from an incident that occurred at the office of the subject child's pediatrician in July of 2015. While the mother and her boyfriend were waiting with the child in the waiting room, the father abruptly and unexpectedly entered the office, removed the child from the mother's arms and informed her that he was leaving with the child. This resulted in a physical altercation between the father and the boyfriend in the parking lot outside of the pediatrician's office. Immediately prior to the altercation becoming physical, while the father was still holding the child, who was an infant at the time, the father suddenly opened his arms and allowed the child to fall. Fortunately, the maternal grandmother was present and was able to catch the child before she hit the ground. The child did not sustain any injuries beyond minor scrapes and scratches. Contrary to Family Court's findings as relate to the father, his behavior did in fact place the child at imminent risk of harm and was inconsistent with the acts of a reasonably prudent parent, notwithstanding the fact that the child did not sustain any serious physical injuries. Consequently, it was error for Family Court to have dismissed the neglect petition against the father. Family Court did, however, properly dismiss the neglect petition against the boyfriend. Since the boyfriend was not a legal guardian and because he did not start living with the mother until after the incident with the father, he was not the functional equivalent of a parent and consequently, neglect could not be established against him based solely upon the incident with the father. The neglect petition filed against the mother was also correctly dismissed by Family Court. The sole reason for DSS filing the petition against the mother was because she violated a safety plan implemented after the incident which safety plan stated that she would not permit the boyfriend to be in the presence of the child. The mother claimed that she was unaware of this requirement until several days later when it was made clear to her by a DSS caseworker. Once the prohibition against the boyfriend having contact with the child was made clear to her, the mother and boyfriend both complied with the safety plan. However, Family Court properly found that the approximately 10 day period that the mother and boyfriend violated the safety plan by residing together, did not demonstrate a showing of imminent danger of impairment to the child sufficient for a finding of neglect.

Matter of Kathleen NN., 154 AD3d 1105 (3rd Dept 2017)

Appeal of Temporary Order in Neglect Proceeding Moot

In a neglect proceeding, the attorney for the child appealed a temporary order removing the child from the respondent (there is no mention in the decision as to how the respondent is related to the child), and placing the child with his maternal aunt and uncle. During the course of the appeal, fact-finding and dispositional hearings were held, and respondent was adjudicated to have neglected the child. The child was then returned to respondent's care and a suspended judgment was issued subject to various terms and conditions. Given the aforementioned and absent any exceptions to the mootness doctrine, the attorney for the child's appeal of the temporary order was dismissed as moot.

Matter of Landyn H., 154 AD3d 1133 (3rd Dept 2017)

Appeal Moot Due to Multiple Subsequent Orders

The Court determined the father's appeal to be moot where three orders have been issued subsequent to the date of the order that is the subject of this appeal. The father was adjudicated to have abused and neglecting his two children pursuant to a December, 2015 order. Thereafter, in February, 2016, a permanency hearing has held and placement with the DSS was continued. This prompted the father's appeal. In light of the three subsequent permanency orders that were issued since the February, 2016 order, the father's appeal was rendered moot and not subject to any exceptions to the mootness doctrine.

Matter of Cheyanne E., 154 AD3d 1206 (3rd Dept 2017)

Adjudication of Abuse and Neglect Against Mother Reversed Where She Was Unaware and Had No Reason to Know About Father's Physical Abuse of Child

Family Court erred in finding that the mother abused one of her children, and derivatively neglected her other

child, where she was unaware that the children's father had physically abused the younger child. The mother routinely left the children, ages 2 and 7, with the father when she went to work. In August, 2015, the parties brought the younger child to his pediatrician because they observed redness and swelling on his left leg. Examination by multiple doctors revealed that the child had bone fractures that occurred within days of him being taken to the pediatrician. There were also fractures that had occurred weeks prior to the visit to the pediatrician and none of the injuries could have been self-inflicted or inflicted by the child's older sibling. Both parties were found to have abused the younger child and derivatively neglected the older child, the father for causing the injuries to the younger child, and the mother for not having done more to safeguard the younger child from the father. The Court reversed Family Court's findings as relates to the mother, determining that the evidence was insufficient to conclude that the mother knew, or reasonably should have known, that she was placing the younger child in danger by leaving him with the father. The mother testified that before bringing the child to the pediatrician, the father never disclosed that he had abused the children or otherwise engaged in behavior that should have put the mother on notice that the child was in danger of being harmed while in the father's care. The medical evidence also revealed that the child's injuries may not have been immediately detectable. There was a lack of noticeable redness and swelling on the child's body, and the discomfort was not so great that it would have resulted in the child acting differently. The mother also took the child to all required wellness visits, none of which reveal any injuries that should have lead the mother to reasonably suspect abuse by the father. Lastly, since the Court determined that the mother did not abuse her younger child, a finding of derivative neglect of the older child by her also required reversal.

Matter of Lucien HH., 155 AD3d 1347 (3d Dept 2017)

Child's Disciplinary and Behavioral Problems Did Not Justify Mother's Act of Neglect by Refusing to Allow the Child to Resume Living With Her

The mother was properly adjudicated by Family Court to have neglected her child where she refused to allow the child to return to her home, or make alternative plans for the child, after the child was admitted and discharged from the hospital. The subject child, who was approximately 16 years old at the time, accidentally overdosed on a prescription for Ambien and was admitted to the hospital. After it was determined that the child should be discharged, the mother refused to allow the child to return home or make any other living arrangements for her. The mother voluntarily consented to the child's removal to foster care. The child's father also refused to allow the child to live with him after her discharge from the hospital, and he was likewise found to have neglected the child (the father was not party to this appeal which was commenced solely by the mother). Despite the child having a history of mental health issues, as well as a tumultuous relationship with the mother, which included death threats, the mother's actions were not excused by the child's behavioral and disciplinary issues. Consequently, Family Court's finding of neglect of the child by the mother was appropriate. Also unpersuasive, was the mother's claim that she was denied the effective assistance of counsel because her attorney did not present more evidence of the child's mental health issues. The mother claimed in her appeal that this evidence would have explained her behavior in denying the child access to her home. The Court determined that this evidence would not have established that it was unsafe for the child to return home and thus, it would not have resulted in a different finding by Family Court. While the mother's attorney's representation was "inartful" at times, it was nevertheless meaningful as is required for effective representation.

Matter of Jacklynn BB., 155 AD3d 1363 (3d Dept 2017)

No Error by Family Court's Denial of the Attorney for the Child's Request For a *Lincoln* Hearing

Family Court correctly found that the mother neglected her child where she admitted to having left the child alone, unsupervised. Family Court also correctly directed, after a hearing on disposition, the child to be placed with DSS. The attorney for the child appealed the court's placement decision. In directing that the child be placed with DSS, Family Court appropriately

credited the testimony of the psychologist who met with the mother and the child and prepared a report based upon his contact. The psychologist testified that the child had special needs and "behavioral issues" that could not be adequately addressed by the mother, whose home environment the psychologist characterized as "chaotic." Also, it was not error for Family Court to deny the attorney for child's request for the court to conduct a *Lincoln* Hearing with the child. Family Court correctly determined that an in camera interview would be of minimal help to the court when deciding the issue of the child's placement since the child had "significant needs and significant issues" and his wishes were articulated by the attorney for the child during closing arguments.

Matter of Jamel HH., 155 AD3d 1379 (3d Dept 2017)

Lack of Proper Prenatal Care by the Mother, and Failure to Provide a Safe Home for the Child by the Father, Resulted in Neglect Findings Against Both Parents

Family Court properly found the parents to have neglected their newborn child. The mother's neglect stemmed from her failure to engage in proper prenatal care for the child by, *inter alia*, abusing drugs and alcohol during her pregnancy. The mother's lack of adequate prenatal care is underscored by the fact that two days after the child was born, the mother refused to admit to a casework and hospital social worker, that she had been pregnant. The mother also refused to sign a consent form so that the hospital could provide emergency medical treatment for the child. The mother's drug use and lack of appropriate prenatal care contributed to the child being born prematurely and spending a period of time in the neonatal intensive care unit of the hospital immediately after his birth. The father's neglect pertained to his failure to make adequate preparations for the child's care, by failing to provide a safe, adequate home for the child. An unannounced home visit by a child protective worker revealed that the home was essentially a "construction site." The home contained numerous construction tools, nails, buckets, containers of fuel and plaster laying about the residence thereby making it difficult to walk through the home. The home also lacked sheetrock on many of the walls and a chemical and/or gas odor permeated the house. Two motorcycles were also parked in the interior of the home. Consequently, a finding of neglect by Family Court against both parents was warranted. While the mother also appeals the order of disposition, the record revealed that the mother consented to the terms of the order of disposition and never filed a motion to vacate the order. The mother, therefore, is unable to appeal the order of disposition.

Matter of Natalee M., 155 AD3d 1466 (3d Dept 2017)

Family Court Properly Determined That Mother Neglected Subject Children By Virtue of Her Drug Use

Family Court determined that the mother neglected the two subject children by virtue of her drug use. The Appellate Division affirmed. Contrary to the contention of the Attorney for the Children, the appeal was not rendered moot by the subsequent entry of a consent order that granted custody of the children to the maternal grandmother. The finding of neglect constituted a permanent and significant stigma that might indirectly affect the mother's status in future proceedings. The court's finding of neglect was supported by the requisite preponderance of the evidence. By submitting overwhelming evidence of the mother's repeated misuse of cocaine and heroin, petitioner established a prima facie case of neglect pursuant to Family Court Act § 1046 (a) (iii) and, therefore, neither actual impairment of the children's physical, mental or emotional condition nor specific risk of impairment needed to be established. Petitioner was not required to present additional specific evidence to establish the common-sense proposition that repeated, multi-year abuse of cocaine and heroin would *ordinarily* have had 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 [emphasis in the original]. The mother's further contention was rejected that the presumption of neglect embodied in Family Court Act § 1046 (a) (iii) was inapplicable given her purported participation in a recognized rehabilitative program. Even assuming, arguendo, that the methadone replacement program in which the mother was enrolled constituted a recognized

rehabilitation program within the meaning of section 1046 (a) (iii), her 18 separate positive drug tests and admitted continued drug use while enrolled in the program established that she was not voluntarily and regularly participating therein.

Matter of Carter B.,154 AD3d 1323 (4th Dept 2017)

Finding of Neglect Sustained Where Record Established That Mother's Judgment Was Strongly Impaired and Children Were Exposed to Risk of Substantial Harm

Family Court adjudicated that respondent mother neglected the subject children. The Appellate Division affirmed. The court properly determined that the children were neglected as the result of an incident that took place in the early morning of October 18, 2014. The testimony of petitioner's witnesses established that the police were dispatched at approximately 5:22 a.m. to respond to a report that a female was yelling at her children in front of a residence and that the children were crying. Upon arriving at the scene, a police officer observed the mother and her five-and-a-half year old daughter and 11-year-old son standing in front of a residence. The children were dressed in light coats, pajamas, and sneakers in weather conditions that the officer described as being 45 degrees with moderate rain. Based on his training and experience, the officer suspected that the mother was under the influence of a narcotic. The children reported that the mother had engaged in bizarre behavior that morning, including waking them up, telling them that they had to leave their residence because of an emergency, and instructing them to carry a cardboard box filled with various items. Those statements were corroborated by the officer's observations. The mother was arrested for endangering the welfare of the children and for appearing in public under the influence of narcotics. According to the officer, the children were cold and wet, and they were placed in a patrol vehicle for the dual purpose of removing them from the weather conditions and transporting them to the police station. The police discovered that the mother, who was placed in another patrol vehicle, was in possession of a box of suboxone, which was used to treat opiate dependence. The box was missing 22 doses even though the mother's prescription was issued only five days prior, and the medication was to be taken only twice daily. The mother's physician documented that the mother had previously reported a tendency to increase the dosage of suboxone on her own, and the physician testified that the misuse of suboxone could have untoward side effects such as sedation, dysphoria and mood changes, and may affect a person's cognitive abilities. The court properly found that petitioner established by a preponderance of the evidence that the children were neglected inasmuch as they were in imminent danger of physical, emotional or mental impairment as a consequence of the mother's failure to exercise a minimum degree of parental care in providing the children with proper guardianship. The incident of October 18, 2014 was sufficient by itself to sustain the finding of neglect inasmuch as the record established that the mother's judgment was strongly impaired and the children were exposed to a risk of substantial harm. The mother's contention was rejected that the court erred in concluding that petitioner established, by a preponderance of the evidence, that the mother also neglected the children by abandoning them following her arrest. The evidence at the hearing established that the mother evinced an intent to forgo her parental rights and obligations as manifested by her failure to visit the children or to communicate with the children or petitioner, although she was able to do so in the days following her arrest and was not prevented or discouraged from doing so by petitioner. The statute made clear that the burden rested on the parent to maintain contact and that subjective good faith would not prevent a finding of abandonment.

Matter of Kaylee D.,154 AD3d 1343 (4th Dept 2017)

Court Properly Determined That Child Would Be Harmed if Mother Were Allowed to Control His Feeding Schedule or to Hold Child Unsupervised

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. The evidence supporting the court's determination included the testimony and notes of petitioner's caseworker, as well as neonatal hospital records, which outlined the mother's difficulties in caring for the child during the first four days of his life. While evidence of mental illness, alone, did not support a finding of neglect, such evidence could be part of a

neglect determination when the proof further demonstrated that a respondent's condition created an imminent risk of physical, mental or emotional harm to a child. Petitioner presented testimony and documentary evidence establishing that the mother's mental illness and intellectual disabilities rendered her unable to feed the child properly or to support the child's head, even while under hospital supervision. Thus, there was a sound and substantial basis supporting the court's determination that the child would be harmed if the mother were allowed to control his feeding schedule or to hold the child unsupervised.

Matter of Sean P., 156 AD3d 1339 (4th Dept 2017)

Affirmance of Adjudication that Child Severely Abused on Ground That Father Committed Felony Sex Offenses Against Her

Family Court adjudicated the subject child severely abused on the ground that respondent father committed felony sex offenses against her. The Appellate Division affirmed. Petitioner proved by clear and convincing evidence that the father committed felony sex offenses against the child in violation of Penal Law Sections 130.50 (3) and 130.65 (3). The child's disclosures of sexual abuse were sufficiently corroborated by, among other things, the testimony of validation experts, a school psychologist, investigators, and the child's counselor, as well as the child's age-inappropriate knowledge of sexual matters. Furthermore, the child gave multiple, consistent descriptions of the abuse and, although repetition of an accusation by a child did not corroborate the child's prior account of abuse, the consistency of the child's out-of-court statements describing the sexual conduct enhanced the reliability of those out-of-court statements. Family Court Act Section 1051 (e) was amended prior to the filing of the petition such that a diligent efforts finding was no longer a required element of a finding of severe abuse in the context of a Family Court Act article 10 proceeding.

Matter of Brooke T., 156 AD3d 1410 (4th Dept 2017)

Petitioner Failed to Establish That Father Intentionally Harmed Child or That Father's Conduct Was Part of Pattern of Excessive Corporal Punishment

Family Court determined that respondent father neglected the subject child. The Appellate Division reversed. Petitioner alleged that the father inflicted excessive corporal punishment on the child. Petitioner's caseworker testified that the child initially stated that he sustained a bruise while roughhousing with his siblings and, although he later gave inconsistent accounts of the incident, the child maintained that his father had not caused the injury. When asked about other marks on his body, the child stated that he had been in trouble at school, so the father struck him. The father testified that he was called into the school by the child's teachers because the child was misbehaving. The father chased the child around the classroom and, in attempting to grab him, accidentally caught him in the face with his hand, causing the marks. The father further testified, consistent with the child's statement to the caseworker, that the child sustained a bruise while roughhousing with his siblings. Petitioner failed to establish that the father intentionally harmed the child or that his conduct was part of a pattern of excessive corporal punishment, and petitioner thus failed to meet its burden of establishing by a preponderance of the evidence that the child was in imminent danger.

Matter of Damone H., 156 AD3d 1437 (4th Dept 2017)

Court Did Not Abuse Its Discretion in Denying Mother's Request to Appear by Telephone

Family Court adjudged that respondent mother neglected the subject children. The Appellate Division affirmed. The mother failed to preserved for review her contention that the court erred in refusing to adjourn the trial and proceeding in her absence. Inasmuch as the mother relocated to Michigan less than one month before the trial date without notifying petitioner, the court did not abuse its discretion in denying the mother's request to appear by telephone. Any error was harmless in the court's admission of an entire case file that contained some inadmissible hearsay because the result reached would have been the same even had such records, or portions thereof, been excluded.

Matter of Jaydalee P., 156 AD3d 1477 (4th Dept 2017)

CHILD SUPPORT

Father Not Entitled to Downward Modification of Child Support Obligation

Family Court, among other things, denied the father's petition for a downward modification of child support obligation. The Appellate Division affirmed. Petitioner failed to show a substantial change in circumstances to warrant a downward modification of his child support obligation after he was convicted of a federal crime and disbarred. That his income was reduced because of his incarceration was but one factor that the court could consider. The court also properly considered petitioner's credibility with respect to the income shown on his tax returns and his overall financial situation.

Matter of Richard K. v Deborah K., 154 AD3d 489 (1st Dept 2017)

Father Not Entitled to More Time to File Objections

Family Court found that the $45,000 purge amount was received and satisfied, and confirmed the Support Magistrate's finding that respondent father willfully failed to pay child support and arrears and, in a subsequent order, denied the father's motion for an enlargement of time to file objections order and order of disposition, and denied his request for sanctions. The Appellate Division affirmed. The court properly exercised its discretion in denying the father's motion for an enlargement of time to file objections to the May 2014 support order. The motion was made more than one year after the father's objections were found to be untimely and his motion to reargue was denied. The objection procedure did not apply to the June 2015 order of disposition finding the father's willful violation of the support order. He had ample opportunity to present arguments and objections when the matter was referred for confirmation. Although the father contended that the Judge should have determined whether the purge amount was fair, the father paid the amount without seeking a reduction and he offered no grounds to disturb the determination of willfulness on the merits.

Matter of Alissa E. v Michael M., 154 AD3d 526 (1st Dept 2017)

Father Willfully Violated Child Support Order

Family Court found that respondent father willfully violated a court order mandating child support payments, sentenced him to incarceration for six months, and set the purge amount at $5000. The Appellate Division affirmed. The father failed to rebut prima facie evidence of his willful violation of the order of support. He failed to present credible evidence that his alleged medical condition rendered him unable to provide support for the parties' children or that he was financially unable to pay. The father also failed to provide proof that he diligently sought gainful employment during the relevant time period or provide documentation of his uncorroborated testimony that he had only recently obtained employment as a sales representative, earning $200 per week plus commissions. Evidence of the father's online social media profile reflected travel and other activities that belied his claim that he was without funds to pay support.

Matter of Jennifer D. v Artise C.J., 154 AD3d 578 (1st Dept 2017)

Income Properly Imputed to Father

Supreme Court, among other things, determined defendant father's child support obligation. The Appellate Division affirmed. In calculating child support, the court properly imputed income to defendant by including significant funds he received from his parents. Defendant was self-employed and refused to maintain a general ledger or financial records for his business. Trial evidence supported the finding that defendant inflated his expenses on his tax return in order to deflate his net income, and otherwise manipulated his income. Defendant, the sole executor of his father's estate, admitted to using estate funds to pay his personal expenses. Because he was unable to quantify these alternative sources of revenue, the court acted within its discretion in imputing income to him based on the discernable measure of parental contributions. The court properly articulated its rationale for including combined parental income above

the statutory cap, i.e., to maintain the standard of living provided to the child during the parties' marriage and taking into account his reasonable needs.

Schorr v Schorr, 154 AD3d 621 (1st Dept 2017)

Father Not Entitled to Credit Against Retroactive Child Support

Supreme Court adjudged valid and enforceable the parties' postnuptial agreement terminating a prior separation agreement, directing, among other things, that defendant father pay 28% of the children's add-on expenses. The Appellate Division affirmed. The father was not entitled to a credit against retroactive child support award because he failed to show any payments he made for child-related expenses. His payments towards the marital home mortgage and maintenance on the home were made in satisfaction of his own contractual obligations. The father also failed to show that the court erred in directing him, based upon the parties' combined income, to pay 28% of child care costs and 28% of extracurricular activities, which the mother demonstrated were incurred as a means of child care enabling her to work.

Aristova v Derkach, 155 AD3d 517 (1st Dept 2017)

Because Respondent Didn't Offer Forensic Report Into Evidence, Failure to Admit it Not Basis For Appeal

Family Court denied respondent mother's affirmative defense of alienation after excluding the testimony and written report of a neutral forensic evaluator appointed during a prior custody proceeding and granted the father's support petition. The Appellate Division affirmed. Because respondent never offered into evidence a forensic report prepared in connection with an earlier custody proceeding between the parties, her contention about the court's failure to admit the report was not a proper basis for appeal. To the extent that respondent appealed from the court's refusal to permit the forensic evaluator to testify about conclusions in the report, the court properly sustained objections to that testimony, given respondent attorney's failure to make an offer of proof about how those conclusions, in a report completed more than two years before trial and before the parties' stipulation changing primary physical custody from respondent to petitioner, was relevant in the current child support proceeding. Suspension of respondent's child support obligation was not warranted inasmuch as she failed to show deliberate frustration of and active interference with her visitation rights.

Matter of Harry T. v Lana K., 156 AD3d 511 (1st Dept 2017)

Father Failed to Demonstrate That His Daughter Refused All Contact and Visitation

Contrary to the plaintiff's contention, the Supreme Court properly determined that his child support obligation with respect to the parties' daughter was not terminated on the ground of constructive emancipation. It is fundamental public policy in New York that parents are responsible for their children's support until age 21. However, under the doctrine of constructive emancipation, a child of employable age who actively abandons the noncustodial parent by refusing all contact and visitation may forfeit any entitlement to support. Here, the plaintiff failed to demonstrate, prima facie, that his daughter had refused all contact and visitation. Accordingly, the Supreme Court properly denied that branch of the plaintiff's cross motion which was to terminate his support obligation with respect to his daughter on the ground of constructive emancipation. Order affirmed.

Werner v Werner, 153 AD3d 759 (2d Dept 2017)

Record Supported Imputation of Income to Defendant

The defendant's contention that the Supreme Court erred by imputing an income to him of $130,000 when it calculated the maintenance and child support awards was without merit. The record demonstrated that the plaintiff was a high school graduate who had worked part-time as a cashier since 1998, earning $10,000 to $15,000 annually. The defendant was a college graduate who had many years of experience working as an estimator for various construction companies. From 2005 until 2009, the defendant's annual salary was approximately $130,000. Although the defendant was

unemployed for part of 2010, he earned approximately $47,000, which was supplemented by unemployment compensation and withdrawals from retirement accounts, raising his total income for 2010 to $186,582. The defendant worked for most of 2011 and had a yearly income of $130,000 from a combination of earnings and unemployment compensation. The defendant's contention that the amount of income imputed to him should have been limited to his earnings from employment as was reported on his 2010 tax return was without merit (*see* DRL § 240 [1-b] [b] [5]). Accordingly, the Supreme Court was within its discretion in considering the defendant's employment history and earning capacity and properly imputed an income of $130,000 to the defendant in determining an award of child support. Judgment affirmed.

Volkerick v Volkerick, 153 AD3d 885 (2d Dept 2017)

Record Supported Imputation of Income to Defendant Based upon His Parents Financial Contributions

In calculating the child support award, the court properly imputed income to defendant by including significant funds he received from his parents to pay his expenses (*see* DRL § 240 [1-b] [b] [5] [iv] [D]). Defendant was self-employed, and refused to maintain a general ledger or financial records for his business. Trial evidence supported the court's finding that defendant inflated his expenses on his tax returns so as to deflate his reported net income, and otherwise manipulated his income. Further, defendant, who was the sole executor of his father's estate, admitted to using estate funds directly to pay some of his personal expenses. In view of its inability to quantify these alternate sources of revenue available to defendant, the court acted within its discretion in imputing income to him based on the discernible measure of parental contributions. Further, the court properly articulated its rationale for including combined parental income above the statutory cap, i.e., to maintain the standard of living provided the child during his parents' marriage and taking into account his reasonable needs. Judgment affirmed.
Schorr v Schorr, 154 AD3d 621 (2d Dept 2017)

Record Supported Denial of Father's Motion to Vacate

The order appealed from denied the father's objections to an order of that court dated January 28, 2016, which denied his motion pursuant to CPLR 4404 (b) and 5015 (a) to vacate two orders of that court dated August 29, 2013, and July 22, 2015, respectively, which, after a hearing and a renewed hearing, granted the mother's petition for an upward modification of his child support obligation. While the father's objections to the Support Magistrate's order dated July 22, 2015, were pending, the father moved pursuant to CPLR 4404 (b) and 5015 (a) (2) and (3) to set aside and vacate the orders dated August 29, 2013, and July 22, 2015, on the grounds that they were predicated on fraudulent and untrue statements by the mother regarding the child's condition and expenses, and that newly discovered evidence existed regarding the child's condition and expenses. In an order dated January 28, 2016, the Support Magistrate denied the father's motion. In the order appealed from entered August 19, 2016, the Family Court denied the father's objections to the order dated January 28, 2016. Since the father's motion was not made within 15 days after the orders that he sought to set aside, and the father failed to demonstrate good cause for the delay, the Family Court properly determined that the branch of the motion which sought to set aside the orders pursuant to CPLR 4404 (b) was untimely (*see* CPLR 4405). CPLR 5015 (a) (2) and (3) provide that an order may be vacated on the ground of newly discovered evidence or based on fraud, misrepresentation, or misconduct of an adverse party. Here, the father submitted numerous documents that were not in existence at the time of the Support Magistrate's order dated August 29, 2013, which was the order that determined that the mother had established a substantial change in circumstances resulting in a concomitant need warranting an upward modification of child support. Thus, these documents did not meet the criteria for newly discovered evidence under CPLR 5015 (a) (2). The only proffered document that was in existence at the time of the order dated August 29, 2013, was a letter dated November 15, 2012, by the child's therapist. However, the father failed to establish that this letter was undiscoverable with due diligence at the time of the original order or judgment, because he testified that he spoke to the therapist

approximately every week. In any event, the father failed to demonstrate that the alleged newly discovered evidence probably would have produced a different result. At most, the submissions demonstrated that the child's condition somewhat improved and his expenses somewhat decreased following the order dated August 29, 2013. Furthermore, the father failed to establish the existence of fraud, misrepresentation, or misconduct on the part of the mother and, therefore, was not entitled to vacatur of the Support Magistrate's orders pursuant to CPLR 5015 (a) (3). Order affirmed.

Matter of Munoz v O'Connor-Gang, 154 AD3d 700 (2d Dept 2017)

Family Court Providently Exercised its Discretion in Determining, Based on the Father's Financial Abilities, His Contribution to Daughter's College Expenses

The parties were married in 1991 and are the parents of two children, a son and a daughter. The parties were divorced by a judgment of divorce entered November 29, 1999, which incorporated, but did not merge, a separation agreement between the parties dated June 17, 1998. As relevant here, the separation agreement stated: "The parties are not making any specific provisions for the payment of college expenses which may be incurred on behalf of the infant children because of the tender age of said children as of the date of this Agreement. The parties do, however, acknowledge an obligation on each of their parts to contribute to the children's future college expenses in accordance with their financial abilities at that time." In June 2015, the mother commenced a proceeding to enforce the above provision of the separation agreement, alleging that the father refused to pay any of their daughter's college expenses. After a hearing, the Support Magistrate issued an order directing the father to contribute $2,700 per semester toward the daughter's college expenses for each semester she has attended college and will attend college in the future, until her emancipation. The father and the mother each filed objections to the Support Magistrate's order. On August 12, 2016, the Family Court issued an order denying the father's objections and, in effect, denying the mother's objections. The mother appealed. Unlike the obligation to provide support for a child's basic needs, support for a child's college education is not mandatory. Here, the father voluntarily agreed "to contribute to" his daughter's "future college expenses in accordance with [his] financial abilities." Contrary to the mother's contention, the Family Court providently exercised its discretion in determining, based on the father's financial abilities, that he should contribute the sum of $2,700 per semester toward the daughter's college expenses. Order affirmed.

