NEW YORK CHILDREN'S LAWYER

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

August 2014 **Volume XXX, Issue II**

Criminal Statute Invalidation Complicates Family Offenses*

By Lewis A. Silverman**

Recent appellate decisions in New York call into question the foundational definition of domestic violence, which should be a matter of concern to attorneys who represent victims. These decisions, one issued by the Court of Appeals, and conflicting decisions from two appellate divisions, expose the fact that the definition of a family offense in New York is not based on specific acts or conduct, but rather on references to various sections of the Penal Law.

On May 14, 2014, the Court of Appeals, in *People v. Golb*,[1] declared unconstitutional Penal Law §240.30(1)(a), aggravated harassment in the second degree. This is a principal section used in Family Court to allege a family offense by litigants seeking an order of protection.[2] The court found the statute unconstitutionally vague and overbroad because it did not clearly define the scope of the proscribed speech which tended to "annoy" and therefore cause alarm.[3]

The decision in *Golb* is not the first time that an appellate interpretation of a Penal Law section used to define a civil family offense has muddied, rather than clarified, the definition. Previously, the Second and Fourth Appellate Division departments split on the construction of Penal Law §240.20, disorderly conduct, and the elements of that statute necessary to obtain a civil order of protection in Family Court. Specifically, the appellate divisions split on whether, in defining a family offense for a Family Court order of protection, the conduct must take place in a public place or not, a major element of the Penal Law definition.

Family Court Act

The basic definition of a family offense in New York is written in Family Court Act (FCA) §812. That section does not define specific acts of conduct nor does it specify particular behavior that may subject a respondent to a Family Court order of protection as a family offense. Rather, the statute makes reference to approximately a dozen sections of the Penal Law by stating that:

The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree,

CONTENTS

News Briefs	Page	5
Recent Books & Articles	Page	8
Federal Cases	Page	11
Court of Appeals	Page	14
Appellate Divisions	Page	16

strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree or coercion in the second degree as set forth in subdivisions one, two and three of section 135.60 of the penal law…

Three-Part Process

Consequently, to allege a family offense, a petitioner must engage in a three-part process. First, the petitioner must enumerate the specific acts or conduct that have occurred; second, the petitioner must identify an appropriate section of the Penal Law that classifies those acts as crimes or violations; finally, the petitioner must find a section of the Penal Law that is included in FCA §812 as part of the definition of family offense. Only after this three-part process has been satisfactorily completed can the alleged victim file a petition in Family Court.

This process can be confusing not only for attorneys, but especially for the multitude of pro se litigants who seek civil relief without the benefit of counsel. Say, for example, a domestic incident has occurred and someone goes to Family Court to seek protection. Instead of prohibiting conduct and acts of violence or threats of violence, the family offense statute and petition refer to a criminal statute defining crimes and violations, and referencing proceedings brought on behalf of the People of the State of New York rather than between two unhappy family members seeking a civil order intended to prevent the inappropriate conduct from recurring. This belies the differing nature of the proceedings. The criminal court is punishing defendants for conduct that society has determined is beyond the realm of acceptable public or private behavior. The Family Court is attempting to regulate behavior within a recognized family relationship to preserve harmony, especially for the well-being of children.

To be sure, *Golb* dealt with a criminal conviction and did not directly affect the reference to the Penal Law in the Family Court Act. However, as we learned with the case of *People v. Dietze*[4] in 1989, the courts became reluctant to issue civil orders of protection based on a penal statute that was no longer valid. In *Dietze*, the Court of Appeals found unconstitutionally overbroad a section of the then-existing harassment statute that criminalized "abusive" language with the intent to "harass" or "annoy" another person.

The court found such language constitutionally protected free speech unless it presented a "clear and present danger of some serious substantive evil…words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence or other breach of the peace."[5] Although only the criminal statute was invalidated, judges hesitated and often declined to grant orders of protection for the conduct prohibited by the statute, feeling that the foundation for a civil order of protection had also been invalidated.[6]

Crossover Definitions

A conflict between the Second and Fourth Departments regarding the interpretation of another section of the Penal Law referenced in Family Court Act §812 has raised further uncertainty. These courts have differed in the application of Penal Law §240.20, disorderly conduct. The Fourth Department held in the *Matter of McLaughlin v. McLaughlin*[7] that, while for purposes of criminal prosecution, the Penal Law requires the acts defined as disorderly conduct to occur in a public place, for the purposes of the Family Court Act definition of family offense there is no comparable requirement that the act occurred in public.

There is textual support in FCA §812, which states: "For purposes of this article, 'disorderly conduct' includes disorderly conduct not in a public place." Nevertheless just a few months later, the Second Department, in *Matter of Cassie v. Cassie*,[8] found that even in the context of a civil order of protection, a petition alleging a family offense based on disorderly conduct had to allege that the conduct took place in public.[9]

The problems of crossover definitions from the Penal Law to the Family Court Act become quickly and readily apparent. The Family Court is a court of limited civil jurisdiction. While some conduct proscribed by various definitions in the Family Court Act may also be crimes under the Penal Law,[10] the emphasis in Family Court must be on the protection and safety of families. A petition for an order of protection is directly filed by the alleged victim seeking relief against the perpetrator,

while in a criminal prosecution an order of protection may be sought by the People as a condition of bail or as part of a sentence and it is not the purpose of the proceeding, only a byproduct.[11]

The use of a crossover definition should raise concern for the victims of domestic violence and for those charged with committing these family offenses. The problem comes not only in the lack of a specific and focused definition of domestic violence, but in utilizing references to a statute intended for a different court, with different rules of procedure and, perhaps most importantly, a different burden of proof.

Any attorney or member of the public who thinks that Family Court follows the "preponderance of the evidence" standard in family offenses should spend a few days sitting in the Family Court where victims of domestic violence are all too often denied an order of protection because the judge, referencing the Penal Law to define the prohibited conduct, unconsciously extends that reference to create a higher burden of proof difficult for pro se litigants to overcome.

A recent article in this publication noted that the Legislature was rushing to correct the constitutional infirmities of Penal Law §240.30(1)(a).[12] Perhaps the Legislature should slow its pace and consider an additional strategy: rewriting the definition of civil domestic violence to eliminate the reference to the Penal Law and instead enumerating a specified list of prohibited conduct and behavior. This would not be novel to New York. In fact, the definitions of child abuse and child neglect, Family Court Act §1012, are quite specific in the types of conduct that is prohibited by parents against their children. For example, part of the definition of abused child focuses on specific conduct:

physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii)…a substantial risk of physical injury…by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ…[13]

While some states continue to define domestic violence with reference to their criminal statutes, many other states enumerate specific conduct rather than references to other laws. The task should not be exceedingly difficult in New York to define inappropriate conduct subject to judicial intervention. One example is the Michigan statute, which defines domestic violence as the occurrence of any of the following acts by a person that is not an act of self-defense:

(i) Causing or attempting to cause physical injury or mental harm to a family member or household member.

(ii) Placing a family member or household member in fear of physical or mental harm.

(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, threatened, harassed, or molested.[14]

This definition is clear, concise, and should leave little doubt as to the specific acts that are prohibited.

One need only look at the official order of protection form promulgated by the Office of Court Administration to see the problem. The respondent, having either consented to an order of protection or being subject to one after a fact-finding hearing, is told to "…refrain from assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal obstruction of breathing or circulation, disorderly conduct, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats, identity theft, grand larceny, coercion or any criminal offense…"[15]

I would suggest that very few respondents know the elements of the specific acts constituting those crimes. A violation of an order of protection is a criminal contempt, yet a valid defense might be asserted that the order is not clear in defining the prohibited conduct.[16]

Conclusion

New York took a great leap forward in 1992 in its definition of civil family offense and again in 2008 to include intimate partners in the definition of who has standing to seek an order of protection.[17] Now it is time to take the next step. Continuing to base our civil family offenses on criminal law definitions leaves the victims of inappropriate conduct subject to continuing judicial interpretations of statutes which are designed in a different context for criminal rather than civil litigation.

A principal function of the Family Court is to ensure that our children are not subjected to domestic discord. To that end, our family laws regulate specific conduct and define obligations between and among family members. Our Legislature should decide that it is now time to redefine family offenses in terms of specifically prohibited conduct and further protect the victims of domestic violence in New York.

****Lewis A. Silverman** *is associate professor of Clinical Law and director of the Family Law Clinic at Touro College, Jacob D. Fuchsberg Law Center. Students* **Brian Hodgkinson** *and* **Nicole Berkman** *assisted in the preparation of this article.*

Endnotes:

1. NYLJ 1202655125012, at *1 (N.Y. May 13, 2014).

2. See, e.g., *Matter of Drexler v. Davis*, 11 A.D.3d 760 (3d Dept. 2004); *Matter of Opray v. Fitzharris*, 84 A.D.3d 1092 (2d Dept. 2011).

3. *People v. Golb*, fn. 1 at 14.

4. 75 N.Y.2d 47 (1989).

5. 75 N.Y.2d at 51–52.

6. See *Rafael F. v. Pedro Pablo N.*, 106 A.D. 3d 635 (1st Dept. 2013); *Matter of Dora V. v. Ramon U.*, 2003 WL 22427239 Queens Cnty. (Fam. Ct. 2003). But see, *Matter of Hirsh v. Stern*, 74 A.D.3d 967 (2d Dept. 2010).

7. 104 A.D.3d 1315 (4th Dept. 2013).

8. 109 A.D.3d 337(2nd Dept. 2013).

9. See also *Matter of Shiffman v. Handler*, 2014 NY Slip Op 01617 (2d Dept. 2014).

10. For example, conduct within the definition of child abuse, N.Y. Family Court Act §1012(e) (McKinney 2009) may also satisfy the definition of one or more sections of the Penal Law. Violation of an Order of Protection, N.Y. Family Court Act §846-a (McKinney 2009), may also qualify as a Criminal Contempt, N.Y. Penal Law §215.50 (McKinney 2014).

11. N.Y. Crim. Proc. Law §§530.12(1), (5) (McKinney 2014).

12. Joel Stashenko, "Lawmakers Scramble to Revive Provision," N.Y.L.J. May 29, 2014 p. 1 col. 6.

13. N.Y. Family Court Act §1012(e) (McKinney 2009).

14. Mich. Comp. Laws Ann. §400.1501, SEC. 1(d).

15. Family Court Form GF-5a, Order of Protection, available at http://www.nycourts.gov/forms/familycourt/pdfs/gf-5a.pdf.

16. See *Matter of Dept. of Envtl. Prot. of the City of N.Y. v. Dept. of Envtl. Conservation of the State of N.Y.*, 70 N.Y.2d 233 (1987); *Matter of Holtzman v Beatty*, 97 A.D.2d 79, 82 (2d Dept. 1983).

17. See 1 Melissa L. Berger, Deseriee A. Kennedy, Jill M. Zucardy and Lee H. Elkins, New York Law of Domestic Violence 21-27 (3d ed. 2013).

NEWS BRIEFS

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

Save the Date! The ***Fall Mandatory Seminar*** for the panel in **Nassau County** has been scheduled for **October 23, 2014**, to be held at Hofstra University Law School from 6 p.m. to 9 p.m. The ***Fall Mandatory Seminar*** for the panel in **Suffolk County** has been scheduled for **November 24, 2014**, to be held at the Suffolk County Supreme Court from 6 p.m. to 9 p.m. The ***Fall Mandatory Seminar*** for the panels in **Westchester, Orange, Dutchess, Putnam and Rockland counties** has been scheduled for **October 31, 2014**, to be held at the Westchester County Supreme Court from 9 a.m. to 4 p.m. Please note that scheduling of the ***Fall Mandatory Seminar*** for the panels in **Kings, Queens, and Richmond Counties** has not yet been finalized, however, it has been **tentatively** set for **October 20, 2014**, and will be held at Brooklyn Law School from 5:30 p.m. to 8:30 p.m. Further details for the above mentioned seminars to follow by e-mail.

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

On May 20, 2014, the Appellate Division, Second Judicial Department, the Attorneys for Children Office, and the AFSA Coalition Mental Health Subcommittee co-sponsored ***Principles to Inform Child Welfare Decision-Making In Mental Illness.*** The presenters were Kevin Cremin, MFY Legal Services, Director of Litigation for Disability and Aging Rights; Kaela Economos, Supervising Social Worker, Brooklyn Defender Services, Family Defense Practice; Camelia Pierre-Anders, Acting Associate Commissioner for the Division of Child Protection (ACS Panelist); Mia Plehn, Supervising Social Worker, Legal Aid Society, Juvenile Rights Practice, Brooklyn; and Dr. Merrill Rotter, Associate Clinical Professor of Psychiatry, Albert Einstein College of Medicine.

On June 17, 2014, the Attorneys for Children Program, the Queens County Family Court, and the Queens County Bar Association co-sponsored ***The Revolving Doors of Family Court: Confronting Broken Adoptions***. The presenters were Dawn Post, Esq., Co-Borough Director of the Brooklyn, New York Office of the Children's Law Center New York; Sarah McCarthy, Kirkland & Ellis Fellow at the Children's Law Center New York; and Brian Zimmerman, Esq., Attorney in Private Practice, Member of the Attorneys for Children/Assigned Counsel Panel in Kings County.

On September 15, 2014, the Attorneys for Children Program, the Queens County Family Court, the CSEC Working Group, and the Center for Court Innovation will co-sponsor ***Creating Change for Children: Addressing Commercial Sexual Exploitation of Children.*** The presenters will be Miriam Goodman, Coordinator, Trafficking Programs: Center for Court Innovation and Katie Crank, Coordination, Domestic Violence Programs: Center for Court Innovation.

Tenth Judicial District (Nassau County)

On June 19, 2014, the Appellate Division, Second Judicial Department, the Attorneys for Children Office, and the Nassau County Family Court Liaison Committee co-sponsored ***Everything you wanted to know about Administrative Fair Hearings Challenging an Indicated COI*** as a part of their ***Lunch and Learn Series***. This presentation was given by Maureen McLoughlin, Esq., MSW, Director of Child Protective Services for Nassau County, and James J. Graham, Esq., Mangi and Graham, Attorneys at Law.

Tenth Judicial District (Suffolk County)

On April 1, 2014, the Appellate Division, Second Judicial Department presented ***Ethical Issues Confronting the AFC*** as a part of their ***Lunch and Learn Program*** in Suffolk County. The presenter was Harriet R. Weinberger, Esq., Director, Attorneys for Children Program, Appellate Division Second Judicial Department.

Please contact Gregory Chickel at gchickel@nycourts.gov to obtain copies of the accompanying handouts for any of the above mentioned programs.

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

Liaison Committees

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts met in May in Lake Placid and will meet again in October. The committees provide a means of communication between panel members and the Office of Attorneys for Children. The Liaison Committees, whose members are nominated by Family Court judges, meet twice annually and representatives are frequently in contact with the Office of Attorneys for Children on an interim basis. If you would like to know the name of your Liaison Committee Representative, it is listed in the Administrative Handbook or you may contact Betsy Ruslander by telephone or e-mail at *oac3d@nycourts.gov*. If you have any issues you would like brought to the attention of the Office of Attorneys for Children, please contact your county's Liaison Representative. Welcome and congratulations to the new Clinton County Liaison Representative, Cheryl Maxwell, Esq., who replaced the long-serving Larry Kudrle who is retiring. Congratulations and all the best to Larry!

Training News

Training dates are available on the web page at nycourts.gov/ad3/oac, link to CLE. Upcoming training dates include:

Introduction to Effective Representation of Children, the two-day introductory course for panel applicants and new panel members, will be held on Thursday and Friday, September 18-19, 2014 at the Clarion Hotel (Century House) in Latham. NOTE: This seminar used to be held twice a year in the Third Department, in the months of June and December. As a result of recent trends, we will be presenting this training in collaboration with the Fourth Judicial Department. It will be held only once a year in the Third Department, in September; and once in the Fourth Department, in March, with attorneys from both Departments invited to both programs.

Children's Law Update 2014 will be held on Friday, September 12, 2014 in Johnson City and on Friday, November 7, 2014 in Albany.

Home Not So Sweet Home: Domestic Violence Dynamics and Children will be held on Thursday, October 9, 2014 in Albany (limited to the first 50 attendees when registration opens)

Local Custody CLE will be held on Friday, October 17, 2014 at Clinton County Family Court in Plattsburgh for Clinton, Essex, Franklin, Hamilton & St. Lawrence County panel members.

Additional dates and agendas will be posted on nycourts.gov/ad3/oac as they become available.

CLE News Alert - The series of 1-1 ½ hour online video presentations, called "KNOW THE LAW", designed to provide panel members with a basic working knowledge of specific legal issues relevant to Family Court practice, is continually being updated. There are modules for a variety of proceeding types including custody/visitation, juvenile justice and child welfare. If you would like to suggest a topic for inclusion in this series, please contact Jaya Connors, the Assistant Director of the Office of Attorneys for Children at (518) 471-4850 or by e-mail at JLCONNOR@courts.state.ny.us

Office of Attorneys for Children CLE is going paperless! Although we have always been able to provide free CLE programs to panel members that included hard copy written material relevant to the presenters' topics, many panel members have pointed out that this is costly and not very *green*. Therefore, beginning with this spring's training, all of our CLE programs will be going paperless and all material associated with our seminars will be provided to you electronically by email, *in advance* of the seminar. Following your online registration and our confirmation, we will email you all the materials accompanying the presenters' lectures in advance of the seminar date. This will be extremely helpful to you in your practice as you will be able to save

the material on your computer, search for relevant information, and cut and paste portions that you may need for litigation or other purposes. If you insist on receiving printed material, you must email your request by a given date and the material will be available to you at the conference. Absent a specific request, you will receive the materials electronically. We strongly encourage the use of the new paperless system and ask you to join us in this effort to be more cost-effective and environmentally friendly.

Website

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, the New York State Bar Association Representation Standards, the latest edition (6-16-14) of the Administrative Handbook, forms, rules, frequently asked questions, seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The *News Alert* feature includes recent program and practice developments of note.

FOURTH DEPARTMENT NEWS

2013 Honorable Michael F. Dillon Awards

Congratulations to the recipients of the 2013 Hon. Michael F. Dillon Awards. Each year two attorneys from each Judicial District in the Fourth Department are chosen to receive this award for their outstanding advocacy on behalf of children. The 2013 Awards were presented to the recipients by Presiding Justice Henry J. Scudder at a ceremony at the M. Dolores Denman Courthouse on June 24, 2014. The recipients are:

FIFTH JUDICIAL DISTRICT

Maureen H. Petersen
Oswego County

Nicholas A. Macri
Herkimer County

SEVENTH JUDICIAL DISTRICT

Jon M. Stern
Monroe County

Lisa S. Siragusa
Monroe County

EIGHTH JUDICIAL DISTRICT

Robert W. Schnizler
Chautauqua County

Jeffrey P. Markello
Wyoming County

UNTIMELY VOUCHERS

The 2013-14 fiscal year closes on September 12. Please send any untimely vouchers to the court, together with a "90-day" affirmation, immediately. This is mandatory for vouchers if the case ended on or before March 31, 2013.

SEMINARS

You are not considered registered for a seminar until you have received a confirming e-mail from our office. If you do not receive a confirming e-mail within 3 business days from the date you registered, please call Jennifer Nealon at 585-530-3177.

FUNDAMENTALS OF AFC ADVOCACY (FAFCA)

Starting in September 2014, the Third and Fourth Departments will be jointly presenting FAFCA. Each year FAFCA will be held in Albany in the Fall and Rochester in the early Spring.

SEMINAR MATERIALS

Due to AFC feedback and OCA's "green" policy, seminar materials will no longer be on CDs or in hard copy. Instead, the material will be posted on the 4th Dept. AFC website at least one week prior to the seminar. AFC can view the material in advance and they may download it and/or print the material if they wish to refer to it during the seminar.

Fall Seminar Schedule

September 18-19, 2014
Fundamentals of Attorney for the Child Advocacy
Clarion Hotel/Century House
Latham, NY

October 22, 2014
Update
Genesee Grande Hotel
Syracuse, NY (full day- taped)

October 30, 2014
Update
Clarion Hotel
Batavia, NY (full day - taped)

RECENT BOOKS AND ARTICLES

ADOPTION

Jacquelyn Loyd, *Chapter 743 Lowers Adoption Costs: More Families Made Whole, More Children Kept Safe,* 45 McGeorge L. Rev. 485 (2014)

Jay Milbrandt, *Adopting the Stateless,* 39 Brook. J. Int'l L. 695 (2014)

Lynn D. Wardle & Travis Robertson, *Adoption: Upside Down and Sideways? Some Causes of and Remedies for Declining Domestic and International Adoptions,* 26 Regent U. L. Rev. 209 (2014)

ATTORNEY FOR THE CHILD

Allison Baxter, *How Pornography Harms Children: The Advocate's Role,* 33 No. 5 Child L. Prac. 113 (2014)

CHILD WELFARE

Cheryl Nelson Butler, *Kids for Sale: Does America Recognize its Own Sexually Exploited Minors as Victims of Human Trafficking?,* 44 Seton Hall L. Rev. 833 (2014)

Angelina Clay, *Rescuing Dependent Children From the Perils of Attachment Disorder: Analyzing the Legislative Intent of California Welfare and Institutions Code Section 361.5,* 25 Hastings Women's L. J. 305 (2014)

Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare,* 92 Neb. L. Rev. 897 (2014)

Katie Valder, *A Stolen Childhood: A Look Into the World of Female Child Soldiers and the Initiatives Targeting the Ending of the Practice,* 7 Alb. Gov't L. Rev. 34 (2014)

CHILDREN'S RIGHTS

Lara Awad, *Chapter 85: Providing Greater Protections for Transgender Students,* 45 McGeorge L. Rev. 473 (2014)

Gary L. Hopkins, *Decades of Research Shows Adolescents do Better With Community Service Rather Than Incarceration,* 57-JUL Advocate (Idaho) 56 (June/July 2014)

Ira P. Robbins, *Kidnapping Incorporated: The Unregulated Youth-Transportation Industry and the Potential for Abuse,* 51 Am. Crim. L. Rev. 563 (2014)

CHILD SUPPORT

David W. Griffin, *Earning Capacity and Imputing Income for Child Support Calculations: A Survey of Law and Outline of Practice Tips,* 26 J. Am. Acad. Matrim. Law. 365 (2014)

CONSTITUTIONAL LAW

David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation's Experiment With State-Sponsored Sex Segregation in Education,* 44 Seton Hall L. Rev. 339 (2014)

Sean Darling-Hammond, *Expanding the Scholastic Circle of Belonging to Realize the Citizenship Promise of the Nation,* 16 Berkeley J. Afr. Am. L. & Pol'y 112 (2014)

Marc J. Herman, *"Super Schools"- - A New Generation of Narcissism and Unlawful Attempts to Police Students' Off-Campus Speech,* 32 Quinnipiac L. Rev. 389 (2014)

David R. Hostetler, *Off-Campus Cyberbullying: First Amendment Problems, Parameters, and Proposal,* 2014 B.Y.U. Educ. & L. J. 1 (2014)

Daniel Marcus-Toll, Tinker *Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech,* 82 Fordham L. Rev. 3395 (2014)

Melanie E. Migliaccio, *Don't Say "Gun": Is Censorship of Student "Gun" Speech in Public Schools*

a Permissible Inculcation of Shared Community Values or an Unconstitutional Establishment of Orthodoxy?, 8 Liberty U. L. Rev. 751 (2014)

Jeremy M. Smith, *Tinkering With Alito's Code to* Morse's *Limits: Why Alito's Concurrence is Crucial to Preserving* Tinker *and Students' Right to Free Speech,* 26 Regent U. L. Rev. 271 (2013-2014)

COURTS

Catherine Cerulli et. al., *Unlocking Family Courts Potential for Public Health Promotion,* 22 Buff. J. Gender, L. & Soc. Pol'y 49 (2013 - 2014)

James D. Konstantopoulos, *Rethinking Traditional Conceptions of Child Pornography: An Analysis of how the U.S. Supreme Court's Decision in* Stevens *Impacts the Illinois Supreme Court's Decision in* People v. Hollins, 89 Chi.-Kent L. Rev. 849 (2014)

Joseph Meyer, *Confronting Victims: Why the Statements of Young Victims of Heinous Crimes Must Still by Subject to Cross-Examination,* 98 Minn. L. Rev. 2408 (2014)

CUSTODY AND VISITATION

Amy C. Gromek, *Military Child Custody Disputes: The Need for Federal Encouragement for the States' Adoption of the Uniform Deployed Parents Custody and Visitation Act,* 44 Seton Hall L. Rev. 873 (2014)

Jennifer Sumi Kim, *A Father's Race to Custody: An Argument for Multidimensional Masculinities for Black Men,* 16 Berkeley J. Afr. Am. L. & Pol'y 32 (2014)

DIVORCE

David N. Hofstein et. al., *Equitable Distribution Involving Large Marital Estates,* 26 J. Am. Acad. Matrim. Law. 311 (2014)

Rebecca V. Lyon, *Hidden Home Videos: Surreptitious Video Surveillance in Divorce,* 89 Chi.-Kent L. Rev. 877 (2014)

Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce,* 25 Hastings Women's L. J. 179 (2014)

DOMESTIC VIOLENCE

Linda L. Bryant & James G. Dwyer, *Promising Protection: 911 Call Records as Foundation for Family Violence Intervention,* 102 Ky. L. J. 49 (2013-2014)

Margaret E. Johnson, *A Home With Dignity: Domestic Violence and Property Rights,* 2014 B.Y.U. L. Rev. 1 (2014)

