NEW YORK CHILDREN'S LAWYER

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21st Century Custody: Issues in Parentage Continue*

By Lee Rosenberg**

Life has changed for many as we continue post the 2016 elections on many fronts. What many expected to occur did not. With that, the LGBTQ+ community, which saw a dramatic positive shift in national opinion and laws encompassed in New York by the passage of the Marriage Equality Act,[1] then the United States Supreme Court's decisions in 2013's *U.S. v. Windsor*[2] and 2015's *Obergefell v. Hodges,*[3] and then the New York Court of Appeals decision on 2016's *Brooke S.B. v. Elizabeth A.C.C.*,[4] has become afraid of the loss or reversal of that momentum. (Tragically, the trailblazing voice of Judge Sheila Abdus-Salaam, who authored the Court's impactful decision in *Brooke S.B.*, has been silenced by her untimely death this past April.) It was then thought that the next phase of rights expansion would be in the transgender/bi-gender community. In March of this year, however, the U.S. Supreme Court opted not to hear a case initially scheduled before it on the issue of bathroom rights in *Gloucester School Board v. G.G.*[5]

Changes in our notions of non-traditional rights and defining "what is a parent?" continue, however, to extend beyond "normal" gender considerations. In *Dawn M. v. Michael M.,*[6] the Supreme Court, Suffolk County, has awarded "tri-custody" as an "extension" of *Brooke S.B.* where a "pre-conception agreement" to raise the child together was found to exist in a polyamorous relationship between a husband (Michael), his wife (Dawn), and another woman (Audria) who gave birth to the child.

"Tri-Custody?"

The initial reaction to the term "tri-custody" as the decision in *Dawn M.* self-labels[7] it is certainly one of curiosity and incredulousness. It is not, however, the first time more than two individuals have been awarded custody of a child.

In *DiBenedetto v. DiBenedetto,*[8] for example, the Second Department maintained an agreed-upon custody arrangement where the mother, father, *and* the paternal grandparents had joint custody of the children with primary physical custody and decision-making authority to the grandparents.

In *Curless v. McLarney*,[9] the Third Department also awarded primary physical custody to the grandmother, with joint custody shared by the parents *and* the grandmother.

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These types of cases and others, however, involve an investigation into, and determination of, "extraordinary circumstances" to first determine standing rights as and between parents and non-parents/biological strangers followed by a best interests determination—presuming that extraordinary circumstances actually exist.[10]

In *Dawn M.*, the court, using *not* the extraordinary circumstances test, but an *extension* of the Court of Appeals' ruling in *Brooke S.B.*, found Dawn M. to be a "nonbiological" *parent* under a "pre-conception" agreement between the biological parents. This analysis created both standing and the ability of Dawn to assert custodial rights to the biological child of her husband Michael and the child's birth mother Audria who had previously settled custody and parenting rights between them.

As a reminder, *Brooke S.B.*, overruled the Court of Appeals prior decision in *Alison D. v. Virginia M.*,[11] to extend the rights of same-sex couples,

> Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child... By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption. It is this context that informs the Court's determination of a proper test for standing that ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents.[12]

Judge Abdul-Salaam held, on the "limited facts" before the Court, that standing may be established to apply to the court for custody and visitation under DRL § 70(a) if:

> 1. The petitioner is not a biological or adoptive parent.
>
> 2. There is a "pre-conception" agreement.
>
> 3. The agreement provides that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents.
>
> 4. The foregoing is proven by clear and convincing evidence.[13]

The Facts of *Dawn M.*

Plaintiff, Dawn M., was married to Respondent, Michael M., on July 9, 1994. They could not conceive a child together. In April 2001, they met Audria G., and in 2004 the three of them began an intimate relationship, ultimately deciding to act as a family and have a child together. Before conception, it was agreed that they would raise the child together "as parents."

Michael and Audria had unprotected sexual relations and conceived a child, J.M., who was born January 25, 2007. The court determined,

> The evidence establishes that plaintiff's medical insurance was used to cover Audria's pregnancy and delivery, and that plaintiff accompanied Audria to most of her doctor appointments. For more than eighteen months after J.M.'s birth, defendant, plaintiff and Audria continued to live together. *Audria and plaintiff shared duties as J.M.'s mother* including taking turns getting up during the night to feed J.M. and taking him to doctor visits. (Emphasis added.)

In another twist, Dawn and Audria moved out of the marital residence *with the child* in October 2008. Dawn commenced the instant divorce action against Michael in 2011. Prior thereto, Michael commenced a custody proceeding *against Audria—the biological mother*—which was settled by agreement with joint legal custody; residential custody to Audria and parenting time to Michael, albeit with no written schedule. The divorce action between Michael and Dawn was settled by written stipulation in 2015 as to all issues, except for Dawn's claim for custody and parenting time with J.M. Notably, Dawn still resides with Audria and the child. At the *in camera*, the 10-year-old child indicated he considers both Dawn *and* Audria to be his mothers and would like the status quo arrangement to continue.

> He makes no distinction based on biology. J.M. is a well adjusted ten-year-old boy who loves his father and his two mothers. He knows nothing about this action. He has no idea that his father opposes tricustody and court ordered

visitation with plaintiff.[FN5] The in camera with J.M. leaves no doubt that J.M. considers both plaintiff and Audria to be equal "mommies" and that he would be devastated if he were not able to see plaintiff. The interview with J.M. also clearly shows that he enjoys his present living situation and would not want it altered in any way.

Dawn sought shared legal custody of the child with Michael. The application was opposed by Michael who had already settled custody with the biological mother, Audria. Audria supported Dawn's position. The decision does not indicate the extent, if at all, Dawn participated in the settlement between Michael and Audria, although she did reside with Audria at the time it was resolved.

The court then lays the foundation of its decision,

> Although not a biological parent or an adoptive parent, plaintiff argues that she has been allowed to act as J.M.'s mother by both Audria and defendant. She has always lived with J.M. and J.M. has known plaintiff as his mom since his birth. Plaintiff asserts that the best interest of J.M. dictates that she be given shared legal custody of J.M. and visitation with him. J.M.'s biological mother Audria strongly agrees. Plaintiff argues, along with the child's attorney, that defendant should be estopped from opposing this application because he has created and fostered this situation by voluntarily agreeing, before the child was conceived, to raise him with three parents. And, further, that the defendant has acted consistent with this agreement by allowing the child to understand that he has two mothers.

The court then looked to the language of *Brooke S.B.* and found that Dawn, being a parent by virtue of the preconception agreement, had standing to apply for custody and that the best interests of the child further required the court to make a custody determination under DRL § 70, which would support those interests. Further, that Michael's own conduct in fostering this relationship should estop him from now attempting to contravene the parenting arrangement.

> Such joint legal custody will actually be a tri-custodial arrangement as Audria and defendant already share joint legal custody. As it appears from Audria's testimony that she whole-heartedly supports such an arrangement, this Court finds no issue with regards to Audria's rights in granting this relief. *Indeed, tri-custody is the logical evolution of the Court of Appeals' decision in Brooke S.B., and the passage of the Marriage Equality Act and DRL § 10-a which permits same-sex couples to marry in New York.*
>
> ...In sum, plaintiff, defendant and Audria created this unconventional family dynamic by agreeing to have a child together and by raising J.M. with two mothers. The Court therefore finds that J.M.'s best interests cry out for an assurance that he will be allowed a continued relationship with plaintiff. No one told these three people to create this unique relationship. Nor did anyone tell defendant to conceive a child with his wife's best friend or to raise that child knowing two women as his mother. Defendant's assertion that plaintiff should not have legal visitation with J.M. is unconscionable given J.M.'s bond with plaintiff and defendant's role in creating this bond. A person simply is responsible for the natural and foreseeable consequences of his or her actions especially when the best interest of a child is involved. Reason and justice dictate that defendant should be estopped from arguing that this woman, whom he has fostered and orchestrated to be his child's mother, be denied legal visitation and custody. As a result of the choices made by all three parents, this ten-year-old child to this day considers both plaintiff and Audria his mothers. To order anything other than joint custody could potentially facilitate plaintiff's removal from J.M.'s life and that would have a devastating consequence to this child. (Emphasis added.)

Given that Dawn's request for parenting time impacts upon the parenting time shared by Michael and Audria, especially since Dawn, Audria and the child already reside together, the court was mindful to try and avoid conflict.[14] Parenting was awarded to Dawn on Wednesday nights for dinner as well as one week-long

school recess and two weeks in the summer, with all three parties to cooperate in scheduling.

Extension and Legislation

The language in *Brooke S.B.* does not limit how a "parent" may obtain standing. To the contrary, it is essentially leaving it open for further creativity in the process of establishing standing.

That having been said the "you made your bed" aspect of *Dawn M.* presents a dilemma which needs legislative action in addressing the needs of families in the modern age, including circumstances that are created by new technology such as where "three-parent" genetic techniques are now available.[15]

Domestic Relations Law § 70 provides, "(w)here a minor child is residing within this state, *either parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court..." (Emphasis added.)

In *Brooke S.B.*, the Court of Appeals citing to DRL § 70, noted,

> Only a "parent" may petition for custody or visitation under Domestic Relations Law §70, yet the statute does not define that critical term, leaving it to be defined by the courts.[FN3]

Importantly, however, Footnote 3 of *Brooke S.B.* states,

> We note that by the use of the term "either," the plain language of Domestic Relations Law §70 clearly *limits a child to two parents, and no more than two, at any given time*. (Emphasis added.)

Dawn M.—not applying the extraordinary circumstances test—appears then to create a three-parent exception for a non-adoptive/non-biological parent in an "extension" of *Brooke S.B.* which simultaneously conflicts with *Brooke S.B.*'s footnote. It might very well be inferred—although the decision does not so specifically state—that Audria, in supporting Dawn's application, has "consented" to share *her* custodial rights by agreement in similar fashion as is usually available and as is also referenced in DRL § 72(c), which states "Nothing in this section shall limit the ability of parties to enter into consensual custody agreements absent the existence of extraordinary circumstances." Of course, Michael was not a party to that consent, but he may still have the estoppel problem asserted by the court.

While asking for legislative action is often a fool's errand, such action would seem necessary. Push-back in the current political climate may further impede same and the courage needed to take it. The needs of *families and children* in the 21st Century, however, require that we look forward and not slip back to outdated and unrealistic views of parentage. The court in *Dawn M.* was faced with a unique set of facts which were created, encouraged, and lived out by three people, who even in a swirl of fantasy, produced a stable, healthy and loving child—a child who needed the court in *parens patriae* to ensure that he would continue to thrive and succeed in all aspects of his development. There appears to be no dispute cited among Dawn, Michael, and Audria that they were all supposed to be J.M.'s parents throughout the 10 years of the child's life to date. The circumstances and result in Dawn M. will continue to provoke reaction, including skepticism and dismay. On the heels of the Dawn M. decision, the New York Post on April 25, 2017, published an article entitled, "Couple Wants to Divorce Each Other to Marry Live-in Girlfriend,"[16] in which the wife was quoted with reference to the girlfriend: "She is going to be legally considered a parent to the children and, more importantly, it will show her that this is not a temporary thing, we both love her and it's something that's meant to be permanent." Without addressing the legal efficacy of that assertion, it is clear that extreme positions will be taken on both sides of the parentage issue.

Beware the Slippery Slope Claim

When New York's Marriage Equality Act and the Supreme Court's *Windsor* case were being debated there was much hew and cry over their effect on "traditional" families. The sky, however, did not fall and the world did not end when those milestones became law. The uniqueness of *Dawn M.* should not be used to encourage an erosion of those rights conveyed to same-sex couples who have seen their lives enhanced by *Brooke S.B*. and similar developments. The "slippery slope" claim is always made by those who seek to use hyperbole and fatalism in their arguments against progress and change. There is no assertion herein that

expanding the definition of family encompasses communal living or institutional polygamy. As the winds of the political climate ebb and flow, we must continue to protect the rights of non-traditional families as was espoused by Judge Abdus-Salaam and permit them the ability to protect and parent their children.

Endnotes

1. DRL § 10-a.

2. 570 U.S. (2013).

3. 756 U.S. (2015).

4. 28 N.Y.3d 1 (2016), decided along with *Estrellita A. v. Jennifer L.D.*

5. *See* Order List: 580 U.S. , March 6, 2017, Certiorari—Summary Disposition, Docket 16-273; R. Barnes, *Supreme Court Sends Virginia*

Transgender Case Back to Lower Court, Washington Post, March 6, 2017.

6. 2017 N.Y. Slip Op. 27073 (Sup. Ct., Suffolk Co. 2017)

7. *See also* J. Stashenko, *In Unique Case, Judge Grants Legal Custody of 1 Child to 3 Adults*, NYLJ, March 9, 2017; S. Jorgensen and E. Kaufman, *Judge Gives Custody of 1 Child to 1 Dad and 2 Moms*, http://www.cnn.com/2017/03/14/health/three-parent-custody-agreement-trnd/; L. Ryan, *Ex-Polyamorous Trio Granted "Tri-Custody" of Their Child by a New York Judge*, http://nymag.com/thecut/2017/03/ex-polyamorous-trio-granted-tri-custody-by-new-york-judge.html.

8. 108 A.D.3d 531 (2d Dep't 2013).

9. 125 A.D.3d 1193 (3d Dept' 2015).

10. *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976).

11. 77 N.Y.2d 651 (1991).

12. For a further discussion of *Brooke S.B.*, *see* L. Rosenberg, *The Court of Appeals Addresses Family Law: Some Welcome Attention*, NYSBA Family Law Review, Fall 2016, Vol 48. No. 2.

13. The court did not preclude the existence of other possible methods of establishing standing going forward.

14. The record indicates that the impetus of Dawn's application was concern going forward that she might have no parenting rights if she and Audria ceased living together. It is again unclear as to the extent she participated in the prior matter between Audria and Michael which initially established the custodial arrangement.

15. *See* S. Scutti, *It's a (Controversial 3-Parent Baby Technique) Boy!*, CNN, September 28, 2016, http://www.cnn.com/2016/09/27/

health/3-parent-baby/.

16. http://nypost.com/2017/04/25/couple-wants-to-divorce-each-other-to-marry-live-in-girlfriend/.

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LEE ROSENBERG, Editor-in-Chief, is a Fellow of the American Academy of Matrimonial Attorneys, a past-Chair of the Nassau County Bar Association Matrimonial Law Committee, and a partner at Saltzman Chetkof & Rosenberg LLP, in Garden City. His email address is lrosenberg@scrllp.com.

NEWS BRIEFS

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

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

On May 8, 2017, the Appellate Division, Second Judicial Department, the Office of Attorneys for Children, and the New York State Unified Court System Child Welfare Court Improvement Project co-sponsored ***Strong Starts Initiative Training Series, Attachment Theory and Research: Implications for Child Welfare Practice***. The speakers were Erica Willheim, Ph.D., Clinical Director, Family PEACE Trauma Treatment Center at New York Presbyterian - Columbia University Irving Medical Center, and Katherine Wurmfeld, Esq., Senior Staff Attorney, Domestic Violence Program, Center for Court Innovation. This seminar was held at the Queens County Bar Association, Jamaica New York.

On May 11, 2017, the Appellate Division, Second Judicial Department, and the Office of Attorneys for Children sponsored ***Protecting Your Immigrant Client in 2017***. The speakers were Rosa Celeste-Astuto, Esq. and Christi M. Gelo, Esq., Attorneys in Private Practice. This seminar was held at the Queens County Bar Association, Jamaica, New York.

On June 19, 2017, the Appellate Divisions in the First and Second Departments, together with, the Mental Health Professionals Certification Committee, the William Alanson White Institute, and the Association of Family and Conciliation Courts–New York Chapter co-sponsored ***Assessment of Intimate Partner Violence: Using the new AFCC Guidelines for Examining the Effects of Intimate Partner Violence***. The speakers were Robin M. Deutsch, Ph.D., ABPP, William James College, Newton, MA, and Leslie M. Drozd, Ph.D., Newport Beach, CA. The Hon. Jane Pearl, New York County Family Court, served as moderator. This seminar was held at the Benjamin N. Cardozo School of Law, New York, New York. To view this program online, together with accompanying handouts, please contact Gregory Chickel at (718) 923-6356 or gchickel@nycourts.gov.

Tenth Judicial District (Nassau County)

On June 15, 2017, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, and the Attorneys for Children Advisory Committee co-sponsored ***The Enough Abuse Campaign: An Awareness Raising and Prevention Initiative Designed to Reduce the Occurrence of Child Sexual Abuse***. The speakers were Lois Schwaeber, Esq., Director of Legal Services, The Safe Center, L.I., and Anthony Zenkus, LMSW, Education Director, The Safe Center, L.I. This seminar was held at the Nassau County Family Court, Westbury, New York.

Tenth Judicial District (Suffolk County)

On June 21, 2017, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, and the Attorneys for Children Advisory Committee co-sponsored ***Special Immigrant Juvenile Findings: Context, Content and Case Law***. The speaker was Theodore S. Liebmann, Esq., Clinical Professor and Director of Clinical Programs, Hofstra Law School. This seminar was held at the Suffolk County Supreme Court, Central Islip, New York.

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

THIRD DEPARTMENT NEWS

Panel Re-Designation Applications Due October 1, 2017

Pursuant to Rules of the Appellate Division, Third Department (22 NYCRR) § 835.2, all panel members are required to submit to the Office of Attorneys for Children by October 1st of each year, a Panel Re-Designation Application in order to be eligible for re-designation. The Panel Re-Designation Application reflects and documents your desire to continue serving on the panel, your knowledge of and compliance with the Summary of Responsibilities of the Attorney for the Child, your familiarity with Compensation Policies and Procedures, the Court

Rule regarding full-time government employment, and any significant information that the office should be aware of concerning your standing as a panel member.

Liaison Committees

On behalf of Karen K. Peters, Presiding Justice of the Appellate Division, Third Judicial Department, the Office of Attorneys for Children is pleased to announce that Ronald T. Walsh, Esq. is the new liaison representative for Cortland County. The Liaison Committee provide a means of communication between panel members and the Office of Attorneys for Children. A department-wide meeting was held on Thursday, May 3, 2017 at the Crowne Plaza Resort in Lake Placid and a fall meeting is scheduled for Thursday, October 26, 2017 in Lake George. If you have any questions about the meetings, or have any issues of concern that you wish to be on the meeting agenda, kindly contact your liaison committee representative, whose name can be found in our Administrative Handbook, pp.18-22 and can be accessed by going to our website at http://www.nycourts.gov/ad3/oac/.

Web page

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

Panel members were recently provided with a billing "job aid" that is posted under News Alerts on the web page. This guide is intended to supplement but not replace reading and becoming completely familiar with both the Compensation and Reimbursement Policies and Procedures(Administrative Handbook, pp. 24-37), as well as the E-voucher manual which can be found on the website. We hope this tool is useful to you in your practice. We encourage you to please contact the Office of Attorneys for Children with any questions, concerns or trouble with billing or the e-voucher system, and we will be glad to help.

Training News

REMINDER TO MARK YOUR CALENDERS! Training dates for Fall 2017 CLE programs are listed below and agendas for these programs will become available as the CLE date nears. You can find this information on the Third Judicial Department OAC web page located at: http://www.nycourts.gov/ad3/oac/Seminar_Schedule.html.

Fall 2017

Article 10 Proceedings & Effective Representation of the Child

Thursday, September 14, 2017
Tompkins County Family Court

Children's Law Update 2017
Friday, September 15, 2017
Holiday Inn, Binghamton

Introduction to Effective Representation of Children
Thursday, October 19 & Friday, October 20, 2017
The Century House, Latham

Collaborative CLE with NYSBA - Law, Youth and Citizenship Program for Educators and AFCs
October 27, 2017
The Sagamore Resort, Bolton Landing

Children's Law Update 2017
Friday, November 17, 2017
The Century House, Latham

Anatomy of a Child Sex Abuse Prosecution: Working With Criminal Court
Friday, December 1, 2017
Otsego County Courthouse, Cooperstown

FOURTH DEPARTMENT NEWS

2016 Honorable Michael F. Dillon Awards

Congratulations to the recipients of the 2016 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 2016 Awards were presented to the recipients by Presiding Justice Gerald J. Whalen at a ceremony at the M. Dolores Denman Courthouse on June 20, 2017. The recipients are as follows:

FIFTH JUDICIAL DISTRICT

Darlene O'Kane, Onondaga County
Mark Malak, Oneida County

SEVENTH JUDICIAL DISTRICT

Teresa Pare, Ontario County
Christine Valkenburgh, Steuben County

EIGHTH JUDICIAL DISTRICT

David Frech, Erie County
Mary Hajdu, Chautauqua County

UNTIMELY VOUCHERS

The 2016-17 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 where the case ended on or before March 31, 2016.

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.

Fall Seminar Schedule

October 19-20, 2017

Fundamentals of Attorney for the Child Advocacy
Clarion Hotel/Century House
Latham, NY

September 28, 2017

Update
Quality Inn & Suites
Batavia, NY (full-day, taped)

October 13, 2017

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

October 27, 2017

CLE Seminar for AFC/Educators
(open to all Depts.)
Sagamore Resort Bolton Landing, NY

October 31, 2017

Update
Quality Inn Geneseo
Geneseo, NY (half-day, taped)

RECENT BOOKS AND ARTICLES

ADOPTION

Jessica Colin-Greene, *Identity and Personhood: Advocating for the Abolishment of Closed Adoption Records Laws,* 49 Conn. L. Rev. 1271 (2017)

CHILD SUPPORT

Leslie Joan Harris, *Child Support for Post-Secondary Education: Empirical and Historical Perspectives,* 29 J. Am. Acad. Matrim. Law. 299 (2017)

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

Margaret Ryznar, *In-Kind Child Support,* 29 J. Am. Acad. Matrim. Law. 351 (2017)

CHILD WELFARE

Cynthia Hawkins DeBose & Alicia Renee Tarrant, *Child Sex Trafficking and Adoption Re-Homing: America's 21st Century Salacious Secret,* 7 Wake Forest J. L. & Pol'y 487 (2017)

Symone Shinton, *Pedophiles Don't Retire: Why the Statue of Limitations on Sex Crimes Against Children Must be Abolished,* 92 Chi.-Kent L. Rev. 317 (2017)

CHILDREN'S RIGHTS

Kayla L. Acklin, *"Hurdling" Gender Identity Discrimination: The Implications of State Participation Policies on Transgender Youth Athletes' Ability to Thrive,* 37 B.C. J. L. & Soc. Just. 107 (2017)

Juliana Carter, *Reimagining Pennsylvania's School Discipline Law and Student Rights in Discipline Hearings,* 88 Temp. L. Rev. Online 4 (2017)

Katie Christian, *"It's Not my Fault!": Inequality Among Posthumously Conceived Children and why Limiting the Degree of Benefits to Innocent Babies is a "No-No!",* 36 Miss. C. L. Rev. 194 (2017)

Chiara R. Mancini, *"Mama, I'm a Big Girl Now,"* In Re: Cassandra C.: *Why Connecticut Should Have Adopted a Standard for the Mature Minor Doctrine,* 30 Quinnipiac Prob. L. J. 247 (2017)

Alexis M. Peddy, *Dangerous Classroom "App"-Titude: Protecting Student Privacy From Third-Party Educational Service Providers,* 2017 B.Y.U. Educ. & L. J. 125 (2017)

Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media,* 66 Emory L. J. 839 (2017)

CONSTITUTIONAL LAW

Nancy E. Dowd, *John Moore Jr.:* Moore v. City of East Cleveland *and Children's Constitutional Arguments,* 85 Fordham L. Rev. 2603 (2017)

Spencer Klein, *The New Unconstitutionality of Juvenile Sex Offender Registration: Suspending the Presumption of Constitutionality for Laws that Burden Juvenile Offenders,* 115 Mich. L. Rev. 1365 (2017)

Deema Nagib, *Jail Isolation After* Kingsley: *Abolishing Solitary Confinement at the Intersection of Pretrial Incarceration and Emerging Adulthood,* 85 Fordham L. Rev. 2915 (2017)

Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children,* 37 Child. Legal Rts. J. 1 (2017)

Andrew P. Stafford, *Resolving an Incoherent Doctrine: Regulating Off-Campus Student Speech With Principles of Personal Jurisdiction,* 23 Widener L. Rev. 135 (2017)

COURTS

Ann Cammett, *Reflections on the Challenge of Inez Moore: Family Integrity in the Wake of Mass Incarceration,* 85 Fordham L. Rev. 2579 (2017)

Eliana Corona, *The Reception and Processing of Minors in the United States in Comparison to that of Australia and Canada: Would Being a Party to the UN Convention on the Right of the Child Make a Difference in U.S. Courts?,* 40 Hastings Int'l & Comp. L. Rev. 2005 (2017)

Alexsis Gordon, *Redefining the Standard: Who Can be a Person Legally Responsible for the Care of a Child Under the Family Court Act?,* 33 Touro L. Rev. 517

(2017)

Rebekah Joab, *Incarcerating Native American Youth in Federal Bureau of Prisons Facilities: The Problem With Federal Jurisdiction Over Native Youth Under the Major Crimes Act,* 9 Geo. J. L. & Mod. Critical Race Persp. 155 (2017)

Gabrielle C. Phillips, Sieglein v. Schmidt: *Securing the Legitimacy of All Children Created Through Assisted Reproductive Technology,* 76 Md. L. Rev. 817 (2017)

CUSTODY AND VISITATION

Darya Hakimpour, *Distributing Children as Property: The Best Interest of the Children or the Best Interest of the Parents?,* 37 Child. Legal Rts. J. 128 (2017)

Linda Nielsen, *Re-Examining the Research on Parental Conflict, Coparenting, and Custody Arrangements,* 23 Psychol. Pub. Pol'y & L. 211 (2017)

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Timothy L. Arcaro, *Should Family Pets Receive Special Consideration in Divorce?,* 91-JUN Fla. B. J. 22 (2017)

DOMESTIC VIOLENCE

Caroline Forell, *Domestic Homicides: The Continuing Search for Justice,* 25 Am. U. J. Gender Soc. Pol'y & L. 1 (2011)

Imogene Mankin, *Abuse-In(G) The System: How Accusations of U Visa Fraud and Brady Disclosures Perpetrate Further Violence Against Undocumented Victims of Domestic Abuse,* 27 Berkeley La Raza L. J. 40 (2017)

Ruth Leah Perrin, *Overcoming Biased Views of Gender and Victimhood in Custody Evaluations When Domestic Violence is Alleged,* 25 Am. U. J. Gender Soc. Pol'y & L. 155 (2017)

Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of* Crawford v. Washington *on Domestic Violence and Rape Prosecutions,* 37 B.C. J. L. & Soc. Just. 1 (2017)

EDUCATION LAW

Michael Lewyn, *The Middle Class, Urban Schools, and Choice,* 4 Belmont L. Rev. 85 (2017)

Jordan Radford McDowell, *Burning Out: The Effect of Burnout on Special Education,* 2017 B.Y.U. Educ. & L. J. 99 (2017)

Michael A. Naclerio, *Accountability Through Procedure? Rethinking Charter School Accountability and Special Education Rights,* 117 Colum. L. Rev. 1153 (2017)

Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias,* 66 Emory L. J. 765 (2017)

Bethany Poppelreiter, *When Words are Weapons: Using* Tinker *and Premises Liability Doctrine to Keep Schools Safe in a Digital Age,* 86 Miss. L. J. 643 (2017)

Orly Rachmilovitz, *No Queer Child Left Behind,* 51 U.S.F. L. Rev. 203 (2017)

Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling,* 2017 B.Y.U. Educ. & L. J. 59 (2017)

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FEDERAL COURTS

Lawful Search Incident to Arrest Where Officer Had Probable Cause to Arrest Defendant for Violation of New York's Open-container Law Based on Objectively Reasonable Belief That Apartment Building Stairwell Was a Public Place Within Meaning of Open-container Law

During a routine patrol of an apartment building on March 21, 2015, a police officer observed defendant sitting in a stairwell in close proximity to an open bottle of vodka, while holding a plastic cup that seemed to the officer to smell of alcohol. The officer initially did not intend to arrest defendant, only issue him a summons for violating New York's open-container law. The officer ordered defendant to stand against the wall and produce identification. Defendant stood and then, as if to retrieve something, fumbled with his hands in his jacket pockets and rearranged his waistband. Fearing, because of his movements, that her safety was threatened, the officer frisked defendant and felt a bulge on the side of his jacket; she opened his jacket pocket and discovered a loaded handgun. The officer then handcuffed defendant, transported him to the police station, and issued him a summons for the open-container violation. On May 5, 2015, a grand jury returned a single-count indictment charging defendant with possessing a firearm as a previously convicted felon in violation of 18 U.S.C. Section 922 (g). Defendant moved to suppress evidence concerning the firearm on Fourth Amendment grounds. The District Court denied the suppression motion and ultimately convicted defendant of the offense charged. The Second Circuit affirmed. Defendant's contention was rejected that the officer did not have probable cause to conduct the search because the apartment building stairwell where he was found with an open container of alcohol was not a "public place" because, although it was a common area, it was located within a locked residential building. However, the question presented was not whether a common area of an apartment building such as a stairwell constituted a public place within the meaning of the open-container law, but only whether the officer had an objectively reasonable belief that it so qualified. The officer's assessment, even if mistaken, was premised on a reasonable interpretation of an ambiguous state law, the scope of which had not been clarified. Thus, the officer had probable cause to believe that defendant had violated the open-container law. Defendant's further contention was rejected that the search was not a lawful search incident to an arrest because, at the time of the search, the officer did not intend to arrest defendant and would not have done so had she not discovered the gun as a fruit of the search. In *United States v. Ricard,* 563 F.2d 45, the Court held that a search incident to an arrest was lawful because the officer had probable cause to arrest the defendant, regardless of whether the officer intended to arrest the defendant prior to conducting the search that was actually the cause of defendant's arrest. Although, in *Knowles v. Iowa,* 525 U.S. 113, the Supreme Court declined to uphold a search incident to arrest where a citation had been issued and there was no concern regarding officer safety or destruction or loss of evidence, here there was a basis for an arrest and the officer had not yet issued a citation, and thus the dangers to the officer remained present. It was irrelevant whether, at the time of the search, the officer intended to arrest defendant or merely to issue him a citation. The Court rejected defendant's contention, based on *People v. Reid*, 24 N.Y.3d 615, that the holding in *Knowles* overruled *Ricard* and stood for the broad proposition that an officer may conduct a search incident to an arrest only if she had already made an arrest or an arrest was impending. An officer who stopped a person to issue a citation faced an evolving situation. As events developed and new information became available - the presence of a gun, for example - an officer was entitled to change her course of action. Also, requiring a court to consider the officer's intent at the time of arrest ran counter to the Supreme Court's repeated rejection of a subjective approach in the Fourth Amendment context.

U.S. v Diaz, 854 F.3d 197 (2d Cir. 2017)

COURT OF APPEALS

Direct Evidence in Form of Contraband or Other Physical Evidence Not Only Adequate Proof to Support Defendant's Convictions

Defendant was convicted, upon a jury verdict in County Court, of conspiracy in the second degree, criminal sale of a controlled substance in the first degree, criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the second degree and two counts of criminal possession of a controlled substance in the third degree. The Appellate Division affirmed. The Court of Appeals affirmed. Defendant's contention was rejected that the evidence was not legally sufficient to support his convictions. Although the People did not recover or introduce any of the cocaine that defendant was charged with possessing, direct evidence in the form of contraband or other physical evidence was not the only adequate proof. The People presented sufficient evidence in the form of, among other things, defendant's intercepted phone calls replete with drug-related conversations, visual surveillance, and the testimony of cooperating witnesses.

People v Whitehead, 29 NY3d 956 (2017)

Sentencing Court Violated CPL 390.50 and Defendant's Due Process Rights by Failing to Adequately Set Forth on Record Basis for Its Refusal to Disclose to Defense Statements Reviewed and Considered by Court for Sentencing Purposes

Defendant pleaded guilty in County Court to second-degree attempted murder, two counts of first-degree assault, and second-degree assault, and was sentenced. The Appellate Division reserved decision and remitted for a determination whether defendant should be granted youthful offender (YO) status. On remittal, the County Court denied YO status. The Appellate Division affirmed. The Court of Appeals reversed and remitted. Defendant's contention was rejected that sentencing courts not onlymust make an on-the-record determination regarding YO status but, where such treatment was denied, must also state reasons for the denial in order to permit intelligent appellate review. The Legislature left it to the discretion of sentencing courts to make an individualized election as to whether, and to what extent, they wished to explain their decision to deny YO status in each particular case. Therefore, the sentencing court complied with CPL 720.20 when it explicitly denied defendant's request for YO treatment, despite the fact that the court did not provide the reasons for its determination on the record. However, the sentencing court violated CPL 390.50 and defendant's due process rights by failing to adequately set forth on the record the basis for its refusal to disclose to the defense certain statements that were reviewed and considered by the court for sentencing purposes. It was impossible to review whether the court abused its discretion in exempting the document in question from disclosure, because neither the Court nor the Appellate Division was provided with the one page that was withheld from the parties. To comply with due process, a sentencing court must assure itself that the information upon which it based the sentence was reliable and accurate, and that the defendant had an opportunity to respond to the facts upon which the court may have based its decision. Here, the sentencing court stated that it had reviewed a document that had been attached to the presentence investigation report as the last page, which was labeled "Confidential to the Court." The court noted that, because the "information was provided to the Probation Department on the promise of confidentiality," the court was excepting it from disclosure to the defense. The court had an obligation to independently review the statement to ensure that confidentiality was necessary and, if so, the extent to which redaction was required. Otherwise, Probation Departments could circumvent the disclosure requirements of the statute merely by promising every declarant that their entire statements would be confidential. Defendant was fully aware of the identities and positions of all of the victims, and any personal or contact information likely could properly have been redacted. If a court decided that it was essential to keep confidential any portion of a document that might have revealed its source, the court should have, at the very least, disclosed the nature of the document or redacted portion thereof - to the extent possible without intruding on necessary confidentiality - and should have set forth on the record the basis for that determination. Alternatively, where possible, the court could choose not to rely on the document, and could clearly so state on the record.

People v. Minemier, __ NY3d ___, 2017 WL 2673951 (2017)

Defendant's Conviction Reversed Where People Failed to Proffer Sufficient Foundation to Authenticate Photograph Obtained From Internet Profile Page Allegedly Belonging to Defendant

Defendant was convicted in Supreme Court of first and second degree robbery. The Appellate Division affirmed. The Court of Appeals reversed and ordered a new trial. The People failed to proffer a sufficient foundation to authenticate a photograph - purportedly of defendant holding a firearm and money - that was obtained from an internet profile page allegedly belonging to defendant. The victim was unable to identify the weapon as that which was used in the robbery, and no witnesses testified that the photograph was a fair and accurate representation of the scene depicted or that it was unaltered. The People contended that authentication of the photograph by a witness with personal knowledge of the scene depicted or through expert testimony was unnecessary where the photograph at issue was obtained from an internet profile page that the People claimed was controlled by defendant. Courts in several other jurisdictions had adopted a two-pronged analysis for authenticating evidence obtained from internet profiles or social media accounts, which allowed for admission of the proffered evidence upon proof that the printout of the web page was an accurate depiction thereof, and that the website was attributable to and controlled by a certain person, often the defendant. The courts that had adopted this approach had generally held that circumstantial evidence, such as identifying information and pictures, could be used to authenticate a profile page or social media account as belonging to the defendant. However, even assuming without deciding that a photograph could be authenticated in this way, the evidence presented of defendant's connection to the website or the particular profile was exceedingly sparse. The detective's testimony identifying and describing the profile page she found on BlackPlanet.com, combined with her testimony that the printout was an accurate representation of the photograph displayed, was not sufficient to establish that defendant was aware of - let alone exercised dominion or control over - the profile page. Notably absent was evidence regarding whether defendant was known to use an account on that website, whether he had ever communicated with anyone through the account, or whether the account could be traced to electronic devices owned by him. The People also proffered no evidence indicating whether the account was password protected or accessible by others, whether non-account holders could post pictures to the account, or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein. Without suggesting that all of the foregoing would be required or sufficient in each case, or that different information could not be relevant in others, the authentication requirement was not satisfied solely by proof that defendant's surname and picture appeared on the profile page.

People v. Price, __ NY3d ___, 2017 WL 2742214 (2017)

APPELLATE DIVISIONS

ADOPTION

Father's Consent to Adoption Not Required

Family Court determined that respondent father's consent was not required for the child's adoption. The Appellate Division affirmed. Petitioner agency proved by clear and convincing evidence that the father failed to contribute to the child's financial support and had only sporadic and minimal contact with the child and the agency. His incarceration did not absolve him of his parental obligations. He did not contact the agency to set up visits while he was incarcerated and did not visit with the child until well after the filing of the petition. Further, the father was not listed on the child's birth certificate or in the putative father registry, and he did not file his paternity petition until after the agency filed its petition, when the child was over one year old.

Matter of Gabriella Kamina M., 146 AD3d 500 (1st Dept 2017)

ARTICLE 78

Indicated Report Deemed Unfounded and Expunged Since Mother Acted Reasonably To Protect Her Own Safety and That of Children

The Appellate Division determined that petitioner mother's application to have a Central Register report amended to be unfounded and expunged should be granted. Here, the mother's paramour, the father of the youngest child, physically assaulted her on two occasions. During the first incident, the paramour, while driving on a high speed road, punched petitioner in the arm and leg while their three-week-old child was in the backseat. The following day, the paramour struck the mother in the back as she held the child, causing her to fall, and then choked and threatened her. This incident was observed by the eldest child. The indicated finding was based upon the mother's delay in reporting the incidents to the agency, the fact that she declined counseling services suggested by the agency, her request to modify the order of protection to permit communication with her paramour, and the possibility she might reunite with the paramour. The Appellate Division noted the most dangerous time in an abusive relationship is when the victim attempts to separate from the abuser. Here, the evidence showed the mother acted reasonably and planned on how to report the paramour's abuse without having to fear for her own safety or the safety of her children. When the mother advised the paramour he should leave their home, he responded by choking her and stated that "if [she] ended it that he would end it." The evidence showed there was no history of violence prior to these attacks, which occurred on two consecutive days. Since the mother did not have access to a vehicle at first, she discussed her plan with family members, and thereafter gained access to a vehicle. She took her two older children to the homes of relatives and brought the youngest child with her to report the incidents. The mother and the eldest child sought counseling and advice from their priest, who had some experience assisting families in similar circumstances. Additionally, the agency did not require the mother to engage in counseling services, and the mother did not act improperly in seeking services from a resource other than that suggested by the agency. Furthermore, the Court found the mother's request to modify the order of protection was in order to permit discussion of finances and child care with her paramour, and this was no more than undesirable parental behavior. Furthermore, since the paramour's incarceration, the mother had not brought the children to visit him. Moreover, the fear of future reunification with the paramour was mere conjecture since the mother testified that she wanted the paramour to complete all court-ordered programs such as anger management and domestic violence awareness classes before seeking any reunification.