Matter of Conroy v Hacker, 154 AD3d 749 (2d Dept 2017)

Father Failed to Present Competent Medical Evidence Pertaining to His Ability to Obtain Gainful Employment

In April 2015, the father filed a petition seeking a downward modification of his child support obligation. He alleged that he was diagnosed with a mental illness which prevented him from securing employment commensurate with his education and experience, resulting in a significant reduction in his income. Following a hearing, a Support Magistrate denied the father's petition. Thereafter, in an order dated September 20, 2016, the Family Court denied the father's objections to the Support Magistrate's order. The father appealed. Here, the record supported the Support Magistrate's determination that the father failed to establish that he made diligent attempts to secure employment commensurate with his education, ability, and experience. Contrary to the father's contention, he failed to present competent medical evidence in support of his testimony that a diagnosis of bipolar disorder interfered with his ability to obtain gainful employment to meet his child support obligation. Thus, the Family Court properly denied the father's objections to the Support Magistrate's order finding that the father was not entitled to a downward modification of his child support obligation. Order affirmed.

Matter of Hackett v Hackett, 154 AD3d 751 (2d Dept 2017)

Increase in the Father's Income of More than 15% Was Sufficient, by Itself, to Permit the Family Court to Modify His Child Support Obligation

The parties divorced in 2014, and in their stipulation of settlement (hereinafter the stipulation), which was incorporated but not merged into the judgment of divorce, they agreed that the father would pay the mother the sum of $500 per month in child support. After the parties divorced, the father began collecting Social Security benefits in addition to his salary, which caused his income to increase by more than 15%. The mother petitioned for an upward modification of the father's child support obligation, which the Support Magistrate granted on the basis of the father's increased income. The Support Magistrate calculated the father's child support obligation under the Child Support Standards Act and awarded the mother $2,074 per month in child support. The father objected to the Support Magistrate's order, and the Family Court denied the father's objections. The father appealed. § 451 of the Family Court Act allows a court to modify an order of child support, without requiring a party to allege or demonstrate a substantial change in circumstances, inter alia, where either party's gross income has changed by 15% or more since the order was entered or modified (*see* FCA § 451 [3] [b] [ii]). Although this statutory ground for modification is not available in the event that the parties specifically opt out of § 451 (3) (b)] in a validly executed stipulation, (*see* FCA § 451 [3] [b]), the parties in this case did not opt out of that provision. Thus, the increase in the father's income of more than 15% was sufficient, by itself, to permit the Family Court to modify his child support obligation (*see* FCA § 451 [3] [b] [ii]). The father additionally objected to the Support Magistrate's order on the ground that he should have received a credit against his child support obligation for the money that he contributed to his daughter's college room and board. The Family Court correctly denied that objection. The stipulation did not provide for such a credit, had separate and distinct sections for child support and college expenses, and categorized college room and board as a college expense rather than as a component of child support. Order affirmed.

Matter of Walsh v Walsh, 154 AD3d 767 (2d Dept 2017)

State of Missouri Retained Continuing, Exclusive Jurisdiction of Child Support Order

In May 2016, the father commenced a proceeding pursuant seeking child support for the parties' son. The mother moved to dismiss the petition on the ground that an order of support was already issued by a court in Missouri, which had continuing, exclusive jurisdiction under the Uniform Interstate Family Support Act (hereinafter UIFSA) (*see* FCA art 5-B). In an order dated August 9, 2016, the Support Magistrate granted the mother's motion to dismiss the petition. Thereafter, the father filed objections to the order dated August 9, 2016. In an order dated October 14, 2016, the Family Court denied the father's objections. The father appealed. Under the Full Faith and Credit for Child Support Orders Act and UIFSA, the state issuing a child support order retains continuing, exclusive jurisdiction over its child support orders so long as an individual contestant continues to reside in the issuing state (*see* 28 USC § 1738B [d]; FCA § 580-205). A state may modify the issuing state's order of child support only when the issuing state has lost continuing, exclusive jurisdiction (*see* 28 USC § 1738B [e]; FCA § 580-611 [a]). Here, contrary to the father's contention, the Family Court properly determined that his petition was in the nature of a modification petition, rather than a de novo application. Further, since the mother and the parties' daughter resided in Missouri, that state retained continuing, exclusive jurisdiction of its child support order, and New York did not have jurisdiction to modify the Missouri order. Order affirmed.

Matter of Zagarino v McLean, 154 AD3d 769 (2d Dept 2017)

Father Failed to Offer a Reasonable Excuse for His Default

The parties have two children together. On August 21, 2012, the mother filed a petition seeking child support from the father. In an order of support, dated August 5, 2013 (hereinafter the 2013 support order), upon the father's default in appearing at a hearing, the Support Magistrate awarded the mother basic child support and child care expenses in the total sum of $5,005.70 per month retroactive to August 21, 2012. The Support Magistrate also awarded the mother retroactive arrears in the sum of $30,211.07. Thereafter, the Support Magistrate granted the father's motion to vacate the 2013 support order and scheduled a new hearing for

December 9, 2014. Upon the father's failure to appear at the new hearing, the Support Magistrate issued an order of support dated December 9, 2014, upon default, reinstating the 2013 support order. The Support Magistrate thereafter issued an amended order of support dated June 26, 2015 (hereinafter the 2015 amended support order), which directed the father to pay the mother the same amount in basic child support and child care expenses and calculated the father's child support arrears to be the sum of $138,404.02 as of December 9, 2014. The father moved to vacate the 2013 support order and the 2015 amended support order pursuant to CPLR 5015 (a) (3), contending that the mother obtained the orders through false testimony and the submission of fraudulent documents to the court. By order dated January 3, 2017, the Support Magistrate denied the father's motion. The father filed objections to that order, and in an order dated April 7, 2017, the Family Court denied the father's objections. The father appealed. The Appellate Division affirmed. In support of his motion, the father failed to offer a reasonable excuse for his default, and his conclusory allegations about the mother were insufficient to show that the mother engaged in fraud, misrepresentation, or other misconduct which could constitute a potentially meritorious defense. The record supported the Support Magistrate's determination that the mother provided credible testimony and evidence during the proceedings.

Matter of Terekhina v. Terekhin, 155 AD3d 750 (2d Dept 2017)

Father Entitled to Credit Against His Child Support Obligation

The parties have one child together. The mother commenced this proceeding to modify an order of support dated September 23, 2014, so as to direct the father to equally contribute to the child's college expenses. After a hearing, in an order dated December 6, 2016, the Support Magistrate granted the petition and directed the father to pay 50% of the child's college expenses, capped at the cost to attend the State University of New York at Stony Brook, after the deduction of grants, scholarships, and awards. The Support Magistrate did not make a determination as to the child's actual college costs. The father filed objections to the Support Magistrate's order. In an order dated February 6, 2017, the Family Court denied the father's objections, and the father appealed. The Appellate Division modified. The record did not support the father's contention that the Support Magistrate's order was unjust because it required him to pay an amount for child support and college expenses that exceeded his claimed and imputed income. However, the Support Magistrate's order should have included a provision awarding the father a credit against his child support obligation for any amount that he contributed toward college room and board for those periods when the child primarily resided at college.

Matter of Trent v Alburg, 155 AD3d 881 (2d Dept 2017)

Mother Failed Without Good Cause to Submit Her Most Recent Tax Returns

The parties have one child together, born in October 2009. In 2015, the mother filed a paternity petition and a separate petition seeking child support. An order of filiation was entered declaring the respondent to be the father of the child, and the matter was referred to a Support Magistrate to establish the father's child support obligation. Following a hearing, the Support Magistrate issued an order of support dated June 3, 2016, which directed the father to pay the mother basic monthly child support in the sum of $663, plus a percentage of certain add-on expenses, and the sum of $8,040 in retroactive child support. The father submitted objections to the order. In an order dated August 19, 2016, the Family Court denied the father's objections. The father appealed. The Appellate Division reversed. The father's contention that the Support Magistrate improperly imputed income to him was without merit. The Support Magistrate properly imputed income to the father based on his future earning capacity and the funds he received from his wife to pay his expenses. There was no basis to reject the Support Magistrate's credibility determination that, contrary to the father's testimony, he had access to his wife's bank accounts which were used to pay the household's expenses. However, FCA § 424–a(a) requires that parties to child support proceedings submit certain required financial documents, including the party's most recently filed state and federal income tax returns. When a petitioner fails without good cause to

file the required documents, the court may on its own motion or upon application of any party adjourn such proceeding until such time as the petitioner files with the court such statements and tax returns (*see* FCA § 424–a[c]). Here, the mother failed without good cause to submit her most recent tax returns. Further, her testimony and the financial documents she did submit did not remedy her failure to make complete financial disclosure, since the mother's financial disclosure affidavit contained inconsistencies, her claimed rental income was unsubstantiated, and her testimony regarding her income and expenses was determined to be incredible. Accordingly, the Support Magistrate improvidently exercised her discretion in failing to adjourn the proceeding until such time as the mother filed the required documents.

Matter of Wei-Fisher v. Michael, 155 AD3d 883 (2d Dept 2017)

Record Supported Determination Granting Defendant's Motion to Hold Plaintiff in Contempt

The order appealed from granted the defendant's motion which was to hold the plaintiff in contempt for failing to pay the full amount of child support required under pendente lite orders dated July 26, 2012, and January 29, 2013, respectively. The plaintiff appealed. The Appellate Division affirmed. Contrary to the plaintiff's contention, the applicable standards in this case were those of civil, not criminal, contempt, as the Supreme Court gave the plaintiff the opportunity to purge his contempt and thereby avoid incarceration by paying his child support arrears in full. The defendant established by clear and convincing evidence that there was "an unequivocal mandate" that the plaintiff pay the sum of $1,400 per month in pendente lite child support, that the plaintiff had knowledge of that mandate, that the plaintiff disobeyed that mandate, and that this disobedience prejudiced the defendant. The defendant was not required to show that she had exhausted other enforcement remedies before moving to hold the plaintiff in contempt. The burden then shifted to the plaintiff either to refute the defendant's showing or to establish a defense. The plaintiff failed to raise a factual dispute as to the amount of the arrears, and thus, contrary to his argument, no hearing was required on this issue. A hearing was not required on the plaintiff's defense that he could not afford to pay $1,400 per month in child support. The facts underpinning this defense were addressed at a trial before a special referee, and the court was not required to hold a new hearing on this issue (*see* CPLR 4403). Accordingly, the court providently exercised its discretion in finding the plaintiff in civil contempt without holding a new hearing on the defendant's motion.

Avraham v Avraham, 155 AD3d 931 (2d Dept 2017)

Record Supported Determination of Child Support Obligation Based on Child's Needs

The mother and the father are the unmarried parents of one child. In October 2015, the mother filed a petition for child support. On February 17, 2016, the Family Court issued a temporary order of support directing the father to pay child support in the sum of $50 per month. In an order of support entered October 13, 2016, made after a hearing, the Support Magistrate directed the father to pay child support in the sum of $490 per month. The father filed objections to the order of support, and in an order entered December 14, 2016, the court denied the objections. The father appealed. The Appellate Division affirmed. When a party has defaulted or if the court has insufficient evidence to determine a party's income, the court shall order child support based upon the needs or standard of living of the child, whichever is greater (*see* FCA § 413 [1] [k]). Contrary to the father's contention, the Support Magistrate did not issue the order of support based on the father's default but, rather, properly determined that there was no credible testimony or documentary evidence upon which to rely in order to impute income or determine the father's actual earning capacity based on past earnings. Thus, it was proper for the Support Magistrate to base the support obligation on the child's needs pursuant to FCA § 413 (1) (k). Accordingly, the Family Court properly denied the father's objection to the Support Magistrate's determination to base his support obligation on the child's needs.

Matter of Bayon v Caston, 155 AD3d 946 (2d Dept 2017)

Father Required to Pay Pro Rata Share of Child's Tuition

The parties, who were never married, are the parents of one child. After an order of filiation established the father's paternity, an order of support directed the father to pay child support in the sum of $200.54 biweekly. On March 28, 2005, the order of support was modified by an order on consent, pursuant to which the parties agreed to deviate from the father's basic child support obligation, that the father would pay for child care, and that the parties would allocate the child's private school educational expenses between them. The order on consent directed the father to pay, in addition to his basic child support in the sum of $200.54 biweekly, $117 biweekly for child care and $39.23 biweekly for educational expenses. In April 2013, the mother commenced a proceeding for an upward modification of the father's child support obligation. The matter proceeded to a hearing before a Support Magistrate. At the conclusion of the hearing on December 9, 2015, the Support Magistrate issued an order dismissing the mother's petition as academic, apparently due to a clerical error. On March 11, 2016, the Support Magistrate issued a modified order and findings of fact granting the mother's petition to the extent of increasing the father's basic child support obligation and directing him to pay his pro rata share of certain child care expenses, including the child's 2013 summer camp and after-school care expenses, as well as tuition for the child's private elementary school. Both the father and the mother filed objections to the March 11, 2016, order and in an order dated June 24, 2016, the Family Court denied the father's objections and granted the mother's objections in part. The father appealed. The Appellate Division affirmed. The mother demonstrated a substantial change in the parties' financial circumstances from the time the March 28, 2005, order was issued and the time her petition was filed in April 2013, and an increase in the child's expenses over that period. The March 28, 2005, order on consent was accompanied by findings of fact. The findings of fact, which the father did not challenge, memorialized the parties' agreement to allocate the cost of the child's private elementary school expenses in exchange for a reduction in the father's basic child support obligation. In light of this agreement, as well as the testimony that the child, who was in middle school at the time of the filing of the mother's modification petition, had attended the private elementary school for the entirety of her education and the lack of any evidence that the father did not have the financial ability to contribute to the child's private elementary school educational expenses, the father was properly directed to pay his pro rata share of the child's private elementary school tuition.

Matter of Daughtry v Jacobs, 155 AD3d 947 (2d Dept 2017)

Father Failed to Establish That Daughter's Residence Had Changed

The father filed a petition to terminate his child support obligation and a separate petition for an award of child support. The father contended that the parties' then-20-year-old daughter, who had resided with the mother in New Jersey since she was 5 years old, had begun residing with him full-time in Brooklyn after she enrolled in a college in Manhattan during the winter 2015 semester. After a fact-finding hearing, the Support Magistrate denied both petitions, finding that the father failed to establish that the daughter's residence had changed. The father then filed objections to the Support Magistrate's order, contending, inter alia, that the Support Magistrate improperly based his decision on whether the mother had continued to provide material support to the child. In an order dated December 1, 2016, the Family Court denied the father's objections to the Support Magistrate's order. The father appealed. The Appellate Division affirmed. The evidence adduced at the fact-finding hearing established that, as of February 2016 and throughout 2016, the daughter continued to reside with the mother in New Jersey, even though the daughter stayed with the father on some evenings during the week. In addition, the documentary evidence submitted by the mother established that she paid for the daughter's automobile lease, EZ-Pass bill, and cell phone bill until June or July of 2016. She also paid rent for an apartment the daughter had resided in prior to 2016. Moreover, the EZ-Pass records demonstrated that the daughter often crossed bridges from New York to New Jersey. Accordingly, the father failed to demonstrate a change in circumstances sufficient to warrant the termination of his child support obligation and an award of child support in his favor.

Matter of Lovaglio v Wagner, 155 AD3d 954 (2d Dept 2017)

Supreme Court Properly Adjudged Father in Civil Contempt

The order appealed from, after a hearing, and upon a decision of that court, granted the mother's petition to enforce the father's child support obligation and to find him in civil contempt, denied the father's petition for a downward modification of his child support obligation, adjudged the father in civil contempt for his failure to comply with the child support provision of the parties' judgment of divorce, and directed that the father be incarcerated unless he paid arrears in the sum of $20,211.97 within 30 days. The order of commitment, upon the order and the father's failure to purge his contempt, directed that the father be committed to the custody of the sheriff of the City of New York for a period of 60 days unless he paid a purge amount of $17,664.50. The father appealed. The Appellate Division affirmed both orders. The mother established by clear and convincing evidence that the father violated the child support provisions of the judgment of divorce (*see* DRL § 245). In opposition, the father did not refute the mother's showing or offer evidence establishing a defense. Accordingly, the Supreme Court properly adjudged the father in civil contempt for his failure to comply with the child support provision of the parties' judgment of divorce, and directed that the father be incarcerated unless he purged the contempt. The Supreme Court likewise properly denied the father's petition for a downward modification of his child support obligation. The father demonstrated that he was unemployed or underemployed, but he did not demonstrate that this constituted a change of circumstances. On the contrary, when the father's support obligation was set in the divorce action, the Supreme Court imputed an income of $21,050 annually since the father was earning only a few thousand dollars a year, and nothing in the record suggested that, in the years since the parties' divorce, the father made greater efforts to obtain employment at even a subsistence level, much less a level commensurate with his skills and education. Consequently, the court correctly concluded that the father failed to demonstrate changed circumstances warranting modification of his support obligation, and properly denied his petition for downward modification.

Binong Xu v Sullivan, 155 AD3d 1031 (2d Dept 2017)

Petition for Downward Modification Properly Denied; Father Voluntarily Left His Employment

The order appealed from denied the father's objections to an order of that court, which, after a fact-finding hearing, dismissed, without prejudice, his petition for a downward modification of his child support obligation. The Appellate Division affirmed. A party seeking modification of an order of child support has the burden of establishing the existence of a substantial change in circumstances warranting the modification. A parent's loss of employment may constitute a substantial change in circumstances. A parent seeking downward modification of a child support obligation must submit competent proof that the termination occurred through no fault of the parent and the parent has diligently sought re-employment commensurate with his or her earning capacity. Here, the record supported the Support Magistrate's determination that the father failed to demonstrate a substantial change in circumstances warranting a downward modification of his child support obligation. The evidence submitted relating to the father's unemployment showed that he voluntarily left his job to follow his girlfriend to Florida. Thus, the father failed to establish that the termination of his employment did not occur through his own fault. Furthermore, the father failed to adduce sufficient evidence to satisfy his burden of establishing that he diligently sought re-employment commensurate with his qualifications and experience. Accordingly, the Family Court properly denied the father's objections to the Support Magistrate's order finding that he was not entitled to a downward modification of his child support obligation.

Matter of Lindsay v Lindsay-Lewis, 156 AD3d 642 (2d Dept 2017)

Mother’s Objections Properly Denied; Foreign Court Lacked in Personam Jurisdiction over the Parties

The parties were married in 1981 and are the parents of two children. In 1995, the mother, who then resided in Greece, filed a petition in that country seeking, inter alia, an award of child support. An order of the First Instance Court of Athens, Greece (hereinafter the foreign order), entered a default judgment against the father pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters *(see* 20 UST 361, TIAS No. 6638 [1969]), awarding the mother, inter alia, child support. In 2015, the mother filed a petition seeking to enforce the foreign order, and in May 2016, registered the foreign order in the Family Court, Kings County. The father then filed a petition to vacate the registration of the foreign order on the ground of lack of personal jurisdiction. The Support Magistrate granted the father's petition to vacate on the ground of lack of personal jurisdiction. The order appealed from denied the mother's objections to the Support Magistrate's order. The Appellate Division affirmed. In order for the decree of a foreign court to be accorded recognition in this State, the court must have had in personam jurisdiction over the parties. The Family Court properly denied the mother's objections to the Support Magistrate's order, which found that the Greek court failed to follow the requirements of the Hague Convention regarding personal jurisdiction. Hence, the foreign order was not entitled to comity by the courts of this State.

Matter of Lorandos v Karakatsiotis, 156 AD3d 643 (2d Dept 2017)

Record Did Not Support Denial of Mother's Objections

The mother and the father are the unmarried parents of one child. In October 2011, the Family Court entered a default order of child support against the father in the amount of $235 per week. In 2015, the father filed a petition for a downward modification of his child support obligation. The father alleged that a change of circumstances had occurred warranting modification; specifically, a loss of employment and insufficient income. After a hearing, by order dated January 29, 2016, the Support Magistrate granted the petition and directed that the father pay child support in the biweekly amount of $164. The mother filed objections to that order, which were denied by order dated May 31, 2016. The mother appealed. The Appellate Division reversed. The Support Magistrate's determination that the father met his burden of proof on the petition was not supported by the record. First, the father failed to meet his burden of demonstrating that his employment was terminated through no fault of his own. Rather, the record established that the father caused his own loss of employment by failing to meet his child support obligation, which resulted in his incarceration, for a period of more than six months. Second, although the record demonstrated the father's unsuccessful attempt to get re-hired with the same employer upon his release from jail, the father failed to sufficiently prove that he made other efforts to procure equivalent full-time employment. Particularly in light of the father's admission during the hearing that he previously earned a much more substantial income than that reflected in the W-2 forms he presented at the hearing, it cannot be said that these efforts demonstrated that the father diligently sought to obtain employment commensurate with his earning capacity. Accordingly, the Family Court should have granted the mother's objections to the order dated January 29, 2016, and should have denied the father's petition for a downward modification of his child support obligation.

Matter of Gillison v Penepent, 156 AD3d 697 (2d Dept 2017**)**

Court Declines to Order Father to Pay for College Expenses and Health Insurance Costs

In divorce action, Supreme Court properly declined to credit the wife for payments that she made towards the parties' daughter's college expenses, finding that the husband did not have the financial ability to contribute towards the cost of his estranged daughter's college education. While the parties purchased rental property during the marriage to help finance the children's college expenses, those properties were in foreclosure, as was the marital residence, and there were no other significant marital assets. The parties also incurred significant debt associated with a business that they had an interest in during the marriage which further impacting their negative financial situation. While the husband was paying child support, with an additional payment towards arrears, he did not have the financial

ability to contribute towards the child's college expenses. Supreme Court also providently exercised their discretion in declining to make the husband's obligation to pay 42% of the children's health insurance costs and uncovered health related costs retroactive to the date of commencement of the divorce action. The children were covered by Child Health Plus and the cost associated with same was modest, which in combination with the husband's financial circumstances, made a retroactive award of child support inappropriate.

Matter of Wallace v. Wallace, 154 AD3d 1078 (3d Dept 2017)

Language in Agreement That Says Each Parent's Share of College Expenses Not to Exceed 50%, Does Not Mean Each Parent Is Equally Responsible for Said Expenses

In child support violation proceeding, Family Court erred in interpreting the higher education provisions of the parties' 2000 separation agreement, which was incorporated without merger into their 2003 judgment of divorce, to require both parties to be equally responsible for the cost of their daughter's higher education expenses. The agreement stated that "The parties agree to share in the costs of the child's higher education, however, neither party's obligation shall exceed fifty (50%) percent of tuition at a state university, plus the cost of reasonable living expenses." In 2015, the father filed a child support violation petition against the mother alleging that she failed to pay her one half share of the daughter's higher education expenses for a number of years. After a hearing, the Support Magistrate determined that the mother's violation was willful, but entered a money judgment for only 20% of the cost of the daughter's higher education expenses for the years in question which amounted to $9,708.00. Both parties filed objections to the Support Magistrate's order. Family Court erroneously determined that the support provisions of the parties' agreement required them to each pay one half of their daughter's higher educational expenses and reasonable living expenses. Family Court further improperly increased the amount of the mother's money judgment from $9,708.00 to $28,377.50, which represented her 50% share of the expenses. The Court determined that the language of the parties' 2000 agreement did not evince an intent for the parties to each be equally responsible for the cost of their daughter's higher educational expenses. The Court noted that had the parties intended to be equally responsible for their daughter's higher education costs, they would have used language in the higher education provisions of their agreement such as "split," or "50/50," which terms were found elsewhere in the agreement but not the portion of the agreement that addressed higher education costs. Family Court also erred in directing the mother's payments for the child's higher education expenses to be paid through the support collections unit, since post-secondary educational expenses are not subject to collection through income execution.

Matter of Dillon v. Dillon, 155 AD3d 1271 (3d Dept 2017)

Child Support Provisions Upheld

Family Court erred in finding that the support provisions of a 1999 written child support stipulation, which was subsequently incorporated into a 1999 order, and then incorporated, but not merged, into a 2000 judgment of divorce, failed to comply with the deviation requirements of the Child Support Standards Act (CSSA). Approximately 15 years after the parties entered into a written stipulation relative to the amount of child support that the father would pay to the mother, the mother filed a support modification petition in 2015 seeking an increase of the father's child support obligation. After a hearing before the Support Magistrate, the mother's petition was dismissed for failing to show the requisite change in circumstances. The mother then filed objections to the Support Magistrate's decision, which Family Court granted. Family Court found that since the 2000 judgment of divorce, which incorporated the 1999 order and written child support stipulation, did not contain the CSSA recitals for deviation, despite the written support stipulation containing these recitals, that the child support provisions in the judgment of divorce were invalid. Family Court then directed a *de novo* hearing. Noteworthy is the fact that Family Court also found that the language in the 1999 stipulation, set forth a lower

standard for modification, namely a "change in circumstances" standard rather than a "substantial and unanticipated change in circumstances" standard. After a *de novo* hearing, the father's child support obligation was substantially increased. The father filed objections to the Support Magistrates *de novo* determination, which objections were denied by Family Court and this appeal ensued. The Court found that the child support provisions of the 2000 judgment of divorce were indeed valid because the 1999 stipulation which was incorporated therein, contained all of the language required by the CSSA for enforceable deviation, even if the 2000 judgment of divorce did not set forth the deviation language. The Court further found that the language of the stipulation set forth a lesser burden of proof for modification, namely a "change in circumstances" standard opposed to a "substantial and unanticipated circumstances" standard and consequently, the Court remitted the matter back to Family Court for an updated hearing using the lesser standard for modification.

Matter of Frederick-Kane v. Potter, 155 AD3d 1327 (3d Dept 2017)

No Deduction From Paying Parent's Income Stream for Equitable Distribution Award Prior to Application of the Child Support Standards Act

In divorce action, Supreme Court correctly declined to deduct the wife's share of the husband's interest in his law firm, from the husband's income stream when determining his child support obligation. The wife had received an equitable distribution award for her share of the husband's interest in a law firm. The husband contended that such a deduction from his income for the wife's equitable distribution award was appropriate, because the income steam used to calculate his child support obligation, was derived from the same law firm in which his interest had already been equitably distributed to the wife, which the husband claimed constituted double counting. The Court determined that the rule against double counting does not apply to the calculation of child support as the Child Support Standards Act does not allow for a deduction of an equitable distribution award from the paying parent's income stream prior to calculation of child support. Also without merit was the husband's claim that Supreme Court erred in applying the applicable child support percentage (25%) to the parties' total combined income rather than limiting said application to the statutory income cap. Despite not addressing each and every statutory factor used to calculate the child support obligation, Supreme Court nevertheless adequately articulated the reasons for the award above the statutory cap and related it to the applicable factors set forth in Domestic Relations Law §240.

Matter of Kimberly C. v. Christopher C., 155 AD3d 1329 (3rd Dept 2017)

Denial of Father's Objections and Motion to Reargue/Renew Upheld

Family Court did not abuse their discretion by dismissing the father's written objections to the Support Magistrate's order, where the father failed to provide proper proof of service of his objections upon the mother's attorney. Despite the fact that the father filed his objections in a timely manner, the certificate of service was not properly notarized and consequently, this was tantamount to a complete failure of service. While Family Court has the discretion to overlook a party's failure to file timely proof of service, they may decline to overlook same and instead, insist upon compliance with the service requirements of Family Court Act 439(e). Additionally, Family Court did not err by denying the father's motion for reargument where the father failed to set forth the legal basis for the relief being sought. Similarly, the father's motion to renew was also properly denied by Family Court, since he failed to point to any new facts or changes in the law that would have required a different result.