Elizabeth Monachino, *Violent Relationships and the Ensuing Effects on Children: Should New York Adopt a Rebuttable Presumption Against Awarding Custody to Batterers?,* 22 Buff. J. Gender, L. & Soc. Pol'y 121 (2013 - 2014)

EDUCATION LAW

Lynn M. Daggett, *Reasonable Supervision of Special Students: The Impact of Disability on School Liability for Student Injury,* 43 J. L. & Educ. 303 (2014)

Brenna Lermon Hill, *A Call to Congress: Amend Education Legislation and Ensure That President Obama's "Race to the Top" Leaves No Child Behind,* 51 Hous. L. Rev. 1177 (2014)

Holly Norgard, *Pushing Schools Around: New Jersey's Anti-Bullying Bills of Rights Act,* 44 Seton Hall L. Rev. 305 (2014)

Matthew Saleh, *Public Policy, Parol Evidence and Contractual Equity Principles in Individualized Education Programs: Marking the "Four Corners" of the IEP to Mitigate Unequal Bargaining Power Between Parent-Guardians and School Districts,* 43 J. L. & Educ. 367 (2014)

FAMILY LAW

Lynda Wray Black, *The Birth of a Parent: Defining Parentage for Lenders of Genetic Material,* 92 Neb. L. Rev. 799 (2014)

Sam F. Halabi, *Abstention, Parity, and Treaty Rights: How Federal Courts Regulate Jurisdiction Under the Hague Convention on the Civil Aspects of International*

Child Abduction, 32 Berkeley J. Int'l L. 144 (2014)

John E. B. Myers, *"I Won't Pay Child Support, But I Insist on Visitation." Should Visitation and Child Support be Linked?,* 45 McGeorge L. Rev. 695 (2014)

FOSTER CARE

Vivek Sankaran, *Using Preventive Legal Advocacy to Keep Children From Entering Foster Care,* 40 Wm. Mitchell L. Rev. 1036 (2014)

IMMIGRATION LAW

Claire Chiamulera, *Protecting Unaccompanied Immigrant Children: ABA Forum Offers Guidance,* 33 No. 5 Child L. Prac. 124 (2014)

Elina Treyger, *The Deportation Conundrum,* 44 Seton Hall L. Rev. 107 (2014)

JUVENILE DELINQUENCY

Megan Annitto, *Consent Searches of Minors,* 38 N.Y.U. Rev. L. & Soc. Change 1 (2014)

Jellisa Joseph, *Catching Up: How the Youth Court Act Can Save New York State's Outdated Juvenile Justice System With Regard to Sixteen and Seventeen-Year-Old Offenders,* 7 Alb. Gov't L. Rev. 219 (2014)

Patrick N. Mcmillin, *From Pioneer to Punisher: America's Quest to Find Its Juvenile Justice Identity,* 51 Hous. L. Rev. 1485 (2014)

Adam Saper, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration,* 38 N.Y.U. Rev. L. & Soc. Change 99 (2014)

Kelly Scavone, *How Long is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82 Fordham L. Rev. 3439 (2014)

Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality,* 38 N.Y.U. Rev. L. & Soc. Change 143 (2014)32

PATERNITY

Caroline Rogus, *Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws,* 21 Mich. J. Gender & L. 67 (2014)

TERMINATION OF PARENTAL RIGHTS

Stacia Walling Driver & Wright S. Walling, *Examining the Intersection of Chemical Dependency and Mental Health Issues With the Juvenile Protection System Timelines as Related to Concurrent Planning and Termination of Parental Rights,* 40 Wm. Mitchell L. Rev. 1008 (2014)

FEDERAL COURTS

District Court Erred in Failing to Suppress Defendant's Confession and Subsequent Statement

When over 25 NYPD and FBI agents came to Defendant Taylor's apartment to effect his arrest in connection with the robbery of a pharmacy, Taylor attempted suicide by ingesting a bottle-full of Xanax pills. Taylor was subsequently interviewed at FBI headquarters. Taylor signed a form waiving his *Miranda* rights, and went on to give a lengthy statement confessing his involvement in the robbery. The next day, Taylor initiated contact with law enforcement, indicating that "he wanted to clear up some issues." He was re-advised of his rights, waived them and confessed again. Taylor moved to suppress his two post-arrest statements on the ground that his *Miranda* waivers and his post-arrest statements were neither knowing nor voluntary. Taylor argued that he was falling asleep and was at times unconscious during the first interview. The detective conducting the first interview testified that, while Taylor nodded off at times during the interview, he was coherent and fluid when he was awake and speaking. When the additional statement was given the following day, Taylor continued to slip in and out of consciousness. The District Court denied suppression of Taylor's post-arrest statements, finding that the government sustained its burden of proving that Taylor's *Miranda* waivers were informed and voluntary. Taylor's statements, which implicated his two co-defendants, were redacted at trial to remove their names. The jury was instructed that Taylor's statements should be considered only as to Taylor. The jury convicted on all counts. The Second Circuit, after granting the Government's petition for re-hearing, adhered to its original decision, vacated the convictions of the three defendants and remanded for a new trial. The District Court's finding that Taylor was coherent when he signed the advice of rights form during the initial interview was not disturbed. However, as the interview progressed, the officers' persistent questioning took undue advantage of Taylor's diminished mental state, and ultimately overbore his will. Accordingly, the initial statement was not voluntary and should have been suppressed. Evidence of Taylor's continued incapacity the following day, coupled with the taint of his prior confession, rendered his second waiver and statement involuntary. Thus, Taylor's second inculpatory statement should have been suppressed. Finally, the Court concluded that the admission of Taylor's confessions was not harmless error beyond a reasonable doubt as to Taylor, and also as to his two co-defendants, because a confession by one co-defendant in a joint trial posed substantial risk for other co-defendants notwithstanding limiting instructions given to the jury. With respect to the *Bruxton* issue, the redactions suggested that Taylor's original statements contained actual names. Given all the facts, the jury could infer that Taylor had likely named the co-defendants.

United States v. Taylor, 745 F3d 15 (2d Cir. 2014)

Autistic Child And Brother Cannot be Extradited Under Hague Convention

Parents of the children at issue began living together in Italy in 2001 and married in 2011. They had two children, Emanuele, who is ten and Daniele, who is nine. Daniele is severely autistic. In 2011, the parents, who were dissatisfied with the treatment available for Daniele in Italy, moved to New York State so the child could be treated by a specialist in Suffern, NY. The parents planned to stay for two or three years, with the possibility of a permanent relocation, depending on the success of Daniele's treatment. The father remained employed in Italy and traveled back and forth between that country and New York. In December 2011, the couple's contentious relationship came to a head when the father physically assaulted the mother by hitting her head against a kitchen cabinet and attempting to suffocate and strangle her. The altercation took place in front of the children in the Suffern home. The mother obtained a temporary order of protection against the father. The father returned to Italy and initiated divorce proceedings and the Italian courts eventually granted the mother full custody. The father filed the instant petition in District Court, pursuant to the Hague Convention, seeking return of the children to him in Italy. The court denied the petition without prejudice, holding that although the children's habitual residence was Italy and the mother had breached the father's custody rights, return to Italy would pose a grave risk of harm to Daniele and separating the brothers would pose

a grave risk of harm to both of them. The Court of Appeals modified by affirming the denial of the petition, but amending the judgment to deny the petition with prejudice. The Court was "uncomfortable" with the District Court's conclusion that the children's habitual residence was Italy and that the father's custody rights were violated, but concluded that it did not need to address those issues because the "grave risk" of harm exception in the Hague Convention was determinative. The Court concluded that there was a grave risk of harm to Daniele if removed from his therapy, and, in light of the children's close relationship to each other and the past domestic violence, the District Court properly declined to separate the children. Further, the Court concluded that based upon the District Court's finding that the father had repeatedly hit the mother and children, the father's history of domestic violence toward the mother and children was itself sufficient to establish the defense. The District Court erred, however, in dismissing the petition without prejudice. After a proper determination applying the Convention was made, all other issues were outside the realm of the treaty. The Convention cannot be used to enforce future foreign custody orders or predict future harms.

Ermini v Vittori, ___F3d___ , 2014 WL 3056360 (2d Cir. 2014)

Request Denied for Stay of Previously-Commenced Custody Proceeding in Family Court Pending Outcome of Hague Convention Claims

Petitioners sought the return of their two sons to the Dominican Republic pursuant to the Hague Convention on the Civil Aspects of International Child Abduction. The District Court denied petitioners' request for a stay of a previously-commenced custody proceeding in Bronx County Family Court. Under the All Writs Act, the Court was empowered to issue all writs necessary or appropriate in aid of the Court's jurisdiction and agreeable to the usages and principles of law. However, the Anti-Injunction Act barred a federal court from enjoining a proceeding in state court unless that action was expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. At the time of petitioners' request for a stay, no judgment had yet been entered requiring the Court's protection. Even if Family Court were to render a competing custody determination before petitioners' claims in District Court were resolved, Hague Convention article 17 provided that "[t]he sole fact that a decision relating to custody has been given in…the requested State shall not be a ground for refusing to return a child under this Convention." Because the merits of the underlying custody claims did not control the outcome of petitioners' Hague Convention claims, a custody determination by Family Court would not defeat or impair the jurisdiction of the federal court.

Matter of A.A.S. v. Cabrera, ___ F2d ___, 2014 WL 840010 (SDNY 2014)

Disabled Child Offered Free Appropriate Public Education; Tuition Reimbursement Denied

Plaintiff parents sought private school tuition reimbursement for their severely disabled daughter for the 2011-12 school year. At that time, their daughter SS was 14 years old, but had an estimated age equivalence of less than two years. In 2011, the Department of Education (DOE) held a Committee on Special Education meeting to determine SS's Individualized Education Program (IEP) for the 2011-12 school year. The IEP, among other things, recommended placement in a 6:1:1 environment with a separate full-time paraprofessional dedicated exclusively to assisting SS with basic tasks; a Behavior Intervention Plan that addressed the behavior of SS that impeded learning; and several academic and behavioral goals to be measured at varying intervals. Thereafter, DOE identified the Horan School as SS's placement. In August 2011, plaintiff parent NS, accompanied by the principal of SS's former private school, Imagine, visited Horan. The principal witnessed an "altercation" in the hallway and NS and the principal believed the classes they observed were too high-functioning for SS to participate. NS did not believe SS would be safe at Horan because of rough-housing and the high boy to girl ratio at the school. Eight months after notifying DOE that they would not accept placement in public school, the parents filed a complaint requesting an impartial hearing on the question of tuition reimbursement. After the hearing, the Independent Hearing Officer (IHO) found that SS was denied a free and appropriate public education (FAPE) and was entitled to tuition reimbursement. The IHO found that

the record was insufficient to show Horan could fulfill the IEP. The DOE appealed to a State Review Officer (SRO). In a detailed and more analytical opinion than the IHO's, the SRO found that SS had been offered a FAPE. The parents then brought this case under the Individuals with Disabilities in Education Act, seeking tuition reimbursement. Thereafter, DOE moved for summary judgment. The District Court granted DOE's motion for summary judgment dismissing the case. The services in the IEP were very comparable to the services the parents sought at Imagine. DOE met its burden of establishing that the extensive services prescribed for SS in her IEP were substantively adequate and would have provided SS a FAPE. Although there were minor procedural violations in the IEP, which informed the Court's analysis, this was not a close case, and there was no doubt the IEP was sufficient. The parent's contentions that Horan was not a proper placement were based upon speculation about what would have occurred at the school. They had no hard evidence that the school would not or could not deliver a FAPE. The IHO improperly placed the burden on DOE to establish that the placement would have fulfilled the IEP. The SRO properly indicated that the parent' claims about placement were speculative, and that the placement was presumptively capable of providing the services in the IEP.

N.S. v New York City Dept. of Education,
___FSupp2d___ , 2014 WL 2722967 (SDNY 2014)

COURT OF APPEALS

Not Disorderly Conduct for Small Group of People With Bad Reputation to Stand Peaceably on Street Corner

Defendant was arrested for disorderly conduct, searched and found to be in possession of cocaine. The Appellate Division denied defendant's motion to suppress. The Court of Appeals reversed, granted defendant's motion to suppress and dismissed the indictment. The Court found no probable cause to arrest for disorderly conduct where defendant stood with three other young men, reputed to be gang members, on a street corner, and the four refused to move when asked to do so by the police. The only evidence of a possible impact on the public was the officer's testimony that one of defendant's companions "was partially blocking" the entrance to a store by standing in front of it. Defendant and the other two men were close to the door but not in front of it, and there was no evidence that anyone trying to enter or leave the store was actually obstructed. Thus, it was not disorderly conduct for a small group of people, even people of bad reputation, to stand peaceably on a street corner.

People v Johnson, 22 NY3d 1162 (2014)

Respondent's Conduct Consistent With PINS Behavior, Not With Juvenile Delinquency

Respondent was adjudicated a person in need of supervision and placed on probation for one year. Upon her appearance in connection with PINS violation charges, Family Court remanded her to a specified non-secure detention facility. She immediately absconded, and her probation officer obtained a PINS warrant for respondent to be returned to the non-secure facility. Six probation officers visited respondent's home to execute the warrant. She acknowledged that she did not comply with the officers' directions. However, the severity of her resistance was disputed. The officers eventually took her into custody and transported her to a non-secure detention facility. Subsequently, the presentment agency prosecuted respondent upon a juvenile delinquency petition charging her with attempted assault in the third degree, resisting arrest, obstructing governmental administration, and menacing in the third degree. Her attorney argued that the presentment agency was improperly seeking to "bootstrap" a PINS case into a juvenile delinquency case given that respondent's conduct was "classic PINS behavior." Upon a fact-finding hearing, Family Court found that respondent had committed resisting arrest and obstructing governmental administration, and dismissed the counts charging attempted assault and menacing. The Appellate Division reversed and dismissed the petition. Under the particular circumstances, respondent's conduct was consistent with PINS behavior, not with juvenile delinquency. In a 5-2 decision, the Court of Appeals affirmed. The crime of resisting arrest required that a person intentionally prevent "an authorized arrest." However, the restraint of a PINS pursuant to FCA § 718 was not the same as a criminal arrest. A PINS proceeding was fundamentally civil in nature. A PINS who resisted being restrained or transported back to a placement facility was not resisting arrest within the meaning of Penal Law § 205.30. With respect to the charge of obstructing governmental administration, while probation officers qualified as public servants, and respondent admitted that she wanted to "make it hard" for the officers to handcuff her and take her to the non-secure facility, a PINS's disobedience and obstruction of lawful authority within the meaning of FCA § 712 (a) was not necessarily the same as an adult's under the Penal Law. Because a PINS could not be placed in a secure facility, the legislature surely did not intend the type of behavior that might cause a child to be designated a PINS in the first place to become the basis for secure detention. Although physical resistance to probation officers was different from ignoring a court order, and respondent's fractious behavior arguably posed a danger to herself, the probation officers and/or her family, respondent's resistance fell within the bounds of the PINS statute rather than Penal Law § 195.05. The expiration of Family Court's dispositional order did not moot the appeal because the Appellate Division's order had the potential for future legal consequences. Judge Pigott and Judge Smith dissented, noting that the majority endorsed a trend in the Appellate Division prohibiting "bootstrapping" a PINS adjudication onto one alleging juvenile delinquency where the PINS absconds from a nonsecure facility with conduct that, if committed by an adult, would constitute certain violations of the Penal

Law. Moreover, the majority imposed an unworkable test that would force probation officers, presentment agencies and courts to analyze whether specific instances of misconduct fit within "PINS-type behavior," or behavior "more harmful to the juvenile than to society."

Matter of Gabriela A., 23 NY3d 155 (2014)

Machete a "Dangerous Knife" Pursuant to Penal Law § 265.05 When Carried Late at Night on Street

Respondent in a juvenile delinquency proceeding made an admission to a count of unlawful possession of weapons by persons under sixteen in which he admitted that, at approximately 11:23 p.m., he was in possession of a dangerous knife, more specifically, a machete that had a blade of approximately 14 inches. Family Court granted respondent an ACD. The case was subsequently restored to the court's calendar because respondent did not comply with the terms of his ACD. Ultimately, respondent was adjudicated a juvenile delinquent and placed on probation for six months. The Appellate Division found the petition facially insufficient because it did not contain allegations which, if true, would have established that the knife respondent possessed was a "dangerous knife" pursuant to Penal Law § 265.05. The arresting officer's account merely described the unmodified, utilitarian knife which respondent possessed, and contained no allegations as to the circumstances of its possession. Thus, the Appellate Division held that there were insufficient allegations to permit a finding that, when respondent was arrested, the knife served as a weapon rather than a utensil. The Court of Appeals reversed. Although the statute did not define the term "dangerous knife," a machete was generally defined as "a large, heavy knife that was used for cutting plants and as a weapon." While a machete had utilitarian purposes, it would be unreasonable to infer that respondent was using the machete for cutting plants. Rather, the officer's description of the "machete," with its 14-inch blade, being carried by respondent late at night on the street supported the charge that respondent was carrying a weapon.

Matter of Antwaine T., ___ NY3d___ (2014)

APPELLATE DIVISIONS

CHILD ABUSE AND NEGLECT

Mother Abused and Neglected Her Child and Derivatively Neglected Her Other Child

Family Court, upon a fact-finding determination that respondent mother neglected and abused the subject child, and derivatively neglected her other child, placed the children with petitioner until the next permanency hearing. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that the respondent abused and neglected the subject child and derivatively neglected her other child based upon the other child's statements to a doctor and ACS caseworker that respondent hit the subject child with a closed fist, pulled her hair, and spanked her, after which she was beaten by her father. Those statements were corroborated by the subject child's hospital records, the doctor's testimony, and the child's injuries. Further, respondent admitted that she did not seek medical care for the subject child after the beating. The court properly determined that the mother was aware of the father's propensity for violence inasmuch as she was a victim of his domestic abuse and she made no effort to restrain him from beating the 22-month-old subject child in her presence.

Matter of Rachel S.D., 113 AD3d 450 (1st Dept 2014)

Respondent Mother Neglected Her Child and Derivatively Neglected Her Other Child and Other Respondent Abused One Child and Derivatively Abused the Other Child

Family Court found that respondent mother neglected her child and derivatively neglected her other child and Oscar N. abused one child and derivatively abused the other child. The Appellate Division affirmed. The findings of sexual abuse by respondent Oscar N. and neglect as a result of excessive corporal punishment by respondent mother were supported by a preponderance of the evidence. The court was entitled to draw a negative inference from Oscar N.'s failure to testify or present evidence. Based upon the social worker's testimony that one of the children's well-being would be severely compromised if she had to testify in respondents' presence, the court properly allowed the child to testify by closed circuit television.

Matter of Jocelyn L., 113 AD3d 484 (1st Dept 2014)

Respondent Inflicted Excessive Corporal Punishment on Child and Derivatively Neglected Her Grandsons

Family Court determined that respondent mother neglected her adopted daughter by inflicting excessive corporal punishment upon her and derivatively neglected her two grandsons. The Appellate Division affirmed. The court properly balanced the child's mental and emotional well-being with respondent's due process rights by allowing the child to testify outside respondent's presence at the fact-finding hearing, utilizing closed circuit video, which allowed all parties to observe the child's testimony and demeanor, and afforded respondent's counsel the opportunity to contemporaneously cross-examine the child after consulting respondent. The finding was supported by a preponderance of the evidence. The record showed that respondent struck her adopted daughter repeatedly on the head with a two-foot wooden paddle. Respondent's contention that the child's testimony was not credible because no one saw any bruising was belied by her own testimony and the child's testimony that respondent kept her home from school following the injury. Moreover, the absence of a physical injury would not be dispositive. The finding of derivative neglect was proper because respondent's inappropriate and excessive corporal punishment of her adopted daughter demonstrated that she had a sufficiently faulty understanding of her parental duties, warranting the inference that she was an ongoing danger to her grandsons.

Matter of Sylvia G., 113 AD3d 416 (1st Dept 2014)

Respondent Neglected Child By Keeping Loaded Semi-automatic Gun Where Child Slept

Family Court found that respondent was a person legally responsible for the child and he neglected the child by illegally keeping a loaded semiautomatic gun, in a plastic bin near where the child slept. The Appellate Division affirmed. Respondent, who had a

seven-year relationship with the child's mother, was a person legally responsible for the child. Respondent described himself as the child's stepfather, picked the child up from school, and engaged in activities with him. Although respondent claimed to have a primary residence other than the child's residence, there was evidence that respondent actually lived in the apartment with the mother and child, at least on a part-time basis. A preponderance of the evidence supported the finding that respondent neglected the child by illegally keeping a loaded semi-automatic gun, which respondent explained was already in the one-room apartment when "they" moved in, in a plastic bin near where the child slept. Respondent's contention that the court's assistance in this matter was unnecessary was not preserved for review, and, if considered, would have been rejected because the child desired to continue seeing respondent and there was a need to continue monitoring respondent's compliance with an order of protection.

Matter of Kevin N., 113 AD3d 524 (1st Dept 2014)

Mother's Prior Orders Finding Neglect Supported Finding of Derivative Neglect of Subject Child

Family Court, based upon a prior fact-finding determination that respondent mother had inflicted excessive corporal punishment against two of the subject child's siblings, determined that respondent derivatively neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the determination that respondent posed an imminent danger of harm to the child, even though he was not abused by respondent, because there were prior orders finding that respondent neglected and derivatively neglected her other children by inflicting excessive corporal punishment upon two of the child's siblings. The instant petition was filed within four months after the court's finding of neglect with respect to the child's siblings. That respondent completed a court-ordered mental health evaluation, parenting skills and anger management programs, and participated in regular visitation with the child and his siblings before the instant proceeding was commenced did not preclude the finding of derivative neglect in light of her inability to acknowledge her previous behavior. Further, respondent tried to hide her pregnancy with the subject child while the previous neglect proceeding was pending, demonstrating that she continued to have a faulty understanding of her duties as a parent. In light of respondent's attorney's failure to offer any excuse for respondent's absence, the court properly exercised its discretion in initially denying the application for an adjournment.

Matter of Keith H., 113 AD3d 555 (1st Dept 2014)

Respondent Abused and Neglected Subject Child

Family Court determined that respondent abused and neglected the child. The Appellate Division affirmed. A preponderance of the evidence supported the court's determination that respondent abused the child by committing offenses against her as defined in Penal Law Part 130. The child's testimony was competent evidence of abuse and did not need to be corroborated by evidence of serious physical injury or other evidence. In any event, it was corroborated by the caseworker's testimony about the out-of-court statements of the child's stepsister and stepbrother. The caseworker testified that the child's stepbrother said he saw respondent beat the child in June 2012, leaving bruises on her face, and that he saw respondent beat her on previous occasions, and the caseworker testified that he observed bruises on the child's face in June 2012. The fact that the severity of the beating described by the child and her stepbrother occurred only once did not negate the finding of neglect. The court properly drew a negative inference against respondent based upon his failure to explain his conduct or to rebut the evidence against him.

Matter of Marelyn Dalys C.-G., 113 AD3d 569 (1st Dept 2014)

Determination That Respondent Sexually Abused Child Sufficiently Corroborated

Family Court determined that respondent father sexually abused his older daughter and derivatively abused his younger daughter. The Appellate Division affirmed. The determination was supported by a preponderance of the evidence. The older daughter's detailed out-of-court statements were sufficiently corroborated by the testimony of her psychotherapist that she suffers from post-traumatic stress disorder and other symptoms consistent with sexual abuse, her

sister's out-of-court statements to the caseworker, and the caseworker's testimony. The court properly drew the strongest negative inference from respondent's failure to testify. The finding of derivative neglect with respect to the younger child was supported by the finding that respondent sexually abused the older child. Further, the younger child's out-of-court statements that respondent asked her for a back massage, in light of the older child's statements that respondent initiated some instances of sex abuse by asking for back massages, at roughly the same age, provided further support for the finding of derivative neglect.

Matter of Estefania S., 114 AD3d 453 (1st Dept 2014)

Determination of Neglect Supported by Respondent's Refusal to Allow Child Back Home After Hospitalization

Family Court determined that respondent mother neglected her child. The Appellate Division affirmed. The determination was supported by a preponderance of the evidence. The evidence showed that respondent refused to take the child home from the hospital where he received psychiatric treatment and that despite petitioner's caseworker's and a hospital social worker's attempts to discuss the child's psychiatric needs with her, respondent requested that he be placed in foster care and refused to make alternate plans for him. This abdication of her parental responsibilities placed the child in imminent risk of impairment.

Matter of Shawntay S., 114 AD3d 502 (1st Dept 2014)

Reinstatement of Neglect Proceeding Nunc Pro Tunc Affirmed

Family Court denied respondent father's habeas corpus petition seeking return of his child and granted petitioner ACS's motion to reinstate the neglect proceedings against the father. The Appellate Division affirmed. Dismissal of the neglect proceeding, occasioned by the disposition of permanency hearings and the termination of parental rights following the father's default, was a ministerial act. In view of the powers granted under the Family Court Act, the father's contention that the court was not authorized to correct the procedural problem when the father's default was vacated, was without merit. The father's contention that a more equitable result would have been to direct ACS to bring a new proceeding also was without merit because such a directive would disrupt the child's stable home and place the father in a more advantageous position than if he had never defaulted in the permanent neglect proceeding.

Matter of Corey McM., 114 AD3d 516 (1st Dept 2014)

Respondent Inflicted Excessive Corporal Punishment on Child

Family Court determined that respondent mother inflicted excessive corporal punishment on her child. The Appellate Division affirmed. Respondent's son's out-of-court statements, that respondent had a history of hitting him with a belt, causing bruises to his body, were properly admitted into evidence because they were corroborated by ACS's caseworker, Legal Aid's social worker, and the child's guidance counselor's observations of bruises on the child's arm.