Matter of Elizabeth B. v New York State Office of Children and Family Services, 149 AD3d 8 (3d Dept 2017)

CHILD ABUSE AND NEGLECT

Father Knew or Should Have Known That Mother Using Narcotics While Pregnant

Family Court determined that respondent father neglected the subject child. The Appellate Division affirmed. Although the court erred in failing to state the grounds for its determination, the Appellate Division had the authority to state the grounds. The finding of

neglect was supported by a preponderance of the evidence inasmuch as the father knew or should have known that respondent mother was abusing narcotics while she was pregnant, but failed to take steps to stop her drug use.

Matter of Ja'Vaughn Kiaymonie S., 146 AD3d 422 (1st Dept 2017)

Father Neglected Children by Using Home as Base of Drug Operations

Family Court found that respondent father neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the father neglected the children by using the residence he occupied with the children as the base for his drug trafficking operations. A DEA special agent testified that he observed the father going in and out of the home numerous times during the day, after engaging in conversations with individuals in cars, and that a search of the residence disclosed a large quantity of cocaine, oxycodone, and cash. The court properly concluded that the father's conduct placed the children at imminent risk of harm. The delay in the proceedings did not prejudice the father or violate his due process rights. The father was not produced in court due to his incarceration and as a result of his concerns about prejudicing the criminal case against him.

Matter of Jayden H., 146 AD3d 444 (1st Dept 2017)

Mother Neglected Children by Engaging in Aggressive and Uncontrolled Behavior in Their Presence

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that the mother neglected her children by engaging in a pattern of aggressive and uncontrollable behavior in their presence, which caused them to be upset and fearful, and impaired or created an imminent danger of impairing their physical, mental or emotional condition. The mother had repeated arguments with a neighbor, and displayed her anger issues toward building staff and other tenants in the presence of one or more of her children. This behavior so concerned the shelter staff that they had to call the authorities on several occasions and repeatedly warn the mother that her behavior could cause her to be evicted or arrested and could harm the children. The detrimental effect that the mother had on the children was well established in the record.

Matter of Ashante H., 146 AD3d 453 (1st Dept 2017)

Respondent Failed to Offer a Reasonable Explanation For Child's Injuries

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that respondent neglected the then one-month-old child by causing him to sustain a subconjunctival hemorrhage in his left eye, a scratch on his nostril, and a torn frenulum on his upper lip. It was undisputed that the child's injuries were not of the type that ordinarily occur absent an act or omission and that the child was in respondent's care when his injuries occurred. Respondent failed to offer a reasonable and adequate explanation regarding how the child sustained the injuries. The testimony of respondent's expert that the child could have sustained the hemorrhage at birth or by violent screaming, coughing, vomiting or an infection was not supported by the record inasmuch as the child had none of those conditions before the incident at issue. The court also properly rejected the testimony of the expert that the child could have sustained a torn frenulum after falling face first on the floor, because she acknowledged that she had seen such an injury in one case out of thousands and that a blow with a hand could affect a child in the same way. The fact that respondent acknowledged that she failed to tell the truth about the injuries because she was afraid he would be removed provided further evidence of neglect.

Matter of Nazere McK., 146 AD3d 487 (1st Dept 2017)

Mother Neglected Child by Stating Child Lied About Rape and Refused to Take Child Home

Family Court found that respondent mother neglected the subject child. The Appellate Division affirmed. After the mother was notified about a 2013 incident, she stated that the child lied about being raped and refused to take her back into her home or discuss services. That the mother would have considered voluntary placement if she knew of it, was immaterial because voluntary placement was appropriate only when the parent could not care for the child, not where

the parent was unwilling to do so. By failing to offer a plan for the child other than foster care, the mother placed the child in imminent risk of harm, Her statements and actions reflected her clear intention to abdicate her parental obligations. The mother's claims that she was unable to care for the child because of health problems were undocumented. That the child may have had disciplinary issues and that the agency may have failed to respond to a request for assistance with the child did not explain the mother's failure to cooperate with the agency's efforts to return the child home.

Matter of Kimberly F., 146 AD3d 562 (1st Dept 2017)

Father Neglected Children by Exposing Them to DV

Family Court determined that respondent father neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that respondent neglected the child. Although the children were not present for the most recent instance of abuse, the out-of-court statements of one of the children indicating that she and her sister witnessed prior episodes, as corroborated by two prior orders of protection and the father's admissions, were sufficient to demonstrate exposure to domestic violence. That the child made consistent statements to more than one person enhanced the credibility of the statements. Although the statements were somewhat lacking in detail, they were consistent with the child's assertion that she hid when her father hit her mother. The child's statement that she was scared when her father hit her mother and would hide demonstrated an imminent risk of emotional and physical impairment.

Matter of Emily S., 146 AD3d 599 (1st Dept 2017)

Respondent Sexually Abused Subject Child

Family Court found that respondent sexually abused the subject child. The Appellate Division affirmed.

Regardless whether the court took judicial notice of certain facts, the child's in-court testimony regarding the sexual abuse respondent inflicted upon her was sufficient to support the abuse finding by a preponderance of the evidence. The child's testimony did not require corroboration. In any event, the testimony was corroborated by the child's medical records, which included her similar account of the abuse, as well as the child protection specialist's testimony. The testimony of respondent's witnesses, who did not witness the incident, did not explain his conduct or rebut evidence of culpability. The court properly drew a negative inference against respondent for failing to testify.

Matter of Kayla S., 146 AD3d 648 (1st Dept 2017)

Father Neglected One Child By Inflicting Excessive Corporal Punishment and Derivatively Neglected Other Two Children

Family Court found that respondent mother and father neglected the subject children T and S and derivatively neglected the child K. The Appellate Division modified by vacating the finding of neglect as to T and entered a finding that respondents derivatively neglected T. A preponderance of the evidence supported the court's finding that the father neglected S by inflicting excessive corporal punishment upon him by striking him with a plastic bat and belt, which caused the child's elbow to be bruised, scratched and swollen. S's out-of-court statements were sufficiently corroborated by the caseworker's testimony about the child's injuries and the photos depicting them. The fact that S did not require medical treatment did not preclude a finding of neglect. The court erred, however, in entering a finding that the father inflicted excessive corporal punishment upon T inasmuch as there was no testimony that the child was physically or emotionally harmed as a result of being disciplined by the father. However, a preponderance of the evidence supported a finding of derivative neglect inasmuch as the evidence showed that T was in the house during the incident between the father and S, and that T was aware of what was transpiring. Petitioner failed to show, by a preponderance of the evidence, that respondent mother inflicted excessive corporal punishment upon T or S. However, S's testimony that the mother observed the incident between the father and S, which was corroborated by K's testimony, supported a finding that the mother neglected S by failing to take any action to protect S and derivatively neglected T and K, who were in the home and aware of what was transpiring.

Matter of Tyson T., 146 AD3d 669 (1st Dept 2017)

Court Properly Denied Respondent's Motion to Vacate His Default

Family Court denied respondent's motion to vacate his default and re-open the fact finding hearing. The Appellate Division affirmed. The court properly exercised its discretion in denying respondent's motion to vacate his default because his moving papers failed to demonstrate a reasonable excuse for his absence. Although respondent's counsel appeared at the fact-finding hearing, he notified the court that he would not be participating and presented no explanation for respondent's absence. Respondent's claim that he was absent because he lost his wallet and his attorney's contact information seven days earlier failed inasmuch as there was no explanation why he did not contact his attorney's office and ask to speak with his attorney and otherwise provided no corroboration for his claims. Respondent's assertion that he would present evidence including expert testimony countering the allegations that he allowed or committed a sex offense against the child was insufficient to establish a meritorious defense.

Matter of Ne Veah M., 146 AD3d 673 (1st Dept 2017)

Father Sexually Abused One Child and Derivatively Neglected Other Child

Family Court found that respondent father sexually abused the child A1 and derivatively neglected the child A2 and placed A2 in the custody of his mother. The Appellate Division affirmed. The determination that respondent sexually abused A1 was supported by her testimony, which, after carefully considering significant issues raised about A1's credibility, the court credited. The determination that respondent derivatively neglected A2 was supported by a preponderance of the evidence inasmuch as respondent's long-term sexual abuse of A1 indicated that he had a faulty understanding of the duties of parenthood, which posed a substantial risk to A2.

Matter of Andrew R., 146 AD3d 709 (1st Dept 2017)

Respondent Abused Older Children and Derivatively Neglected Younger Children

Family Court found that respondent abused the three oldest subject children and derivatively neglected the two younger subject children. The Appellate Division affirmed. Respondent, the father of the youngest child, was a person legally responsible for the other children. He abused the three oldest children by hitting them, using pressure points, making them stand on one leg and then kicking that leg out, and locking them in a room for extended periods of time without access to a bathroom. The two oldest girls also witnessed the more severe abuse of the oldest boy, including respondent slamming the boy against a wall and choking him. The children's out-of-court statements regarding the abuse were largely consistent and were corroborated by photos of the boy's injuries, a caseworker's testimony regarding her observations of the boy's injuries, the smell of urine in the children's bedroom, medical expert testimony that the boy's injuries could not have been self inflicted, and respondent's admissions. Medical testimony revealed that the boy's injuries caused a substantial risk of death and at least a substantial risk of protracted impairment of emotional health, constituting abuse. The violent and repeated abuse of the oldest child was so proximate in time to the derivative proceeding that it could reasonably be concluded that respondent had a faulty understanding of the duties of parenthood and therefore the younger children's physical or emotional conditions were in imminent danger of becoming impaired. The court did not err in finding derivative neglect rather than abuse. There was no evidence that the youngest child, who was a baby, was ever directly exposed to the abuse and the second youngest child, while locked in the room with the other children, was two years old and not apparently subjected to the more severe forms of abuse.

Matter of Nayomi M., 147 AD3d 413 (1st Dept 2017)

Respondent Sexually Abused Older Child and Derivatively Abused Younger Child

Family Court found that respondent sexually abused the oldest subject child and derivatively abused the two younger subject children. The Appellate Division affirmed. Respondent was a person legally responsible for the two oldest children when the sex abuse occurred because the oldest child's undisputed testimony permitted an inference of substantial familiarity between herself, her siblings and respondent. A preponderance of the evidence supported the court's finding that respondent sexually abused the oldest child and derivatively abused the two youngest children. The court properly credited the oldest child's testimony and

any inconsistencies with her prior statements were minor. Although the child's testimony was competent evidence that respondent sexually abused her, the record also showed that such testimony was corroborated by the caseworker's testimony and the child's records from the advocacy center, which included the child's similar account of the sexual abuse. Respondent's intent to gain sexual gratification from touching the child's breasts and vagina was properly inferred from the acts themselves. His out-of-court statements that the child misunderstood and that he only hugged her and did not mean to do it, confirmed the child's testimony that respondent touched her and failed to rebut evidence of his culpability. Respondent's failure to testify permitted the court to draw the strongest inference against him.

Matter of Karime R., 147 AD3d 439 (1st Dept 2017)

Mother Neglected Child by Impairing Her Physical, Mental or Emotional Condition

Family Court determined that respondent mother neglected the subject child and derivatively neglected her younger child. The Appellate Division affirmed. A preponderance of the evidence demonstrated that the mother neglected the older daughter by impairing her physical, mental or emotional condition by making her sit outside the home in freezing temperatures for hours at a time without sufficient clothing or proper food, while cursing at her from inside. The mother also withheld food from the child, or offered her food that she did not like or was allergic to, so that the younger daughter had to sneak food to her at the risk of getting into trouble. As she previously did with her older son, the mother emotionally rejected the subject child, stating that the agency could "keep" her. These actions demonstrated a flawed understanding of the mother's parental responsibilities sufficient to support the derivative neglect of the younger sibling.

Matter of Jasmine G., 147 AD3d 593 (1st Dept 2017)

Mother Neglected Children by Leaving Young Children in Care of Older Daughter For Extended Periods

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the finding of neglect. The court properly found that the children's mental or emotional condition was in imminent danger of becoming impaired because the mother left a daughter to supervise her younger siblings, who were nine, seven and six, for extended periods, without a working telephone, adequate food, or instructions about caring for the younger children. The court also properly found neglect based upon the mother's regular misuse of marijuana while the children were present.

Matter of Shajada B., 147 AD3d 645 (1st Dept 2017)

Respondent's Transient Lifestyle and Inability to Provide Shelter Impaired Child

Family Court determined that respondent father neglected the subject child. The Appellate Division affirmed. Petitioner agency established by a preponderance of the evidence that the subject child's physical, mental or emotional condition had been impaired or was in imminent danger of becoming impaired because of respondent's transient lifestyle and inability to provide adequate shelter or make provisions for the child.

Matter of Baby Girl L., 147 AD3d 683 (1st Dept 2017)

Mother Neglected Children

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. The chronic poor hygiene of the children was well documented and demonstrated that the children were at imminent risk of impairment. The mother also medically neglected one child's severe eczema, resulting in a three-day hospitalization. Additionally, two of the children had excessive absences from school, which detrimentally affected their education and contributed to poor grades. The mother also prohibited one of the children from attending a school-recommended evaluation.

Matter of Nivek A.S., 148 AD3d 459 (1st Dept 2017)

Father's Sexual Abuse of Unrelated Child and Other Factors Warranted Derivative Neglect Finding

Family Court found that respondent father derivatively neglected his children. The Appellate Division

affirmed. The finding of neglect was supported by a preponderance of the evidence. The findings were not based solely upon a presumption that the father's conviction for sexually abusing an unrelated five year old was sufficient to establish that he posed a danger to his children in the absence of treatment. Rather, the findings were premised on the circumstances surrounding the conviction, involving the abuse of a friend's child, as well as the father's failure to complete a sex offender treatment program before the filing of the petition, his denial of responsibility for the crime to which he pleaded guilty, and violation of the conditions of his parole, which prohibited him from living with any children without permission of the court.

Matter of Enrique R., 148 AD3d 474 (1st Dept 2017)

Children Impaired by Father's Violence

Family Court found that respondent father neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence established that the father neglected his children. The evidence before the court, including the father's aggressive and intimidating behavior in front of the children, causing them visible distress, and incidents of domestic violence against the children's mother while the children were present, was sufficient to establish that the children were subject to actual or imminent danger of injury or impairment of their emotional and mental condition.

Matter of Macin D., 148 AD3d 572 (1st Dept 2017)

Child at Imminent Risk of Becoming Impaired by Reason of Mother's Mental Illness

Family Court found that respondent mother neglected her three-month-old child. The Appellate Division affirmed. A preponderance of the evidence demonstrated that the mother's mental condition resulted in imminent danger to her child. The mother had numerous delusional episodes, the most serious of which involved her being found on a road in Texas in the middle of the night, making bizarre statements while the infant child was left in the front seat of the vehicle; a one-week hospitalization where the mother was noncompliant with her medication; her unfounded belief that the infant child had been raped, resulting in the mother "testing" the child to determine if she had been raped and making an unnecessary trip to the hospital; and her continued "extremely concerning behavior" after her return to New York. Her mental condition, in conjunction with her failure to comply with her medication regimen and follow-up treatment, and the fact that her mental illness impaired her ability to care for the child, and caused her to keep unnecessarily checking the child for evidence of rape, supported the finding of neglect. The dissent would have found that there was no admissible evidence before the court from which it could have made a finding of neglect.

Matter of Ruth Joanna O.O., 149 AD3d 32 (1st Dept 2017)

Dismissal of Petition Alleging Sexual Abuse Affirmed

Family Court dismissed the petition brought by ACS on the ground that it failed to prove by a preponderance of the evidence that respondent father sexually abused the subject child. The Appellate Division affirmed. The record provided no basis to overturn the court's credibility finding with respect to the mother. Inasmuch as the child was not called to testofy in the proceeding, there were no admissions by the father, and there was no physical evidence of sexual abuse, the only proof that was offered were hearsay statements. The child's out-of-court statements were not sufficiently corroborated to establish abuse by a preponderance of the evidence. Even if the witness had been qualified as an expert, there still was not sufficient proof. The out-of-court statements by the child had several inconsistencies, and the child stated that he could not remember certain details upon further questioning by the advocacy center interviewer. The mother's account, which the court doubted, also was inconsistent. The child's parents were involved in a custody dispute and the instant allegations could not be separated from the dispute between the parties.

Matter of Django K., 149 AD3d 405 (1st Dept 2017)

Father Neglected Children by Reason of His Mental Illness and Medical and Educational Neglect

Family Court found that respondent father mother neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the father neglected the children by reason of his mental illness. The father's failure to comply with mental health treatment and his continued

use of marijuana directly impacted the children's development. Further, the father's failure to toilet train one of the children, which left him in diapers at age five, precluded the child's enrollment in school. A preponderance of the evidence also supported the finding that the father educationally neglected the children. The father failed to obtain services or alternate educational services to address the children's developmental delays. The record also supported the finding of medical neglect inasmuch as he failed to follow through on referrals to medical professionals to address the children's serious developmental delays, obesity, and one child's excessive tooth decay.

Matter of Angelise L., 149 AD3d 469 (1st Dept 2017)

Record Supported Finding That Father Neglected His Daughter by Inflicting Excessive Corporal Punishment on Her and Derivatively Neglected Her Two Younger Siblings

The evidence adduced at the fact-finding hearing established that the father became enraged and locked the mother out of the house when she left for the evening without cooking dinner for the subject children, all of whom were teenagers. The father blocked the door and instructed the children not to allow the mother back into the home. When the father discovered that K. the oldest child, had helped the mother re-enter the house, he struck K. with a chair, bruising the arm she had raised to protect herself. When K. tried to stand, the father grabbed her by the throat and threw her down. These facts amply supported the Family Court's conclusion that the father neglected K. by inflicting excessive corporal punishment on her and derivatively neglected the two younger children, as the father's actions demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in his care. Order affirmed.

Matter of Kennedy B., 146 AD3d 772 (2d Dept 2017)

Record Supported Family Court's Finding of Neglect Against the Mother Who Behaved Violently and Impulsively as a Result of Her Ongoing Mental Illness

The Family Court's finding of neglect against the mother was supported by a preponderance of the evidence which demonstrated that the physical, mental, or emotional condition of the subject children was in imminent danger of becoming impaired as a result of the mother's violent, impulsive behavior and her ongoing mental illness. In addition, the finding of neglect against the father was supported by a preponderance of the evidence demonstrating, inter alia, that he knew or should have known about the mother's behavior and mental illness and that he failed to take the necessary steps to protect the subject children. Orders affirmed.

Matter of Omisa C.L., 146 AD3d 784 (2d Dept 2017)

Record Supported Finding That Father Medically Neglected Child Born Prematurely at Home

The evidence showed that the father medically neglected the child L. when he failed to seek medical attention for her for a week despite L. being born approximately six weeks premature at home and without any medical assistance. Further, when he finally did seek medical attention for L. and was advised to immediately take her to the emergency room, he waited a full day before doing so. The result of this delay was L. being admitted to the pediatric intensive care unit at Stony Brook Hospital for four days. Moreover, because the evidence established that the father was a person legally responsible for the children M. and A., the medical neglect finding as to L. formed the basis upon which a derivative neglect finding could be made as to M. and A. The evidence further showed that the father neglected each of the children by his misuse of drugs, including cocaine and marijuana (*see* FCA §§ 1012 [f] [i] [B]; 1046 [a] [iii]). The father admitted at the fact-finding hearing that he had been using cocaine and marijuana since 2013 and that he used cocaine about three times, and used marijuana about five times during the time that L. was in his care. Moreover, a witness from the Treatment Alternative for Safer Communities program testified that the father tested positive for marijuana and cocaine pursuant to a 30-day hair follicle test on May 5, 2015. This evidence established a prima facie case of neglect as to the three subject children, and the father failed to demonstrate that he had entered a rehabilitation program before the neglect petitions were filed and, therefore, failed to rebut that showing. Orders affirmed.

Matter of William B., 146 AD3d 882 (2d Dept 2017)

Record Supported Finding That Mother Neglected Her Son by Inflicting Excessive Corporal Punishment on Him

A preponderance of the evidence supported the Family Court's finding that the mother neglected the child by inflicting excessive corporal punishment on him. Contrary to the mother's contention, the child's out-of-court statements were sufficiently corroborated by testimony from a police officer, the child's medical records, and progress notes from the child's caseworker, all of which confirmed that the child had suffered injuries. Further, although the mother disputed the allegations, the court's determination that her version of events lacked credibility was entitled to deference and was supported by the record. Order affirmed.

Matter of Tina H., 146 AD3d 961 (2d Dept 2017)

Father's Plea in Criminal Court Provided Sufficient Corroboration of Child's Out-of-Court Statements

Contrary to the Family Court's determination, the evidence that the father pleaded guilty in a criminal proceeding to endangering the welfare of a child provided sufficient corroboration to support the reliability of S.'s out-of-court statements regarding the father's sexual abuse of her. Together with the testimony of the petitioner's caseworker and the mother, this evidence established the allegations of sexual abuse by a preponderance of the evidence. Moreover, it was appropriate to draw a negative inference against the father for his failure to testify at the fact-finding hearing. The father's sexual abuse of S. supported a finding that he derivatively abused the child A., since his conduct demonstrated a fundamental defect in his understanding of the duties of parenthood so as to create a substantial risk of harm to any child in his care. Accordingly, the order was reversed and the matter was remitted to the Family Court for a dispositional hearing and a disposition thereafter.

Matter of Jose G.-G., 147 AD3d 829 (2d Dept 2017)

Family Court Should Have Denied Mother's 1028 (a) Application

An application pursuant to FCA § 1028 (a) for the return of a child who has been temporarily removed shall be granted unless the court finds that "the return presents an imminent risk to the child's life or health" (*see* FCA § 1028 [a]). In a proceeding for removal of a child, the Family Court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. Ultimately, the Family Court must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests. Here, the record did not provide a sound and substantial basis for the Family Court's determination to grant the mother's application. In particular, the evidence established, among other things, that the mother had failed to address or acknowledge the circumstances that led to the removal of the child. Accordingly, the order was reversed, and the mother's application was denied.

Matter of Audrey L., 147 AD3d 838 (2d Dept 2017)

Record Supported Finding That Mother Neglected Child by Inflicting Excessive Corporal Punishment

A preponderance of the evidence supported the Family Court's finding that the mother neglected C. by inflicting excessive corporal punishment on her. Contrary to the mother's contention, C.'s out-of-court statements were sufficiently corroborated by testimony from the caseworker as well as photographs taken by the caseworker of C.'s injuries. Furthermore, although the mother disputed the allegations, the Family Court's determination that her version of events lacked credibility was entitled to deference and was supported by the record. Further, the evidence which established that the mother inflicted excessive corporal punishment on C. was sufficient to support the Family Court's determination that the other three children were derivatively neglected. Order affirmed.

Matter of Douglas L., 147 AD3d 840 (2d Dept 2017)

Child's Out-of-Court Statements Were Sufficiently Corroborated

The Family Court's finding that the respondent sexually abused the child J. was supported by a preponderance of the evidence (*see* FCA §§ 1012 [e] [iii]; 1046 [b] [i]; PL 130.30). J.'s out-of-court statements to her therapist and two caseworkers were corroborated by medical records (*see* FCA § 1046 [a] [iv]) establishing that J. had become pregnant. Contrary to the respondent's contention, corroborative evidence as to the identity of an abuser is not required. The credibility of J.'s initial

claim that she was impregnated by a teenage neighbor was a determination for the court given the conflicting evidence that, once the respondent learned that J. was pregnant, he told her to say that the teenage neighbor was the father. There was no basis in the record to disturb the court's assessment of the witnesses' credibility. The respondent's abuse of J. occurred while the children T., A., and E. were asleep and the mother was at work, and the respondent's admitted role was one of caretaker for the children. The respondent demonstrated a fundamental defect in his understanding of his duties as a person with legal responsibility for the care of children, and the Family Court properly found that T., A., and E. were derivatively neglected. Order affirmed.

Matter of Gregory A., 147 AD3d 844 (2d Dept 2017)

Inconsistencies in Child's Accounts Did Not Render Her Testimony Unworthy of Belief

Contrary to the Family Court's determination, the petitioner met its burden of establishing, by a preponderance of the evidence, that the respondent abused D. (*see* FCA §§ 1012 [e] [iii]; 1046 [b] [i]; PL § 130.52 [1]). D. testified that the respondent, on three occasions, grabbed her buttocks, and, when she looked at him, the respondent said "what," and smiled. Further, D. testified that each incident made her feel "uncomfortable." This evidence, together with a negative inference drawn from the respondent's failure to testify, was sufficient to support a finding of abuse. Any inconsistencies in D.'s accounts of the incidents did not render her testimony unworthy of belief. Moreover, the respondent's intent to gain sexual gratification could be inferred from the nature of the conduct about which D. testified. In addition, the petitioner met its burden of establishing, by a preponderance of the evidence, that the respondent neglected D. (*see* FCA § 1012 [f] [i] [B]). However, the Family Court properly dismissed the petition related to R., the respondent's biological son who was born shortly after the incident at issue, insofar as it alleged that the respondent derivatively abused and/or neglected R. While evidence of the abuse or neglect of one child may evince a flawed understanding of parental duties and impaired parental judgment sufficient to support a finding of derivative abuse or neglect as to another child in the respondent's care, a finding of abuse or neglect of one child does not, by itself, establish that other children in the care of the respondent have been derivatively abused or neglected. Here, under the circumstances presented, the respondent's conduct with regard to D. failed to establish that the respondent derivatively abused and/or neglected R. Accordingly, the order was modified and the matter was remitted for a dispositional hearing and an order of disposition thereafter.

Matter of Shaqueina W., 147 AD3d 856 (2d Dept 2017)

Mother's Motion Pursuant to FCA § 1061 Was Properly Denied

FCA § 1061 provides that, for good cause shown, a court may set aside, modify, or vacate any order issued in the course of a child protective proceeding (*see* FCA § 1061). Nevertheless, as a general rule, a parent's compliance with the terms and conditions of a suspended judgment does not eradicate the prior neglect finding. Here, the record demonstrated that the mother failed to establish good cause to vacate the prior adjudication of neglect. Accordingly, the mother's motion was properly denied. Order affirmed.

Matter of Inocencia W., 147 AD3d 865 (2d Dept 2017

Petitioner's Application Pursuant to FCA § 1027 Should Have Been Denied

In determining a removal application pursuant to FCA § 1027, the court must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal. Here, the petitioner failed to establish that the child would be subjected to imminent risk if she were not placed in the custody of the petitioner pending the outcome of the neglect proceeding. Under the circumstances of this case, concerns about, inter alia, the adequacy of the father's plan to care for the child did not amount to an imminent risk to the child's life or health that could not be mitigated by reasonable efforts to avoid removal. Accordingly, that branch of the petitioner's application pursuant to FCA § 1027 which sought removal of the child from the father should have been denied. Order reversed.

Matter of Emmanuela B., 147 AD3d 935 (2d Dept 2017)

Dispositional Hearing Not Required

The petitioner commenced proceedings alleging that the father abused and neglected the subject children. In an order entered January 16, 2013, upon the consent of the mother and father, the Family Court awarded temporary custody of the children to their maternal aunt. In a final order of custody entered February 8, 2013, in a related custody proceeding commenced by the maternal aunt, the court, upon the consent of the mother and father, awarded sole legal and physical custody of the subject children to the maternal aunt. Subsequently, at the dispositional phase of the neglect proceedings, after finding that the children were severely abused and neglected, the Family Court, noting that all parties had previously consented to the final order of custody entered February 8, 2013, again awarded permanent custody to the maternal aunt, without conducting a dispositional hearing. Under the circumstances of this case, the father's contention that the Family Court erred in failing to conduct a dispositional hearing was without merit. While an initial custody determination should generally be made only after a full and plenary hearing and inquiry, the Family Court in this case relied upon the fact that a final custody determination had already been made in the order entered February 8, 2013, upon the father's consent. Therefore, no dispositional hearing was required. Further, the issues raised by the father with respect to the temporary order of custody were not properly before the Appellate Division. As noted by the Family Court in the order appealed from, the order awarding the maternal aunt temporary custody of the children was superseded by the final order of custody entered February 8, 2013, from which no appeal was taken. Order affirmed.

Matter of S.M., 147 AD3d 954 (2d Dept 2017)

Record Supported Finding of Neglect Based upon Mother's Misuse of Drugs and Alcohol

The Family Court's finding of neglect was supported by a preponderance of the evidence (*see* FCA §§ 1012 [f] [i] [B]; 1046 [a] [iii]; [b] [I]). Contrary to the mother's contention, the evidence adduced at the fact-finding hearing of her repeated misuse of drugs and alcohol, her repeated positive drug tests for marijuana and cocaine, and her failure to regularly attend a substance abuse treatment program established a prima facie case of neglect (*see* FCA § 1046 [a] [iii]). Therefore, neither actual impairment of the children's physical, mental, or emotional condition, nor specific risk of impairment, needed to be established. Accordingly, the court properly found that the mother neglected the children.

Matter of Kenneth C., 148 AD3d 799 (2d Dept 2017)

Child, Three Months Old, Diagnosed with Multiple, Unexplained Skeletal Fractures

The record revealed that when the subject child was three months old, the mother took her to a hospital where she was diagnosed with multiple, unexplained skeletal fractures. The petitioner thereafter commenced a proceeding alleging that the mother and the child's childcare provider had abused the child. After fact-finding and dispositional hearings, the Family Court determined that the mother and the childcare provider abused the child and placed the child in the custody of the Commissioner of Social Services. The mother appealed. The Appellate Division affirmed. The petitioner established a prima facie case of child abuse. It was uncontested that the injuries suffered by the child were the result of abuse and that only the mother and the childcare provider had access to her in the relevant period. The mother failed to rebut the presumption of parental culpability. Accordingly, the Family Court properly determined that the mother abused the subject child.

Matter of Zoey D., 148 AD3d 802 (2d Dept 2017)

Child's Out-of-Court Statements Were Inadmissible Hearsay

The petitioner filed neglect petitions against the respondent, which, alleged that he had derivatively neglected his children based upon prior convictions of endangering the welfare of a child regarding two other children. Following a fact-finding hearing, the Family Court found that the petitioner failed to establish a prima facie case of neglect and dismissed the petitions. The petitioner appealed. The Appellate Division affirmed. At the fact-finding hearing, the petitioner presented a caseworker as its only witness and documentation of the father's criminal offenses. The caseworker testified to previous statements allegedly made to her by a child complainant in one of the respondent's prior criminal cases. The petitioner failed

to establish that the respondent was a person legally responsible for the child whose statements it wished to introduce through the testimony of the caseworker (*see* FCA § 1012 [g]). Accordingly, the Family Court properly found that the out-of-court hearsay statements of this child were not admissible under the hearsay exception provided by Family Court Act § 1046 (a) (vi). The remaining evidence, which consisted only of certain criminal court records regarding the respondent's convictions of endangering the welfare of a child, were insufficient for the court to make a finding of derivative neglect. The records did not sufficiently detail the facts underlying these criminal convictions. Without additional evidence, expert or otherwise, the petitioner failed to prove by a preponderance of the evidence that the respondent posed an imminent danger to his children (*see* FCA § 1046 [b] [I]).

Matter of Kaliia F., 148 AD3d 805 (2d Dept 2017)

Record Supported Dismissal of Neglect Petitions

The petitioner commenced neglect proceedings alleging, inter alia, that the mother neglected the subject children as a result of her mental illness. After a fact-finding hearing, where evidence of the mother's mental illness, her ongoing treatment for her mental illness, and the condition of the children was admitted, the Family Court dismissed the proceedings on the ground that neglect was not established. The petitioner appealed. The Appellate Division affirmed. The petitioner failed to sustain its burden of proving by a preponderance of the evidence that the children's physical, mental, or emotional condition was in imminent danger of becoming impaired as a result of the mother's mental illness. The evidence showed that the children were healthy and well cared for by the mother. Accordingly, the Family Court properly dismissed the neglect petitions.

Matter of Jaurelious G., 148 AD3d 807 (2d Dept 2017)

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

The petitioner commenced proceedings alleging that the mother neglected the then-eight-year-old subject child by inflicting excessive corporal punishment on her, and thereby derivatively neglected the other two subject children. At the conclusion of the petitioner's case, the Family Court granted the mother's motion to dismiss the petitions. Thereafter, the Appellate Division granted the petitioner's motion to stay enforcement of the order and to continue the remand of the subject children to its care and custody, pending a hearing and determination of the appeal. Contrary to the Family Court's determination, viewing the evidence in the light most favorable to the petitioner and affording it the benefit of every favorable inference which could be reasonably drawn from the evidence, the petitioner presented a prima facie case of neglect. At the fact-finding hearing, the petitioner introduced a recording of two telephone calls to the 911 emergency number, and elicited testimony from a police officer and a caseworker that the mother admitted using a belt against the child. Such evidence was sufficient to corroborate the child's out-of-court statements to the caseworker that the mother beat her (*see* FCA §§ 1012 [f] [i] [B]; 1046 [a] [vi]). Moreover, the absence of physical injury is not dispositive. In any event, the caseworker's testimony that the child had stated that her upper right arm hurt from having defended herself, was not undermined on cross examination. Finally, dismissal was not warranted on the ground that the child gave a conflicting statement to the police officer. Accordingly, the Family Court erred in granting the mother's motion to dismiss the petitions. Since the court terminated the proceedings at the close of the petitioner's direct case upon an erroneous finding that a prima facie case had not been established, a new hearing, and a new determination of the petitions was required.

Matter of Jaivon J., 148 AD3d 890 (2d Dept 2017)

Record Did Not Support Finding That Father Neglected Child by Failing to Supply Him with Adequate Food

After a fact-finding hearing, the Family Court found that the father neglected the child by failing to supply him with adequate food. An order of disposition was subsequently issued. The father appealed. The Appellate Division reversed. The Family Court's finding that the child was neglected by the father's failure to exercise a minimum degree of care in supplying him with adequate food was not supported by a preponderance of the evidence (*see* FCA §§ 1012 [f] [i] [A]; 1046 [b] [i]). The record revealed that the father and the child were living with relatives during the relevant time period, and that the child was

provided with meals by a family member when the father was working. Moreover, the child, who was 12 years old, was given access to the food in the kitchen of the residence where he and the father were living. Under these circumstances, the petitioner failed to establish by a preponderance of the evidence that the child's physical, mental, or emotional condition had been impaired or was in imminent danger of becoming impaired, as a result of the father's failure to provide him with adequate food (*see* FCA §§ 1012 [f] [i] [A]; 1046 [b] [I]). Accordingly, the order of disposition was reversed, on the facts, the order of fact-finding was vacated, the petition was denied, and the proceeding was dismissed.

Matter of Justin P., 148 AD3d 903 (2d Dept 2017)

Record Supported Finding That Father Neglected Children by Misusing Marijuana and Committing Domestic Violence in Their Presence

Contrary to the father's contention, a preponderance of the evidence supported the Family Court's finding that the father neglected the subject children by misusing marijuana and by committing an act of domestic violence in their presence. The record demonstrated that the father was previously adjudicated to have neglected the children based on substance abuse and that the father submitted to a toxicology screening and tested positive for marijuana. This evidence was sufficient to corroborate the out-of-court statements of the children C.W. and R.L.L., which established that the father smoked "weed" about once per week in the presence of C.W. and R.L.L. and, on one occasion the child C.W., then 7 years old, found remnants of the father's marijuana in an ashtray and tried to smoke it. The evidence further demonstrated that the father neglected the children by committing domestic violence in the presence of R.L.L, and another child. Specifically, during an argument with the children's mother, the father threw a stone object into the mother's car windshield, shattering the glass. R.L.L., then five years old, and another child, then three years old, were present and standing between the father and the mother at the time of the incident. Orders affirmed.

Matter of Ronald L., 148 AD3d 914 (2d Dept 2017)

Record Supported Finding That Mother Severely Abused Her Child

The petitioner established, by clear and convincing evidence, that the mother severely abused her child (*see* SSL § 384-b [8] [a] [i]; FCA § 1051 [e]). The testimony of the two medical experts called by the petitioner established that the child, then two years old, suffered a serious physical injury inasmuch as she suffered, inter alia, a skull fracture, a subdural hematoma intrahemispherically, and swelling of the brain when she presented at the hospital. The expert also testified that the constellation of injuries sustained by the child could not have been caused accidentally or been self-inflicted, and that these injuries culminated in the child's death. The testimony of the petitioner's caseworker further established that the mother and her boyfriend were the only two persons who cared for the child in the 24 hours before her hospitalization and that, according to the statements made by both the mother and the boyfriend during the caseworker's investigation, the child appeared healthy and normal for the majority of the day and the mother alone was caring for the child in the few hours immediately before her hospitalization. Moreover, the nature and severity of the child's injuries, coupled with the mother's failure to offer any explanation for those injuries, supported a finding that she acted recklessly or intentionally under circumstances evincing a depraved indifference to human life within the meaning of Social Services Law § 384-b (8) (a). As such, the petitioner established a prima facie case of severe abuse, which created a presumption of culpability extending to the mother and shifted the burden of explanation or of going forward to her. The mother did not offer any evidence to rebut the petitioner's showing and declined to testify at the hearing, which warranted the Family Court drawing the strongest possible negative inference against her. Therefore, the finding that the mother severely abused the child was supported by clear and convincing evidence. As to the boyfriend, the petitioner established a prima facie case of child abuse against him by eliciting testimony from its witnesses that established that the child sustained an injury which would ordinarily not occur absent an act or omission of the boyfriend, and that the boyfriend was a caretaker of the child at the time the injury occurred (*see* FCA § 1046 [a] [ii]). After a prima facie case of abuse was established, the burden of going forward shifted to the

boyfriend to offer a reasonable explanation as to how the injury occurred. While the boyfriend did testify in his own defense and implicated the mother, his testimony placed him in the room with the mother and the child at the time that the injuries to the child occurred. Despite the boyfriend's claim that he had no direct involvement in the child's injury, a parent or person legally responsible who stands by while others inflict harm may be found responsible for that harm (*see* FCA § 1012 [e] [ii]). As such, the finding that the boyfriend physically abused the child was supported by a preponderance of the evidence.