Matter of Gary Treistman v. Suzanne M. Cayley, 155 AD3d 1343 (3d Dept 2017)

Failure to Articulate Reasons for Not Strictly Adhering to CSSA Requires Remittal

Supreme Court erred in (1) failing to articulate the reason why they did not apply the applicable child support percentages to the parties' income above the statutory cap; and (2) failing to articulate why they deducted the husband's short term maintenance

obligation from his gross income before calculating child support, without providing a mechanism for adjusting child support when the maintenance obligation terminated. Consequently, the Court remitted this matter back to Supreme Court to resolve these issues. Supreme Court did, however, providently exercised discretion in requiring the husband to pay 75% of the parties' child's college expenses during the time that the husband was paying basic child support to the wife. The wife insisted that the husband should have been required to pay 100% of the college expenses in addition to paying her basic child support. Supreme Court properly directed the husband to assume 100% of the college expenses when his basic child support obligation to the wife terminates.

Matter of Stuart v. Stuart, 155 AD3d 1371 (3d Dept 2017)

Child Deemed to be Constructively Emancipated

Supreme Court correctly declined to award the husband/father, the custodial parent of the parties' 20 year old daughter, child support from the wife/mother where she demonstrated that the child was constructively emancipated, thereby negating her obligation to pay child support to the husband/father. Upon the parties' physical separation in 2012, the daughter began residing with the husband/father and thereafter, refused any communication with the wife/mother. The court found that the wife/mother made repeated efforts to contact and communicate with the daughter, and the child's refusal to communicate with the wife/mother, was not the fault of the wife/mother. The Court also noted that despite the husband/father's claims to the contrary, the evidence revealed that he did not encourage the daughter to have a relationship with the wife/mother.
Matter of Tiger v. Tiger, 155 AD3d 1368 (3d Dept 2017)

Failure to Prove Payment Justifies Finding of Willfulness

In a child support proceeding, Family Court properly confirmed a finding of the Support Magistrate who determined that the father had willfully violated his child support obligation, by failing to pay his court ordered share of the parties' daughter's college tuition and expenses. Family Court confirmed the amount that the Support Magistrate established as the father's arrears. After Family Court denied the father's written objections, he appealed the denial and argued that the Support Magistrate erred in failing to admit into evidence, cancelled checks that the father alleged had represented payments made towards the child's college tuition and expenses. Despite having the checks on the first day of the hearing, which hearing was adjourned to another date for the father's benefit, the checks were ultimately not introduced into evidence. Additionally, even if the checks had been admitted into evidence, the checks evinced the payment of college expenses for a period of time different than the time frame at issue. Thus, Family Court's denial of the father's objections and confirmation of the Support Magistrate's order were appropriate.

Matter of Vincek-Breakell v. Czizik, 155 AD3d 1384 (3d Dept 2017)

Expenses Attendant to a Growing Child and Increased Income of Non-Custodial Parent, Do Not Constitute a Substantial and Unanticipated Change in Circumstances

In child support modification proceeding, it was a provident exercise of discretion by Family Court to sustain the father's written objections, finding that the mother had not demonstrated the requisite change in circumstances to warrant an increase of the father's child support obligation. The father's child support obligation was memorialized in the parties' 2000 judgment of divorce and had not been modified since that time. Upon the eldest child's emancipation in 2014, the mother sought an upward modification of the father's child support obligation. In support of her petition, the mother offered only generalized allegations about how costs for the parties' children had increased as they grew, as well as the fact that the father's income had also increased. Since the order at issue came into existence prior to 2010, the mother was required to show
a substantial and unanticipated change in circumstances. Family Court properly determined that

the mother's allegations in support of her petition were not sufficient to constitute a substantial and unanticipated change in circumstances and as such, her petition was properly dismissed.

Matter of Krege v. Hoffman, 155 AD3d 1398 (3d Dept 2017)

Unexpected Closure by Family Court Clerk's Office Excuses Untimely Filing

In a child support proceeding, Family Court abused their discretion by dismissing the father's written objections as untimely, where the building in which the Family Court Clerk was located closed earlier than usual, thereby preventing the father from filing his objections the day they were due. The father's attorney called the Family Court Clerk's officer several days before the filing deadline. The father's attorney was assured that the objections could be filed up to 5:00 p.m. the day they were due. The Unified Court System's website also stated that the clerk's office was open until 5:00 p.m. during weekdays. The day the objections were due to be filed, the father's attorney arrived at the Clerk's office at approximately 4:36 p.m., but was told that the building had closed at 4:30 p.m. that day. The father's attorney was further assured by court personnel that the objections would be accepted the following business day with no penalty to the father. The father's attorney mailed a copy of the objections to the mother's attorney and to the clerk the same day. The father's attorney also hand delivered the objections to the Clerk for filing the next business day. Noteworthy, in her rebuttal to her father's objections, the mother did not complain of the late filing. The mother also received an extension of time to serve her rebuttal with her request being made after the deadline for filing the rebuttals. Under the totality of the circumstances, Family Court should have exercised their discretionary authority and excused the brief delay in filing. The Court remitted the matter back to Family Court for a review of the father's objections on the merits.

Matter of Alberino v. Alberino, 154 AD3d 1139 (3rd Dept 2017)

Family Court Properly Imputed Income to Father

Family Court providently imputed income to the father in a child support proceeding, where the father had income from rental properties and also derived income from his ownership of shares in his parent's business. The father owned two rental properties which he acknowledged he had earned income for in years prior to a fire to the properties in approximately 2013. The father claimed that the fire negatively impacted the rental income. However, the father's argument was deemed unavailing by Family Court because he acknowledged at the hearing that the fire damage had been repaired. The father also failed to submit evidence to show that the fire damage adversely impacted the rental income on a long term basis. Also, the father owned shares of a company where his parents were the majority shareholders. The father's tax returns revealed passive income from these shares in 2013, as well as the fact that the father paid roughly $3,000 in taxes on the income received from the shares. Despite the aforementioned, the father claimed that he did not receive the income set forth on his tax returns, which explanation was also deemed unavailing by Family Court. Under the circumstances, Family Court properly imputed income to the father. Family Court also properly considered a home loan to the father from his parents when fashioning the father's child support obligation.

Matter of Worfel v. Kime, 154 AD3d 1143 (3rd Dept 2017)

***De Novo* Child Support Hearing Necessary Where Stipulation Failed to Comply with CSSA**

In a child support modification proceeding, Family Court improperly dismissed the mother's petition where the provisions of the parties' April, 2009 child support stipulation, which were incorporated without merger into their 2012 judgment of divorce, were invalid and unenforceable. The parties' 2009 stipulation incorrectly calculated the mother's presumptive child support obligation and further failed to adequately apprise the parties that the Child Support Standards Action (CSSA) provided for the presumably correct amount of child support to be paid by the custodial parent. Given the

deficiencies with the child support provisions of the 2009 stipulation, the matter was remanded back to Family Court for a *de novo* child support determination.

Matter of Hardman v. Coleman, 154 AD3d 1146 (3rd Dept 2017)

Where Findings of Fact and Conclusions of Law Entered Upon Wife's Default Failed to Comply With Deviation Requirements of the Child Support Standards Act, *De Novo* Review Necessary

Supreme Court erroneously denied the wife's motion seeking a *de novo* determination of the husband's child support obligation. In a divorce action, where the wife was the defendant, she defaulted in the action and based upon the husband's request, Supreme Court signed a findings-of-fact and conclusions of law and judgment of divorce. The divorce documents provided the wife with less child support than the Child Support Standards Act (CSSA) dictated. The findings-of fact and conclusions of law also stated that the parties' were deviating from the CSSA based upon their agreement. However, the parties never entered into a written or oral stipulation indicating that they had been advised of the provisions of the CSSA, or that they were aware that the CSSA provided the presumptively correct amount of child support to be paid. The findings-of-fact and conclusions of law also failed to explain why the parties deviated from the CSSA. In light of the aforementioned, the matter was remitted back to Family Court for a *de novo* child support determination.

Matter of Spooner v. Spooner (a/k/a Lajoie), 154 AD3d 1158 (3rd Dept 2017)

Court Has No Discretion to Reduce or Eliminate Child Support Arrears Accumulated Prior to the Filing of Petition

Family Court properly denied the father's written objections to the Support Magistrate's refusal to annul arrears that had accumulated prior to the filing of the father's child support modification petition. The father filed a modification petition in 2015, challenging the amount of arrears set forth in a 2015 order, and seeking cancellation of the arrears established within that order. The arrears at issue accrued between 2002 and 2004. The father filed a downward modification petition in 2004 to address the two years of arrears. Inexplicably, the order that addressed these arrears was not signed until 2015, when the father again filed a modification petition. In denying the father's request for modification, Family Court appropriate recognized the fact that they had no discretion to cancel, reduce or otherwise modify arrears that accumulated prior to the date a petition was filed to terminate or reduce a child support obligation. Since the father did not file a petition until 2004 to terminate an obligation that he claimed should have ended in 2002, he was required to pay the arrears that accumulated between 2002 and 2004.

Matter of Pratt v. Pratt, 154 AD3d 1201 (3rd Dept 2017)

Support Magistrate Did Not Abuse Discretion in Permitting Dentist's Telephonic Testimony

Family Court denied respondent's objection to the order of the Support Magistrate. The Appellate Division affirmed. Petitioner mother alleged that respondent father violated his child support obligations by refusing to pay certain dental expenses for the parties' child. The Support Magistrate permitted a dentist to testify telephonically regarding the child's need for dental treatment. The Support Magistrate did not abuse her broad discretion in permitting the dentist's telephonic testimony. Moreover, the father was not prejudiced by a ministerial error on the dentist's application for leave to testify by telephone.

Matter of Phalen v Robinson,155 AD3d 1587 (4th Dept 2017)

Court Erred in Granting Father Downward Modification That He Did Not Seek

Family Court concluded that it was not in the children's best interests to change their primary placement and, among other things, modified the parties' visitation schedule and also modified the father's weekly child support obligation despite the fact that the parties had agreed to a different amount in a separate proceeding.

The Appellate Division modified. The court erred in granting the father a downward modification of child support inasmuch as the father did not raise any issue regarding his child support obligation in his petitions. Therefore, the order was modified by vacating the ninth ordering paragraph.

Matter of Buchanan v Kocke,155 AD3d 1602 (4th Dept 2017)

Wife Was Noncustodial Parent for Purpose of Calculating Child Support Obligation

Among other things, Supreme Court ordered plaintiff wife to pay defendant husband child support. The Appellate Division affirmed. Supreme Court properly determined that the wife was the noncustodial parent for purpose of calculating the child support obligation. The court did not abuse its discretion in imputing $32,000 of income to the husband for 2013 and $33,500 of income to the husband for 2014. The income imputed to the husband was based upon his employment history and earning capacity as a truck driver. The wife's contention was rejected that the court should have imputed additional income to the husband inasmuch as such imputation was not supported by the record and would be speculative. The wife's income was established at trial and was higher than that imputed to the husband. Where, as here, neither parent had the children for a majority of the time, the parent with the higher income, who bore the greater share of the child support obligation, should be deemed the noncustodial parent for purpose of child support.

Betts v Betts, 156 AD3d 1355 (4th Dept 2017)

Court Properly Denied Motion Based on Doctrine of Unclean Hands

Supreme Court denied the motion of defendant to, among other things, vacate a judgment of divorce with respect to his obligation to pay child support and maintenance. The Appellate Division affirmed. Shortly after the entry of a judgment of divorce in 2008, defendant relocated to Taiwan and failed to comply with the judgment or with subsequent judgments ordering him to pay money to plaintiff. Defendant learned in early 2016 that, during the marriage, plaintiff acquired property in Taiwan that she failed to disclose in her statement of net worth. As a result, in August 2016, defendant moved, among other things, to vacate the judgment of divorce regarding his obligation to pay maintenance and child support. The court did not abuse its discretion in denying the motion based on the doctrine of unclean hands. Defendant's contention was rejected that the doctrine of unclean hands was not applicable or that there was an exception where there was a fraud perpetrated on the court.

Hsieh v Teng, 156 AD3d 1421 (4th Dept 2017)

CUSTODY AND VISITATION

Court Properly Dismissed Petition to Modify Visitation

Family Court dismissed the mother's petition to modify visitation with the parties' child. The Appellate Division affirmed. A full evidentiary hearing on the petition to modify a visitation order less than four months after the order, was not required because petitioner made no offer of proof of a change in circumstances, and the court possessed sufficient information for a determination of the child's best interests.

Matter of Peggy M. v Michael O'L., 154 AD3d 438 (1st Dept 2017)

Supervised Visitation Proper

Family Court granted petitioner father supervised day-visitation only, upon two weeks' notice to respondent mother. The Appellate Division affirmed. The testimony of the expert forensic psychologist and both parties provided a sound and substantial basis for the court's determination that there had been no change in circumstances warranting modification of the existing orders and that it was not in the child's best interests for petitioner to have unsupervised visitation with the child. Following a history of domestic violence, two orders of protection were in place that prohibited petitioner from being in contact with the child for five years and petitioner had twice been convicted of violating orders of protection. The forensic evaluations

concluded that petitioner was unable to place the child's needs above his own anger against respondent and that he was unable to control his rage and maintained the belief that respondent, the court, and the police colluded against him with respect to access to the child. The then 16-year-old child expressed a desire to remain in respondent's care and visit petitioner only in New York, supervised by a maternal relative. Petitioner had rejected the supervised visitation he had been granted over the years and had seen or communicated with the child only a few times.

Matter of James K.T. v Laverne W., 154 AD3d 471 (1st Dept 2017)

No Viable Arguments on Appeal

Family Court modified a visitation order. The Appellate Division dismissed the appeal and granted assigned counsel's motion to withdraw. There were no viable arguments to be raised on appeal. The child turned 18 and thus was no longer subject to the visitation order.

Matter of Victor M.N. v Norma G.C., 154 AD3d 554 (1st Dept 2017)

Court's Order Directing if Mother Moved Father be Awarded Physical Custody of Child Reversed

Family Court directed that the child be enrolled in school in Bronx County and that if the mother moved to Queens, the father be awarded primary physical custody, with visitation to the mother on three weekends each month. The Appellate Division reversed. Because the mother's petition did not seek permission to relocate with the child, the court's order that custody be modified to set a particular parenting time schedule in the event the mother moved in the future lacked a sound and substantial basis in the record. Further, there was no basis for the court to direct that the child be enrolled in school in Bronx County because the father was granted final decision-making authority on education issues.

Matter of Jonathan A. v Tiffany V., 154 AD3d 572 (1st Dept 2017)

Joint Custody Appropriate

Family Court awarded the parties joint custody of their children. The Appellate Division affirmed. The record did not support the mother's contention that there was a prior custody arrangement in place, and therefore the court's paramount consideration was the ultimate best interest of the children as opposed to whether there had been a change in circumstances. The court's finding that it was in the children's best interest to award joint legal and physical custody to the parties was amply supported. The parties appeared equally well-suited to provide for the children's needs, had conducted themselves civilly and had generally set aside their personal feelings for the sake of the children.

Matter of Felicia S.A. v Gary C., 154 AD3d 628 (1st Dept 2017)

Sole Custody to Mother, Supervised Visitation to Father Affirmed

Supreme Court awarded defendant mother sole physical and legal custody of the parties' child, granted plaintiff father supervised visitation, granted a five year stay-away order of protection in the mother's favor, and awarded the mother basic child support and child support arrears. The Appellate Division affirmed. The court's determination that it was in the child's best interests to award sole custody to the mother had a substantial evidentiary basis, based partly upon findings that the father committed acts of domestic violence against the mother, during her pregnancy with the child and after the child's birth. Photos of the mother's injuries taken shortly after the abuse, as well as the mother's witnesses, corroborated the mother's account. Further, the father's outbursts and conduct at trial reinforced the court's conclusion that the father, unlike the mother, could not control his emotions. This evidence provided a sound and substantial basis for the court's finding that unsupervised visitation would have a negative impact on the child's well-being. In determining the father's child support obligation, the court properly imputed income to him. Even if he was terminated from his employment because of negative publicity from sanctions during the instant proceedings, it was his own misconduct that caused the unemployment.

Zappin v Comfort, 155 AD3d 497 (1st Dept 2017)

Father Failed to Show Change in Circumstances

Family Court dismissed respondent father's petition to modify a custody order to change custody of the parties' children from the mother to him. The Appellate Division affirmed. The court properly found no change in circumstances to warrant modification of a prior custody order and that a change in custody was not in the children's best interests. The father's claims of educational neglect rang hollow inasmuch as he failed to visit the children for six years or to learn about their educational needs. While the father claimed that the children were doing poorly in school, he did not know the name of their school or what grade each child was enrolled in. Further, the record showed that the mother took appropriate steps to address the children's challenges and learning disabilities by working with their school and obtaining appropriate services. Relocation to Georgia was not in the best interests of the children inasmuch as they maintained positive relationships with their grandparents, older siblings, and other relatives, all of whom line in New York.

Matter of Tiffany H.-C. v Martin B., 155 AD3d 501 (1st Dept 2017)

Father Not Obligated to Foster Child's Bond With Mother Where Order of Protection Prohibited Her Contact With Child

Family Court dismissed the mother's petition to modify a custody order. The Appellate Division affirmed. The mother failed to show a change in circumstances to warrant modification of the custody order. The mother's contention that the custodial father failed to foster a bond between her and the child was unavailing inasmuch a stay-away order of protection prohibited her from having any contact with the child unless ordered by the court.

Matter of Derick B. v Catherine L., 155 AD3d 511 (1st Dept 2017)

Sole Legal & Physical Custody of Child to Father in Child's Best Interests

Family Court granted sole physical and legal custody of the subject child to petitioner father. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that sole legal and physical custody to the father was in the child's best interests. The child resided with the mother until she was five years old, at which time a neglect petition was filed against the mother, resulting in the child being paroled to the father's care. Evidence showed that the neglect petition was brought as a result of the mother's anger, aggression and domestic violence in the child's presence and that the child was afraid of the mother and reported that the mother hit her with a belt. Although the mother attended services and the neglect proceeding was resolved, during the proceeding the mother was involved in another violent incident when the child was present at an overnight visit. There was also evidence that the mother had unresolved alcohol abuse problems and that she showed an insensitivity to the child's needs. The father was a suitable caretaker who provided a stable home and the child was loved and well-cared for in his care. The father was living with the paternal grandparents in a three-bedroom home, and the grandparents were willing to provide financial support to the father and child and to assist in the child's care. Since living with the father, the child's school attendance and timeliness had improved, and all her needs were met.

Matter of Nyron P. v Giselle A., 155 AD3d 545 (1st Dept 2017)

Sole Legal & Physical Custody of Child to Grandmother Affirmed

Family Court granted sole physical and legal custody of the subject child to petitioner grandmother. The Appellate Division affirmed. The determination that it was in the child's best interests to be in the grandmother's custody was amply supported by the record. The grandmother had supported the child and provided him with a stable and loving home. The mother remained in a long-term relationship with a man who repeatedly engaged in acts of domestic violence against her in the child's presence, and she had stated her intention to continue to live with the man. After an assault that left the mother hospitalized with a broken arm, burns, and various bruises, she resumed living

with the man within days. She denied, and continued to deny, that the man was a danger to her or the child.

Matter of Nyron P. v Giselle A., 155 AD3d 545 (1st Dept 2017)

Grandparent's Petition For Custody of Child Properly Dismissed

Family Court dismissed the petition of the subject child's grandparents. The Appellate Division affirmed. The court properly dismissed summarily the paternal grandparents' petition for custody of the subject child inasmuch as the petition contained only conclusory statements that failed to allege extraordinary circumstances warranting a hearing. There was no basis for the child to be placed with the grandparents without a showing of extraordinary circumstances, where the child was in the custody of an otherwise fit parent. Although the grandparents asserted that they cared for the child for seven years after his birth, there was no proof of a prolonged separation between the mother and child or intent by the mother to relinquish her parental duties to the grandparents.

Matter of Jose C. v Johnny C., 156 AD3d 430 (1st Dept 2017)

Denial of Visitation With Incarcerated Father Affirmed

Family Court granted petitioner mother's motion for modification of a prior order of visitation and denied respondent father visitation with the parties' child at his correctional facility. The Appellate Division affirmed. Substantial evidence supported the determination that visitation at the father's correctional facility would be detrimental to the child's welfare. Given the father's extensive prison sentence, the four-year-old child's severe special needs, and the father's lack of awareness and understanding of the child's special needs and behavioral issues, the distance of six hours each way to the correctional facility, with the father's aunt with whom the child had no relationship, visitation was not in the child's best interests. The court properly credited the testimony of the mother, pediatrician and social worker regarding the child's condition, including that any sensory change in the child's environment would cause him distress and trigger extreme behavioral issues. The court properly modified the order of visitation to allow the father continued and regular contact with the child through letter writing, telephone and video communication, including requiring the mother to update the father regarding the child's medical and educational progress and to assist the child in returning letters to the father on a monthly basis.

Matter of Michelle C. v Jerome Alvin M., 156 AD3d 463 (1st Dept 2017)

Grandparent's Petition For Post-Adoption Visitation of Children Properly Dismissed

Family Court dismissed the petition of the subject child's maternal grandmother for post-adoption visitation with the subject children. The Appellate Division affirmed. The adoptive mother testified that the children came into her care when they were one month old and three years old, respectively. At the time of that testimony, the grandmother had not seen the children in approximately three years and had no relationship with them and they did not ask about the grandmother. The children had significant behavioral and emotional issues, which were addressed by the adoptive parents, a behavioral specialist, and a school therapist, who had implemented a highly structured program, including constant supervision in the home and at school. The record strongly supported the court's determination that introducing grandparent visitation into the children's life would present a risk of the children's regression. Additionally, the grandmother had previously taken the children to visit their biological parents and wrongly told them that they would live with the biological parents, whose rights were terminated in 2011.

Matter of Georgianna N. v Carmen V., 156 AD3d 535 (1st Dept 2017)

Record Did Not Support Family Court's Determination to Suspend Mother's Parenting Time

The parties are the parents of one child, born in 2004. In 2010, the parties entered into a stipulation of settlement which was incorporated but not merged into their judgment of divorce. By their stipulation, the

parties agreed to joint legal custody of their child, with the mother having physical custody and the father having weekly parenting time. In May 2015, the father filed a petition for sole physical custody of the child after his parenting time with the child had ceased. In an order dated December 5, 2016, the Family Court, after a hearing and an in camera interview with the child, inter alia, granted the father's petition for sole physical custody of the child and suspended the mother's parenting time with the child for a period of three months, to be followed by supervised visitation with a therapist to be selected by the father. The mother appealed. Here, the father established a change in circumstances such that modification of the existing custody arrangement between the parties was necessary to protect the best interests of the child. Further, the Family Court's determination to award sole physical custody of the child to the father was supported by a sound and substantial basis in the record. However, the Family Court's determination to suspend the mother's parenting time with the child for a period of three months was not supported by a sound and substantial basis in the record. While the Family Court appropriately determined that supervised therapeutic visitation was necessary, the court should have directed that it would designate the therapist upon consultation with the attorney for the child and the parties, and that the mother's supervised therapeutic visitation would commence immediately. Order modified.

Matter of Nixon v Ferrone, 153 AD3d 625 (2d Dept 2017)

Record Supported Order of Commitment Against Mother

In September 2010, the father filed a petition seeking visitation with the subject child. In an order dated April 1, 2014, the Family Court directed that "observed and evaluated visits" between the father and the child be conducted, and that "the parties are to telephone the social worker, schedule appointments and cooperate in all respects with the observed and evaluated visitation." Following a hearing, the court adjudged the mother in contempt of court for failing to comply with the order dated April 1, 2014. In an order of commitment dated December 18, 2015, the court committed the mother to the custody of the New York City Department of Correction on weekends for a period of six months. Thereafter, the court received a report stating that no further visits between the father and the child had taken place, and the mother stated that she did not "need to" bring the child for a visit with the father. Based on the mother's continuing failure to comply with the visitation order, the court issued an order of commitment dated January 19, 2016, committing the mother to the custody of the New York City Department of Correction for a consecutive period of six months of incarceration. In an order dated February 3, 2016, the Family Court suspended the order of commitment dated January 19, 2016, on the condition, inter alia, that the mother produce the child for alternate weekend visitation with the father. Thereafter, the father expressed his intention to withdraw his visitation petition, and the court suspended its directive that the mother produce the child for alternate weekend visitation. In an order dated August 30, 2016, the court dismissed the father's visitation petition as withdrawn. Contrary to the mother's contention, the father established, by clear and convincing evidence, that the mother willfully violated a clear and unequivocal court order by failing to cooperate with court-ordered visitation between the child and the father, thereby prejudicing the father's right to visitation with the child. Order affirmed.

Matter of Chaundhry v Saleem, 153 AD3d 518 (2d Dept 2017)

Record Did Not Support Award of Sole Legal and Residential Custody of the Children to the Father

Considering all of the facts and circumstances of this case, the father failed to demonstrate that it was in the children's best interests to award him sole legal and residential custody of the children, as well as final decision-making authority over medical and dental issues, and issues of mental health. The mother had been the children's primary caretaker since birth, and their emotional and intellectual development was closely tied to their relationship with her. The record overwhelmingly demonstrated that the mother took care of the children's physical and emotional needs both during and after the marriage, while it was undisputed that the father consistently failed to fully exercise his visitation rights or fulfill his most basic financial

obligations to the children after the parties' separation. Indeed, aside from objecting to her decision to expose the children to views to which he personally objected, the father expressed no doubts whatsoever about the mother's ability to care and provide for the children. The weight of the evidence established that awarding the father full legal and residential custody of the children with limited visitation to the mother would have been harmful to the children's relationship with her. Furthermore, the Supreme Court improperly directed that enforcement of the parties' stipulation of settlement required the mother to practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy during any period in which she has physical custody of the children and at any appearance at the children's schools. Although the court accepted the father's argument that the religious upbringing clause "forb[ids] [the mother from] living a secular way of life in front of the children or while at their schools," the plain language of the parties' agreement was "to give *the children* a Hasidic upbringing" (emphasis added). The parties' agreement did not require the mother to practice any type of religion, to dress in any particular way, or to hide her views or identity from the children. Nor may the courts compel any person to adopt any particular religious lifestyle. Indeed, the parties themselves agreed in the stipulation of settlement that they "shall [each] be free from interference, authority and control, *direct or indirect,* by the other" (emphasis added). The weight of the evidence did not support the conclusion that it was in the children's best interests to have their mother categorically conceal the true nature of her feelings and beliefs from them at all times and in all respects, or to otherwise have forced her to adhere to practices and beliefs that she no longer shared. There was no indication or allegation that the mother's feelings and beliefs were not sincerely held, or that they were adopted for the purpose of subverting the religious upbringing clause, and there had been no showing that they were inherently harmful to the children's well-being. The Appellate Division concluded that the stipulation of settlement did not adequately provide the father with meaningful time with the children. Accordingly, the stipulation of settlement was modified to give the father additional visitation with the children, and awarded the father visitation during all Jewish holidays and for two weeks during summer vacation. Further, the mother was awarded visitation during all non-religious school vacations, with the exception of the two weeks each summer to be spent with the father. Order modified.

Weisberger v Weisberger, 154 AD3d 41 (2d Dept 2017)

Record Supported Determination That it Was in the Child's Best Interests to Limit Visits with Incarcerated Father to Once Every Other Month

The father, who is incarcerated, petitioned for visitation with his child. He appealed from an order of the Family Court dated February 25, 2014, which, after a hearing, granted his petition for visitation only to the extent of awarding him visitation by means of letters, cards, gifts, and telephone calls. In an order dated February 4, 2015, the Appellate Division reversed the order dated February 25, 2014, insofar as appealed from, and remitted the matter to the Family Court for further proceedings to establish an appropriate in-person visitation schedule. On February 23, 2015, the Family Court, without the father's appearance in court, awarded the father in-person visitation with the child once every other month. The father appealed. The Appellate Division affirmed. The father's contention that the Family Court erred in issuing a determination without holding a hearing lacked merit, as the father and his attorney consented to the court making a determination, inter alia, based upon its review of the transcript of the prior hearing and the arguments made by the parties during the court appearance. The Family Court's conclusion that it was in the child's best interests to limit his visits with the father in prison to once every other month for one hour was supported by a sound and substantial basis in the record. While the attorney for the child argued that there has been a change of circumstances since the Family Court issued its determination, the question of the father's move from one prison to another should have been brought to the attention of the court by means of a modification petition.