Matter of Kesan W., 114 AD3d 533 (1st Dept 2014)

ACS Failed to Establish Child Educationally Neglected; Dissent Disagrees

Family Court, after a fact-finding hearing, found that respondent mother neglected her child by failing to provide for the child's educational needs and by failing to provide adequate guardianship. The Appellate Division reversed. Although the child had excessive absences form school, the mother faced obstacles in getting the child to attend school on a regular basis. The mother took the child to school for a time, but she was financially unable to escort the child to school on an ongoing basis. Further, even when the child was present at school, she had a history of truancy, tardiness, leaving school early and loitering in the hallways. The record demonstrated that the child was defiant, violent, and had a history of lying and threatening to harm herself if the mother would not allow her to do what she wanted. The child was hospitalized and given a number of psychiatric diagnoses for which she was prescribed medications that made her drowsy and disoriented, further exacerbating her unwillingness to go to school. Any impairment the child suffered resulted from her psychiatric and behavioral issues, rather than the mother's failure to compel her to attend

school. Regarding that part of the order finding inadequate guardianship, although the mother showed poor judgement in hosting a 15th birthday party for the child where alcohol was consumed, there was no evidence that the child consumed alcohol. The dissent would have affirmed.

Matter of Brianna R., 115 AD3d 403 (1st Dept 2014)

Neglect Finding Based Upon Inadequate Supervision Affirmed

Family Court determined that respondent mother neglected the subject children by leaving them without any advance notice for their care with their maternal grandmother, who was an inappropriate caregiver. The Appellate Division affirmed. The mother left the children, at the time ages eight and three, with her own mother, who she knew, or should have known, was an inappropriate caregiver. The mother conceded, in prior proceedings, that her mother was attending a methadone treatment program each day from the morning until the afternoon, yet made no provision for the children's care during those times. The mother also failed to provide for the children to have adequate food and health care while they were with the maternal grandmother. After the mother learned that the grandmother left the children with their respective paternal grandmothers, she failed to provide the grandmothers with her contact information, and failed to communicate with the children for a substantial period of time.

Matter of Charisma D., 115 AD3d 441 (1st Dept 2014)

Respondent Inflicted Excessive Corporal Punishment on Children

Family Court determined that respondent neglected the subject children by inflicting excessive corporal punishment on them. The Appellate Division affirmed. The determination was supported by a preponderance of the evidence. The children's out-of-court statements that respondent had a history of violence towards them, including one child's account of respondent punching him in the face and leaving scratches on his back, were cross-corroborated by the other children's statements, by the children's statements to petitioner agency's caseworkers, and by a caseworker's observation of the scratches on the child who said he was punched and scratched.

Matter of Julia CC., 115 AD3d 565 (1st Dept 2014)

No Reasonable Excuse or Meritorious Defense For Respondent's Default

Family Court denied respondent mother's motion to vacate a default order determining that she neglected the subject children. The Appellate Division affirmed. The mother failed to demonstrate a reasonable excuse for her failure to appear at the fact-finding hearing or a meritorious defense to the allegations of educational and medical neglect. The mother's relocation to South Carolina with the children violated the terms of the court's prior parole order and because her cryptic account of her delay due to "unforeseen problems," the court was not able to access whether the problems were foreseeable or beyond the mother's control. Further, the mother failed to present a detailed defense to the neglect claim. She did not deny that her older child, who had developmental delays resulting from a brain injury, missed 100 out of 128 school days, and thus was unable to receive the services required for his special needs. She also did not deny that she refused entry to her apartment to medical personnel charged with monitoring the child's condition and administering his medication. Respondent's other child also missed a significant amount of school without any explanation for the absences.

Matter of Isaiha M., 115 AD3d 575 (1st Dept 2014)

Respondent Neglected Child by Engaging in Domestic Violence 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 respondent neglected the child by engaging in a verbal and physical altercation with the child's mother while the child was present in the home and aware of what was happening. The caseworker's testimony that the child told her that he heard his parents yelling and engaging in a physical altercation, and that the mother's injuries were the result of the altercation, demonstrated that the child was in imminent risk of emotional and physical impairment.

The child's out-of-court statements about the mother's injuries were corroborated by the caseworker's testimony and the police officer's statement about the injuries he observed on the mother, as reflected in the domestic incident report for the date of the incident.

Matter of Carmine G., 115 AD3d 594 (1st Dept 2014)

Mother Neglected Two of Her Children and Derivatively Neglected Her Other Children

Family Court found that respondent mother neglected two of her children, Joshua and Jaziah, and derivatively neglected her other children, Jadaquis and Dashell. The Appellate Division affirmed. A preponderance of the evidence, including evidence of excessive school absences, which had a detrimental effect on school performance, supported the court's finding that respondent neglected Joshua and Jaziah by failing to provide them with a proper education. A preponderance of the evidence supported the finding that respondent also was medically neglectful of Joshua and Jaziah. Although respondent acknowledged the children's serious behavioral problems, she failed to follow through on numerous referrals to engage them in mental health services. Credible evidence supported the court's finding that respondent also subjected Joshua and Jaziah to excessive corporal punishment with the use of belts and a plastic bat. Joshua and Jaziah each provided a detailed account of how they were disciplined by respondent and their out-of-court statements were further corroborated by the caseworker's testimony that she saw marks on the children's legs that were partially attributed to being hit by respondent. Their older brother's statements also provided corroboration. The finding of derivative neglect of Jadaquis and Dashell was supported by a preponderance of the evidence of respondent's neglect of Joshua and Jaziah, which demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to any child in her care.

Matter of Jadaquis B., 116 AD3d 448 (1st Dept 2014)

Petitioner Failed to Establish a Demonstrated Pattern of Excessive Corporal Punishment

The petitioner, Administration for Children's Services (ACS), filed petitions against the father, alleging that he had neglected the subject children through the infliction of excessive corporal punishment upon one of his children and his own use of marijuana. The father allegedly hit his 14-year-old child with a belt several times when she refused to give him her cell phone upon his request, causing bruises to her body. Also, the 14-year-old child and her sibling had allegedly observed the father smoking marijuana on prior occasions. The father testified at a fact-finding hearing that he was attempting to discipline the 14-year-old child for cutting school by taking away her cell phone, and that he hit her with the belt when she refused to give him the phone and charged at him. He testified that corporal punishment was not his normal mode of discipline. The father testified that he had smoked marijuana, but did not smoke it regularly, and that he never used or was under the influence of marijuana in the children's presence. Under the circumstances presented here, the Family Court correctly found that ACS failed to establish by a preponderance of the evidence that the father neglected the 14-year-old child by virtue of his infliction of excessive corporal punishment upon her. ACS failed to establish that the father intended to hurt this child, or that his conduct demonstrated a pattern of excessive corporal punishment. There was insufficient evidence that she suffered the requisite impairment of her physical, mental, or emotional well-being to support a finding of neglect. Given the child's age, the circumstances under which the altercation occurred, and the isolated nature of the father's conduct, the Family Court did not err in dismissing the petitions. Furthermore, the Family Court correctly found that there was no basis for concluding that the father derivatively neglected his other child, who was in the room during the incident, inasmuch as ACS did not prove by a preponderance of the evidence that the father neglected his 14-year-old child.

Matter of Anastasia L., 113 AD3d 685 (2d Dept 2014)

Mother Rebutted the Presumption of Parental Culpability; Father Did Not

Contrary to the respondent parents' contentions, the petitioner made a prima facie case of abuse of the subject child with evidence that the four-month-old was brought to the hospital with injuries, including a bulging fontanelle, multi-layered retinal hemorrhages,

subdural hemorrhages, and a subarachnoid hemorrhage, that were of such a nature as not to be accidental (*see* FCA § 1046 [a] [ii]). The respondent father failed to rebut the presumption of culpability. Although the respondent parents' expert testified that the child's injuries were consistent with the accidental trauma described by the respondent father, he also acknowledged that events could not have occurred as described by the respondent father, given the child's condition upon arriving at the hospital. Accordingly, the Family Court properly found that the ACS had established by a preponderance of the evidence that the respondent father had abused the child. However, the mother rebutted the presumption of parental abuse with evidence, which was credited by the Family Court, that the child was solely in the care of the respondent father at the time when the injury would have occurred, and that the mother immediately sought medical assistance when she returned to the respondent father's apartment and found the child limp and pale. Accordingly, the Family Court should have denied the petitions and dismissed the proceedings insofar as asserted against the mother.

Matter of Jordan T.R., 113 AD3d 861 (2d Dept 2014)

Family Court Should Have Granted Mother a Separate Dispositional Hearing

Contrary to the mother's contention, at the conclusion of a fact-finding hearing, the Family Court properly found that there was clear and convincing evidence that she was then and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child (*see* SSL § 384–b[4] [c]). However, the Family Court improvidently exercised its discretion when it denied the mother's motion for a separate dispositional hearing. In the context of a proceeding to terminate parental rights based on mental illness, a separate dispositional hearing is not necessarily required in every case. However, the circumstances of a particular case may warrant a dispositional hearing such that a court's determination to forgo such a hearing constitutes an improvident exercise of discretion (*see* SSL § 384-b). Here, the mother consistently continued her treatment, successfully completed parenting classes, and regularly visited the subject child. Furthermore, the record indicated that the subject child, who was then 13 years old, had long opposed adoption and had expressed a desire to maintain a close relationship with her mother. Under these circumstances, the court should have granted the mother's motion for a dispositional hearing so that the parties could introduce evidence as to which of the dispositional alternatives would have been in the best interests of the child.

Matter of Christina L.N., 113 AD3d 777 (2d Dept 2014)

Mother Engaged in Acts of Domestic Violence in Children's Presence

To establish neglect pursuant to § 1012 (f) (i) (B) of the Family Court Act, the petitioner must prove, by a preponderance of the evidence, that (1) the child's physical, mental or emotional condition has been impaired, or is in imminent danger of becoming impaired, and (2) the actual or threatened harm to the child is due to the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship". Here, contrary to the mother's contention, a preponderance of the evidence established that she neglected the subject children by, inter alia, engaging in certain acts of domestic violence in the children's presence that impaired, or created an imminent danger of impairing, their physical, mental, or emotional condition.

Matter of Eugene S., 114 AD3d 691 (2d Dept 2014)

Father's Motion to Vacate Default Denied

The Family Court providently exercised its discretion in denying the father's motion to vacate an order of fact-finding entered upon his failure to appear at the fact-finding hearing. Contrary to the father's contention, in moving to vacate his default, he did not provide a reasonable excuse for his failure to appear at the continuation of the fact-finding hearing, and did not establish a potentially meritorious defense to the allegations of the petition. The father, who had successfully obtained three mistrials and discharged five separate court-appointed attorneys in this proceeding, candidly admitted that he had failed to appear for the continuation of the fact-finding hearing because he was trying to find a way to stop the case from moving forward. The father's contention that he

was deprived of the opportunity to testify on his own behalf or call witnesses was without merit, as the record showed that the Family Court repeatedly adjourned the proceeding in order to afford him such an opportunity.

Matter of Devyn B., 114 AD3d 768 (2d Dept 2014)

Permanency Goal of Adoption Was in Best Interests of the Children

Given the length of time that the subject children remained in foster care and the mother's failure to avail herself of numerous referrals by a family services agency for mental health treatment and parenting skills classes or to address the reasons the subject children were placed in foster care in the first instance, the petitioner met its burden of establishing, by a preponderance of the evidence, that the determination to change the permanency goal for the subject children from return to parent to placement for adoption was in the best interests of the subject children. Moreover, the Family Court's determination that supervised visitation was in the subject children's best interests had a sound and substantial basis in the record.

Matter of Diceir D.R.R., 114 AD3d 948 (2d Dept 2014)

Family Court's Finding of Derivative Neglect Was Supported by a Preponderance of the Evidence

The petitioner alleged that the father derivatively neglected the subject child, an infant born on October 23, 2011, based upon prior adjudications that the father, through his drug use, neglected the child's two oldest siblings and derivatively neglected one of the child's older siblings. The Family Court's finding of derivative neglect was supported by a preponderance of the evidence, which demonstrated that the neglect and derivative neglect of the child's older siblings was so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still existed, and that the neglect and derivative neglect of the child's older siblings evinced a fundamental defect in the father's understanding of the duties of parenthood. Since the father presented no evidence that the circumstances giving rise to the neglect and derivative neglect of the child's older siblings no longer existed, the Family Court properly made a finding of derivative neglect with respect to the subject child.

Matter of Brandon T., 114 AD3d 950 (2d Dept 2014)

Removal of Child Pursuant to FCA § 1027 Was Proper

Contrary to the contentions of the petitioner and the attorney for the child, the appeal was not rendered academic by two subsequent permanency orders continuing the placement of the child, because the removal "created a permanent and significant stigma" and the mother still sought the return of the child to her custody. Upon reviewing the record, the Appellate Division found that the Family Court, after a hearing, properly granted the application made on behalf of the subject child pursuant to FCA § 1027 to temporarily remove the child from the custody of the mother and place the child in the petitioner's custody pending the outcome of the proceeding. The Family Court properly took judicial notice of, among other things, the prior adjudications of permanent neglect against the mother with respect to the child's two older siblings. Further, the evidence showed that, if the child were to have remained in the custody of the mother, there would have been imminent risk to the child's life or health, and the risk could not have been mitigated by reasonable efforts to avoid removal (*see* FCA § 1027 [a] [iii]; [b]).

Matter of Nowell M., 115 AD3d 746 (2d Dept 2014)

Mother Failed to Obtain Psychiatric Treatment for Child

The finding of neglect was supported by a preponderance of the evidence, which demonstrated that the mother's failure to obtain psychiatric treatment for the subject child placed the child's mental and emotional condition "in imminent danger of becoming impaired" (FCA § 1012 [f] [i]). In addition, since the mother's unwillingness to pursue a recommended course of psychiatric treatment for the child demonstrated a fundamental defect in her understanding of parental duties relating to the care of children, there was sufficient evidence for the Family Court to make a finding of derivative neglect with respect to her two other children.

Matter of Beautisha B., 115 AD3d 854 (2d Dept 2014)

Record Supported Family Court's Determination That Expert Testimony Sufficiently Corroborated Child's Out-of-Court Statements

Validation testimony from an expert that the child's psychological and behavioral characteristics lead the expert to conclude that the child was sexually abused may supply the corroboration of the child's out-of-court statements necessary to make out a prima facie case of sexual abuse. However, as with any expert opinion, the validation testimony must meet a threshold of reliability. The Family Court has considerable discretion in deciding whether a child's out-of-court statements alleging incidents of abuse have been reliably corroborated. Contrary to the father's contention, the record supported the Family Court's determination that the testimony of the petitioner's child sexual abuse expert sufficiently corroborated the child's out-of-court statements so as to establish a prima facie case of sexual abuse against the father.

Matter of Alexis S., 115 AD3d 866 (2d Dept 2014)

Children's Out-of-Court Statements Were Sufficiently Corroborated by Father's Admissions

A preponderance of the evidence supported the Family Court's determination that the father sexually abused the children C. and T., and derivatively neglected the child Y. (*see* FCA § 1046 [b] [i]). The out-of-court statements of C. and T. were sufficiently corroborated by evidence of adverse changes in C.'s behavior and by the father's admissions that he physically "arranged" C.'s penis allegedly to make the child feel more comfortable and examined T.'s vagina. Contrary to the father's contention, the element of intent to obtain sexual gratification could be inferred from the totality of the circumstances.

Matter of Chaim T., 116 AD3d 704 (2d Dept 2014)

Siblings' Out-of-court Statements Cross-Corroborated One Another and Were Sufficiently Corroborated by Petitioner's Progress Notes and Mother's Testimony

The Family Court's determination that the maternal stepgrandfather sexually abused the subject children was supported by a preponderance of the evidence (*see* FCA §§ 1012 [e], [g]; 1046 [b] [i]). It is well established that the out-of-court statements of siblings may properly be used to cross-corroborate one another. Here, the evidence presented at the fact-finding hearing established that, in May 2011, then-10-year-old N. and 3-year-old J. made independent and consistent out-of-court statements to several individuals describing similar incidents of sexual abuse by the maternal stepgrandfather. Further, the children's statements were corroborated by the petitioner's progress notes and the mother's testimony as to the children's statements. The Family Court, upon a finding of abuse pursuant to FCA § 1012 (e), was required to make a further finding of the specific sex offenses that were committed, as defined in PL article 130 (*see* FCA § 1051 [e]). A review of the record indicated that the Family Court did not make this additional finding. Accordingly, the Appellate Division found, based on the children's statements and the testimony of the mother, that the maternal stepgrandfather committed offenses against the children as defined in and prohibited by PL §§ 130.52, 130.55, 130.60, 130.65 and 130.80.

Matter of Jada A., 116 AD3d 769 (2d Dept 2014)

Respondent Engaged in Excessive Corporal Punishment

The Family Court's finding that the respondent engaged in excessive corporal punishment when he struck the subject child several times with a belt, causing raised red marks on her arm and legs, was supported by the evidence presented at the fact-finding hearing. The child's out-of-court statements that the respondent struck her with a belt were sufficiently corroborated by the caseworker's observations of the child's injuries and the respondent's admission to the caseworker that he had struck the child with a belt in the past (*see* FCA § 1046 [a] [vi]). The Family Court's determination that the respondent lacked credibility when he testified that he never hit the child with a belt was fully supported by the record.

Matter of Nurridin B., 116 AD3d 770 (2d Dept 2014)

Family Court Retained Subject Matter Jurisdiction Pursuant to SSL § 374-a (ICPC)

In three related child protective proceedings, the

petitioner appealed from an order of the Family Court which dismissed the petitions on the ground of, inter alia, lack of subject matter jurisdiction. The record revealed that the subject children were provisionally placed with their maternal grandmother in Ohio pursuant to the Interstate Compact on the Placement of Children (ICPC). The ICPC, codified in SSL § 374-a, provides that the state which places a child in out-of-state foster care "shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child . . . until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state" (*see* SSL § 374-a [1], art V [a]). Here, none of the circumstances that would have triggered a termination of New York State's jurisdiction over the subject children had occurred. Accordingly, the Family Court erred in dismissing the petitions on the ground that it lacked subject matter jurisdiction (*see* SSL § 374-a [1]). In addition, it was error for the Family Court to conclude that the allegations concerning the respondents' failure to plan for the children and the allegations of derivative neglect against the respondent Germail B. were barred by res judicata as a result of the court's May 15, 2013, order, which dismissed a prior neglect petition "for failure to state a cause of action".

Matter of Tekiara F., 116 AD3d 852 (2d Dept 2014)

Evidence Established That Narcotics Transactions Were Taking Place in the Home

The Family Court's determination that the mother neglected the subject child was supported by a preponderance of the evidence (*see* FCA § 1046 [b] [i]). Specifically, the evidence adduced at the fact-finding hearing established that the mother resided with the child in a home in which narcotics transactions were taking place, in which heroin was stored, and in which the child had easy access to marijuana. Accordingly, the Family Court properly concluded that the mother's conduct posed an imminent danger to the child's physical, mental, and emotional well-being (*see* FCA § 1012 [f] [i]).

Matter of Diamonte O., 116 AD3d 866 (2d Dept 2014)

Children Lacked Proper Hygienic Care and Home Was in Deplorable and Unsanitary Condition

Contrary to the mother's contention, the Family Court's determination that she neglected her children was supported by a preponderance of the evidence (*see* FCA §§ 1012 [f] [i] [A]; 1046 [b] [i]). The credible evidence adduced at the hearing established, inter alia, that the mother maintained her apartment in a deplorable and unsanitary condition, that the apartment was infested with flies for a period of at least several weeks prior to the date of a caseworker's visit, that the mother maintained little or no edible food in the apartment in the period prior to and during a caseworker's visit, that the apartment did not contain permanent beds for the children, and that the children were unbathed, malodorous, and wearing unclean clothing and/or diapers on the date of a caseworker's visit. In addition, the record showed that the mother declined assistance that was offered by the caseworker. Under these circumstances, the Family Court correctly determined that there was an imminent danger of impairment of the children's health as a result of the mother's conduct.

Matter of China C., 116 AD3d 953 (2d Dept 2014)

Family Court Should Have Conducted a Hearing to Determine Whether Father Demonstrated "Good Cause" to Vacate the Finding of Neglect

The Family Court properly denied that branch of the father's motion which was to modify so much of an order of fact-finding and disposition which placed the father under the petitioner's supervision for a stated period of time pursuant to an order suspending judgment in accordance with FCA § 1052 (a) (i), as the period of supervision had expired. However, the Family Court should have held a hearing on that branch of the father's motion which was to vacate so much of the order of fact-finding and disposition which found that he had neglected the subject child. Pursuant to FCA § 1061, the court may modify an order issued during the course of a proceeding under article 10 for "good cause shown". Under the circumstances of this case, the Family Court should have conducted a hearing to determine whether the father demonstrated "good cause" to vacate the finding of neglect. Accordingly, the matter was remitted to the Family Court for a hearing and, thereafter, a new determination on that

branch of the motion.

Matter of Noah M., 116 AD3d 956 (2d Dept 2014)

Evidence of Mother's Marijuana Use and Failure to Reach Treatment Goals Established a Prima Facie Case of Neglect

The evidence established that the mother failed to comply with certain terms of a prior order, including that she refrain from drug use, successfully complete a drug rehabilitation program, and be evaluated by a mental health services provider. Specifically, the mother repeatedly tested positive for marijuana use while she was pregnant with the subject child, and she tested positive for marijuana when the child was born. Moreover, the mother ultimately was discharged from a rehabilitation program because of her noncompliance and failure to reach treatment goals. The mother's continued abuse of marijuana and failure to regularly attend the drug rehabilitation program evinced a fundamental defect in her understanding of the duties of parenthood. Accordingly, the evidence established a prima facie case of neglect (*see* FCA § 1012 [f] [i] [B]), and the petitioner was not required to establish either actual impairment of the child's physical, mental, or emotional condition, or a specific risk of impairment. Additionally, the mother's failure to appear at the fact-finding hearing permitted the Family Court to draw a strong negative inference against her. Accordingly, the evidence adduced at the fact-finding hearing, coupled with that negative inference, established by a preponderance of the evidence that the mother neglected the subject child. The petitioner also established by a preponderance of the evidence that the father neglected the subject child. Despite his knowledge that the mother continued to abuse marijuana during her pregnancy, he failed to exercise a minimum degree of care to protect the child. Moreover, the father's failure to appear at the fact-finding hearing permitted a strong negative inference against him.

Matter of Jamoori L., 116 AD3d 1046 (2d Dept 2014)

Sound and Substantial Basis in the Record

Family Court adjudicated respondents to have neglected their two children. The Appellate Division affirmed, finding there was a sound and substantial basis in the record for the court's decision. A police search of respondents' home, based on information they were involved in narcotics trafficking, resulted in a discovery of various drugs and drug paraphernalia and criminal charges were filed against respondent father. The children were not home at the time of the search but the drugs were in areas easily accessible to them. Additionally, the father admitted he sold drugs at home and both parents admitted to regular drug use. Although the father claimed he was participating in a drug rehabilitation program, the record showed he had tested positive for an illegal substance while in treatment, and he had only entered the program after his arrest. Furthermore, it was proper for Family Court to consider previous adjudications of neglect and abandonment against respondents by a North Carolina court on behalf of another child, in rendering its decision in this case. The child in North Carolina had been removed shortly after birth from respondents' care because both the child and mother had tested positive for cocaine. The child's positive toxicology along with respondents' illegal drug use, domestic violence and lack of contact with the child had been the basis for the North Carolina adjudication.

Matter of Brandon R., 114 AD3d 1028 (3d Dept 2014)

Failure to Provide Visitation to Noncustodial Parent Results in Reversal

Respondents husband and wife consented to neglect adjudications based on their commission of domestic violence in the presence of three children who were in their care. Thereafter, Family Court did not accept the agreement reached by the parties and a dispositional hearing was held. The court continued the previous order of protection for one year, released custody of the children to the wife and directed the parties to engage in services. By the time the appeal was heard, the order of protection had expired, and the issues raised pursuant to this order were deemed moot. However, since the dispositional order failed to provide any contact between the husband and the children, and visitation with a noncustodial parent is deemed to be in the children's best interests to be denied only in exceptional circumstances, the issue was remitted in order for the court to schedule parenting time between the husband and children.

Matter of Luka OO., 114 AD 3d 1056 (3d Dept 2014)

Sound and Substantial Basis in the Record

Family Court determined that respondent mother's escalating, irrational, out-of-control behavior and repeated threats of violence towards her two children placed the children in imminent danger of harm and constituted neglect. The Appellate Division affirmed. The record established that respondent had, among other things, made disparaging comments about her 17-year-old daughter to a neighbor, which respondent's 12-year-old son had most likely overheard, and accused her daughter of sleeping with her son's father. Respondent stated she was planning to buy a gun to shoot the daughter and the father. Later that day, when the son's father telephoned to see his son was ready to be picked up, respondent screamed obscenities into the phone and told the 12-year-old if he let his father into the house, she would put a bullet in the father's head. Respondent also threatened to put the child's head through the wall if he talked back to her. That evening, respondent broke down her daughter's bedroom door and frame, which nearly landed on the daughter, hit the daughter with a laptop computer and threatened to kill her. The daughter called a neighbor for help. The neighbor came into the daughter's bedroom and saw the child curled up in a fetal position, crying hysterically, while the mother spewed vulgar names and murderous threats at her. Respondent's violent and abusive behavior towards the children had escalated following the father's departure from the home. The evidence also showed respondent had tirades in the middle of the night, which awakened the daughter, and called the daughter vile names and accused her of having sexual relations with the son's father. Additionally, respondent had a history of mental illness and prescription drug abuse. Based on this and other evidence, the court's decision had a sound and substantial basis in the record.