Matter of Mackenzie P. G., 148 AD3d 1015 (2d Dept 2017)

Record Did Not Support Finding of Neglect

The Administration for Children's Services (hereinafter ACS) filed a child neglect petition four days after the mother gave birth to the subject child in a Brooklyn hospital. During the initial days in the hospital, the child was placed in the room with the mother, where she took appropriate care of him. However, when the hospital personnel discovered that the mother only had income from public assistance and that she and the baby would not be accepted back into the home where the maternal grandmother was staying, they called ACS, which undertook an emergency removal of the child. It was undisputed that no ACS worker provided the mother with housing information, including emergency housing information, or provided any supplies for the child. After a fact-finding hearing, the Family Court found that the mother neglected the child. The mother appealed. The Appellate Division reversed. ACS failed to demonstrate, by a preponderance of the evidence, that the mother did not supply the child with adequate food, clothing, and shelter although financially able to do so or offered financial or other reasonable means to do so (*see* FCA § 1012 [f] [i] [A]). Thus, the Family Court should have denied the child neglect petition and dismissed the proceeding. Accordingly, the order was reversed, the petition was denied and the proceeding was dismissed.

Matter of Zachariah W., 149 AD3d 853 (2d Dept 2017)

Record Supported Determination That Mother Derivatively Neglected Subject Child

In this child protective proceeding commenced on January 19, 2016, the petitioner alleged that the mother derivatively neglected the subject child, H.P., who was born on January 11, 2016, based upon prior findings that the mother neglected the child's two older siblings and a finding made approximately ten months before the subject child's birth that the mother permanently neglected one of the siblings. The verified petition in this proceeding also alleged that the mother failed to address the mental health condition that rendered her incapable of properly caring for her children. In an order dated April 1, 2016, the Family Court granted the petitioner's motion for summary judgment, determining that the mother derivatively neglected the subject child. The mother appealed. The Appellate Division affirmed. The petitioner established, prima facie, that the subject child was derivatively neglected by the mother. The petitioner demonstrated that the mother failed to resolve the issues that resulted in the prior findings of neglect as to the subject child's older siblings, and that the conduct that formed the basis for the finding of permanent neglect as to one of the siblings was sufficiently proximate in time to the derivative neglect proceeding such that it could reasonably be concluded that the condition still existed. Moreover, the mother's neglect and permanent neglect of the subject child's siblings evidenced a fundamental defect in the mother's understanding of the duties of parenthood. In opposition to the petitioner's prima facie showing, the mother's submission of only an attorney's affirmation was insufficient to raise a triable issue of fact. Accordingly, the Family Court properly granted the petitioner's motion for summary judgment, determining that the mother derivatively neglected the subject child. Order affirmed.

Matter of Hope P., 149 AD3d 947 (2d Dept 2017)

Family Court Providently Exercised its Discretion in Permitting Child to Testify via Two-way Closed-Circuit Television

The order appealed from granted the motion of the subject child to testify at a fact-finding hearing via closed-circuit television. A respondent parent's right to be present at every stage of a Family Court Act article 10 proceeding is not absolute, as such a proceeding is

civil in nature. The Family Court must balance the respondent parent's due process rights with the mental and emotional well-being of the child. Here, the court properly weighed the respective rights and interests of the mother and the subject child and thereafter providently exercised its discretion in permitting the child to testify via a two-way closed-circuit television arrangement. The mother, appearing pro se, was permitted to be present during the child's televised testimony and to cross-examine her, thereby safeguarding the mother's constitutional rights. Order affirmed.

Matter of Hannah T.R., 149 AD3d 958 (2d Dept 2017)

Record Supported Determination to Extend Supervision

The father appealed from an order of the Family Court dated June 2, 2016, which, after a hearing, modified an order of disposition and an order of protection of that court, both dated December 1, 2014, and extended supervision of the father by the county's Department of Social Services for 12 months. The Appellate Division affirmed. The record established that on or about December 16, 2014, an altercation occurred between the mother and the father, during which the mother sustained an injury. As a result of the incident, the father was arrested and charged with assault. The evidence further demonstrated that the children were present in the home during the incident. Based on this evidence, as well as the prior finding that the father neglected the children, the court properly determined that there was good cause to extend supervision and to modify the order of disposition and the order of protection (*see* FCA §§ 1056, 1057 [d]; 1061). Moreover, viewing the totality of the circumstances, the court's modified orders were consistent with the best interests of the children.

Matter of Jahred S., 149 AD3d 963 (2d Dept 2017)

Child's Out-of-court Statement Sufficiently Corroborated

A preponderance of the evidence established that the father neglected the subject children by perpetrating acts of domestic violence against the mother in their presence. Contrary to the Family Court's determination, the child's out-of-court statement was sufficiently corroborated. The child's statement was corroborated by, among other evidence, proof of the father's prior neglect of the children by perpetrating acts of domestic violence against the mother in their presence (*see* FCA § 1046 [a] [i], [vi]). Additionally, contrary to the court's further determination, the evidence was sufficient to establish that the father's acts of domestic violence against the mother in the children's presence impaired, or created an imminent danger of impairing, the children's physical, mental, or emotional condition. Moreover, a negative inference was properly drawn from the father's failure to testify. Thus, the Appellate Division found that the Family Court improperly dismissed the petitions. The order was reversed, the petitions were reinstated, a finding of neglect was entered, and the matter was remitted to the Family Court for a dispositional hearing and dispositions thereafter.

Matter of Jubilee S., 149 AD3d 965 (2d Dept 2017)

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

The petitioner commenced neglect proceedings alleging that the mother's paranoid and delusional belief that she and the subject children had suffered sexual abuse by the father impaired her ability to care for the children. After a fact-finding hearing, the Family Court found that the mother had neglected the children. The mother appealed. The Appellate Division affirmed. The petitioner established, by a preponderance of the evidence, the existence of a causal connection between the mother's mental illness and actual or potential harm to the children. The evidence established that the mother made repeated unfounded allegations of abuse against the father, necessitating that the children undergo medical examinations and interviews regarding intimate issues. Further, the mother's constant questioning of the children as to whether they had been touched made the oldest child "very sad and uncomfortable." Accordingly, the Family Court's determination that the mother neglected the children was supported by a preponderance of the credible evidence.

Matter of Tyler W., 149 AD3d 968 (2d Dept 2017)

Non-Treating Physician's Testimony Still Had Probative Value

Family Court determined respondent mother had neglected the child. The Appellate Division affirmed finding the agency had established a prima facie case of neglect. Here, the mother left the one-year-old child with the paternal grandparents while she went to work. The grandmother noticed the child did not want to lie on his back when she tried to change his diaper, and seemed to be in pain. She also noticed the child had extensive bruising on his chest, leg, shoulder and head. She took the child to the hospital where he was diagnosed with a skull fracture. The grandparents had taken care of the child the previous day and he had been fine. There was no bruising or other injury on his body when he was returned to the mother the evening prior to the discovery of the injuries. Although the mother contended the physician's opinion testimony should have been disregarded because the physician did not personally examine the child, this did not render the testimony without any probative value but instead went to the weight to be accorded the opinion.

Matter of William KK, 146 AD3d 1052 (3d Dept 2017)

Court Did Not Err in Allowing the Father To Proceed Pro Se

Family Court properly determined respondents had neglected the parties' biological daughter and the mother's son. Here, the father denied he had committed prior sex offenses and he failed to complete sex offender treatment when he had been designated a risk level three sex offender. The mother refused to believe that the father had committed the offenses and chose her relationship with the father over the safety of her children. Although, in light of the father's past history, the mother decided to become a "stay-at-home mom" in order to provide a "safety net" for the children, she admitted she had no fears about leaving the father alone with the children, and was indifferent to his need for sex offender treatment, and believed him when he claimed he had completed sex offender treatment while incarcerated even though she later discovered that the facility did not offer such treatment. Aside from the father's vague and self-serving testimony that he participated in what he assumed was sex offender treatment while in prison, there was no proof that he completed an appropriate program, and there was ample support for the court's finding that the father posed an actual danger to the children. The derivative neglect finding on behalf of the son was supported by the mother's entrenched denial of the father's offenses. Furthermore, Family Court's refusal to assign new counsel to the father, or grant him an adjournment to obtain counsel did not violate the father's right to counsel. The father, who had rested his case, waited until the fifth day of the hearing to claim he was dissatisfied with the way in which the proceedings were progressing. Additionally, Family Court did not err in permitting the father to proceed pro se. Although the father did not unequivocally express a desire to proceed without counsel, he did make it clear that he did not wish to go forward with his assigned counsel, even in an advisory capacity, and refused to give a reason for his request. The hearing proceeded, with the father representing himself and assigned counsel acting as his legal advisor. Even though Family Court could have conducted a more detailed inquiry, the father's refusal to accept reasonable options available supported the court's decision. The court did apprise the father of the perils and pitfalls of proceeding pro se. However, Family Court did err in requiring the mother to reside in Ulster County since no such requirement was embodied court's written decision.

Matter of Lillian SS, 146 AD3d 1088 (3d Dept 2017)

Appeal Rendered Moot

Following an FCA §1027 hearing, Family Court determined an emergency removal of the infant child from respondent mother's care was proper and issued a temporary order directing the agency to investigate whether the maternal aunt would be a possible placement resource. The mother appealed. The Appellate Division dismissed the appeal finding it had been rendered moot. Family Court had since made a finding of neglect, upon consent, and had issued a dispositional order placing the child with the maternal aunt. The exception to the mootness doctrine did not apply, since a temporary order of removal did not constitute a finding of wrongdoing.

Matter of Makayleigh, 146 AD3d 1103 (3d Dept 2017)

Court's Repeated Judicial Errors Contributed to Prolonged Separation Between Mother and Children

After the subject children had spent years in foster care in connection with findings of neglect against respondent mother, in September of 2011 Family Court terminated the mother's parental rights on mental illness grounds. In October of 2011, the mother last visited with the children. In October of 2013, the Appellate Division reversed the orders terminating parental rights and dismissed the petitions. Shortly thereafter, the mother filed petitions seeking to reestablish contact with the children. In January of 2014, Family Court refused to permit any contact pending a hearing because the mother had not had contact with the children "in excess of two years." After a permanency hearing was held in February of 2014, Family Court issued orders in June of 2014 changing the permanency goal from return to parent to free for adoption, and that goal continued in permanency orders issued in September of 2014. The Appellate Division again reversed that portion of the June 2014 and September 2014 orders that modified the permanency goal. In September of 2014, Family Court began hearing proof on the mother's petitions. The hearing continued over the course of seven months and, on March 16, 2015, the parties were given time to submit written summations. On June 26, 2015, roughly twenty months after the mother filed the petitions, Family Court dismissed the mother's petitions and orders were entered on August 6, 2015. For the third time, the Appellate Division reversed and determined the proceedings should be heard by a different Judge. The Court noted that it was presented with "a tragic situation in which Family Court's repeated judicial errors [had] contributed to the prolonged separation of [the mother] and two of her children…." Here, Family Court incorrectly and repeatedly stated on the record that the mother's parental rights had not been restored; and although the agency had the burden to demonstrate that visitation would be detrimental or harmful to the children, the court improperly imposed upon the mother the burden of proving that visitation would be in the children's best interests. Furthermore, the lack of contact between the mother and the children was in part due to repeated judicial errors by Family Court. Although there was some evidence that the mother suffered from medical and/or mental health issues that could affect her interactions with the children, medical or mental health issues did not necessarily preclude supervised visitation, therapeutic visitation or other contact, and in fact, Family Court had permitted the mother to have supervised visitation with two of her other children.

Matter of Angela F. v *St. Lawrence Department of Social Services*, 146 AD3d 1243 (3d Dept 2017)

Issuance of Subsequent Orders Renders Appeal Moot

Upon consent of respondent mother, Family Court determined that she had neglected the subject child, continued custody of the children with the father and placed both parents under the supervision of the agency. The mother filed to modify terms of the supervision order, seeking unsupervised visits with the child. The court denied her request and found there was good cause to extend the period of supervision. The mother appealed. By the time the appeal was heard, the orders extending the period of supervision had expired and were superceded by subsequent orders, thereby rendering the appeal moot.

Matter of Abigail QQ., 146 AD3d 1252 (3d Dept 2017)

Failure to Provide Comprehensive Explanation for Placing Butane Canisters Near Stove Supports Neglect Determination

Family Court determined respondent father had neglected his four sons, ages nine, two, one and newborn. The Appellate Division affirmed. Here, respondent had several canisters of butane in his kitchen because he stated he had been refilling a cigarette lighter. All the children were in the home when one of the canisters of butane exploded causing severe burns to respondent and significant damage to the home. Respondent failed to offer a comprehensible explanation for placing an apparently leaking butane canister two feet from the stove and several butane canisters nearby. Additionally, the proof established the damage to the home was extensive since it was a major explosion. A finding of neglect will be sustained if petitioner can demonstrate, by a preponderance of the evidence, that the children's physical, mental or emotional condition will be harmed as a result of the parent's failure to exercise a minimum degree of care that a reasonably prudent person would have used under the circumstances. The evidence presented in this case supported an adequate basis for a neglect finding.

Matter of Cameron O., 147 AD3d 1257 (3d Dept 2017)

Children's Out-of-Court Statements Sufficiently Cross-Corroborated One Another To Support Neglect Determination

Family Court properly determined that respondent mother had neglected her four daughters, ages six to eleven based on, among other things, their exposure to the domestic violence in respondent's home. The mother contended since the children did not testify, their statements to the caseworkers were uncorroborated and thus there was no evidence they were exposed to domestic violence. The Appellate Division was not persuaded. Here, at the fact-finding hearing, each of the three caseworkers testified about the domestic violence witnessed by the children. There was also evidence that the children were all receiving counseling from a domestic violence shelter to address the violence they had observed, and the mother acknowledged one of the children was "very messed up" as a result of witnessing domestic violence between respondent and her ex-husband. Despite this, the mother admitted she allowed the ex-husband to spend a lot of time in her home and she also admitted her current boyfriend was a heroin addict, whom she had let back into her home after his relapse, with warning the children not to be alone with him. The evidence showed the mother minimized her vast history of domestic violence, her volatile relationship with her boyfriend and the children's mental health. Although none of the children testified, their out-of-court statemens sufficiently cross-corroborated one another. *(see* FCA § 1046 [a][vi]).

Matter of Annarae I., 148 AD3d 1243 (3d Dept 2017)

Respondent's Domestic Violence and Injuries to the Mother's Son Supports Neglect Determination

Family Court determined respondents, the mother and her boyfriend, had neglected the mother's seven-year-old son and derivatively neglected the parties' infant daughter. The Appellate Division affirmed. Here, the son came to school with bruising on his face and ear, and reported that the mother's boyfriend had "flick[ed]" his ear and head-butted him. The child also stated he was afraid of the boyfriend and other bruising was found on his leg and torso. The caseworkers testified the son was scared of the boyfriend, they had seen bruises on many places on the child's body, and photographs of the bruising were admitted into evidence. The mother denied ever seeing the boyfriend hit her son but admitted she and the boyfriend fought and that the boyfriend disciplined the son. She also admitted she called her mother to pick up the children when there was a bad fight and the grandmother corroborated this testimony. A caseworker also observed bruising around the mother's eye and arms. The boyfriend's other children testified the boyfriend was "mean" to the son and yelled at him. The children also recounted several instances of domestic violence they had observed between the respondents. The boyfriend denied causing any of the injuries to the son or the mother, and the mother claimed her black eye was caused by a girl on her block. Family Court found the mother to be "loud, agitated and border[ing] on rude" during her testimony and noted she frequently looked at the boyfriend while she testified. The court also found the boyfriend's demeanor to be hostile during his testimony. Based on the evidence, there was a sound and substantial basis to support the court's determination. Respondents' actions demonstrated such an impaired level of parental judgment that it created a substantial risk of harm to any child left in their care. Moreover, there was no merit to the boyfriend's argument that the children's statements were not corroborated. The son's statements to the caseworker about the boyfriend's violence was sufficiently corroborated by the boyfriend's other children as well as the photographs of the son's bruising.

Matter of Jade F., 149 AD3d 1180 (3d Dept 2017)

Father's Ongoing Abuse of Drugs Established Prima Facie Case of Neglect

After a hearing, Family Court determined respondent father had neglected the subject children based on his drug use. The Appellate Division affirmed. Here, medical records pertaining to the father's substance abuse treatment were admitted into evidence. The evidence showed at the time of his initial hospitalization, the father used between 30 and 40 bags of heroin per day and was experiencing withdrawal since his last use of the drug the day before. Three months after this, the father reported using five to ten bags of heroin per day. Although the court admitted the father's entire hospital records into evidence, without any testimony as to which portions were relevant to the father's diagnosis and treatment, the court only relied on those portions of the hospital records germane to the

father's diagnosis and treatment. Pursuant to FCA §1046(a)(iv), hospital records offered to prove a condition which relates to children in a neglect or abuse proceeding are admissible for that purpose, provided that they were made in the regular course of business. Additionally, the father's admissions of drug use, the particular drugs he used and the frequency with which he used them was relevant to a diagnosis of drug addiction and treatment. Furthermore, proof that a parent repeatedly abuses drugs or alcohol is prima facie evidence of neglect except when such person is voluntarily and regularly participating in a recognized rehabilitation program. By showing the father had a substantial drug problem at the time of the filing of the neglect petition, and his reported abuse of heroin although in lesser amounts, established a prima facie case of neglect, which the father failed to rebut. While the evidence showed the father had engaged in drug rehabilitative programs, there was no evidence offered to show he voluntarily and regularly engaged in a treatment program during the relevant period.

Matter of Jonathan E., 149 AD3d 1197 (3d Dept 2017)

Court Could Consider the Evidence Adduced at the Earlier Hearing in Rendering its Decision

Family Court properly removed the six-year-old child from respondent mother's custody after a FCA § 1027 hearing held in June of 2016. A prior request for removal had been filed by the agency one month earlier, in May of 2016, which the court had denied based on the condition that respondent, among other things, refrain from using drugs or alcohol and remain compliant with any prescribed medications. However, shortly after the May §1027 hearing, the police had been called to respondent's apartment on a number of occasions because of concerns that respondent was impaired, and on one of those occasions, a caseworker had observed respondent exhibiting signs of intoxication. Respondent admitted that she was not taking two of her three prescription medications and, as to a third medication, a caseworker discovered that a large number of the pills were unaccounted for. Family Court properly considered the evidence adduced at the May §1027 hearing in rendering its decision since both hearings were part of the same proceeding.

Matter of Isayah R., 149 AD3d 1223 (3d Dept 2017)

Where Child Has No Home State Under the UCCJEA, Subject Matter Jurisdiction is With the State Where Child and Parent Have Significant Connections

Respondent mother, who was a resident of New York, gave birth to a daughter at a hospital in Pennsylvania. Petitioner agency commenced neglect proceedings against respondent while the child was still hospitalized. Respondent moved to dismiss, asserting, inter alia, that Family Court lacked subject matter jurisdiction since the child had never lived in New York. Family Court denied the motion and the Appellate Division affirmed. The home state of a child less than six months old is "the state in which the child live[d] from birth with a parent or person acting as a parent." (*see* DRL § 75-a[7]). Here, respondent and the child's father resided in Sullivan County and intended to relocate to New York City after the child's birth. The child was still hospitalized when the proceedings were commenced and did not have an opportunity to live with a person acting as a parent. Thus, the child had no home state under the UCCJEA. Where a child lacks a home state when a neglect proceeding is commenced, subject matter jurisdiction under the UCCJEA is where the child and the parents, or the child and at least one parent or a person acting as a parent, has significant connections with a state other than mere physical presence, and substantial evidence is available in that state concerning the child's care, protection, training, and personal relationships. Evidence showed respondent and the child's father had significant connections to New York. Moreover, while the child was hospitalized in Pennsylvania, child protective officials in New York became involved with the child's case and offered evidence regarding the parents' ability to care for the child as well as the child's relationship with other relatives in New York.

Matter of Milani X., 149 AD3d 1225 (3d Dept 2017)

Deplorable Conditions of Home and Respondent's Failure to Comprehend and Address Children's Needs Supports Neglect Determination

The six subject children resided with respondent, the father of three of the children, their mother and their maternal and paternal grandmothers. Following observations of deplorable conditions in the home, petitioner agency temporarily removed the children and

commenced a neglect proceeding against respondents. Following improvements to the condition of the home, the children were returned. Subsequently, the agency filed another neglect petition, alleging, among other things, that unsafe and unsanitary conditions persisted and that respondent father had placed the youngest child at risk of serious physical harm when he failed to immediately and appropriately respond to signs that she was in distress and having difficulty breathing. Following a hearing, Family Court adjudicated the children to be neglected. Respondent appealed only that part of the decision which found he had failed to "comprehend and adequately address the needs" of his oldest and youngest daughters, aged eight and five. The Appellate Division affirmed. The evidence showed that the eight-year-old child's poor hygiene was negatively affecting her both emotionally and academically. Furthermore, the child suffered from urinary incontinence and frequent urinary tract infections and on more than one occasion, the child had been locked in her bedroom overnight and forced to urinate on the mattress where she slept and the resulting mess had not been cleaned up. Additionally, the five-year-old had sleep apnea and hypoxemia which required the use of an apnea monitor and oxygen therapy while she slept. Testimony from a caseworker showed respondent failed to appropriately respond to the child's needs when she was in "acute respiratory distress," and evidence showed if the caseworker had not intervened and urged respondent to seek medication attention for the child, the child might have died. Furthermore, despite the provision of in-home intensive prevention services twice weekly, the home remained unsafe and unsanitary. There was an overwhelming smell of urine and the home was infested with cockroaches. The children, who attended school, were repeatedly treated for head lice and some performed better academically when placed outside of the home. Although respondent argued the attorney for the children improperly substituted judgment for the children, he failed to preserve this argument. Even if the issue had been preserved, the attorney for the children acted properly. She advised the court the older two children wanted to stay in their home but the condition of the home posed a substantial risk of imminent serious harm. Furthermore, under the circumstances of this case, the attorney did not have an obligation to withdraw from her representation of the older two children and in all other respects, her representation of the children was meaningful and appropriate.

Matter of Emmanuel J., 149 AD3d 1292 (3d Dept 2017)

Affirmance of Finding of Neglect Where Respondent Father's Drug Use Simultaneously With Mother's Drug Use Contributed to Mother's Use of Drugs

Family Court adjudged that respondent father neglected the subject child. The Appellate Division affirmed. A finding of neglect could be appropriate even when a child had not been actually impaired, in order to protect that child and prevent impairment. The subject child was born with a positive toxicology for crack cocaine and marihuana and, based upon the testimony adduced at the hearing, the court properly found that the father's drug use simultaneously with the mother's use contributed to the mother's use of illegal drugs, which was harmful to the child. The positive toxicology, together with the father's substance abuse history, his failure to submit to drug screenings as requested, and his mental health issues, for which he failed to take his prescribed medication and failed to attend mental health appointments, supported the finding of neglect on the ground that the child was placed in imminent danger. To the extent that the positive toxicology may not have been the basis for the court's finding of neglect, the Appellate Division was not precluded from affirming the order based in part on that finding, inasmuch as the authority of the Court to review the facts was as broad as that of Family Court.

Matter of Baby B.W., 148 AD3d 1786 (4th Dept 2017)

Court Erred in Disposing of Matter Based on Mother's Purported Default

Family Court determined that respondent mother neglected the subject child. The Appellate Division reversed and remitted. The court erred in disposing of the matter on the basis of the mother's purported default. A respondent who failed to appear personally in a matter but nonetheless was represented by counsel who was present when the case was called was not in default in that matter. Moreover, inasmuch as the mother's counsel objected on ten occasions during the inquest, this was not a situation where a default could be found based, at least in part, upon counsel's election to stand mute during the inquest. Furthermore, the

court abused its discretion in denying the mother's counsel's request to adjourn the hearing. The request was based on the fact that the mother was unable to attend the hearing owing to illness. The record demonstrated that the mother contacted her counsel and petitioner prior to the hearing to report her illness, that the proceedings in the matter were not protracted, that the mother personally appeared at all prior proceedings, and the request for an adjournment was the mother's first. Accordingly, the matter was remitted for a new fact-finding hearing and, if necessary, a new dispositional hearing.

Matter of Cameron B., 149 AD3d 1502 (4th Dept 2017)

CHILD SUPPORT

Judgment of Divorce Entitled Father to Child Support Credit For Child's College Expenses

Supreme Court denied mother's motion to direct father to cease deducting the parties' son's college expenses for room and board from the father's child support payments for the parties' daughter and to direct him to pay the resulting child support arrears, and granted the father's cross motion to direct the mother to pay the father's attorney fees. The Appellate Division modified by denying the father's cross motion for attorneys' fees. The parties' judgment of divorce provided that the father was entitled to a full credit against all monthly child support payments for any and all amounts he contributed to the cost of the son's room and board while away at college. Thereafter, the parties entered into a revised stipulation that modified the custody and financial stipulations and judgment of divorce by granting the father sole legal and physical custody of the parties' son, and providing that, for the support of the parties' daughter, the father would pay the sum of $5000 per month instead of the $6000 per month for support of both children. After the parties' son began attending college, the father reduced his child support payments for deductions for certain of the parties' son college expenses. The court properly concluded that the revised stipulation did not modify the divorce judgment's provision regarding college room and board credit. The revised stipulation was completely unambiguous and clear that the only modification was the $1000 reduction in child support. However, the court improvidently awarded the father attorney fees. While the mother did not prevail, her motion was not frivolous.

Meshel v Meshel, 146 AD3d 595 (1st Dept 2017)

Judgment of Divorce Entitled Father to Child Support Credit For Child's College Expenses

Supreme Court properly determined that defendant father was responsible for 80% of the private school educational expenses of the parties' child. Defendant's refusal to give his explicit consent to the child attending a certain school did not absolve him of his contractual obligations. The parties' custody and settlement agreement provided that in the event of a disagreement on a major matter, including the child's education, the resolution process included seeking judicial intervention. Defendant's actions, including a failure to seek such judicial intervention, amounted to defendant's acquiescence to the child's enrollment in the school. Defendant's contention that he should be relieved of his obligation to pay for the educational expenses because he was unable to afford them, was unavailing. The agreement did not make consideration of financial factors a precondition to defendant's obligation to pay his share of the education costs.

Espy v Espy, 147 AD3d 666 (1st Dept 2017)

Court Erred in Not Imputing Income Solely on Basis of Family Ct. Act § 437-1

Family Court denied respondent mother's motion to dismiss the father's modification petition. The Appellate Division modified by remanding for a new determination of the amount of child support. The court improvidently exercised its discretion in not imputing income to the father from earnings from part-time employment solely on the basis of Family Ct. Act § 437-a, which barred the court from requiring a recipient of social security disability benefits to engage in certain employment related activities. The statue was not dispositive here because the father was employed during the pendency of his social security benefits application and did not show that he was unable to continue to be employed in any capacity after he received benefits. The court properly denied the mother's motion to dismiss the father's modification petition. The paternal grandmother and the parties' eldest daughter were not parties to the proceeding and there was no evidence that they were under the father's control. The parties' daughter was 19 years old and

represented by her own counsel. Therefore, there was no basis to sanction the father for alleged discovery violations of the paternal grandmother and the daughter.

Matter of Anthony S. v Monique T. B., 148 AD3d 596 (1st Dept 2017)

Parties Cannot Contract Away Duty of Child Support

Supreme Court interpreted a cap on the "room and board" provision in the parties' stipulation of settlement and agreement as providing a cap on defendant father's credit against his child support obligation at an amount identical to the decrease in his monthly child support when each child became emancipated. The Appellate Division affirmed. The agreement provided that upon emancipation of the first child his monthly payment of $2500 would be reduced to $2150 per month and upon the second emancipation the payment would be reduced to $1462 per month. The agreement further provided: "During the period in which a child is attending a college and residing away from the residences of the parties and [the father] is contributing towards the room and board expenses of the child, [the father] shall be entitled to a credit against his child support obligations in an amount equal to the amount [the father] is paying for that child's room and board." At the time the agreement was executed, the eldest child was attending a 10-month seminary program in Israel. The father, who was responsible under the agreement for the entire tuition and for room and board, paid $12,000 for the latter expense. The father, before a judgment of divorce had been entered, informed the mother that, pursuant to the agreement, he was due a credit towards his child support obligation in the amount of approximately $12000 (the cost of the child's room and board). In an order to show cause, the mother sought a declaration that the agreement provided that the amount of child support credit the father was due would be capped in accordance with the graduated emancipation reduction. The credit sought by the father violated the rule that parties cannot contract away the duty of child support. Taken to its logical end, the subject agreement could completely deprive the other children of any support, if the monthly room and board costs for one child exceeded $2500. Moreover, while it is important to adhere to the plain language of an agreement, it is also true that a contract should not be interpreted to produce a result that is absurd, and the father's interpretation would result in such absurdity. The dissent would have interpreted the agreement according to its plain language.

Keller-Goldman v Goldman, 149 AD3d 422 (1st Dept 2017)

Granting Father's Objection to Modification of Support Order Reversed

Family Court granted respondent father's objections to modifications of an earlier support order and remanded for recalculation by the Support Magistrate. The Appellate Division reversed. The modified order was consistent with the application of the statutory formula the Magistrate followed. The father's voluntarily deferred income in his 401 (k) was properly included in his income. The court erred in finding that the Magistrate improperly applied the CSSA to the parties' combined income above the statutory cap of $143,000. The Magistrate elected to apply the statutory percentage to the parties' above-the-cap income and provided three sound reasons for doing so, including the child's special needs, which was not an improvident exercise of discretion.

Matter of Garduno v Valdez, 149 AD3d 551 (1st Dept 2017)

Record Supported Determination of Father's Income

The Support Magistrate providently exercised her discretion in determining the father's income based on personal and corporate tax returns, and imputing income based on the following year's salary. This determination was supported by the record. The Support Magistrate was presented with enough evidence to determine the father's gross income, including income imputed to the father, and, thus, properly calculated the father's child support obligation based on the statutory formula rather than the needs of the child (*see* FCA § 413 [1] [k]). The mother's testimony, as well as submission of proof of her payment of the monthly bill for the tuition for day care in the form of a letter from the child's day care provider, was sufficient evidence of the costs of child care expenses. Accordingly, the Family Court properly denied the father's objections.

Matter of Barmoha v Eisayev, 146 AD3d 946 (2d Dept 2017)

Father Failed to Establish That His Loss of Employment Was Involuntary and Through No Fault of His Own

In 2006, the parties entered into a stipulation of settlement that provided that the mother would have residential custody of the parties' children and the father would pay child support in a specified amount each month. The stipulation of settlement was incorporated but not merged into a subsequent judgment of divorce. In February 2015, the father filed a petition for a downward modification of his child support obligation. After a hearing, the Support Magistrate denied the father's petition. Subsequently, the Family Court denied the father's objections to the Support Magistrate's determination. The father appealed. The Appellate Division affirmed. The Support Magistrate's determination that the father failed to establish that his loss of employment was involuntary and through no fault of his own was supported by the record. Thus, the Family Court properly denied the father's objections to the Support Magistrate's determination that he was not entitled to a downward modification of his child support obligation.

Matter of Lorenzo v Lorenzo, 146 AD3d 959 (2d Dept 2017)

Father Failed to Establish That He Made a Good Faith Effort to Find Employment Commensurate with His Qualifications

The record supported the Support Magistrate's determination that the father failed to demonstrate a substantial change in circumstances warranting a downward modification of his child support obligation. The father failed to establish that he made a good faith effort to find employment commensurate with his qualifications and experience. He also did not submit evidence showing that his physical disability, with which he has lived since he was a young child, interfered with his ability to work. The Support Magistrate properly found that the father was capable of working as an attorney and that he made a choice to open a solo practice, which would not turn a profit for several years. While the father was entitled to invest in a new business, it was not a basis for lowering his child support obligation. Indeed, the father did not submit any evidence reflecting that he had pursued other more lucrative opportunities before deciding to open his own practice. In addition, contrary to the father's contentions, he did not establish that his child support obligation should be downwardly modified on the ground of constructive emancipation or parental alienation. Here, only the older child was of employable age during the relevant time period. Further, the evidence at the hearing failed to demonstrate that the father made sufficient attempts to maintain a relationship with the children, or that the children actively abandoned their relationship with him. With regard to parental alienation, the father failed to meet his burden of demonstrating that the mother deliberately frustrated or actively interfered with his relationship with the children. Accordingly, the Family Court properly denied the father's objections to the Support Magistrate's order denying his petition for a downward modification of his child support obligation.

Addimando v Huerta, 147 AD3d 750 (2d Dept 2017)

Record Supported Determination That Father Willfully Violated Child Support Order

The mother commenced this proceeding against the father, alleging that he was in willful violation of a child support order dated August 27, 2014. Following a hearing, the Support Magistrate found that the father was in willful violation of the child support order and issued an order of disposition recommending that the court consider a period of incarceration. The Family Court confirmed the Support Magistrate's findings of fact, granted the mother's petition, and issued an order of commitment committing the father to the custody of the Nassau County Correctional Facility for a period of 90 days unless he paid the purge amount of $17,500. The father appealed. The Appellate Division affirmed. The mother presented proof that the father failed to pay child support as ordered. The burden of going forward then shifted to the father to offer competent, credible evidence of his inability to make the required payments. The father failed to sustain his burden. Even assuming the truth of the father's contention that he had been unemployed in his chosen field since he lost his professional licenses, he failed to present any evidence that he had made a reasonable and diligent effort to secure employment. Thus, the father failed to meet his burden of presenting competent, credible evidence that

he was unable to make payments as directed. Accordingly, the Family Court properly confirmed the determination of the Support Magistrate that the father willfully violated the child support order.

Matter of Kretkowski v Pasqua, 147 AD3d 836 (2d Dept 2017)

Record Did Not Support Determination of Father's Child Support Obligation

The parties, who have four children together, entered into a separation agreement dated April 20, 2012, which was incorporated but not merged into their subsequent judgment of divorce. In relevant part, the agreement provided that, upon the sale of the marital home, the father would pay "the full amount of child support required by the [Child Support Standards Act] Guidelines," and that the father's "obligation to pay the sum as calculated in accordance with the Guidelines shall commence on the date of the sale of the marital home." The marital home was sold on December 17, 2014. Relying on the above-quoted provision, the mother petitioned the Support Magistrate, inter alia, to calculate the father's child support obligation, pursuant to the Child Support Standards Act Guidelines, using his 2013 income. Instead, the Support Magistrate relied on a calculation made in 2012, when the separation agreement was first entered into. The mother appealed. The Appellate Division reversed. There was nothing in the separation agreement to support the father's contention that, upon the sale of the marital home, he would be required only to pay child support based on the income he was earning at the time the agreement was entered into. To the contrary, the agreement provides that the father's obligation to pay child support "calculated in accordance with the [Child Support Standards Act] Guidelines shall commence on the date of the sale of the marital home." As the marital home was sold in December of 2014, the necessary calculation should have been based on the father's "most recent federal income tax return" (*see* FCA § 413 [1] [b] [5] [I]).

Miller v Fitzpatrick, 147 AD3d 845 (2d Dept 2017)

Father's Petition and Mother's Motion to Dismiss Should Have Been Entertained on Their Merits

The father commenced a proceeding in the Family Court seeking a downward modification of his child support obligation based on a substantial change of circumstances and a change in both party's gross income by 15% or more (*see* FCA § 451 [3] [a], [b] [ii]). The petition cited an order dated October 3, 2013 as the final child support order, and alleged that the father's income had substantially decreased, while the mother's income had substantially increased, since the order. The mother moved to dismiss the petition on the grounds of documentary evidence, res judicata and collateral estoppel, and a failure to state a cause of action. In an order dated January 6, 2016, the Support Magistrate dismissed the petition without prejudice on the ground of lack of subject matter jurisdiction, stating that the Family Court lacked jurisdiction to modify the October 3, 2013 order, which was not a final child support order. The father submitted objections to the Support Magistrate's order. In an order dated April 12, 2016, the Family Court denied the father's objections, stating that the October 3, 2013, order was not a final order of child support and the father should have sought to modify the child support provisions of the judgment of divorce, rather than the October 3, 2013, order. The father appealed. The Appellate Division reversed. While the Family Court is a court of limited jurisdiction, constrained to exercise only those powers granted to it by the State Constitution or by statute, it is empowered to determine applications to modify judgments and orders of child support (*see* NY Const, art VI, § 13; FCA §§ 115 [a] [ii]; 451, 461 [b] [ii]). Where, as here, the Supreme Court has set child support in a judgment of divorce and does not retain exclusive jurisdiction to modify the award, the Family Court has jurisdiction to entertain an application to modify the child support provisions of the judgment of divorce (*see* FCA § 461 [b] [ii]). Although the father, in his petition, mistakenly referred to the October 3, 2013, order as the final order of child support, rather than the judgment of divorce, the judgment of divorce incorporating the prior order was before the Support Magistrate, and it was clear that the father sought downward modification of the support obligation imposed in the judgment of divorce—an application the Family Court had the subject matter jurisdiction to determine. The mother moved to dismiss the petition on the merits, and was not prejudiced by the father's mistake in identifying the proper final order of support. Since no substantial right of the mother was prejudiced by the father's error, the mistake should have been

disregarded and the petition and motion to dismiss the petition entertained on their merits (*see* CPLR 2001). Accordingly, the Family Court should have granted the father's objections, vacated the Support Magistrate's order, and remitted the matter to the Support Magistrate to determine the mother's motion to dismiss on the merits.

Matter of Nimkoff v Nimkoff, 147 AD3d 850 (2d Dept 2017)

Court Failed to Provide Any Explanation as to How it Determined the Amount of the Award of Pendente Lite Child Support

In determining an award of pendente lite child support, courts may, in their discretion, apply the Child Support Standards Act (hereinafter CSSA) standards and guidelines, but they are not required to do so. However, under some circumstances, particularly where sufficient economic data is available, an award of temporary child support that deviates from the level that would result if the provisions of the CSSA were applied may constitute an improvident exercise of discretion, absent the existence of an adequate reason for the deviation. Here, the court failed to provide any explanation as to how it determined the amount of the award of pendente lite child support. Thus, the order was modified and the matter was remitted to the Supreme Court for a calculation of the defendant's pendente lite child support obligation, and a new determination of that branch of the plaintiff's motion which was for pendente lite child support.