Matter of Torres v Corniel, 154 AD3d 654 (2d Dept 2017)

Record Supported Award of Sole Legal an Physical Custody of Children to Father

The parties, who were never married, are the parents of two children. Prior to the younger child's birth, the parents lived together in the father's home. However, when the younger child was approximately two weeks old, the mother became concerned that the father was sexually abusing the older child, who was then two years old. The mother took the children and went to the home of the maternal grandmother, where she remained. When the younger child was approximately 18 months old, the father, who had not seen the children since the mother left, sought and was granted visitation with both children. Thereafter, the mother made repeated accusations that the father had abused both children. Although the mother's accusations were deemed unfounded by the Administration for Children's Services and court-appointed evaluators, the mother continued to believe that the father had abused the children, continued to make new allegations of abuse, and failed to comply with the visitation orders. Eventually, both parties filed petitions seeking sole legal and physical custody of the children. While the petitions were pending, the father was awarded extended visitation with the children, and, later, temporary custody. After a hearing, the Family Court issued a first order dated June 8, 2015, in which it granted the father's petition and denied the mother's petition, finding that it was in the children's best interests to remain in the father's custody. The court issued a second order dated June 8, 2015, in which it awarded the mother visitation. The mother appealed from both orders. The Appellate Division affirmed. Contrary to the mother's contention, the Family Court correctly concluded that awarding sole legal and physical custody to the father was in the children's best interests. One of the primary responsibilities of a custodial parent is to assure meaningful contact between the children and the noncustodial parent, and the willingness of a parent to assure such meaningful contact between the children and the other parent is a factor to be considered in making a custody determination. Here, the mother's repeated and unfounded allegations of sexual abuse against the father were an act of interference with the parent-child relationship so inconsistent with the best interests of the children as to raise a strong probability that the mother was unfit to act as custodial parent. Thus, there was a sound and substantial basis in the record for the court's determination, upon its consideration of the totality of the circumstances, that the best interests of the children were served by awarding custody to the father and visitation to the mother.

Matter of Abramson v Shaw, 154 AD3d 744 (2d Dept 2017)

Family Court Erred in Denying Father's Petition for Visitation

The father commenced a proceeding seeking a one-time visit with his three children. In an order dated December 1, 2015, made after a hearing, the Family Court denied the father's petition. The father appealed. The Appellate Division reversed. When adjudicating visitation rights, the court's first concern is the welfare and the interests of the children. Visitation is a joint right of the noncustodial parent and of the child, and the denial of visitation rights to a natural parent is such a drastic remedy that it should only be considered when there is substantial evidence that visitation would be detrimental to the welfare of the child. In fact, visitation with a noncustodial parent is presumed to be in the best interests of the child, although the presumption may be overcome upon a showing, by a preponderance of the evidence, that visitation would be harmful to the child's welfare or not in the child's best interests. Here, prior to the hearing on the father's petition seeking a one-time visit with his three children, the Family Court ordered the mother to produce the children for three supervised visits with the father. The mother failed to comply. Thereafter, the father testified at the hearing that he loved the children and wanted to visit with them and engage in age-appropriate activities, such as taking them to the park or the library. The mother failed to appear at the hearing to oppose the father's petition. The attorney for the children would not take a position, because she had not had contact with the children or their mother for over a year. Under the circumstances, the court should have granted the father's petition. Accordingly, the matter was remitted to the Family Court for further proceedings, including scheduling a visit between the father and the parties' children, and for a determination of whether said visit should be supervised.

Matter of Dey v Minvielle, 154 AD3d 750 (2d Dept 2017)

Record Was No Longer Sufficient to Review Whether Family Court's Determination Regarding Custody Was in Best Interests of the Children in View of New Developments Brought to the Court's Attention by the Attorney for Children

The parties were married in 2004 and have two children. They lived in Bronx County until 2010, when they purchased a home in Orange County and moved there with the children. In 2014, the mother and the children moved back to the same neighborhood in Bronx County where they had lived previously. The father thereafter petitioned the Family Court, Orange County, for sole custody of the children. The children remained in the care of the mother throughout the pendency of the proceeding, and maintained visitation with the father. After a hearing, in an amended order, the Family Court, inter alia, awarded sole custody of the children to the mother. The father appealed. The court's paramount concern in any custody dispute is to determine, under the totality of the circumstances, what is in the best interests of the child. Here, the Family Court, after a hearing, awarded sole custody of the parties' children to the mother. However, on appeal, new developments were brought to the Appellate Division's attention by the attorney for the children, thus, rendering the record no longer sufficient to review whether the court's determination regarding custody was in the best interests of the children. Accordingly, the matter was remitted to the Family Court, Orange County, for a reopened hearing, at which the new facts shall be considered, and a new custody and visitation determination rendered thereafter. Order modified.

Matter of Lopez v Reyes, 154 AD3d 756 (2d Dept 2017)

Record Supported Determination Granting Father Sole Custody of Children and Permission to Relocate

The mother and the father have two children together, born May 18, 2000, and April 12, 2002, respectively. Until 2013, the children resided for the most part with their paternal grandmother, who stated at a hearing that she was no longer able to care for them. In 2013, the father and his wife moved with the children to Las Vegas, Nevada, where the wife's extended family resides, without first petitioning for custody. The mother, who remained in New York, petitioned for sole custody of the children. The father cross-petitioned for sole custody of the children and for permission to relocate with the subject children to Las Vegas. Pending hearing and determination of the petition and cross petition, temporary orders of visitation awarded the mother visitation in New York on vacations and holidays. A court-appointed forensic evaluator recommended that the children remain with their father in Las Vegas, based in part on the children's wishes and the crowded conditions of the mother's apartment, where she resided with at least two of her adult children and a grandson. After a hearing and in camera interviews with the children, the Family Court awarded sole custody of the children to the father and granted him permission to relocate to Las Vegas with the children. The mother appealed. A court deciding an initial petition for child custody must determine what is in the child's best interests. The wishes of the child are not controlling, but are entitled to great weight, particularly where the child's age and maturity would make his or her input particularly meaningful. Here, although the father's relocation to Las Vegas precipitated the commencement of these proceedings, the matter concerned an initial custody determination, and, therefore, the strict application of the factors relevant to relocation petitions was not required. The father's relocation was one factor for the hearing court to consider in determining what was in the children's best interest. Here, contrary to the mother's contentions, the Family Court's determination had a sound and substantial basis in the record based upon the totality of the evidence, including the wishes of the children. Order affirmed.

Matter of McDonald v Thomas, 154 AD3d 763 (2d Dept 2017)

Defendant's Relocation to a Different School District Did Not Constitute a Sufficient Change in Circumstances

The parties are the divorced parents of two children. In 2009, they entered into a stipulation of settlement which provided for joint legal custody of the children

and residential custody to the plaintiff "for school district purposes." In the event that the parties could not agree upon a private school, the stipulation provided that the children would be enrolled in public school, which, given the provision of residential custody to the plaintiff "for school district purposes," would be located in the school district in which the plaintiff lived. At the time the parties entered into the stipulation, however, the children were enrolled in private school, and they have continuously been so enrolled. In 2015, the defendant moved to modify the parties' stipulation so as to award him residential custody of the parties' children. The modification was sought on the ground that the defendant wished to enroll the children in public school in the school district to which he had relocated. The plaintiff cross-moved, inter alia, to modify the visitation provisions of the stipulation. After a hearing, the Supreme Court granted the defendant's motions, and denied those branches of the plaintiff's cross motion. The plaintiff appealed. Here, the evidence at the hearing demonstrated that, at the time they entered into the stipulation, the parties were not satisfied with the school district in which they lived and in which the plaintiff continued to live after the divorce, and thus had enrolled the children in private school. Despite their dissatisfaction with the school district, the stipulation provided for residential custody to the plaintiff "for school district purposes," and the children remained in private school for the next six years. Under these circumstances, the defendant's relocation to a different school district did not constitute a sufficient change in circumstances since the time of the stipulation so as to warrant a modification of the custody agreement by the court. Accordingly, the Supreme Court should have denied the defendant's motions to modify the parties' stipulation so as to award him residential custody. In contrast, the plaintiff demonstrated a sufficient change in circumstances warranting modification of the visitation provisions of the stipulation. Indeed, both parties agreed that the visitation provisions, which included overnight visitation with the defendant during the week, had become impractical in light of the defendant's relocation a significant distance from the plaintiff's residence and the children's school. Accordingly, the Supreme Court should have granted that branch of the plaintiff's cross motion which was to modify the visitation agreement. Thus, the matter was remitted for further proceedings to set a new visitation schedule that will be more workable in light of the defendant's relocation while still providing him with such liberal visitation as the court deems appropriate. Order modified.

Trimarco v Trimarco, 154 AD3d 792 (2d Dept 2017)

Record Supported Award of Residential Custody of the Children to the Father with Liberal Parenting Time to the Mother

The parties, who were never married, have two children together. Pursuant to a so-ordered stipulation dated February 14, 2013, the parties agreed to joint legal custody of the children, with residential custody to the mother, and parenting time to the father. On January 12, 2016, the father filed a petition to modify the custody provisions of the so-ordered stipulation, inter alia, so as to award him residential custody of the children. After a hearing, the Family Court granted that branch of the father's petition and modified the stipulation so as to award the father residential custody of the children with liberal parenting time to the mother. The mother appealed. Here, the Family Court's determinations that there had been a change in circumstances since the so-ordered stipulation and that a transfer of residential custody to the father would be in the children's best interests had a sound and substantial basis in the record. The evidence adduced at the hearing regarding, inter alia, the children's academic and development difficulties and the father's better ability to care for and attend to the children's daily needs and academic development, as well as the mother's interference with the visitation time between the father and the children, supported the determination to transfer residential custody to the father. Willful interference with a noncustodial parent's right to visitation is so inconsistent with the best interests of the children as to, per se, raise a strong probability that the offending party is unfit to act as a custodial parent. Further, there was evidence adduced which demonstrated the father's willingness to foster the relationship between the mother and the children. Accordingly, the Family Court properly granted that branch of the father's petition which was to modify the custody provisions of the so-ordered stipulation so as to award him residential custody of the children, and

awarded the mother parenting time with the children. Order affirmed.

Bullard v Clark, 154 AD3d 846 (2d Dept 2017)

Record Supported Denial of Mother's Petition for Permission to Relocate with Child

The parties, who were never married, have one child together. After they lived together for a brief period, the parties separated in 2007, when the child was approximately one year old. In an order dated December 7, 2007, the parties were awarded joint legal custody, with primary residential custody to the mother, and the child resided with the mother in Rockland County. In 2016, the mother filed a petition which sought permission to relocate with the child to California and to modify the father's visitation schedule. After a hearing, the Family Court denied the mother's petition. The mother appealed. A parent seeking to relocate with a child bears the burden of establishing by a preponderance of the evidence that the proposed move would be in the child's best interests. Here, the Family Court properly determined that the mother failed to establish, by a preponderance of the evidence, that a proposed relocation to California would have served the child's best interests. The court considered and gave appropriate weight to all of the relevant factors, including, but not limited to, each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and each parent, the impact of the move on the quantity and quality of the child's future contact with the father, the degree to which the mother's and the child's lives might be enhanced economically, emotionally, and educationally by the move, and the feasability of preserving the relationship between the father and child through suitable visitation arrangements. The mother failed to prove that her life and the child's life would be enhanced economically, emotionally, and educationally by the move. Although the mother established that she would be able to continue to rely on her mother for monetary support, the mother's proposed economic situation in California was tenuous at best. Furthermore, the impact of a move on the relationship between the child and the noncustodial parent is a central concern. Here, the mother failed to establish that the proposed move would not have had a negative impact on the quantity and quality of the child's future contact with the father. Accordingly, the Family Court properly denied the mother's petition, inter alia, for permission to relocate with the child to California.

Matter of McGinn v Devivo, 154 AD3d 852 (2d Dept 2017)

Record Supported Determination to Award Sole Residential Custody of Child to Father

The parties, who were never married, are the parents of one child, born in 2008. In 2012, the parties entered into a stipulation of settlement, in which they agreed to joint legal custody of their child, with the mother having sole residential custody and the father having certain parenting time. In 2014, after the father filed a petition to modify the 2012 stipulation of settlement so as to award him sole residential custody of the child, the parties entered into a second stipulation of settlement dated September 15, 2014, in which they agreed, inter alia, to the same custody and parenting time arrangement as set forth in the 2012 stipulation of settlement. In December 2015, the father filed a petition seeking, among other things, to modify the 2014 stipulation so as to award him sole residential custody of the child. The Family Court, in an order dated November 17, 2016, upon a decision dated August 29, 2016, made after a hearing and an in camera interview with the child, granted the father's petition. The mother appealed. The Appellate Division affirmed. The father established a change in circumstances since the parties' recent stipulation was entered into such that modification of the existing custody arrangement between the parties was necessary to protect the best interests of the child. The record revealed, among other things, that the mother had lapses in judgment with respect to the security of weapons in her home, the child had multiple unexcused absences and latenesses at school, and the mother made statements to the child that potentially placed the child in the middle of the parties' conflict. Accordingly, the Family Court's determination to award sole residential custody of the child to the father was supported by a sound and substantial basis in the record.

Bixler v Vitrano, 155 AD3d 718 (2d Dept 2017)

Hearing on Issue of Standing Not Necessary

The petitioner, who is not the parent of the subject child, commenced a proceeding for custody of the child, who was born in 2005. The respondent father moved to dismiss the petition, contending that the petitioner lacked standing to seek custody of the child. The Supreme Court, without a hearing, denied the petition and granted the father's motion to dismiss based on the petitioner's lack of standing. The plaintiff appealed. The Appellate Division affirmed. The Supreme Court properly, without a hearing, denied the petition and granted the motion to dismiss based on the petitioner's lack of standing. The submitted papers established that the petitioner had been involved in the child's life since the child was a baby, and that the child had resided primarily with the petitioner, and not the father, for a number of recent years. However, the period of time when the child resided primarily with the petitioner and not the father largely coincided with the period of time when the father was working full time and attending law school at night. During that period of time, the father contributed financially to the child's support. The petitioner and the father completed certain forms designating the petitioner as the child's caregiver for stated purposes, yet these forms were for a limited duration, and some of the forms contained notations to the effect that the father was not giving up his custodial rights. This situation may be likened to one in which a parent had a compelling reason to allow a nonparent to assume custody for a defined period of time, which would not support a finding of extraordinary circumstances. Since the submissions raised no triable issue of fact, a hearing on the issue of standing was not necessary.

Schmitt v Troche, 155 AD3d 739 (2d Dept 2017)

Change in Circumstances Did Not Warrant a Change in Custody

The mother and the father were not married to each other and separated approximately one year after the birth of their child. An initial custody and visitation order dated October 28, 2011, which was entered on consent of the parties, awarded sole custody of the child to the mother and liberal parenting time, including unsupervised overnight visitation, to the father. The father filed a petition for modification of the custody and visitation order, seeking sole custody of the child. After a hearing, the Family Court found that the evidence supported a finding of a change in circumstances, as the child was older and attending school, and that the initial order was no longer compatible with the child's schedule. However, the court determined that the change in circumstances did not warrant a change in custody to the father, and that a change in custody would not have been in the child's best interests. The father appealed. The Appellate Division affirmed. Contrary to the father's contentions, the evidence supported the Family Court's finding that the mother did not attempt to alienate the child from him. Further, after a careful review of the court's order, the Appellate Division found that the Family Court gave careful consideration to all relevant factors concerning the best interests of the child, and the court's determination had a sound and substantial basis in the record. Accordingly, the Family Court properly denied the father's petition to modify the prior order of custody and visitation so as to award him sole custody of the child.

Matter of Vargas v Gutierrez, 155 AD3d 751 (2d Dept 2017)

Record Supported Finding That Grandfather Did Not Have Standing

The petitioner, the paternal grandfather of the subject child, commenced a proceeding seeking visitation with the child. At the conclusion of the grandfather's case at a hearing on the issue of standing, the Family Court dismissed the petition, finding that the grandfather did not have standing. The grandfather appealed. The Appellate Division affirmed. Tthe Family Court's determination that the grandfather lacked standing was supported by the record. Under the circumstances of this case, equitable considerations did not warrant judicial intervention for the visitation he sought (*see* DRL § 72 [1]). Accordingly, the Family Court properly dismissed the grandfather's petition for visitation.

Matter of McAvoy v McAvoy, 155 AD3d 867 (2d Dept 2017)

Record Did Not Support Issuance of an Order of Protection Against Mother

The mother and the father are unmarried parents of twin girls, born in 2007. Pursuant to an order of custody and visitation dated June 18, 2015, entered on consent, the mother was awarded sole legal and physical custody of the children, with visitation to the father. In August 2016, the mother filed a petition to terminate the father's visitation with the children, alleging that he failed to follow the existing visitation schedule and had subjected the children to corporal punishment. In the order appealed from, the Family Court, inter alia, denied the mother's petition, determining that continued, unsupervised visitation between the father and the children was in the children's best interests, and directed the issuance of an order of protection against the mother directing her to refrain from using corporal punishment against the children. The mother and the children separately appealed. The Appellate Division modified. The Family Court's determination that continued, unsupervised visitation between the father and the children was in the children's best interests was supported by a sound and substantial basis in the record. However, the Family Court improperly directed the issuance of an order of protection against the mother directing her to refrain from using corporal punishment against the children. The father's enforcement petition contained no allegations that the mother had engaged in corporal punishment, and the evidence did not otherwise reveal a basis for the issuance of a protective order (*see* FCA § 656).

Matter of Staten v King, 155 AD3d 879 (2d Dept 2017)

Record Supported Denial of Father's Petition for Permission to Relocate to Pennsylvania

The parties have one child together. The father, who has sole custody, resides in Queens, while the mother, who has visitation with the child on alternating weekends, resides in Manhattan. In 2016, the father filed a petition for permission to relocate with the child to Pennsylvania. After a hearing, the Family Court denied the father's petition, and the father appealed. The Appellate Division affirmed. In determining the father's petition, the Family Court considered and gave appropriate weight to all of the relevant factors, including the potential impact on the quantity and quality of the mother's visitation if the child were to relocate to a part of Pennsylvania that is an approximate three-hour drive from the mother's residence. The court also considered, inter alia, the degree to which the father's and the child's lives might be enhanced economically, emotionally, and educationally by the move. As to that factor, the father offered only his opinion as to the quality of the schools in Pennsylvania as opposed to those in the father's current neighborhood; unsubstantiated, vague testimony about an employment opportunity in Pennsylvania; and no testimony regarding his efforts to locate similar employment in New York. Under these circumstances, the Family Court's determination that the father failed to establish that relocating from Queens to Pennsylvania would be in the best interests of the child had a sound and substantial basis in the record.

Reyes v Gill, 155 AD3d 1044 (2d Dept 2017)

Record Supported Dismissal of Grandmother's Petition for Custody Based on Lack of Standing

The subject child lived with his mother and maternal grandmother from the time of his birth until the mother died on August 24, 2015. At the time of the mother's death, she was engaged to be married to the child's father. In November 2015, the grandmother filed a petition for custody of the child. The Family Court held a hearing to determine if extraordinary circumstances existed to confer standing upon the grandmother. After the hearing, the court dismissed the petition based on lack of standing, finding that the grandmother had failed to establish the existence of extraordinary circumstances. The grandmother appealed. The Appellate Division affirmed. Contrary to the grandmother's contention, the Family Court did not apply the wrong standard, and the fact that the child's mother was deceased did not constitute a "per se" extraordinary circumstance under DRL § 72 to give her standing to seek custody. DRL § 72 (1) gives a grandparent standing to seek visitation when one or both of the parents are deceased, but does not apply to cases in which the grandparent seeks custody. DRL § 72 (2) (a), provides that a grandparent may commence a proceeding for custody of his or her grandchild based upon the existence of extraordinary circumstances.

Contrary to the grandmother's contention, she failed to establish extraordinary circumstances pursuant to DRL § 72 (2) based on an extended disruption of custody. An extended disruption of custody includes a prolonged separation between a parent and a child for at least 24 continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of a grandparent (*see* DRL § 72 [2] [b]). Here, the grandmother failed to show that the father voluntarily relinquished care and control of the child. The evidence established that, at all times, the father visited with the child, provided financial support from when the child was born, and was mentally and physically fit. Although the child lived with the mother and the grandmother from the time the child was born in December 2012, the grandmother did not become the child's caregiver and custodian until the mother died in August 2015. Therefore, when she petitioned for custody, she had only been the child's custodian for three months, not for almost three years as she claimed. Although DRL § 72 (2) (b) allows the court to find that extraordinary circumstances exist where a prolonged separation between a parent and a child lasts for less than 24 months, here, the evidence established that the father sought to take custody of the child after the mother died, and the grandmother refused to release the child. In addition, the Family Court directed that the child stay with the grandmother pending the outcome of the hearing. Moreover, the father testified that because he and the mother were engaged to be married, he did not petition for custody prior to the mother's death. Furthermore, while there is no doubt that the child bonded with the grandmother, the grandmother failed to show that separating the child from either her or the child's sibling would threaten the child's well being. A parent cannot be displaced merely because the child has bonded psychologically with a nonparent. In addition, contrary to the contention of the attorney for the child, the Family Court providently exercised its discretion in declining to direct forensic evaluations, since the court had sufficient information to enable it to render its extraordinary circumstances determination without forensic reports. Accordingly, the Family Court's determination that the grandmother failed to establish extraordinary circumstances conferring standing to seek custody of the child was supported by a sound and substantial basis in the record.

Matter of Sellers v. Brown, 155 AD3d 1047 (2d Dept 2017)

Record Supported Determination to Grant Grandmother's Petition for Visitation

The subject child was born in September 2015. Eight days after giving birth, the child's mother suffered a cardiac arrest, which left her unable to speak or eat on her own. On or about December 28, 2015, the child's maternal grandmother commenced a proceeding seeking visitation with the child pursuant to DRL § 72 (1), alleging that the child's father had refused to grant her access to the child since the mother's cardiac arrest. After a fact-finding hearing, the Family Court granted the petition, finding that the grandmother had standing to commence the proceeding and that her visitation with the child was in the child's best interests. The father appealed. The Appellate Division affirmed. The Family Court providently exercised its discretion in determining that the grandmother had standing to petition for visitation pursuant to DRL § 72 (1). The evidence adduced at the hearing established that the grandmother had a close relationship with, and maintained regular contact with, her daughter, who is the mother of the child. The grandmother further established that she had repeatedly contacted the father in an attempt to visit with the child, and that the mother would have allowed regular contact between the grandmother and the child had she not become incapacitated. The Family Court also properly determined that visitation between the grandmother and the child was in the child's best interests. the estrangement between the grandmother and the child resulted principally from the animosity between the father and the grandmother, and the court providently exercised its discretion in determining that it was in the child's best interests to grant the grandmother's petition for visitation.

Matter of Winn v Diaz, 156 AD3d 645 (2d Dept 2017)

Record Did Not Support Award of Residential Custody to Mother

The parties were married in 2005, and are the parents of two children, born in 2008 and 2010, respectively. In

December 2012, the father commenced an action for divorce. After an extensive trial that included the testimony of both parents, the paternal grandmother, and a court-appointed forensic evaluator, the Supreme Court, in a judgment dated January 7, 2016, entered upon a corrected decision dated March 17, 2015, inter alia, awarded residential custody of the children to the mother. The father appealed. The Appellate Division reversed. The Supreme Court's determination awarding residential custody of the parties' children to the mother lacked a sound and substantial basis in the record. While the record showed that the father denigrated the mother on more than one occasion by calling her derogatory names, the mother struck the father on more than one occasion in the presence of the children. In addition, the mother described the father as being a pedophile toward their daughter, a word she used at separate times in reports to the police and in an interview with the court-appointed forensic evaluator. Since both the police and the evaluator are mandatory reporters, Child Protective Services was contacted. There was no evidence in the record that the father engaged in any pedophilic or similar conduct toward the daughter. While the mother backtracked from her use of that term when pressed for details by the forensic evaluator, her words were so reckless that they warrant relevance to a custody determination. A parent's false accusation of sexual abuse by the other parent constitutes conduct so inconsistent with the best interests of the child as to per se raise a strong probability that the parent is unfit to act as a custodial parent. The court, by minimizing the mother's pattern of mentioning pedophilia to others, did not recognize that the mother's allegations in this regard were consistent with other evidence in the record that she placed her own interests ahead of the best interests of the children.

Altieri v Altieri, 156 AD3d 667 (2d Dept 2017)

Record Supported Determination That Relocation with Mother Was in Child's Best Interests

The parties were married in 2006, and had a child together in 2008 while they were both serving in the United States Army and stationed in Georgia. In 2012, the family moved to New York when the mother was re-assigned by the Army and the father received a medical discharge. In 2013, the parties entered into a stipulation of settlement that provided that they would share joint legal custody of the child, and each have physical custody of the child for approximately half of each week. In November 2014, the parties were awarded a judgment of divorce, which incorporated, but did not merge, the stipulation of settlement. In 2015, after the Army re-assigned the mother to Colorado, the mother commenced a proceeding to modify the provisions of the stipulation of settlement so as to award her sole legal and residential custody of the child, and to permit her to relocate with the child to Colorado. During the pendency of the proceeding, the father relocated with the child to Georgia. After a hearing, the Family Court granted the petition, and awarded certain visitation to the father. The father appealed. The Appellate Division affirmed. The Family Court's visitation award was in the best interests of the child and had a sound and substantial basis in the record. The Family Court properly determined that joint custody was no longer appropriate because the parties were unable to sufficiently communicate and cooperate on matters concerning the child. Further, the evidence at the hearing established that both parents love the child, maintain their own homes, and can adequately provide for the child's overall development. However, the court, having the benefit of observing and listening to the witnesses, including the testimony of both parties, found that the mother was better suited to place the child's interests ahead of her own and to foster the child's relationship with the other parent. Moreover, in light of the mother's reassignment to Colorado and the father's relocation from New York to Georgia, the court properly determined that it would be in the child's best interest to permit the mother to relocate with the child to Colorado.

Morris v Morris, 156 AD3d 702 (2d Dept 2017)

Text Messages Did Not Constitute Family Offense

The order appealed granted the mother's petition to modify the custody provisions of a stipulation of settlement so as to award her sole custody of the parties' child, and granted the mother's family offense petition, which had been transferred from the Family Court to the Supreme Court. The Supreme Court properly determined that the acrimony between the parties and

their demonstrated inability to cooperate on matters concerning the child made continued joint custody inappropriate. Further, given the evidence that the father had experienced financial and housing instability since the stipulation, while the mother provided a stable and loving home for the child, there was a sound and substantial basis in the record for the court's determination that an award of sole custody to the mother was in the child's best interests. However, the Supreme Court erred in determining that the father had committed the family offenses of disorderly conduct and menacing in the third degree. The evidence did not establish that the father intended to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm (*see* PL § 240.20). Further, there was no showing that the father placed the child in imminent fear of physical injury, or that he intended to do so (*see* PL § 120.15). Contrary to the mother's contention, the evidence did not support a finding that the text messages the father sent to her constituted the family offense of aggravated harassment in the second degree. Although the text messages were vulgar and insulting, they did not contain any true threats of physical harm to the mother or the child, or of unlawful harm to the mother's property (*see* PL § 240.30). Accordingly, the Supreme Court should have denied the mother's family offense petition. Order modified.

Paruchuri v Akil, 156 AD3d 712 (2d Dept 2017)

Record Supported Determination to Award Parties Joint Legal and Physical Custody of Child

The parties, who never married, are the parents of a daughter born in 2006. The mother and the daughter moved out of the father's home in 2009. In an order of custody and visitation entered June 26, 2015, upon the parties' consent, the Family Court awarded the mother sole residential custody of their daughter. The father subsequently moved to obtain sole legal and physical custody of the daughter. The court held a hearing and, after determining that there was a change in circumstances, inter alia, awarded the parties joint legal and physical custody of the daughter and set up detailed parenting schedules for the school year as well as the summer. The father appealed.
The Appellate Division affirmed. The court's determination that the daughter would benefit from equal amounts of time with each parent, and that it would be in her best interests for physical custody to be shared by the parents, had a sound and substantial basis in the record. Notably, although the court determined that there was an antagonistic relationship between the parties, such a determination, without more, does not mean that an award of shared physical custody is inappropriate. Moreover, the Family Court was not required to follow the recommendations of the forensic expert, and, contrary to the father's contention, the court's stated reasons for disregarding the expert's recommendation had a sound and substantial basis in the record.