Matter of Daniel X., 114 AD3d 1059 (3d Dept 2014)

Mother's Failure to Follow Pediatrician's Recommendation Supports Neglect Determination

Family Court's neglect determination based on the mother's refusal to follow the recommendation of the child's treating pediatrician was supported by a sound and substantial basis in the record. The subject child was seen a week after her birth by her pediatrician, when her weight fell in the 25th percentile on the growth chart. She was not seen again until a year later, by which time the child had missed routine vaccinations and her weight was significantly below normal growth and development levels. The mother restricted the child's food intake without such direction by the pediatrician and alleged the child had allergies yet she failed to allow the child to be tested for potential food allergies. Although she did take the child to a nutritionist upon the pediatrician's recommendation, the mother failed to cooperate with the nutritionist's recommendations. Thereafter, she continued to miss pediatric appointments. Additionally, the mother failed to respond to the child's dental issues. When the child was placed in her father's care, she gained three pounds in the first three months which supported the court's finding that the mother had failed to provide the child with proper care and nutrition. Furthermore, the evidence established the mother had psychological issues which resulted in her inability to recognize her neglectful actions and caused her to blame others.

Matter of Josephine BB., 114 AD3d 1096 (3d Dept 2014)

Family Court Erred in Granting Agency's Summary Judgment Motion for Adjudication of Derivative Neglect

Family Court erred in granting agency's motion for summary judgment adjudicating respondent's child to be derivatively neglected, since triable issues of fact remained. Although respondent's parental rights had been terminated by the time the case was heard on appeal, the matter was not moot since a neglect finding created a stigma which could adversely affect the parent's rights in future proceedings. The record showed respondent had consented to a neglect finding concerning his three other children less than three months before the instant petition was filed on behalf of the subject child. However, prior to the filing of the derivative neglect petition, a FCA §1028 hearing involving the subject child was held, and questions of fact were raised as to whether respondent was appropriately dealing with the conditions which had led to the prior neglect determination, including his housing situation. During the §1028 hearing, although

the agency alleged respondent, among other things, had failed to get a substance abuse evaluation, respondent testified he had been advised by an agency representative, whom he was able to name, that no treatment was necessary. This testimony was not contradicted by the agency. Additionally, although the agency was ordered to investigate respondent's home and submit a report to the court with regard to its suitability, the record failed to show that any such investigation had been completed.

Matter o Karm'ny QQ. 114 AD3d 1101 (3d Dept 2014)

Temporary Order of Removal Deemed Moot

Family Court granted the agency's petition to temporarily remove the children from respondent mother, based on allegations she had allowed both children to live with a risk level III sex offender. Respondent appealed the temporary order and during the pendency of the appeal, Family Court adjudicated the subject children to be neglected based on evidence of sexual abuse of one child, and respondent's actions in permitting the children to be in the company of the level III sex offender. The Appellate Division deemed the appeal to be moot. Additionally, since the appeal was from was a temporary order, the exception to the mootness doctrine did not apply.

Matter of Brandon WW., 116 AD3d 1108 (3d Dept 2014)

Finding of Abuse and/or Neglect Proper

Family Court adjudicated respondent mother of three and her boyfriend, the father of her youngest child, to have abused and/or neglected the mother's middle child and derivatively abused and/or neglected the other two children. The Appellate Division affirmed. Here, testimony from several physicians who treated the middle son established the child had suffered two or more traumatic events causing damage to his skull and brain that could not have been caused accidentally, as respondents suggested. Evidence showed the mother was the primary caretaker of the older two children before their removal by the agency, and respondent boyfriend had helped take care of the children during the relevant period of time, making him a person legally responsible for the children's care. The court properly paid little heed to the testimony of respondent mother's mother, who said another relative was often present in her home when the children were there and she had seen this relative behave violently towards his own child, since the relative had only been left alone with the middle son for a 10-minute period and the child seemed fine thereafter. Additionally, the middle child had been injured on more than one occasion. Due to the severity of the middle child's injuries, which could have caused his death and would probably result in permanent brain damage, and respondents' refusal to take responsibility for their actions, the findings of derivative abuse and/or neglect were proper.

Matter of Braydon UU., 116 AD3d 1179 (3d Dept 2014)

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

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

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

Dismissal of Neglect Petition Reversed; Petition Granted

Family Court dismissed the neglect petition against respondent mother. The Appellate Division reversed, granted the petition, adjudicated respondent to have neglected the subject child, and remitted the matter for a dispositional hearing. The respondent's failure to provide proper supervision was the first basis for neglect alleged in the petition. On the morning of the incident, while the mother was taking a nap, the 3 ½ year old child left the apartment on her own. The child wandered away approximately 1 ½ blocks, and was eventually found by a neighbor, who took the child to her home and then assisted the police in attempting to locate the child's caretaker. Although the hearing court's determinations were entitled to great deference, the court erred in holding that DSS failed to establish, by a preponderance of the evidence, that the single incident at issue was sufficient to constitute neglect. The mother was aware, or should have been aware, of the intrinsic danger of going to sleep without ensuring that the child would remain securely in the apartment. There was no evidence that the mother suffered from any physical ailment that prevented her from properly supervising the child, nor was there any evidence that the mother took proactive steps, such as locking the door, using a child lock, or obtaining a caregiver to prevent the child from leaving the apartment while the mother slept during the day. Therefore, petitioner met its burden of establishing that the imminent impairment of the child's physical, emotional or mental condition was a consequence of the mother's failure to exercise a minimum degree of parental care. The condition of the mother's apartment was the second basis for neglect alleged in the petition. The evidence at the fact-finding hearing established that there were several garbage bags on the porch, and in the kitchen and living room; there was a mound of toys covering the livingroom floor; and there were dirty dishes both overflowing the kitchen sink and stacked next to the toilet in the bathroom. In addition, the freezer was full of ice; the bottom drawer of the refrigerator contained moldy fruit floating in several inches of dirty water; and the bathroom sink was full of a grayish-brown substance which appeared moldy and gel-like. Moreover, in the living room, where the child slept, cat litter and feces were in and around a large trash can lid that was accessible to the child. There was evidence that the mother previously admitted that the child had been exposed to cat feces in the past and that the mother had been warned about the safety hazards of failing to prevent the child's access to the litter and feces. There was also evidence that the child had access to the large quantities of garbage within the apartment. During one visit by a DSS caseworker, the child was observed wearing no pants or underwear, with a disposable razor cover stuck between her buttocks. Therefore, the court's determination that the unsafe and unsanitary condition of the mother's apartment, on numerous occasions, did not place the child's physical, mental or emotional state in imminent danger of impairment, was not supported by a sound and substantial basis in the record.

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

CHILD SUPPORT

Award of Child Support Affirmed

Family Court denied the father's objections to an order that directed him to pay $1,250 per month for child support. The Appellate Division affirmed. The Support Magistrate awarded child support based upon the parties combined parental income, rather than the combined parental income statutory cap of $130,000, but modified that amount downward by $187 per month in light of the child's receipt of Social Security benefits based upon the father's active disability claim. The test whether it is proper to base the calculation of child support on parental income above $130,000 is generally whether the child is receiving enough to meet the child's actual needs and the amount required to live an appropriate lifestyle. Here, the child enjoyed a middle-class lifestyle with extracurricular activities, and attended private school and summer camp. The Support Magistrate properly determined that the child's needs would be met, and her lifestyle maintained, with an award based upon applying the child support percentage to the total combined parental income.

Matter of Keith v Lawrence, 113 AD3d 615 (1st Dept 2014)

Denial of Downward Modification Affirmed

Family Court denied the father's petition for a downward modification of his child support obligation.

The Appellate Division affirmed. A party seeking a downward modification of child support based upon a loss of employment has the burden to show that he or she made diligent attempts to secure employment commensurate with his or her education, ability, and experience. Here, the record supported the court's determination that the father failed to submit competent proof of his diligent efforts to obtain employment commensurate with his qualifications and experience.

Matter of Nenninger v Tonnessen, 113 AD3d 619 (1st Dept 2014)

Father Failed Without Good Cause to Comply With Financial Disclosure

Family Court granted the mother's petition to enforce the child support provisions of the parties' stipulation of settlement. The Appellate Division affirmed. In 2007, an order of support was issued by the court upon the parties' consent based upon the parties' agreement that the father would pay child support based upon his annual income of $61,467. In a stipulation of settlement, the parties agreed in 2010 that the father's obligation to pay child support would be suspended for 15 months, after which his child support obligation would resume, as calculated pursuant to the CSSA. In 2012 the mother commenced this proceeding to enforce the child support provisions of the stipulation of settlement. The court ordered the parties to exchange and file financial disclosure before the date set for a hearing. After the father failed to do so, the Support Magistrate, in effect, granted the mother's petition and found that the father had an income of $61,467, based upon the 2007 order. Because the father failed, without good cause, to comply with the compulsory financial disclosure mandates of the Family Court Act, the court was required to either grant the relief sought in the petition or preclude the father from offering evidence about his financial ability to pay support. Thus, the court providently exercised its discretion to grant the relief sought in the mother's petition.

Matter of Speranza v Speranza, 113 AD3d 622 (1st Dept 2014)

Father Not Obligated to Pay For Private School; Denial of Downward Modification Affirmed

Supreme Court denied the plaintiff mother's motions directing defendant father to pay damages for her eviction, setting aside a 2008 finding of alienation, and directing defendant to pay monies to their child's private school. The Appellate Division affirmed. Plaintiff did not appeal from the order concerning the finding of alienation and, in any event, there was no evidence to undermine the finding. There was no reason to reinstate maintenance because its purpose was to give the recipient a sufficient period to become self-supporting and here the marriage lasted two years, plaintiff received maintenance for 1 ½ years and, although she had a great earning capacity, she apparently was unwilling to work. Defendant had no obligation to pay for the parties' child's private school as relevant orders and judgments evinced. There was no basis for awarding plaintiff damages due to her eviction. Plaintiff failed to meet her burden of establishing a substantial change in circumstances warranting an upward modification of child support. She failed to submit credible evidence of her income and failed to demonstrate efforts to obtain employment commensurate with her experience and education.

Angel v O'Neill, 114 AD3d 486 (1st Dept 2014)

Increase in Father's Income Not Unanticipated Change in Circumstances

Supreme Court denied plaintiff mother's motion for increased child support and to enforce the parties' stipulation of settlement. The Appellate Division affirmed. Plaintiff failed to meet her burden of establishing a substantial change in circumstances warranting an upward modification of child support or that the child's needs were not adequately being met. The increase in defendant's income did not constitute an unanticipated change in circumstances. In any event, the parties' agreement provided a mechanism for increases every three years based upon defendant's income. Plaintiff also failed to submit evidence of her income and failed to demonstrate efforts to obtain employment commensurate with her experience and training. Plaintiff's underemployment was not a change in circumstances inasmuch as she had been underemployed at the time of the parties' agreement.

The court also properly found that there was no violation of the terms of the parties' agreement.

W.B. v D.B., 114 AD3d 551 (1st Dept 2014)

Court Should Have Held Hearing Regarding Payment of Child's Private School Tuition

Supreme Court summarily denied plaintiff mother's motion for an order modifying custody and enforcing the child support provisions of the parties' stipulation of settlement. The Appellate Division modified by remitting for a hearing on the issue of the child's private school tuition. Plaintiff failed to make a sufficient showing that a hearing was required on her modification of custody motion. The fact that the parties had different views on education or extracurricular activities did not mean that they were unable to co-parent. They anticipated that such disagreement might arise and provided a procedure to deal with them in their stipulation of settlement. Given defendant's reduction in income and increased debts, the court properly found that it was reasonable to withhold consent to the use of out-of-network medical providers or the child's participation in more that two extracurricular activities. However, considering the parties' agreement, which contemplated that the child would attend private school, the child's long attendance at a private school the parties chose, and the child's fondness and outstanding performance at the school, the court should have held a hearing to determine whether defendant unreasonably refused his consent to contribute to the costs of the child's private school education.

Boyce v Boyce, 115 AD3d 552 (1st Dept 2014)

Father Willfully Violated Child Support Order

Upon the Support Magistrate's fact-finding determination that respondent father willfully violated a child support order, Family Court committed him to the NYC Department of Corrections for a term of four months' intermittent weekend incarceration, unless discharged by payment of $7000 to the Child Support Collection Unit. The Appellate Division affirmed. The Magistrate properly found that respondent willfully violated the child support order. Petitioner established prima facie that respondent's failure to pay child support for five years was willful and respondent failed to show that he was unable to make the required payments. Respondent and his witnesses gave conflicting testimony about whether respondent was working and there was no basis to disturb the Magistrate's credibility determinations. In any event, unemployment alone would not establish inability to pay, especially given respondent's failure to show that he used his best efforts to obtain employment commensurate with his qualifications and experience. The Magistrate's reference to respondent's failure to pay child support for years did not demonstrate bias and the Magistrate's questioning of the witnesses was necessary in order to facilitate or expedite the orderly progress of the hearing. The Magistrate's consideration of certain notes and tape recordings of prior proceedings, if error, was harmless, in light of the evidence supporting the determination.

Matter of Gina C. v Augusto C., 116 AD3d 478 (1st Dept 2014)

Determination to Calculate Father's Child Support Obligations Based upon Parties' Combined Parental Adjusted Gross Income Was Adequately Supported by Record

The father filed objections to the order of support and findings of fact, arguing, among other things, that the Support Magistrate erred in awarding child support based on combined parental income in excess of the $130,000 income cap. Upon reviewing the record, the Appellate Division found that the Family Court's determination to calculate the father's child support obligations based upon the parties' combined parental adjusted gross income of $215,818,43 which was $85,818.43 more than $130,000 statutory cap, was adequately supported by the record, and was not an improvident exercise of court's discretion (*see* FCA §413 (1) (b), (1) (f)). The record showed that the child enjoyed a middle-class lifestyle with extracurricular activities, and attended private school and summer camp.

Matter of Keith v Lawrence, 113 AD3d 615 (2d Dept 2014)

Family Court Properly Directed Father to Pay Child Support Based on His Annual Income

Here, since the father failed, without good cause, to comply with the compulsory financial disclosure mandated by FCA § 424-a, the Family Court was required to either grant the relief demanded in the petition or preclude the father from offering evidence as to his financial ability to pay support (*see* FCA § 424-a [b]). The Appellate Division found that under the circumstances of this case, the Family Court providently exercised its discretion by, in effect, granting the relief requested in the mother's petition and directing that the father pay child support based upon his annual income of $61,467 (*see* FCA §424-a [b]).

Matter of Speranza v Speranza, 113 AD3d 622 (2d Dept 2014)

Annual Income Properly Imputed to Plaintiff

Contrary to the defendant's contentions, the Supreme Court did not improvidently exercise its discretion in imputing to the plaintiff an annual income of only $125,000 for the purpose of calculating child support, given the plaintiff's current employment situation, his future earning capacity, and the evidence presented relating to additional streams of income. In addition, the court properly imputed an annual income of $65,000 to the defendant (*see* DRL § 240 [1-b] [b] [5] [iv] [D]). Contrary to the defendant's further contention, the Supreme Court's determination to calculate the parties' child support obligations based on the $130,000 statutory cap was adequately supported by the record, and was not an improvident exercise of discretion.

Fein v Fein, 113 AD3d 647 (2d Dept 2014)

Within Support Magistrate's Discretion Whether to Consider Father's Obligation to Support His Three Custodial Children

The Support Magistrate did not improvidently exercise his discretion in declining to consider the father's obligation to support his three custodial children in determining his responsibility to support the noncustodial subject child (*see* FCA § 413 [1] [f]). In determining whether the full amount of support under the standard guideline would be unjust or inappropriate, the court may consider the needs of the children of the noncustodial parent who are not the subject of the support proceeding and for whom the noncustodial parent is providing support. However, the court may only take this factor into consideration where the resources available to support such children are less than the resources available to support the children who are the subject of the proceeding. The evidence here did not support such a finding.

Matter of Best v Hinds, 113 AD3d 676 (2d Dept 2014)

Father Failed to Prove an Express or Implied Waiver by the Mother of Her Right to the Child Support and Maintenance Payments

The father contented that the mother waived her right to receive child support and maintenance upon her voluntary and intentional decision not to cash the checks that he sent to her during the period from April 2008 through September 2009. He argued that, at the time that he sent the checks, there were sufficient funds to cover them. However, after the mother failed to cash approximately 8 to 12 checks, the father allegedly used the funds in the account. The father failed to prove that the mother's decision not to cash the child support and maintenance checks constituted a voluntary and intentional relinquishment of her right to those payments. The father did not dispute that the mother's decision not to cash the checks was based upon the advice of her counsel in the plenary action so as to preserve and support her claim that she was entitled to an increase in child support and maintenance payments. The father did not come forward with any evidence showing that the mother intended to abandon her rights to child support and maintenance payments. In fact, she was seeking an increase in such payments. Since the father failed to prove an express or implied waiver by the mother of her right to the child support and maintenance payments from April 2008 through September 2009, he remained bound by the contractual obligations within the stipulation of settlement.

Matter of Hinck v Hinck, 113 AD3d 681 (2d Dept 2014)

It Was Error to Direct the Mother to Present Proper Documentation Directly to the Father with Respect to College Expenses in Order to Trigger His Duty to Pay

Contrary to the father's contention, the provisions in the parties' stipulation of settlement and a so-ordered stipulation were clear and unambiguous, and required him to pay 50% of the college expenses of the parties' children regardless of their emancipation. Further, the father's obligation included expenses which were paid from the proceeds of loans obtained by the parties' child M. Accordingly, the Family Court properly granted the mother's petition to the extent that the father was required to pay college expenses after the children's emancipation, and included money paid from loan proceeds. The court erred, however, in directing the mother to present proper documentation directly to the father with respect to college expenses in order to trigger his duty to pay. The documentation should have been provided to the Family Court to allow it to determine whether the college expenses were mandatory and, therefore, payable by the father pursuant to the parties' agreement. If it is then deemed necessary by the court, after the documentation is presented to the court by the mother, a limited inquiry may then be conducted to allow the parties to present further evidence as to the amount of those expenses that had previously been paid by the father and the amount that he may still owe to the mother.

Matter of Shaughnessey v Cox, 113 AD3d 689 (2d Dept 2014)

Support Stipulation Found Sufficient to Comply with the Recital Requirements of CSSA

The plaintiff sought to vacate the child support provisions set forth in the support stipulation and the judgment of divorce. The plaintiff alleged that the support stipulation failed to comply the Child Support Standards Act (CSSA) because the parties did not state the reason or reasons the parties chose to deviate from the CSSA guidelines (*see* DRL § 240 [1-b] [h]). The defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). The Supreme Court granted the motion. The plaintiff appealed. The record revealed that the parties placed the support stipulation on the record in open court and it was incorporated, but not merged, into the judgment of divorce. The defendant argued, and the Supreme Court found, that the parties articulated therein, albeit not in precise language, that the reason they were deviating from the guidelines was that the defendant was paying maintenance to the plaintiff during the period of deviation. The Appellate Division agreed and found that the support stipulation was sufficient to comply with the recital requirements of the CSSA, as set forth in DRL§ 240 (1-b) (h). Accordingly, contrary to the plaintiff's contention, the Supreme Court properly granted the defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) on the ground that a complete defense to the action was founded on documentary evidence (*see* CPLR 3211 [a] [1]).

Rockitter v Rockitter, 113 AD3d 745 (2d Dept 2014)

Child's Enrollment into a Post Associate Degree Program Constituted Pursuit of a College Education

Following the child's 21st birthday, the father ceased paying child support, whereupon the mother filed a violation petition seeking arrears for child support and unreimbursed medical expenses. In an order dated June 28, 2012, the Support Magistrate granted the petition and directed the father to pay the arrears. In an order dated September 27, 2012, the Family Court denied the father's objections to the Support Magistrate's order. The father appealed. Contrary to the father's contention, the Support Magistrate properly determined that the child's enrollment at Farmingdale State College, where she first received an associate degree and was then accepted into a second degree program, constituted the pursuit of a college education with reasonable diligence, as contemplated by the separation agreement. Consequently, the Support Magistrate properly enforced the child support provision of the parties' agreement.

Matter of McMahon-Rohan v Rohan, 113 AD3d 771 (2d Dept 2014)

Father Waived Any Objection to Service of Mother's Motion to Reinstate Child Support Petition

Under the circumstances of this case, the Family Court providently exercised its discretion in determining that

the mother's default in appearing at the hearing regarding service of her earlier motion should be vacated and that her petition for support, and the order of support entered thereon, should be reinstated. The father waived any objection to service of the prior motion by appearing in the proceeding and participating in the support hearing on the merits. He did not request dismissal of the proceeding or vacatur of his default in opposing the mother's prior motion due to lack of service until after the merits of the petition had been litigated and an order of support issued. Under these circumstances, his motion to vacate his default due to such alleged lack of service should have been summarily denied. Accordingly, the Family Court properly granted the mother's objection and reinstated both the petition and the order of support.

Matter of Stanford v Job, 113 AD3d 782 (2d Dept 2014)

Defendant Entitled to a Credit Towards His Child Support Obligation

Contrary to the defendant's contention, the Supreme Court properly denied his motion to reject the report of a Court Attorney Referee recommending that the defendant be held in civil contempt for certain violations of the judgment of divorce and that the plaintiff receive a money judgment in the amount of specified arrears, and confirmed the report. The plaintiff demonstrated that the defendant had violated a clear and unequivocal court order by failing to pay child support and maintenance as required by the judgment of divorce, thereby prejudicing the plaintiff's rights (*see* DRL § 245; JL § 756). However, the defendant was entitled to a credit towards his child support obligation. The defendant submitted proof by affidavit that he had paid the plaintiff $1,875 in child support with which the Office of Child Support Enforcement had not credited him. The plaintiff admitted that she had received a certain amount of support payments from the defendant during the relevant time, that the statement of arrears she submitted from the Office of Child Support Enforcement did not credit him with those amounts, and that she had not acknowledged receipt of any of those payments to the Office of Child Support Enforcement. Nonetheless, the Court Attorney Referee credited the defendant with only the amount proven by a canceled check because the plaintiff would not stipulate to an exact amount of the support actually paid to her. Under these circumstances, where the plaintiff did not dispute that the defendant paid her the amount claimed, the court should have credited the defendant with the full $1,875.

Ashmore v Ashmore, 114 AD3d 712 (2d Dept 2014)

Father Not Entitled to Downward Modification of His Child Support Obligation

The record supported the Support Magistrate's determination that the father did not testify credibly regarding the reasons and circumstances surrounding his departure from his former employment. Further, contrary to the father's contention, he failed to adduce sufficient credible evidence to satisfy his burden of establishing that he lost his employment through no fault of his own and that he diligently sought re-employment commensurate with his earning capacity. Thus, the Family Court properly denied the father's objections to the Support Magistrate's finding that the father was not entitled to a downward modification of his child support obligation.

Matter of Rubenstein v Rubenstein, 114 AD3d 798 (2d Dept 2014)

Father's Objection to Determination to Base Support Obligation Only on Child's Needs Was Properly Denied

Although the father submitted a financial disclosure affidavit and various financial records to the Family Court, his affidavit and the accompanying records did not contain adequate information for the Support Magistrate to determine his income and assets. Under these circumstances, the Family Court properly denied the father's objection to the Support Magistrate's determination to base his support obligation only on the child's needs (*see* FCA § 413 [1] [k]). The Family Court also properly deferred to the Support Magistrate's determination that the father's claims of indigence were not credible in light of the Support Magistrate's superior opportunity to evaluate the credibility of the witnesses.

Matter of Thompson v Coleman, 114 AD3d 802 (2d

Dept 2014)

Father Satisfied Burden of Demonstrating That Child Was Constructively Emancipated

Contrary to the Family Court's determination, the father met his burden of establishing that the subject child was constructively emancipated. The father established that a substantial change had taken place in his relationship with the subject child since the father and mother entered into a May 11, 2011, stipulation (*see* FCA § 451 [2] [a]). Since then, the subject child had attained the age of 18, rendering her of employable age and, thus, capable of becoming constructively emancipated. The evidence at the hearing established that the father consistently made a serious effort to maintain a relationship with the subject child during the relevant time period. The father regularly called the subject child at the mother's home, but his calls would either go unanswered, or, according to the mother, the subject child would refuse to speak with him. The father testified that he left messages indicating his willingness to participate in counseling with the subject child, but these offers were not accepted. On special occasions, the father left gifts and cards for the child that the child did not acknowledge. The father also contacted the child's therapist and suggested therapeutic visitation with the child. However, the child refused this offer. In addition to demonstrating the father's serious efforts to maintain a relationship with the child, the evidence demonstrated that, during the relevant period of time, the father's behavior was not a primary cause of the deterioration in his relationship with the subject child. Based on the evidence presented at the hearing, the father satisfied his burden of demonstrating that the subject child was constructively emancipated, and a finding in the father's favor in connection with this issue was warranted by the facts.

Matter of Jurgielewicz v Johnston, 114 AD3d 945 (2d Dept 2014)

Mother's Petition for Upward Modification of Father's Child Support Obligation Granted

Contrary to the father's contention, the mother's petition properly sought to modify a child support order dated August 4, 2011, which was entered on consent of the parties and directed a downward modification of the father's child support obligation, rather than seeking to modify a stipulation of settlement dated July 27, 2006. At the time the support order entered on consent was issued, the parties shared physical custody of the subject child. However, it was undisputed that visitation between the father and the child subsequently ceased, and the mother's expenses related to the child had increased significantly as a result of the child living exclusively with her. This change constituted a substantial change in circumstances sufficient to warrant the modification of the father's child support obligation. Accordingly, the Family Court properly denied the father's objections to the order dated January 29, 2013, which granted the mother's petition for an upward modification of his child support obligation.