Kashman v Kashman, 147 AD3d 1034 (2d Dept 2017)

Family Court Properly Recognized Continuing, Exclusive Jurisdiction of Florida Court

The father appealed from an order of the Family Court which denied the father's objections to an order of that court, which, dismissed his petition to vacate the registration in New York of a contempt order issued by a Florida court based on his violation of a prior Florida child support judgment. The respondent mother registered, in the Family Court, a contempt order dated December 4, 2014, issued by a Florida court (hereinafter the Florida order). The Florida order was based on the father's violation of an October 4, 2000, Florida child support judgment. The father commenced a proceeding to vacate the registration of the Florida order, primarily on the ground that the Florida court lacked subject matter jurisdiction over the matter of child support. A Support Magistrate dismissed the petition, and the Family Court denied the father's objections to the Support Magistrate's order. The Family Court properly denied the father's objections to the Support Magistrate's order dismissing his petition. As the Family Court determined, the father set forth no grounds to vacate the registration of the Florida order (*see* FCA § 580-607). Contrary to the father's contention, the Family Court properly recognized the continuing, exclusive jurisdiction of the Florida court over the matter of child support, based on the Florida court's issuance of a child support judgment pursuant to the Uniform Interstate Foreign Support Act or a law substantially similar to that act which modified a child support order of a tribunal of this state (*see* FCA § 580-205 [c]). Order affirmed.

Matter of Kellerman v Ross, 147 AD3d 1056 (2d Dept 2017)

Record Supported Imputation of Income to Plaintiff

When determining a parent's child support obligation, the court may impute income based upon the party's past income or demonstrated future potential earnings. The court may take into account what the parent is capable of earning by honest efforts, given his or her education and opportunities. Here, the record supported the Court's determination to impute income to the plaintiff in the sum of $30,000 per year. Additionally, contrary to the plaintiff's contention, the court did not err in declining to direct the defendant to contribute his pro rata share of the parties' unemancipated child's future college expenses. The court may direct a parent to contribute to a child's college education pursuant to DRL § 240 (1-b) (c) (7). However, when college is several years away, and no evidence is presented as to the child's academic interests, ability, possible choice of college, or what his or her expenses might be, a directive compelling a parent to pay for those expenses is premature and not supported by the evidence. At the time of the trial, the parties' unemancipated child was 16 years old and was entering his junior year of high school. There was no evidence presented as to his academic interests, his possible choice of college, or what the expenses of college might be. Accordingly, the plaintiff's request

that the court direct the defendant to contribute his pro rata share of the parties' unemancipated child's future college expenses was premature. However, the court should have directed the defendant to maintain a dental insurance policy for the parties' unemancipated child until his emancipation (*see* DRL § 240 [1] [a]).

Repetti v Repetti, 147 AD3d 1094 (2d Dept 2017)

Plaintiff's Agreement to Child Support Provisions of Stipulation Was Made Knowingly

The plaintiff commenced an action for divorce and ancillary relief in 2010 after 11 years of marriage, during which two children were born. On November 20, 2012, the parties entered into a stipulation in open court in which, among other things, they agreed that the plaintiff would have sole custody of the children and the defendant would pay a specified amount of child support, which was less than the presumptive award if calculated pursuant to the Child Support Standards Act (*see* DRL § 240 [1-b]; hereinafter the CSSA). Two months after the stipulation was entered, the plaintiff moved, inter alia, to vacate the child support provisions of the stipulation based on an alleged failure to comply with the mandatory provisions of the CSSA. The Supreme Court denied the motion. A judgment of divorce was entered January 7, 2015, which incorporated but did not merge the parties' stipulation. The plaintiff appealed. The Appellate Division affirmed. The Supreme Court properly found that the child support provisions of the parties' stipulation were valid and enforceable. It was undisputed that the oral stipulation otherwise complied with the requirements of DRL § 240 (1-b) (h), except that it did not include an on-the-record statement of the precise amount of the presumptive child support under the CSSA. Instead, it recited that the parties were entering into the agreement "after having been advised of the calculations pursuant to the [CSSA]," and each party had received a copy of the CSSA and was "fully aware" of the amount the court would award if applying the CSSA based upon the parties' respective incomes. The agreement to deviate from the CSSA was made in exchange for concessions in the distribution of certain marital assets. The plaintiff stated on the record that she understood the terms of the stipulation, which were clear to her, and she had discussed them with her attorney. In addition, the parties' respective federal income tax returns and statements of net worth were incorporated into the record for the purpose of demonstrating "calculations of income for purposes of CSSA." While the better practice would have been to state for the record the number reflected by those calculations, the statutory requirement was satisfied here, and the record demonstrated that the plaintiff's agreement to the child support provisions of the stipulation was made knowingly.

Bitic v Bitic, 148 AD3d 664 (2d Dept 2017)

Father's Objections Properly Denied

The parties, who were never married, have two minor children, a daughter and a son. In an order of support dated October 3, 2005, the Family Court directed the father, inter alia, to pay support for the parties' two children and pay 75% of the cost of the childrens' education at a private school. Ten years later, the mother filed a petition seeking, inter alia, to enforce the order dated October 3, 2005. After a hearing, the Support Magistrate issued an order, inter alia, directing the father to pay 75% of the private school tuition and expenses incurred by the daughter. Thereafter, the father filed objections to the Support Magistrate's order, and the Family Court denied the objections. The father appealed. The Appellate Division affirmed. The Support Magistrate rendered her determination after conducting a full hearing, at which the mother established that her daughter suffered from a language-based learning disability that was negatively affecting her academic success and emotional well-being, and that the mother had undertaken various efforts to locate a school that would adequately address the daughter's needs. During the course of the hearing before the Support Magistrate, the daughter applied to and was accepted at a private school, where she is currently enrolled. The record demonstrated that she had begun to thrive and succeed at the private school in ways she had not been able to in the public school setting, ultimately warranting the finding that it was in her best interests to be enrolled at the private school. Accordingly, the Family Court properly denied the father's objections.

Matter of Casey v Kelleran, 148 AD3d 800 (2d Dept 2017)

Support Magistrate Properly Imputed Income to Father

The parties have one child together. In December 2014, the mother filed a petition for child support. Following a hearing, the Support Magistrate imputed an annual income of $70,000 to the father for the purpose of calculating his child support obligation. In an order dated April 6, 2016, the Support Magistrate directed the father to pay child support in the sum of $888 per month based upon the imputed income. In an order, dated May 24, 2016, the Family Court denied the father's objections to the Support Magistrate's order. The father appealed. The Appellate Division affirmed. When determining a parent's child support obligation, a court need not rely upon a party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated future potential earnings. Here, the Support Magistrate properly imputed income to the father based upon his prior employment income and rental income. The record supported the Support Magistrate's determination that the father reduced his income in order to reduce his child support obligation, and that an annual income of $70,000 should be imputed to him (*see* FCA § 413 [1] [b] [5] [iv], [v]).

Matter of Liling Gao v Ming Min Fan, 148 AD3d 897 (2d Dept 2017)

Overpayments Could Be Credited Against Father's Share of Add-On Expenses

Upon reviewing the record, the Appellate Division could find no basis for concluding that there was any exception to be found to the strong public policy against restitution or recoupment of support overpayments. Consequently, the Family Court improvidently exercised its discretion in denying the mother's objection to the Support Magistrate's determination that the father was entitled to a credit against his child support obligation based on prior overpayments of child support. However, while child support overpayments may not be recovered by reducing future support payments, public policy does not forbid offsetting add-on expenses against an overpayment. Thus, although the overpayments could not be applied to the father's child support obligation, he could use the overpayments to offset his share of the add-on expenses, such as the educational expenses. Accordingly, the order was reversed, the father's petition for recoupment of child support overpayments was denied, the mother's cross petition to compel the father to pay for educational expenses for the parties' children was granted, and the matter was remitted to the Family Court to determine the amount of child support arrears and the father's share of the children's educational expenses owed to the mother and the amount of the credit against add-on expenses due to the father.

Matter of McGovern v McGovern, 148 AD3d 900 (2d Dept 2017)

Record Did Not Support Imputation of Rental Income to Father

Family Court Act § 413 (1) (c) (4) provides that where the custodial parent is working . . . and incurs child care expenses as a result thereof, the court shall determine reasonable child care expenses and such child care expenses, where incurred, shall be prorated in the same proportion as each parent's income is to the combined parental income. The record revealed that the mother was the custodial parent, that she was employed full time, and that the child was entering kindergarten in September 2015. Nevertheless, contrary to the finding of the Family Court, no testimony was elicited before the Support Magistrate regarding the cost of the child's after-school program, the cost of child care during school closings, or the cost of summer camp. Accordingly, the Family Court erred in denying the father's objections to the initial order and the amended order which directed him to pay, commencing on October 23, 2015, child care expenses in the sum of $101.68 biweekly and retroactive support for child care expenses for the period from September 10, 2015, to October 22, 2015. Moreover, while a Support Magistrate is afforded considerable discretion in determining whether to impute income to a parent, a determination to impute income will be rejected where the amount imputed was not supported by the record, or the imputation was an improvident exercise of discretion. The Support Magistrate's imputation of the sum of $17,400 annually in rental income to the father was not supported by the record. The father's testimony, as well as his 2014 tax return, demonstrated that the rental payments he received did not cover the mortgage and expenses related to his property. Accordingly, the Family Court erred in denying the

father's objections to the initial order and the amended order. Contrary to the father's contention, however, the Family Court properly denied his objections to so much of the initial order and the amended order which directed him to pay the sum of $6,483.62 in retroactive support for child care expenses incurred by the mother from November 1, 2013, to September 9, 2015. The mother's testimony, coupled with her submission of receipts and a letter from the child's day care provider, were sufficient evidence of the cost of child care during that time.

Matter of Quashie v Wint, 148 AD3d 905 (2d Dept 2017)

Father Consented to Paying Balance of Child's Student Loan

In January 2001, the parties executed a stipulation, which was incorporated but not merged into their judgment of divorce, that required the father to pay the mother child support. The stipulation also required the father to pay "any and all student loans taken by the [parties' child], provided that the [f]ather has agreed to the [c]hild seeking a specific loan." In 2015, the mother, pro se, filed an enforcement petition alleging that the father had failed to pay child support for more than two years and had failed to make college tuition payments. After a hearing, the Support Magistrate granted the enforcement petition and directed the father, inter alia, to pay the mother child support arrears in the sum of $10,237.50, and to pay the balance of a Parent Plus Student Loan, including interest. The father filed objections to those portions of the Support Magistrate's order, and in the order appealed from, the Family Court denied the father's objections. The Appellate Division affirmed. The Support Magistrate's findings that the father failed to pay child support to the mother as specified in the parties' stipulation was based upon an assessment of the parties' credibility and was supported by the record. The father's contention that he was entitled to a credit against his outstanding child support obligation because he gave the mother $6,000 in proceeds he received from the sale of the former marital home was without merit. The father's claim that this sum represented an advance payment of child support was not supported by the record. Moreover, contrary to the father's contention that he never consented to pay the balance of the subject student loan, the father's counsel explicitly told the Support Magistrate twice during the hearing that the father agreed to pay the student loan as demanded by the mother. An order of a Support Magistrate is final, and the Family Court's review of objections to such an order is the equivalent of appellate review. Since no appeal lies from an order entered on the consent of the appealing party (*see* CPLR 5511), the Family Court properly denied as not appealable the father's objection to so much of the Support Magistrate's order which directed him to pay the balance of the subject student loan. Accordingly, the Family Court properly denied the father's objections.

Matter of Taylor v Taylor, 148 AD3d 1161 (2d Dept 2017)

Record Did Not Support Finding That Needs of Father's Other Two Children Was a Proper Basis for Deviating from CSSA

The mother appealed from (1) an order of the Family Court, dated June 24th, 2015, which, after a hearing, inter alia, increased the father's child support obligation from the sum of $260 biweekly to the sum of only $425 biweekly, and (2) an order of the Family Court, dated July 31, 2015, which denied the mother's objections to the order dated June 24, 2015. The Appellate Division dismissed the order dated June 24, 2015, as that order was superseded by the order dated July 31, 2015; and modified the order dated July 31, 2015. The Support Magistrate failed to consider the financial resources of the father's wife in concluding that a deviation from the Child Support Standards Act (hereinafter the CSSA) presumptive amount of child support was warranted based on the needs of the father's other two children. Although the Support Magistrate noted that the income of the father's wife was approximately $35,000, no evidence was elicited as to the amount of any assets that the wife might have, nor was any evidence presented as to the value of her business, for which the father and the wife took a deduction on their income taxes. Thus, the Support Magistrate lacked sufficient information to conclude that the resources available to the father's other two children were less than the resources available to support the child at issue and, therefore, erred in finding that the needs of the father's other two children was a proper basis for deviating from the CSSA presumptive amount of child support. Although the Support Magistrate properly rejected the father's inconsistent testimony about his income and

correctly calculated the CSSA amount based on the father's most recent annual adjusted gross income as reflected in his income documents, the Support Magistrate improperly credited the father's disingenuous account of his economic situation and expenses, as the father's evidence as to both his income and his expenses was inconsistent, contradictory, and not supported by the record. Since the Support Magistrate failed to consider the resources of the father's wife and improperly relied on the father's contradictory evidence as the bases for deviating from the CSSA presumptive amount of child support, the Family Court should have sustained the mother's objection to the Support Magistrate's order dated June 24, 2015, and should have awarded child support in the sum of $839.76 biweekly pursuant to the CSSA formula.

Matter of Hall v Pancho, 149 AD3d 735(2d Dept 2017)

Mother Not Entitled to Reimbursement of College Expenses

In a support proceeding, the mother sought reimbursement for the father's share of college expenses she paid for the parties' two children pursuant to the parties' separation agreement. The expenses were paid by the mother from the children's 529 college savings accounts (*see* 26 USC § 529; hereinafter 529 accounts), to which the father regularly contributed. The mother contends that the father's contributions actually constituted his repayment of a loan she made to him from an inheritance from her father, and thus constituted her separate property. The mother also sought child support arrears. The father denied that the funds loaned to him were the wife's separate property, and instead contended that the funds he paid into the 529 accounts were in repayment of a loan of marital funds. He also contended that he paid all outstanding support arrears. The Support Magistrate credited the father's testimony in this regard, and the Family Court denied the mother's objections to the Support Magistrate's order. The Appellate Division affirmed. The Family Court did not err in denying her objections to so much of the Support Magistrate's order as denied her request for reimbursement of college expenses. The mother failed to establish that the money used to fund the 529 accounts for each child originated from an inheritance from her father, and thus constituted her separate property pursuant to DRL § 236 (B) (1) (d) (1). There was no basis to disturb the court's determination as to the parties' credibility regarding the source of that money. Similarly, the mother failed to establish that the subject money was described as separate property by written agreement pursuant to DRL § 236 (B) (1) (d) (4). Furthermore, the Family Court did not err in denying the mother's objections to so much of the Support Magistrate's order as denied her request for payment of child support arrears. The parties stipulated at the first hearing date as to payments that had been made on those arrears by the father. The father also testified at the second hearing date as to additional payments he had made since the first hearing date, which satisfied the arrears due and owing. The mother failed to rebut the father's testimony as to those additional payments, and there was no basis to disturb the court's determination as to the parties' credibility with regard to this issue.

Matter of McNair v Fenyn, 149 AD3d 747 (2d Dept 2017)

Evidentiary Hearing Required to Establish Amount Owed by Defendant

The parties were divorced pursuant to a judgment entered April 2, 2002, which incorporated but did not merge their stipulation of settlement dated July 6, 2001. Pursuant to the stipulation, the defendant was required to pay child support for the parties' three children. The amount of support was to be adjusted each year based on the percentage increase, if any, in the Consumer Price Index (hereinafter CPI) for New York City. Pursuant to an agreement between the parties signed on December 1, 2006, and a consent order dated September 5, 2007, the parties agreed to equally split adoptive child subsidy (hereinafter ACS) payments they receive on behalf of their adopted son. The plaintiff further acknowledged in the December 1, 2006, agreement that she had received, on that date, an increased payment in the amount of $1,666.36, which represented the monthly child support payment that would be due for each month in the year 2007, inclusive of the increase based on the CPI. The plaintiff moved, inter alia, to hold the defendant in contempt for his willful failure to pay child support and her share of the ACS payments, to determine child support and ACS arrears, and to recalculate the defendant's child support obligations de novo based upon the emancipation of the parties' oldest child. The

defendant opposed the motion, claiming that although he owed the plaintiff for the ACS payments, the plaintiff owed him money since he had overpaid child support. The Supreme Court issued an order based on the parties' written submissions without holding a hearing. In its order, the court, inter alia, determined that the defendant owed the sums of $9,275.91 in child support arrears and $5,096.12 in ACS arrears. The defendant appealed. The Appellate Division reversed. The Supreme Court erred in granting those branches of the plaintiff's motion which were for child support and ACS arrears and directing the entry of a money judgment against the defendant without first conducting an evidentiary hearing to establish the amount owed, which was disputed by the defendant. Moreover, the court erred in relying on the plaintiff's calculations for increases to annual child support in determining arrears since her calculations failed to reflect the correct increase for 2007 based upon the parties' agreement signed on December 1, 2006. As such, the plaintiff's calculations for each successive year's increase were rendered incorrect. Accordingly, the order was reversed and the matter was remitted for a hearing to determine the amount of child support arrears and ACS arrears, if any.

Massina v Massina, 149 AD3d 927 (2d Dept 2017)

Father Entitled to New Hearing on Violation Petition Based on Finding of Ineffective Assistance of Counsel

In October 2014, the county's Department of Social Services (hereinafter DSS) commenced a proceeding on behalf of the mother alleging that the father was in violation of an order of support issued in 2013 directing him to pay $256 biweekly to support the parties' child. On January 20, 2015, following an adjournment for personal service upon the father, the parties appeared before the Support Magistrate. The Support Magistrate advised the father of his right to an attorney, and offered to adjourn the matter for the father to hire an attorney; the father declined. Following several more adjournments, the father was assigned counsel and a fact-finding hearing commenced on July 15, 2015. At the hearing, the father testified that he was unable to work due to mental illness. The father provided no medical proof to support his claim that he was unable to work, nor did he provide a financial disclosure affidavit or any other proof of expenses, earnings, or assets. The Support Magistrate found the father to be in willful violation of the order of support, established arrears in the sum of $12,481.77, recommended a period of incarceration, and referred the proceeding to the Family Court for confirmation. Thereafter, the Family Court, by order dated July 27, 2015, confirmed the Support Magistrate's finding of willfulness and directed that the father be incarcerated for a period of 14 days unless he paid a purge amount of $2,000. The father appealed. Upon reviewing the record, the Appellate Division found that counsel for the father failed to provide meaningful representation to the father in the support proceeding. The father's defense to the allegation that he willfully violated the order of child support turned on the success of his claim that he was unable to work due to his mental illness. Notably, more than a month before the hearing, the Support Magistrate indicated that the father would have to submit medical proof at the hearing to refute the presumption of a willful failure to comply with the order of support. However, notwithstanding the father's contention that he was being treated by a mental health professional, his counsel failed to procure any of the father's medical documents relating to such treatment in order to support his claim. The father's counsel also failed to call any witnesses to testify as to the effects of the father's mental illness, subpoena his treating mental health professional, or otherwise ensure the availability of the father's treating medical professional as a witness on the trial date. The Support Magistrate made specific reference to the lack of medical evidence in its decision, finding that the father had not refuted the mother's prima facie showing of willfulness. The father's counsel was, or should have been, aware that the father's medical condition would be an issue at the hearing as she was informed of such more than a month before the hearing—the father's counsel was present in court when the Support Magistrate indicated that the father would have to submit medical proof at the hearing in order to rebut the presumption of willfulness and support his contention that he was unable to work. However, the first time the father's counsel even addressed the issue of medical proof was after the hearing on willfulness was completed and during the confirmation proceeding before the Family Court. Counsel argued that no medical proof had been submitted at the hearing because counsel had a problem subpoenaing the father's doctor. Counsel claimed that the subpoena was returned to her office and she had not

had enough time to continue to subpoena. Nonetheless, the record reflected that the father's counsel had not asked the Support Magistrate to adjourn the hearing, nor did the father's counsel seek court intervention to enforce any issued subpoena. Counsel's failure to obtain relevant medical information that may have supported the father's contention, together with the failure to seek an adjournment of the hearing or court intervention to obtain such information, constituted a failure to meaningfully represent the father. Accordingly, the order of commitment was reversed, and the matter was remitted for a new hearing on the violation petition, and a new determination thereafter.

Matter of Nassau Cty. Dep't of Soc. Servs. v King, 149 AD3d 942 (2d Dept 2017)

Family Court Retained Jurisdiction to Enforce its Own Order of Support

The mother commenced a proceeding to enforce an order of the Family Court, Orange County, dated April 24, 2007, which required the father to pay $60 per week in child support. The petition alleged that as of January 28, 2015, the arrears amounted to the sum of $143,542.52. At the time of the commencement of the proceeding, the mother was living in Port Jervis, New York, and the father was living in Pennsylvania. During the pendency of the proceeding, the mother moved to Arizona. Upon direction of the court, the mother had the child support order registered in Pennsylvania. The Pennsylvania court modified the order, reducing the amount of the arrears, and altering the payment terms. After a hearing, the Family Court, Orange County, found that the father willfully violated the April 24, 2007 order of support. The court further found that it had jurisdiction to enforce its own order and continued the father's obligation to pay $60 a week towards arrears in the sum of $148,813.05. The court also directed entry of a money judgment for the amount of arrears not previously reduced to a judgment and ordered the father be committed to the Orange County Jail for 30 days or until he paid $5,000 to purge himself of his contempt. The father appealed. The Appellate Division affirmed. The father argued that the Family Court erred in enforcing the April 24, 2007 order of support, because that order had been registered in and modified by the Pennsylvania court. However, neither of the parties sought a modification of the April 24, 2007 order of support. The mother merely registered that order in Pennsylvania, as directed, for the purpose of enforcement. It was undisputed that the April 24, 2007 order of support was the original child support order and, therefore, New York was the issuing state. A state may modify the issuing state's order of child support only when the issuing state has lost continuing, exclusive jurisdiction. The record did not support the father's contention that New York lost its continuing, exclusive jurisdiction over the April 24, 2007 order of support since it was unclear when the mother moved to Arizona or whether either of the children resided in New York. Moreover, even if both parties and the children no longer resided in New York, the Family Court was not divested of jurisdiction to enforce its own order of support. Accordingly, the Family Court properly granted the petition for enforcement of the April 24, 2007 order of support.

Matter of Pauls v Neathery, 149 AD3d 950 (2d Dept 2017)

A Trial Court Has Broad Discretion to Impute Income When Determining the Amount of Child Support and Maintenance

The parties divorced and stipulated to the terms of custody and parenting time. During the pendency of the divorce proceedings, both parties filed for bankruptcy. The remaining issues, including the amount of the husband's child support obligation, went to trial and after a non-jury hearing, Supreme Court imputed additional income to the parties in determining the child support obligation. The husband appealed arguing the court should have imputed less income to him and more income to the wife. The Appellate Division affirmed finding there was a sound and substantial basis in the record for the court's determination. Here, the husband owned a property maintenance business and the wife had two Masters' degrees and was a certified school counselor. Evidence established she worked at two part-time jobs. Supreme Court imputed income in the amount of $44,447.16 per year to the wife and $85,000 per year to the husband. A trial court has broad discretion to impute income when determining the amount of child support and maintenance and is not bound by the parties' representations of their finances and in this case, there was ample support for Supreme Court's determination to impute income to the parties. Income may be imputed where a party does not report all of his or her

income or where personal expenses are paid through a business account or where a party's earning capacity is enhanced by his or her employment experience and education. The court noted that the Bankruptcy Court accepted the husband's annual income to be $39,747.84 per year. It also cited evidence that the husband earned more than $120,000 per year until 2009, when he began to change the way he kept his financial records, and that he historically paid for the family's expenses through his business accounts. Furthermore, the court observed the husband's income similarly decreased during the action for a divorce and that the business's gross profits were "extremely disproportionate" to the husband's net income. As for the wife, the court emphasized her advanced degrees and rejected her argument that she should not be required to work full time and instead fixed her income pursuant to her actual earnings derived from the two part-time jobs in accordance with the findings of the Bankruptcy Court.

Pfister v Pfister, 146 AD3d 1135 (3d Dept 2017)

Court Abused Its Discretion by Imposing Sentence of Incarceration Although Respondent Had Complied With Order

The Support Magistrate found respondent wilfully violated the $25 per month order of support, established arrears in the amount of $500 and recommended incarceration for a period not to exceed six months. Family Court confirmed the wilfulness finding and at the sanctions hearing, despite being informed by respondent's counsel that respondent had cured the default by paying the arrears in full, plus two months, the court sentenced respondent to 90 days in jail, (*see* FCA§ 454 [3][a]), consecutive to the eight-month sentence he was serving on an unrelated matter. The Appellate Division affirmed the willfulness finding but determined Family Court had abused its discretion in issuing the order of commitment since respondent had complied with the order by paying the arrears.

Matter of Provost v Provost, 147 AD3d 1256 (3d Dept 2017)

Supreme Court Had Broad Discretion To Impute Income

The parties stipulated to a divorce and after a hearing, Supreme Court, among other things, awarded the wife child support. The husband argued the court's imputation of income in arriving at his child support obligation was an abuse of discretion, since the amount was based on his prior employment and some family trusts and he was now unemployed; and, he challenged the calculation of his obligations since the parties shared physical custody. The Appellate Division affirmed. A trial court has broad discretion to impute income when determining child support and a parent's obligation is determined by his or her ability rather than the parent's current financial situation. Although at the time of the hearing the husband was unemployed, he was seeking certification as a public finance officer and in imputing income, the court correctly considered his employment history, his educational background and his recent salaries in the public sector as well as his quarterly income from several family trusts. Furthermore, the court properly applied the three-step method in calculating the husband's proportional share of the basic child support obligation. Because the parties' income slightly exceeded the statutory cap, the court noted it had considered the statutory factors and had specifically taken into consideration the children's entitlement to continue the standard of living they enjoyed prior to the parties' separation. Based on the record, there was a lack of evidence to support the husband's claim that shared parenting justified a reduction of his child support obligation or that his share of child support was unjust or inappropriate.

Arthur v Arthur, 148 AD3d 1254 (3d Dept 2017)

Court Properly Dismissed Father's Motion to Terminate Provision Requiring Parties to Exchange Annual Income Tax Returns

The parties stipulated to a separation agreement that was incorporated but not merged into the judgment of divorce. Among other things, the agreement set forth the father's support obligation and also provided that the parties would exchange their "proper and complete" income tax returns each year and the father's support obligation would be modified accordingly. Thereafter, the mother moved to enforce the agreement and the father moved to modify the agreement to terminate the tax exchange provision. After a hearing, Supreme Court granted the mother's motion, calculated the arrears owed by the father, set forth his support obligation and denied his motion. The Appellate Division affirmed. The record showed that post-agreement, the father verbally negotiated child support

increases with the mother without providing her with his complete tax information. Although a parent can expressly waive his or right to unpaid child support, the waiver must be a "voluntary and intentional abandonment of a known right." (see *Matter of Williams v Chapman,* 22 AD3d 1015, 1017). Here, the mother attempted to obtain more information about the father's income but the father told her he didn't have to provide her with his complete tax returns. He acknowledged he consistently failed to provide her with his annual tax returns and she was unaware his annual income eventually exceeded $350,000. Due to the father's efforts to conceal the true extent of his income, the mother did not voluntarily and intentionally waive her right to child support. Additionally, the court employed the proper analysis in determining the father's child support obligation for the years 2011 to 2014 by addressing each of the statutory factors listed in DRL §240 (1-b)(f), and determined the support amounts did not render the father's share of the financial obligation unjust or inappropriate. Moreover, the court did not abuse its discretion by imputing income to the father for purposes of calculating his child support for 2015. Contrary to the father's assertions, the court was not required to find that the father had deliberately reduced his income to avoid his child support obligation in order to impute income. The imputation of income was based on many factors, including past employment history, future earning capacity and standard of living and a review of the record supported the court's decision. Finally, the court properly determined the subject child was not emancipated and thus the father's support obligation could not be terminated. A parent has an obligation to support the child until the child turns 21, or becomes emancipated by economic means through employment. The record showed that at the time of the hearing, the child was a college student residing in off-campus housing and during the school breaks she lived with the mother. Although the daughter had a part-time job, the mother helped her with her living expenses. Based on this information, the court properly found the child was not emancipated. Moreover, there was no merit to the father's request to terminate the provision regarding tax return exchange since this method was the only practical way to determine the appropriate amount of child support without the court's annual intervention.

Decker v Decker, 148 AD3d 1272 (3d Dept 2017)

No Basis To Disturb Court's Award of Child Support

Supreme Court correctly imputed income in awarding child support. Here, the court discredited the testimony of both parties' expert witnesses and relied instead on the parties' income tax returns between 2002 and 2011, their net worth statements and the husband's credit applications and testimony. Based on this evidence, the court imputed a certain amount to the husband. The wife's testimony established she had a Master's degree in reading, had taught at various times prior to and during their marriage and she testified about her earnings as a teacher in 2000. The court specifically found incredible that the wife, who was a substitute teacher, would be unable to become employed again and imputed a certain amount of gross annual income to her. Based on the record and giving due deference to the court's credibility determinations, there was no basis to disturb the court's order.

Seale v Seale, 149 AD3d 1164 (3d Dept 2017)

Appeal Not Properly Before the Court

Family Court issued an order of support requiring the father to, among other things, reimburse the mother for 42% of her child care expenses. Thereafter, the mother filed a violation petition alleging the father willfully violated the support order and sought arrears and counsel fees. The Support Magistrate found the father in willful violation, directed judgment against him for a certain sum in arrears and since the parties could not agree on an award of counsel fees, they requested the court to resolve the issue and the Support Magistrate directed the father to pay a certain sum in counsel fees, less than the amount the mother was seeking. The mother's objections to the order were denied. Thereafter, the mother appealed directly from the Support Magistrate's order but since this order was superceded by the Family Court order, the appeal was deemed improper. Furthermore, the record was devoid of proof that the Family Court order was ever entered or filed and thus the order was not properly before the Court.

Matter of Jordan v Horstmeyer, 149 AD3d 1307 (3d Dept 2017)

Court Erred in Denying Father's Objections to Support Magistrate's Order

Family Court denied respondent father's objections to the order of the Support Magistrate denying his petition for a downward modification of his child support obligation. The Appellate Division reversed and remitted. The court erred in concluding, following a hearing, that the father failed to establish a sufficient change in circumstances to warrant such a modification. The reduction of the father's income by approximately 18% constituted a sufficient change in circumstances to warrant a recalculation of his child support obligation.

Matter of Brink v Brink, 147 AD3d 1443 (4th Dept 2017)

Mother's Child Support Petition Reinstated Where Petition Denied Upon Application of Incorrect Standard

Family Court denied petitioner mother's objection to an order that dismissed her petition with prejudice. The Appellate Division reversed, granted the objection, reinstated the petition and remitted. The mother sought modification of her child support obligation as set forth in a 2013 oral stipulation which was incorporated but not merged in the judgment of divorce, on the ground that respondent father's income had increased by more than 15%. The Support Magistrate dismissed the petition on the ground that the mother failed to establish a substantial change in circumstances since the entry of the stipulation. The court denied the mother's objection, stating that, although a petition for modification of child support could be brought based on an increase in a party's income of 15% or more, there had to be a showing of a substantial change of circumstances in order to be successful. Section 451 of the Family Court Act allowed a court to modify an order of child support without requiring a party to allege or demonstrate a substantial change in circumstances. Because the court and the Support Magistrate failed to address Family Court Act Section 451 (3) (b) (ii), the petition was denied upon application of the incorrect standard.

Matter of Harrison v Harrison, 148 AD3d 1630 (4th Dept 2017)

Family Court Properly Denied Respondent DSS's Written Objections to Order of Support Magistrate

Family Court denied respondent Department of Social Services's written objections to the order of the Support Magistrate. The Appellate Division affirmed. Petitioner father sought to terminate an order of support with respect to his daughter, who had been released to his custody on a trial basis but remained in the legal custody of respondent. Respondent opposed the petition, contending that it was entitled to reimbursement for foster care maintenance payments that it had expended on the daughter's behalf during the one-month trial discharge period. The Support Magistrate determined, among other things, that, given the father's financial resources and the expenses he had incurred as a result of the child residing with him during the trial discharge period, he was entitled to a deviation from the level of child support calculated under the Child Support Standards Act (CSSA) (*see* Section 413 [1][f]), and that it would be unjust and inappropriate to require the father to pay support during that period. When a child was placed in foster care, the child's parent had a continuing obligation to provide financial support (*see* Social Services Law Section 398 [6] [d]; Family Court Act Sections 415, 422). Family Court properly denied respondent's objections inasmuch as the Support Magistrate properly applied the CSSA guidelines, analyzed the relevant factors and made specific findings on the record concerning why it would be unjust or inappropriate to require the father to pay the amount of child support calculated under the CSSA formula.

Matter of Smith v Jefferson County Dept. of Soc. Servs., 149 AD3d 1539 (4th Dept 2017)

CUSTODY AND VISITATION

Court Did Not Improvidently Exercise Its Discretion in Transferring Petition to Another County

Family Court transferred the father's petition to modify visitation to Suffolk County. The Appellate Division dismissed the appeal. The order transferring the petition was not a final order and was not appealable as of right. Moreover, the father did not object to the transfer and, therefore, his claim that it was an improvident exercise of the court's discretion was not preserved. Also, because the petition had since been dismissed the issue

was academic. Were the Appellate Division to reach the merits, it would not find that the transfer was an improvident exercise of the court's discretion. The mother's family offense petition was pending in Suffolk County and the mother and child resided there.

Matter of Walter S. v Cynthia H., 146 AD3d 408 (1st Dept 2017)

Court Erred in Dismissing Mother's Petition For Modification of Order of Custody

Family Court dismissed the mother's petition for modification of a final order of custody and parenting time. The Appellate Division reversed. Although the mother's request to travel with the children to the Dominican Republic was moot, the issue regarding vacation time would likely arise in the future and therefore was addressed by the Appellate Division. Further, the mother demonstrated a sufficient change in circumstances requiring a modification of the custody order in the children's best interests inasmuch as the parties' relationship continued to deteriorate, and they had been unable to resolve the mother's reasonable requests to travel with the children to the Dominican Republic to visit her family there and for extended summer vacation time with the children. Although the Referee stated on the record that the mother's request that the father be directed to cooperate in obtaining passports for the children would be addressed, neither the custody trial transcripts nor the custody fact-finding determination were included in the record on appeal. It does not appear the court ever addressed the mother's request. The father stated on the record that he opposed the mother traveling with the children because he feared she might not return. Under these circumstances, it was improper not to address this issue because it would be a source of conflict between the parties, which was not in the children's best interests. The current custody order failed to address summer vacation time for the mother, the custodial parent, and did not provide sufficient time during other school holidays to travel with the children, thus effectively depriving the mother of the opportunity to vacation with the children and failed to properly consider the importance of the children's relationship with their mother and her extended family. Further, inasmuch as the custody order provided potentially overlapping parenting time during school breaks and on specific holidays, modification was necessary to resolve conflicts that could arise under those circumstances.

Matter of Aly T. v Francisco B., 146 AD3d 425 (1st Dept 2017)

Court Properly Granted Mother's Motion to Enroll Child in School

Supreme Court granted the mother's motion for permission to enroll the parties' child in The Shefa School for the 2016-17 school year and ordered the father to pay 25% of the tuition and expenses as set forth in the parties' stipulation of settlement. The Appellate Division affirmed. The court was not required to hold a hearing on the mother's motion because the father presented no evidence that raised triable issues of fact or made an evidentiary showing that the mother's decision was not in the child's best interests. The court properly determined that a hearing would be superfluous, cruel to the child, and would needless delay the proceedings so that the child would lose his place at the school. The court properly denied the father's request for an adjournment. The record suggested that the father sought the adjournment so the child would lose his place at the school.

Ringel v Rogosnitzky, 146 AD3d 450 (1st Dept 2017)

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

Family Court, upon a finding of extraordinary circumstances, determined that it would be in the best interests of the subject child to award petitioner grandmother sole legal and physical custody of the subject child. The Appellate Division affirmed. Respondent mother conceded that the requisite extraordinary circumstances existed for the grandmother to seek custody of the child. The court correctly found that it was the child's best interests to remain in the grandmother's custody inasmuch as all the relevant factors supported such determination. The child resided with the grandmother for several years and wished to remain with her, and the grandmother provided for all the child's needs.

Matter of Sherrene R. v Sheena R., 146 AD3d 480 (1st Dept 2017)

Grandmother Established Extraordinary Circumstances

Family Court appointed the grandmother guardianship of the subject child under the subsidized kinship guardian program. The Appellate Division affirmed. The grandmother demonstrated extraordinary circumstances. The child came into foster care because of a finding of excessive corporal punishment inflicted upon her by respondent mother, and for almost two years, the mother failed to engage in services, communicate with the agency, or visit with the child. It was in the child's best interests to grant the grandmother's petition in light of the finding of excessive corporal punishment and evidence of the mother's abject failure to engage in services or develop a relationship with the child. The grandmother, for over two years, provided the child with a safe and stable home, where she was attending high school and was thriving. Given the child's age and the circumstances of the case, adoption or return home were not in her interests. The mother failed to raise an issue regarding the AFC's representation of the child before the trial court. In any event, the AFC clearly stated that he had met and consulted with the child, who stated that she fully supported the grandmother's petition and that position was entirely consistent with the child's signed and notarized preference form.

Matter of Izora W., 146 AD3d 569 (1st Dept 2017)

Sound and Substantial Basis Supported Continued Custody of Child With Mother

Family Court granted respondent mother's motion, upon petitioner father's default, to dismiss his petition seeking modification of an order of custody and denied the father's motion to vacate his default. The Appellate Division affirmed the denial of the father's motion to vacate the default. The court properly denied the father's motion to vacate his default because he failed to demonstrate both a reasonable excuse for the default and a meritorious claim. His excuse that he was delayed climbing the stairs is unavailing given that the courthouse has elevators. The father failed to make an evidentiary showing to demonstrate the need for a change in custody in order to ensure the continued best interests of the children. Because the court possessed ample information regarding the factors it was required o consider in analyzing the children's best interests, it had a sound and substantial basis upon which to determine that it was in the children's best interests to remain in the mother's custody, even without a full evidentiary hearing.

Matter of Tony R. v Stephanie D., 146 AD3d 691 (1st Dept 2017)

Appointment of AFC Not Necessary to Resolve Custody Issue

Supreme Court awarded plaintiff mother sole physical and legal custody of the parties' children, delineated the vacation and holiday periods awarded to each parent, and directed defendant father to pay legal fees to the mother. The Appellate Division affirmed. The court considered the totality of the evidence and properly determined that an award of sole legal and physical custody to the mother was in the children's best interests. The evidence supported the court's view of the mother's superior ability to meet the emotional and intellectual needs of the children. The record reflected the father's palpable animosity towards the mother and his attempts to exclude her from important events in the children's life. The father's conduct was undertaken without any thought about the potential impact on the children and he had a pattern of aggressive behavior towards the mother. The record also showed that notwithstanding the father's conduct and lack of reciprocal courtesy, the mother had attempted to be civil and recognized the value of maintaining the children's relationship with the father. The court considered the testimony and recommendation of the forensic evaluator, but was not bound by it. The appointment of an AFC was not necessary for the court to resolve the custody issue.