Matter of Steingart v Fong, 156 AD3d 794 (2d Dept 2017)

Record Supported Determination to Award Sole Custody to Mother and Supervised Visitation to Father

The parties have two children together, a son born in May 2010 and a daughter born in October 2012. The parties were never married, but lived together when the children were born, and separated during the fall of 2013. The mother filed a petition for sole custody of the children in November 2014, and the father filed a petition for sole custody of the children in January 2015. Through a series of temporary orders, the children remained in the custody of the mother and had supervised visitation with the father, until a fact-finding hearing was held in December 2015 and March 2016. By order dated July 15, 2016, the Family Court granted the mother's petition for sole custody of the children, with supervised visitation to the father, and denied the father's petition for sole custody of the children. The father appealed. The Appellate Division affirmed. The evidence presented at the hearing supported the Family Court's determination that the father refused to obtain appropriate treatment for his mental health issues, displayed extreme negativity toward the mother, would not be able to foster a loving relationship between the children and the mother, and lacked insight into how his behavior in front of the children was harmful to them. Consequently, the court's determination to award sole custody to the mother and supervised visitation to the father, which was consistent with the opinion of the court-appointed forensic expert and the position of the

attorney for the children, had a sound and substantial basis in the record.

Matter of Watson v Maragh, 156 AD3d 801 (2d Dept 2017)

Error to Deny Father's Petition Without a Hearing

The parties, who were never married, are the parents of a child born in 2004. In November 2013, the Family Court awarded the mother sole custody of the child and awarded the father visitation. In September 2014, the father filed a petition seeking increased visitation with the child. The court assigned counsel to represent the mother, re-appointed an attorney for the father and an attorney for the child, and adjourned the matter for a conference. Thereafter, based on statements that the father made during a court appearance, the court referred the father, with his consent, for a mental health evaluation and, by order dated August 28, 2015, temporarily suspended visitation pending the results of the evaluation. Following the evaluation of the father, the court permitted telephone contact between the father and the child, but the child eventually refused to have any contact with the father and the court again temporarily suspended all visitation and adjourned the matter for a conference. Thereafter, the court adjourned the matter for receipt of results of an observation and evaluation of the child and the father, and if that had not occurred, for a conference. At the subsequently scheduled conference, the court indicated that it required more information and suggested that the father's attorney subpoena the father's psychiatrist to testify. The parties also discussed with the court the issue of whether another forensic evaluation should be ordered. The court initially indicated that it would not order another forensic evaluation, then changed its position and agreed to order an evaluation conducted by a psychologist, and thereafter changed its position again and indicated that it was entering a final order suspending the father's visitation with the child. The court indicated that visits would be suspended pending a future modification petition by the father demonstrating the father's substantial participation in mental health treatment. The father's counsel twice attempted to make a record in response to the court's ruling, but was interrupted, first by the court and then again when the electronic recording of the proceeding was abruptly ended. Thereafter, by order dated June 16, 2016, the court, without a hearing, denied the father's petition for increased visitation and indefinitely suspended his visitation with the child. The father appealed. The Appellate Division reversed. Generally, where a facially sufficient petition has been filed, modification of a custody and visitation order requires a full and comprehensive hearing at which a parent is to be afforded a full and fair opportunity to be heard. A decision regarding child custody and visitation should be based on admissible evidence. Here, the Family Court relied on information provided at the court conferences, and the hearsay statements and conclusions of mental health providers whose opinions and credibility were untested by either party. Under the circumstances of this case, the Family Court erred when it, without a hearing, denied the father's petition for increased visitation and indefinitely suspended his visitation with the child. Accordingly, the matter was remitted for a hearing on the father's petition and a new determination thereafter.

Matter of Edmunds v Fortune, 156 AD3d 880 (2d Dept 2017)

Father Failed to Demonstrate a Change in Circumstances Warranting a Modification

The parties' child was born in 2003. The father, who is serving a long prison term, filed a petition, seeking, inter alia, modification of a prior order regarding visitation that had been entered after the father had already been imprisoned for several years, so as to award him visitation with the child at his place of incarceration. The Family Court denied the petition, and the father appealed. The Appellate Division affirmed. Modification of an existing order of visitation is permissible only upon a showing that there has been such a change in circumstances since the entry of the order that its modification is necessary to ensure the continued best interests and welfare of the child. Here, a prior order of visitation provided for contact between the father and child only by means of cards and letters. At the hearing on the father's modification petition, the father failed to establish that a change in circumstances since the entry of the prior order necessitated modification of the prior visitation order to ensure the best interests of the child. The child, who

was 12 years old at the time of the hearing, did not want to visit with the father in prison, had not seen the father in more than 7 years, and had not had a close relationship with him even before he was incarcerated. The Family Court appropriately gave considerable weight to its in camera interview with the child. In sum, the court's determination that modification of the prior visitation order was not required to ensure the best interests of the child had a sound and substantial basis in the record.

Matter of Parker v Hennessey, 156 AD3d 885 (2d Dept 2017)

Record Supported Determination to Grant Father's Petition for Sole Legal and Residential Custody of Daughter

The parties, who never married, are the parents of daughter born in 2015. In July of 2015, the father filed a petition, in effect, for sole legal and residential custody of the daughter, and the mother filed a cross petition, in effect, for sole legal and residential custody of the daughter. The mother also filed a family offense petition, alleging that the father subjected her to harassment in the second degree. The Family Court conducted a fact-finding hearing that included the testimony of both parents, the paternal and maternal grandparents, the paternal aunt, and the maternal uncle. In addition, the court admitted a report from a court-appointed forensic psychiatrist. The court granted the father's petition, denied the mother's cross petition, and dismissed the mother's petition alleging a family offense. The mother appealed. The Appellate Division affirmed. The record established that the mother had a history of cutting herself when she was a teenager and that the most recent episode of cutting occurred while she was pregnant, that the mother had been diagnosed with "intermittent explosive disorder," and that although the court-appointed psychiatrist acknowledged that the mother was attending therapy, he still opined that she was emotionally fragile. Consequently, the Family Court's determination to grant the father's petition, and to deny the mother's cross petition, which was consistent with the opinion of the court-appointed forensic expert and the position of the attorney for the child, had a sound and substantial basis in the record. Furthermore, the court properly dismissed the mother's family offense petition because she failed to establish that the father subjected her to harassment in the second degree (*see* FCA § 841 [a]; Penal Law § 240.26 [3]).

Smith v Rygiel, 156 AD3d 891 (2d Dept 2017)

Failure of the Mother to Acknowledge Acts of Neglect Equated to a Failure to Show a Change in Circumstances

Family Court properly dismissed the mother's custody modification petition after a hearing, where the mother failed to establish the requisite change in circumstances, thereby negating the need for a best interest determination. The mother previously consented to a finding of neglect as a result of allegations that she had inappropriately cleaned her two daughters' genitals. The finding of neglect lead to an order of custody and an order of protection that resulted in essentially no contact between the mother and the children. In July, 2013, the mother sought modification of the custody arrangement by requesting supervised parenting time with her children. In support of this request, the mother's treating psychologist testified on her behalf and further supported her request for supervised parenting time. However, a psychologist who conducted a psychological evaluation of the parties and the children opined that the mother did not appreciate the significance of the events that lead to her admission of neglect, which as aforesaid, was her inappropriate cleaning of her daughters' genitals. The psychologist who conducted the evaluation further testified that an expansion of the mother's contact with the children was "contraindicated." Notwithstanding the other improvements that the mother made in her life, Family Court did not abuse their discretion in finding that the mother had failed to show the requisite change in circumstances to seek modification of the custodial arrangement.

Matter of Alexis EE., 153 AD3d 1056 (3rd Dept 2017)

Court's Admonition to a Party Requesting to Proceed *Pro Se* Need Not Take a Specific Form

In custody proceeding, where the mother wished to proceed *pro se* at the custody trial, Supreme Court's

inquiry of the mother sufficiently revealed that her decision was knowing, voluntary and intelligent. While the court is required to conduct a searching inquiry to ensure that the parent's waiver is knowing, voluntary and intelligent, the inquiry need not take a specific form in terms of assessing the voluntariness of the waiver. Rather, the record need only demonstrate that the individual is aware of the dangers and disadvantages of proceeding without counsel. Supreme Court fulfilled their obligation by making it clear to the mother that she would be held to the same standards as an attorney, that many people who proceed *pro se* are ultimately unsuccessful and that it was possible that she could lose custody of her children due primarily, to her lack of legal knowledge and legal procedure.

Matter of Martinez v. Gomes-Munoz, 154 AD3d 1085 (3d Dept 2017)

Modification From Joint Legal Custody to Sole Legal Custody to Father Appropriate

Family Court properly modified the parties' 2014 stipulation, which was incorporated into an order of custody, by awarding the father sole legal custody of the parties' daughter. The evidence revealed that the parties' relationship had deteriorated to the point of no communication. The 2014 order provided for the parties to have joint legal custody of the child, with the father having primary physical custody. In continuing primary physical custody with the father, the court noted that the mother had a limited role in the child's life for which she blamed the father, notwithstanding the fact it was the father who did all of the transportation to effectuate the mother's parenting time. Family Court also appropriately reduced the mother's parenting time by eliminating her Friday evening visits where the evidence revealed that she did not exercise these visits. Another source of contention for the parties was the mother's boyfriend, with whom she had two children, and who was also a risk level two sex offender. Aside from the aforementioned issues, the boyfriend previously engaged in a physical altercation with the father in 2015 during an exchange of the child. Given this fact, the court correctly conditioned the mother's parenting time on the boyfriend not being present for the visits.

Matter of Madelyn Z. v. Daniel AA., 154 AD3d 1092 (3rd Dept 2017)

Mother Permitted to Relocate to North Carolina With Children

In custody modification proceeding, Family Court appropriately granted the mother's request to relocate to North Carolina with the parties' two children, finding that the move would materially benefit the children's lives. In February of 2014, an order was issued by Family Court directing the parties to have joint legal custody of the children, with the mother having primary physical custody and the father having parenting time. Also occurring in 2014, the mother married an active duty Marine stationed at Camp Lejeune in North Carolina. The mother continued to reside with the children in New York State after she was married, however, in November of 2014, she filed a relocation petition seeking to move with the children to North Carolina. After a hearing, Family Court properly granted the mother's request noting that the move would benefit the mother and children by resulting in a more stable living environment. At the time of the Family Court proceeding, the mother and children were living in a bedroom at the maternal grandmother's home. The mother was unable to afford alternate housing because she did not have access to childcare that would permit her to work full-time (the grandmother testified that she could not provide the requisite childcare). In allowing the move, the court noted that the mother would have free daycare as a benefit of her husband's military service thereby allowing the mother to obtain employment. The court also noted the father's failure to consistently pay child support was a contributing factor for the mother's financial woes. In establishing a parenting time schedule for the father, which schedule included a month in the summer and alternating holidays, the court noted the father's limited involvement in the children's medical and educational affairs as justification for the limited parenting time schedule. The court also noted that the father routinely made disparaging, and racially insensitive comments about the mother's husband, which actions Family Court viewed as an attempt to sabotage the children's otherwise positive relationship with their step-father. While Family Court acknowledged that the move would limit the amount of time that the children spent with the

father and the paternal grandparents, the totality of the circumstances dictated that the relocation was in the children's best interests.

Matter of Emily GG. v. Tyler HH., 154 AD3d 1097 (3rd Dept 2017)

Mother's Mediocre Attempts to Foster the Father/Children Relationship Not So Egregious as to Warrant An Award of Sole Custody to Father

There was a sound and substantial basis in the record to justify Family Court's denial of the father's request for sole custody of the parties' child, in custody modification proceeding. An order of custody was issued in 2015 providing the parties with joint legal custody of their child, with the mother having primary physical custody and the father having parenting time. Within a matter of months after the order was entered, the father sought to modify the order of custody and further sought a determination that the mother violated the order. Family Court correctly dismissed the father's violation petition and modified the order of custody only to the extent of establishing specific pick-up and drop-off times. While the father established the requisite change in circumstances, namely, that the parties were having difficulty with pick-ups and drop offs, the court nevertheless determined that the factors that lead the court to award the mother sole custody in 2015, were still present. While the father complained that the mother was impeding his parenting time, the evidence revealed that she neither refused, nor denied, the father parenting time despite the fact that the mother had a "cavalier" attitude regarding the child's relationship with the father. This did not, however, constitute a willful violation of a clear and unequivocal mandate as required to establish a violation of a court order. While the mother's phone frequently could not accept calls, there were other means by which the father could contact the mother. Furthermore, the evidence demonstrated that the father did not necessarily have to have contact with the mother in order to exercise his parenting time, which the father frequently failed to exercise. In light of the aforementioned, the court's minor modification of the 2015 order adequately addressed both of the father's petitions. Finally, the father's claim that the court erred in failing to appoint an attorney for the child, was unpreserved for the Court's review.

Matter of Sanchez v. Santiago, 154 AD3d 1099 (3rd Dept 2017)

Grandparents Had Standing to Seek Visitation With Grandchildren

Family Court improvidently granted the mother's motion to dismiss the paternal grandparent's petition, seeking visitation of their two grandchildren, without first having conducted a hearing. In response to the mother's motion to dismiss which claimed that the grandparents lacked standing, the grandparents acknowledged that they did not have a relationship with their grandchildren, however, they claimed that this was because of the mother's actions which frustrated their attempts to have a relationship with the children. While the attorney for the children supported the mother's motion, the father, who was also a respondent in the proceeding, took no position on the mother's motion to dismiss. In terms of the grandparent's attempts to show the efforts they made to see their grandchildren, they alleged that they were allowed to briefly hold the oldest child, who was two years of age at the time of the Family Court proceeding, the day she born and they were further permitted to visit the child four additional times. The grandparents further contend that all other attempts to have contact with the oldest child were forbidden by the mother for no justifiable reason. As for the youngest child who was only two months old at the time the grandparents filed their petition, the grandparents claim that they were able to hold the child in the hospital, briefly, the day the child was born and before the mother had them escorted out of the hospital by security. As was the case with the older child, the grandparents contended that the mother had not permitted any other contact with the youngest child for no justifiable reason. The Court determined that the grandparents had established standing to seek visitation with their grandchildren, given their repeated attempts to have contact with them, which attempts were frustrated by the mother. Consequently, the matter was remitted back to Family Court for a hearing to determine if visitation with the grandparents was in the children's best interests.

Matter of Monroe v. Monroe, 154 AD3d 1110 (3rd Dept 2017)

Supervised Parenting Time for Father Was Justified

There was a sound and substantial basis in the record to support Family Court's decision to modify the parties' order of custody, and limit the father's parenting time with the child to one hour per week, with said parenting time to be supervised by the maternal aunt. The father, who was incarcerated when the child was born, sought parenting time upon his release from prison. Despite the father's desire for more unsupervised parenting time, the Court determined that the father's history of alcohol abuse, including an incident where he was intoxicated when caring for the child, his habit of engaging in physical altercations with third parties, his history of domestic violence against the mother, the occurrence of an incident where the father used corporeal punishment on the child at five months old, and overall, a "minimal commitment" to caring for the child, all justified limited parenting time for the father in a supervised setting.

Matter of Vincente X. v. Tiana Y., 154 AD3d 1113 (3rd Dept 2017)

Extraordinary Circumstances Justify Award of Custody to Grandmother

In custody proceeding, Family Court appropriately found extraordinary circumstances to exist which justified an award of primary physical custody of the five subject children to the grandmother. The children's mother encountered housing difficulties in 2015 and as a result thereof, requested that the grandmother allow the children to reside with her. The grandmother cared for the children for several months before petitioning for custody of them. After a hearing, Family Court correctly found extraordinary circumstances to exist and providently established an order whereby the mother and grandmother had joint legal custody of the children, with the grandmother having primary physical custody of them and the mother having parenting time. Among the facts considered by Family Court in determining that extraordinary circumstances existed, was the mother's volatile temper, her history of engaging in relationships with men who exposed the children to acts of domestic violence, the mother's involvement in a series of child protective proceedings, the mother's frequent moves with the children requiring them to repeatedly change schools, her lack of appropriate housing and lack of full time employment. While the attorneys for the children requested affirmative relief in the course of the mother's appeal, their failure to file notices of appeal preclude any requests for affirmative relief.

Matter of Durgala v. Batrony and Stevenson, 154 AD3d 1115 (Third Dept 2017)

While Allegations That Step-Father Sexually Abused Child Constituted a Change in Circumstances, the Father's Minimal Involvement With Child Did Not Justify Modification to Order of Custody

Family Court erred in modifying the parties' 2013 order of custody by eliminating the requirement that the father's parenting time be supervised. Pursuant to the 2013 order, which order was entered on consent, the father was permitted supervised parenting time with the child on alternate Sundays from 9 a.m. until 5 p.m. After the mother's estranged husband was accused of sexually abusing the subject child, the father sought modification of the 2013 order. Family Court erroneously found that the father had not established a change in circumstances for purposes of attempting to modify the order of custody, but that he had established a change in circumstances for purposes of modifying his parenting time schedule, which finding by Family Court was also incorrect. In reviewing the record as part of the mother's appeal, the Court determined that the father had, in fact, established the requisite change in circumstances to seek modification of the 2013 order, namely, the that the mother's estranged husband had sexually abused the child. However, a best interest analysis did not support modification of the 2013 order in any capacity, much less the elimination of the requirement that the father's parenting time be supervised. The Court determined that the father had not exercised a fraction of the parenting time provided for him in the 2013 order, and as such, had failed to demonstrate a "sincere desire to establish a relationship with the child." In determining that unsupervised parenting time was inconsistent with the child's best

interest, the Court considered the fact that while the 2013 order required the father to complete an anger management class, he never bothered to complete same which was inappropriately ignored by Family Court. Family Court did properly dismiss the mother's family offense petition finding that she failed to prove, by a preponderance of the evidence, that the father committed acts which constituted harassment in the first or second degree. The mother alleged that the father, during an incident in April, 2015, repeatedly drove by her home, pulled into her driveway, blew his car horn, flickered his headlights and left messages for the mother demanding that she pay the father money which he claimed she owed him. The father denied all of the mother's allegations in support of her family offense petition. The Court determined that there was ample evidence in the record to support Family Court's determination, that the mother failed to meet her burden of proof relative to the allegations in her family offense petition.

Matter of Kevin F. v. Betty E., 154 AD3d 1118 (3rd Dept 2017)

Reduction of Parenting Time Too Restricting

Family Court correctly modified the custody provisions of the parties' 2013 judgment of divorce, by reducing the father's periods of physical custody with the child. The parties' custody arrangement provided that they would have joint legal custody of the child and nearly equal periods of physical custody. Noteworthy is the fact that the custody stipulation, which was incorporated without merger into the 2013 judgment of divorce, allowed either party to seek modification of the custody arrangement without having to show a change in circumstances. The child had attention deficit hyperactivity disorder and Family Court credited the mother's testimony that the child's behavior was different upon his return from the father's home. Evidence also revealed that the child was tardy to school on occasion when he was in the father's physical custody. While a reduction of the father's parenting time was warranted because of the aforementioned issues, Family Court erroneously reduced the father's parenting time to alternate weekends and a mid week dinner visit, which reduction was too substantial considering the fact that the father had nearly equal access to the child pursuant to the custody provisions of the judgment of divorce. The Court noted that Family Court should have been more "creative" in utilizing holidays and school vacations when fashioning the father's parenting time schedule, rather than simply adopting, "wholesale, the mother's proposed schedule. Consequently, remittal back to Family Court to address the father's parenting time schedule was appropriate.

Matter of Rosenkrans v. Rosenkrans, 154 AD3d 1123 (3rd Dept 2017)

Despite Lengthy Period as Child's Primary Caretaker During Father's Incarceration, the Best Interests of the Child Were Not Promoted by an Award of Custody to Father's Ex-Girlfriend

In a custody proceeding, where the petitioner, who was the ex-girlfriend of the subject child's biological father, sought custody of the subject child, Family Court providently exercised their discretion by dismissing the petition concluding that custody to the girlfriend was inimical to the child's best interests. During the course of the petitioner's relationship with the father, she served as the subject child's primary caretaker from the time that he was one year old, until he was approximately 7 years old. This included a year long period after the father was incarcerated (the father was incarcerated at the time of the appeal). Despite the length of time associated with the petitioner caring for the child, she married a man who was a convicted murderer and who also had been convicted of endangering the welfare of a child. The totality of the facts and circumstances resulted in Family Court correctly determining that the child's best interests were not promoted by the petitioner having custody of him. Lastly, while Family Court did err by relying upon information derived from a prior permanency hearing, said error was harmless given that the information was contained in the other exhibits admitted at the custody trial.

Matter of Renee DD., 154 AD3d 1131 (3rd Dept 2017)

Reliance on Information Obtained by Off the Record Conversations With Third Parties Improper

In a custody modification and violation proceeding, Family Court erred in dismissing the father's petitions without first conducting a hearing, and instead, relying on information obtained from off the record conversations with two mental health providers. The father sought modification of a 2015 order which provided him with supervised, therapeutic parenting time with his son. More specifically, the father sought increased, unsupervised parenting time with the child outside of a therapeutic setting. During one court appearance, two mental health counselors were directed to appear and Family Court spoke with them off the record and outside the presence of the parties (the record was unclear as to whether the parties' attorneys were present during the conversation). The court then dismissed the father's custody modification petition and violation petition. The Court determined that the dismissal of the petitions, without first having conducted a hearing, was an abuse of Family Court's discretion. The father was entitled to present evidence at a hearing in support his request to increase his parenting time and remove the restriction of supervision in a therapeutic setting. The father was also entitled to cross-examine the mental health providers that the court spoke with outside the parties' presence. By dismissing the father's petitions prior to a hearing, the father was wrongfully denied the opportunity to engage in the aforementioned activities which was error.
Matter of Buck v. Buck, 154 AD3d 1134 (3rd Dept 2017)

Father's Request to relocate With Child to Pennsylvania Affirmed

In a custody proceeding, where father sought permission to relocate with the subject child to Pottstown, Pennsylvania which was more than three hours from Elmira, New York where the mother resided, Family Court providently exercised their discretion by allowing the father to relocate with the child. The evidence at trial revealed that the father, who had been the child's primary caretaker for approximately three years, was in line to lose his job in Elmira, and was unable to find comparable employment in the surrounding areas. The father did, however, find a job in Pottstown, Pennsylvania, which job paid substantially more than his job in Elmira. Family Court temporarily allowed the father to move pending the hearing. Aside from his employment, the relocation to Pottstown allowed the child to spend time with the father's extended family members who also resided in Pottstown. Upon arriving in Pottstown, the father enrolled the child in private school and in a soccer league. The mother on the other hand, resided with her fiancé, both of whom were unemployed with the fiancé being disabled. The fiance's son, who had behavioral and mental health issues which resulted in past outbursts, also resided with the mother and the fiancé. Under the totality of the circumstances, there was a sound and substantial basis in the record for Family Court to permit the father to relocate with the child.

Matter of Hoffman v. Turco, 154 AD3d 1136 (3rd Dept 2017)

Allegations of a Violation of an Order of Custody Sufficient to Warrant a Hearing

Family Court erred in dismissing the mother's custody modification petition without first conducting a hearing. The parties entered into an order in 2015 which addressed custody of their child. The mother alleged numerous violations by the father, including the father's failure to keep the mother informed when he moved his residence, made plans for the child's Bar Mitzvah without the mother's input and that he scheduled a one week vacation with the child without telling the mother. The Court determined that these allegations were sufficient to entitle the mother to a hearing on her modification petition.

Matter of Horowitz v. Horowitz, 154 AD3d 1207 (3rd Dept 2017)

Despite Both Parents Being Adequate, Primary Physical Custody Awarded to the Mother

In a custody proceeding, Family Court appropriately found that the child's best interest was promoted by a custodial arrangement wherein the parties had joint legal custody of the child, with primary physical custody to the mother. While Family Court found the parties to be more or less equal in terms of their respective parenting abilities, the deciding factor for the court when awarding the mother primary physical custody, was the fact that the mother resided in the

home that the child had lived in her entire life, which was also in the same school district the child had always attended. In light of the aforementioned, there was a sound and substantial basis in the record to support Family Court's determination of primary physical custody of the child to the mother.

Matter of Whetsell v. Braden, 154 AD3d 1212 (3rd Dept 2017)

Father's Failure to Accept Responsibility for Abusive Behavior Towards Children Justified Supervised Parenting Time

Supreme Court correctly directed the father's parenting time with the parties' two children to be supervised. The evidence at trial revealed that the father had angry outbursts, engaged in verbal abuse of the mother and children, and physically abused the mother. In light of the father's abusive behavior, one of the children had been hospitalization for depression and post traumatic stress syndrome. At trial, the father minimized the abuse he inflicted upon his children and failed to accept responsibility for his poor relationship with them, thereby justifying the directive of supervised parenting time. Supreme Court did err in continuing the supervised parenting time until such time as the children, with the approval of the mother, deem the supervision to be unnecessary. The Court determined that while parties may decide peripheral issues such as the choice of supervisor, the authority to determined if a visit is to be supervised cannot be delegated to the parties. Consequently, Supreme Court's judgment was modified to provide for modification of the father's supervised parent time upon the father's showing of the requisite change in circumstances.

Matter of Kimberly C. v. Christopher C., 155 AD3d 1329 (3rd Dept 2017)

Parenting Agreement Which Bestowed Jurisdiction to Israel, Deemed Unenforceable

Family Court appropriately rejected the provisions of a parenting agreement executed by the parties before the birth of their child, when awarding the father primary physical custody of the child with parenting time for the mother. The parties met in Israel and decided to get married and have a child together. Despite the fact that they never ultimately married, the mother became pregnant and both parties moved to New York and lived as a couple. During the mother's pregnancy, the parties executed the aforesaid parenting agreement which made provisions for how they would co-parent the child should they no longer be living together as a couple. Noteworthy is the fact that the parenting agreement stated that the courts in Israel would have exclusive jurisdiction over parenting disputes. In April, 2015, approximately a year after the child was born, the parties' relationship soured and the father filed a custody petition in Family Court. The mother filed a motion to dismiss the father's custody petition, alleging that New York did not have the right to exercise jurisdiction of the parties' custody dispute because of the provisions of the parenting agreement which granted jurisdiction to Israel. The mother further claimed in her motion that New York should decline to exercise jurisdiction because it was an inconvenient forum. In denying the mother's motion to dismiss, Family Court correctly determined that New York had subject matter jurisdiction of the parties' custody dispute. The court further determined that the provisions of the parties' parenting agreement, which bestowed exclusive jurisdiction to the courts in Israel, was unenforceable on public policy grounds. This Court agreed with Family Court, that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) gave Family Court subject matter jurisdiction of the parties custody dispute. The child had resided in New York State for more than six months, thereby making New York the home state of the child and forming the basis for Family Court's exercise of subject matter jurisdiction. As for the mother's argument that New York was an inconvenient forum, the only facts asserted by the mother in support of this claim was the provision of the parenting agreement stating that Israel would have jurisdiction of any custody issues. In rejecting the mother's argument, Family Court determined that the parties cannot by agreement, confer jurisdiction on another state, and the existence of such an agreement, while a factor to be considered, is nevertheless but one factor that the Court may consider when determining if New York was an inconvenient forum. Family Court also properly awarded the father primary physical custody of the child, parenting time to the mother and a directive that the child not be removed from the United

States without the written consent of both parties. Notwithstanding the fact that the parenting agreement provided for a custodial arrangement should the parties physically separate, an agreement that affects custody of a minor child is unenforceable on public policy grounds unless it is consistent with the child's best interest, which in the instant case, it was not. Rather, the evidence at trial revealed that the mother threatened to return to Israel with the child, had no stable plan for the child's care if she were to return to Israel, had repeated angry outbursts with the father and the child's nanny and had mental health issues. All of these factors justified an award of physical custody to the father. Family Court also providently directed that neither party remove the child from the United States without the written consent of both parties. Family Court did err, however, in awarding the father sole legal custody of the child where there was inadequate evidence that the parties could not communicate for the benefit of the child, and where a award of sole custody to the father, would deprive the mother of the ability to file a petition under the terms of the Hague Convention on International Child Abduction should the need ever arise. Family Court also erred in fashioning a parenting time schedule that did not take into consideration a scenario where the mother would no longer be a legal resident of the United States, since her visa expired during the court proceedings. Consequently, the Court remitted this matter back to Family Court to fashion a more workable parenting time schedule for the mother taking into consideration her immigration issues.