Matter of Kay v Desantis, 114 AD3d 947 (2d Dept 2014)

Defendant Should Have Been Given a Hearing to Substantiate Allegations

The defendant appealed from an order of the Supreme Court, which, upon granting her motion to enforce the provisions of the parties' stipulation of settlement relating to college expenses and medical and dental expenses for the parties' child, directed the plaintiff to pay only the principal sum of $6,534.42. The Appellate Division agreed with the defendant that under the circumstances of this case, upon granting the defendant's motion, the court should have given her the opportunity to substantiate her allegations as to the amount of those expenses at a hearing. Accordingly, the matter was remitted to the Supreme Court for a hearing on the amount of college expenses and medical and dental expenses that the plaintiff was required to pay under the terms of the stipulation and a new determination thereafter.

Chi-Lu Chiang v Tzu-Chien Ju, 115 AD3d 698 (2d Dept 2014)

Plaintiff Offered No Evidence That Children Were Emancipated

The Supreme Court declined to award the defendant child support, having found that the subject children, then age 20, and age 17, were emancipated. The Appellate Division agreed with the defendant that the

Supreme Court should have awarded child support. "Children are deemed emancipated if they attain economic independence through employment or entry into military service or marriage and, further, may be deemed constructively emancipated if, without cause, they withdraw from parental supervision and control". Here, the plaintiff offered no evidence demonstrating that the subject children were economically independent or otherwise emancipated. Accordingly, the plaintiff should have been directed to pay child support.

Matter of Diaz v Gonzalez, 115 AD3d 913 (2d Dept 2014)

Supreme Court Was Not Required to Apply CSSA Standards When Considering Application for Pendente Lite Child Support

The Supreme Court was not required to calculate the plaintiff's child support obligation pursuant to the Child Support Standards Act (CSSA) which provides the formulas to be applied to the parties' income and the factors to be considered in determining a final award of child support. Courts considering applications for pendente lite child support may, in their discretion, apply the CSSA standards and guidelines, but they are not required to do so. Any perceived inequity in the award of pendente lite child support could best be remedied by a speedy trial, at which the parties' financial circumstances could be fully explored.

Vistocco v Jardine, 116 AD3d 842 (2d Dept 2014)

Mother Failed to Offer Competent, Credible Evidence of Her Inability to Make Required Payments

The Family Court did not err in finding that the mother had wilfully violated the child support provisions of the parties' judgment divorce. Evidence of the mother's failure to pay child support as ordered constituted prima facie evidence of a wilful violation (*see* FCA § 454 [3] [a]). The burden then shifted to the mother to offer competent, credible evidence of her inability to make the required payments. The mother failed to sustain this burden. Although the mother asserted that she was unemployed and had no money to pay child support, she did not present competent, credible evidence that she had actively sought employment sufficient to rebut the father's prima facie showing.

*Matter of Signorile v Kaminski,*116 AD3d 961 (2d Dept 2014)

Father's Appeal of Support Collection Unit's Determination Should Have Been Commenced Pursuant to CPLR Article 78

The father appealed from an order of the Family Court, dated July 31, 2012, which denied his objections to an order of the same court, dated June 1, 2012, which dismissed his petition to cancel or reduce child support arrears. The father's child support arrears were previously set by an order of the Family Court, dated November 18, 1997, which, inter alia, canceled arrears retroactive to August 9, 1996, the child's 21st birthday, and denied the father's application to cancel any additional arrears. The propriety of that order was not before the Appellate Division. In effect, the father was seeking review of a determination of the county's Support Collection Unit as to the computation of arrears and interest thereon, which should have been commenced as a proceeding pursuant to CPLR article 78 in the Supreme Court. Accordingly, the order appealed from was affirmed by the Appellate Division.

Matter of Hirsch v Hirsch, 116 AD3d 1041 (2d Dept 2014)

Mother Did Not Waive Her Right to Child Support by Accepting Child's Social Security Benefits

The mother did not waive her right to child support by accepting the child's Social Security benefits. A dependent child's Social Security benefits are designed to supplement existing resources and are not intended to displace the obligation of parents to support their children. Although the father testified at a hearing that the mother expressly agreed, in 2006, to accept Social Security benefits in lieu of child support, the court credited the mother's testimony that she did not agree to waive child support in exchange for Social Security benefits. The father did not adduce any other evidence to prove that the mother agreed to waive child support. In the absence of an express waiver, a party seeking modification of a child support obligation is required to apply to the courts. The father here failed to move for

modification of his support obligation until after arrears had already accrued, and did not show good cause for his failure to do so. Therefore, any modification or annulment of accrued child support arrears was prohibited. The Support Magistrate did not err in entering a money judgment against the father for support arrears.

Matter of Wendel v Nelson, 116 AD3d 1047 (2d Dept 2014)

Application for Adjournment Made by Father's Counsel Denied; **Mother's Petition for Upward Modification Granted**

The father appealed from an order of the Family Court which denied his objections to an order of the same court, which, after a hearing, granted the mother's petition for an upward modification of his child support obligation. Here, in light of the fact that the father left the courthouse before the hearing began despite advanced notice that a hearing would occur, and his counsel's failure to articulate a legitimate reason for an adjournment, the Support Magistrate providently exercised her discretion in denying the application for an adjournment made by the father's counsel at the conclusion of the mother's case. The Support Magistrate's decision to impute $100,000 in income to the father, which was based primarily on a credibility determination, was supported by the record.

Matter of Lorys v Powell, 116 AD3d 955 (2d Dept 2014)

Family Court's Basis for Vacating Support Magistrate's Order was Incorrect

Family Court vacated the Support Magistrate's order, which granted an upward modification of child support, based on insufficiency of the mother's evidence. The Appellate Division agreed the order should have been vacated, but determined Family Court's ground for vacating the order was incorrect since the issue was not raised by the father in his objections and therefore it was not properly before the court. The court should have based its decision on the Support Magistrate's failure to allow the father an opportunity to present his case. The record showed that after the mother rested her case, the Support Magistrate asked the father if he wished to present witnesses or renew his prior motion to dismiss the mother's case. Father's counsel responded he wished to dismiss the mother's case and moved to do so. The Support Magistrate took this to mean the father was not presenting witnesses and reserved his decision on the motion. He failed to ask the father if he had rested, and closed the hearing despite the father's immediate objection that he had not yet presented his case.

Matter of Porter v D'Adamo, 113 AD3d 908 (3d Dept 2014)

Son Not Required to Attend SUNY School in Order for Father to Contribute Towards His College Expenses

Parties' separation agreement, which was incorporated but not merged into their divorce decree, included specific child support provisions. Thereafter, both filed support modification petitions in Family Court, contesting, among other things, a provision in their agreement concerning the child's college expenses. The father argued the parties had agreed to a cap provision where each parent was required to contribute to the son's undergraduate college costs, in an amount not to exceed half of the cost of tuition, room and board charged at a SUNY college, and the child was required to apply "to said college or university" for all possible grants, scholarships and financial aid. He argued since the son had applied for and received financial aid from a private college and not a SUNY institution, he did not have to contribute anything towards the son's college expenses. Family Court disagreed with the father's argument and the Appellate Division affirmed. As with any contract, it was necessary to infer the parties' intent when the agreement was drafted and any ambiguity in the contract had to include a consideration of what could be reasonably implied from the literal language. Both parties "expected and desired" the son to pursue higher education and it was reasonable to infer they intended to support this goal by making it as affordable for him as possible. Furthermore, the agreement did not specifically require the son to attend or apply for admission to a SUNY school, and thus the son's financial aid application to the college where he enrolled was sufficient to trigger the father's contractual obligation to contribute to the son's expenses. The agreement was also ambiguous with regard to whether

the financial aid obtained by the son was to be applied to reduce the parties' contributions or to the son's remaining expenses. Based on the parties' intent, Family Court, among other things, properly reduced the father's obligation by the amount of the child's small one time outside scholarship award, but not by the four-year grant amount received directly from the private college. To do so would have negated any tuition obligation from the father and left the son with a substantial bill. However, Family Court erred when it subtracted loans obtained by the son from the amount to be contributed by the parties since the agreement neither mentioned loans nor required the son to obtain them. Since repayment of the loans would be the son's responsibility, the loans should not have been taken into account in calculating the parties' obligations.

Matter of Apjohn v Lubinski, 114 AD3d 1061 (3d Dept 2014)

Support Magistrate Correctly Found Mother Had Satisfied Arrears Obligation

The Support Magistrate correctly found the mother had satisfied her child support arrears obligation and Family Court properly dismissed the father's objections. The parties' settlement agreement, which included support provisions, was incorporated but not merged into their judgment of divorce. The agreement reflected the mother owed the father child support arrears of approximately $33,000, with one year of accrued interest at 14%. The mother made all payments in a timely manner and the father's claim the mother owed additional interest on the arrears was inconsistent with the clear and unambiguous language of the agreement.

Matter of Drake v Drake, 114 AD3d 1119 (3d Dept 2014)

Court Set Forth Adequate Reasons for Deviating from Presumptive Amount of Maintenance and Support

During the pendency of a matrimonial action, Supreme Court properly issued a temporary child support and maintenance order by continuing the father's support and maintenance obligation from a prior support order issued in 2000, which came to slightly over 10,000 per month, and adequately set forth the reasons for deviating from the presumptive amount of maintenance. The court acknowledged the father's presumptive obligation based on his earning history of $480,000, and also noted that three of the four children, for whom support was issued back in 2000, were now emancipated. Additionally, the father was providing other contributions to support the family and the mother was able to meet her reasonable expenses based on the amount of support issued in the prior order.

Matter of Jordan v Jordan, 114 AD3d 1129 (3d Dept 2014)

While Presumptive Amount of Support was Unjust, Amount of Support Reduced was Excessive

After a divorce trial, the father was awarded primary physical custody. However, since the father's income was twice that of the mother's, Supreme Court directed him to pay child support. On appeal, the Appellate Division reversed and remitted the matter. Supreme Court again reviewed the matter, calculated the mother's presumptive support amount, determined such amount would be unjust or inappropriate and directed the mother to pay support in the amount of $30 per week. The court ordered that the retroactive support owed by the mother should not include the nine-month period of time she was unemployed and seeking treatment for alcohol dependance. The Appellate Division modified the order. Given the parties' disparate financial situations, Supreme Court properly concluded the presumptive amount was unjust or inappropriate. However, the amount of support reduced was excessive and under the circumstances the mother's support obligation should have been $150 per week. Additionally, while the retroactive support amount properly considered the nine-month period when the mother was unemployed, the child support for that period should have been fixed at $25 per month pursuant to DRL §240 [1-b][d].

Smith v Smith, 116 Ad3d 1139 (3d Dept 2014)

Child Support Provisions in Judgment of Divorce Modified

Pursuant to a judgment of divorce, Supreme Court awarded defendant mother maintenance and child

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

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

Judgment of Divorce Modified With Regard to Child Support

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

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

COURTS

Family Court Erred in Directing Agency to Provide Information to CASA

During the pendency of a FCA §10-A matter, Family Court issued an order based on a motion by CASA, regarding CASA's access to information concerning the subject children. The Appellate Division found the court had correctly determined the agency could not prevent the children's foster parents from speaking to the CASA volunteer. However, Family Court's order requiring the agency to provide other information concerning the family to CASA, was error. CASA was not a party and thus not entitled to intervene as of right or by permission, nor did it have the right or capacity to make a motion seeking the relief awarded by Family Court. However, the Appellate Division determined CASA's court filings could be regarded as a report to the court and thus granted CASA, sua sponte, amicus curiae status on appeal. The Court noted although foster parents could not be prevented from communicating about the children with a CASA volunteer, they did have an ongoing duty to maintain the confidentiality of information concerning the children in their care and custody, where required by law. Here, certain aspects of Family Court's order required the agency to violate the statutory confidentiality protections afforded to foster care records and information and exposed it to liability for such disclosure. Family Court also failed to employ safeguards to limit the unnecessary disclosure of confidential information, and it exceeded its authority when it issued an unqualified directive that a CASA volunteer be allowed to attend all family service plan review meetings, and directed the agency to provide CASA with notice. While the rules contemplated a CASA volunteer's input with respect to the permanency plans for children and their families, service plan reviews often involved confidential information, such as medical and mental health information and reports of abuse and maltreatment, and CASA volunteers were not among those who had to be invited to attend. Additionally, there was no indication that the parents requested the presence of a CASA volunteer in this case. While reviews could occur without improper disclosure of confidential records, Family Court's unconditional order did not limit the CASA volunteer's access or attendance to non-confidential matters. The

court's order should have been issued only after a hearing, on notice to all interested persons, a finding should have been made as to the necessity for the CASA volunteer to attend all or certain service plan reviews, and adequate safeguards and limitations on attendance should have been crafted to minimize the unnecessary disclosure of confidential information. The court also lacked the authority to direct the agency to provide the CASA volunteer with the names of individuals and agencies providing mental health services to the children, subject only to the providers' own professional judgment as to what, if any, information regarding the children may be shared with CASA. Mental Hygiene Law § 33.13(c) prohibited the release of mental health records contained in foster care records except in limited circumstances, which were not present here. Family Court also erred in directing the agency not to discourage mental health or other service providers from speaking to the CASA volunteer about the children since this directive lacked parameters to protect confidential information.

Matter of Evan E., 114 AD3d 149 (3d Dept 2013)

CUSTODY AND VISITATION

Parent May Assert Legal Malpractice as Affirmative Defense to AFC's Fee Claim

Supreme Court, among other things, awarded plaintiff mother a cost of living increase in child support, directed defendant father to pay support arrears and add-on expenses, and granted the motion of the AFC to direct defendant to pay outstanding fees. The Appellate Division affirmed. A parent may assert legal malpractice as an affirmative defense to an AFC's fee claim in a domestic relations case because the AFC, no less than the parties' attorneys, was an advocate and must be equally accountable to professional standards. The fact that a parent who was unhappy with the result in a custody case may claim malpractice to avoid paying the AFC fees did not warrant completely immunizing AFC against the defense of legal malpractice. However, asserting such defense would not necessitate further evidentiary proceedings in every case. Here, no hearing was warranted because the father's accusations did not establish a prima facie case of malpractice and disciplinary violations. The court found that the AFC properly advocated the positions of the children and represented them zealously, competently and professionally. The court did not abuse its discretion in modifying the visitation schedule. In modifying the visitation schedule, which the court stated it would revisit, the court properly considered the children's schedule, including extracurricular activities in the neighboring state to which their mother relocated. The parties' agreement concerning cost of living increases was not vague and unenforceable.

Venecia V. v August V., 113 AD3d 122 (1st Dept 2014)

Award of Custody to Mother With Phased Visitation Plan Including Therapeutic Visitation to Father Affirmed

Supreme Court awarded defendant mother sole legal custody of the parties' child and ordered that plaintiff father spend time with the child in accordance with a schedule that included therapeutic visitation. The Appellate Division affirmed. The record supported the court's findings that the parties' acrimonious relation precluded joint custody and that the mother is better able than the father to meet the emotional and intellectual needs of the child, including a positive relationship with the father. The court fully explored the issue of the mother's mental health and noted that she had addressed her past difficulties. Also, there was no evidence that the mother's past mental health issues affected her parenting abilities. The father's focus on his conflict with the mother caused him to cease visitation with the child. The requirement of therapeutic visitation was the court's well-considered response to the fact that the transitions between the parties caused the child serious anxiety and the fact that the father had not been visiting the child in a consistent or stable manner. There was no basis to reopen the forensic evaluation. The court properly denied the father's request for a stay of the financial proceedings because any further delay could harm the child. The father's filing for bankruptcy did not operate as a stay of the instant proceeding.

Elkin v Labis, 113 AD3d 419 (1st Dept 2014)

Father Failed to Show Referee Was Biased

Family Court awarded custody of the parties' two children to respondent mother. The Appellate Division affirmed. Although the court should have analyzed the matter under the standard applicable to relocation matters, the record showed that, even under that standard, it was in the best interests of the children to remain in New Jersey with their mother. In seeking the Referee's recusal, the children's father failed to identify an actual ruling that showed bias. The father cited no authority to allow him, based upon an unsubstantiated claim of bias, to revoke his consent to a referee's hearing and determining the parties' custody petition.

Matter of Bay v Solla, 113 AD3d 482 (1st Dept 2014)

Cases Remitted For Court to Fashion Visitation Schedule

Family Court granted respondent father's petition for modification of custody and awarded him sole legal and physical custody of the child with visitation to respondent mother. The Appellate Division modified to the extent of remitting the matter to determine a visitation schedule. There was a sound and substantial basis for the determination that it was in the child's best interests to modify the prior joint custody order and award the father sole legal and physical custody. The parties were unable to reach a consensus on issues related to the child and the mother ignored the custody order's directive that she keep the father informed of all major issues regarding the child's health, education and welfare. When the child was in the mother's care he did not regularly attend school, was not picked up from school on time, and did not receive proper medical care. The father expressed his intention to allow the mother to have meaningful interaction and regular visitation with the child and had provided a stable and supportive home for the child and had met the child's academic and medical needs. The fact that the child expressed a desire to live with the mother was not determinative. The directive that the parties establish their own visitation schedule was untenable given their inability to communicate and, therefore, the court must establish a visitation schedule.

Matter of Michael B. v Dolores C., 113 AD3d 517 (1st Dept 2014)

Sole Custody to Mother in Child's Best Interests

Family Court awarded sole custody to petitioner father. The Appellate Division affirmed. The award of sole custody to the father was supported by a sound and substantial basis in the record, notwithstanding the father's reportedly troubled past. Since the child was placed in the father's care after being removed from the mother's care following a finding of neglect, he had taken good care of the child without incident and has provided her with a safe, loving, and stable home. The father demonstrated an ability to place the child's feelings above his own, by making the child available for visits and maintaining phone contact with the mother following the suspension of visitation. The record showed that the mother continued to behave erratically, inappropriately, and unpredictably in the presence of the child and acted out, leading to an order limiting her supervised visitation with the child. The court properly credited the testimony of the expert psychiatrist, who opined that the mother had a mood disorder with paranoid and narcissistic features and that it would be detrimental for the child to observe the mother's behavior.

Matter of Kenneth H. v Fay F., 113 AD3d 542 (1st Dept 2014)

Award of Attorney's Fee Reduced

Family Court, without a hearing, awarded respondent father attorney's fees from petitioner mother in the amount of $37,649.97. The Appellate Division modified by reducing the award of attorney's fees to $12,550. In a prior order, the Appellate Division concluded that the father was entitled to an award of attorney's fee, pursuant to the parties' stipulation requiring the mother, as the party breaching the stipulation, to indemnify the father for all reasonable costs and expenses, including an award of attorneys fees. The court's award of $37,649.97, however, included fees for opposing the mother's cross petition to relocate with the parties' child and pursuing his own petition for custody of the child. An award of $12,550 would sufficiently indemnify the father for his attorney's fees incurred by the mother's breach of the stipulation by relocating with the child prior to seeking court approval.

Matter of Wilson v Kilkenny, 113 AD3d 623 (1st Dept 2014)

Court Erred in Granting Sole Custody of Child to Mother

Family Court awarded petitioner mother sole legal custody of the parties' child. The Appellate Division reversed, and awarded the parties joint custody, with petitioner having primary physical custody. It was in the best interests of the children for the parties to have joint legal custody. As the referee noted, sharing physical custody was not feasible because the parties resided in different boroughs, and the child was starting school. However, there was no evidence that the parties' relationship was characterized by acrimony or mistrust. The parties were able to resolve custody and visitation disputes between themselves and they appeared to be in accord with respect to the child's best interests, despite their failure to communicate directly. Respondent father should not be deprived of a decision-making role in the child's life because he was unable to care for the child full time. He had a strong interest and played an active role in the child's life, including aggressively seeking out necessary services to foster the child's development and arranging for child care while he worked. Although his testimony may have painted an unfairly negative picture of petitioner, there was no evidence that he disparaged her in the presence of the child and the record showed that his concern for the child's welfare was paramount.

Matter of Johanys M. v Eddy A., 115 AD3d 460 (1st Dept 2014)

Award of Legal And Physical Custody of Child to Father Had Sound And Substantial Basis

Family Court awarded custody of the parties' child to petitioner father. The Appellate Division affirmed. The court properly considered all relevant factors before concluding that the child should remain with the father. The father had been employed for the last 12 years and had stable housing, whereas the mother had been in and out of prison with a pending criminal matter at the time of the hearing, no income except welfare and babysitting, and did not have stable housing. The father understood the child's special needs, whereas the mother testified that she might have to remove the child from the special education program he had been enrolled in by the father and where he was thriving. Although the mother contended that the father's weight issues prevented him from properly caring for the child, there was no evidence in the record that he was physically unable to work or properly care for the child.

Matter of Raymond A. v Lisa M H., 115 AD3d 553 (1st Dept 2014)

Mother Failed to Make Evidentiary Showing Sufficient to Warrant Hearing

Supreme Court denied defendant mother's cross motion for an order of protection, to adjudicate plaintiff father in contempt, to modify custody, to appoint an AFC and forensic evaluator, and for counsel fees. The Appellate Division affirmed. Because the mother failed to show that the father violated an unequivocal mandate or that she was prejudiced, a finding of contempt was not warranted. The language in the parties' agreement about their obligation to foster a feeling of affection between the children and the other parent did not clearly prohibit the parties from disparaging each other in emails. While the father was to provide his credit card to certain medical providers, the provision setting forth this requirement did not contain a deadline, and therefore did not constitute a clear and unequivocal mandate. The mother failed to make an evidentiary showing sufficient to warrant a hearing on her custody modification request. The fact that the parties had different views on education or extracurricular activities did not mean that they could not co-parent. The parties anticipated such disagreements and provided for a procedure to deal with them in their stipulation of settlement. The fact that the father was living outside the country was also anticipated in the parties' agreement. Because a hearing on custody was not warranted, the court properly denied the mother's requests for a forensic evaluator and appointment of an AFC. The court properly granted the mother's request for an order of protection only to the extent of allowing her to request a hearing when the father returns to New York. The court properly denied the mother's request for attorney fees.

Monaco v Monaco, 116 AD3d 452 (1st Dept 2014)

Proposed Relocation in Child's Best Interests

Family Court granted mother's petition to relocate from Bronx County to Florida with the parties' child. The Appellate Division affirmed. The court's determination had a sound and substantial basis in the record. It considered all the relevant factors and properly concluded that the proposed relocation would serve the child's best interests. Although the four-year-old child had a loving relationship with both parents, petitioner had been the child's primary caregiver and had been responsible for the child's day-to-day routine and financial support for the past 2 ½ years. Petitioner showed that the move to Florida would improve the child's quality of life. Further, both petitioner and her husband were committed to fostering a relationship between the child and respondent father. Although the relocation would have an impact on respondent's ability to spend time with the child, the liberal visitation schedule would allow for respondent and the child to continue to have a meaningful relationship.

Matter of Karen Michelle F. v Wilfredo C., 116 AD3d 561 (1st Dept 2014)

Father's Living Situation and Employment Were Considerably More Stable than That of the Mother

Upon reviewing the record, the Appellate Division found that there was a sound and substantial basis for the Family Court's determination that it was in the best interest of the parties' children for the father to have sole custody of them, based on, inter alia, the unrefuted evidence that his living situation and employment were considerably more stable than that of the mother. While the attorney for the children took the position that the mother should have been granted sole custody, this position was but one factor for the court to have considered, and could not be permitted to usurp the judgment of the trial judge.

Matter of Mitchell v Mitchell, 113 AD3d 775 (2d Dept 2014)

Child's Attendance at Religious School Could Not Be Considered an Activity Within Meaning of Stipulation of Settlement

The parties' stipulation of settlement provided, inter alia, that the children would be raised in the Jewish faith, including, without limitation, attending religious school. While the stipulation of settlement also stated that neither parent shall enroll the children in an activity during the other parent's scheduled access time without the consent of the other parent, that provision related to "Extracurricular Activities/Summer Camp." In interpreting the stipulation of settlement in a manner so as to give full meaning and effect to its material terms, contrary to the father's contention, the subject child's attendance at religious school cannot be considered an activity within the meaning of the stipulation of settlement. Accordingly, the Family Court, in effect, properly granted the mother's petition for enforcement of the parties' stipulation of settlement to the extent of directing that the subject child "shall attend Hebrew School."

Matter of Grill v Genitrini, 113 AD3d 767 (2d Dept 2014)

Holiday and Vacation Schedule Was Ambiguous and Unworkable

While the Appellate Division agreed with the Supreme Court that the parties should have shared holidays and vacations with their children equally, the schedule created by the Supreme Court was ambiguous and unworkable. Additionally, the schedule unrealistically required the parties to cooperate in coordinating their respective parenting time during the children's summer vacations. Accordingly, the matter was remitted to the Supreme Court to set forth a new schedule of holiday and vacation visitation that was in the best interests of the children.

Gillis v Gillis, 113 AD3d 813 (2d Dept 2014)

Petition to Relocate to Arizona Denied

The evidence presented by the mother failed to establish, prima facie, that her proposal to relocate to Arizona with the subject children was in their best interest. She failed to provide sufficient proof that the move would enhance the children's lives economically. The mother, an unemployed educator, testified that she had received a job offer in Arizona, contingent on her obtaining reciprocal certification. She, however, did not testify about what salary she expected to earn. Further,

the mother's second husband, who had a secure job in New York earning between $60,000 and $80,000, annually, did not have a job waiting for him in Arizona. The mother also provided no evidence that the lives of the subject children would be enhanced emotionally by the move. There was no testimony regarding how the children felt about the proposed move, in terms of how they believed it would affect their relationship with their father or any of their friends. Also, there was no evidence as to whether the subject children even desired to move.