Phillips v Phillips, 146 AD3d 719 (1st Dept 2017)

Dismissal of Wife's Complaint Because Husband Obtained Egyptian Divorce Reversed

Supreme Court granted defendant husband's cross motion to dismiss plaintiff wife's complaint. The Appellate Division reversed. The wife commenced the instant action on October 5, 2015. On April 20, 2016, in response to the wife's motion for an order granting her temporary child support and maintenance, the husband cross-moved to dismiss the action on the ground that he had obtained an Egyptian divorce. He submitted an Egyptian bill of divorce dated October 27, 2015, stating

that, on October 13, 2015, he revocably divorced the wife. The doctrine of comity did not mandate dismissal of the action. The wife commenced the instant action eight days prior to the date the husband sought the revocable divorce under Egyptian law. Also, as the husband conceded, the divorce was revokable for 90 days and the wife averred that the husband did revoke the divorce in December 2015, before he allegedly instituted a second divorce in February 2016. New York had jurisdiction to determine child custody issues because New York was the children's home state within six months of the commencement of the divorce action, and the husband continued to reside here.

Fouad v Magdy, 147 AD3d 436 (1st Dept 2017)

Grandmother's Rights to Custody of Child No Greater Than Foster Parents

Family Court dismissed the grandmother's petition for custody of the subject child. The Appellate Division affirmed. Petitioner failed to establish standing to seek custody and/or visitation pursuant to Domestic Relations Law § 72 (1). Petitioner visited the child so infrequently that she was unable to demonstrate an existing relationship with the child. In any event, petitioner failed to show that awarding her custody would be in the child's best interests. In addition to the lack of a meaningful relationship between petitioner and the child, the child was well-bonded, loved, and cared for in the foster home, which was the only home he had ever known. Kinship relatives of parents whose parental rights have been terminated do not have and are not afforded any greater standing or interests with respect to custody of the child than the child's foster parents. Here, respondent agency supported the child's foster parents as his adoptive resource and would not consent to adoption by petitioner. Petitioner failed to establish extraordinary circumstances to support her claim that her trial counsel and the AFC rendered ineffective assistance of counsel. During the proceedings, the then two-year-old child was unable to articulate his judgment. Therefore, the AFC properly substituted her judgment for her client in advocating his best interests.

Matter of Diane T. v Shawn N., 147 AD3d 463 (1st Dept 2017)

Parties Enjoined From Filing Petitions Without Court Permission

Family Court, upon respondent mother's motion, directed that neither party file additional petitions to modify the final custody or visitation order without the Judge's permission or, if the Judge was not sitting, the permission of any Family Court Judge. The Appellate Division affirmed. The court properly enjoined the parties from filing petitions without court approval. The father's abuse of the judicial process was evident from the record, particularly in light of his unsupported allegations of racism and many filings that appeared to have been motivated by spite and control of the proceedings, rather than a genuine desire to visit his son.

Matter of Averty C.P. v Mirlande D., 147 AD3d 590 (1st Dept 2017)

Court Properly Declined to Hold Mother in Contempt

Supreme Court denied plaintiff father's motion to hold defendant mother in contempt, granted mother's cross motion to the extent of ordering the father to pay her attorney's fees, granted the father's motion to the extent of appointing Dr. Hariton to conduct therapeutic visitation between the father and the parties' child and directed the father to arrange six therapeutic visits between him and the child with Dr. Hariton. The Appellate Division affirmed. Plaintiff failed to establish any basis for the motion court to order defendant to bring the child to the courtroom. Plaintiff also failed to establish any change in circumstances warranting reassessment or updating the parenting plan. The court properly declined to have a doctor who previously declined appointment to supervise therapeutic visitation between plaintiff and the child. Similarly, the court properly declined to appoint the doctor who had served as plaintiff's expert during the custody trial. The court properly appointed Dr. Hariton, especially since plaintiff failed to submit, at the court's request, any appropriate professionals to conduct therapeutic visitation and failed to establish that Dr. Hariton was unqualified. The court properly denied plaintiff's motion to hold defendant in contempt for her alleged failure to follow the court's order concerning plaintiff's access to the child's medical information. Defendant confirmed with the child's pediatrician that plaintiff

received all medical records to date and that no additional records had been created.

Elkin. v Labis, 148 AD3d 477 (1st Dept 2017)

Change in Custody to Father in Children's Best Interests

Family Court granted the father's petition to modify custody of the parties' children to the extent of awarding him sole residential custody with parenting time to respondent mother and awarding him final decision making in all area of the children's life, except religion. The Appellate Division affirmed. The totality of the circumstances supported the determination that a change in custody was in the children's best interests. The children were not thriving in the mother's home or in their former school. The mother made unilateral decisions regarding the children without informing the father. While there were concerns raised regarding how the father's negativity toward the mother was impacting the children' perception of her, the father provided a more nurturing home environment where the children's educational, emotional and social needs were better met. Any error in allowing the children's treating psychologist to testify about confidential matters about the children was harmless.

Lawrence C. v Anthea P., 148 AD3d 598 (1st Dept 2017)

Grandmother Properly Denied Visitation

Family Court determined that petitioner grandmother did not establish standing to seek visitation and dismissed her petition. The Appellate Division affirmed. The record supported the court's determination that conditions did not exist to warrant an equitable intervention granting the grandmother standing to seek visitation. The court properly conducted a hearing on the issue and considered all the relevant factors. The record demonstrated that the grandmother made a false ACS report against the father in retaliation for his eviction of the mother and that the grandmother was aggressive and angry. The grandmother admitted that she had not seen the child since 2013 and that the child did not recognize her at that time. There was no evidence to suggest that the grandmother attempted to visit the child after the child and the father moved upstate or to contact the child before 2014.

Matter of Margot M. V Chante T., 148 AD3d 647 (1st Dept 2017)

Denial of Mother's Request For Custody Affirmed

Family Court denied respondent mother's request for custody of the parties' child and granted the father's petition for modification of visitation. The Appellate Division affirmed. The mother's unsubstantiated claim that she completed drug treatment and received therapy for her depression was not a substantial change in circumstances warranting a change in custody from the father to the mother. There was no evidence that the father was unfit or that continued custody with him was not in the best interests of the child. The court did not abuse its discretion in denying the mother's request for an in camera interview of the child. The court was aware of the child's preferences inasmuch as the AFC stated during the hearing that the child wanted to live with the father and visit the mother. There was a sound and substantial basis for the court's finding to change the mother's visitation to once a week. The mother failed to properly supervise the child and did not adhere to the court's prior order.

Matter of Paul P. v Tonisha J., 149 AD3d 409 (1st Dept 2017)

Maternal Aunt Properly Denied Custody of Child

Family Court denied the maternal aunt's petition for custody of the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the court's order denying petitioner's application to have custody of the child returned to her. The hearing demonstrated that the child had special needs that were being met by his foster mother; the child was thriving in her care; and he is living with his two older siblings, who had already been adopted by the foster mother. Although petitioner loved the child and stopped caring for him through no fault of her own, she was physically incapable of providing the child with proper care after suffering an aneurism and stoke. The testimony also established that petitioner lacked insight into the child's special needs and lacked the parental judgment necessary to provide him with proper custody and guardianship, because she allowed people she did not know well to live in her home and continued to allow them to stay there even after one of them began using marijuana.

Matter of Antonio E.B., 149 AD3d 540 (1st Dept 2017)

Remand For Determination of Visitation Schedule

Family Court granted respondent mother visitation supervised by a responsible adult acceptable to petitioner father. The Appellate Division modified and remanded for a determination of a visitation schedule and choice of appropriate supervisor. While the court wanted to allow these largely cooperative parents flexibility to make their own visitation schedule, the order effectively delegated to the father the court's authority to set a schedule. In view of the parties' ability to work together and their need for flexibility to accommodate scheduling supervisors, and the mother's need for drug and/or alcohol rehabilitation, the court's responsibility to set a schedule could be satisfied by mandating the frequency and duration of visitation, even if particular days or times were not specified.

Matter of Izrael J., 149 AD3d 630 (1st Dept 2017)

Record Did Not Support Determination to Grant Relocation

The Supreme Court's determination that the plaintiff could relocate with the children was not supported by a sound and substantial basis in the record, as the plaintiff did not establish by a preponderance of the evidence that the proposed relocation would serve the children's best interests. The plaintiff's evidence that relocating would enhance her life and the children's lives economically was tenuous at best, and the court's finding that the plaintiff could become self-supporting and contribute to the children financially if she relocated was thus speculative, and not supported by a sound and substantial basis in the record. Moreover, the relocation would have negatively impacted the quantity and quality of the children's future contact with the defendant, which weighed against granting relocation in this case. The defendant presented evidence of his involvement in the children's daily lives, school, and extracurricular activities. If the plaintiff was permitted to relocate with the children, the defendant would no longer be able to see the children midweek or remain involved in their many activities. Finally, the plaintiff did not establish by a preponderance of the evidence that her proposed relocation would enhance the children's lives emotionally or educationally. Accordingly, the order was reversed and the plaintiff's motion was denied.

Defilippis v Defilippis, 146 AD3d 750 (2d Dept 2017)

Father's Failure to Visit Children for Five Years Constituted Abandonment

The parties are the parents of a daughter born in April 2003, and a son born in November 2004. In an order of visitation dated October 19, 2007, the father was awarded supervised visitation with both children on alternate Saturdays. In December 2013, the mother petitioned to modify the visitation order on the ground that the father had not contacted or visited the children for five years. After a hearing, the Family Court found that the father had failed to visit or contact the children for five years and that he was solely responsible for that failure. Accordingly, the court granted the mother's petition, and in effect, suspended the father's visitation rights by terminating the visitation order. The father appealed. The Appellate Division affirmed. The record contained a sound and substantial basis for the Family Court's determination that the father had failed to visit or contact the children for five years. This failure by the father constituted, in effect, an abandonment of the children by the father and this abandonment amounted to a change in circumstances such that modification of the visitation order was required to ensure the children's best interests.

Matter of Licato v Jornet, 146 AD3d 787 (2d Dept 2017)

Record Supported Granting Father's Motion to Enjoin Mother from Relocating with Children

At a hearing on the issue of relocation, the father testified that he picked up the children from school every day, even when he did not have scheduled visitation, and cared for them until the mother picked them up or while they spent the night at his home for overnight visitation. The father testified that he coached many of the children's sports teams and attended their other extracurricular activities, that he was "very close" with his children and involved in their daily lives since they were born, and that, if the mother relocated to Rye with the children, the amount of time he would be able to spend with them "would be decreased tremendously." The father testified that he works at various locations in New Jersey, and that he would be unable to maintain the same level of

involvement in his children's lives due to the increased commuting time to Rye. The mother testified that she wished to move to Rye because it would reduce her commute to work as a teacher librarian for the Rye City School District. Based on her work experience, she also believed that the Rye school district was "a lot better" than the Nyack school district, where the children currently attend school, and that she could save money by moving to an apartment in Rye. The Supreme Court granted the father's motion to enjoin the mother from relocating with the children from Valley Cottage to Rye. The mother appealed. The Appellate Division affirmed. The evidence at the hearing established that the proposed move would significantly impact the father's relationship with the children. The father had frequent contact with the children, including substantial time during the week. The record demonstrated that the quality and quantity of the father's contact with the children during the week would have been substantially impaired due to the demands of his work and the rush-hour commute to pick up and drop off the children in Rye. Moreover, the mother failed to demonstrate, by a preponderance of the evidence, that the children's lives would be enhanced economically, emotionally, or educationally by the move.

Lipari v Lipari, 146 AD3d 870 (2d Dept 2017)

Record Supported Determination to Award Sole Custody of Child to Father

The father and the mother, who never married, have one child in common, born in 2012. The parties had been living together but separated in March 2014, and the father left the family home. Approximately one week later, he filed a petition for custody of the child. At about the same time, the mother left New York and moved to Mississippi with the child without informing the father. Following a court order, the child was returned to New York and the father was granted temporary custody pending determination of his petition. The mother then filed a petition for custody of the child, and subsequently amended the petition to include a request to relocate with the child to Mississippi. After a hearing, the Family Court awarded the father sole custody of the child with visitation to the mother and, in effect, denied the mother's amended petition. The mother appealed. The Appellate Division affirmed. Upon reviewing the record, the Appellate Division found that the Family Court's determination had a sound and substantial basis in the record.

Matter of Goodman v Jones, 146 AD3d 884 (2d Dept 2017)

Record Supported Determination to Deny Grandmother's Petition for Custody

In 2008, the subject children (born in 2007 and 2008), were placed in foster care with the petitioner, the paternal grandmother of the younger child (hereinafter the grandmother), following neglect proceedings against their biological mother. In March 2014, the children, then ages five and six, were removed from the grandmother's home and placed in a pre-adoptive foster home after the grandmother's son was arrested in connection with an incident involving the six year old child that occurred in the grandmother's home. Thereafter, the court terminated the parental rights of the mother of the children and the children were freed for adoption. In June 2014, the grandmother, inter alia, petitioned for custody of the children. In March 2015, the grandmother moved for unsupervised visitation with the children. The grandmother did not have standing to seek visitation with the older child, with whom she had no biological relationship, and so much of her motion as sought unsupervised visitation with that child should have been denied by the Family Court without a hearing (*see* DRL § 72). As to the younger child, contrary to the grandmother's contention, there was a sound and substantial basis for the court's denial, after a hearing, of the grandmother''s motion which was for unsupervised visitation with him. Order affirmed.

Matter of Mary M. v Tremaine L.M., 146 AD3d 960 (2d Dept 2017)

Record Supported Family Court's Dismissal of Father's Violation Petition

Upon reviewing the record, the Appellate Division found that the Family Court providently exercised its discretion in denying, without a hearing, the father's cross petition to modify a custody and visitation order. The matters raised in the father's cross petition were not new, but were based on facts and events pre-dating one or more of his prior petitions, most of which had previously been brought to the Family Court's attention. To the very limited extent that the cross petition

contained any new, recent allegations regarding the mother's "coaching" the child to end telephone conversations with the father, or "forcing" the child to use a particular phone to call the father, those allegations were based on substantially similar conduct raised in the father's previous petitions and, therefore, did not constitute a change in circumstances. Accordingly, the Family Court providently exercised its discretion in denying the father's cross petition without a hearing. Moreover, the Family Court providently exercised its discretion in dismissing the father's separate violation petition. While public policy generally mandates free access to the courts, a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will. Here, not only were both parties known to the court as "serial filers" who commence proceedings by filing petitions on a continuous basis, the father also filed his violation petition a mere five days after his cross petition to modify the custody and visitation order, repeating many of the same allegations. Orders affirmed.

Matter of Scott v Powell, 146 AD3d 964 (2d Dept 2017)

Error to Dismiss Mother's Modification Petition Without a Hearing

Here, the mother established her entitlement to a hearing on the basis of changed circumstances. Specifically, the mother made a sufficient evidentiary showing in support of her allegations that the father sexually abused the oldest child and that, as a result of the ensuing litigation, the mother's relationship with the father had deteriorated to the point that they could no longer communicate, and the oldest child was no longer visiting with the father. Moreover, the narrow exception to the general requirement that a hearing be held was inapplicable in this case. The dismissal of the article 10 proceeding pursuant to an adjournment in contemplation of dismissal was not a dismissal on the merits and it did not resolve the allegations of sexual abuse (*see* FCA § 1039 [f]). Indeed, no evidentiary hearing was held in the article 10 proceeding, and the Family Court never made any findings of fact in that proceeding regarding the allegations of sexual abuse. In sum, the court should not have dismissed the mother's modification petition without a hearing. Accordingly, the order was reversed and the matter was remitted to the Family Court for a hearing on the mother's modification petition. In light of certain statements made by the court regarding the mother and the oldest child, the Appellate Division deemed it appropriate that the hearing be held before a different Judge.

Matter of Chess v Lichtman, 147 AD3d 754 (2d Dept 2017)

Record Did Not Support Determination That Mother Was Entitled to Unsupervised Visitation

The subject child was in foster care and the mother had supervised visitation pursuant to a prior order of the Family Court. The Family Court, sua sponte, directed a hearing pursuant to Family Court Act § 1061 to determine whether the mother was entitled to unsupervised "sandwich" visits (scheduled between supervised visits) with the child. A hearing was held, and in the order appealed from, the court, inter alia, directed that the mother have such three-hour unsupervised visits with the child. The petitioner appealed. The Appellate Division reversed. The Family Court erred in modifying the visitation provisions of a prior order. Pursuant to Family Court Act § 1061, the court may modify any order issued during the course of a proceeding under article 10 for "good cause shown" (*see* FCA § 1061). The statute expresses the strong legislative policy in favor of continuing Family Court jurisdiction over the child and family so that the court can do what is necessary in the furtherance of the child's welfare. As with an initial order, the modified order must reflect a resolution consistent with the best interests of the children after consideration of all the circumstances, and must be supported by a sound and substantial basis in the record. Supervised visitation is appropriate only where it is established that unsupervised visitation would be detrimental to the child. The determination of whether visitation should be supervised is a matter left to the Family Court's sound discretion, and its findings will not be disturbed on appeal unless they lack a sound and substantial basis in the record. Here, the determination that the mother was entitled to unsupervised visitation lacked a sound and substantial basis in the record.

Matter of Mario D., 147 AD3d 828 (2d Dept 2017)

Father's Petitions Properly Dismissed for Lack of Jurisdiction

The parties lived in California, where they were married in September 2005. The parties' son, who has special needs and various significant physical and cognitive disabilities, was born in 2006. A divorce judgment was entered in California on March 25, 2011, which incorporated the parties' marital settlement agreement providing for joint custody of the child, with primary physical custody to the mother. An application by the mother to relocate with the child to Israel was granted by a California court in an order dated March 13, 2013 (hereinafter the California order). The California order also provided the father with a new visitation schedule with the child in the United States. Shortly thereafter, the mother moved to Israel with the child and the father relocated to New York. The mother then filed a petition in the Israel Family Court seeking to modify the father's visitation with the child, wherein she alleged an inability to obtain travel medical insurance for the child. The Israel Family Court issued a temporary stay with respect to visitation. The father commenced a proceeding in the Family Court, Westchester County, to enforce the visitation rights awarded to him in the California order, as well as two related proceedings alleging that the mother had violated that order. By this time, California had relinquished its continuing jurisdiction pertaining to issues of custody and visitation regarding the child. The mother moved to dismiss the father's petitions pursuant to DRL § 77-f on the ground that a simultaneous proceeding was pending in the child's "home state" of Israel. In the order appealed from, the Family Court granted the mother's motion to dismiss the father's petitions based on lack of subject matter jurisdiction. The Appellate Division affirmed. Here, the Family Court properly determined that New York was not the child's "home state" since he lived in Israel for more than six months before the commencement of these proceedings. The Family Court also properly ascertained that compliance with DRL § 75-i was not feasible, as the laws and procedures to which the Israel Family Court must adhere prevent communication between the two courts. Further, the Family Court properly determined that Israel is the appropriate forum to rule on whether the child's best interests necessitate modification of the California order because "the child, who is sick and has certain special needs, resides in Israel, as do any necessary contacts, witnesses and service providers, and . . . there are no such contacts in New York," making New York a forum non conveniens. Accordingly, under these circumstances, the father's petitions were properly dismissed for lack of jurisdiction.

Matter of Hollander v Weissberg, 147 AD3d 831 (2d Dept 2017)

Family Court Erred in Failing to Determine Whether it Had Exclusive, Continuing Jurisdiction

On June 17, 2011, the Family Court issued an order (hereinafter the custody order) awarding the parties joint legal custody of their child, with residential custody to the mother and visitation to the father. On or about June 15, 2015, the mother filed a petition in Kentucky to enforce the custody order. In February 2016, the father filed a petition in the Family Court, Suffolk County, seeking to modify the custody order so as to award him residential custody of the child with supervised visitation to the mother. In the order appealed from, the Family Court dismissed that petition on the basis that "there is a case pending in another jurisdiction." The Appellate Division reversed. Here, it was undisputed that the initial custody determination was rendered in New York. Accordingly, the Family Court erred in summarily dismissing the father's petition on the ground that the mother had commenced a proceeding in Kentucky, without considering whether it had exclusive, continuing jurisdiction pursuant to DRL § 76-a (1), and affording the father an opportunity to present evidence as to that issue (*see* DRL § 76-a). Since the Family Court did not determine whether it had exclusive, continuing jurisdiction, the order was reversed, and the matter was remitted to the Family Court for a determination of that issue.

Matter of LaCour v Puglisi, 147 AD3d 842 (2d Dept 2017)

Relocation to Florida Was in Child's Best Interests

The parties have one child together. After a finding of neglect was made against the mother, the father was awarded sole custody of the child. An order of protection was issued against the mother, and she was not awarded visitation. The father subsequently filed a petition seeking permission to relocate with the child to

Florida. After a hearing, the Family Court granted the father's petition for permission to relocate. The mother appealed. The Appellate Division affirmed. Here, the father established by a preponderance of the evidence that relocation was in the child's best interests. The mother was not granted visitation and currently does not have a relationship with the child, so the relocation will not affect that relationship. Additionally, the father and the child will have the support of close family members in Florida. Accordingly, the Family Court providently exercised its discretion by granting the father's petition for permission to relocate.

Matter of Morales v Savage, 147 AD3d 848 (2d Dept 2017)

Record Supported Determination Denying Visitation to the Mother

The parties have one child together. After a finding of neglect was made against the mother, the father was awarded sole custody of the child. An order of protection was issued against the mother, and she was not granted visitation. The mother subsequently filed a petition seeking visitation. After a hearing, the Family Court denied the petition, finding that the mother failed to demonstrate that she had addressed the mental health issues that were the basis for the finding of neglect against her. The mother appealed. The Appellate Division affirmed. There was a sound and substantial basis in the record for the Family Court's determination that it was not in the child's best interests to grant visitation to the mother, against whom a finding of neglect had been made. There was no evidence that the mother had addressed or gained insight into the issues that led to the neglect finding and the awarding of custody to the father.

Matter of Savage v Morales, 147 AD3d 861 (2d Dept 2017)

Best Interests of the Children Required a Supervised Visitation Schedule

Contrary to the mother's contention, the Family Court did not err in granting the petitions to limit her to only supervised visitation. Modification of an existing court-sanctioned custody or visitation arrangement is permissible only upon a showing that there has been a change in circumstances such that a modification is necessary to ensure the continued best interests and welfare of the child. The best interests of the child are determined by a review of the totality of the circumstances. Supervised visitation is appropriately required where it is established that unsupervised visitation would be detrimental to the child. The determination of whether visitation should be supervised is a matter left to the trial court's sound discretion, and its findings will not be disturbed on appeal unless they lack a sound and substantial basis in the record. Here, the court's determination that there had been a change in circumstances, and that it was in the children's best interests for the mother's future visitation to be supervised, was supported by a sound and substantial basis in the record. However, under the circumstances of this case, including the fact that the parties have previously experienced difficulties in agreeing upon visitation, the best interests of the children required that the Family Court set forth a supervised visitation schedule that would allow the mother to have meaningful time with the children. Accordingly, the matter was remitted to the Family Court to set a schedule for the mother's supervised visitation with the children. Order modified.

Matter of Spencer v Killoran, 147 AD3d 862 (2d Dept 2017)

Error to Award Father Sole Custody of the Child Without a Hearing

The parties, who were never married, are the parents of a nine-year-old boy. Since the child's birth, the parties have engaged in extensive litigation over issues involving custody and visitation. The parties both had petitions for custody and visitation pending when they appeared in the Supreme Court on February 11, 2015. At the urging of the court, the mother signed a stipulation agreeing to a schedule for visitation with the child, who was then in the father's custody pursuant to a temporary order. Although only the issue of visitation was discussed when the parties appeared on February 11, 2015, at the conclusion of the appearances, the court stated, without elaboration, that it was granting a final order of custody to the father. The mother promptly moved to vacate the final order of custody and visitation, indicating that she was revoking her consent to resolve the issue of visitation without a hearing, and pointing out that neither the parties nor the court had discussed awarding the father custody. In the

order appealed from, the Supreme Court denied the mother's motion. The Appellate Division reversed. The Supreme Court erred in awarding the father sole custody of the child in the absence of a hearing to determine the best interests of the child. The court failed to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision. Furthermore, the issue of custody was not discussed at the February 11, 2015 court appearances that resulted in the issuance of the final order of custody and visitation. Under these circumstances, the mother's motion to vacate the final order of custody and visitation dated February 11, 2015 should have been granted. Accordingly, the order was reversed, the mother's motion was granted, and the matter was remitted for a hearing on the parties' respective petitions for custody and visitation, and for new determinations of the petitions thereafter.

Fraser v Fleary, 147 AD3d 937 (2d Dept 2017)

Family Court Properly Denied Mother's Motion Without a Hearing

As a general rule, the Family Court does not have jurisdiction to countermand the provisions of a criminal court order of protection. Thus, where a criminal court order of protection bars contact between a parent and child, the parent may not obtain visitation until the order of protection is vacated or modified by the criminal court. However, the criminal court has authority to determine whether its order of protection is" subject to" subsequent Family Court orders, and where the criminal court order of protection expressly contemplates future amendment of its terms by a subsequent Family Court order pertaining to custody and visitation, the Family Court is not precluded from granting custody or visitation by the terms of the order of protection. Here, since the Supreme Court's temporary order of protection dated April 1, 2016, did not state that it was "subject to" subsequent Family Court orders, the Family Court had no basis to permit "kinship visitation" supervised by the maternal grandmother. Accordingly, the Family Court properly denied the mother's motion without a hearing. Order affirmed.

Matter of R.J.H., 147 AD3d 945 (2d Dept 2017)

Maternal Aunt Demonstrated Extraordinary Circumstances

The father of the subject child and the child's maternal aunt both filed petitions for sole custody. The Family Court granted the maternal aunt's petition and denied the father's petition. The father appealed. The Appellate Division affirmed. As between a parent and a nonparent, the parent has the superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or similar extraordinary circumstances. The nonparent has the burden of proving that extraordinary circumstances exist such that the parent has relinquished his or her superior right to custody. Where extraordinary circumstances are present, the court must then consider the best interests of the child in awarding custody. Here, the Family Court properly determined that the maternal aunt sustained her burden of demonstrating extraordinary circumstances based upon, inter alia, the father's prolonged separation from the subject child and lack of involvement in her life for many years, as well as the father's failure to contribute to the child's financial support. Moreover, the court's determination that an award of custody to the maternal aunt was in the best interests of the child was supported by a sound and substantial basis in the record.

Matter of Hunte v Arnold, 147 AD3d 946 (2d Dept 2017)

Family Court Erred in Determining That New Jersey Was the Child's Home State

The subject child was born in 2007 and, on May 26, 2009, the Court of Common Pleas, Lebanon County, Pennsylvania, issued a custody order granting the mother primary physical custody and the father partial custody and visitation. Sometime after May 26, 2009, but before April 1, 2015, both parties relocated to New York. On April 1, 2015 the mother moved to New Jersey, but the subject child stayed with the father in New York until early June 2015. On November 9, 2015 the father commenced a proceeding in the Family Court, Kings County, to modify the Pennsylvania custody order. Based upon the mother's April 1, 2015 move to New Jersey, the Family Court found that the subject child's home state was New Jersey and dismissed the father's petition for lack of subject matter

jurisdiction. The father appealed. The Appellate Division reversed. Here, the Family Court erred in determining that New Jersey was the child's home state based upon the mother's April 1, 2015 move to New Jersey, since the child resided with the father in New York until early June 2015 and the father commenced this proceeding less than six months later, on November 9, 2015. Therefore, the child did not live with the mother in New Jersey for at least six consecutive months immediately before the commencement of the proceeding. DRL § 76 (1) (a) permits New York courts to exercise jurisdiction if, inter alia, New York "was the home state of the child within six months before the commencement of the proceeding." However, as the record did not disclose the date the child moved to New York, the Appellate Division could not determine whether the child resided in New York for a period of six consecutive months prior to June 2015, so as to establish New York as his home state (*see* DRL § 75-a [7]) for purposes of Domestic Relations Law § 76 (1) (a). Accordingly, the matter was remitted to the Family Court, Kings County, for further proceedings to determine whether the Family Court had jurisdiction to modify the Pennsylvania custody order. Contrary to the father's contention, registration of the Pennsylvania custody order in New York pursuant to Domestic Relations Law § 77-d was not sufficient to confer exclusive, continuing jurisdiction over this custody matter pursuant to Domestic Relations Law § 76-a.

Matter of Intriago v Diaz Garcia, 147 AD3d 1054 (2d Dept 2017)

Record Supported Determination That Joint Legal Custody Was Not a Viable Option

The mother and the father, who were never married, have one child together. In September 2013, the mother filed a petition for sole legal and physical custody of the child. Subsequently, the father filed a petition for joint legal custody. At the conclusion of a hearing on the custody petitions, the Family Court determined that joint legal custody was not a viable option based on evidence of the parents' inability to communicate. The court granted the mother's petition for sole legal and physical custody and denied the father's petition. The father appealed. The Appellate Division affirmed. Contrary to the father's contention, the Family Court properly determined that joint legal custody was not a viable option. Joint custody reposes in both parents a shared responsibility for and control of a child's upbringing and is appropriate between relatively stable, amicable parents who behave in a mature and civilized fashion. However, it is inappropriate where, as here, the parties have demonstrated an inability to communicate and cooperate on matters concerning the child. Further, viewing the totality of the circumstances, there was a sound and substantial basis for the court's determination that it was in the child's best interests to award sole legal custody to the mother.

Matter of Lee v Fitts, 147 AD3d 1058 (2d Dept 2017)

Record Supported Determination to Award Residential Custody to Father

In December 2013, the father filed a petition for residential custody of the subject child. The Family Court conducted a seven-day hearing that commenced in December 2014 and concluded in March 2016. Additionally, the court conducted an in camera interview with the child. In the order appealed from, the Family Court awarded residential custody to the father with regularly scheduled visitation to the mother. The Family Court, after having the opportunity to evaluate the testimony and interview the child, determined that an award of residential 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 had a sound and substantial basis in the record. Order affirmed.

Matter of Lliviganay v Fajardo, 147 AD3d 1059 (2d Dept 2017)

Record Did Not Support Determination to Order Therapeutic Visitation Between Mother and Children

In a stipulation of settlement which was incorporated but not merged into the parties' judgment of divorce dated October 14, 2011, the parties agreed to joint legal custody of their children and for the mother to have primary physical custody, with visitation to the father. In August 2015, the father petitioned to modify the custody provisions of the stipulation of settlement so as to award him sole custody of the children. After a hearing, the Family Court issued an order dated January 21, 2016, inter alia, granting that branch of the father's petition which was to award him physical custody of

the parties' children and granting certain therapeutic visitation to the mother. The mother appealed. Contrary to the mother's contention, the Family Court's determination that there had been a change in circumstances requiring a transfer of custody to the father in order to ensure the best interests of the children had a sound and substantial basis in the record. However, the Family Court's determination limiting the mother's visitation with the children to certain therapeutic visits lacked a sound and substantial basis in the record. Accordingly, the order was modified, and the matter was remitted to the Family Court for determination of a new visitation schedule.

Matter of Oyefeso v Sully, 148 AD3d 710 (2d Dept 2017)

Family Court Did Not Give Undue Weight to Opinion of Court-Appointed Forensic Psychologist

The father and the mother, who were never married, have two children together. The father filed a petition for custody of both children, and, following a hearing, the Family Court awarded the mother and the father joint legal custody, with residential custody to the father and visitation to the mother. The mother appealed. The Appellate Division affirmed. The Family Court properly weighed all of the factors in awarding the mother and father joint legal custody and awarding residential custody to the father. The court did not, contrary to the mother's contention, give undue weight to the opinion of the court-appointed forensic psychologist. The court, after evaluating the testimony and considering the recommendations of the forensic expert, determined that the children's best interests were served by awarding the mother and father joint legal custody and awarding the father residential custody. That determination was supported by the record.

Matter of Estrada v Palacios, 148 AD3d 804 (2d Dept 2017)

Father Failed to Present Sufficient Evidence of Parental Alienation by the Mother to Warrant a Change of Custody

The parties are the parents of a child born in 2001. An order of custody and visitation dated September 14, 2004, awarded sole custody of the child to the mother and visitation to the father. Subsequently, an order of visitation dated April 27, 2010 continued the father's visitation with the child. The father filed a petition seeking to modify the order dated September 14, 2004, so as to award him sole custody of the child or, in the alternative, to modify the order dated April 27, 2010 so as to award him increased visitation with the child. The mother filed a petition to modify the order dated April 27, 2010 so as to suspend visitation between the father and the child. In the order appealed from, the Family Court, after a hearing, denied the mother's petition and that branch of the father's petition which sought sole custody of the child, but granted that branch of the father's petition which was, to modify the order dated April 27, 2010 so as to award him increased visitation with the child. The mother appealed and the father cross-appealed. The Appellate Division affirmed. The father failed to demonstrate that a change of custody was in the child's best interests. While the father contended that the child's desire not to participate in visitation with him was caused by the mother's interference, the record revealed that the deterioration of the relationship between the father and the child was due, in part, to the father's own conduct and his failure to make sufficient efforts towards improving his relationship with the child. Therefore, the father failed to present sufficient evidence of parental alienation by the mother to warrant a change of custody. Contrary to the mother's contention, the Family Court's determination that increased visitation with the father was in the child's best interests was supported by a sound and substantial basis in the record.

Matter of Sanders v Jaco, 148 AD3d 812 (2d Dept 2017)

Grandmother Failed to Sufficiently Allege Extraordinary Circumstances

In August 2015, the petitioner, who is the subject child's maternal grandmother, filed a petition seeking custody of the child. The petitioner alleged that the child's mother and father had joint legal custody of the child, with residential custody to the mother, but that the mother was expected to shortly begin serving a term of incarceration. The father opposed the petition. Following two court appearances, the Family Court granted the father's motion to dismiss the grandmother's custody petition, without a hearing, for lack of standing. The grandmother appealed. The Appellate

Division affirmed. The grandmother's petition failed to sufficiently allege the existence of extraordinary circumstances relating to the father, who had joint custody of the child. Accordingly, the Family Court properly granted the father's motion to dismiss the petition, without a hearing, based upon her lack of standing.

Matter of Smith v Cooks, 148 AD3d 814 (2d Dept 2017)

Record Supported Determination To Award Custody to Maternal Grandmother

The subject child, who was born in 2003, has been in the exclusive care of the maternal grandmother since he was approximately 10 months old. In March 2004, the maternal grandmother filed a petition for custody of the child, which was granted in an order dated December 9, 2004, upon the default of the mother and the father. The mother had been arrested for shoplifting in 2004, and was deported in 2005 based on her illegal status. The mother returned to the United States legally in March 2011, and filed a petition to modify the order dated December 9, 2004, so as to her award her sole custody of the child. In an order dated December 16, 2015, after a hearing, the Family Court granted the petition only to the extent of awarding the mother visitation with the child, and awarded sole legal and residential custody to the maternal grandmother. The mother appealed. The Appellate Division affirmed. The Family Court properly determined that the maternal grandmother sustained her burden of demonstrating extraordinary circumstances based upon the mother's prolonged separation from the subject child, and the maternal grandmother having provided for the child's financial, educational, emotional, and medical needs, with no contribution from the mother. Moreover, the court's determination that an award of custody to the maternal grandmother was in the best interests of the child was supported by a sound and substantial basis in the record.

Matter of Williams v Frank, 148 AD3d 815 (2d Dept 2017)

Allegations in Father's Petition Were Conclusory and Unsubstantiated

The father appealed from an order of the Family Court, which, without a hearing, denied the father's petition to enforce the visitation provisions of a stipulation of settlement dated October 26, 2013, modify the custody provisions of that stipulation, and hold the mother in contempt for failure to comply with the visitation provisions of that stipulation. The Appellate Division affirmed. The Family Court properly denied, without a hearing, that branch of the father's petition which was to modify the custody provisions of the stipulation of settlement. The father failed to make an evidentiary showing of a change in circumstances sufficient to warrant a hearing. His assertions were conclusory and nonspecific, and were unsubstantiated. The Family Court did not err in denying, without a hearing, that branch of the father's petition which was to enforce the visitation provisions of the stipulation of settlement, as the allegations in the petition were conclusory and unsubstantiated. In addition, the court did not err in denying, without a hearing, that branch of the father's petition which was to hold the mother in contempt for failure to comply with the visitation provisions of the stipulation of settlement. A hearing is not mandated in every instance where a finding of contempt is sought. It need only be conducted if a factual dispute exists which cannot be resolved on the papers alone. The father offered no evidentiary support for his allegation that the mother failed to comply with the visitation provisions of the stipulation of settlement and, therefore, failed to raise an issue of fact that would have necessitated a hearing.

Matter of Chichra v Chichra, 148 AD3d 883 (2d Dept 2017)

Maternal Aunt Established Extraordinary Circumstances

This custody proceeding concerned a child who was born in 2006 and had never lived with her mother. In 2007, after the child resided with another relative for the first year of her life, she came into the care of the mother's maternal aunt, who was awarded custody, upon the mother's consent, in 2009. In December 2014, the mother filed a petition for sole custody. After a hearing, the Family Court denied the mother's petition. The mother appealed. The Appellate Division affirmed. The Family Court failed to address the threshold determination of whether the mother's maternal aunt had established the existence of extraordinary circumstances giving her standing to maintain custody of the child. Remittal, however, was

not necessary, because the record was adequate for the Appellate Division to determine that the maternal aunt did, in fact, establish the existence of such extraordinary circumstances. Specifically, the child, who was born in 2006 and was eight years old when the mother filed her custody petition, had never resided with the mother and had lived with the maternal aunt since she was one year old. This prolonged period of separation, albeit with the mother's consent, and with some parental contact, served to give the maternal aunt standing to maintain custody. The record contained a sound and substantial basis for the Family Court's determination that, although the mother had made great strides in dealing with her difficulties, custody with the maternal aunt continued to be in the child's best interests. Finally, while it would have been better for the Family Court to have conducted an in camera interview with the child, its failure to do so in this case did not require a reversal.