Matter of Eldad LL. v. Dannai MM., 155 AD3d 1336 (3d Dept 2017)

Mother's Progress Insufficient to Constitute a Change in Circumstances

Dismissal of the mother's custody modification petition by Family Court was warranted, where the mother failed to show the requisite change in circumstances. Pursuant to a 2013 order, the child was in the physical custody of a married couple that were acquaintances of the child's father. The 2013 order provided for supervised parenting time for the mother. In or about 2015, the mother petitioned to have unsupervised parenting time with the child. Family Court determined that, despite the mother having completed domestic violence classes and parenting classes, she still had significant issues, including but not limited to, continued mental health issues, a seizure issue and a bed bug problem in her home where she at times allowed a prostitute to reside. In sustaining Family Court's dismissal of her petition, the Court also noted that even if a best interest analysis had been conducted, the mother still would not have prevailed in her request for modification of the 2013 order.

Matter of Bridget Bar v. Diana Short et al., 155 AD3d 1357 (3d Dept 2017)

Only Pre-Petition Evidence May Be Considered When Assessing a Change in Circumstances

Family Court properly dismissed the father's custody modification petition for failure to show the requisite change in circumstances. The father sought modification of a 2015 order that provided him with one hour per month, of supervised parenting time with his daughter. Noteworthy is the fact that the petition was filed after only one visit with the child. While Family Court permitted the father to present evidence of visits that occurred after the filing of the petition, only the visit that occurred before the filing of the petition could be considered when determining if the father had demonstrated the requisite change in circumstances, which the Family Court found he had not. Consequently, dismissal of the father's custody modification petition was appropriate.

Matter of Alan U. v. Mandy V., 155 AD3d 1359 (3d Dept 2017)

Despite Prior Extraordinary Circumstances, Mother Showed Change in Circumstances Sufficient to Modify Custody

In a custody modification proceeding, Family Court appropriately modified a prior order by changing custody of the three subject children from their grandmother, back to their biological mother. The grandmother was previously awarded custody of the children after a showing of extraordinary circumstances. After a hearing on the mother's petition, Family Court providently determined that the mother

had demonstrated a change in circumstances in that she no longer used drugs, is no longer incarcerated, has a steady, full-time job and has acted as a care giver for the children, including providing them with financial support. Family Court also correctly determined that changing custody from the grandmother to the biological mother was in the children's best interests, where the grandmother was disingenuous about her alcohol consumption, the living conditions in her home were poor and unsanitary, her relationship with one of the children was volatile and her relationship with the mother was strained to the point that she interfered with mother's time with the children. As such, a change of custody was appropriate. Family Court also properly rejected the grandmother's claim that the attorney for the children had a conflict of interest where he previously represented the mother in a criminal matter. Aside from the fact that the grandmother failed to address the alleged conflict before or during the trial, she also failed to show how the two proceedings were similar, or how the children's interests were adverse to that of the mother, for purposes of establishing a conflict of interest. The grandmother also alleged, without merit, that the attorney for the children did not zealously represent them, an allegation not supported by the record. Family Court was also acted appropriately in declining to draw a negative inference against the mother for failing to take a drug test during the proceeding, where there was confusion over who was going to pay for the drug test.

Matter of Catherine A. v. Susan A., 155 AD3d 1360 (3d Dept 2017)

Mother Established a Change in Circumstances But Failed to Prove Best Interests

Family Court properly dismissed the mother's petition in a custody modification proceeding, finding that it would not be in the child's best interest for the mother to have primary physical custody of the child. In 2015, the mother sought modification of a 2014 order which provided the father with sole custody of the parties' son. The mother sought joint legal and primary physical custody of the child. The mother had established the requisite change in circumstances based upon the fact that her mental health had improved, the child's dental health had declined and the child had been bitten by the father's dog. Notwithstanding the existence of a change in circumstances, after a best interest analysis, Family Court properly found that a change in legal and physical custody of the child was not warranted. The child, who was approximately three years old at the time of trial, had resided with the father for his entire life and had a close relationship with the paternal grandparents, who lived next door and provided assistance to the father. Family Court also found that despite the child's issues with his dental health, as well as the fact that the father's dog had bitten the child, the father was addressing both issues at the time of trial in an appropriate manner. In limiting modification of the 2014 order to an extension of parenting time for the mother, the court noted that joint legal custody would not be appropriate given the parties' communication issues, including their refusal to speak with one another and communicating only by email.

Matter of Kvasny v. Sherrick, 155 AD3d 1366 (3d Dept 2017)

Despite Parental Shortcomings, Grandmother Failed to Establish Extraordinary Circumstances

The maternal grandmother filed a petition in 2016 seeking custody of her three grandchildren. At the time, the children were in the custody of the paternal grandmother. During the course of the proceeding, the children's biological parents were released from jail and began living with the paternal grandmother. In the decision granting custody of the children to the maternal grandmother, Family Court, while not expressly making a finding, nevertheless incorrectly alluded to the existence of extraordinary circumstances. The court found that the parents were unstable, were inconsistent in meeting the children's needs and exercised questionable judgment by allowing unsavory individuals, including a registered sex offender, to be around the children. In reversing Family Court's decision, this Court determined that these facts were not sufficient for the grandmother to sustain her burden of showing the existence of extraordinary circumstances. The parents were only incarcerated briefly, and upon their release from jail, they immediately moved into the paternal grandmother's home to begin caring for the children, with the father immediately obtaining employment. The father acknowledged that his brother

was a level two sex offender, but averred that had never harmed the children and both parents testified that they would not allow the children to be left alone with the father's brother. The record also demonstrated that the maternal grandmother had historically little contact with the children and a poor relationship with the children's mother. Family Court also erred by stating in it's decision, that the children had been around "another male" who was "questionable," where this fact could only have been obtained from the children at the *Lincoln* Hearing and said fact had not been independently verified for accuracy. Consequently, the Court remitted the matter back to Family Court to address the existence of this other male and further determine if extraordinary circumstances had been established based upon the totality of the evidence.

Matter of Shaver v. Bolster et al., 155 AD3d 1368 (3d Dept 2017)

Primary Physical Custody Awarded to Mother Who Was Better Able to Foster a Relationship Between the Child and the Father

In a custody modification proceeding, where both parties were deemed more or less suitable parents, Family Court appropriately awarded primary physical custody of the child to the mother. Despite the relative parity of the parties in terms of their respective parenting ability, the evidence demonstrated that the mother was better able to foster a relationship between the father and the child. The mother testified that she would attempt to work cooperatively with the father to co-parent their child and would facilitate parenting time between the child and the father. In contrast, the father testified that he was unable to appreciate the mother's position on various parenting issues and did not support the child having contact with the mother at her home. Family Court did err, however, by modifying the previous order to substantially limit the amount of parenting time that the father had with the child. Prior to the instant proceeding, the parties' order of custody provided each of them with near equal access to the child. The evidence demonstrated that the father had a "positive" relationship with the child and the record also demonstrated that the mother supported the father having more parenting time with the child than Family Court awarded him. Also noteworthy is the fact that, rather than having any concerns about the other parent, the parties only sought modification of the custody order because they needed to have a primary physical custodian designated so that they could determine the child's school district. Therefore, it was improper for Family Court to have so significantly reduced the father's parenting time.
Matter of Kukilish v. Delanoy, 155 AD3d 1376 (3d Dept 2017)

Family Court Erred in Dismissing Amended Petition Without Hearing

Family Court dismissed the father's amended petition for a modification of a prior custody order. The Appellate Division reversed, reinstated the petition and remitted the matter for further proceedings. The court erred in dismissing the amended petition without a hearing inasmuch as the father made a sufficient evidentiary showing of a change in circumstances to require a hearing, based upon, among other things, the undisputed fact that, after entry of the prior custody order, one of the children was left unattended at the mother's house and accidently set a fire that resulted in $125,000 in property damage.

Matter of Whitney v Whitney, 154 AD3d 1295 (4th Dept 2017)

Court Violated CPLR 4403 By Confirming Referee's Report Prior to Expiration of 15-day Period

Family Court adjudged that the parties shall have joint custody of the subject child and designated respondent mother the primary residential custodian. The Appellate Division reversed and remitted. The court referred to a Court Attorney Referee to hear and report the father's petition to obtain custody and/or visitation with the parties' minor son. The Referee conducted an evidentiary hearing and issued an oral report. Three days later, the Referee issued supplemental written findings. The court, acting on its own initiative, confirmed the Referee's report that same day. The court violated CPLR 4403 by confirming the Referee's report prior to the expiration of the 15-day period during which the parties were permitted to move to confirm or reject the report in whole or in part.

Therefore, the order was reversed and the matter remitted to afford the parties and the Attorney for the Child an opportunity to file any appropriate motions under CPLR 4403.

Matter of McDuffie v Reddick, 154 AD3d 1308 (4th Dept 2017)

Mother's Willful Violations of Court's Orders Constituted Civil Contempt

Family Court adjudged that respondent mother's willful violations of the court's orders constituted civil contempt. The Appellate Division affirmed. A motion to punish a party for civil contempt was addressed to the sound discretion of the hearing court. The court did not abuse its discretion in determining that the father met his burden of establishing, by clear and convincing evidence, that the mother willfully violated orders that required her, among other things, to permit the father to have visitation and telephone contact with the children; to share medical information; to be absent during visitation exchanges; to complete the intake process at the Parent Resource Center Visitation Program as soon as possible after a May court appearance so that the father could have visitation with the children at the Center in June; and to re-enroll the children in counseling services. The record supported the court's finding that the mother's violations of the orders unjustifiably impaired the father's rights to communicate with the children, to visit with the children, and to participate in decision-making with respect to the children's healthcare. Thus, the court properly determined that the mother violated a lawful and unequivocal mandate of the court that was in effect at the time of the filing of the petition, that her actions caused prejudice to a right of the father, who was a party, and that the mother's violations were willful.

Matter of Moreno v Elliott, 155 AD3d 1561 (4th Dept 2017)

Family Court Properly Awarded Petitioner Father Sole Legal and Physical Custody

Family Court granted petitioner father sole legal and physical custody of the parties' child. The Appellate Division affirmed. A year after the child was born, the parties stipulated that the mother would have sole legal and physical custody of the child. The father shortly thereafter moved first to Delaware and then to New Jersey. Neglect proceedings were brought against the mother in 2015 based on her drug use, and the father sought custody in May 2016. Inasmuch as the father was not the custodial parent when he relocated to New Jersey and when he filed his petition seeking custody, the contention of the mother and the AFC was rejected that the court should have applied the factors set forth in *Matter of Tropea v Tropea*. However, the relocation of the child to New Jersey was an issue for the court to consider in determining whether custody to the father was in the child's best interests. The court's custody determination, which was afforded great deference, was supported by a sound and substantial basis in the record. The father showed through his testimony that he wanted to remedy his absence and inexcusable lack of contact with the child, who lived with him for several weeks before the hearing began. The court properly determined that the fitness of the father, the quality of his home environment, and the parental guidance he would be able to provide for the child were superior to that of the mother. The 11-year-old child's wishes were not entitled to great weight where it appeared that they were due at least in part to the lack of discipline in the home of the mother and grandmother.

Matter of Gartner v Reed, 155 AD3d 1562 (4th Dept 2017)

Venue in Erie County Was Proper

Family Court granted petitioner grandparents sole custody of respondent mother's children. The Appellate Division affirmed. The mother's contention was rejected that Family Court should have sua sponte transferred venue from Erie County to Monroe County. The grandparents and the children all resided in Erie County at the commencement of the proceedings and, therefore, venue in Erie County was proper. The mother did not move for a change in venue to Monroe County, where she lived, and thus she did not set forth any good cause for such change. Moreover, the court did not abuse its discretion in denying the mother's request for an adjournment of the hearing. The mother's further contention was rejected that she

received ineffective assistance of counsel. With respect to counsel's failure to move for a change in venue, there was no denial of effective assistance of counsel arising from a failure to make a motion or argument that had little or no chance of success.

Matter of Devita v Devita, 155 AD3d 1587 (4th Dept 2017)

Court Properly Permitted Mother to Testify Regarding Child's Out-of-Court Statements Where Such Statements Were Corroborated and Based in Part Upon Allegations of Neglect

Family Court modified a prior order of custody and visitation to grant the mother sole legal custody and to provide that the father's visitation take place through a particular agency. The Appellate Division affirmed. The court did not abuse its discretion in failing to conduct a Lincoln hearing with the 13-year-old child, inasmuch as the Attorney for the Child provided the court with sufficient information concerning the child's wishes, i.e., that the child was in favor of the mother's petition. The court did not err in permitting the mother to testify to out-of-court statements made by the child. Such statements, if corroborated, were admissible in custody and visitation proceedings that were based in part upon allegations of abuse or neglect. The father's alleged conduct in allowing a 13-year-old child with no prior experience to operate a boat and race another boat at 70 miles per hour would support a finding of neglect. The child's statements about the incident were corroborated by a screenshot properly admitted into evidence of the father's Facebook post regarding the incident. The court stated that it intended that the father receive visitation comparable in frequency and duration to his visitation under the prior order. Therefore, the court satisfied its obligation to set a visitation schedule even though it did not specify the days of the week or times of day that visitation would occur.

Matter of Montalbano v Babcock, 155 AD3d 1636 (4th Dept 2017)

Court Erred in Enforcing Residency Provision of Parties' Agreement and Denying Motion to Modify Custody and Visitation Provisions Without a Hearing

Supreme Court enforced the residency provision of the parties' separation/ opting out agreement (the agreement) and denied that part of the father's cross motion seeking to modify the custody and visitation provisions of the agreement. The Appellate Division reversed and remitted to Supreme Court for a hearing to determine whether to enforce or modify the agreement. The court erred in giving the father a three-month deadline to relocate within the 15-mile radius of the mother's residence provided in the agreement without conducting a hearing. The court further erred in denying that part of the father's cross motion seeking modification of the custody and visitation provisions of the agreement, also without conducting a hearing. While a hearing was not automatically required whenever a parent sought modification of a custody order, the combined effect of the parties' relocations was a change in circumstances warranting a reexamination of the existing custody arrangement at an evidentiary hearing.

Shaw v Shaw, 155 AD3d 1673 (4th Dept 2017)

Award of Residential Custody With Father and Visitation With Mother Affirmed

Supreme Court modified the custody and visitation provisions of the parties' judgment of divorce by, among other things, awarding the parties joint legal custody of the subject children, with residential custody with defendant father and visitation with plaintiff mother. The Appellate Division affirmed. The prior custody arrangement, which was set forth in a stipulation that was incorporated but not merged into the parties' judgment of divorce, provided that the father had residential custody of the children in Syracuse, New York, and that the mother's appointment to a semi-permanent station with her job in the United States Air Force would constitute a change in circumstances warranting an inquiry into whether a change in custody would be in the best interests of the children. After the mother received a three-year assignment in California, she moved to modify the prior custody arrangement, seeking residential custody of the children. The mother's contention was rejected that the

court erred in awarding residential custody to the father inasmuch as the children would live with their half brother if the mother were awarded residential custody. The children had never resided with their half brother, outside of the times when they visited with the mother. Thus, this was not a situation in which the children would be removed from a home with half siblings to live in a home without those siblings. The court properly determined that it was in the children's best interests to remain in the residential custody of the father. The record established that the children shared a close bond the maternal and paternal grandmothers, as well as the mother's brother and his children, all of whom live near the father, and that the mother would be able to maintain her relationship with the children through nightly telephone contact, as well as visitation during school breaks and summer.

Prall v Prall, 156 AD3d 1351 (4th Dept 2017)

Finding of Contempt Supported by Record; Order Modified by Adding Ordering Paragraph Containing Requisite Language

Family Court found respondent mother in contempt of court and denied her petition to modify a prior stipulated order of custody and visitation. The Appellate Division modified. The father established by clear and convincing evidence that a lawful court order clearly expressing an unequivocal mandate was in effect, that the mother had actual knowledge of its terms, and that the violation defeated, impaired, impeded or prejudiced the rights of the father. The father testified that the mother failed to bring one or more of the children for visitation on four scheduled dates in 2015. The mother admitted to those failures. Indeed, it was undisputed that the father did not see the children between June 6, 2015 and March 8, 2016, the date of the hearing. The court found the mother in contempt of court based on her refusal to allow visitation. However, the court did not expressly find that the contemptuous acts were calculated to, or actually did, defeat, impair, impede or prejudice the father's rights or remedies. Inasmuch as the finding of contempt was supported by the record, the order was modified by adding an ordering paragraph containing the requisite language. The mother's contention was moot that the court inappropriately imposed a suspended jail sentence inasmuch as that portion of the order had expired according to its own terms. The court properly dismissed the mother's petition seeking to modify the prior stipulated order. The mother alleged that there was a change in circumstances because the parties' son sustained a bruise while in the father's care. The court properly determined that the facts of the incident did not demonstrate the requisite change in circumstances.

Matter of Peay v Peay, 156 AD3d 1361 (4th Dept 2017)

Court Abused Its Discretion in Denying Mother's Motion for Adjournment

Family Court awarded petitioner father sole custody of the parties' children. The Appellate Division reversed. The court entered the amended order after holding a joint trial on the mother's Family Court Act article 6 petition for modification of custody and visitation, and the father's amended article 8 petition alleging family offenses against the mother. Before the trial commenced, the mother's attorney made a motion for an adjournment based on the mother's absence, and the court denied the motion. On the mother's prior appeal from the order of protection entered on the father's amended article 8 petition, the court was found to have abused its discretion in denying the mother's motion for an adjournment inasmuch as she had shown good cause for her absence. Because the instant appeal arose out of the same joint trial and motion for an adjournment, the order was reversed for the reasons stated in the Court's prior decision (*see Drake*, 149 AD3d at 1469).

Matter of Drake v Riley, 156 AD3d 1478 (4th Dept 2017)

Court Lacked Authority to Condition Any Future Application by Father on Proof of His Completion of Substance Abuse Evaluation and Completion of Any Recommended Treatment

Family Court modified a prior order of custody and visitation by, among other things, reducing respondent father's visitation time with the parties' son. The Appellate Division modified. Pursuant to the prior order, the father was entitled to visitation with the

parties' son for five hours every Sunday. After a hearing, the court modified the order by, among other things, reducing the father's visitation time to five hours every other Saturday. The court was entitled to credit petitioner mother's testimony that the father was visibly intoxicated on an occasion when she came to drop the child off for visitation. In view of the father's history of alcohol abuse, that testimony establish both a change of circumstances warranting review of the prior order and that modification of the father's visitation was in the best interests of the child. However, the court lacked the authority to condition any future application by the father to modify the custody and visitation order on proof of his completion of a substance abuse evaluation and completion of any recommended treatment from this evaluation. Therefore, the order was modified accordingly.

Matter of Smith v Loyster, 156 AD3d 1490 (4th Dept 2017)

FAMILY OFFENSE

Father Violated Order of Protection by Committing Family Offenses

Family Court found that respondent father violated an earlier order of protection by committing the family offenses of disorderly conduct and harassment in the second degree. The Appellate Division affirmed. The court's findings that the father committed the family offenses of disorderly conduct and harassment in the second degree were supported by a fair preponderance of the evidence, including the mother's testimony that, among other things, the father grabbed the mother in the lobby of her apartment building and cursed at her with the intent to alarm her through physical contact, and that his conduct alarmed and annoyed the public. The father admitted the truth of some of the mother's allegations regarding the incident, including that he cursed and yelled at the mother and that the child was frightened.

Matter of Theresa M. v Antoine A., 154 AD3d 414 (1st Dept 2017)

Respondent Committed F.O. of Harassment

Family Court determined that respondent committed the family offense of harassment in the second degree against petitioner, and granted a two-year order of protection in favor of petitioner. The Appellate Division affirmed. A fair preponderance of the evidence supported the court's finding that respondent committed the family offense of harassment in the second degree. Petitioner was shocked, embarrassed, and alarmed to be the subject of several emails sent by respondent, which placed his job in jeopardy and served no legitimate purpose, particularly considering they were sent years after the parties' relationship ended.

Matter of Edward B. v Elizabeth T., 156 AD3d 423 (1st Dept 2017)

Record Did Not Support Order of Protection's Requirement That Respondent Surrender Any Firearms in His Possession

In July 2016, the petitioner commenced a family offense proceeding against the respondent, her son-in-law. In October 2016, the Family Court granted the petitioner's motion for leave to amend the petition to include an allegation that the respondent had committed the family offense of harassment in the second degree against her. After a hearing, the court found that the respondent committed the family offense of harassment in the second degree. The court then issued an order of protection directing the respondent, inter alia, to stay away from the petitioner for a period up to and including December 20, 2017. The order of protection also directed the respondent to immediately surrender any and all handguns, pistols, revolvers, shotguns, and any other firearms owned or possessed to the county's police department. There was no merit to the respondent's contention that the Family Court erred in granting the petitioner's motion for leave to amend the petition to include an allegation that the respondent's conduct constituted the family offense of harassment in the second degree. Leave to amend a pleading should be freely given (*see* CPLR 3025 [b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit. Here, the amendment did not allege any additional conduct by the respondent.

Rather, the amendment added another family offense that was applicable to the conduct alleged. Contrary to the respondent's contention, at the hearing, the petitioner established, by a fair preponderance of the evidence, that he committed acts which constituted the family offense of harassment in the second degree, warranting the issuance of an order of protection. However, the Family Court erred in directing the respondent to surrender any firearms in his possession during the pendency of the order of protection. The direction that the respondent surrender any firearms he owned or possessed was not warranted inasmuch as the court did not find, nor did the evidence indicate, that the conduct which resulted in the issuance of the order of protection involved the infliction of physical injury, the use or threatened use of a deadly weapon or dangerous instrument, or behavior constituting any violent felony offense (*see* FCA § 842-a [2] [a]), or that there was a substantial risk that the respondent might use or threaten to use a firearm unlawfully against the petitioner (*see* FCA § 842-a [2] [b]). Therefore, the court should not have directed the respondent to immediately surrender any and all handguns, pistols, revolvers, shotguns, and any other firearms owned or possessed to the county's police department during the pendency of the order of protection.

Matter of Rhoda v Avery, 155 AD3d 737 (2d Dept 2017)

Record Supported Finding That Respondent Committed Family Offense of Harassment in the Second Degree

In February 2017, the petitioner commenced this family offense proceeding pursuant to Family Court Act article 8 against the respondent, who is the petitioner's wife and the mother of his three children. The parties and their children reside together in the marital home pursuant to a temporary stipulation entered into by the parties in January 2017. After a hearing, the Family Court found that the respondent committed the family offenses of harassment in the first degree and harassment in the second degree, and issued an order of protection dated February 22, 2017. The order of protection, inter alia, directed the respondent to refrain from having contact with the petitioner and the children until and including February 22, 2018. The Respondent appealed. The Appellate Division affirmed. A fair preponderance of the evidence adduced at the fact-finding hearing supported a finding that the respondent committed the family offense of harassment in the second degree (*see* FCA §§ 812 [1]; 832; PL § 240.26 [1], [3]). The evidence demonstrated that on both September 19, 2016, and February 4, 2017, the respondent, with the intent to harass, annoy, or alarm the petitioner, struck or subjected him to physical contact (*see* PL § 240.26 [1]). Further, on two occasions on February 4, 2017, the respondent engaged in a course of conduct consisting of screaming at and striking the respondent on his face, neck, and back with both of her hands, which alarmed or seriously annoyed him and served no legitimate purpose (*see* PL § 240.26 [3]). However, contrary to the Family Court's findings, the petitioner failed to establish by a fair preponderance of the evidence that the respondent committed the family offense of harassment in the first degree. The evidence failed to establish that the respondent's conduct put the petitioner in reasonable fear of physical injury (*see* PL § 240.25). Under the circumstances of this case, the Appellate Division could find no basis to disturb the order of protection (*see* FCA § 842). Contrary to the respondent's contention, the evidence demonstrated that the order of protection in favor of the petitioner, as well as the parties' three children, was the appropriate disposition, even without a finding that the respondent committed the family offense of harassment in the first degree, since it was reasonably necessary to provide meaningful protection to them and to eradicate the root of the domestic disturbance (*see* FCA § 842 [a], [k]).

Matter of Shank v Shank, 155 AD3d 875 (2d Dept 2017)

Record Did Support Finding That Respondent Committed Family Offense of Aggravated Harassment and Assault

The petitioner commenced a proceeding alleging that her sister, the respondent, had committed various family offenses against her and seeking an order of protection. Following a fact-finding hearing, the Family Court determined that the respondent had committed the family offenses of aggravated harassment and assault in the third degree. The court subsequently issued an

order of protection which directed the respondent, inter alia, to stay away from the petitioner for a period of two years. The respondent appealed. The Appellate Division reversed. In a family offense proceeding, the petitioner has the burden of establishing, by a fair preponderance of the evidence, that the charged conduct was committed as alleged in the petition (*see* FCA § 832). the petitioner failed to establish by a fair preponderance of the evidence that the respondent committed the family offenses of aggravated harassment and assault in the third degree. Both of those family offenses require proof of physical injury, which is defined as impairment of physical condition or substantial pain (*see* PL § 10.00 [9]; PL §§ 120.00 [1]; 240.30 [3]). Contrary to the Family Court's determination, the evidence presented at the fact-finding hearing failed to adequately demonstrate that the petitioner suffered a physical injury as a result of the conduct alleged in the petition.

Matter of Stanislaus v Stanislaus, 155 AD3d 963 (2d Dept 2017)

Violation of Order of Protection Proven Beyond a Reasonable Doubt Justified Father's Incarceration

Family Court properly found the father to have violated an order of protection that was issued in favor of the child and the mother, which required the father to stay away from them both. Family Court also properly committed the father to a six month period of incarceration because of the violation. Thereafter, the mother sought to hold the father in violation of the order of protection. The basis for this request was an incident that occurred after a court appearance in support court. The mother alleged that the father walked by her after she exited the courthouse and was walking towards another building, and uttered the words "I am going to kill you." The father, in denying that he made the threat, nevertheless acknowledged that he walked by the mother, but claimed that he did so for innocent, logistical reasons which Family Court found unpersuasive and incredible. Family Court credited the mother's testimony when finding the father committed the violation. In terms of the jail sentence, the Court determined that where a period of incarceration of six months or more is contemplated, proof of the violation must be established beyond a reasonable doubt. Family Court correctly determined that the mother had, in fact, established the violation beyond a reasonable doubt.

Matter of Cori XX., 155 AD3d 113 (3rd Dept 2017)

Court Did Not Abuse Its Discretion In Denying Respondent's Request for Adjournment

Family Court entered an order of protection requiring respondent to remain at least 500 feet from petitioner at all times and to refrain from any communication with petitioner. The Appellate Division affirmed. Respondent's contention was rejected that the court abused its discretion in denying her request for an adjournment of the hearing. The record reflected that respondent was avoiding service of the summons to appear in the proceeding, thereby rendering it necessary for the court to ask the police to serve respondent therewith. Moreover, on the morning of the scheduled hearing, respondent conveyed misleading information to the court and gave inconsistent excuses why she could not be present. Under those circumstances, the court did not abuse its discretion in refusing to adjourn. Petitioner established by a preponderance of the evidence that respondent committed the family offense of aggravated harassment in the second degree. The record evidence, consisting of the testimony of petitioner and petitioner's mother, established that respondent communicated threats of physical harm to petitioner.