Matter of Christy v Christy, 113 AD3d 848 (2d Dept 2014)

Petition Sufficiently Alleged a Change in Circumstances

The mother's petition to modify an order of custody sufficiently alleged a change in circumstances. Accordingly, the Family Court erred in dismissing the petition for failure to state a cause of action. The mother's allegations as to the subject child's alarming behavior after the underlying custody agreement went into effect warranted a hearing as to whether the best interests of the child required a change in custody. The order was reversed and the matter was remitted for a hearing on the mother's petition and a determination as to the best interests of the child.

Matter of Lore v Sclafani, 114 AD3d 685 (2d Dept 2014)

Mother's Request for Leave to Move with the Children to New Rochelle Should Not Have Been Denied

The Family Court's determination that the subject children's best interests would not have been served by relocating to New Rochelle was not supported by a sound and substantial basis in the record. Although the Family Court was properly concerned about the impact that the move would have on the father's relationship with the subject children, the record demonstrated that the relocation to New Rochelle would not "deprive the father of regular and meaningful access" to the children. Furthermore, although the relocation may not have been an economic necessity, it was necessary for the mother to obtain a new residence after she was unable to negotiate an acceptable renewal of her lease at her previous residence, and her considerations as to where to move were valid and not based on animus. Under the circumstances of this case, the mother's request for leave to move with the children to New Rochelle should not have been denied.

Matter of Caruso v Cruz, 114 AD3d 769 (2d Dept 2014)

Mother Made Repeated and Unfounded Allegations of Sexual Abuse Against the Father

Contrary to the mother's contentions, the Family Court's determination to modify the parties' custody agreement by awarding sole legal and physical custody to the father had a sound and substantial basis in the record. The mother's repeated and unfounded allegations of sexual abuse against the father constituted "conduct so inconsistent with the best interests of the child as to per se raise a strong probability that she is unfit to act as a custodial parent".

Matter of Dezil v Garlick, 114 AD3d 773 (2d Dept 2014)

Grandmother's Applications for Adjournment and/or to Appear Telephonically Denied

On June 21, 2-12, after several appearances, conferences, and adjournments, the grandmother's petitions for grandparent visitation were scheduled for a fact-finding hearing on August 29, 2012. The grandmother, who lived in Florida and was present in court on June 21, 2012, indicated that she could not come back to New York on August 29, 2012, and requested that she be allowed to appear at the hearing by telephone. The Family Court denied the application, and told the grandmother that she could either withdraw her petitions immediately, without prejudice, and re-file them at a later date, or appear in court for the fact-finding hearing on August 29, 2012. The grandmother did not withdraw the petitions, and did not appear in court on August 29, 2012. Her attorney did appear, informed the court that the grandmother had injured her wrist and therefore could not travel because she used a walker, and requested an adjournment. The court denied the attorney's application and dismissed the grandmother's petitions, with prejudice, based upon a

finding that the grandmother failed to prosecute the case. A party may not appeal from an order or judgment entered upon his or her default (*see* CPLR 5511). The proper procedure in such instance is to move to vacate the default and, if necessary, appeal from the denial of the motion to vacate (*see* CPLR 5015 [a] [1]). An order entered upon the default of the appealing party, however, brings up for review those matters which were the subject of contest. Since the order appealed from was entered upon the grandmother's default, review by the Appellate Division was limited to those matters which were the subject of contest in the Family Court, namely the denial of the grandmother's application to appear in the proceeding by telephone and the denial of the request made by the grandmother's counsel for an adjournment. The granting of an adjournment rests in the sound discretion of the hearing court upon a balanced consideration of all relevant factors. Here, the Appellate Division found that the Family Court did not improvidently exercise its discretion in denying the application made by the grandmother's attorney for an adjournment. Nor did the court improvidently exercise its discretion in denying the grandmother's request to appear in the proceeding telephonically.

Matter of Sacks v Abraham, 114 AD3d 799 (2d Dept 2014)

Plaintiff Demonstrated Changed Circumstance; Awarded Sole Custody of Parties' Child

On December 3, 2010, the plaintiff, who, despite having a liberal visitation schedule, had seen the child only for one three-week visit in August and a 10–minute visit in November, filed an emergency motion seeking a change in custody. The defendant cross-moved for sole custody of the child and to modify provisions of the judgment of divorce so as to limit the plaintiff's visitation. After a hearing, the Supreme Court granted the plaintiff's motion, and awarded him sole custody on the basis that the defendant had failed to comply with the visitation provisions of the parties' stipulation of settlement, and denied the defendant's cross motion. The defendant appealed. The Appellate Division found that the plaintiff demonstrated changed circumstances in that the defendant not only failed to take any responsibility for transporting the child for the plaintiff's visitation, but also denied the plaintiff visitation on several occasions when he had traveled from New York to South Carolina at his sole expense to see the child. The defendant also denied the plaintiff other visitation to which he was entitled. The record therefore contained ample evidence to support the Supreme Court's conclusion that the parties could not effectively co-parent and that awarding sole custody to the plaintiff was the only way to ensure the child an ongoing relationship with both parents.

Alvarez v Alvarez, 114 AD3d 889 (2d Dept 2014)

California Was the More Appropriate Forum to Determine Custody and Visitation

Upon reviewing the record, the Appellate Division agreed with the Family Court that the State of California was the more appropriate forum to determine any custody and visitation matters affecting the parties' child. The subject child had lived in California since August 2011 with the permission of the defendant, who maintains a residence in Utah. The record provided a substantial basis for the Family Court's finding that the evidence regarding the child's care, well being, and personal relationships was more readily available in California. There was no evidence that the child retained substantial connections with New York or that significant evidence existed in this State. The Superior Court of Napa County, California was familiar with the family and the pending issues, and that court was willing to exercise jurisdiction. Additionally, an attorney for the child based in the same state as the child could far more effectively communicate with the child than an attorney across the country. Although the parties had previously agreed, in August 2011, that New York would retain jurisdiction of custody and visitation matters, that agreement was outweighed by the other relevant factors. Accordingly, the Family Court providently exercised its discretion in concluding that the State of California was the more appropriate and convenient forum to determine the matters of custody and visitation (*see* DRL § 76-f).

Matter of Greenfield v Greenfield, 115 AD3d 645 (2d Dept 2014)

Record Was No Longer Sufficient to Determine Children's Best Interests Due to Significant Change in Circumstances

The children's great aunt appealed from an order of the Family Court which dismissed her petitions for custody of the children. In light of the highly significant new development as to the subject children's removal from the preadoptive foster family with which they had spent three years, the record was no longer sufficient to determine which arrangement was in the best interests of the subject children. Accordingly, the Appellate Division reversed the order and remitted the matter remitted to the Family Court for a new, expedited hearing and a new, expedited determination of the aunt's petitions.

Matter of Leona B. v Keona E., 115 AD3d 665 (2d Dept 2014)

Award of Sole Legal and Residential Custody to the Father Was in the Best Interests of the Child

The father sought to modify a prior order of custody, alleging, inter alia, that the child was having behavioral problems in school and was being suspended often, and that the mother was not adequately dealing with the problems and was allowing the child to be absent from school. After a hearing, the Family Court granted the petition and awarded sole legal and residential custody to the father. Here, there was a change in circumstances such that a modification was required to protect the best interests of the child. The Family Court's determination as to the best interests of the child, made after a hearing in which the court heard testimony from the parties, the child's paternal grandmother, the forensic evaluator, a child protective specialist from the Administration for Children's Services, and school personnel, had a sound and substantial basis in the record.

Matter of Mack v Kass, 115 AD3d 748 (2d Dept 2014)

Family Court Erred in Conditioning Father's Visitation upon Enrollment in a Random Drug Testing Program

The Appellate Division found the Family Court's determination that the subject child's best interests would be served by an award of sole legal and physical custody to the mother had a sound and substantial basis in the record. However, the Family Court erred in conditioning the father's visitation upon his enrollment in a random drug testing program at a medical facility, and should have instead directed the father to enroll in such a program as a component of visitation. Moreover, by authorizing the mother to suspend visitation upon the father's failure to provide proof of his prescription, the Family Court improperly delegated its responsibility to determine whether and when visitation rights should be suspended. The Appellate Division noted that directing the father to enroll in a random drug testing program at a medical facility did not improperly make the ordered treatment a prerequisite to his access to the child, and the Family Court retained the responsibility to supervise and enforce this therapeutic component of its visitation order.

Matter of Welch v Taylor, 115 AD3d 754 (2d Dept 2014)

A Natural Parent Has Standing to Seek Legal Custody of His or Her Child

The Family Court erred in dismissing the petition in which the mother sought orders of custody for her two teenaged children. A natural parent has standing to seek legal custody of his or her child (*see* DRL § 70 [a]; FCA § 511). The petitioner mother expressed to the Family Court that the children's father had abandoned the children and, due to their immigration status, they were at risk of being returned to El Salvador where they had been subjected to abuse by family members and threats by gang members. The petitioner mother alleged that awarding her custody would have been in the best interests of the children, since it would have enabled the children to apply for special immigrant juvenile status pursuant to 8 USC § 1101 (a) (27) (J). Accordingly, since the Family Court dismissed the subject petition without conducting a hearing or considering the best interests of the children, the Appellate Division remitted the matter to the Family Court for a hearing and a new determination of the custody petition thereafter.

Matter of Sanchez v Bonilla, 115 AD3d 868 (2d Dept 2014)

Award of Joint Legal Custody to Parties Not in the Best Interests of the Child

Joint custody is appropriate between "relatively stable, amicable parents behaving in mature civilized fashion". Here, given the nature of the parties' relationship and their inability to put aside their differences for the good of the child, joint legal custody could only "enhance familial chaos". Thus, contrary to the Supreme Court's determination, under the circumstances of this case, an award of sole legal custody to the plaintiff was the best interests of the child. The provision of the order providing that each parent shall have full and unimpeded access to the child's school and medical information, as well as contact with teachers, caregivers, and providers, and treating physicians and therapists, remained in effect.

Irizzary v Irizzary, 115 AD3d 913 (2d Dept 2014)

Award of Sole Custody to the Father Was in the Best Interests of the Child

Upon reviewing the record, the Appellate Division found that the Family Court's determination that it was in the child's best interests to award sole custody to the father had a sound and substantial basis in the record. As to the mother's claim that the Court Attorney Referee lacked the authority to hear and determine the petition, there was no merit to this argument since the record revealed that the parties executed a stipulation consenting to such a reference (*see* CPLR 4317 [a]). Further, the Family Court did not improvidently exercise its discretion in admitting the testimony of the father's expert. Contrary to the mother's contention, the expert's testimony was "based on facts in the record and his own analysis, not speculation".

Matter of Islam v Lee, 115 AD3d 952 (2d Dept 2014)

Error in Neglect Proceeding to Award Final Order of Custody to Father, Who Did Not Petition for Custody

The Family Court's "final order of custody," awarding custody of the subject children to the father, who did not petition for custody, was an unauthorized disposition of the neglect proceedings commenced pursuant to Family Court Act article 10 (*see* FCA §§ 1052, 1061). Thus, the Appellate Division found that the Family Court erred in denying the mother's motion to vacate that order. The matter was remitted to the Family Court for further proceedings, which, the Appellate Division noted should include a dispositional hearing and determination thereafter of the neglect proceedings and, if custody petitions are filed, hearings relating to those petitions.

Matter of Kenneth S., 115 AD3d 961 (2d Dept 2014)

Mother Made Unfounded Allegations of Sexual Abuse Against the Father; Award of Sole Custody to the Father Was in the Child's Best Interests

The mother appealed from an order of the Family Court, which, after a hearing, granted the father's petition to modify the parties' stipulation of settlement so as to award him sole custody of the subject child. The Appellate Division found that the father established that there had been a sufficient change in circumstances since the time of the stipulation. Specifically, he demonstrated that the mother had interfered with his relationship with the child, such that a modification in the custody arrangement was in the best interests of the child. The mother's unfounded allegations of sexual abuse of a child that she made against the father were an act of interference with the parent-child relationship so inconsistent with the best interests of the child as to raise a strong probability that the mother is unfit to act as custodial parent. The mother's conduct demonstrated a purposeful placement of her self-interest above the interests of others. The record indicated that the father was more likely than the mother to foster a relationship between the child and the noncustodial parent. The mother's unfounded allegations of sexual abuse of a child, along with her other acts of interference in the relationship between the father and child since the stipulation, established a sound and substantial basis for the Family Court's determination that there had been a sufficient change in circumstances warranting a modification of the custody arrangement in the child's best interests.

Matter of Fargasch v Alves, 116 AD3d 774 (2d Dept 2014)

Mother Lacked Effort and Interest Regarding the Children's Schooling and Therapy

There was a sound and substantial basis for the Family Court's determination that it was in the best interests of the parties' children to award sole custody to the father. The record supported findings that the father's employment was considerably more stable than the mother's employment, the mother recently lacked effort and interest regarding the children's schooling and therapy, and the mother had a history of placing her own interests before the interests of the children. Moreover, the father was supportive of visitation between the children and the mother.

Matter of Norfleet v Williams, 116 AD3d 865 (2d Dept 2014)

Joint Decision-Making Authority Outside Spheres of Medical and Educational Needs Found Appropriate

Contrary to the mother's contention, the Family Court did not err in granting her cross petition for sole custody only to the extent that she "shall have sole medical and educational decision-making authority," for the subject child and in granting the father's petition for joint custody to the extent that "the parents will have joint decision-making authority with respect to all other custodial matters outside the spheres of medical and educational needs." Although it was evident that there was some antagonism between the parties, it was also apparent that both parties generally behaved appropriately with the child and in a relatively civilized fashion toward each other. Furthermore, there was no evidence that they were so hostile or antagonistic toward each other that they would have been unable to put aside their differences for the good of the child. Under these circumstances, the Family Court's determination has a sound and substantial basis in the record.

Matter of Thorpe v Homoet, 116 AD3d 962 (2d Dept 2014)

Hearing on Mother's Petition to Modify Custody Was Not Necessary

Here, the Family Court was familiar with the parties from a multitude of court appearances held over the course of several years. Before reaching its determination on the mother's application for a change in custody, the Family Court conducted an in camera interview of the then-13-year-old subject child, and reviewed a court-ordered investigative report prepared by the New York City Administration for Children's Services. Under these circumstances, the Family Court properly denied that branch of the mother's petition which was for a modification of custody without conducting a further hearing on the petition. Furthermore, the Family Court possessed adequate relevant information to enable it to make an informed and provident visitation determination without conducting a hearing. To the extent that the Family Court relied upon the in camera interview of the child, who was then 13 years old, it was entitled to place great weight on the wishes of the child, who was mature enough to express them.

Matter of O'Shea v Parker, 116 AD3d 1051 (2d Dept 2014)

Order Lacked a Sound and Substantial Basis in the Record

Subject child was adjudicated to be neglected and thereafter placed in the custody of the paternal grandmother. Family Court then issued an article 10 custody order, granting joint legal custody of the child to the grandmother and the parents, with primary, physical custody to the grandmother and weekly supervised visits to the mother. After expiration of the article 10 order, the mother filed an article 6 petition to modify visitation and requested weekly supervised visits. She also asked that her husband, whom she had recently married, be approved as an additional supervisor. Family Court modified the mother's visitation to a minimum of two hours once a month, and directed that such visitation be supervised by the grandmother, or any person the grandmother designated. The Appellate Division determined the court's order lacked a sound and substantial basis in the record. Visitation with the non-custodial parent is presumed to be in the child's best interests. Here, the mother presented proof she had improved her personal life, parenting skills and living situation. Family Court did not find her proof lacked credibility, but reduced her time with the child because the weekly visits were

inconvenient for the grandmother. Additionally, despite requests from the child's attorney, the court failed to hold a Lincoln hearing. Although whether to hold a Lincoln hearing was within the court's discretion, given the child's age and representations by others regarding the child's wishes, hearing from the child could have been useful to the court in determining the extent to which the mother's visitation would have been in the child's best interests. Finally, the court's denial of the mother's husband as a supervisor was not proper. The husband, although a citizen of another country, had been in the US since 2009, was pursuing a doctoral degree, had no plans to return to his native country and was willing to leave his passport on file with the court when acting as supervisor. Family Court's determination to disqualify the husband was based on the agency's failure to file an investigative report regarding the husband, although the husband had provided the agency with all the requested information. Moreover, the grandmother was allowed to designate anyone of her choosing, without asking for qualifications, to act as supervisor.

Matter of Angela F. v Gail WW., 113 AD3d 889 (3d Dept 2014)

Inadequate Record Results in Dismissal of Appeal

Pursuant to a FCA article 10 proceeding, the subject-newborn child was removed from his mother's care and placed with the agency. Thereafter, putative father was determined to be the child's biological and legal father, and he filed for custody of the child. The attorney for the child orally moved to dismiss the petition and the court granted his motion. The Appellate Division dismissed the father's appeal because the record was inadequate. It failed to include the transcript of the appearance before Family Court, and no other documentation was provided to show the basis for the motion or the basis for the court's decision.

Matter of Christopher RR. v St. Lawrence County Department of Social Services, 113 AD3d 899 (3d Dept 2014)

No Non-frivolous Issues Presented

Family Court dismissed the father's violation and modification of custody petitions. The Appellate Division determined his appeal from the modification order was rendered moot since the child was no longer a minor and thus not subject to the provisions of FCA article 6. Additionally, the Court determined there were no non-frivolous issues from that part of the violation order not rendered moot.

Matter of Collins v Brush, 113 AD3d 936 (3d Dept 2014)

Sound and Substantial Basis in the Record to Award Father Sole Custody

The mother of two children consented to a finding of neglect under an ACD due to her mental health issues, and the mother and the biological father of the younger child were awarded joint legal custody of both children. The order directed shared physical custody of older child, but physical custody of younger child was given to the mother with visitation to the father. Thereafter, the father filed modification and violation petitions and the mother filed modification and family offense petitions. Following fact-finding and Lincoln hearings, Family Court awarded custody of both children to the father with liberal visitation to the mother. The Appellate Division affirmed. There was a sound and substantial basis in the record to support the court's order. The breakdown in communication between the parties' demonstrated a change in circumstances. The record amply supported the court's finding that the children's best interests would be best served by awarding custody to the father. While in the mother 's custody, the older child, who was a special needs child, had done poorly in school. He was described in his school file as having behavioral problems, had frequent absences from school and consistently failed to complete his homework. Contrarily, while living with the father under a temporary order of custody, the older child, who had enrolled in another school, had excelled in school and had an excellent attendance record. He was also completing his schoolwork and earning honor roll status. During this time, the father had also enrolled the younger child in nursery school, which the mother had not even considered doing when the child was in her care. Additionally, the mother failed to comply with the terms of the ACD, which required her to seek and participate in mental health treatment.

Matter of Tod ZZ. v Paula ZZ., 113 AD3d 1005 (3d

Dept 2014)

No Need to Disturb Family Court's Conclusion

Family Court slightly modified a joint legal and physical custody order by ordering the child attend school in the district where the mother's lived. The Appellate Division affirmed. The child's commencement of kindergarten constituted a change in circumstances necessitating a modification of the order. The evidence showed both parties were loving parents. They were involved in the child's education and activities and the child would flourish in either school district. However, the court's decision was made after weighing the evidence presented and there was no reason to disturb its conclusion. In rendering its decision, the court considered all the relevant factors, including the stability and quality of each parent's respective environment, the ability of each parent to foster the child's intellectual and emotional development and the feasibility of maintaining equal parenting time for the parties.

Matter of Voland v Stalker, 113 AD3d 1010 (3d Dept 2014)

Father's Cannabis Dependance Results in Sole Custody to Mother

Family Court awarded the mother sole legal custody of the 2-year-old child with supervised visitation to the father. The Appellate Division affirmed. There was sound and substantial basis in the record to award sole custody to the mother and supervised visitation to the father. Among other things, the father admitted to smoking marijuana "once or twice a week" for many years, including times when he was caring for his own two daughters from a previous relationship. He stated "there's no telling" how much marijuana he would smoke on any one occasion. The father was diagnosed with "cannabis dependance", and although he agreed it was illegal to smoke marijuana and knew it could impair his ability to care for the children, he still did not understand that his routine drug use was a problem. Furthermore, the evidence showed the father had consumed alcohol and then driven a vehicle with his daughters as passengers, and he had failed to pick up the subject child from daycare because he had been drinking alcohol. The mother testified that at least on one occasion, the father come to her home with blood shot eyes and smelling of alcohol, to pick up the subject child. Although the mother had shortcomings, she was able to provide stability for the child and had been the primary caretaker since the child's birth. Additionally, the court did not abuse its discretion by failing to appoint an attorney for the child. Although appointing an attorney for the child in contested custody matters is preferred, in this case, the child was very young and the father failed to show "demonstrable prejudice" by the court's failure to appoint one.

Matter of Keen v Stephens, 114 AD3d 1029 (3d Dept 2014)

Father Showed Remarkable Lack of Judgment and Insight

After conducting a fact-finding and two Lincoln hearings with the older subject child, then aged 9, Supreme Court modified a joint legal and physical custody order and awarded the mother sole legal custody of the 9-and-6-year-old children, with parenting time to the father. The father and the attorney for the children appealed. The Appellate Division affirmed. The record overwhelming established there had been a change in circumstances since the prior order had been issued. The parents had an extremely hostile relationship, which resulted in frequent police intervention and were not able to effectively communicate with each other, disagreeing on nearly every significant aspect of their children's lives. There was sound and substantial basis in the record to award sole custody to the mother. While the parties were caring and concerned parents, both also acknowledged using corporal punishment on the children and both had weaknesses. The mother had a history of calling the police about innocuous marks on the children, and exercised questionable judgment. After separating from the father, she went to a domestic violence safe house yet continued to engage in sexual relations with him, but would not allow him to see the children. On the other hand, the father had contacted CPS on many occasions to report the mother's use of corporal punishment on the children, which had later been deemed unfounded. When the older child began acting out aggressively in school and expressed suicidal ideation, the mother alone took a proactive role in the child's medical and mental health needs while the father

was almost averse to engaging in such services. Furthermore, the father engaged in conduct meant to alienate the children from their mother. He berated her and called her derogatory names in their presence and continued to do so during the hearing. He would not give the mother information about the daycare the children were attending while in his care, and violated court orders by refusing to return the children to their mother's care during her parenting time. Moreover, he had left the state with the children to visit a female acquaintance without telling the mother. The father discussed court proceedings with the older child, brought the children to his attorney's office, without their attorney present, and was prepped for the court proceeding. By doing so, the father showed a "remarkable lack of judgment and insight into the enormous conflict" this inflicted on the children, especially the older child who was being treated for anxiety disorder directly due to his parents' dysfunctional relationship. Giving due deference to the trial court's credibility assessments, sole custody to the mother was in the children's best interests.

Matter of Virginia C. v Donald C., 114 AD3d 1032 (3d Dept 2014)

Lincoln Hearing Necessary in Order to Determine Whether Relocation in Children's Best Interests

Family Court denied the mother's petition to relocate with the children, reduced the father's parenting time with them and directed the mother to obtain mental health treatment for the children. The Appellate Division remitted the matter for a Lincoln hearing because without it, the record was insufficient to determine whether modification of the prior order was in the children's best interests. Here, the evidence showed the father had stopped seeing the children because they resisted any contact with him. There was also proof the move would have an adverse impact on the father's relationship with the children and his ability to visit them. However, despite repeated requests to the court by the mother and the attorney for the children for a Lincoln hearing with the then 9-and 13-year-old children, the court failed to hold one and the record was devoid of information regarding the basis for the children's animosity against their father.

Matter of Norback v Norback, 114 AD3d 1036 (3d Dept 2014)

Default Order of Custody to Mother Supported by a Sound and Substantial Basis in the Record

After a Lincoln and a default fact-finding hearing, Family Court awarded the mother custody and suspended the father's visitation rights until such time he petitioned for this relief. The Appellate Division affirmed. Family Court did not abuse its discretion in declining to adjourn the fact-finding hearing. The father had been provided written notice of the hearing date four-months earlier, advised that no oral requests for adjournment would be granted and given notice that his failure to appear would be treated as a default. The father had previously frustrated the efforts of counsel and court staff to resolve the matter promptly. By the time the hearing was held, the mother's custody petition had been pending for over eight months. The father's actions in failing to attend two consecutive court proceedings, together with the allegations that he had been wholly uninvolved in the children's lives, showed a pattern and the court's decision not to delay the hearing was not an abuse of discretion. Although visitation with a non-custodial parent is presumed to be in the children's best interests, here, the father had failed to avail himself of the opportunity to visit with his children and was a stranger to them. Although the mother, who was the sole caretaker of the children, had "left the door open" for the father to visit, he had only seen the children, then one and two-years old, briefly on two occasions during a four-year period, and had never provided child support. The mother no longer knew where the father resided or his current circumstances and was unwilling to have the children leave her home to visit him. She was also concerned about forcing the children to visit someone they did not know. The record showed the father had never petitioned for visitation and had failed to file a cross petition for custody. Furthermore, Family Court's order allowed the father to initiate contact with the children by petitioning for such relief. Upon a review of all the circumstances, the court's decision was based on a sound and substantial basis in the record.