Matter of Gunther v Brown, 148 AD3d 889 (2d Dept 2017)

Record Did Not Support Determination Awarding Father Sole Legal and Physical Custody

The mother appealed from an order of the Family Court, entered October 21, 2106, which, after a hearing, granted the father's petition to modify the custody provisions set forth in an order of custody and visitation dated November 16, 2012, so as to award him sole physical and legal custody of the subject child, and denied the mother's petition to relocate with the child to North Carolina. The Family Court properly determined that the mother failed to establish, by a preponderance of the evidence, that a proposed relocation to North Carolina served the child's best interests. The mother failed to prove that her life and the child's life would be enhanced economically, emotionally, and educationally by the move. Furthermore, the evidence adduced at the hearing demonstrated that the father had faithfully exercised his visitation rights, and had fully participated in the child's life. The mother failed to establish that the proposed move would not have a negative impact on the quantity and quality of the child's future contact with the father. As to the father's petition, the Family Court's determination awarding the father sole legal and physical custody of the child lacked a sound and substantial basis in the record. In particular, since the mother had not yet moved to North Carolina and the father failed to show that he had been denied access to the child at any time, the father failed to establish a change of circumstances since the initial custody determination. Furthermore, the court failed to give sufficient weight to the fact that the mother had been the child's primary caregiver for his entire life, and there was no evidence that the mother has been anything but a devoted mother. Since the father failed to establish a change of circumstances requiring a modification of the existing custody arrangement, his petition should have been denied. Order modified.

Matter of Lopez v Chasquetti, 148 AD3d 1151 (2d Dept 2017)

Family Court Should Not Have Relied Exclusively on Recommendation of Child's Therapist

The petitioner is the biological mother of the subject child, who was born in 2005, and the respondent is the stepfather of the child, who was appointed the child's legal guardian in 2010. The mother left the child with the stepfather and was out of their lives for several years. In 2013, the mother petitioned to have visitation with the child in a therapeutic setting and the Family Court, on consent of the parties, directed therapeutic visitation in an order dated November 7, 2013. Several visits occurred, and then stopped during the summer of 2015. The mother then filed a new petition alleging that visitation had ceased and seeking to modify the prior order so as to award her unsupervised visitation with the child. Without holding a hearing, the court dismissed the petition, relying on the recommendation of the child's therapist, who indicated that there should be no visitation between the mother and the child at that time. The mother appealed. The Appellate Division reversed. A hearing was necessary to determine whether the totality of the circumstances warranted a modification of the visitation order and whether such a change was in the best interests of the child. In making that determination, the child's wishes should have been discerned from an in camera interview. Moreover, it was improper for the Family Court to rely exclusively on the therapist's recommendation.

Matter of Jennifer J.H. v Artrieo J.R., 148 AD3d 809 (2d Dept 2017)

Mother Demonstrated a Change of Circumstances Warranting Modification

The father appealed from an order of the Family Court, dated September 29, 2015, which, after a hearing, denied his petition to modify a prior visitation order of that court dated November 16, 2009 by increasing his visitation, and granted that branch of the mother's petition which was to modify the prior visitation order by limiting his visitation. The Appellate Division affirmed. The Family Court's determination that the mother satisfied her burden of demonstrating that there existed a change in circumstances warranting a reduction in the amount of visitation time allowed to the father was supported by a sound and substantial basis in the record. The father's repeated failure to visit or communicate with the subject children over an extended period of time constituted a change of circumstances warranting modification of the visitation provisions set forth in a 2009 visitation order. Further, the record supported the court's determination that it was in the best interests of the children for visitation to resume incrementally with the father by permitting him unsupervised daytime visitation on Sundays, which could expand to holiday and summertime visitations upon the parties' consent. It was noted that the court also gave appropriate weight to the wishes of the children.

Matter of Pagan v Gray, 148 AD3d 811 (2d Dept 2017)

Family Court's Dismissal of Petition Did Not Deprive Father of Due Process

The petitioner and the respondent are the parents of a daughter born in December 2009. The father was incarcerated when the child was four months old, and has not had any contact with her since that time. While incarcerated, the father commenced a proceeding seeking visitation with the child. The Family Court ordered a forensic evaluation of the parties and the child, and the evaluator concluded that reintroducing the child to the father while he was incarcerated would have been "highly disruptive" and "possibly traumatic" for the child. In February 2015, upon learning that the father expected to be released from prison in 90 days, the court issued an order granting the father three psychologist-supervised visits with the child, to be held after his release from prison. The father was not released from prison as anticipated, and the supervised visitation never occurred. At a court appearance on September 28, 2015, the father, who was still incarcerated, appeared via video conference. However, there was a defective audio connection, and the father's voice could not be heard. The mother and the attorney for the child requested that the father's petition be dismissed without prejudice because the father's prison release date was unknown and the arrangement to reintroduce the child to the father could not be carried out until he was released. The father's counsel argued against dismissal and requested an adjournment. The Family Court dismissed the father's petition without prejudice, and the father appealed. The Appellate Division affirmed. The right to be heard is fundamental to our system of justice, and even an incarcerated parent has a right to be heard on matters concerning his or her child, where there is neither a willful refusal to appear nor a waiver of appearance. Here, the father was afforded due process since he was represented by an attorney who advocated for his interests. Moreover, since the visitation petition was dismissed without prejudice, the father was free to file another petition.

Matter of Bagot v McClain, 148 AD3d 882 (2d Dept 2017)

Paternal Stepgrandfather Had No Standing to Seek Visitation

The paternal grandmother and paternal stepgrandfather of the subject child commenced a proceeding for visitation with the child. After a hearing, the Supreme Court granted the petition and set forth a visitation schedule. The mother appealed. The record revealed that the paternal stepgrandfather was not the biological grandfather of the child or the legal grandfather by virtue of adoption. Therefore, he was not the child's grandparent within the meaning of Domestic Relations Law § 72 and, therefore, he had no standing to seek visitation. Accordingly, the petition for visitation should have been dismissed insofar as asserted by him. As to the grandmother, the Supreme Court properly determined that she had standing to seek visitation based upon the equitable circumstances, including an ongoing and affectionate relationship between her and the child. Moreover, as a result of the father's unexpected death during the pendency of the visitation proceeding, the grandmother acquired automatic standing to seek visitation. Based on the totality of the circumstances, the Supreme Court properly determined

that visitation with the grandmother was in the best interests of the child. Accordingly, the order was modified to the extent of dismissing the stepgrandfather's petition, and, inter alia, granting visitation with the paternal grandmother for one full week during each summer school break.

B. S. v B. T., 148 AD3d 1029 (2d Dept 2017)

Mother Allegations of Parental Alienation Established Entitlement to Hearing

Pursuant to the parties' judgment of divorce dated February 20, 2008, the father was awarded sole custody of the subject child. In May 2015, the mother filed a petition to modify the custody provisions of the judgment of divorce so as to award her sole custody of the child. In an order dated December 29, 2015, the Family Court, among other things, in effect, denied, without a hearing, the mother's petition. The mother appealed. The Appellate Division reversed. Where modification of an existing custody order is sought, the petitioner must make a showing that there has been a change in circumstances such that modification is necessary to protect the best interests of the child. When the allegations of fact in a petition to change custody are controverted, the court must, as a general rule, hold a full hearing. Here, the mother established her entitlement to a hearing by alleging, inter alia, that the father prevented her from visiting with or speaking to the child, and was attempting to alienate the child from her. Moreover, under the circumstances presented, the Family Court should have conducted an in camera interview of the child. Accordingly, the order was reversed, and the matter was remitted to the Family Court for a new determination of the mother's petition following a full hearing, and an in camera interview of the child.

Matter of Laureano v Wagner, 149 AD3d 745 (2d Dept 2017)

Record Supported Determination That Mother's Testimony Was Not Credible

The Family Court's determination that an award of custody to the father was in the children's best interests had a sound and substantial basis in the record. The court, after determining that some of the mother's testimony was not credible, particularly with respect to her claims that she was no longer consuming alcohol, concluded that the father would provide the children with the permanency of a more stable and appropriate home. Contrary to the mother's contention, a review of the court's decision indicates that it carefully considered all of the relevant factors in making its determination. Further, the court properly awarded the father custody of the children pursuant to Family Court Act article 6 at the conclusion of the consolidated dispositional hearing for the Family Court Act articles 6 and 10 proceedings (*see* FCA § 1055-b).

Matter of Craig S. v Emily S., 149 AD3d 751 (2d Dept 2017)

Hearing Required on Father's Motion to Modify Custody Provisions

The parties were married in 2005, and have one child, born in September 2007. In 2010, the parties entered into a separation agreement which provided that they would have joint physical and legal custody of the child, and further provided a visitation schedule. The father commenced an action for a divorce in 2011. After a nonjury trial, the Supreme Court, in a decision dated January 25, 2013, determined that the custody arrangement set forth in the parties' separation agreement would remain in effect. A judgment of divorce, entered July 8, 2013, provided that the parties would have joint physical and legal custody of the child, with each party having visitation with the child as set forth in the separation agreement. By order to show cause dated November 1, 2013, the father moved to modify the custody provisions of the parties' judgment of divorce so as to award him sole custody of the child. In an affidavit in support of the motion, the father alleged that on October 31, 2013, he observed the mother, who had a history of alcohol abuse, to be in an intoxicated condition. The police were called and responded, and the mother could not tell the officers where her other child, who was then 18 months old, was located. The mother was transported to the hospital, where she could not provide police officers or hospital staff with her live-in boyfriend's cell phone number or work number. The father further alleged that the mother's blood alcohol content was determined to be over .35%. Pending the determination of the father's motion, the Supreme Court awarded the father temporary sole custody of the child. Between November 13, 2013, and September 5, 2014, the parties

appeared before the Supreme Court on various dates, and the court appointed a mental health professional to complete a forensic chemical dependency evaluation report regarding the mother. By order entered July 23, 2015, based on the conferences held and the forensic report, the Supreme Court, without a hearing, inter alia, denied the father's motion and set forth a new visitation schedule for the parties. By order dated May 11, 2016, the court modified the visitation schedule set forth in the order entered July 23, 2016. The father appealed. The Appellate Division reversed the order of July 23, 2015, modified the order of May 11, 2016, and remitted the matter for a hearing on the father's motion and a new determination thereafter. The father made the necessary showing entitling him to a hearing regarding that branch of his motion which was to modify the custody provisions of the parties' judgment of divorce. Further, the record failed to demonstrate that the Supreme Court possessed adequate relevant information to enable it to make an informed and provident determination as to the child's best interests so as to render a hearing unnecessary. In making its determination, the court relied on information provided at the court conferences, and the hearsay statements and conclusions of the forensic evaluator, whose opinions and credibility were untested by either party. Accordingly, the Supreme Court erred when it denied the father's motion and set forth a new visitation schedule for the parties, without first conducting a hearing to ascertain the child's best interests.

Gentile v Gentile, 149 AD3d 916 (2d Dept 2017)

Determination to Award Father Decision-Making Authority over Children's Education Was Inconsistent with Parenting Schedule Established by the Court

The parties are married and are the parents of two children. After the birth of the first child, the family moved from Brooklyn to Baldwin in July 2008, after buying a home. In 2012, the parties separated, and the mother moved back to Brooklyn. Although the mother took the children with her when she moved out, due to her work schedule, the parties informally agreed that the father would have parenting time with the children from Tuesday after school until Friday mornings, and occasionally for a full weekend. The father worked in Brooklyn and the children attended a private school in Brooklyn. In April 2014, the mother filed a petition for sole legal and physical custody of the children. Following a hearing, the court awarded decision-making authority over the children's education to the father, and over the children's health and religious upbringing to the mother. The court also awarded primary physical custody to the father, but based upon the recommended visitation schedule proposed by one of the children, awarded the mother parenting time with the children during the school year from Sunday afternoon until Wednesday morning, and awarded the father parenting time with the children from Wednesday afternoon until Sunday morning. The children appealed, arguing that the court should have awarded the parties joint legal custody, and the mother sole physical custody. The Appellate Division reversed the order and remitted the matter for a new hearing and determination of the mother's petition. The Family Court's order lacked a sound and substantial basis. The award to the father of decision-making authority over the children's education was inconsistent with the parenting schedule established by the court. During the hearing, the father testified that if he was awarded custody, the children would attend public school in Baldwin, rather than their private school in Brooklyn. However, pursuant to the parenting schedule established by the court, the children would be spending Monday through Wednesday morning in Brooklyn with the mother, despite the fact that they would be attending school in Baldwin. This arrangement did not promote stability for the children, lacked a sound and substantial basis in the record, and did not serve the best interests of the children.

Matter of Massay v Manoyrine, 149 AD3d 939 (2d Dept 2017)

Record Supported Determination Limiting Father's Visitation

The mother and the father were married in July 1997 and divorced in 2006, and have one child together. The judgment of divorce, inter alia, awarded sole physical and legal custody of the child to the mother, with liberal visitation to the father. The mother remarried in 2008 and moved to New Jersey. In 2009, the father petitioned the Family Court to modify the custody provisions of the judgment of divorce so as to award him sole custody of the child, alleging a change in circumstances. A hearing was conducted on various dates between 2009 and 2015. Substantial evidence in

the record indicated that the father was deeply upset by the mother's remarriage, and set out to prove that the new husband was abusing the child. To that end, he used his visitation to repeatedly question the child about his relationship with his stepfather, making numerous audio and video recordings of these interviews, which were made part of the record. The incessant questioning was described by one of the forensic evaluators as "toxic, annoying and repetitive." Based on substantial evidence that the father's conduct was detrimental to the child's welfare, the Family Court, while the petition was still pending, restricted the father's visitation to supervised visitation and directed him to stop recording his conversations with the child. Despite these interim measures, the father continued to record many of his conversations with the child and persisted in his campaign against the mother's new husband. The father appealed from an order of the Family Court which denied the father's petition, continued the mother's sole physical and legal custody of the child, and limited the father's visitation to supervised and therapeutic visitation. The Appellate Division affirmed. The Family Court properly denied the father's petition and limited his visitation to supervised and therapeutic visitation based on his conduct in repeatedly questioning the child about his relationship with the mother's husband, and systematically recording his interactions with the child. Sound and substantial evidence in the record showed that the father's conduct had a detrimental impact on the welfare of the child and, therefore, the court was justified in restricting his visitation to supervised and therapeutic visitation.

Matter of Batista v Mocktar, 149 AD3d 1068 (2d Dept 2017)

Award of Physical Custody to Father During School Year Was Supported by a Sound and Substantial Basis in the Record

Contrary to the plaintiff's contention, the Supreme Court's award of physical custody of the child to the defendant during the school year was supported by a sound and substantial basis in the record. The evidence demonstrated that both parties were fit, loving parents who should have had equal parenting time if was possible, but that because they could not work together to make decisions for the child, it was necessary to award them decision-making authority in separate areas of the child's life. Under the totality of the circumstances, it was in the child's best interests to be in the defendant's physical custody during the school year, as the child was late to or absent from school an excessive number of times while under the plaintiff's temporary custody, and the evidence showed that the plaintiff had failed to foster a relationship between the child and the defendant. In contrast, the defendant testified that when he had previously been responsible for driving the child to school, the child was never late to school. The defendant further testified that he would foster a relationship between the child and the plaintiff if awarded custody, and the Appellate Division deferred to court's decision to credit that testimony. The court correctly gave more weight to the child's needs to attend school regularly and timely, and to have relationships with both parties, than to the child's expressed preference to continue living with the plaintiff. Because the court did not credit the plaintiff's allegations of abuse, it was not required to consider the effects of such alleged violence upon the child. The court's allocation of decision-making authority between the parties was also supported by a sound and substantial basis in the record. Judgment affirmed.

Spence-Burke v Burke, 149 AD3d 1124 (2d Dept 2017)

Father Did Not Interfere With Mother's Relationship With Child

Supreme Court awarded the parties joint legal custody of their eight-year-old daughter, with primary physical custody to the father and parenting time to the mother. The Appellate Division affirmed. The parties in this case also had two older sons, over the age of 18. Family Court considered the necessary factors in making a best interest determination with regard to the subject child. Both parents were loving and capable of taking care of the child. However, the mother, who was a "disfellowed" Jehovah's Witnesses, worked in Queens County and spent much of her time commuting from Sullivan County to Queens County, leaving early in the morning and returning after the child had gone to bed, and at times, stayed in Queens County during the week. The child had spent her entire life in Sullivan County, where she attended school, religious meetings and had close friends. The father had been the child's primary caretaker and had a flexible work schedule. The mother's allegation that the father was an unfit parent based on his interference with her relationship with the

child was without basis. Although the father revealed the reason for the mother's disfellowship from the Jehovah's Witnesses to the sons, such a revelation was not made in the presence of the subject child. Moreover, the record showed the father encouraged the sons to maintain a relationship with their mother and had delayed the daughter's bedtime so that she could see her mother.

Matter of Herrera v Pena-Herrera, 146 AD3d 1034 (3d Dept 2017)

Mother's Violation of Visitation Order to Father Not Willful

Family Court modified a prior order of custody and awarded the mother primary physical custody of the parties two daughters, aged 15 and 17, with specific parenting time to the father. Additionally, the court prohibited the father from contacting the mother for any reason other than visitation adjustment and required that such contact be via a telephonic message. Thereafter, the father filed a violation petition and the mother filed a family offense petition. The court determined the mother had violated the order but such violation was not willful. Moreover, the court found the father had committed a family offense of second degree harassment against the mother. The Appellate Division affirmed. Here, among other things, the evidence showed the children vehemently and repeatedly resisted visiting with their father and the relationship between the father and the children was "toxic and volatile." The children would only see the father when it was convenient for them to do so. Giving due deference to the court's credibility determinations and based on the proof presented, there was sufficient basis to find the violations of the order were not willful on the part of the mother. Furthermore, the father's repeated text messages to the mother, which he was prohibited from doing, supported the court's determination that he had committed a family offense since these messages "annoyed" and "alarmed" the mother and the children and "served no legitimate purpose."

Matter of James XX. v Tracy YY., 146 AD3d 1036 (3d Dept 2017)

Sound and Substantial Basis for Court's Determination

Family Court modified a prior order of sole legal custody to the mother by awarding the father sole legal and physical custody of the two subject children with parenting time to the mother. The Appellate Division affirmed. Here, since the entry of the prior order, the mother had left an abusive relationship and moved into a shelter with the children; but shortly thereafter, she was asked to leave the shelter when she was caught visiting with the abusive ex-boyfriend. Thereafter, the mother moved in with a new boyfriend who lived in another school district. This circumstance caused the children to miss three weeks of school and the son found marihuana in the boyfriend's jacket. There were concerns about the boyfriend's behavior toward the children. These findings along with evidence of the parties' inability to communicate effectively, supported a finding of a change in circumstances. Moreover, it was in the children's best interests to live with their father. The mother's home continued to be unsanitary. She had allowed maggots to fester on unwashed dishes in her home and her daughter had repeated bouts of head lice. The mother moved in with her boyfriend after an extremely brief relationship and the new boyfriend was an unemployed alcoholic, who continued to consume alcohol, suffered from seizures and smoked marihuana on a daily basis. The children were left alone in his care while the mother worked and on one occasion, the boyfriend became upset with the son and threatened to evict the mother and the children. Furthermore, the mother admitted the children had seen her and her boyfriend nude on the couch after they had engaged in "adult time." Although the father had his own shortcomings, there was a sound and substantial basis in the record for the court's determination.

Matter of Richard Y. v Vanessa Z., 146 AD3d 1050 (3d Dept 2017)

Involvement in Child's Life Supported Sole Custody to Mother

Family Court modified a prior order of joint legal custody and awarded sole legal and physical custody of the child, who had learning disabilities and developmental delays, to the mother with parenting time to the father. The Appellate Division affirmed. Both parties agreed the break down in the parties'

relationship and their inability to communicate effectively on the child's behalf was a sufficient finding of a change in circumstances. While both parties were loving parents who differed in their parenting styles, the mother was "more aware of and involved with" the child's teachers and service providers, had made "thoughtful, rational decisions" with respect to the child's welfare and on balance was able to provide better and "greater continuity of care" for the child than the father. The court's findings were supported by testimony from the child's service providers who attested to the father's lack of involvement in the child's life and his disruptive behavior when they attempted to provide services to the child. Although the father played an important role in the child's life, his attitude, demeanor and parenting style supported custody to the mother.

Matter of Andrea C. v David B., 146 AD3d 1104 (3d Dept 2017)

Court Properly Considered the Potential for Influence That May Have Been Exerted on Child

After a fact-finding and Lincoln hearing, Family Court awarded the parties joint legal and physical custody of the 13-year-old child, with weekday physical custody to the mother and shared holidays/vacations and weekend parenting time and other times as the parties could agree to the father. The Appellate Division affirmed finding a sound and substantial basis in the record for the court's decision. Here, the attorney for the child supported the father's position. The court found that although the child's position needed to be considered as part of the best interests analysis, it was "but one factor to be considered...[and] should not be determinative ." Additionally, Family Court properly took into consideration the "potential for influence" that may have been exerted on the child. The father's testimony revealed he had spoken to the child on at least four separate occasions regarding with whom the child wanted to live. Although both parties were loving and were able to provide stable homes and cooperate regarding visitation and the child's needs, living in the mother's home would allow the child to attend the same school he had attended since pre-kindergarten. Even thought the mother had struggled with alcoholism, she had been sober since 2012. Although there were allegations of domestic violence against the father, those incidents did not support a finding of unfitness. Moreover, the mother was

extremely cooperative with the father and had not refused any requests by him for parenting time with the child and she had always been the child's primary caretaker.

Matter of Manell v Manell, 146 AD3d 1107 (3d Dept 2017)

Order Modified to Expand Mother's Online Activity on Social Media

Family Court issued eight temporary orders and finally, after a hearing, the court awarded sole legal and physical custody to the father and specific unsupervised parenting time to the mother. The court also prohibited the mother from posting on Facebook, Twitter or any other social media site, any mention of the father, the child or members of the family. The Appellate Division determined that some of the court's factual findings lacked a sound and substantial basis in the record and given the extensive record, modified the order. Here, the evidence showed the parties were able to co-parent until the mother allegedly abused alcohol and illegal substances, and began to act irrationally. The police were summoned and the mother was transported to a hospital. The child had been with the father when the incident occurred. The evidence showed the mother was the child's primary caretaker until the parties separation and thereafter, the mother was the parent to primarily attend to the child's medical and school needs. Although Family Court focused on the mother's behavior, the evidence showed the father was often hostile, disrespectful and manipulative toward the mother. Given the parties' relationship, there was sufficient evidence to find that joint legal custody was not feasible and the record supported an award of sole legal custody to the father. Although the mother denied use of cocaine, she did test positive for the drug; but the mother did submit to a drug and alcohol evaluation and participated in all recommended counseling. While both parties had an active social life, the mother's lifestyle was less stable. However, it was also in the child's best interests to award the mother more extensive parenting time since the current schedule did not provide the child with a meaningful opportunity to develop a close relationship with the mother. There was no reason for the mother not to have access to the child's educational and medical

records and order was modified to allow her to have access to these records and to be kept apprised of all appointments, meetings and school events regarding the child. Additionally, while there was no error in the court's determination that the father be allowed to monitor all telephone calls between the mother and the child, the broad restriction on the mother's social media activity was not warranted and the Appellate Division modified the prohibition to communications about the father, his paramour and the subject child.

Matter of Driscoll v Oursler, 146 AD3d 1179 (3d Dept 2017)

Visitation With Untreated Sex Offender Father Was in Child's Best Interests

Following a fact-finding and Lincoln hearing, Family Court awarded the father one-supervised visit, one hour per month, at a time and date to be arranged by the supervisor and the mother, and potential for more visits if mutually agreed upon by the parties. The Appellate Division affirmed finding the court's decision was in the child's best interests. Here, the father was an untreated sex offender. However, he was able to show a change of circumstances based on his compliance with an Article Ten dispositional order that required him to, inter alia, participate in parenting classes, sexual abuse evaluations and sexual offender treatment programs. Although the mother argued the counseling was not related to sexual abuse, and that the father was not recommended for sexual offender treatment based on his continued denial of problems involving sexual offending, the father had "technically" complied with the order. Although the father responded to certain questions by asserting his Fifth Amendment privilege and the mother testified that, following his sexual abuse of the older child, the younger child had required years of therapy and had exhibited certain disturbing behaviors such as bed wetting, the father was able to show that he had an acceptable supervisor for visits in a suitable office environment. However, there was no basis for the father's contention that Family Court improperly delegated authority to the mother to arrange or modify visitation. The mother had sole legal custody and it logically followed, based on the terms of the order, that she and the supervisor should have the responsibility of arranging visitation.

Matter of Alan U. v. Mandy V., 146 AD3d 1186 (3d Dept 2017)

Family Court's Repeated Judicial Errors Results in "Tragic Situation"

After years of foster care in connection with findings of neglect, in September of 2011, Family Court terminated the mother's parental rights on mental illness grounds. In October of 2011, the mother last visited with the children. In October of 2013, the Appellate Division reversed the orders terminating parental rights and dismissed the petitions. Shortly thereafter, the mother filed visitation petitions seeking to reestablish contact with the children. In January of 2014, Family Court refused to permit any contact pending a hearing because the mother had not had contact with the children for "in excess of two years." After a permanency hearing was held in February of 2014, Family Court issued orders in June of 2014, changing the permanency goal from return to parent to free for adoption, and that goal was continued in permanency orders issued in September of 2014. The Appellate Division once more reversed the portion of the June 2014 and September 2014 orders that modified the permanency goal. In September of 2014, Family Court began hearing proof on the mother's petitions. The hearing continued over the course of seven months and, on March 16, 2015, the parties were given time to submit written summations. On June 26, 2015, roughly twenty months after the mother filed the visitation petitions, Family Court dismissed the petitions and orders were entered on August 6, 2015. The Appellate Division reversed for the third time. Here, the Court noted that this case was "a tragic situation in which Family Court's repeated judicial errors... contributed to the prolonged separation of [the mother] and two of her children…." Family Court incorrectly and repeatedly stated on the record that the mother's parental rights had not been restored. Although DSS had the burden to demonstrate that visitation would be detrimental or harmful to the children, Family Court improperly imposed upon the mother the burden of proving that visitation would be in the children's best interests. The lack of contact between the mother and the children was in part a consequence of repeated judicial error; and although there was some evidence that the mother suffered from medical and/or mental health issues that could affect her interactions with the children, medical or mental health issues did not necessarily preclude supervised visitation, therapeutic visitation or other

contact, and, in fact, Family Court had permitted the mother to have supervised visitation with two of her other children.

Matter of Angela F. v Gail WW., 146 AD3d 1248 (3d Dept 2017)

Court Had to Choose Between Two Less than Perfect Parents

Family Court awarded the parties joint legal custody with primary physical custody to the mother and parenting time to the father. The Appellate Division affirmed. Here, the court had to "choos[e] between two less than perfect parents." The record showed while the mother had financial issues, these issues did not rise to such a level that it negatively affected the children. The mother did have a history of substance abuse but she had received treatment at a facility and her use of illicit substances were too remote in time to be relevant. Moreover, despite her shortcomings, she was the primary caretaker, had a flexible work schedule and a close relationship with the maternal grandmother, who helped take care of the children. Although the father engaged in activities with the children, the mother testified he would often sleep or watch television when he was home with them and he had control issues. The mother stated the father would not allow her to have access to their finances when they lived together, told her how to clean the house, what clothes to wear and often became upset when she did not return his phone calls. The mother also alleged the father's home was unclean. Family Court found the mother to be more credible and found the father's testimony began to "unravel" on cross-examination. Giving due deference to the court's credibility determinations, there was a sound and substantial basis in the record for the court's decision.

Matter of Snow v Dunbar, 147 AD3d 1242 (3d Dept 2017)

Father's Harassing Behavior and Parents Inability to Communicate Effectively Establishes a Change in Circumstances

Family Court modified a prior order of joint legal custody and awarded sole legal custody of the two-year-old child to the mother and parenting time to the father. The Appellate Division determined the issue of parenting time had been rendered moot based on a subsequent order by Family Court modifying the parenting time schedule, and affirmed the custody order. Contrary to the father's assertions, Family Court properly determined there had been a change in circumstances warranting a review of the child's best interests. The mother's proof established that the father had threatened and harassed her and the father agreed the parents were unable to communicate effectively for the sake of the child. Moreover, based on the record, the court's award of custody to the mother was supported by a sound and substantial basis in the record.

Matter of Cameron Z. v Ashton B., 148 AD3d 1234 (3d Dept 2017)

Mother's Dissatisfaction With Order Did Not Support Finding of Change in Circumstances

Family Court did not err in dismissing the mother's petition to modify parenting time without a hearing. The mother's petition was filed only three months after the issuance of the prior order awarding the aunt sole legal custody and supervised parenting time to the mother. Even according the mother every favorable inference, the pleadings submitted by the mother did not show a change in circumstances; instead, the papers reflected her disappointment at the lack of telephone contact with her children and noted the poor quality of the educational records provided by the children's teachers. The mother's dissatisfaction with the order, without more, did not demonstrate a change in circumstances warranting a best interest analysis.

Matter of Elizabeth NN. v Hannah MM., 148 AD3d 1235 (3ed Dept 2017)

Visitation With Non-Custodial Parent Would Be Harmful To Child

Family Court awarded the parties joint legal custody of the three-year-old child, with primary, physical custody to the mother and correspondence by letter and once monthly visitation to the incarcerated father so long as he remained within 40 miles of the mother's home. Thereafter, the father plead guilty to criminal contempt for violating the order of protection which was issued on behalf of the mother, and he was moved to a correctional facility which was more than three hours away, one-way, from the mother's home. Both parties filed petitions, the father alleging the mother had

violated the prior order by failing to bring the child to visit him and the mother for sole legal custody and termination of the father's parenting time. After a hearing, Family Court dismissed the father's petitions and granted the mother's applications. The Appellate Division affirmed, finding that visitation with the non-custodial parent would be harmful to the child. Here, the evidence showed the father had used his correspondence with the child, who could not yet read, to correspond and threaten the mother. Moreover, the correspondence was inappropriate for the young child since it contained threats against the mother, profanity, referred to guns and violence and sexually explicit language. The evidence also showed the father had generally played a small role in the child's life and the only person who was willing to supervise correspondence between the father and the child was the paternal grandmother, who had no relationship with the child. Given the evidence, there was a sound and substantial basis in the record for the court's order.

Matter of Kari CC. v Martin DD., 148 ADd3d 1246 (3d Dept 2017)

No Change in Circumstances

After a hearing, Family Court dismissed the father's visitation modification petition. Approximately two hours later, the father again filed to modify visitation and Family Court dismissed his petition based on the motion by the grandparents, who were the custodians of the children. The father appealed and the Appellate Division affirmed. Here, as the petitioning party the father bore the burden of establishing a change in circumstances. The only allegation in the father's petition, which was the same as his prior petition, was that he had moved closer to the children and had exercised consistent parenting time. The father's counsel also agreed there were no factual changes in circumstance. Additionally, the father had filed various other appeals and it was clear he was using the modification petition as a means to get the relief he sought without waiting for the outcome of the appeals he had filed.

Matter of William O. v John A., 148 AD3d 1258 (3d Dept 2017)

Family Court Properly Determined Aunt Had Failed To Establish Extraordinary Circumstances

Following fact-finding and Lincoln hearings, Family Court determined that the aunt had failed to establish extraordinary circumstances and among other things, awarded legal and physical custody of the children to the mother. The attorney for the child appealed, and the Appellate Division affirmed. Here, although the trial testimony showed the child had a strong bond with the aunt, extraordinary circumstances could not be established "merely by showing the child had bonded psychologically." And, although there was a lengthy period time when the child lived with the aunt, who was her guardian, and the mother did not have contact with the child, this was because the mother was under the mistaken impression that there was an order of protection in effect against her prohibiting her from having any contact with the subject child. Additionally, the mother's supervised visits with the child had progressed to unsupervised and she had brought the child to the park, to the museum and went swimming with her. The mother had taken steps to address her mental illness and substance abuse and the mother's counselor testified the mother was a "new person" whose change was "remarkable." Moreover, the mother volunteered at a hospital, worked at a restaurant and attended community college where she studied human services with a specialty in chemical dependency counseling. Based on the foregoing and giving due deference to the court's credibility determinations, there was a sound and substantial basis in the record for the court's decision.

Matter of Thompson v Bray, 148 AD3d 1364 (3d Dept 2017)

Court Did Not Abuse its Discretion in Going Forward With the Hearing Despite Father's Failure to Appear

After a hearing, where the father failed to appear although he had been given proper notice, Family Court modified the father's prior parenting time. The Appellate Division affirmed finding the court's decision to go forward with the hearing was not an abuse of discretion and did not deprive the father of his due process rights. Here, the record showed at the first appearance both parties were advised if they were not present at the next scheduled appearance, the court

matter would still continue. Thereafter, the parties appeared with counsel and were informed by the court of the hearing date and once more advised if they were not present the matter would still proceed without them. Thereafter, the court rescheduled the hearing but all parties were notified. The father did not appear at the hearing but his attorney appeared and stated the father was aware of hearing date, that he had called and left a message for the father but the father had not responded. Father's counsel did not request an adjournment but participated fully in the hearing. There was no indication that the father had contacted the court or counsel after the court's oral ruling at the conclusion of the hearing, prior to the issuance of the written order. While counsel could have asked to be relieved in order to preserve the father's right to move to vacate any default order, his tactical choice to participate did not constitute ineffective assistance since there was the possibility that the court would have proceeded with the hearing and issued a decision on the merits rather than a default judgment.

Matter of Ritter v. Moll, 148 AD3d 1427 (3d Dept 2017)

Court Erred in Dismissing Father's Petition

The father filed to modify a prior custody order issued by the court in 2014, and alleged, among other things, that the mother, who lived with the child in Wisconsin, lacked housing and abused substances. The father sought sole legal custody. Family Court, sua sponte, dismissed the petition and determined pursuant to the UCCJEA (*see* DRL § 5-A), New York lacked jurisdiction. The Appellate Division reversed. Given due process concerns, sua sponte dismissal of pleadings should be used sparingly in the absence of extraordinary circumstances. Here, in rendering its decision, Family Court relied on the fact that the child and the mother had not resided in New York for over two years and the events alleged by the father occurred in Wisconsin. However, the father alleged that the child spent the summer of 2015 with him in New York. He also stated the child lived in New York from birth until June 2014 and thereafter, lived in New York for a period of several months in early 2016. Additionally, the father testified the child had a half sibling who lived with the father with whom the subject child was bonded. Moreover, the child had his own bedroom at the father's house, a bank account, a YMCA membership and many family and social relationships in New York. Therefore, the allegations showed the child continued to have significant connections to New York. Since the New York court issued the prior order, it presumably had more familiarity with the case and the parties than Wisconsin courts would have and testimony from the mother, grandmother and other relevant Wisconsin witnesses could be presented by telephone, audiovisual means, or other electronic means.

Matter of Burdock v Boehm, 148 AD3d 1439 (3d Dept 2016)

Contrary to Father's Allegations, Mother Did Not Attempt to Alienate Children

There was a sound and substantial basis in the record for Family Court's decision to modify a prior joint custody order and award the mother sole legal custody and therapeutic visitation to the father. Here, the breakdown in the party's ability to communicate and cooperate for the sake of the children supported a finding of a change in circumstances. Based on the record as a whole, including the Lincoln hearing and the recommendation in the psychologist's report, it was in the children's best interests to award custody to the mother. Contrary to the father's allegation of parental alienation by the mother, the record showed the mother supported the children's relationship with the father and the mother stopped pursuing allegations of sexual abuse of the oldest child by the father once the agency deemed the allegations to be unfounded. Moreover, the father was unable to support himself and relied on his domestic partner for financial support while the mother was more able than the father to provide a stable and supportive home for the children.

Matter of Paul LL. v Tanya LL., 149 AD3d 1173 (3d Dept 2017)

Technical Violation of Court Order Insufficient to Find Contempt

Family Court dismissed the mother's petition to find the father in willful violation of a custody order, which had awarded the mother sole custody with no visitation to the father. The Appellate Division affirmed. To sustain a finding of civil contempt for a violation of a court order, a petitioner must show by clear and convincing evidence "that there was a lawful court

order in effect that clearly expressed an unequivocal mandate, that the person who allegedly violated the order had actual knowledge of its terms, and that his or her actions or failure to act defeated, impaired, impeded or prejudiced a right of the moving party" (see *Howe v Howe,* 132 AD3d 1088,1089). Here, the 16-year-old child had accompanied the mother to the hospital for an appointment and she gave him permission to go home. Thereafter, the child could not be located for eight days. The mother alleged the child was with the father but the only testimony at the hearing was that of the mother and her paramour and neither of them had direct knowledge of the child's whereabouts during the relevant period and both of them based their conclusions on out-of-court statements made by those who did not testify. The court properly found the testimony not credible and although the father and the child may have had some contact during the relevant period, it was merely a "technical violation" of the visitation order.

Matter of Wesko v Hollenbeck, 149 AD3d 1175 (3d Dept 2017)

Child's Best Interests To Continue Physical Custody With Father

Although proof of the subject child's recent emotional issues and the mother's participation in domestic violence and mental health counseling constituted a change in circumstances, the Appellate Division remained unpersuaded that Family Court's erred in maintaining primary, physical custody with the father. Here, the 13-year-old child was removed from the mother's care due to domestic violence between the mother and her then-boyfriend, and placed with the father, who was later awarded legal custody of the child. Thereafter, the mother filed to modify. The record showed the father had done a good job caring for the child and although the mother and the child had withheld information about the child's emotional issues from the father, once he found out he was supportive of the child's mental health counseling and participated in sessions with the mother and the child. Additionally, the record showed the father had allowed the mother substantial time with the child, outside the court schedule, and even though he had a stricter parenting style, he was better able to guide and provide for the child's overall well being. Moreover, the record reflected the mother would not foster the child's relationship with the father given her past attempts to sever the father-child relationship. Although the child wanted to live with the mother, her wishes could be taken into account but were not dispositive.

Matter of Garcia v Zinna, 149 AD3d 1185 (3d Dept 2017)

Abundance of Evidence To Support a Change in Circumstances

Family Court modified a prior custody order and changed primary, physical custody of the eight-year-old child from the mother to the father with parenting time to the mother. The Appellate Division affirmed. Here, there was an abundance of evidence to show a change in circumstances. The parties' had been unable to work together for the good of the child for some years and more recently, the mother had attempted to limit her contact with the father by having her husband communicate with him and meet him for exchanges with the child. As a result, the father had been unaware of the child's special education meetings and medical appointments. Moreover, the mother admitted she had recently informed the father that the child wanted to live with him and she had allowed the child to think he was going to live with the father when she dropped him off at the father's home. A few days later the mother walked to the father's house and demanded return of the child. The father attempted to keep the child out of the parties' confrontation. The evidence showed the father was willing to move to the child's school district and was committed to keeping the mother informed about the child. He was also able to provide the child with more stability and was willing to foster a relationship between the child and the mother. Giving due deference to the court's credibility determinations, the order of custody to the father was supported by a sound and substantial basis in the record.