Matter of Clausell v Salame, 156 AD3d 1401 (4th Dept 2017)

JUVENILE DELINQUENCY

Respondent's Placement Modified to Probation

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act of unlawful possession of a weapon by a person under 16, and placed him with ACS for 12 months. The Appellate Division modified by placing respondent on level three probation for 18 months, with certain conditions. Although the underlying offense was serious, the weapon was a BB gun and the 13-year-old respondent did not use it to commit an act of violence. The Appellate Division disposition, which was the same as

the presentment agency's recommendation at the dispositional hearing, was the least restrictive dispositional alternative consistent with respondent's needs and the community's need for protection.

Matter of Roemaine Q., 154 AD3d 427 (1st Dept 2017)

Respondent's Actions Not Excused Because His Mother Was Being Arrested

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted the crimes of assault in the second and third degree, obstructing governmental administration in the second degree, and resisting arrest, and placed him on probation for 12 months. The Appellate Division affirmed. The determination was based upon legally sufficient evidence and was not against the weight of the evidence. The testimony established that respondent assaulted a police officer and interfered with an arrest while the officer was performing her official function. His physical intrusion and actions were not justified because it was his mother who was being arrested and he was upset. The placement was proper in light of the nature of the incident, Probation's recommendation, respondent's poor school performance, and his attendance and disciplinary record, despite the fact that this was his first offense.

Matter of Brandon D., 155 AD3d 435 (1st Dept 2017)

Court Properly Placed Respondent's in Non-Secure Detention

Family Court, upon respondent's admission that she violated the terms of her probation, revoked her probation and placed her with ACS Close to Home Program for 12 months. The Appellate Division affirmed. The court properly exercised its discretion in placing respondent in nonsecure detention rather than restoring her to probation, in light of her extensive and repeated violations of her probation conditions, and her failure to avail herself of opportunities for rehabilitation. The court considered, but was not obligated to accept, the reports and recommendations of the agencies.

Matter of Angelic W., 155 AD3d 477 (1st Dept 2017)

Probation Least Restrictive Alternative

Respondent was adjudicated a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would have constituted the crimes of attempted assault in the third degree and grand larceny in the fourth degree, and placed him with ACS Close to Home Program for 18 months, and upon findings that respondent violated the terms of his probation, revoked his probation and placed him with the abovementioned Program for a period of 12 months. The Appellate Division affirmed. The placement was the least restrictive dispositional alternative consistent with respondent's needs and the community's need for protection in light of respondent's repeated criminal conduct, poor attendance in school, substance abuse problems, and the recommendations in the probation and mental health services reports.

Matter of Sine C., 155 AD3d 539 (1st Dept 2017)

Showup Identification Evidence Not Unreliable

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted the crimes of robbery in the second degree (two counts), grand larceny in the fourth degree (two counts), criminal possession of stolen property in the fourth degree, assault in the third degree, and criminal possession of stolen property in the fifth degree, and placed him on probation for 15 months. The Appellate Division affirmed. Respondent's legal insufficiency claim was unpreserved and would not be reached in the interests of justice. As an alternative, the determination was based upon legally sufficient evidence and was not against the weight of the evidence. Because respondent did not move for suppression, his contention that a showup identification should have been suppressed was not supported by a sufficient factual record. Respondent's contention that the showup rendered the identification evidence unreliable was unavailing inasmuch as the evidence at the fact-finding hearing established that there was a reliable identification, in very close temporal and geographical proximity to the crime.

Matter of Julio A., 156 AD3d 407 (1st Dept 2017)

JD Adjudication Reversed

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for 12 months. The Appellate Division reversed, vacated the finding and dispositional order, and remanded to the court with a direction to order an adjournment in contemplation of dismissal. Although respondent's challenges to the weight and sufficiency of the evidence were unavailing, an adjournment in contemplation of dismissal was the least restrictive dispositional alternative consistent with respondent's needs and the community's need for protection.

Matter of Tyler Y., 156 AD3d 441 (1st Dept 2017)

Nonsecure Placement Least Restrictive Dispositional Alternative

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted the crimes of attempted assault in the second degree, criminal possession of a weapon in the fourth degree, and obstructing governmental administration in the second degree, and imposed a nonsecure placement with ACS for a period of 6 to 18 months. The Appellate Division affirmed. Respondent's legal insufficiency claim was unpreserved and would not be reached in the interests of justice. As an alternative, the determination was based upon legally sufficient evidence and was not against the weight of the evidence. The disposition was a provident exercise of discretion in light of respondent's history of escalating delinquency and failure to benefit from opportunities for rehabilitation.

Matter of Javaughn V., 156 AD3d 560 (1st Dept 2017)

Family Court Properly Declined to Suppress Juvenile's Oral and Written Statements to the Police

The respondent and another individual allegedly were involved in a shooting in an apartment building. They were stopped by the police near the scene of the incident shortly after it occurred. A police officer recovered a loaded firearm from the respondent's waistband. At a showup identification conducted shortly thereafter, the complainant identified the respondent and the other individual as the perpetrators, and they were arrested. The Family Court properly denied that branch of the respondent's omnibus motion which was to suppress the physical evidence recovered by the police. The police officers had a founded suspicion that criminality was afoot, and it was proper for them to conduct an inquiry. In light of the bulge in the respondent's waistband observed by one of the officers when he stopped the respondent, the officer's experience, and other attendant circumstances, the evidence was sufficient to establish that the officer had reasonable suspicion to stop and frisk the respondent. Once the officer recovered the gun from the respondent, there was probable cause to arrest him. The Family Court properly denied that branch of the respondent's omnibus motion which was to suppress the respondent's oral and written statements to the police. A child under the age of 16 does not have the absolute right to the presence of a parent during interrogation. FCA § 305.2 expressly contemplates the possibility that the police may be unable to contact the parent of a child in custody, despite every reasonable effort (*see* FCA § 305.2 [4]). Whether a statement was voluntary is a mixed question of law and fact, to be determined from the totality of circumstances. Here, the requirements of FCA § 305.2 were satisfied. The police made reasonable efforts to contact the respondent's parent or another relative. The respondent's grandmother, the person with whom he resided (*see* FCA § 305.2 [3]), was present when the respondent gave his oral and written statements to the police. Under the totality of the circumstances, the respondent's statements were voluntary. As the petitioner did not offer identification testimony at the fact-finding hearing from the witness who made a showup identification, the respondent's contention that the Family Court erred in denying that branch of his omnibus motion which was to suppress this identification testimony was academic. The respondent's contention that the evidence was legally insufficient to support the Family Court's findings of fact is without merit. The evidence at the fact-finding hearing was legally sufficient to establish that the respondent committed acts which, if committed by an

adult, would have constituted the crimes of burglary in the second degree, criminal possession of a weapon in the second degree, and attempted assault in the second degree.

Matter of Lavon S., 153 AD3d 526 (2d Dept 2017)

Respondent Failed to Satisfy Burden of Demonstrating That Showup Procedure Was Unduly Suggestive

The order appealed from adjudicated the respondent a juvenile delinquent and placed her on probation for a period of 24 months. The Appellate Division affirmed. The appeal brought up for review the denial, after a hearing, of the respondent's motion to suppress identification testimony, and a fact-finding order of that court dated June 23, 2016, which, after a hearing, found that the respondent had committed acts which, if committed by an adult, would have constituted the crimes of attempted assault in the first degree, attempted gang assault in the first degree, assault in the second degree, attempted assault in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, criminal possession of a weapon in the fourth degree, and criminal mischief in the fourth degree. The respondent moved to suppress testimony regarding a showup identification and any in-court identification flowing therefrom. Following a *Wade* hearing the Family Court denied the respondent's motion. The presentment agency met its initial burden of establishing the reasonableness of the police conduct and the lack of undue suggestiveness, and the respondent failed to satisfy the ultimate burden of demonstrating that the showup procedure was unduly suggestive. Accordingly, the Family Court properly denied the respondent's motion to suppress identification testimony.

Matter of Heydi M., 154 AD3d 759 (2d Dept 2017)

Record Supported Determination to Credit Police Officers' Testimony

The order appealed from adjudicated the respondent a juvenile delinquent. The appeal brought up for review a fact-finding order of that court dated November 16, 2015, which, after a hearing, found that the respondent committed acts which, if committed by an adult, would have constituted the crimes of criminal possession of a weapon in the second degree, criminal possession of a firearm, and unlawful possession of a weapon by a person under the age of 16 (two counts), and the denial, after a hearing, of that branch of the respondent's omnibus motion which was to suppress physical evidence. The Appellate Division affirmed. Contrary to the respondent's contention, the police officers' testimony that they saw the handle of a black gun sticking out of the pocket of his white jacket did not appear to have been tailored to nullify constitutional objections. Furthermore, the officers' testimony was not incredible as a matter of law, as it was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory. Any inconsistencies in the officers' testimony were minor, and did not render their testimony incredible or unreliable. Viewing the evidence in the light most favorable to the presentment agency, the Appellate Division found that it was legally sufficient to establish, beyond a reasonable doubt, that the respondent committed acts which, if committed by an adult, would have constituted the crimes of criminal possession of a weapon in the second degree, criminal possession of a firearm, and unlawful possession of a weapon by a person under the age of 16. Moreover, the Appellate Division was satisfied that the Family Court's fact-finding determination was not against the weight of the evidence.

Matter of Cromwell S., 154 AD3d 857 (2d Dept 2017)

Record Did Not Support Granting Respondent's Request for an Adjournment in Contemplation of Dismissal

The order of disposition adjudicated the respondent a juvenile delinquent, upon an order of fact-finding of that court dated September 7, 2016, made upon his admission, finding that he had committed an act which, if committed by an adult, would have constituted the crime of forcible touching, and placed him on probation for a period of 12 months. The respondent appealed. The Appellate Division affirmed. Contrary to the respondent's contention, the Family Court providently exercised its discretion in adjudicating him a juvenile

delinquent instead of granting his request for an adjournment in contemplation of dismissal. The imposition of probation was the least restrictive alternative consistent with the needs and best interests of the respondent and the need for protection of the community. The disposition was appropriate in light of, inter alia, the recommendation in the probation report, the respondent's minimization of and failure to accept responsibility for his conduct, and his need for increased supervision.

Matter of Jahiem J., 155 AD3d 1037 (2d Dept 2017)

Appeal of Placement Extension Deemed Moot Where Term of Placement Expired During Appeal

The mother of a child, whose placement was extended by Family Court in accordance with Article 3 of the Family Court Act, appealed Family Court's placement decision. The mother claimed Family Court lacked good cause to excuse DSS's late filing of the petition seeking placement, as well as their decision to extend placement of the child. This Court determined that upon expiration of the child's period of extended placement, the mother's appeal was rendered moot and there were no exceptions to the mootness doctrine.

Matter of Kaitlyn KK., 155 AD3d 1365 (3d Dept 2017)

PATERNITY

Petitioner Equitably Estopped From Obtaining DNA Test

Family Court adjudged and declared that respondent was the father of the subject child. The Appellate Division affirmed. The court properly determined that it was in the child's best interests to equitably estop respondent from obtaining a DNA test to establish paternity. Clear and convincing evidence demonstrated that respondent held himself out as the father of child and that the now 10-year-old child considered respondent to be his father. The child lived with respondent, his mother and siblings for about two years, called respondent dad, and spent time with him on birthdays and holidays, including father's day. Respondent introduced the child to his family and friends as his son, and allowed the child to spend time and develop relationships with his family.

Matter of Commissioner of Social Servs. v Dwayne W., 146 AD3d 718 (1st Dept 2017**)**

SPECIAL IMMIGRANT JUVENILE STATUS

Record Did Not Support Denial of Application for SIJS Finding

In December 2015, the petitioner filed a petition to be appointed as guardian for the subject child for the purpose of obtaining an order declaring that the child was dependent on the Family Court and making specific findings that he was unmarried and under 21 years of age, that reunification with one or both of his parents was not viable due to parental abuse, neglect, or abandonment, and that it was not in his best interests to be returned to India, his previous country of nationality and country of last habitual residence, so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101 (a) (27) (J). Thereafter, the child moved for the issuance of an order making the requisite declaration and specific findings so as to enable him to petition for SIJS. In an order dated September 29, 2016, the Family Court denied the child's motion on the ground that he failed to establish that reunification of the child with one or both of his parents was not viable due to parental abuse, neglect, or abandonment, and that it would not be in the child's best interests to return to India. The child appealed. The Appellate Division reversed. The record revealed that reunification of the child with his father was not a viable option due to parental neglect, which included the infliction of excessive corporal punishment and requiring the child to begin working at the age of 15 instead of attending school on a regular basis. The record also supported a finding that it was not be in the child's best interests to be returned to India. Accordingly, the Family Court should have granted the child's motion for the issuance of an order, inter alia, making the requisite specific findings so as to enable him to petition for SIJS. Having found the record sufficient to make its own findings of fact and conclusions of law, the Appellate Division found that reunification of the child with his father was not viable

due to parental neglect, and that it was not in his best interests to return to India, his previous country of nationality and last habitual residence.

Matter of Gurwinder S., 155 AD3d 959 (2d Dept 2017)

TERMINATION OF PARENTAL RIGHTS

TPR Based Upon Mother's Mental Illness and Abandonment and Permanent Neglect Affirmed

Family Court, upon findings of mental illness, abandonment and permanent neglect, terminated her parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence, including expert testimony of the court-appointed psychologist who examined the mother on two occasions and reviewed her available medical records, supported the determination that she was then and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child. The psychologist testified that the mother suffered from schizophrenia and that she lacked insight into her illness, as demonstrated by her belief that continued treatment was unnecessary. That the mother's illness was in remission at the time of the hearing was immaterial, given the psychologist's unrefuted testimony that her prognosis was poor and that her symptoms were likely to recur. Clear and convincing evidence also supported the determination that the mother abandoned the child by failing to visit or communicate with the child or the agency for the six months prior to the filing of the petition, although she was able to do so and not prevented or discouraged from doing so by the agency. Her hospitalization for some portion of the six-month period did not automatically excuse her from maintaining contact before and after the hospitalization. Clear and convincing evidence also supported the determination that the mother permanently neglected the child by failing for at least one year to maintain contact with or plan for the future of the child, although physically and financially able to do so.

Matter of Jackie Ann W., 154 AD3d 459 (1st Dept 2017)

Mother Permanently Neglected Children

Family Court determined that respondent mother permanently neglected the subject children, terminated her parental rights, and committed custody and guardianship of the children to the Commissioner of ACS and petitioner agency for the purpose of adoption. The Appellate Division affirmed. The determination of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts to encourage and strengthen the mother's relationship with the children by developing an individualized plan tailored to her situation and needs, including multiple referrals for DV counseling, individual counseling, visitation, and housing. Despite those efforts, the mother continued to deny responsibility for and failed to gain insight into the conditions that led to the children's removal.

Matter of Unique M., 154 AD3d 590 (1st Dept 2017)

Father Permanently Neglected Child

Family Court found that respondent father permanently neglected the subject child. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts to strengthen the parental relationship by scheduling visitation and providing referrals for services to address the reasons for the child's placement in foster care, but respondent failed to plan for the return of the child. That respondent completed services did not preclude a finding of permanent neglect inasmuch as he failed to demonstrate adequate parenting skills and to plan for the child because of his inability to separate from the mother, who suffered from untreated alcoholism. Respondent refused to acknowledge his failure to protect the child from the effects of the mother's alcoholism.

Matter of Nekia C., 155 AD3d 431 (1st Dept 2017)

Father Permanently Neglected Children

Family Court determined that respondent father abandoned Baby Girl A and permanently neglected all three children. The Appellate Division affirmed. The agency engaged in diligent efforts to encourage and

strengthen the father's relationship with the children by developing individualized plans tailored to his situation, including parenting skills classes, domestic violence services, mental health services, attendance in case planning meetings, and family visitation. The father refused to speak to the agency or answer the door when its representatives went to his apartment. He never engaged in services and did not take advantage of visitation opportunities. The father's contention that his mental illness prevented him from planning for the children was rejected inasmuch as the agency made multiple referrals and appointments for the father to receive treatment, but he did not take advantage of them. There was clear and convincing evidence of the father's abandonment of baby Girl A, whom he did not name.

Matter of Angelicah U., 155 AD3d 455 (1st Dept 2017)

Mother Permanently Neglected Child

Family Court found that respondent mother permanently neglect the subject child, terminated her parental rights, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that respondent failed to maintain contact with or plan for the future of the child for a period of more than one year, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship. Respondent failed to avail herself of the multiple services the agency referred her to and failed to submit to drug testing or to obtain suitable housing. It was in the child's best interests to terminate respondent's parental rights inasmuch as she was not in a position to care for and provide an adequate home for the child and the child wished to remain in his pre-adoptive foster home. The child's best interests would not be served by granting the maternal grandmother custody. When he was in the grandmother's care he was consistently late to school and the grandmother allowed the mother to take the child in an unsupervised setting, resulting in the mother returning the child two days later with a broken arm.

Matter of Miquel Angel S., 155 AD3d 587 (1st Dept 2017)

TPR in Children's Best Interests

Family Court, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children and committed custody and guardianship of the subject children to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The determination that the agency met its burden of establishing permanent neglect had previously been affirmed. On remittitur, the court properly determined that it was in the children's best interests that respondent's parental rights be terminated. A suspended judgment was not warranted inasmuch as there was no evidence that respondent had a realistic and feasible plan to provide an adequate and stable home for the children, all of whom had special needs.

Matter of Andrea L.P., 156 AD3d 413 (1st Dept 2017)

Court Properly Dismissed Permanent Neglect Petition

Family Court dismissed the petition of Edwin Gould Services for Children (EGS) to declare the subject child permanently neglected. The Appellate Division affirmed. After the child was born prematurely and placed directly into foster care as a result of findings of neglect, the Commissioner of Social Services transferred responsibility for the child's foster care placement to EGS. The child had lived with the same foster mother since 2009 and she sought to adopt the child. EGS failed to prove, by clear and convincing evidence, that the parents, for a period of at least one year following the date the child came into the care of EGS, substantially and continuously or repeatedly failed to plan for the child's future. EGS and the AFC contended that the parents did not complete certain mandated services. However, the period of alleged noncompliance was shorter than the statutory one-year period. With respect to the period where the parents undisputably complied with the service plan, EGS and the AFC argued that, notwithstanding that cooperation, the parents failed to gain insight into the behaviors that led to the children's removal, as well as their mental

health issues. The evidence, however, included testimony that the mother completed all mandated service and sought out additional services on her own initiative. The limited testimony relied upon by EGS to prove the father's failure to gain insight was insufficient to meet EGS's high burden. Further, because it was not possible from the record to determine why the child was removed from the parents' care in 2009, EGS did not prove, by clear and convincing evidence, that the parents failed to gain insights into the behaviors that led to removal.

Matter of Legend S., 156 AD3d 438 (1st Dept 2017)

Parents Permanently Neglected Children

Family Court found that respondent parents permanently neglect the subject children, terminated their parental rights, and transferred custody and guardianship of the children to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The record showed, by clear and convincing evidence, that the agency made diligent efforts to strengthen the parental relationship between respondent father and the children by scheduling visitation, and referring him for mental health services, a parenting skills class, random drug screenings and sex offender treatment. The father's contention that it was inappropriate to require him to receive sex offender treatment because no finding of sexual abuse was entered against him was unavailing. The court entered such finding after it determined that a child he was legally responsible for saw child pornography on his computer and that he had participated in chat rooms where child pornography was discussed. Additionally, the record demonstrated, by clear and convincing evidence, that the parents permanently neglected the children, despite regularly visiting them, by failing to comply with the agency's referrals for services, complete programs, attend mental health therapy regularly, and gain insight into the reasons for the children's placement.

Matter of Antonio James L., 156 AD3d 554 (1st Dept 2017)

Record Supported Finding of Permanent Neglect

The court determined, after fact-finding and dispositional hearings, that the mother permanently neglected the subject children by, among other things, failing to plan for the future of the children, although physically and financially able to do so, notwithstanding the petitioner's diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [4] [d]; [7]). The court terminated the mother's parental rights and transferred guardianship and custody of the children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appealed. The Appellate Division affirmed. In proceedings to terminate parental rights based on permanent neglect, the agency must establish as a threshold matter that it made diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [7] [a]). The diligent efforts must include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parents to overcome problems which prevent the discharge of the child into their care, and informing the parents of their child's progress (*see* SSL § 384-b [7] [f]). Contrary to the mother's contention, the petitioner met its initial burden of establishing by clear and convincing evidence that it exercised diligent efforts to strengthen the parental relationship between the mother and the children (*see* SSL § 384-b [7] [a], [f]).

Matter of Yolanda H., 154 AD3d 669 (2d Dept 2017)

Record Supported Finding That Mother Was Presently and for Foreseeable Future Unable, by Reason of Mental Illness, to Provide Proper and Adequate Care for Child

The order appealed from, after a fact-finding hearing, found 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 child, terminated her parental rights, and placed the child into the joint custody of the Catholic Guardian Services and the Administration for Children's Services for the purpose of adoption.
The Appellate Division affirmed. Here, the agency presented the uncontroverted testimony of its expert

psychiatrist, who conducted an evaluation of the mother and reviewed her extensive mental health records dating from 2004 to 2014. He diagnosed the mother with "schizophrenia spectrum," "other psychotic disorders," "mood disorder," and "other specified depressive disorder," in addition to neurological impairment due to epilepsy and borderline intellectual functioning. The record further showed that the mother had limited insight into her condition, a long-standing pattern of only intermittent compliance with medication and psychotherapy treatment, and recurrent hospitalizations. Moreover, the mother had almost no insight into the health problems of the child, and the agency's expert further testified that because of the mother's mental illness, the child would be in danger of becoming neglected if he were returned to her care. Accordingly, the Family Court correctly found that there was clear and convincing evidence that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child, and terminated her parental rights (*see* SSL § 384-b [3] [g] [i]; [4] [c]; [6] [a]).

Matter of Angel C.M., 154 AD3d 696 (2d Dept 2017)

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

The petitioner commenced a proceeding to terminate the mother's parental rights to the subject child on the ground of permanent neglect. After fact-finding and dispositional hearings, the Family Court found that the mother permanently neglected the child, terminated her parental rights, and transferred custody and guardianship of the child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother appealed. The Appellate Division affirmed. Contrary to the mother's contention, the Family Court properly found that she permanently neglected the child. The petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the mother's relationship with the child. These efforts included, among other things, facilitating regular visitation between the mother and the child, providing transportation assistance to and from services and visits, regularly meeting with the mother to encourage her to comply with her service plan and successfully complete it, and referring the mother to substance abuse treatment, random drug screenings, parenting skills courses, and a mental health evaluation (*see* SSL § 384-b [7] [f]). Despite these efforts, the mother failed to plan for the future of the child (*see* SSL § 384-b [7] [c]). The mother lacked insight into the reasons for removing the child from her care, and she failed to benefit from the services offered to her. Furthermore, the Family Court properly determined that it was in the best interests of the child to terminate the mother's parental rights and to free the child for adoption.

Matter of Lisette M.C., 154 AD3d 847 (2d Dept 2017)

Family Court Properly Relieved Petitioner of its Obligation to Make Reasonable Efforts to Reunite Mother with Child

The mother appealed from an order of the Family Court, which, after a hearing, granted the petitioner's motion pursuant to FCA § 1039-b for a finding that reasonable efforts to reunite the mother with the subject child were no longer required. The Appellate Division affirmed. In support of its motion, the petitioner demonstrated that the mother's parental rights had been involuntarily terminated with respect to the subject child's older siblings. In opposition, the mother failed to establish that "reasonable efforts" should nonetheless still be required under the exception provided for in FCA § 1039-b (b).

Matter of Melissa D., 154 AD3d 851 (2d Dept 2017)

Both Parents Failed to Plan for the Future of Their Child Despite Petitioner's Diligent Efforts

In this proceeding to terminate the parents' parental rights to the subject child, the child was placed in foster care when the child tested positive for cocaine at birth. After fact-finding and dispositional hearings, the Family Court found that the parents permanently neglected the child, terminated the parents' parental rights, and transferred custody of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The parents separately appealed. The Appellate Division affirmed. The Family Court properly determined that

the petitioner established by clear and convincing evidence that, despite the petitioner's diligent efforts to encourage and strengthen the parent-child relationship, both parents had permanently neglected the child by, among other things, failing to plan for the future of the child for a period of at least one year following the child's placement into foster care. The court also properly determined that it was in the child's best interests to terminate both parents' parental rights and free the child for adoption.

Matter of Londa K., 154 AD3d 862 (2d Dept 2017)

Parents' Belated Partial Compliance with Service Plan Was Insufficient to Preclude Finding of Permanent Neglect

The subject child was born in May 2007, and was placed in foster care upon his discharge from the hospital. He has lived with the same foster mother since September 2007. In 2010, the petitioner commenced a proceeding to terminate the mother's parental rights on the basis that she was unable to care for the child due to her mental illness, and to terminate both parents' parental rights on the basis of permanent neglect. Thereafter, the petitioner withdrew the cause of action alleging mental illness with respect to the mother. After fact-finding and dispositional hearings, the Family Court issued an amended order of fact-finding and disposition, dated August 8, 2016, finding that the parents permanently neglected the child, terminating their parental rights, and transferring custody and guardianship of the child to the petitioner for the purpose of adoption. The parents separately appealed. The Appellate Division affirmed. Contrary to the parents' contention, the petitioner established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen their relationship with the child, which were specifically tailored to the parents' individual situation (*see* SSL § 384-b [7] [a]). These efforts included, inter alia, making referrals to mental health, parenting, and housing services, following up with those programs, encouraging compliance with the programs, and facilitating visitation (*see* SSL § 384-b [7] [f]). Despite these efforts, the parents failed to plan for the child's future. During the relevant time period, the mother was hospitalized in a psychiatric hospital after she stopped taking her medication, and both parents failed to successfully complete parenting skills programs or gain insight into their previous behavior and the need for services, refused to take random drug tests, and failed to attend visitation consistently. Contrary to the parents' contention, consideration of events which took place between the child's initial placement and the filing of the petition on June 8, 2010, did not preclude a finding of permanent neglect since the evidence established that the parents had not fully complied with services as of that date. The parents' belated partial compliance with the service plan was insufficient to preclude a finding of permanent neglect, and there was clear and convincing evidence of the parents' permanent neglect of the child. Moreover, the Family Court properly determined that termination of the parents' parental rights was in the child's best interests (*see* FCA § 631). Contrary to the parents' contention, the entry of a suspended judgment was not appropriate in light of their continued lack of insight into their problems, and their failure to acknowledge and address the issues preventing the return of the child to their care.

Matter of Elizabeth S., 155 AD3d 630 (2d Dept 2017)

Mother Failed to Comply with at Least One of the Conditions of the Suspended Judgment

The petitioner agency (hereinafter the agency) alleged that the four subject children were permanently neglected by the mother and sought the termination of her parental rights. The mother thereafter made an admission that she permanently neglected the children and stipulated that the agency had made diligent efforts to strengthen and encourage the parent-child relationships. A suspended judgment was entered for one year, expiring March 9, 2015. By order to show cause dated October 29, 2014, the agency filed a motion alleging violations of the suspended judgment. The agency alleged that the mother violated the terms and conditions of the suspended judgment by: failing to attend mental health services and follow recommendations for more intensive treatment; failing to obtain a source of income and telling the agency staff that it was none of their business; failing to obtain stable housing and owing rent arrears; failing to make herself available for monthly home visits by the agency; failing to consistently participate in conferences and

appointments related to the children; failing to demonstrate appropriate parenting skills at the visits by using profanity and threatening the children; failing to participate in meetings with the agency to discuss her service plan and visitation with the children; and displaying explosive and aggressive behavior when interacting with agency staff. The agency sought the entry of an order committing the custody and guardianship of the children to the agency. By order to show cause dated December 29, 2014, the agency sought an order suspending the mother's visitation with the children. The Family Court granted interim relief and suspended visitation, pending a combined hearing on the alleged violation of the suspended judgment motion and the application to suspend the mother's visitation. The Family Court held a combined hearing which commenced on February 20, 2015, on the violation of the suspended judgment motion filed by the agency on October 29, 2014, and the suspension of visitation application filed on December 29, 2014. The court, after the hearing, revoked the suspended judgment, determined that it was in the best interests of the subject children to be freed for adoption, and dismissed, as academic, the application to suspend the mother's visitation. The mother appealed. The Appellate Division affirmed. The Family Court properly found, by a preponderance of the evidence, that the mother failed to comply with at least one of the conditions of the suspended judgment issued in this matter during the one-year term of the suspended judgment. Further, the Family Court properly found that the best interests of the children were served by terminating the mother's parental rights and freeing the children for adoption.