Matter of Owens v Chamorro, 114 AD3d 1037 (3d Dept 2014)

Mother's Conduct Per Se Raised Strong Probability That She Was Unfit to Act as Custodial Parent

Family Court modified an order of joint legal custody by changing physical custody of the children from the mother to the father. The Appellate Division affirmed finding there was a sound and substantial basis in the record to support the decision. Due deference was given to the court's credibility determinations and the evidence showed the father had met his burden of showing there was a change in circumstances based on the mother's interference with the father's relationship with his children. Among other things, the mother had failed to immediately inform the father when the older child had been diagnosed with cancer, and she had failed to advise him that surgical treatment was required for the child. She also refused to sign authorizations allowing the father to speak with the son's doctors. The father had to seek a court order compelling her to do so. The mother limited the children's ability to communicate with their father via internet, and she listened in on conversations between the children and their father. She refused to be flexible about the father's visitation when the children's activities interfered with his visitation schedule. Additionally, both the 13- and 15-year-old subject children had openly expressed a preference to reside with their father. It was in the best interests of the children to change physical custody from the mother to the father. While both parents were loving and attentive to their sons' needs and could provide them with suitable homes, the mother's hostility towards the father had alienated the sons from her as well as interfered with the sons' relationship with their father. The mother's conduct, per se, raised a strong probability that she was unfit to act as custodial parent. Furthermore, the father would be more likely than the mother to support and nurture the children's relationship with the other parent. Although the move would require the children to leave the school district they had attended for 9 years, both children wished to do so and academic and athletic advantages were available to them in their father's school district.

Matter of Parchinsky v Parchinsky, 114 AD3d 1040 (3d Dept 2014)

Mother's Escalating Problems With Alcohol Coupled With Her Arrest and Indicated CPS Reports Sufficient to Find Change in Circumstances, but Insufficient Information to Make Best Interests Determination

Parents of three children stipulated to joint legal custody of the youngest child and equal parenting time. This agreement was incorporated into their divorce decree. Thereafter, the father filed to modify custody. After fact-finding and Lincoln hearings, Supreme Court dismissed the father's petition finding he had failed to show a change in circumstances. The Appellate Division reversed. The record showed after the stipulation had been issued, the mother had become involved in a domestic violence incident with her boyfriend, and was arrested for DWI while trying to leave the boyfriend. An indicated report had been issued against her. Thereafter, the mother, who worked for a cleaning service, became severely intoxicated while cleaning the residence of one of her clients and fell down the stairs. The subject child had accompanied the mother to work and managed to take the mother's car keys and called the father for help. The police were contacted and the mother was charged with endangering the welfare of a minor. Another indicated report was filed against her. Although the father was aware of the mother 's issues with alcohol when the parties entered into the stipulation, evidence of the mother's continuing and escalating problems with alcohol along with her arrest and the indicated child protective reports, were sufficient to constitute a change in circumstances. However, since the court's record was not sufficiently developed to make a determination regarding custody based on the child's best interests, the matter was remitted on this issue.

Matter or Kiernan v Kiernan, 114 AD3d 1045 (3d Dept 2014)

Court Improperly Delegated Its Authority to Determine Father's Parenting Time

Pursuant to FCA article 10 proceedings, the children were removed from their mother's care and placed in the care of the agency, with physical residence of the children granted to the paternal grandmother. Thereafter, the parents were found to have neglected the children, and custody of the children continued with

the agency at the home of the grandmother. Some months later, the grandmother filed for custody. All parties except the father were present at the hearing date although the father's attorney was present. Family Court determined the father had, among other things, "defaulted" and issued an order of joint legal custody between all three parties, with primary, physical custody to the grandmother. The father was given supervised parenting time as agreed upon by the father and the grandmother. The conditions of supervision were to be set by the grandmother. The Appellate Division determined the court did not abuse its discretion by going forward with the hearing. The father was competently represented by counsel, he had appeared at the court proceeding prior to the hearing and was aware of the trial date. The father had a history of nonappearance and failed to offer a good excuse for failing to appear. Additionally, there were extraordinary circumstances present and it was in the children's best interests to live with their grandmother. The children had not resided with their father for more than two-and-one-half years, and during that time he had only visited them sporadically. He did not participate in their medical care or schooling and did not support them financially. However, Family Court improperly delegated its authority regarding visitation to the grandmother. It was the court's responsibility to determine frequency of visitation to the father based on the children's best interests.

Matter of Aida B. v Alfredo C., 114 AD3d 1046 (3d Dept 2014)

Sound and Substantial Basis in the Record to Award Sole Legal Custody to Mother and Supervised Parenting Time to Father

Family Court modified an order of joint legal custody with primary, physical custody to the mother and parenting time to the father, to sole legal custody to the mother and supervised parenting time to the father. The Appellate Division affirmed. The parties agreed there had been a change in circumstances since the last order had been issued. The manifestation of the father's psychological issues, his move to Georgia and his diagnosis of schizophrenia supported this finding. There was a sound and substantial basis in the record to award the mother sole custody. Although the court's application of a negative inference, due to the father's failure to call his treating psychiatrist as a witness, was error, such error was harmless since there was other, sufficient evidence to support the finding. The mother testified the father had tried to commit suicide by attempting to stab himself and by spraying chemicals into his mouth. He had also tried to hang himself in the presence of their then two-year old child, who had screamed and cried upon witnessing the father's actions. The mother also testified the father had threatened her for trying to modify his visitation rights. Additionally, the father had a long history of alcohol abuse, which in combination with his mental health issues, raised concerns for the child's safety if left alone in the father's care. Furthermore, the father failed to acknowledge or address his problem with alcohol and continued to drink alcoholic beverages.

Matter of LaRussa v Williams, 114 AD3d 1052 (3d Dept 2013)

Relocation Not in the Child's Best Interests

Family Court properly dismissed the mother's custody modification petition seeking to relocate with the child to Oklahoma. The mother did not meet her burden of establishing the move would substantially enhance the child's economic, emotional or educational well-being. The mother's impetus for the move was her recent marriage and pregnancy with her husband's child. The husband's family, including his daughter from a previous relationship, resided in Oklahoma. While the mother argued the move would allow her to earn $9.00 an hour as opposed to the $8.50 she earned in New York and her husband, who was working at a local grocery store, would be able to earn several hundred dollars each week as a flooring contractor in Oklahoma, no evidence was provided regarding the husband's current wages, his efforts to find suitable employment in this State or his wage-earning capacity in Oklahoma. Although the mother stated she was enrolled in nursing school and nurses make "good money" in Oklahoma, she agreed it would take longer for her to complete her nursing course in Oklahoma than New York because she would have to repeat certain courses if she moved. Additionally, the mother failed to show the child would benefit educationally from the move. The father, who had undergone brain surgery prior to the child's birth, was unable to drive and suffered from various disabilities. The mother had provided the necessary

transportation for visitation purposes until she began her relationship with her husband. Thereafter, despite the child's requests to see his father, the child and father had not seen each other for five months and the father was unable to obtain other means of transport. The move to Oklahoma would significantly impair the father's ability to spend time with the child, especially given the distance, the father's disabilities and his limited financial resources.

Matter of Stetson v Feringa, 114 AD3d 1089 (3d Dept 2014)

Since No Appeal Was Filed by Attorney for the Child, Her Arguments Were Not Properly Before the Court

Family Court modified an order of custody. The Appellate Division affirmed. The father appealed but later withdrew his appeal stating he was satisfied with the court's order. Although the attorney for the child sought to have the court order reviewed, she had not filed an appeal, therefore the arguments made on the child's behalf were dismissed.

Matter of Valmas-Mann v Loewenguth, 114 AD3d 1091 (3d Dept 2014)

Error to Modify Visitation Without First Holding an Evidentiary Hearing

Family Court erred in modifying the father's visitation schedule without first holding a hearing since such a determination can only be made upon a showing of a change in circumstances reflecting a genuine need for the modification in order to ensure the child's best interests. Although the allegations in the mother's petition set forth sufficient facts which if true, could afford a basis for modification, an evidentiary hearing should have been held.

Matter of Moore v Palmatier, 115 AD3d 1069 (3d Dept 2014)

Sound and Substantial Basis to Modify Custody from Joint to Sole

Parents of three children shared joint legal and physical custody. Thereafter, both filed several petitions to modify and the father also alleged the mother had violated several provisions of the custody order. After a hearing, Family Court modified the order and awarded sole custody of the children to the mother. The Appellate Division affirmed. The court's decision was supported by a sound and substantial basis in the record. The parties' antagonistic and uncivil relationship made joint custody unworkable. The record showed the mother could provide the children with more stability. She rented a home from her parents, was employed and the maternal grandparents were able to care for the children while she worked. On the other hand, the father's home was described by a sergeant from the Sheriff's Department as being " a disgusting mess" with "garbage everywhere" and "absolutely not" safe for children. Additionally, while in the father's care, the parties' 3-year-old child was found wandering in the parking lot at 2:00 a.m. outside the apartment building where the father's girlfriend resided, while the father and the girlfriend were asleep inside.

Matter of Sonley v Sonley, 115 AD3d 1071 (3d Dept 2014)

Mere Fact that Incarcerated Father Had Moved to Facility Closer to Where Child Lived Insufficient to Support Visitation Modification

After fact-finding and Lincoln hearings, Family Court dismissed incarcerated father's petition to modify visitation. The Appellate Division affirmed. The father, who had been provided phone and written communication with the child in the prior order, sought to have the child visit him at his facility since he had been moved to a correctional facility closer to the child's residence. Although visitation with a non-custodial parent is presumed to be in the child's best interests, relocation to a closer facility alone was insufficient to support modification where as in this case, the father had failed to maintain contact with the child to the extent provided in the prior order and his relationship with the child had not changed since the prior order had been issued.

Matter of Ruple v Cullen, 115 AD3d 1123 (3d Dept 2014)

Court Went Beyond Mere Clarification by Issuing "No Contact" Provision Between Father's Paramour and Child

Due to the parties' acrimonious relationship, Family Court awarded the mother sole custody and provided the father with parenting time. Thereafter, both parties filed modification petitions and the mother also filed a violation petition. After a hearing, the court dismissed all petitions but issued an order directing no contact between the father's paramour and the child. The Appellate Division agreed the parties had failed to show a change in circumstances and gave due deference to Family Court's credibility determinations. However, it determined that Family Court, in attempting to clarify a provision in the prior order relating to contact between the child and the father's paramour, had gone beyond mere clarification by issuing a "no contact" provision between the father's paramour and the child. Since the court determined there had been no change of circumstances, it did not have the basis to modify.

Matter of Barbara L. v Robert M., 116 AD3d 1101 (3d Dept 2014)

Children's Desire to Relocate is Not Determinative, But a Factor to Consider

Family Court denied the mother's petition to relocate with the children. The attorney for the child appealed and the Appellate Division affirmed, finding there was a sound and substantial basis in the record for the court's decision. The mother was the only witness to testify in support of her petition. Her primary reason for moving was to be closer to family members. However, the evidence showed the home the mother had rented in anticipation of the move was smaller than her current home and her economic situation would not improve since she would continue to work at the same job but would have a much longer commute of 1 ½ hours each way. Although the mother stated she would be able to work from home two days per week, this was unsupported by evidence. Additionally, while the mother stated she would continue to drive the children to and from weekend visitation with their father, she failed to show how this additional travel time would not negatively impact on her time with the children or her finances. Furthermore, no evidence was presented to indicate the proposed new school would be more advantageous to the children than their current school, and while the children wanted to relocate, this factor alone was not determinative.

Matter of Bracy v Bracy, 116 AD3d 1172 (3d Dept 2014)

Sound and Substantial Basis in the Record to Award Sole Custody of Children to Aunt

After fact finding and Lincoln hearings, Family Court modified an order of custody and awarded sole legal custody of two children to their aunt who, based on the previous order, already had physical custody of the older child. The Appellate Division affirmed. Although Family Court failed to make an extraordinary circumstances finding, the record was sufficiently developed to allow the Appellate Division to make an independent determination. The older had lived with the aunt for approximately four years. The younger child had lived with the aunt for almost one year, briefly returned to the mother, then resumed living with the aunt. The mother had health issues which significantly limited her ability to care for the children. She inappropriately relied on the children to assist her with personal and health needs as well as housekeeping duties, and caused stress to the younger child by discussing court proceedings with her and telling the younger child she needed her home because she was "dying". She was unable to adequately supervise the younger child who was getting into trouble at school, and during her hospitalizations, she left the child with questionable individuals. The mother's home was unsanitary and when the younger child came to live with the aunt, she had ill fitting clothes and untreated dental issues. Based on this evidence, there was a sound and substantial basis in the record to find that it was in the children's best interests to award sole custody to the aunt.

Matter of Roth v Messina, 116 AD 3d 1257 (3d Dept 2014)

Award of Physical Residence to Father Had Sound and Substantial Basis

Family Court awarded the parties joint custody of their daughter with primary physical residence to petitioner father. The Appellate Division affirmed. Although

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

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

Dismissal of Former Foster Parents' Custody Petition Affirmed

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

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

Award of Sole Custody to Nonparent Affirmed

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

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

Dismissal of Petition to Modify Visitation Order Affirmed

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

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

Petition Reinstated Where Petitioner Denied Right to Counsel

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

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

Family Court Properly Denied Respondent's Request for Adjournment

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

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

AFCs Properly Substituted Judgment

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

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

Supreme Court Improperly Delegated Authority to Child's Counselor

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

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

Order Denying Permission to Relocate Affirmed

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

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

Award of Custody to Nonparent Affirmed

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

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

Appeal Mooted By New Order

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

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

FAMILY OFFENSE

Order Modified by Vacating Finding of Aggravated Harassment in The Second Degree

Family Court determined that respondent father committed the family offense of aggravated harassment in the second degree and stalking and directed him to stay away from her and not communicate with her. The Appellate Division modified by vacating the finding of aggravated harassment in the second degree. The hearing testimony proved by a fair preponderance of the evidence that on the day of the incident, respondent's actions constituted the family offense of stalking in the fourth degree because his behavior was designed to hound, intimidate and threaten petitioner. The issuance of a two-year order of protection with the reasonable condition that he stay away from petitioner's home and employment was proper because it would likely be helpful in eradicating the root of the family disturbance. Family Court Act § 1051 (b) did not apply here because that statute applied to article 10 of the Family Court Act, whereas this proceeding was filed pursuant to article 8. The court did not violate respondent's due process rights by suggesting to petitioner's counsel that she should make a motion to conform the pleadings to the proof, because it had the authority, sua sponte, to deem the petition amended to conform to the evidence presented at the hearing. A fair preponderance of the evidence did not support the court's determination that respondent's actions constituted the family offense of aggravated harassment in the second degree.

Matter of Oksoon K.. v Young K., 115 AD3d 486 (1st Dept 2014)

Respondent Committed Family Offense of Harassment

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

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

JUVENILE DELINQUENCY

Petition to Extend Placement Was Timely

Family Court extended respondent's placement with petitioner OCFS for nine months. The Appellate Division affirmed. The court properly determined that the petition was timely. The petition was filed more than 60 days before the expiration of respondent's period of placement, as adjusted for the 24 days she was absent without authorization from her original nonsecure facility. The court also properly determined that even if the petition was not timely, OCFS established good cause for an untimely filing. Good cause was not based entirely upon events that occurred before the expiration of the period of placement, but instead, OCFS relied on its own evaluation of respondent and her behavior, made after she was transferred to OCFS custody. The petition was not barred by a prior unsuccessful extension petition filed by ACS. Regardless whether the two agencies should be considered to be in privity, the court had discretion to allow a renewed petition based upon additional information.

Matter of Diamond S., 113 AD3d 540 (1st Dept 2014)

Respondent's JD Finding And Dispositional Order Reversed

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 crime of forcible touching and sexual abuse in the third degree and placed him on probation for 12 months. The Appellate Division reversed, vacated the delinquency finding and dispositional order, and remitted to the court with a direction to order an ACD nunc pro tunc. At the time of the underlying occurrence, the complainant was 14 years old and respondent was 15 ½ years old. While they were walking home from school, respondent asked the complainant to kiss him and she refused. He persisted and she continued to refuse. At some point, respondent placed his hands on the complainant's shoulders, put her against a wall and lowered her blouse and bra. He then kissed her on the mouth two times, kissed her breasts two times, and kissed her on the neck once. The complainant told respondent to leave her alone, but respondent said he would not until she gave him a kiss. Respondent followed her into her residence and when they reached the complainant's floor, respondent grabbed her to kiss her and she bit his lips. She then left and respondent told her that was "how he liked women." At the hearing there was evidence that the complainant pursued the matter because her father made her do so. The probation department recommended ESP probation, but the presentment agency indicated it disagreed and that respondent needed only general supervision probation. An ACD, which could have been made subject to conditions, such as counseling and educational requirements, would have been the least restrictive dispositional alternative. This was respondent's first offense, he had an exemplary academic record, strong recommendations from school personnel and there was no indication that he had unsavory friends, school disciplinary problems, truancy, or poor grades. Rather, he had a strong social support record, an award for perfect school attendance, was a leader in sports, and upon his graduation from eighth grade, an assemblyman and senator awarded him a certificate of merit for academic achievement. Respondent participated in a sexual behavior program and expressed remorse for his actions. The dissent would have affirmed because the court, based upon the facts and circumstances as they existed at the time of the proceeding, properly concluded that probation was the least restrictive alternative. Respondent's statements and behavior suggested a more deep seated problem that the majority was willing to acknowledge.

Matter of Juan P., 114 AD3d 460 (1st Dept 2014)

Court Erred in Imposing Conditional Discharge; ACD Least Restrictive Alternative

Respondent was adjudicated a juvenile delinquent upon his admission that he committed the act of unlawful possession of a weapon by a person under 16, and imposed a conditional discharge for a period of 12 months. The Appellate Division reversed, vacated the delinquency finding and dispositional order, and remitted to the court with a direction to order an ACD nunc pro tunc. An ACD would sufficiently serve the needs of respondent and society. This was the 11-year-old respondent's first conflict with the law and he admitted his guilt of possessing a BB gun. He was enrolled in after school programs and, pursuant to an ACD, the court could have directed the probation department to monitor his school attendance and impose appropriate terms and conditions.

Matter of Eric M., 114 AD3d 489 (1st Dept 2014)

Juvenile Delinquency Adjudication Based on Legally Sufficient Evidence And Not Against Weight of Evidence

Family Court adjudicated respondent to be a juvenile delinquent based upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted criminal sexual act in the first and third degrees, attempted sexual abuse in the first degree, sexual abuse in the third degree, and forcible touching, and placed him on probation for a period of 12 months. The Appellate Division modified by vacating the findings of attempted criminal sexual act in the third degree and attempted sexual abuse in the first degree because they were lesser included offenses. The court's finding was based upon legally sufficient evidence and was not against the weight of the evidence. Probation was the least restrictive dispositional alternative. The underlying incident was a violent sexual attack, respondent was in

need of a treatment program that could not be completed within the six-month duration of an ACD, and there was little or no indication that respondent and his mother would voluntarily cooperate with treatment in the absence of court supervision.

Matter of Jose P., 115 AD3d 420 (1st Dept 2014)

Respondent's Moving Papers Insufficient to Justify *Dunaway* Hearing

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 criminal mischief in the fourth degree, and placed him on probation for 18 months. The Appellate Division affirmed. A *Dunaway* hearing, concerning the legality of respondent's arrest, was not required. Respondent's moving papers, when considered in the context of the information provided to respondent about the basis for his arrest, were insufficient to create a factual dispute. The petition and other documents clearly placed respondent on notice that the reason for his arrest was an alleged criminal mischief incident that occurred before the arrest. Respondent did not specifically deny the allegations or assert another basis for suppression. The record supported the court's finding that although the identification procedure was suggestive, the complainant had an independent basis for her in-court identification of respondent.

Matter of Sylvester W., 115 AD3d 622 (1st Dept 2014)

Respondent Lawfully Stopped and Detained as a Suspected Truant

The Family Court properly denied that branch of the respondent's omnibus motion which was to suppress physical evidence. The evidence presented at the suppression hearing established that there was a lawful basis to stop and detain the respondent as a suspected truant, and the officer's pat down of the book bag which the respondent was wearing was reasonable under the circumstances. The evidence further established that, as a result of the pat down, the officer was justified in searching the contents of the book bag. The Family Court also properly denied that branch of the respondent's omnibus motion which was to suppress statements which he made to law enforcement personnel. The record is clear that the subject statements were spontaneous and not the product of custodial interrogation or its functional equivalent.

Matter of Denzil B., 113 AD3d 762 (2d Dept 2014)

Respondent Not Deprived of a Speedy Fact-finding Hearing

Contrary to the respondent's contention, he was not deprived of a speedy fact-finding hearing, as required by FCA § 340.1 (1). The Family Court providently exercised its discretion in finding "good cause" to justify the initial adjournment of the fact-finding hearing (*see* FCA § 340.1 [4] [a]). Contrary to the respondent's contention, special circumstances existed to warrant the Family Court's second adjournment of the fact-finding hearing (*see* FCA § 340.1 [6]). These circumstances included the failure of the respondent's mother to appear in court, a fact of which the Family Court was not timely notified, the resulting need to appoint a guardian ad litem for the respondent, and the guardian ad litem's scheduling conflicts that prevented him from being present for a fact-finding hearing on the first adjourned date.

Matter of Orlando G., 113 AD3d 766 (2d Dept 2014)

Respondent Properly Denied an Adjournment in Contemplation of Dismissal

Contrary to the respondent's contention, the Family Court providently exercised its discretion in adjudicating him a juvenile delinquent and placing him on probation for a period of 12 months instead of directing an adjournment in contemplation of dismissal (*see* FCA § 315.3). The disposition was appropriate in light of, among other factors, the seriousness of the offense, the recommendation made in the probation report, the respondent's excessive absences at school, and his poor academic performance.

Matter of Thomas N., 113 AD3d 778 (2d Dept 2014)

Fact-Finding Determination Not Against the Weight of the Evidence

The respondent was alleged to have intentionally caused a school administrator to suffer physical injury

by kicking her. At the conclusion of the fact-finding hearing, the Family Court found that the evidence proved beyond a reasonable doubt that the respondent intended to cause the complainant to suffer physical injury and that the complainant suffered physical injury. At disposition, the Family court adjudged the respondent to be a juvenile delinquent and placed him on probation for a period of 12 months. Upon reviewing the record, the Appellate Division found that the evidence was legally sufficient to establish beyond a reasonable doubt that the respondent committed acts that, if committed by an adult, would constitute the crime of assault in the second degree, and was satisfied that the Family Court's fact-finding determination was not against the weight of the evidence. As to the order of disposition, the Appellate Division found that in light of the seriousness of the respondent's conduct, as well as his refusal to take responsibility for it and his need for monitoring, the Family Court did not improvidently exercise its discretion in adjudicating the respondent a juvenile delinquent (*see* FCA § 352.2), rather than directing an adjournment in contemplation of dismissal.

Matter of Kaseem R., 113 AD3d 779 (2d Dept 2014)

Showup Procedure Was Found to Be Reasonable and Not Unduly Suggestive

Contrary to the respondent's contentions, the showup procedure by which the complainant identified him was reasonable under the circumstances, having been conducted in close spatial and temporal proximity to the incident. Furthermore, there was no evidence of undue suggestiveness. The respondent also argued that his right to a speedy fact-finding hearing was violated (*see* FCA § 340.1 [2]). The record revealed that his counsel repeatedly consented to adjourn the proceedings (*see* FCA § 340.1), thereby waiving speedy fact-finding hearing objections and tolling the 60-day statutory period within which the fact-finding hearing must be commenced. The Appellate Division found that contrary to the respondent's contentions, counsel was not ineffective for failing to move to dismiss the petition on speedy fact-finding hearing grounds. The respondent's counsel provided meaningful representation.

Matter of Deshawn P., 114 AD3d 686 (2d Dept 2014)

Preclusion of Identification Evidence Required

Contrary to the Presentment Agency's contention, its voluntary disclosure form, which gave an erroneous time and an erroneous location of a showup identification procedure, did not give the respondents adequate notice of the identification evidence that the Presentment Agency intended to present at the fact-finding hearing (*see* FCA § 330.2 [2]; CPL 710.30 [1] [b]). The Family Court properly determined that the Presentment Agency's failure to comply with FCA § 330.2 (2) required preclusion of the identification evidence, without regard to whether the respondents were prejudiced by the lack of notice.

Matter of Courtney C., 114 AD3d 938 (2d Dept 2014)

Inclusory Concurrent Counts Should Have Been Dismissed

Here, the evidence was legally sufficient to establish, beyond a reasonable doubt, that the defendant committed acts, which if committed by an adult, would have constituted the crimes of attempted criminal sexual act in the first degree (*see* PL §§ 110.00, 130.50 [1]), sexual abuse in the first degree (*see* PL § 130.65 [1]), rape in the third degree (*see* PL § 130.25 [3]), attempted criminal sexual act in the third degree (*see* PL §§ 110.00, 130.40 [3]), sexual misconduct (*see* PL § 130.20 [1]), attempted sexual misconduct (*see* PL §§ 110.00, 130.20 [2]), and sexual abuse in the third degree (*see* PL§ 130.55). The Appellate Division was satisfied that the Family Court's fact-finding determinations were not against the weight of the evidence (*see* FCA § 342.2 [2]). However, the defendant correctly argued that the counts of attempted sexual misconduct and sexual abuse in the third degree should have been dismissed as inclusory concurrent counts of attempted criminal sexual act in the third degree and sexual abuse in the first degree, respectively (*see* CPL 300.30 [4]; 300.40 [3] [b]).

Matter of Justin D., 114 AD3d 941 (2d Dept 2014)

Adjudication of Defendant and Dispositional Order Supported by the Record

The Family Court has broad discretion in determining the proper disposition in a juvenile delinquency

proceeding (*see* FCA § 141), and its determination is accorded great deference. Contrary to the defendant's contention, the Family Court providently exercised its discretion in adjudicating him a juvenile delinquent and, inter alia, placing him on probation for a period of 18 months and directing him to perform 75 hours of community service (*see* FCA §§ 352.2 [1] [b]; 353.2). The disposition was appropriate in light of, among other factors, the seriousness of the offenses, the recommendation made in the probation report, and the defendant's excessive absences from school, poor academic performance, and school suspensions.