Matter of Smith v McMiller, 149 AD3d 1186 (3d Dept 2017)

Evidence Sufficient to Rebut Presumption That Visitation Was in Child's Best Interests

Married parents separated and the mother was granted sole legal and physical custody of the child. Thereafter, both parents faced many struggles; the mother was laid off work, bounced from place to place and the father spent time in jail and was later "severely mugged"

which cause him to sustain a traumatic brain injury. The mother sent the then 13-year-old child to live with non relative petitioners until she could "get situated." Thereafter, the mother concluded she could not support the child and following a court ordered forensic evaluation of the parties and the child, and a stipulation on the record in open court by the parties, petitioners were awarded sole legal custody of the child and the mother was awarded parenting time as the mother and petitioners could agree. After a hearing regarding the father's access, the court denied all contact between the father and the child and also denied him access to the child's medical and educational records. The Appellate Division affirmed the denial of parenting time but modified the order to allow the father access to the child's medical and educational records. Here, the court relied on the results of the forensic evaluation which diagnosed the father as suffering form posttraumatic stress disorder, personality disorder not otherwise specified and found "clear and rather overwhelming evidence" that the father suffered from delusional disorder. This evidence was sufficient to rebut the presumption that visitation would be in the child's best interests. During his evaluation, the father disclosed he suffered from "short-term memory impairment" and "occasional seizures" for which he received medication. The forensic evaluator stated the father's demeanor and psychological testing revealed a "profoundly pathological" profile strongly "suggestive of significant psychopathology." Specifically, during the interview, the father engaged in "bizarre rambling," stated he was a "master mathematician" whose brain felt like " a super conducting computer"and claimed he had participated in "conversations with ...the Pentagon." Additionally, the father stated he had sustained a bilateral hernia following an "incident at a chemical factory" where he grabbed a pipe to avoid an explosion and . . . saved the City of Baltimore." Although the father responded to some questions appropriately, the psychologist determined he "manifested a significant element of gross thought disturbance," expressed "convoluted paranoid delusional thoughts" and displayed "clear evidence of disordered thinking." Although the psychologist was not opposed to the idea of therapeutic visitation, the court had discretion to determine, based upon the relevant circumstances, whether such visitation would be in the child's best interests and based on the record, the court's determination was not an abuse of discretion.

Matter of Robert G. v Tammy H., 149 AD3d 1192 (3d Dept 2017)

Issues With Transporting Child Supports Court's Determination That Father's Address Be Primary for School Enrollment Purposes

Parents disputed over which school district the child would attend and after a hearing, Family Court issued an order of joint legal and physical custody, with the father's address to be the primary for school enrollment purposes. The Appellate Division affirmed finding a sound and substantial basis in the record for the court's decision. Family Court considered the appropriate factors in rendering its determination. While it was undisputed both parents were loving and capable, the evidence showed the father had issues transporting the child to the school in the mother's school district while the mother did not have problems transporting the child to the father's school district. Placing the child in the father's preferred school made more logistical sense and afforded the child an education in the city where he was raised and where several of his relatives lived.

Matter of Wisneski v Shafer, 149 AD3d 1196 (3d Dept 2017)

Uncontroverted Evidence of Successful Drug Treatment Supports Unsupervised Parenting Time to Father

After a hearing, Family Court granted sole legal and physical custody of the two-year-old child to the mother and unsupervised parenting time to the father. The Appellate Division affirmed. When making an initial custody determination, the focus is solely on the child's best interests and Family Court is in the best position to observe and assess witnesses' testimony and make credibility determinations. Here, the primary issue was whether the father's history of substance abuse should have precluded him from having unsupervised visits with the child. The evidence showed the father lived with his fiancee and their one-year-old son in a two-bedroom apartment, worked full-time and participated in a parenting program. The father had completed a substance abuse treatment program where he had done "very well", and had been successfully discharged. The father continued to submit to drug tests three to four times each week and had not been tested positive for using any drugs. Although the mother claimed the

father had told her he could cheat on these tests, the director from the facility where the father sought treatment testified it would be difficult to do so given the way the tests were administered. Moreover, the father testified about his coping mechanisms when he had a craving for drugs. While the mother's concerns were understandable, given the uncontroverted evidence regarding the father's successful treatment, there was a sound and substantial basis in the record to support the court's determination.

Matter of Spoor v Carney, 149 AD3d 1209 (3d Dept 2017)

Grandmother Failed To Make Sufficient Showing of Extraordinary Circumstances

Family Court erred in determining that the grandmother had made a sufficient showing to establish extraordinary circumstances. Here, although the child had lived with the grandmother for a continuous 11-month period following the mother's move to Florida, this was not sufficient to show this was a prolonged separation of the mother and child; and it was not enough to prove that the mother had voluntarily relinquished care and control of the child. Contrary to the grandmother's assertions that the mother had not discussed whether or not she would be taking the child with her when she moved to Florida, the mother testified she had discussed this issue with the grandmother and had told her she wanted the child to remain in New York with the grandmother until she could find employment and find a suitable home for herself and the child. Additionally, the mother stated she had only allowed the child to remain in New York to finish off the school year. Based on the conflicting testimony, the court should have made credibility determinations, which it failed to do, but given its broad discretion, the Appellate Division found the mother more credible. Furthermore, the grandmother admitted the mother regularly called the child during this period, visited the child over Christmas and paid for the grandmother and the child to visit her over the child's April vacation. Moreover, the grandmother offered little to no evidence about making any important decisions affecting the child's life and evidence showed it was the mother who had final decision-making authority over important decisions.

Matter of Donna SS. v Amy TT., 149 AD3d 1211 (3d Dept 2017)

Father's Release From Prison, Standing Alone, Was Insufficient To Establish a Change in Circumstances

Family Court properly granted the motion made by the mother and the attorney for the child to dismiss the pro se father's petition to modify custody at the close of the father's proof. The father failed to show there was a change in circumstances warranting an inquiry in to whether the best interests of the child would be served by modifying the existing custody arrangement. Although the court did not set forth the facts it deemed essential to ruling on the motion to dismiss (*see* CPLR § 4213[b]), its underlying rationale was sufficiently developed to permit the Appellate Division to do an independent review. As to the merits, while the prior consent order stated the father could petition for a modification of the order upon his release from prison, he still had to show a change in circumstances and the father's release from prison, standing alone, was insufficient to establish such a showing. Moreover, the other allegations made by the father proved unfounded, including his allegation that the mother's boyfriend had physically abused the child and that the mother's home was inadequate.

Matter of Michael YY. v Michell Z., 149 AD3d 1284 (3d Dept 2017)

Family Court Erred in Compelling Parties to Participate in Hearing

The Appellate Division determined Family Court erred by compelling the parties to participate in a hearing despite the fact that they had resolved all outstanding issues except for a dispute over a small block of time when the father had physical custody of the child. Furthermore, the court erred in deeming the father the primary residential custodian "for purposes of school enrollment," and allowing him to enroll the child in the father's district for the 2015-2016 school year. Here, the parties resided in different school districts and the prior consent order did not address where the child would attend school. Since the child had reached school age, a change in circumstances had been shown. However, the hearing was devoid of testimony as to the child's individual educational and social needs or how the programs and courses offered by each school could

benefit the child; and, since the child had been attending school in the district where the mother resided, there was no testimony as to the impact that a disruption in schools would have on the child. The Appellate Division also determined further proceedings should be held before a different judge. The parties in custody proceedings should be encouraged to resolve custody issues, "subject to the supervisory powers of the court to assure that the agreement is in the child's best interest." Family Court abused its discretion by not accepting the parties' resolution to continue the child in the mother's school district and there was no evidence that their agreement was not in the child's best interests.

Matter of Woodrow v. Arnold, 149 AD3d 1354 (3d Dept 2017)

No Need To Disturb Order

Following a fact-finding and *Lincoln* hearing, Family Court awarded sole legal and primary physical custody to the father and parenting time to the mother along with full access to the children's medical and educational records. The Appellate Division affirmed. As this was an initial custody hearing, the primary concern was the children's best interests. The evidence showed both parties made efforts to provide for the children. The father lived in a hotel and had plans to move to an apartment and worked as a nursing assistant although it was unclear how many hours he worked per week. The mother, who was in a domestic violence shelter, had plans to move into an apartment with her paramour. The evidence showed the mother had been the primary caregiver and knew the names of the children's teachers while the father did not; but the father was willing to become more involved in the children's lives. The mother, who had mental health issues, attributed her depression and PTSD to the father's emotional and physical abuse but the father claimed the mother's issues stemmed from mental illness. Both parents' testimony was frequently evasive and defensive but both agreed the other parent was capable; and, the mother did not dispute that the parties were unable to communicate effectively which supported the court's determination to grant sole legal custody. However, neither party submitted medical evidence and given Family Court's superior ability to assess credibility and demeanor, there was no need to disturb the order.

Matter of Charles I. v Khadejah I., 149 AD3d 1422 (3d Dept 2017)

Court Erred in Denying Father's Motion to Compel Mother to Engage in Collaborative Counseling

Supreme Court denied defendant father's motion to compel plaintiff mother to engage in collaborative counseling. The Appellate Division modified by granting the father's motion to the extent of compelling the mother to cooperate with collaborative counseling, and remitted. The parties stipulated in 2011 that the mother would have sole custody of their two daughters, and the father would have two hours a week of supervised visitation, with the eventual goal of unsupervised visitation. The parties stipulated that the parties and the children would all engage in individual counseling, and at some point they would engage in family therapy with one professional. The parties further stipulated that the mother's positive support for the father's parental role, and the mother's participation in the therapy, were essential for any meaningful progress to occur. The father began supervised visits but they ended when, according to him, the children decided they no longer wanted to go on the visits. The father sought to have the parties engage in family counseling, which the mother resisted. An in camera interview was conducted with the children. Although the children expressed their wish not to have visitation with the father, there was no showing on the record that collaborative counseling or even supervised visitation was harmful to the children or contrary to their best interests. The record established that the mother made little or no effort to encourage the relationship between the father and the children, and the father submitted evidence supporting an inference that the mother was alienating the children from the father. The court improperly allowed the children essentially to dictate whether visits would ever occur with the father. In the event that the mother or children continued to refuse to participate in the collaborative counseling or attend visitation, the court should consider whether an order of contempt or an order relieving the father of his child support obligation with respect to the older child would be appropriate.

Guy v Guy, 147 AD3d 1305 (4th Dept 2017)

Court Properly Modified Prior Order By Awarding Petitioner Father Custody in View of Evidence of Domestic Violence at Mother's Home

Family Court modified a prior order by awarding petitioner father custody of the parties' child. The Appellate Division affirmed. The father established a change in circumstances sufficient to warrant an inquiry into whether a change in custody was in the best interests of the child. The mother admitted at the hearing that she was arrested for assault in the second degree and spent about two weeks in jail following an incident with her former boyfriend that occurred with the child asleep in the home. The mother's contention was rejected that the arrest had no current bearing on the proceeding, inasmuch as the underlying incident was plainly relevant to her fitness as a parent. The award of custody to the father was in the child's best interests in view of the evidence of domestic violence at the mother's home. Notably, the court found that the mother's testimony was not entirely credible that she no longer had any relationship with her former boyfriend, and there was no basis for disturbing that credibility determination.

Matter of Belcher v Morgado, 147 AD3d 1335 (4th Dept 2017)

New York Court Had Jurisdiction to Modify Order of Florida Court, Notwithstanding Florida Court's Reservation of Jurisdiction

Family Court granted respondent father's motion to dismiss for lack of jurisdiction the mother's petition seeking to modify a custody order entered by a court in the state of Florida, which granted the father permission to relocate with the child to New York. The Appellate Division reversed, denied the motion to dismiss, reinstated the petition and remitted. The mother's petition was dismissed on the ground that the Florida court's order expressly provided that it retained jurisdiction over the matter. The New York court had jurisdiction to modify the order of the Florida court, notwithstanding the Florida court's reservation of jurisdiction. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) had been adopted by both New York and Florida. It was undisputed that New York was the child's home state as of the commencement of the proceeding, and that the child and both parents had lived in New York since 2011. The appeal was not rendered moot by the commencement of subsequent proceedings in Florida inasmuch as no orders had been entered in those proceedings. However, the New York court was required by Domestic Relations Law Section 76-e to confer with the Florida court upon learning that the father commenced a subsequent proceeding in Florida, and the court failed to do so. The matter was remitted for the court to make the requisite contact with the Florida court, so that the courts of the two states could confer with each other and determine which state was the more appropriate forum for this proceeding at this juncture.

Matter of Rusiecki v Marshall, 147 AD3d 1394 (4th Dept 2017)

Court Erred By Refusing to Allow Parties to Enter Into Settlement Agreement

Supreme Court granted primary physical custody of the parties' children to plaintiff father. The Appellate Division modified by vacating all but three decretal paragraphs of the judgment of divorce, and granted a new trial on the issues of custody, visitation, child support and equitable distribution. The court erred by refusing to allow the parties to enter into a settlement agreement. Where the parties evinced their agreement in open court to the material terms of a settlement agreement, there were no indicia of fraud or manifest injustice, and the court prevented the parties from ratifying their agreement but instead made a ruling directly contrary to the terms of that agreement, the court erred in granting primary physical custody to plaintiff. That error was compounded when the court entered a visitation schedule that erroneously denied meaningful visitation to defendant. The judgment of divorce also failed to conform with the mandatory provisions of the Domestic Relations Law pertaining to child support and equitable distribution. The court erred in failing to award plaintiff child support arrears. The court should have awarded child support retroactive to the date of the application therefor. Moreover, the final judgment contained no provision at all for child support. That was also error.

Keegan v Keegan, 147 AD3d 1417 (4th Dept 2017)

Court Erred in Determining That Respondent Grandparents Failed to Establish Extraordinary

Circumstances

Family Court granted full custody of respondents' grandson to petitioner, the child's biological mother. The Appellate Division reversed and remitted. Pursuant to a prior consent order, respondents had primary physical custody of the child, with visitation to petitioner, since shortly after his birth. Nearly six years later, petitioner filed the modification petition at issue, seeking primary physical custody of the child. In *Matter of Suarez v Williams*, 26 NY3d 440, the Court of Appeals clarified what constituted extraordinary circumstances when the nonparent seeking custody was a grandparent of the child. In that context, extraordinary circumstances could be demonstrated by an extended disruption of custody, specifically: (1) a 24-month separation of the parent and child, which was identified as prolonged, (2) the parent's voluntary relinquishment of care and control of the child during such period, and (3) the residence of the child in the grandparents' household. The grandparents met their burden of establishing extraordinary circumstances, thereby giving them standing to seek custody of the child. Petitioner voluntarily relinquished custody to respondents and had been separated from the child for a prolonged period of well over 24 months, during which time the child had resided in respondents' home.

Matter of Orlowski v Zwack, 147 AD3d 1445 (4th Dept 2017)

Court Erred in Dismissing Petition

Family Court dismissed with prejudice a petition seeking modification of the custody provisions in the parties' judgment of divorce. The Appellate Division modified. The court determined that the petition was facially insufficient to allege a change of circumstances warranting a change in custody. Thus, because petitioner did not have a full and fair opportunity to litigate her allegations that the custody provisions in the judgment of divorce should have been modified, the court erred in dismissing the petition with prejudice.

Matter of Coughlin v Coughlin, 147 AD3d 1485 (4th Dept 2017)

Court Abused Its Discretion in Eliminating Periods of Visitation; Record Supported Award of Sole Custody

Family Court determined that respondent father wilfully violated an amended order entered on consent, that petitioner mother established a change in circumstances warranting a determination of the best interests of the child, and that the child's best interests were served by an award of sole custody to the mother. The court also reduced the father's visitation. The Appellate Division modified. The court erred in conditioning the father's right to file any future modification petitions on his completion of anger management and parenting classes. Accordingly, that ordering paragraph was vacated. Furthermore, the record did not support the court's determination that it was in the best interests of the child to eliminate the Thursday evening and Friday night visitation periods. There was no testimony that there were any problems regarding the Thursday visits. The mother admitted that she and the father disputed which weekend visits were to commence on Friday and which were to commence on Saturday, but it appears from the record that the parties had resolved that issue prior to the hearing. Thus, the court abused its discretion in eliminating those periods of visitation. Therefore, the order was further modified by reinstating the schedule set forth in the amended order. The father's contentions were rejected that the court erred in determining that the mother established a change of circumstances warranting a review of the amended order with respect to custody, and it further erred in determining that it was in the best interests of the child to award the mother sole custody. The court credited the mother's testimony that the father yelled and swore at her on the telephone and that she therefore communicated with him only through text messages, and the text messages admitted in evidence supported the court's determination that, in light of the acrimonious relationship between the parties, the existing joint custody arrangement was inappropriate. The court's determination was entitled to great deference, and it was supported by a sound and substantial basis in the record.

Matter of Gorton v Inman, 147 AD3d 1537 (4th Dept 2017)

Court Erred in Sua Sponte Ordering That Father Had Right to Relocate Residence of Child

Family Court modified a prior order entered on stipulation of the parties by awarding petitioner father primary physical residence of the parties' child. The Appellate Division modified. Family Court properly determined that the father met his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a change of custody was in the best interests of the child. There was a sound and substantial basis in the record for the court's determination that it was in the child's best interests to award the father primary physical residence of the child and to award the mother visitation. However, the court erred in sua sponte ordering that the father had the right to relocate the residence of the child anywhere in the continental United States with 30 days' notice to the mother inasmuch as that relief was not requested by the parties or the Attorney for the Child. Therefore, the order was modified accordingly.

Matter of Kieffer v Defrain, 147 AD3d 1539 (4th Dept 2017)

Affirmance of Award of Primary Physical Residence to Father

Supreme Court awarded plaintiff father and defendant mother joint custody of the subject child, with primary physical residence to the father and visitation to the mother. The Appellate Division affirmed. The fact that the mother was the child's primary caretaker prior to the parties' separation was not determinative. The record supported the court's determination that both parents love and care for the child, but the mother was less willing to truly co-parent the child, and the father was the more stable parent with a higher quality home and was better situated to serve as a primary placement parent. The AFC's contention was rejected that the court gave undue weight to the paternal grandparents' involvement in the child's life inasmuch as a more fit parent could not be deprived of custody simply because the parent assigns day-care responsibilities to a relative owing to work obligations. Although the court was required to consider the effects of domestic violence in determining the best interests of the child, the mother failed to prove her allegations of domestic violence by a preponderance of the evidence.

Hendrickson v Henderickson, 147 AD3d 1522 (4th Dept 2017)

Court Properly Exercised Its Discretion in Declining to Conduct Lincoln Hearing

Family Court modified a prior order by granting petitioner mother primary physical custody of the parties' child. The Appellate Division affirmed. The father's decision to enroll the child in a different school, together with the mother's testimony concerning the father's interference with her custodial rights, was sufficient to establish a change in circumstances. The court's determination awarding the mother primary physical custody was in the child's best interests. Most of the factors did not favor one party over the other. However, the evidence established that the father failed to nurture or facilitate a relationship between the mother and child. In addition, the father made decisions regarding the child that were beneficial to his new family, such as changing her school, pediatrician, and dentist, but the decisions were not always beneficial to the child. Granting the mother primary physical custody was in the child's best interests inasmuch as the mother was better able to provide for the child's emotional and intellectual development. Moreover, the court properly exercised its discretion in declining to conduct a *Lincoln* hearing. The conduct of the father's wife prevented the scheduled *Lincoln* hearing from occurring, and the court declined to schedule another one. Considering the child's young age as well as the testimony that she was being coached on what to say to the court, an in camera hearing with the child would not be helpful in determining the child's preferences.

Matter of Sloma v Sloma, 148 AD3d 1680 (4th Dept 2017)

Modification of Grandmother's Visitation With Teenaged Children Affirmed

Family Court modified a prior consent order by changing respondent grandmother's one-hour biweekly supervised therapeutic visitation with the two teenaged children to one supervised two-hour visit per month in a public place, and denied petitioner father's request to terminate visitation. The Appellate Division affirmed. The grandmother's contention was rejected that the father failed to establish that there was a sufficient

change in circumstances to warrant consideration of the best interests of the children. The 15-year-old testified that she did not wish to visit with the grandmother and, although not dispositive, the express wishes of older and more mature children could support the finding of a change in circumstances. Furthermore, the Court Attorney Referee was entitled to credit the testimony of the father and the child that the children had difficulty completing homework on the days that both extracurricular activities and the therapeutic visits were scheduled. The determination of the court that it was in the best interests of the children to modify the visitation schedule had a sound and substantial basis in the record. In any event, the modified schedule had no meaningful adverse impact on the grandmother's interests.

Matter of Rohr v Young, 148 AD3d 1681 (4th Dept 2017)

Court Properly Weighed Against Mother Her Proposed Relocation to Texas in Initial Custody Determination

Family Court awarded the parties joint custody of their child and ordered that the child's residence remain in New York. The Appellate Division affirmed. This case involved an initial custody determination and was not properly characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea*, 87 NY2d 727 [1996] strictly applied. The court, in evaluating respondent mother's proposed relocation to Texas as part of the best interests analysis, properly weighed that factor against the mother upon determining that the child's relationship with petitioner father would be adversely affected by the proposed relocation because of the distance between western New York and Texas. The court's determination that the child's best interests were served by awarding joint custody to the parties with continued residence in New York was supported by a sound and substantial basis in the record and could not be disturbed.

Matter of Fisher v Fisher, 148 AD3d 1784 (4th Dept 2017)

Family Court Properly Transferred Primary Physical Custody of Child to Father

Family Court continued joint custody of the parties' son but transferred primary physical custody of the child to petitioner father, with visitation to respondent mother. The Appellate Division affirmed. The father established the requisite change in circumstances since the entry of the consent order, namely, the child's repeated changes of schools, his recent attendance at a school in the district where the father resided, and the parents' inability to agree on where their child should attend school. There was a sound and substantial basis in the record for the determination that it was in the child's best interests to change his primary physical residence from the mother's house to the father's house in connection with the child's school enrollment.

Matter of Stanton v Kelso, 148 AD3d 1809 (4th Dept 2017)

Court Erred By Ordering That Future Modification of Father's Visitation Was Conditioned on Completion of Parenting Class

Family Court modified a prior custody and visitation order by directing that petitioner father have supervised visitation with the parties' three children and ordering him to attend a parenting class as a prerequisite for modification of visitation. The Appellate Division modified. The mother established the requisite change in circumstances inasmuch as her undisputed testimony established that, the last time she met the father to exchange the children, he physically assaulted her in the children's presence such that persons in a nearby parking lot had to intervene. The record established that the father committed acts of domestic violence against the mother in the children's presence and that he demonstrated poor impulse control during trial. Thus, although there was no evidence in the record that the father physically harmed the children, the record provided no basis to disturb the court's conclusion that limiting the father to supervised visitation was in the children's best interests. However, the court erred to the extent that it ordered that future modification of the father's visitation was conditioned on completion of a parenting class. The court lacked the authority to condition any future application for modification of a parent's visitation on her or his participation in counseling. Nevertheless, the court may order that a parent's completion of counseling and compliance therewith would constitute a substantial change of circumstances for any future petition for modification of the order, provided that nothing in the order prevented the parent from supporting a modification

petition with a showing of a different change of circumstances. Therefore, the order was modified by striking the provision requiring the father to complete a parenting class as a prerequisite for modification of visitation and substituting therefor a provision directing that the father comply with that condition as a component of supervised visitation.

Matter of Allen v Boswell, 149 AD3 1528 (4th Dept 2017)

Affirmance of Order Denying Modification Petition

Family Court denied the father's petition seeking modification of a prior order of custody by awarding him sole custody of the subject child. The Appellate Division affirmed. The order was entitled to great deference and would not be disturbed inasmuch as it was supported by a sound and substantial basis in the record. There was no reason to remit the matter for an expedited hearing, as requested by the Attorney for the Child, based upon allegations of a change of circumstances subsequent to the entry of the order on appeal. The contentions raised in that regard were more appropriately considered by the court in a petition to modify its order.

Matter of Gschwend v Davila, 149 AD3 1608 (4th Dept 2017)

FAMILY OFFENSE

Children's Hearsay Statements Not Admissible in Article 8 Proceedings

Family Court dismissed petitioner's family offense proceeding. The Appellate Division affirmed. Petitioner failed to establish a family offense. The allegations that respondent paternal uncle inappropriately touched one or more children were supported by the inadmissible hearsay statements of the children. Family Court Act provisions that allow such testimony are limited to article 10 and have no application to family offense proceedings under article 8. The application of that provision in child custody cases had been confined to situations where the custody proceeding was founded upon abuse or neglect, which rendered the issues inextricably interwoven.

Matter of Dhanmatie G. v Zamin B., 146 AD3d 495 (1st Dept 2017)

Respondent Committed F.O. of Harassment and Disorderly Conduct, But Not Menacing

Family Court determined that respondent committed the family offenses of menacing in the second degree, disorderly conduct, and harassment in the second degree, and granted the petition for a two-year order of protection against respondent. The Appellate Division modified by vacating the finding of menacing in the second degree. Petitioner's testimony that respondent threatened to kill her and followed her to try to discover where she lived, which was confidential, was sufficient to support the harassment in the second degree offense. Disorderly conduct was established because there was evidence that respondent intended to cause or recklessly created a risk of causing inconvenience, annoyance or alarm. Menacing in the second degree was not established because petitioner did not allege that respondent displayed a weapon or what appeared to be a weapon and did not demonstrate a course of conduct to place her in reasonable fear of physical injury.

Matter of Nafissatou D. v Ibrahima B., 149 AD3d 517 (1st Dept 2017)

Record did not support denial of Respondent's Motion to Vacate Order of Protection Entered upon Her Default

In a family offense proceeding, the Family Court issued an order of protection against the respondent and in favor of her sister upon the respondent's failure to appear at a hearing. The respondent moved to vacate the order of protection entered upon her default, and the Family Court denied her motion. The respondent appealed. The Family Court improvidently exercised its discretion in denying the respondent's motion to vacate the order of protection entered upon her default in appearing at the hearing. The respondent showed no willfulness or intent to default, where she was minimally tardy to the hearing, and the tardiness might have been due, at least in part, to crowded conditions at the courthouse, she attended prior court appearances, she engaged in motion practice through her attorney, and she participated in multiple preparatory conferences with her attorney. Also, the respondent moved to vacate the order of protection relatively soon after it was issued. Under the circumstances, the respondent demonstrated a reasonable excuse for her

failure to appear at the hearing. Further, the respondent demonstrated a potentially meritorious defense to the petition. Accordingly, the Appellate Division reversed the order, granted the respondent's motion to vacate the order of protection entered upon her default, and remitted the matter to the Family Court for further proceedings on the family offense petition.

Matter of Williams v Williams, 148 AD3d 917 (2d Dept 2017)

Supreme Court Properly Denied Mother's Cross Motion to Vacate Order of Protection

The parties were married in 2009 and have two children. In 2011, the father commenced an action for a divorce and ancillary relief. In an order dated September 13, 2011, the parties stipulated that the mother would have custody of the children and the father would have visitation every Thursday and every other weekend. In an order dated September 10, 2012, after a hearing, the Supreme Court found the mother in contempt for failing to comply with the visitation schedule. After the mother failed to purge herself of the contempt by complying with the visitation schedule, the court, in an order dated January 11, 2013, awarded the father temporary custody of the children. In February 2013, the father moved by order to show cause for an order of protection. In an order of protection dated February 27, 2014, the court, after a hearing, directed the mother, inter alia, to stay away from the father and the children and refrain from contacting them electronically, subject to subsequent orders of visitation. Between February 18, 2014, and August 18, 2014, the father made three motions seeking, inter alia, pendente lite child support, to preclude the mother from offering any evidence at trial on the issue of her finances, and a finding that the mother violated the order of protection. The mother cross-moved for an order vacating the order of protection dated February 27, 2014. The Supreme Court, inter alia, granted that branch of the father's motion which was for pendente lite relief, denied the mother's cross motion to vacate the order of protection, granted those branches of the father's motion which were to direct the mother to pay pendente lite child support arrears, to preclude the mother from offering specified evidence at trial, and to find the mother in violation of the order of protection, committed the mother to a term of incarceration of six days, and suspended the sentence subject to her future compliance with the order of protection. The Appellate Division affirmed. Here, the Supreme Court providently exercised its discretion in directing the mother to pay temporary child support as any perceived inequity in the award of temporary child support could best be remedied by a speedy trial, at which the parties' financial circumstances could be fully explored. Additionally, the Supreme Court providently exercised its discretion in precluding the mother from offering any evidence at trial on the issue of her finances which contradicted the information that she submitted in opposition to the father's motion. The record supported a finding that the mother's repeated failure to comply with prior discovery orders of the Supreme Court was willful and contumacious. Further, the Supreme Court properly denied the mother's cross motion to vacate the order of protection. The court properly found that the proof adduced at the hearing established that the mother committed the family offense of harassment in the second degree. The evidence demonstrated that the mother, with the intent to harass, annoy, or alarm the father, engaged in a course of conduct which alarmed and seriously annoyed the father, and which served no legitimate purpose (*see* FCA § 812 [1]; PL § 240.26 [3]). Accordingly, there was no basis to disturb the order of protection. Moreover, as the mother admitted that she sent a text message to the father in violation of the order of protection, the Supreme Court properly found her to be in contempt.
Rosenstock v Rosenstock, 149 AD3d 887 (2d Dept 2017)

Dismissal of Family Offense Petition Prior to Presentation of Evidence and a Factual Determination Was Improper

The Family Court's dismissal of the family offense petition prior to the mother's presentation of evidence and without first making a factual determination as to whether a family offense had been committed was improper. The purpose of a family offense proceeding is to attempt to stop the violence, end the family disruption and obtain protection (*see* FCA § 812 [2] [b]). Where, as here, a petition sets forth factual allegations which, if proved, would constitute a family offense (*see* FCA § 812 [1]), a hearing must be held and a factual determination made as to whether a family offense was committed. Accordingly, the petition was reinstated and the matter was remitted to the Family

Court for further proceedings on the petition. In light of certain remarks made by the Family Court Judge during the course of the proceedings, the Appellate Division deemed it appropriate that the family offense petition be heard and determined by a different Judge.

Matter of Price v Jenkins, 149 AD3d 952 (2d Dept 2017)

Record Did Not Support Denial of Mother's Application for Leave to Amend Petition

The Family Court improvidently exercised its discretion by, in effect, denying the mother's application for leave to amend the family offense petition, and, consequently, in dismissing the petition without a hearing. Leave to amend a family offense petition should be freely granted so long as the amendment is not plainly lacking in merit and there is no significant prejudice to the nonmoving party. Here, the petition, filed pro se, alleged that the father called the mother repeatedly and left messages threatening, among other things, to have her arrested after the parties' child left the father's home. The mother, through counsel, requested leave to amend the petition "to provide some specificity," including as to the dates and times of the alleged acts. That amendment was not palpably insufficient or patently devoid of merit. Further, contrary to the Family Court's determination, the petition, if amended to include sufficiently specific information, would have sufficiently alleged that the father committed acts which, if proven, constituted the family offense of harassment in the second degree (*see* FCA § 812 [1]; PL § 240.26 [3]). Moreover, there was no evidence of prejudice to the father. Accordingly, the application for leave to amend the petition should have been granted, and therefore, the matter was remitted to the Family Court for further proceedings on the petition. In light of certain remarks made by the Family Court Judge, the Appellate Division deemed it appropriate that the matter be heard and determined by a different Judge.

Matter of Price v Jenkins, 149 AD3d 954 (2d Dept 2017)

JUVENILE DELINQUENCY

Probation Least Restrictive Alternative Given Serious Sex Offense Against Young Child

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would have constituted the crime of sexual abuse in the second degree, and placed him on probation for 18 months. The Appellate Division affirmed. Probation for 18 months was the least restrictive dispositional alternative consistent with respondent's needs and the community need for protection, in light of the serious sex offense committed against a much younger child. An ACD would not have ensured that respondent remained in and satisfactorily completed an appropriate sex offender treatment program.

Matter of Xavier P., 146 AD3d 532 (1st Dept 2017)

Probation Least Restrictive Alternative Given Serious Sex Offense Against Young Child

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would have constituted the crime of sexual abuse in the second degree, and placed him on probation for 18 months. The Appellate Division affirmed. Probation for 18 months was the least restrictive dispositional alternative consistent with respondent's needs and the community needs for protection in light of the serious sex offense committed against a much younger child. An ACD would not have ensured that respondent remained in and satisfactorily completed an appropriate sex offender treatment program. While respondent contended that this adjudication could subject him to sex offender registration in another jurisdiction, the Family Court Act provided remedies such as sealing that would minimize the likelihood of such a situation.

Matter of Darwin P., 146 AD3d 682 (1st Dept 2017)

Probation Least Restrictive Alternative Given Violent Conduct

Respondent was adjudicated a juvenile delinquent upon a finding that he committed acts that, if committed by an adult, would have constituted the crimes of burglary in the first degree, criminal possession of a weapon in the fourth degree, criminal mischief in the fourth degree, and attempted assault in the second degree, and placed him on probation for 12 months. The Appellate Division affirmed. Probation was the least restrictive dispositional alternative consistent with respondent's

needs and the community need for protection in light of respondent's extremely violent conduct in the underlying incident and the negative factors in his background, including his poor disciplinary and academic record at school.

Matter of Elijah N., 147 AD3d 422 (1st Dept 2017)

Victim's Recantation Was Satisfactorily Explained

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted the crimes of sexual abuse in the first degree (two counts) and sexual abuse in the third degree, and placed him on probation for 18 months. The Appellate Division affirmed. The determination was based upon legally sufficient evidence and was not against the weight of the evidence. Despite minor inconsistencies in the victim's account, she gave a generally consistent description of the sexual abuse, providing details that an eight-year-old would be unlikely to fabricate. Her recantation of the allegations, made to another child, was satisfactorily explained and did not render her testimony incredible. None of respondent's claims of evidentiary errors warranted reversal.

Matter of Jeffrey A, 147 AD3d 660 (1st Dept 2017)

Respondent Properly Adjudicated JD Rather Than PINS

Respondent was adjudicated a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would have constituted the crime of resisting arrest, and placed her on probation for 12 months. The Appellate Division affirmed. The court properly adjudicated respondent a JD, rather than a PINS and placed her on probation for 12 months with the requirement that she participate in services. This was the least restrictive dispositional alternative consistent with respondent's needs and the community's need for protection. Based upon respondent's history of attacks on her mother and others, violations of curfew, running away from home, truancy, gang involvement, and drug use, the court found that respondent needed a treatment program and noted that the statutory enforcement mechanisms available under a PINS adjudication were inadequate to ensure compliance with such program.

Matter of A. H., 149 AD3d 573 (1st Dept 2017)

Respondent Not Entitled to an Adjournment in Contemplation of Dismissal

In a juvenile delinquency proceeding, the Family Court issued an order of fact-finding, made upon the respondent's admission, which found that she had committed acts which, if committed by an adult, would have constituted the crime of endangering the welfare of a child. Thereafter, the court issued an order of disposition which adjudicated the respondent a juvenile delinquent and placed her on probation for a period of 12 months. The respondent appealed from the order of disposition. The Appellate Division affirmed. Contrary to the respondent's contention, the Family Court providently exercised its discretion in denying her request for an adjournment in contemplation of dismissal. The respondent was not entitled to an adjournment in contemplation of dismissal merely because this was her first encounter with the law. The disposition was the least restrictive alternative consistent with the needs and best interests of the respondent and the need for protection of the community in light of, inter alia, the recommendation in the probation report, the seriousness of the underlying acts, and the respondent's poor school record and disciplinary issues at school.

Matter of Tanaja F., 147 AD3d 936 (2d Dept 2017)

Respondent Properly Adjudicated a Juvenile Delinquent

The Family Court adjudicated the respondent a juvenile delinquent upon determining that he had committed an act which, if committed by an adult, would have constituted the crimes of obstructing governmental administration in the second degree and resisting arrest, and placed him on probation for a period of twelve months. The respondent appealed. The Appellate Division affirmed. On March 7, 2015, the respondent was observed by two police officers drinking from an open container of alcohol on a public sidewalk. When questioned by the officers, the respondent refused to present identification and said that he was 17 years old. When the officers attempted to arrest the respondent, he tried to flee and physically struggled with the officers for three to five minutes, until he was handcuffed. The respondent was arrested and charged with obstructing

governmental administration in the second degree and resisting arrest. At some point after the arrest, the officers learned that the respondent was actually 15 years old. The respondent argued that his arrest resulted from his possession of an open container of alcohol in a public place, and that since this offense was a violation, rather than a felony or a misdemeanor, it could not provide the basis for a juvenile delinquency proceeding for a person younger than 16. He contended that his conduct constituted "quintessential PINS behavior" and that the presentment agency improperly "bootstrapped" the charges of obstructing governmental administration in the second degree and resisting arrest onto his PINS-type behavior. When a person in need of supervision (hereinafter PINS) fails to comply with conditions imposed in a PINS proceeding by "engaging in typical PINS-type behavior," such behavior cannot be the basis of a juvenile delinquency petition seeking to impose punishments which are not permissible in a PINS proceeding. Here, however, the respondent was never the subject of a PINS proceeding, and the charges for which he was adjudicated a juvenile delinquent did not arise out of his failure to comply with a court order rendered in a PINS proceeding. Accordingly, the Family Court properly adjudicated the respondent a juvenile delinquent for committing acts which, if committed by an adult, would have constituted the crimes of obstructing governmental administration in the second degree and resisting arrest.

Matter of Dominick M., 147 AD3d 951 (2d Dept 2017)

Record Did Not Support a Lesser Restrictive Placement

In an order of disposition, the Family Court adjudicated the respondent a juvenile delinquent upon his admission that he committed acts which, if committed by an adult, would have constituted the crime of robbery in the first degree, and placed him under the care and custody of the New York State Office of Children and Family Services for a period not to exceed 18 months, but no less than 6 months, with a credit of 1 month for time served in detention pending disposition. The respondent appealed. Contrary to the respondent's contention, the Family Court did not improvidently exercise its discretion in denying his request for a lesser restrictive placement. The court's determination demonstrated that it carefully considered the less-restrictive alternatives to the respondent's placement, and properly balanced the needs of the respondent and the need for the protection of the community (*see* FCA § 352.2 [2]). Contrary to the respondent's contention, the record demonstrated that he was advised of all possible dispositional alternatives and was properly allocuted (*see* FCA § 321.3 [1]). The respondent served 2 months in predisposition detention, but the Family Court credited him with only 1 month. As such, the court was required to make a specific finding that crediting the respondent with the entire period of predisposition detention would not serve the interests of the respondent or the community (*see* FCA § 353.3 [5]). However, it failed to do so. Thus, the respondent was entitled to credit for all predisposition detention as a result of the charge that culminated in the period of placement. Order modified.