Matter of Shainisa L.R., 155 AD3d 869 (2d Dept 2017)

Mother Failed to Address Her Mental Health and Substance Abuse Issues

The order, after fact-finding and dispositional hearings, found that the mother was presently, and for the foreseeable future, unable by reason of mental illness to provide proper and adequate care for the subject child and that the mother permanently neglected the child, terminated her parental rights, and transferred custody and guardianship of the child to the petitioner for the purpose of adoption. The mother appealed. The Appellate Division affirmed. Contrary to the mother's contention, the petitioner demonstrated, by clear and convincing evidence, that she is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child (*see* SSL § 384-b [4] [c]). The record revealed a long history of symptomatic mental illness and recurrent hospitalizations. The court-appointed psychologist testified that the mother suffers from schizoaffective disorder, bipolar type, and opined that if the child were returned to the mother, he would be at risk of being neglected in the present and in the foreseeable future. This conclusion was based upon disturbances in the mother's thinking, feeling, behavior, and judgment due to her mental illness, her inability over a protracted period to consistently comply with treatment, her inability to "function independently in terms of self-care," such as by maintaining housing or an income, and her inability to provide stability and safety to the child. The petitioner further demonstrated, by clear and convincing evidence, that the mother permanently neglected the child (*see* SSL § 384-b [4], [7] [a]). Contrary to the mother's contention, the petitioner made diligent efforts to assist the mother in maintaining contact with the child and planning for the child's future, including by facilitating visitation, repeatedly providing the mother with referrals for drug treatment programs and mental health evaluations, and advising the mother of her need to attend and complete such programs and of the consequences of her failure to do so. Despite the petitioner's diligent efforts, the mother failed to adequately plan for the child's future, by, most significantly, failing to address her mental health and substance abuse issues.

Matter of Christina S., 155 AD3d 872 (2d Dept 2017)

Record Supported Finding That Mother Was Presently and for the Foreseeable Future Unable, by Reason of Intellectual Disability, to Provide Proper and Adequate Care for Child

After fact-finding and dispositional hearings, the Family Court found that the mother permanently neglected the child and, pursuant to SSL § 384-b (4) (c), was presently and for the foreseeable future unable to provide proper and adequate care for the child, terminated her parental rights, and transferred

guardianship and custody of the child to the petitioner for the purpose of adoption. The mother appealed. The Appellate Division affirmed. Contrary to the mother's contention, the petitioner met its initial burden of establishing by clear and convincing evidence that it exercised diligent efforts to strengthen the parental relationship by, among other things, scheduling regular visits between the mother and the child, providing the mother with a visiting coach to assist her to interact appropriately with the child during visits, referring her to mental health services and parenting skills training, and attempting to place her in supportive housing (*see* SSL§ 384-b [3] [g] [i]; [7] [a], [f]). Moreover, the evidence adduced at the fact-finding hearing established, by the requisite clear and convincing standard of proof, that despite the petitioner's efforts, the mother failed to plan for the future of the child (*see* SSL § 384-b [7] [a]). The record also supported the Family Court's determination that the petitioner established by clear and convincing evidence that, pursuant to SSL § 384-b (4) (c), the mother was presently and for the foreseeable future unable to provide proper and adequate care for the child (*see* SSL § 384-b [3] [g] [i]; [4] [c]; [6] [b]). The court-appointed psychologist who evaluated the mother, testified that the mother's full scale IQ was 65, her intellectual functioning was in the extremely low range of abilities, her deficits originated during childhood, her adaptive functioning abilities were significantly compromised, and, while the mother was motivated to parent and would be capable of assisting another in the tasks of parenting, she lacked the ability to parent independently. The court-appointed psychologist concluded that the mother was "mildly mentally retarded," and that her limitations were such that the child, if returned to her care presently or in the foreseeable future, would be at risk of being neglected. The mother did not challenge this testimony. Accordingly, the Family Court properly terminated the mother's parental rights and transferred guardianship and custody of the child to the petitioner for the purpose of adoption.

Matter of Yvonne M.S., 155 AD3d 961 (2d Dept 2017)

Father's Incarceration Did Not Absolve Him of Responsibility to Maintain Regular Contact with Children

The order appealed from found that M.B. was a notice father only, or in the alternative, that he had permanently neglected the children J.M.B., J.A.B., and J.S.B., and that the mother had permanently neglected all five children. The Appellate Division affirmed. The Family Court's determination that the father's consent to the adoption of his children was not required was supported by clear and convincing evidence. The father's incarceration did not absolve him of the responsibility to maintain regular contact with the children or the agency and to provide financial support for the children, nor did it establish as a matter of law that he did not have the means to provide financial support. The father's testimony at the fact-finding hearing established that he did not provide financial support for the children either during or after his incarceration. Although the father claimed that he had called the agency numerous times, the court was not required to credit that testimony. The Family Court also did not err in finding that the mother had permanently neglected the children. The agency established by clear and convincing evidence that the mother failed for a period of either at least one year or 15 out of the most recent 22 months following the date the children came into its care substantially and continuously or repeatedly to plan for the future of the children, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [7] [a]).

Matter of Claudia H., 155 AD3d 1027 (2d Dept 2017)

Father's Partial Compliance with Service Plan Was Insufficient to Preclude Finding of Permanent Neglect

The petitioner filed a petition to terminate the father's parental rights to the subject child on the ground of permanent neglect. After a fact-finding hearing, the Family Court found that the father had permanently neglected the child. After a dispositional hearing, the court terminated the father's parental rights and freed the child for adoption. The father appealed. The Appellate Division affirmed. Contrary to the father's contention, the petitioner established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen his relationship with the

child, which efforts were specifically tailored to the father's individual situation (*see* SSL § 384-b [7] [a]). These efforts included, inter alia, providing case work counseling, making referrals for mental health therapy, psychological evaluations, parenting programs, and anger management programs, attempting to follow up with those programs, encouraging compliance with the programs, and facilitating supervised visitation (*see* SSL § 384-b [7] [f]). Despite these efforts, the father failed to plan for the child's future. During the relevant time period, the father failed to gain insight into his previous behavior and failed to address and overcome the specific personal and familial problems which endangered the child, and which could endanger the child in the future. The father's partial compliance with the service plan was insufficient to preclude a finding of permanent neglect, and there was clear and convincing evidence of the father's permanent neglect of the child. Moreover, the Family Court properly found, by a preponderance of the evidence, that termination of the father's parental rights was in the child's best interests (*see* FCA § 631). Contrary to the father's contention, the entry of a suspended judgment was not appropriate in light of his continued lack of insight into his problems, and his failure to acknowledge and address the issues preventing the return of the child to his care.

Matter of Ramadan G.O.-A., 156 AD3d 691 (2d Dept 2017)

Record Supported Revocation of Suspended Judgment and Termination of Mother's Parental Rights

The county's Department of Social Services (hereinafter DSS) commenced proceedings to terminate the mother's parental rights on the ground that she permanently neglected the subject children. On June 9, 2015, the mother consented to a finding of permanent neglect, and an order of suspended judgment was issued upon certain conditions. Notably, the mother was required to maintain a 100% compliance rate with her substance abuse program and with the Family Support Program. On December 22, 2015, DSS filed an order to show to revoke the suspended judgment, alleging that the mother had failed to comply with the terms and conditions thereof. After a hearing, the Family Court revoked the suspended judgment and terminated the mother's parental rights. The mother appealed. While the mother made some efforts to comply with the conditions of the suspended judgment, the Family Court properly determined that the mother's discharge from her substance abuse program for "noncompliance," and her failure to consistently attend and benefit from the Family Support Program, constituted a violation of the terms of the suspended judgment. Moreover, the record supported the court's conclusion that the mother failed to understand "the full extent of why her children were in care or why they were removed." Accordingly, the mother failed to demonstrate that progress had been made to overcome the specific problems which led to the removal of the subject children. Accordingly, the Family Court properly revoked the suspended judgment and terminated the mother's parental rights.

Matter of Deysanni H., 156 AD3d 699 (2d Dept 2017)

Record Did Not Support Finding of Abandonment

On August 8, 2013, the mother gave birth to the subject child. D.H.J. was listed as the father on the child's birth certificate. On or about December 1, 2014, the child came into the care of the county agency (hereinafter the agency) after a neglect petition was filed against the mother. The mother died on December 24, 2014. After she died, it was determined that D.H.J. was not the biological father of the child. In March 2015, K.R. (hereinafter the father) filed a petition seeking to be declared the father of the child. On April 9, 2015, he obtained the results of a DNA test, which confirmed that he was the biological father of the child. On May 14, 2015, an order of filiation was entered, declaring that the father is the child's father. On September 18, 2015, the agency filed a petition against the father alleging that he had abandoned the child, and seeking to terminate his parental rights and to commit guardianship and custody of the child to the agency. After a fact-finding hearing, the Family Court found that the agency had established by clear and convincing evidence that the father had abandoned the child for a period in excess of six months prior to the filing of the petition, terminated his parental rights, and transferred guardianship and custody of the child to the agency for the purpose of adoption. The father appealed. The Appellate Division reversed. The agency failed to

establish, by clear and convincing evidence, that during the relevant period of time the father evinced an intent to forgo his parental rights and obligations. The record demonstrated that once the father had sufficient reason to believe he might be the father, he took action to assert his paternity, and sought to have contact with the child, filed petitions for custody, visited with the child on two occasions and attempted to visit on a third occasion, and brought the child snacks, toys, and clothes during the visits. In addition, the father spoke with the caseworker on the phone on multiple occasions, paid child support in the amount of $25 per month, and provided the caseworker with information about where he was living, who he was living with, and about a daycare where he would enroll the child. Under these circumstances, the Family Court should have denied the petition on the merits, and dismissed the proceeding.

Matter of Darrell J., 156 AD3d 788 (2d Dept 2017)

Record Supported Finding That Mother Failed to Comply with Certain Conditions of Suspended Judgment

In March 2014, the New York Foundling Hospital (hereinafter the petitioner) commenced this proceeding pursuant to terminate the mother's parental rights with respect to the subject child on the ground of permanent neglect. Upon the mother's admission, the Family Court found that she permanently neglected the child, and an order of suspended judgment was issued upon certain conditions for a period of one year. The petitioner subsequently filed a petition alleging that the mother had violated the conditions of the suspended judgment. At the ensuing hearing, evidence was adduced that the mother had been involuntarily hospitalized after she had failed to inform her therapist or the petitioner that she was experiencing certain symptoms of her mental illness. In addition, she had missed three scheduled appointments or meetings with the child's health care providers. The court, inter alia, found that the mother failed to comply with certain conditions of the suspended judgment, revoked the order of suspended judgment, terminated the mother's parental rights, and transferred guardianship and custody of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appealed. The Appellate Division affirmed. The Family Court properly found, by a preponderance of the evidence, that the mother failed to comply with certain conditions of the suspended judgment, including the conditions requiring her to cooperate with mental health treatment and medication management as required by her mental health providers, and to participate in and cooperate with all services for the subject child and cooperate with recommendations made by said child's therapists. Further, the hearing evidence supported the Family Court's determination that it was in the best interests of the child to terminate the mother's parental rights and free him for adoption.

Matter of Noelle M.R., 156 AD3d 791 (2d Dept 2017)

Incarcerated Parent Still Expected to Plan for Child's Future to Avoid Finding of Permanent Neglect

In a proceeding pursuant to Social Services Law §384-b, Family Court properly adjudicated the subject child to have been permanently neglected by the mother, and appropriately terminated the mother's parental rights (the father's parental rights had been terminated in a separate proceeding). The mother appealed from both the fact-finding and dispositional hearing (the Court dismissed the portion of the appeal from the fact-finding hearing) arguing that DSS failed to prove by clear and convincing evidence, that they made diligent efforts to encourage and strengthen the parent-child relationship. The mother, who was incarcerated at the time of the child's birth and was not due to be released from prison until 2020 the earliest, received, *inter alia*, letters and phone calls from a DSS caseworker informing her of the child's progress. The caseworker also sent the mother correspondence from the child's foster mother, photographs of the child and medical information about the child. The caseworker also delivered gifts and other items that the mother requested be given to the child. The mother and the caseworker also discussed placement options. Family Court providently determined that DSS established, by clear and convincing evidence, that they made diligent efforts to encourage and strengthen the mother's relationship with the child. Notwithstanding the aforementioned, Family Court providently found that the mother failed to plan for the child's future. The

mother was incarcerated, and her proposal that the child remain in foster care until she was no longer incarcerated, was unrealistic. Furthermore, the individuals that the mother proposed as a placement option, was not available or suitable. The Court determined that the mother's claim, that she was denied the effective assistance of counsel, was also without merit. The crux of the mother's complaint against her attorney was that he was not prepared to provide a defense for her because they had not had adequate time to communicate. However, at the fact-finding hearing, the mother claimed that she had a sufficient level of communication with her attorney. As for the mother's complaint that the attorney did not call certain witnesses that she wanted him to call to testify, the record revealed that these resources were unwilling or inappropriate for purposes of serving as a resource. In sum, the mother's attorney provided meaningful representation, which is what is constitutionally required.

Matter of Duane FF., 154 AD3d 1086 (3d Dept 2017)

Mother Was Not Entitled to a Suspended Judgment

After a dispositional hearing, Family Court appropriately terminated the mother's parental rights, thereby freeing the subject child for adoption. The mother argued, as part of her appeal, that Family Court erred in terminating her parental rights and should have instead, granted her a suspended judgment. The mother, who admitted to permanently neglecting her child, failed to comply with a number of significant provisions associated with the dispositional order. More specifically, the order required the mother to reside in Chemung County, however, she relocated to New York City without the permission of DSS. Also, despite being directed in the dispositional order to attend and successfully complete, a number of programs, including but not limited to, a substance abuse treatment program, parenting classes and domestic violence services, the mother had not participated in any of these programs or services much less complete them. The mother also visited the child only two times from the date of the order of disposition. In light of the aforementioned, the mother failed to clearly demonstrate that she deserved another opportunity to show that she had the ability to be a fit parent. Consequently, Family Court was justified in declining to grant the mother a suspended judgment and instead, terminate her parental rights.

Matter of Illion RR., 154 AD3d 1126 (3rd Dept 2017)

Father's Appealable Arguments Not Supported by Trial Testimony

There was a sound and substantial basis in the record to support Family Court's decision to terminate the father's parental rights finding that the father had abandoned his child, and in turn, permanently neglected said child. The father was incarcerated during the Family Court proceeding, as well as during the appeal. The father's sole argument on appeal was that he should not have been found to have abandoned his child for the six month period after the commencement of the neglect proceeding. The father avers that his child's foster care caseworker testified only that the father failed to communicate with her, not that he failed to communicate with the child and as such, the finding that he abandoned the child was inappropriate. The Court found the father's appellate argument was unsupported by the hearing testimony, which testimony revealed that the caseworker clearly stated that the father did not communicate with her in any capacity, including for purposes of arranging parenting time, within the requisite six month period necessary to establish permanent neglect. Given the father's failure to testify at the hearing, Family Court acted appropriately by drawing the strongest possible negative inference against the father. In light of the above, adjudication of the child as permanently neglected and termination of the father's parental rights, was an appropriate exercise of Family Court's discretion.

Matter of Mason H., 154 AD3d 1129 (3rd Dept 2017)

Father Put His Relationship With the Mother Before the Needs of the Children Justifying Finding of Permanent Neglect and TPR

There was no error in Family Court's decision to adjudicate the parties' three children as permanently neglected and to terminate the father's parental rights accordingly (the mother's parental rights were also

terminated based upon her default). In 2014, the parents consented to a finding of neglect and Family Court entered a suspended judgment that permitted the children to continue living with the father, subject to certain conditions. One of those conditions was a prohibition against the father permitting contact between the children and the mother outside of the supervised contact arranged by DSS. After a brief period of physical separation, the father resumed living with the mother, and the father allowed the mother extensive, unsupervised contact with the children. DSS filed a violation petition against the father, and the children were removed from his care. Approximately a year later, a permanent neglect proceeding was commenced against the parents seeking to terminate their parental rights, which, after a hearing, ultimately occurred and which the father now appeals. Family Court correctly determined that DSS had established, by clear and convincing evidence, that they had exercised diligent efforts to encourage and strengthen the relationship between the father and the children. DSS made the father aware that due to the mother's uncontrollable drug problem, her presence in the home would impede permanent reunification with the children. While DSS developed a detailed, individualized service plan for the father, made numerous referrals for him to other service providers, and encouraged the father to seek public assistance for alternative housing, the father's inability to disentangle himself from the mother and establish a safe, sober home for the children, rendered him unable to adequately plan for their futures. Consequently, Family Court's finding that the father permanently neglected the children and the court's decision to terminate the father's parental rights, was justified by the record.

Matter of Paige J., 155 AD3d 1470 (3d Dept 2017)

Petitioner Established by Clear and Convincing Evidence That it Made Diligent Efforts

Family Court terminated the parental rights of respondent father with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. The father's contention was rejected that reversal was required because petitioner did not comply with the statutory requirement of contacting the child's paternal grandmother and advising her of the pendency of the proceeding and her right to seek to become a foster parent or to seek custody of the child. Even assuming, arguendo, that petitioner failed to fulfill its statutory duty with respect to the child's grandmother, a reversal was not required. The grandmother filed a petition for custody of the child, and the court denied that petition after determining that it was not in the child's best interests for custody to be granted to the grandmother; that determination was not reviewable on the present appeal. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and child. The evidence adduced at the fact-finding hearing established that petitioner, among other things, scheduled regular visitation between the two and referred the father to tailored services designed to address his needs regarding his mental health and parenting skills. Although the father took advantage of some of the services offered by petitioner, petitioner demonstrated that he failed to fully comply with his service plan inasmuch as he did not regularly attend visitation and refused to engage in mental health treatment. Although the court misstated that the father failed to engage in recommended sex offender treatment, as opposed to the recommended mental health treatment, the misstatement did not warrant reversal.

Matter of Valentina M.S., 154 AD3d 1309 (4th Dept 2017)

Affirmance of Termination of Parental Rights on Ground of Permanent Neglect

Family Court terminated the parental rights of respondent father with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. The children were removed from the father's home and placed in foster care after a domestic violence incident when the father was beating his wife and throwing objects, and a diaper bag thrown by the father struck one of the children. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the children. Among other things, petitioner conducted service plan reviews and provided supervised visitation with the children until the visits were suspended because of the

father's belligerent and threatening behavior during visits. Petitioner also referred the father to parenting and domestic violence programs and to anger management and mental health counseling. Despite those diligent efforts, the father failed to plan for the future of the children. To the extent that the father completed any of the recommended programs or services, he did not successfully address or gain insight into the problems that led to the removal of the children and continued to prevent the children's safe return. The record supported the court's determination that termination of the father's parental rights was in the best interests of the children.

Matter of Brady J.C., 154 AD3d 1325 (4th Dept 2017)

Termination of Parental Rights on Ground of Permanent Neglect Affirmed

Family Court terminated the parental rights of respondent father with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Contrary to the father's contention, the court did not excuse petitioner from its obligation to demonstrate diligent efforts based on the father's incarceration but, rather, excused petitioner on the ground that the court, in a prior order under a separate docket number, had previously determined in accordance with Social Services Law § 358-a (3) (b) that reasonable efforts to make it possible for the child to return safely to his or her home were not required. Although the court's determination was based on a previous determination under a separate docket number, the father's contention was properly before the Court; however, it lacked merit. Petitioner established that the father permanently neglected the child inasmuch as he failed to address successfully the problems that led to the removal of the child and continued to prevent the child's safe return. The father failed to preserve for appellate review his contention that the court erred in failing to grant a suspended judgment. In any event, where, as here, the parent had not made any progress in addressing the issues that led to the child's removal, a suspended judgment was unwarranted.

Matter of Justin T., 154 AD3d 1338 (4th Dept 2017)

Suspended Judgment Properly Revoked

Family Court revoked the suspended judgment issued on behalf of respondent mother and terminated her parental rights with respect to the subject children. The Appellate Division affirmed. If the court determined by a preponderance of the evidence that there had been noncompliance with any of the terms of a suspended judgment, the court could revoke the suspended judgment and terminate parental rights. The mother acknowledged that such failure included repeated positive tests for cocaine. Accordingly, there was a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to terminate the mother's parental rights.

Matter of Ireisha P., 154 AD3d 1340 (4th Dept 2017)

Mother's Contacts with Child Merely Sporadic and Insubstantial

Family Court terminated the parental rights of respondent mother with respect to the subject child on the ground of abandonment. The Appellate Division affirmed. A child was deemed to be abandoned where, for the period of six months immediately prior to the filing of the petition for abandonment, a parent evinced an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or petitioner, although able to do so and not prevented or discouraged from doing so by petitioner. The mother admitted in her testimony at the hearing that she had moved to Florida voluntarily after the child was placed in foster care based upon a finding of neglect, that she thereafter had only a single visit with the child, which occurred after the petition was filed, and that her only contacts with the child, the caseworker, or the child's foster parent during the six-month period prior to the filing of the petition were several telephone calls and one birthday gift. Those were merely sporadic and insubstantial contacts. An abandonment petition was not defeated by a showing of sporadic and insubstantial contacts where clear and convincing evidence otherwise supported granting the petition.

Matter of Kaylee Z., 154 AD3d 1341 (4th Dept 2017)

Respondent Father's Parental Rights Properly Terminated on Ground of Mental Illness

Family Court terminated the parental rights of respondent father with respect to the subject children on the ground of mental illness, and declined to rule on whether the father had permanently neglected the children. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that the father, by reason of mental illness, was presently and for the foreseeable future unable to provide proper and adequate care for his children. The psychologist who examined the father on petitioner's behalf testified that the father suffered from delusional disorder, paranoid type and persecutory type. The psychologist further testified that, as a result of the disorder, the father was unable to parent the children effectively, and that the children would be in danger of being harmed or neglected if they were returned to his care at the present time or in the foreseeable future. The father's contention was rejected that the testimony was equivocal with respect to his inability to parent the children. Inasmuch as the psychologist had performed a recent and extensive examination of the father, the fact that some of the records upon which the psychologist relied to form his opinion were older than other records did not render the evidence insufficient to meet petitioner's burden. A separate dispositional hearing was not required following the determination that a parent was unable to care for a child because of mental illness. Because the court properly terminated the father's parental rights based on mental illness, his contention was not addressed that petitioner failed to establish permanent neglect.

Matter of Jason B., 155 AD3d 1575 (4th Dept 2017)

Termination of Father's Parental Interests With Respect to 14-year-old Child Was in Child's Best Interests, Notwithstanding Child's Hesitancy Toward Adoption

Family Court terminated the parental rights of respondent father with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner properly laid a foundation for those parts of the case file that the court admitted in evidence at the fact-finding hearing through the testimony of its caseworkers and typist, which established that they contemporaneously made those entries in the case file within the scope of their statutory duty to maintain a comprehensive case record for the children containing reports of any transactions or occurrences relevant to their welfare. The court erred in failing to consider the father's hearsay objections to the entries in the case file that contained statements by persons under no business duty to report to petitioner. Nonetheless, even assuming, arguendo, that the court improperly admitted in evidence the entries in the case file that contained hearsay, the error was harmless. The father failed to preserve for review his contention that the court improperly admitted and relied upon evidence that the father was regularly using marihuana after the date of the petition inasmuch as the father failed to object on that ground to the admission of the evidence. Nonetheless, any errors were harmless. Even without reference to such evidence, the record of the fact-finding hearing contained sufficient admissible facts to support the court's permanent neglect finding. Although one of the subject children was over 14 years old and was not prepared to consent to adoption, the desires of a child who was over 14 years old was but one factor to be considered in determining whether termination of parental rights was in the child's best interests. Termination of the father's parental interests with respect to the 14-year-old child was in the child's best interests, notwithstanding his hesitancy toward adoption.

Matter of Cyle F., 155 AD3d 1626 (4th Dept 2017)

Court Properly Revoked Suspended Judgment

Family Court vacated a previously issued suspended judgment and terminated respondent mother's parental rights to the subject child. The Appellate Division affirmed. The mother's contention that petitioner did not make significant efforts to reunite her with the child was not properly before the Court inasmuch as it was conclusively determined in the prior proceedings to terminate the mother's parental rights. To the extent that the mother contended that her consent to the finding of permanent neglect and the entry of the suspended judgment was not given knowingly, voluntarily, and intelligently, the mother did not move to vacate her admission to having permanently

neglected the subject child, and thus, her contention which was raised for the first time on appeal, was not properly before the Court. The court's determination that the mother failed to comply with the terms of the suspended judgment, and that it was in the child's best interests to terminate the mother's parental rights, was supported by the requisite preponderance of the evidence. Although there was some evidence in the record that the mother attempted to comply with the literal terms and conditions of the suspended judgment, the record established that she was unable to overcome the specific problems that led to the removal of the child from her care.

Matter of Kh'niayah D., 155 AD3d 1649 (4th Dept 2017)

Parental Rights of Mother Diagnosed With Antisocial Personality Disorder Properly Terminated

Family Court terminated the parental rights of respondent mother with respect to the subject children on the ground of mental illness. The Appellate Division affirmed. Petitioner demonstrated by clear and convincing evidence that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for her children. Petitioner's expert psychologist diagnosed both the mother and the father with antisocial personality disorder (ASPD). According to the expert. ASPD was effectively resistant to treatment, had a very remote chance of being cured, and was characterized by criminal and/or antisocial behavior that suggested a lack of internalization of societal norms and appropriate moral development. The expert opined, to a reasonable degree of clinical certainty and without contradiction, that any child in the care of either the mother or the father would be at imminent risk of harm both in the present and for the foreseeable future. The reliability of the expert's diagnosis and prognosis was underscored by various tragedies that befell other children of these parents. In light of the overwhelming evidence of the mother's mental illness and her resulting inability to parent the subject children adequately, any improperly admitted hearsay was harmless.

Matter of Neveah G., 156 AD3d 1340 (4th Dept 2017)

Respondent Father's Parental Rights Properly Terminated on Grounds of Mental Illness and Intellectual Disability

Family Court terminated the parental rights of respondent father with respect to the subject children on the grounds of mental illness and intellectual disability. The Appellate Division affirmed. The petitioner met its burden of establishing by clear and convincing evidence that the father was presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for the children. The testimony and report of petitioner's expert psychologist established that the father's capacity to care for the children was substantially impaired as the result of both his limited intellectual functioning, and his antisocial personality disorder. The father did not object to the testimony or report of the expert psychologist on the ground that his methods should have been subjected to a *Frye* hearing, and thus the father failed to preserve that contention for appellate review.

Matter of Ayden W., 156 AD3d 1389 (4th Dept 2017)

Suspended Judgment Properly Revoked

Family Court revoked the suspended judgment entered upon respondent mother's admission of permanent neglect and terminated the mother's parental rights with respect to the subject child. The Appellate Division affirmed. The prior order finding permanent neglect and suspending judgment was entered on consent of the parties, and thus it was beyond appellate review. The court properly revoked the suspended judgment and terminated the mother's parental rights. If the court determined by a preponderance of the evidence that there had been noncompliance with any of the terms of a suspended judgment, the court could revoke the suspended judgment and terminate parental rights. The testimony of the case planner assigned to the mother established that he mother was repeatedly discharged from substance abuse treatment and repeatedly failed drug tests. Inasmuch as there was proof that a parent had repeatedly violated significant terms of a suspended judgment, petitioner was not obligated to wait until the

end of the period of suspended judgment to seek to revoke the suspended judgment.

Matter of Dah' Marii G., 156 AD3d 1479 (4th Dept 2017)