Matter of Shyquan M., 115 AD3d 747 (2d Dept 2014)

Defendant Not Entitled to Adjournment in Contemplation of Dismissal

Contrary to the defendant's contention, the Family Court providently exercised its discretion in adjudicating him a juvenile delinquent and placing him on probation instead of directing an adjournment in contemplation of dismissal (*see* FCA § 315.3). The defendant was not entitled to an adjournment in contemplation of dismissal merely because this was his first encounter with the law. The disposition was appropriate in light of, among other things, the seriousness of the offense, and the defendant's failure to take responsibility for his actions.

Matter of Leonce K.O., 115 AD3d 955 (2d Dept 2014)

Allegations Supporting the Petition Were Sufficient

Here, the defendant was charged with having committed acts, which, if committed by an adult, would have constituted a violation of Administrative Code § 10-131 (g), which provides, as relevant here: "[i]t shall be unlawful for any person to . . . possess . . . any toy or imitation firearm which substantially duplicates or can reasonably be perceived to be an actual firearm" (Administrative Code of City of NY § 10-131 [g]). Contrary to the defendant's contention, the factual allegations supporting the petition were sufficient. An air gun, which is not itself a firearm, may nevertheless be an imitation firearm within the intendment of Administrative Code § 10-131 (g).

Matter of Tilar Mc., 116 AD3d 700 (2d Dept 2014)

***Miranda* Rights Were Knowingly and Intelligently Waived**

At a *Huntley* hearing, a police detective testified that he advised the defendant of his *Miranda* rights in the presence of his mother, and that the defendant and his mother indicated, both orally and in writing, that they understood these rights. Contrary to the defendant's contention, his statements to the detective were voluntarily made after his *Miranda* rights were knowingly and intelligently waived (*see* FCA § 305.2 [3], [7]). The defendant's contention that his statements were involuntary because the *Miranda* rights given to his mother were not in her native Creole language was not supported by the record, since neither the defendant nor his mother testified at the *Huntley* hearing, and his father, who did testify, made no reference to the mother's inability to comprehend English. Also, the Family Court properly granted the presentment agency's motion to preclude the defendant from inquiring into the complainant's claimed prior sexual abuse and self-injurious behavior (*see* FCA § 344.4). Further, the defendant's argument that the testimony of certain witnesses did not qualify under the prompt outcry exception to the hearsay rule was unpreserved for appellate review, since the defendant never objected and could not derive any benefits from any objections made by the co-respondents.

Matter of Jerry J.-B., 116 AD3d 1042 (2d Dept 2014)

Evidence Presented Was Legally Sufficient

Family Court properly adjudicated respondent to be a juvenile delinquent, and found he had committed acts, that if committed by an adult, would constitute the crime of strangulation in the second degree. The undisputed facts showed respondent and the victim were students in the same high school. On the day of the incident, respondent led the victim to an infrequently used stairway, then while standing near the top of the stairway, he put his arm around the victim's neck and applied pressure, which caused the victim to collapse and lose consciousness. Respondent's claim he was only joking around and his intent was not to hurt or choke the victim was found not credible. The evidence presented by petitioner was legally sufficient to establish that respondent's "conscious objective" in putting in arms around the victim's neck

was to impede her normal breathing.

Matter of Jesse Z., 116 AD3d 1105 (3d Dept 2014)

ORDER OF PROTECTION

Objections to Motions Not Preserved for Review

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

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

PINS

Determination to Revoke Dispositional Order of Probation Supported by the Record

The determination of whether to revoke a prior dispositional order of probation and proceed to make a new dispositional order pursuant to FCA § 779 is committed to the sound discretion of the Family Court, to be determined on the basis of the best interests of the child (*see* FCA § 754 [1]). Upon the defendant's admission that she had repeatedly violated a condition of her probation, the Family Court's determination to revoke her probation constituted a provident exercise of discretion since, under the circumstances of this case, her needs and best interests were best served by placement in the custody of the Commissioner of Community and Family Services until April 16, 2014 .

Matter of Catherine B., 115 AD3d 741 (2d Dept 2014)

TERMINATION OF PARENTAL RIGHTS

TPR Based Upon Permanent Neglect Affirmed

Family Court, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. Petitioner agency exercised diligent efforts to encourage and strengthen the parental relationship by, among other things, assisting respondent in filling out applications for housing, referring him for parenting skills and anger management programs, and scheduling visitation. Despite those efforts, respondent failed to plan for the child's future during the relevant time period. Respondent failed to obtain suitable housing, tested positive for opiates, and was arrested for selling narcotics shortly after the agency planned a trial release of the child to his care. Termination of respondent's parental rights was in the best interests of the child, who had been in foster care nearly her entire life, and where she was well cared for.

Matter of Jaelyn Hennesy F., 113 AD3d 411 (1st Dept 2014)

Father Abandoned Children and Mother Permanently Neglected Them

Family Court, upon a finding of permanent neglect by respondent mother and abandonment by respondent father, terminated respondents' parental rights to the subject children and committed custody and guardianship of the children to petitioner agency for the purpose of adoption. Clear and convincing evidence established that the father failed to visit or communicate with the children for the six-month period immediately preceding the filing of the petition. The agency provided credible evidence that during the relevant period the father never visited the children at the agency and never contacted the agency concerning the children. The evidence showed that the father failed to respond to the agency's attempts to contact him and, during that time, the father drove the mother to scheduled visits with the children at the agency but did not go into the agency to participate. His claim that he asked the mother to convey his love to the children and that he paid for the majority of the items that the mother brought to give to the children, including candy, juice, shoes, and toys, were unsubstantiated. The agency, by clear and convincing evidence, demonstrated that it exercised diligent efforts with respect to the mother by scheduling visits and implementing a service plan that included referrals for

individual mental health counseling and assistance in finding suitable housing. Despite those efforts, the mother failed to complete individual counseling or obtain suitable housing. The mother offered only multiple, uncorroborated and inconsistent excuses for her noncompliance. The finding that termination of respondents' parental rights was in the children's best interests was supported by a preponderance of the evidence.

Matter of Alliyah C., 113 AD3d 562 (1st Dept 2014)

Respondent Abandoned and Neglected His Child

Family Court determined respondent father abandoned and permanently neglected his child and terminated his parental rights. The Appellate Division affirmed. The court properly determined that respondent abandoned the child by failing to make even minimal efforts to maintain contact with the agency during his incarceration. Although in the context of abandonment the agency is not required to show diligent efforts, here the agency established that it made such diligent efforts and, therefore, the court also properly determined that respondent permanently neglected the child by failing to maintain contact, provide support, gifts or letters for the child, and by failing to address the conditions that led to the placement of the child in foster care.

Matter of Nishe Rasheen G., 114 AD3d 416 (1st Dept 2014)

Respondent Permanently Neglected Her Child

Family Court, after a hearing, found that respondent mother permanently neglected her child, terminated her parental rights, and committed custody of the child to the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. Petitioner agency exercised diligent efforts to encourage and strengthen the parental relationship by arranging for frequent visitation, referring respondent for mental health counseling, anger management, and parenting skills for children with special needs, and developing a plan for appropriate services for the child. Respondent failed to complete her service plan within the required time. Although she did complete many of the services after the petition was filed, respondent failed to gain insight into her parenting problems, to understand her child's special needs or to demonstrate that she had the ability to care for the child. Respondent's request for a suspended judgment was raised for the first time on appeal and, in any event, termination of respondent's parental rights was in the best interests of the child, who had been in the foster care home since she was five days old, had bonded with the foster parents who wished to adopt her and could ensure the child's special needs would be met.

Matter of Angelina Jessie Pierre L., 114 AD3d 406 (1st Dept 2014)

Adoption in Children's Best Interests

Family Court found that respondent mother permanently neglected her children, terminated her parental rights, and committed custody of the children to the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. Petitioner agency explained the importance of visitation, but respondent failed to attend about one-half of the scheduled visits and offered insubstantial excuses for her failure. Respondent's sporadic and inconsistent visitation, as well her inattention to the children observed during at least one visit, prevented her from having a close relationship with the children. Although respondent completed the parenting course she was referred to by petitioner, she failed to attend the twins' medical appointments and demonstrated a lack of understanding and insight into their diagnoses, medication and medical treatment. A preponderance of the evidence supported the determination that termination of respondent's parental rights, rather than a suspended judgment, was in the best interests of the children. The children had lived in their foster homes almost all their lives and the foster families had appropriately provided for their needs.

Matter of Isis M., 114 AD3d 480 (1st Dept 2014)

Respondent Permanently Neglected Her Children

Family Court found that respondent mother permanently neglected her child, terminated her

parental rights, and committed custody of the child to petitioner agency for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. Petitioner agency exercised diligent efforts to reunite respondent and the child by scheduling visitation, providing respondent with transportation between New York and Rhode island, where she was living, and by repeatedly advising her that she needed to complete a drug treatment program, obtain housing and a stable source of income. Despite those efforts, respondent failed to complete a drug program, did not attend all the scheduled visits with the child, and otherwise failed to plan for the child's future. A preponderance of the evidence supported the court's finding that termination of respondent's parental rights was in the best interests of the child, given the positive environment provided by the foster mother and her desire to adopt the child.

Matter of Jaylin Elia G., 115 AD3d 452 (1st Dept 2014)

Respondent Abandoned Her Children

Family Court, upon respondent mother's default, terminated her parental rights upon a finding of that she abandoned her children. The Appellate Division affirmed. The court had personal jurisdiction over respondent. She was personally served with the summons and petition and did not raise any jurisdictional objection in support of her motion to vacate. Her contention that she did not receive notice of the date on which a default could be taken against her is belied by the record. Respondent failed to demonstrate a reasonable excuse for her default and a meritorious defense to the petitions. Although she submitted documentation showing that she was in the hospital on the date of the adjourned hearing, she provided no details about her alleged inability to communicate during that time. Her vague assertion that she visited with the children to the best of her physical and mental ability and based upon the availability of visitation, lacked detail sufficient to demonstrate that she maintained contact with the children or the agency during the relevant period. Because this was a case based upon abandonment, the agency had no obligation to make diligent efforts.

Matter of Ruth R.., 115 AD3d 531 (1st Dept 2014)

Respondent Permanently Neglected Her Child

Family Court, upon a fact finding determination that respondent mother permanently neglected her child, terminated her parental rights, and committed custody of the child to ACS for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. Petitioner agency exercised diligent efforts to reunite the mother with the child, based upon testimony of the caseworker that regular visitation and meetings were scheduled, appropriate referrals were made for a mental health evaluation and therapy, and the agency maintained contact with the mother's drug treatment program to monitor her progress. The mother failed to plan for the child's future. She admitted that she failed to maintain contact with the agency for long periods of time and at one point relapsed into drug use. Although she reentered a treatment program after detox, she failed to complete the program when the petition was filed. Termination of respondent's parental rights was in the best interests of the child, who was residing in a satisfactory foster care home, where the foster mother wanted to adopt her, and the child did not want to visit the mother.

Matter of Alyssa Maureen N., 116 AD3d 410 (1st Dept 2014)

Respondent Failed to Address Her Ongoing Sexual Abuse of Children

Family Court, after a hearing, determined that respondent mother permanently neglected her children, terminated her parental rights, and committed custody of the child to ACS for the purpose of adoption. The Appellate Division affirmed. There was clear and convincing evidence that petitioner agency exerted diligent efforts to reunite the mother with the children by creating a service plan for the mother, referring her to domestic violence counseling and a program for sex abusers, scheduling numerous service plan reviews, and scheduling supervised and unsupervised visitation with the children. Despite these efforts, the mother failed to address the problems that led to the children's placement, including ongoing sexual abuse of the children. A preponderance of the evidence supported

the court's determination that termination of respondent's parental rights was in the best interests of the children, rather than a suspended judgment.

Matter of Gina Maritza S., 116 AD3d 570 (1st Dept 2014)

Respondent Permanently Neglected Her Child

Family Court found that respondent mother permanently neglected her child, terminated her parental rights, and committed custody of the child to the agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that petitioner agency exercised diligent efforts to encourage and strengthen the parental relationship and that, despite those efforts, respondent failed to plan for the child's future during the relevant time period. Among other things, petitioner referred respondent for parenting skills and anger management programs and scheduled visitation. Although respondent completed the programs, she behaved disruptively and violently during scheduled visitation, did not gain insight into the reasons the child was placed in foster care, and failed to benefit from the programs. Termination of respondent's parental rights was in the best interests of the child, who had been in the foster care home for two years, was well cared for and was doing well in school, and indicated that she wanted to be adopted by her foster mother and did not want to visit respondent.

Matter of Ebonee Annastasha F., 116 AD3d 576 (1st Dept 2014)

Dispositional Hearings Required Due to Substantial Changes Since Prior Dispositional Hearing

Family Court, after a fact-finding determination that respondent mother permanently neglected her children, terminated her parental rights, and committed custody of the children to the agency and Commissioner of Social Services for the purpose of adoption. The Appellate Division modified by vacating the disposition with respect to one child in its entirety and vacating the disposition with respect to the other child only with respect to his placement. There was clear and convincing evidence that petitioner agency exercised diligent efforts to reunite the mother and the children by establishing a service plan, referring her for parenting and anger management programs, scheduling visitation, attempting to assist her to obtain suitable housing, and referring her to mental health therapy. The mother failed to complete the programs, was inconsistent with visitation, did not obtain suitable housing and failed to demonstrate that she was in counseling. However, the children's circumstances changed dramatically since the dispositional hearings. One child, who was 15 years old, did not want to be adopted and requested that the agency resume diligent efforts to reunite him with the mother. The other child wants to be adopted and the foster parent wants to adopt him. The Appellate Division remitted for new dispositional hearings to determine the fitness of the foster parents and foster homes, and whether it is in the best interests of the 15-year-old child to terminate the mother's parental rights, given his refusal to consent to adoption.

Matter of Brandon Michael R., 116 AD3d 620 (1st Dept 2014)

Respondent Permanently Neglected Her Children

Family Court, upon findings of permanent neglect, terminated respondent mother's parental rights, and committed custody of the children to petitioner agency and ACS for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. Petitioner agency made diligent efforts to strengthen the parental relationship by scheduling regular visitation and referring respondent for mental health services and parenting skills classes. Respondent failed, during the statutory time period, to plan for the children's return by refusing to avail herself of the assistance of a visiting coach and of a special needs parenting course, which would have assisted her in understanding the children's special needs. Respondent also failed to visit the children consistently. Termination of respondent's parental rights was in the best interests of the children, who had been in the foster care for most of their lives and needed permanency.

Matter of Alani G., 116 AD3d 629 (1st Dept 2014)

Father Failed to Establish a Reasonable Excuse for His Default or a Meritorious Defense

Contrary to the father's contention, the Family Court properly denied that branch of his motion which sought to vacate the determination that he abandoned the subject children, which was made in an order entered upon his default. A parent seeking to vacate an order entered upon his or her default in a termination of parental rights proceeding must establish that there was a reasonable excuse for the default and a potentially meritorious defense to the relief sought in the petition. The determination of whether to relieve a party of a default is within the sound discretion of the Family Court. Here, the father established neither a reasonable excuse for his default in appearing nor a potentially meritorious defense.

Matter of Mia P.R.D., 113 AD3d 679 (2d Dept 2014)

Mother Failed to Complete Drug Treatment Program

The Family Court properly determined that there was clear and convincing evidence that the mother permanently neglected the subject child by failing, for a year following the child's entrance into foster care, to plan for her return. The record established that the petitioner agency made diligent efforts to help the mother comply with her service plan, which required the mother to complete a drug treatment program, complete parenting skills training, complete individual counseling, complete domestic violence training, and maintain regular visits with the child. Further, at the time of the filing of the petition, the mother still had not completed parenting skills training or a drug treatment program, and had not maintained regular visitation with the child. Moreover, the Family Court properly determined that termination of the mother's parental rights was in the child's best interests.

Matter of Breanna M.G., 114 AD3d 678 (2d Dept 2014)

Father's Suggested Custodial Resources Resided in Florida and Were Not Relatives

Contrary to the father's contention, the evidence presented at the fact-finding hearing established that the petitioner made diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [7]), despite the father's incarceration, by keeping him apprised of the children's welfare, sending him service plan reviews, forwarding his letters and photographs to them, sending him their photographs, exploring the resources in Florida provided by him, as well as reminding him of the need to find a custodial resource for the care of his children in New York, where the children resided. Visitation would not have been in the children's best interests in light of their young ages, the distance they would have had to travel to the Florida penitentiary, and their medical and behavioral issues. Despite the petitioner's efforts, the father failed to plan for the future of the children (*see* SSL § 384-b [7] [a]), as the father's suggested custodial resources resided in Florida and were not relatives, and the father did not provide any viable alternative plan for the return of the children.

Matter of Angel R.F., 114 AD3d 781 (2d Dept 2014)

Mother Failed to Obtain Suitable Housing and Income

Contrary to the mother's contention, the Family Court properly found that the petitioner agency exercised diligent efforts to strengthen her relationship with the subject children by, inter alia, facilitating visitation, developing a service plan, advising her that she needed to secure adequate housing and income, making recommendations on how to obtain suitable housing and income, and providing appropriate referrals. However, the mother refused to accept the agency's assistance and did not take the necessary steps to acquire suitable housing or a stable income. Under these circumstances, the Family Court correctly found that, despite diligent efforts by the agency, the mother failed to adequately plan for the subject children's future and, therefore, permanently neglected them. Additionally, the Family Court properly determined that the best interests of the subject children would be served by terminating the mother's parental rights and freeing them for adoption by their foster parents, with whom the children had been living for substantially all of their lives.

Matter of "Baby Boy" P., 115 AD3d 861 (2d Dept 2014)

Father Admitted He Permanently Neglected Subject Children

The Family Court properly determined, by a preponderance of the evidence, that the father violated the terms and conditions of a suspended judgment. Contrary to the father's contention, the petitioner was not required to prove that it made diligent efforts to strengthen the parental relationship, because the father admitted, inter alia, that he permanently neglected the subject children and that caseworkers had exercised due diligence in working with him. Moreover, the Family Court properly admitted the father's medical records into evidence (*see* CPLR 4518). Furthermore, the father's contention that he was not afforded the effective assistance of counsel was without merit. Accordingly, the Family Court properly revoked the order of suspended judgment, terminated the father's parental rights, and transferred custody and guardianship of the subject children to the Department of Social Services for the purpose of adoption.

Matter of Albert R., 115 AD3d 865 (2d Dept 2014)

Incarcerated Father Failed to Find a Resource for the Care of His Child

The Family Court's finding of permanent neglect as to the father of the subject child was supported by clear and convincing evidence (*see* SSL § 384-b [7] [a]). The petitioner made the requisite diligent efforts to encourage and strengthen the parental relationship. Those efforts included arranging for the child's visitation with the father, who was incarcerated in State prison, exploring the planning resource suggested by the father, repeatedly reminding the father of the need to find a resource for the care of his child, and keeping the father apprised of the child's progress. Despite the petitioner's diligent efforts, the father failed to adequately plan for his child's future.

Matter of Dutchess County Dept. of Social Servs. (Tony R.), 115 AD3d 952 (2d Dept 2014)

Father' Judicial Surrender Properly Accepted and Approved

Family Court properly accepted and approved respondent father's judicial surrender of his parental rights. A surrender of parental rights becomes final and irrevocable immediately upon its execution and acknowledgment, and in the absence of fraud, duress or coercion, no action may be maintained by the surrendering parent to revoke or annul the surrender. Here, the agency filed a permanent neglect petition against respondent, who was incarcerated for stabbing the child's mother when the mother was over 8-months pregnant. Family Court went over the terms of the judicial surrender with respondent, who appeared with counsel, and informed him of his rights as well as consequences of signing the surrender. Additionally, respondent informed the court he understood his rights and agreed he had sufficient time to consult with counsel. He further stated he wasn't under the influence of any substance affecting his mental capacity, and denied being forced or coerced into signing the surrender.

Matter of Chastity O., 113 AD3d 894 (3d Dept 2014)

Sporadic and Insubstantial Contact by Respondent Insufficient to Defeat Abandonment Showing

Family Court determined respondent father had abandoned the subject child and terminated his parental rights. The Appellate Division affirmed. A finding of abandonment is warranted when it's established by clear and convincing evidence that the parent failed to visit or communicate with the child or the agency during the six-month period immediately prior to the filing of the petition. Sporadic and insubstantial contacts by respondent are insufficient to defeat a showing of abandonment. Here, the evidence reflected that respondent, who was incarcerated for four-months during the relevant six-month period, only visited with the child once during this period and did not otherwise contact the child. Although the child's foster mother testified respondent telephoned her twice inquiring about the child, the child did not receive any cards, letters, emails or gifts from respondent. While respondent telephoned the caseworker on three occasions during the relevant period, two of the phone calls were about respondent's desire for a bus pass. Furthermore, respondent failed to show that his incarceration or his allegedly limited access to a telephone "so permeated his life" that it made access to his child infeasible. Additionally, even if respondent had requested a suspended sentence, such a disposition

was not available from an abandonment finding.

Matter of Dustin JJ., 114 AD3d 1050 (3d Dept 2014)

Termination of Parental Rights Reversed

Family Court granted the agency's motion to revoke respondent's suspended sentence and terminated his parental rights. The Appellate Division reversed. The agency's motion was based on its allegation that respondent had failed to develop a plan for the children's future because he had only named their mother, who had voluntarily surrendered her parental rights, as a resource. Although respondent, via affidavit, alleged he had also provided names of his mother and two family friends as possible resources, Family Court found the provision of names was not timely since the children had already been in foster care for over three years. However, the record failed to show whether respondent had in fact provided the names and if so when the names had been provided. Thus the matter was remitted for an evidentiary hearing.

Matter of Bayley W., 116 AD3d 1109 (3d Dept 2014)

TPR in Children's Best Interests

Family Court terminated respondents parental rights with respect to their three children on the grounds of permanent neglect. The father appealed and the Appellate Division affirmed. Respondent father, with the assistance of counsel, had knowingly, voluntarily and intelligently made admissions that he had permanently neglected the children. It was in the children's best interests to terminate respondents' parental rights. The dispositional hearing was held nearly six months after the fact-finding hearing, allowing respondents "one last ditch opportunity" to prove they could parent the children. However, respondent father consistently refused to engage in recommended parenting classes and court-ordered mental health treatment. And although encouraged to do so, respondent father failed to maintain any contact with the children outside the one-hour weekly supervised visits, and made no effort to communicate with the children's foster parents or service providers. Additionally, even though all three subject children had been diagnosed with various psychological disorders, and one child had been hospitalized with seizure disorder, respondents made no effort to inquire about the children's needs or progress. Respondent father had not engaged with the children during visits and acted inappropriately in their presence. The children's therapists expressed strong views that the visits were having a negative effect on the children and visits with the father were not in their best interests. Moreover, the father failed to testify and this allowed the court to draw the strongest inference against him. Furthermore, the children had been placed together in one foster home and were thriving under their foster parents' care.

Matter of Katie I., 116 AD3d 1309 (3d Dept 2014)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent father's and respondent mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of proving by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the parents and children. Among other things, petitioner provided the parents with the opportunity to obtain appropriate housing, provided supervised visitation with the children, and provided the parents with counseling. Despite petitioner's diligent efforts to reunite them with the children, the parents chose to obtain different housing and then denied petitioner access to their home after one visit. Moreover, the visits with the children did not go well and were stressful for the children. Additionally, the parents failed to make progress in counseling due to their refusal to acknowledge the sexual abuse inflicted on the children and to take responsibility for their failure to protect the children. Thus, petitioner established that the parents failed to successfully address the problems that led to the removal of the children and continued to prevent the children's safe return. Although not preserved for review, the court did not abuse its discretion in simply restating petitioner's position following an overly broad question posed by the father's attorney that would have merely elicited repetitive testimony. The mother's contention was rejected that her attorney was ineffective in failing to object to the qualification of certain witnesses as experts and in failing to call as a witness the mother's

new counselor, whom she did not start seeing until after the diligent efforts period. There was no denial of effective assistance of counsel arising from a failure to make a motion or argument that had little or no chance of success.

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

Mother Not Denied Effective Assistance of Counsel

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

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

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

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

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

Parental Rights Properly Terminated on Ground of Permanent Neglect

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

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

Revocation of Suspended Judgment Affirmed

Family Court revoked a suspended judgment and

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

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

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

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

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

Record Sufficient for Appellate Review Notwithstanding Failure of Recording Device

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

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

YOUTHFUL OFFENDER

Supreme Court Failed to Consider Defendant's Eligibility for Youthful Offender Status

CPL 720.20 (1) requires "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain". Here, the record did not demonstrate that the Supreme Court considered the defendant's eligibility for youthful offender status. The defendant's eligibility was not affected by a prior conviction of robbery in the second degree, as eligibility for youthful offender status is met at the time of conviction, not at the time of sentencing. On the date the defendant pleaded guilty to attempted murder in the second degree, he had not been "convicted and sentenced for a felony" so as to disqualify him pursuant to CPL 720.10 (2) (b). The defendant's claim also was not precluded by his waiver of the right to appeal. Accordingly, the defendant's sentence was reversed and the matter was remitted to the Supreme Court for resentencing upon the court's determination as to whether the defendant should be adjudicated a youthful offender.

People v Ramirez, 115 AD3d 992 (2d Dept 2014)

New York
Children's Lawyer

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

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