Matter of Sharice B., 149 AD3d 833 (2d Dept 2017)

Fact-Finding Determination Was Not Against the Weight of the Evidence

The Family Court adjudicated the respondent a juvenile delinquent upon determining that she committed acts which, if committed by an adult, would have constituted the crime of unauthorized use of a vehicle in the third degree and false personation, and placed her in the custody of the New York City Administration for Children's Services for a period of 12 months. The respondent appealed. Upon reviewing the record, the Appellate Division was satisfied that the Family Court's fact-finding determination was not against the weight of the evidence (*see* FCA § 342.2 [2]). Order affirmed.

Matter of Madeline D., 149 AD3d 932 (2d Dept 2017)

Court Properly Determined Not To Substitute a PINS Finding in Place of a JD Finding

Family Court adjudicated respondent to be a juvenile delinquent and placed her in the custody of DSS. The Appellate Division affirmed and found unpersuasive the argument that Family Court abused its discretion by failing to substitute a PINS finding in place of the JD. Here, the evidence showed that over a course of three months, between the fact-finding and dispositional hearing, the court had monitored respondent's progress and reviewed her compliance with different levels of supervision, first beginning with her grandmother.

However, respondent's poor attendance had resulted in two remands to detention and eventual placement in a nonsecure facility. At the facility, respondent had engaged in violent behavior against staff and peers, escaped from the facility and was later apprehended by police. Due to concerns over respondent's mental health, she was evaluated and diagnosed with PTSD, ADHD and oppositional defiant disorder. Respondent was also indicated for marihuana abuse and inconsistent compliance with medication. Respondent's treating psychiatrist determined respondent was a "huge risk to herself" and recommended placement in a residential treatment center. This information was sufficient to show the court's determination was proper and placement with DSS was the least restrictive alternative, consistent with both respondent's needs and best interests and the protection of the community.

Matter of Alliyah GG., 149 AD3d 1171 (3d Dept 2017)

ORDER OF PROTECTION

Order Reversed Where Court Abused Its Discretion in Denying Request For Adjournment

Family Court entered a stay away order of protection directing respondent mother to refrain from having contact with petitioner father and the parties' two children. The Appellate Division reversed and remitted for a new trial. The court entered the order of protection upon a finding that the mother committed two family offenses, i.e. disorderly conduct (Penal Law Section 240.20) and harassment in the second degree (Penal Law Section 240.26), against petitioner father. In his amended petition, the father alleged that the mother yelled at him and called him names. The matter proceeded to trial, after which the court issued a stay away order of protection. The court abused its discretion in denying the mother's attorney's motion to adjourn the hearing because the mother was unable to attend. Although the court would not abuse its discretion in denying a request for an adjournment where the party making the request gave no reason for his or her absence, here, the mother explained her absence. Moreover, the proceedings were not protracted and the mother made no prior requests for an adjournment.

Matter of Drake v Riley, 149 AD3d 1468 (4th Dept 2017)

PATERNITY

Petitioner Equitably Estopped From Obtaining DNA Test

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

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

Petitioner Equitably Estopped From Denying Paternity

Family Court declared respondent to be the father of the subject child. The Appellate Division affirmed. The court properly determined that it was in the child's best interests to equitably estop respondent from obtaining a DNA test and denying paternity. The record established that he assumed the role of a parent, albeit in a somewhat limited way, and led the child to believe that he was the father for the next 15 years of her life.

Matter of Aranessa L. v Isaac C., 148 AD3d 609 (1st Dept 2017**)**

Record Supported Determination That Estoppel Was in the Child's Best Interests

In April 2015, the petitioner filed a petition to declare him the father of the subject child, who was then eight years old, and seeking an order for genetic testing pursuant to Family Court Act § 532 (a). The respondent acknowledged that the petitioner was the child's biological father, but noted that her husband's name was on the child's birth certificate, and that her husband had raised the child as his son for the entirety of the child's life. After a hearing, the Family Court

denied the petition, determining that it would not be in the child's best interests to declare the petitioner the father. The petitioner appealed. The Appellate Division affirmed. The Family Court properly determined that it was in the best interests of the child to deny the petition. Among other things, the petitioner provided limited financial support for the child and had seen the child only approximately 20 times over the course of the child's life. Additionally, the respondent's husband, whose name appears on the birth certificate, had assumed the role of the child's father, providing for the child financially and emotionally, and living with the respondent and their other children as a family unit consistently for the entirety of the child's life. As such, although the parties agreed that the petitioner was the child's biological father, the court properly estopped the petitioner from asserting any paternity claim in the child's best interests.

Matter of Carlos O. v Maria G., 149 AD3d 945 (2d Dept 2017)

Child's Best Interest To Order Genetic Marker Tests

Respondent and the mother were involved in an intimate relationship. Thereafter, the mother married another man and three weeks after their marriage she gave birth to the subject child. The mother and husband later divorced. When the child turned 13-years-old, the mother commenced a paternity proceeding against respondent. Respondent cross petitioned against the husband and the attorney for the child invoked the doctrine of equitable estoppel against respondent to preclude him from denying paternity. The husband petitioned for visitation. A hearing was held, with only the mother testifying, on the issue of whether the presumption of legitimacy could be overcome and Family Court determined the mother had presented clear and convincing evidence to rebut the presumption of legitimacy. Thereafter, a hearing was held on the issue of equitable estoppel and the court determined there was insufficient evidence to warrant application of the doctrine and ordered genetic marker tests which indicated respondent was the child's biological father and excluded the husband as the father. The court further determined the husband had no standing to seek visitation and dismissed his petition. The husband appealed and the Appellate Division affirmed. A presumption of legitimacy may be rebutted upon clear and convincing evidence excluding the husband as the child's father or otherwise tending to prove the child was not the product of a marriage. Here, the mother's uncontroverted testimony showed that the husband did not have access to her at the time the child was conceived. Additionally, the husband knew the child was not his biological child prior to marrying her and he had declined to sign an acknowledgment of paternity following the child's birth. Furthermore, contrary to his argument, the husband did not invoke the doctrine of equitable estoppel. Even if the court had found there was basis to this argument, the husband would have failed to satisfy the burden of showing he had a parent-child relationship since the evidence showed the husband had been incarcerated for most of the child's life and had not had contact with the child since she was a baby. Moreover, the court did not err in ordering the genetic marker tests. Considering the child's age and maturity, and her interest in knowing the identity of her biological father, it was in the child's best interest to do so.

Matter of Beth R. v Ronald S., 149 AD3d 1216 (3d Dept 2017)

Petitioner Made Requisite Threshold Showing of Nonfrivolous Controversy as To Paternity

The mother married and shortly thereafter gave birth to a child. Petitioner filed a paternity petition alleging he was the child's biological father. The mother and her husband moved to dismiss and Family Court granted their motion based upon a presumption of legitimacy, without making a determination as to whether genetic marker testing would be in the child's best interests. The Appellate Division reversed and remanded the matter. Pursuant to the governing statute in paternity proceedings, an application for genetic testing should only be denied if the court makes a written finding that testing "is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman" (*see* FCA § 532 [a]). Here, petitioner made the requisite threshold showing of a "nonfrivolous controversy as to paternity" (see *Prowda v Wilner*, 217 AD2d 281,289) and his request for the test should not have been denied. However, the limited testimony taken at the hearing failed to address whether the court had taken into consideration all the factors necessary in

determining whether it would not be in the child's best interest to order the test. The evidence showed the respondents were still married and living together at the time of petitioner's application and the child was around seven months old, the child had never met petitioner. The mother testified the husband believed he was the child's father, he was willing to raise the child as his own and was named on the child's birth certificate. However, the husband did not testify but submitted an affidavit. There was no evidence to show the quality of the relationship between the husband and child and whether the quality of the relationship would be affected by the uncertainty of biological paternity. Furthermore, the hearing did not address whether the testing would cause trauma to the child by potentially identifying petitioner as the biological father and thereby disrupting the child's existing family and, as stated in cases involving equitable estoppel, interfering with an already recognized and operative parent-child relationship.

Matter of Mario WW. v Kristin XX., 149 AD3d 1227 (3d Dept 2017)

PINS

Court's Failure To Apprise Respondent of His Right To Be Silent Results in Vacatur

Respondent was adjudicated a PINS and placed on probation. Thereafter, a violation petition was filed and Family Court revoked respondent's probation and placed him in the care of the county agency. The Appellate Division reversed and vacated the order of disposition since

Family Court had failed to apprise respondent of his right to remain silent either at the initial appearance or the fact-finding hearing (*see* FCA § 741).

Matter of Daniel XX., 149 AD3d 1231 (3d Dept 2017)

TERMINATION OF PARENTAL RIGHTS

In Child's Best Interests to be Adopted

Family Court determined that respondent mother permanently neglected the subject child, terminated her parental rights, and transferred custody of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The court previously determined that the agency met its burden of establishing permanent neglect. Termination of respondent's parental rights was in the child's best interests. The mother refused to avail herself of mental health services despite being repeatedly ordered and encouraged to do so. The court rejected the mother's contention that such services were unnecessary. The child, now 17 years old, had not resided with the mother since he was nine months old, and had resided with his foster mother for the majority of his life, and wanted to be adopted by her.

Matter of Selvin Adolph F., 146 AD3d 418 (1st Dept 2017)

Mother Permanently Neglected Children

Family Court determined that respondent mother permanently neglected the subject children, terminated her parental rights, and committed custody and guardianship of the children to the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts to assist the mother by developing an individualized plan tailored to fit her situation and needs, including referrals for drug and mental health counseling, visitation, and random drug testing. Despite the agency's efforts, the mother failed to benefit from the services and continued to deny responsibility for the conditions necessitating the children's removal. It was in the children's best interest to terminate parental rights inasmuch as they had been in a stable and loving foster home for several years, where all their basic and special needs were met. The foster mother wished to adopt the children.

Matter of Jaydein Celso M., 146 AD3d 448 (1st Dept 2017)

Mother Abandoned and Permanently Neglected Child

Family Court determined that respondent mother abandoned and permanently neglected the subject child. The Appellate Division affirmed. The finding of abandonment was supported by clear and convincing evidence that respondent failed to have any contact with the child during the six months preceding the filing of the petition, and had only one contact with the agency during that time. Respondent's vicarious

communication with petitioner grandmother, who had visitation with the child, did not evince respondent's intention to maintain a parental role. The finding of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts by, among other things, developing a service plan, which included drug testing, rehabilitation, and visitation with the child. Despite these efforts, respondent was expelled from her in-patient drug rehabilitation program for noncompliance and failed to maintain contact with the agency. Denying the grandmother custody of the child was in the child's best interests. It would not be in the child's best interests to uproot him from his pre-adoptive foster home, which was the only home he had ever known.

Matter of Karin R., 146 AD3d 526 (1st Dept 2017)

Mother Failed to Plan For Child's Future

Family Court determined that respondent mother permanently neglected the subject child. The Appellate Division affirmed. The agency demonstrated by clear and convincing evidence that it made diligent efforts to assist respondent to reunite with the child, and that respondent rejected the assistance in that she failed to follow through on referrals for a mental health evaluation, drug treatment, drug testing, and parenting skills and failed to consistently attend agency-supervised visits with the child. Respondent failed to visit with the child for a period of almost six months. She also failed to plan for the child's future by failing to address the problems that led to the child's removal.

Matter of Julian John C., 146 AD3d 565 (1st Dept 2017)

Mother Failed to Gain Insight Into Problems Leading to Children's Removal

Family Court, upon findings of permanent neglect terminated respondent mother's parental rights to the subject children, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The findings of permanent neglect were supported by clear and convincing evidence. The record demonstrated that the agency exercised diligent efforts to encourage and strengthen the mother's relationship with the children by referring her to mental health treatment, drug treatment programs, and domestic violence counseling; encouraging her to leave the father; assisting in obtaining suitable housing; and scheduling supervised visitation with the two younger children and therapeutic visitation wit the two older children. Although respondent completed some of her goals and many of her visits with the children were positive, she failed to gain insight into the problems that led to the children's removal. A preponderance of the evidence showed that it was in the children's best interests to terminate the respondent's parental rights and free them for adoption.

Matter of Maranda R., 146 AD3d 612 (1st Dept 2017)

Father Abandoned Child

Family Court determined that respondent father abandoned the subject child. The Appellate Division affirmed. The father's abandonment of the child was established by clear and convincing evidence. The father failed to maintain contact with the child or petitioner agency for at least the six-month period prior to the filing of the petition. The father knew the child was in foster care and he admitted that his only effort to determine the child's whereabouts and welfare was a single letter to the agency sent at an unspecified time, requesting that his parental rights be transferred to his mother and sister, and a call by his mother to the agency.

Matter of Clifford W. C., 146 AD3d 640 (1st Dept 2017)

Suspended Judgment Not Warranted

Family Court, upon a finding of permanent neglect, upon respondent mother's default, terminated her parental rights and transferred custody and guardianship of the subject children to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. Respondent could not challenge the determination of permanent neglect because it was entered upon her default. In any event, the finding of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts to strengthen and encourage the parent-child relationship, but despite those efforts respondent only visited the children five times in one year, never provided a certificate of completion of a parenting or anger management classes,

and refused to sign releases to allow the agency to verify her compliance with her service plan within the scheduled time frame, or to plan for the children's return. A preponderance of the evidence supported the determination that it was in the children's best interests to terminate respondent's parental rights. A suspended judgment was not warranted.

Matter of Felicia Malon Rogue J., 146 AD3d 725 (1st Dept 2017)

Full Dispositional Hearing Following Abandonment Finding Not Required

Family Court, upon a finding of abandonment, terminated respondent mother's parental rights and transferred custody and guardianship of the subject child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of abandonment was supported by clear and convincing evidence. The record demonstrated that respondent failed to communicate or visit with the child or agency during the six months immediately preceding the filing of the petition. A full dispositional hearing following the finding of abandonment was not statutorily required.

Matter of Michael Angelo D., 147 AD3d 446 (1st Dept 2017)

TPR Based Upon Mother's Mental Illness Affirmed

Family Court, upon a fact-finding determination that respondent mother suffered from mental illness, terminated her parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence, including the uncontroverted expert testimony of the court-appointed psychologist who testified that respondent suffered from schizophrenia, supported the determination that respondent was presently and for the foreseeable future unable to care for the child and that the child would be in danger of becoming a neglected child if he were placed in the mother's care. Petitioner submitted the psychologist's detailed report, which was prepared after an interview with respondent and a review of her mental health records. The expert noted respondent's schizophrenic diagnosis, her limited insight into her condition, her recurrent hospitalizations, and her inconsistent treatment.

Matter of Priseten T., 147 AD3d 458 (1st Dept 2017)

Court Properly Denied Mother's Motion to Vacate Her Default

Family Court denied respondent mother's motion to vacate an order of disposition, which, upon the mother's default terminated her parental rights and transferred custody and guardianship of the subject child to petitioner agency for the purpose of adoption. The Appellate Division affirmed. The mother failed to demonstrate a reasonable excuse for the default and a meritorious defense to the petition. Her excuse that she was ill the day of the fact-fining and dispositional hearings was unsupported by medical evidence and she failed to explain why it took her a month to contact her attorney to attempt to vacate the default. The medical note she provided was dated more than a month after the default and did not support her claim. The mother also failed to demonstrate a meritorious defense inasmuch as she failed to support her assertion that she was compliant with mental health services and medication.

Matter of Paul G.D.H.., 147 AD3d 699 (1st Dept 2017)

Father Abandoned and Permanently Neglected Child

Family Court determined that respondent father abandoned and permanently neglected the subject child, terminated his parental rights, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The agency established, by clear and convincing evidence, that respondent abandoned the child by failing to communicate with the child or agency during the six months before the filing of the petition. There was also clear and convincing evidence that respondent permanently neglected the child. The agency made diligent efforts to foster respondent's relationship with the child by referring him for alcohol abuse treatment, anger management and parenting skills for special needs children, on order to address the conditions that led to the child's removal. However, respondent was uncooperative inasmuch as he failed to maintain

contact with the agency, avoided the agency's attempts to contact him and engage him in services, refused referrals for services, continued to deny the conditions that led to the child's removal, and failed to gain insight into the reasons for the child's placement.

Matter of Dante Alexander W., 148 AD3d 492 (1st Dept 2017)

Suspended Judgment Not Warranted

Family Court terminated respondent mother's parental rights upon her admission of abandonment, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The record supported the conclusion that it was in the child's best interests to terminate mother's parental rights and that a suspended judgment was not warranted. The mother failed to address the conditions that led to the child's placement, including her long-term substance abuse, failure to engage in drug rehabilitation and mental health treatment, and failure to maintain contact with the agency. She also failed to visit the child regularly, including a six-month period when she disappeared. She did not demonstrate a realistic and feasible plan to provide an adequate and stable home for the child and her siblings. She presented no evidence about how she would plan separately from the child's putative father, with whom the mother continued to reside despite the restrictions on his ability to be around children because of his sex offender status. It was in the child's best interests to be freed for adoption by her long-term foster mother, with whom she had resided her entire life, and where she was well cared for and her needs were met.

Matter of Ariana S.S., 148 AD3d 581 (1st Dept 2017)

Suspended Judgment Not Warranted

Family Court determined that respondent mother permanently neglected the subject children, terminated her parental rights, and committed custody and guardianship of the child to petitioner 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 despite the agency's diligent efforts, the mother failed to plan for the child's future. A suspended judgment was not appropriate given the mother's lack of insight into her behavior and the special needs of the children, and given the fact that the children's needs were being met in their foster home, where they had resided since 2010.

Matter of Kasey Rene'e R., 149 AD3d 507 (1st Dept 2017)

Respondent Parents Permanently Neglected Children

Family Court found that respondent parents permanently neglected the subject children, terminated their parental rights, and committed custody and guardianship of the children to petitioner 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 despite the agency's diligent efforts, the mother failed to plan for the child's future. The agency made diligent efforts by, among other things, referring respondents for various parenting programs and mental health services, as well as scheduling visitation with the children. Despite these efforts, the mother continually failed to respond to the agency's attempts to make contact with her and failed to undergo a mental health evaluation, engage in mental health treatment and visit with the children consistently. The father, despite being diagnosed as bipolar, failed to consistently engage in mental health services, nor was there any update regarding his mental health status, other than that he was severely depressed and not taking medication. It was in the children's best interests to free them for adoption by their long-term foster mother who had met all their needs.

Matter of Cerenithy B., 149 AD3d 637 (1st Dept 2017)

Respondent Parents Permanently Neglected Children

Family Court determined that respondent parents permanently neglected the subject children, terminated their parental rights, and committed custody and guardianship of the children to petitioner agency and ACS for the purpose of adoption. The Appellate Division affirmed. The court's determination that respondents permanently neglected the subject children was supported by clear and convincing evidence. The agency engaged in diligent efforts by, among other things, developing individualized plans tailored to fit

their situation and needs, and providing referrals for, among other things, parenting skills, anger management, and individual counseling. Despite these efforts, respondents only partially complied with their service plans and failed to benefit from the services offered, inasmuch as they continued to deny responsibility for the conditions necessitating the children's removal. Moreover, after completing some services, respondents knowingly orchestrated the unauthorized removal of the children from the agency, setting off a week-long manhunt that ended when the van they and the children were in was surrounded by police officers with guns drawn. Respondents embarked on this journey without the children's medications and the children reported that they did not have enough to eat, that they were forced to sleep in the van and urinate in bottles, and that at least two of them were beaten. Termination of respondents' parental rights was in the children's best interests inasmuch as the children had been in a stable and loving foster home for several years, all of their basic needs were being met, and their foster parents wanted to adopt them.

Matter of Nephra P., 149 AD3d 642 (1st Dept 2017)

Expert Testimony Regarding Mother's Underlying Mental Illness Was Required Prior to TPR Determination

The Family Court erred in determining the legal sufficiency of the evidence without complying with Social Services Law § 384-b (6) (e), which provides that "the judge shall order" an allegedly mentally ill parent "to be examined by, and shall take the testimony of, a qualified psychiatrist or a psychologist" (*see* SSL § 384-b [6] [c]). Termination of parental rights on the ground of mental illness may be ordered only upon proof by clear and convincing evidence that the parent "presently and for the foreseeable future" is unable, by reason of the parent's mental illness, to provide proper and adequate care for the subject children (*see* SSL § 384-b [4] [c]). Termination on this ground requires expert testimony not only as to the parent's underlying mental illness, but also as to how that mental illness renders the parent unable to provide proper and adequate care for the subject child presently and in the foreseeable future. Accordingly, the court erred in terminating the mother's parental rights on the basis of mental illness, and a new fact-finding hearing was required as to the mother. As to the father, petitioner failed to meet its initial burden of establishing by clear and convincing evidence that it exercised diligent efforts to strengthen the parental relationship between the father and the subject children (*see* SSL § 384-b [7] [a], [f]). The evidence at the fact-finding hearing failed to establish that the petitioner assisted the father in addressing the important issue of his need to secure stable and suitable housing; assisted the father with enrolling in and completing a second anger management/domestic violence prevention course; or reinstated visitation between the father and the children as soon as practicable after an alleged altercation with an employee of the petitioner resulted in a suspension of visitation. In light of the petitioner's failure to meet its burden of establishing its diligent efforts under SSL § 384-b (7) (a), the Family Court should have, as to the father, denied the petitions and dismissed the proceedings. Thus, the orders of fact-finding and disposition were reversed, on the law, the petitions were denied and the proceedings were dismissed as to the father, and the matters were remitted for a new fact-finding hearing as to the mother, and, if warranted, a new disposition thereafter.

Matter of Elijah W. L., Jr., 146 AD3d 782 (2d Dept 2017)

Record Supported Appointment of Guardian Ad Litem for Mother

The petitioner commenced a proceeding to terminate the mother's parental rights on the ground of intellectual disability (*see* SSL § 384-b [4] [c]). The mother was 15 years old when the child was born and 17 years old when this proceeding was commenced. Upon the application of the mother's attorney, the Family Court appointed the mother a guardian ad litem. Thereafter, the court proceeded to a fact-finding hearing, during which the mother was represented at all times by her attorney and by her guardian ad litem. The mother failed to appear on at least two court dates, August 3, 2015 and August 7, 2015. Her attorney did not request an adjournment of the fact-finding hearing on either date, electing instead to proceed in the mother's absence, with the assistance of the mother's guardian ad litem. At the conclusion of the hearing, the court determined that the mother was presently and for the foreseeable future unable to care for the child, terminated her parental rights, and freed the child for adoption. The mother appealed. The Appellate

Division affirmed. Contrary to the mother's contention, the Family Court did not err in appointing her a guardian ad litem because, among other reasons, the appointment was made at the request of her counsel and she was under 18 years old at the time the proceeding was commenced (*see* CPLR 1201, 1202). Further, under the circumstances of this case, any alleged procedural irregularities in the appointment of the guardian ad litem did not constitute reversible error since they did not result in any prejudice to the mother (*see* CPLR 2001). Contrary to the mother's contention, the Family Court providently exercised its discretion in proceeding with the fact-finding hearing in the mother's absence on August 3, 2015 and August 7, 2015. The mother's counsel did not request an adjournment. Further, the mother was not prejudiced by the court's decision to proceed because her counsel actively participated at the hearing on those two dates, her guardian ad litem was present on those dates, the mother was present at the hearing on several other dates, and she had an opportunity to testify.

Matte of Anastasia E. M., 146 AD3d 887 (2d Dept 2017)

Mother Failed to Correct Conditions That Led to Removal of Children Despite Petitioner's Diligent Efforts

The Family Court improperly determined that the petitioner established a prima facie case of permanent neglect on the basis of a trial brief, consisting of a summary of facts submitted by its counsel, and the mother's failure to dispute the factual allegations in the trial brief. However, the petitioner's progress notes, which were admitted into evidence without objection, established a prima facie case of permanent neglect, and the mother had the opportunity to cross-examine the petitioner's caseworker, who was called as a witness by the attorney for the children. Contrary to the mother's contention, the petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship, These efforts included facilitating visitation, providing a visitation coach to encourage interaction with the children during visits, providing the mother with referrals to parenting classes, domestic violence programs, and mental health therapy, and finding suitable housing for her. Despite these efforts, the mother failed to plan for the children's future, and failed to correct the conditions that led to the removal of the children from her custody. Accordingly, the Family Court properly determined that it was in the best interests of the children to terminate the mother's parental rights. Contrary to the mother's contention, the entry of a suspended judgment was not appropriate in light of the mother's continued lack of insight into her problems and the children's special needs, and her failure to acknowledge and address many of the issues which led to the children's removal from her in the first instance. Orders affirmed.

Matter of Hector V. P., 146 AD3d 889 (2d Dept 2017)

Mother Failed to Comply with Court-Ordered Services and Counseling

In 2008, the subject child was placed with her maternal aunt pursuant to Family Court Act § 1055. In 2010, the county's Department of Social Services filed a petition to terminate the mother's parental rights. In 2012, after a hearing, a finding of permanent neglect was made against the mother. Thereafter, a dispositional hearing was held, but the mother's attorney passed away before the hearing could be concluded. A de novo dispositional hearing was conducted in 2013 and 2014, at which the agency presented evidence that the mother failed to comply with the court-ordered services and counseling required in order for reunification to occur. The Family Court determined that it was in the child's best interests to remain with her aunt for the purpose of adoption, and terminated the mother's parental rights. The mother appealed. The Appellate Division affirmed. The record supported a finding that the mother failed to comply with the requirements necessary for reunification. In addition, there was evidence that the child had bonded strongly with her maternal aunt, with whom she had resided for approximately five years. Accordingly, the evidence at the hearing established that it was in the child's best interests to terminate the mother's parental rights, and free the child for adoption by her aunt (*see* FCA § 631). Order affirmed.

Matter of Ari W.-N.T., 146 AD3d 892 (2d Dept 2017)

Mother Missed Numerous Supervised Visitations with Child and Failed to Correct Issues Preventing Reunification

Contrary to the mother's contention, the Family Court properly found that she permanently neglected the subject child. The petitioner established by clear and convincing evidence that it made diligent efforts to assist the mother in maintaining contact with the child and planning for the child's future (*see* SSL § 384-b [7]). These efforts included facilitating visitation, providing the mother with referrals for drug treatment programs and mental health evaluations, advising the mother of the need for her to attend and complete such programs, and advising the mother how to secure adequate housing for herself and the child. Despite the petitioner's diligent efforts, the mother failed to substantially and repeatedly maintain contact with or plan for the future of the child (*see* SSL § 384-b [7]). In particular, the mother missed numerous supervised visitations with the child and failed to correct issues preventing reunification, such as her anger management problem, her inability to maintain an income, and her lack of appreciation for the child's special needs. The Family Court also properly determined that it was in the child's best interests to terminate the mother's parental rights and free the child for adoption by her foster mother. Order affirmed.

Matter of Destiny A. K., 147 AD3d 758 (2d Dept 2017)

Mother Was Unable to Properly and Adequately Care for Child by Reason of Mental Illness

In a proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights on the grounds of mental illness, permanent neglect, and abandonment, the mother was diagnosed with schizoaffective disorder with bipolar features and exhibited delusional behavior. After fact-finding and dispositional hearings, the Family Court found that the petitioner had established by clear and convincing evidence that the mother had permanently neglected the child, that the mother was presently and for the foreseeable future unable to provide proper and adequate care for the child by reason of mental illness, and that the best interests of the child required that the mother's parental rights be terminated and the child freed for adoption. The mother appealed. The Appellate Division affirmed. The agency established by clear and convincing evidence that the mother was unable to properly and adequately care for the child, now and in the foreseeable future, by reason of mental illness (*see* SSL § 384-b [3] [g]; [4] [c]), inter alia, through the testimony of a court-appointed clinical psychologist. Contrary to the respondent's contention, many of the records relied upon by the court-appointed clinical psychologist were admissible as business records and, in any event, his reliance as an expert upon those records was not error.
Matter of Morphius I., 147 AD3d 948 (2d Dept 2017)

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

Contrary to the father's contentions, the Family Court's finding that he permanently neglected the child was supported by clear and convincing evidence that the petitioner made diligent efforts to strengthen the parental relationship (*see* SSL§ 384-b [7] [a], [f]). These efforts included facilitating visitation, referring the father to a parenting program, referring the father to a substance abuse treatment program, and providing the father with a schedule of the child's medical appointments. His contention that the petitioner was required to do more was unavailing. The evidence demonstrated the father's lack of cooperation and initiative to address the underlying concerns which led to the child's placement with the petitioner. The evidence at the hearing further demonstrated that, for a period of one year following the child's placement with the petitioner, the father failed to plan for the future of the child (*see* SSL § 384-b [7] [a]). Thus, the court properly found that the father permanently neglected the child. Order affirmed.

Matter of Anastasia E. Mc., 147 AD3d 955 (2d Dept 2017)

Record Did Not Support Termination of Mother's Parental Rights

In 2011, the county's Department of Social Services (hereinafter DSS) commenced a proceeding to terminate the mother's parental rights based upon her permanent neglect of the subject child. The mother consented to a finding of permanent neglect, and an order of suspended judgment for a one-year period was issued on April 9, 2012. The order of suspended judgment required the mother to cooperate in seeking

drug abuse treatment, submit to drug testing, and remain drug free. Several violation petitions were filed, and the Family Court repeatedly extended the period of the suspended judgment. In November 2015, DSS moved to revoke the order of suspended judgment. The application was supported by the affidavit of a caseworker who averred that the mother had been directed by the Family Court to attend individual and family counseling and to follow through with caseworker recommendations. The mother failed to comply and her case at the counseling center was closed due to her lack of compliance. After a hearing, the Family Court revoked the order of suspended judgment and terminated the mother's parental rights. The subject child appealed. The Appellate Division reversed. The preponderance of the evidence supported a finding that the mother failed to comply with certain conditions set forth in the order of suspended judgment. However, the evidence did not support the Family Court's conclusion that it was in the best interests of the child to terminate the mother's parental rights. The child was residing in a treatment facility and there was no indication that termination would increase the child's opportunities for adoptive placement. Further, the testimony demonstrated that the mother and the child had a strong bond, which the court characterized as the child's "lifeline," and that the child looked forward to visiting with the mother. Under these circumstances, the Appellate Division found that the termination of the mother's parental rights was not in the best interests of the child. Accordingly, the matter was remitted to the Family Court for a new dispositional hearing to determine the best interests of the child, with the continuation of the mother's supervised visitation at the facility where the child resided, and a new disposition thereafter.

Matter of Isabella M., 147 AD3d 1061 (2d Dept 2017)

Mother Failed to Comply with Terms of Order of Suspended Judgment

The Family Court properly found, by a preponderance of the evidence, that the mother failed to comply with the terms of the order of suspended judgment requiring her to attend and complete a substance abuse treatment program and attend scheduled visits with the child. Moreover, under the circumstances of this case, the Family Court providently exercised its discretion in determining that a separate dispositional hearing was not required before, in effect, revoking the order of suspended judgment as to the mother and terminating the mother's parental rights. The Family Court may enforce a suspended judgment without the need for a separate dispositional hearing where the court has presided over prior proceedings from which it became acquainted with the parties, and the record shows that the court was aware of and considered the child's best interests. Here, the court conducted a full fact-finding hearing on the violation petition, as well as a permanency hearing, and the record showed that it was aware of and considered the child's best interests. Order affirmed.

Matter of Treana B.-S., 148 AD3d 1157 (2d Dept 2017)

Respondents Failed to Plan for the Children's Future Despite Agency's Diligent Efforts

The finding of permanent neglect was supported by clear and convincing evidence that despite the agency's diligent efforts to encourage and strengthen the parental relationship, the respondents failed to plan for the children's future. The agency made diligent efforts by, among other things, referring respondents for various parenting programs and mental health services, as well as by scheduling visitation with the children (*see* SSL § 384-b [7] [f]). Despite these efforts, the mother continually failed to respond to the agency's attempts to make contact with her, and failed to undergo a mental health evaluation, engage in mental health treatment and visit with the children consistently. She also gained no insight into the reasons for the children's placement in foster care, nor benefitted from the limited services with which she complied. The father, despite being diagnosed as bipolar, likewise failed to remain consistently engaged in mental health services, nor was there any update as to his mental health status, other than that he was severely depressed and not taking medication. While he visited with the children consistently, on alternate weekends, his visitation never progressed beyond supervised visits at his mother's home, during which his mother primarily cared for the children. The record supported the Family Court's determination that the children's interests were best served by terminating the respondents' parental rights to free the children for adoption by their long-term foster mother, who had met all of their needs. Despite engaging in services, some belatedly, there was no indication that the mother was able to care for the

children or would be able to do so in the future. Similarly, the father's home was found to be unsuitable for the children, and there was no evidence that he was ready to care for them. Orders affirmed.

Matter of Cerenithy B., 149 AD3d 637 (2d Dept 2017)

Record Supported Finding of Permanent Neglect

Family Court's determination that respondents permanently neglected the subject children was supported by clear and convincing evidence (*see* SSL § 384-b [7] [a]; [3] [g] [i]). The agency engaged in diligent efforts to encourage and strengthen respondents' relationship with the children by, among other things, developing individualized plans tailored to fit their situation and needs, and providing referrals for, among other things, parenting skills, anger management, and individual counseling (*see* SSL § 384-b [7] [f]). Despite these efforts, respondents only partially complied with the service plan and failed to benefit from the services offered, as they continued to deny responsibility for the conditions necessitating the children's removal from their care. Moreover, after respondents completed some services, they knowingly orchestrated the unauthorized removal of the children from the agency, setting off a week-long manhunt that only ended when the van they and the children were in was surrounded by police officers who had their guns drawn. The respondents embarked on this journey without the children's medications, and the children reported that they did not have enough to eat, that they were forced to sleep in the van and to urinate in bottles, and that at least two of them were beaten. The respondents' decision to subject the children to this harrowing ordeal and their inability to appreciate the traumatic effect it had on the children—as well as the father's inability to spend even one week with the children without resorting to corporal punishment—constituted clear and convincing evidence that respondents did not benefit from services. The preponderance of the evidence supported the Family Court's determination that termination of respondents' parental rights was in the best interests of the children, as the children had been in stable and loving foster homes for several years, all of their basic needs were being met and their foster parents wanted to adopt them.

Matter of Nephra P., 149 AD3d 642 (2d Dept 2017)

Record Supported Finding That Father Abandoned Child

The petitioner commenced a proceeding to terminate the father's parental rights on the ground of abandonment. The petition alleged that the father was only entitled to notice of the proceeding pursuant to Social Services Law § 384-c and, alternatively, that if the father's consent for the adoption of the child was required, the father abandoned the child. After a hearing, the Family Court found that the father's consent for the adoption of the child was required. The court also found that the father abandoned the child, terminated his parental rights, and transferred guardianship and custody of the child to the petitioner for the purpose of adoption. Contrary to the Family Court's finding, there was clear and convincing evidence that the father's consent for the adoption of the child was not required (*see* DRL § 111 [1] [d]). In any event, as the Family Court properly found, clear and convincing evidence established that the father abandoned the child by failing to visit or maintain contact with her or the petitioner for the six-month period immediately preceding the filing of the petition to terminate his parental rights (*see* SSL § 384-b [5] [a]), and that termination of the father's parental rights was in the best interests of the child.

Matter of Akasha J. G., 149 AD3d 734 (2d Dept 2017)

Record Supported Denial of Father's Motion to Vacate Default

The order appealed from denied the father's motion to vacate his default in appearing at a fact-finding hearing wherein the court determined that his consent to the adoption of the subject child was not required pursuant to Domestic Relations Law § 111. The Appellate Division affirmed. The determination of whether to relieve a party of a default is a matter left to the sound discretion of the Family Court. In a proceeding to terminate parental rights, a parent must show that there was a reasonable excuse for the default and a potentially meritorious defense in order to establish his or her entitlement to vacatur of the default (*see* CPLR 5015 [a] [1]). Contrary to the father's contention, he failed to provide a reasonable excuse for his failure to appear. He failed to present detailed information or documentation to substantiate his claim of a delay in transportation, and he did not explain his failure to

contact his attorney or the court about the alleged delay. Accordingly, the court providently exercised its discretion in denying the father's motion to vacate his default.

Matter of Nathalie D.N., 149 AD3d 750 (2d Dept 2017)

Mother's Incarceration Did Not Relieve Her of Her Responsibility to Maintain Contact or Communicate with the Children or the Agency

In 2014, the petitioner commenced proceedings to terminate the mother's parental rights to the subject children. After fact-finding and dispositional hearings, the Family Court found that the mother abandoned her children, terminated her parental rights, and transferred guardianship and custody of the children to the petitioner's agency for the purpose of adoption. The mother appealed. The Appellate Division affirmed. The petitioner established, by clear and convincing evidence, that the mother abandoned the subject children during the six-month period before the filing of the petition (*see* SSL § 384-b [4] [b]). The mother's incarceration did not relieve her of her responsibility to maintain contact or communicate with the children or the agency.

Matter of Tamar T.W., 149 AD3d 852 (2d Dept 2017)

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

The Family Court's finding that the father permanently neglected the subject child was supported by clear and convincing evidence (*see* Social Services Law § 384-b [7] [a]). The petitioner made the requisite diligent efforts to encourage and strengthen the parental relationship. Those efforts included, inter alia, arranging for the child's visitation with the father, and referring the father to domestic violence counseling. Despite the petitioner's diligent efforts, the father failed to adequately plan for his child's future (*see* Social Services Law § 384-b [7] [c]). Furthermore, the Family Court properly determined that it was in the best interests of the child to terminate the father's parental rights. Contrary to the father's contention, the entry of a suspended judgment was not appropriate in light of his continued lack of insight into his problems and the child's special needs, as well as the father's failure to acknowledge and address many of the issues which led to the child's removal in the first instance.

Matter of Stephon B.M. III, 149 AD3d 1080 (2d Dept 2017)

Sound and Substantial Basis in the Record to Revoke Mother's Suspended Sentence

Family Court revoked respondent mother's suspended judgment and terminated her parental rights. The Appellate Division affirmed. Here, the mother had consented to the permanent neglect finding and an eight-month suspended judgment had been issued, requiring the mother to, among other things, cooperate with the agency, attend all of her mental health and psychiatric appointments, take medications as prescribed, attend all parental visits with the child and comply with programs designed to help her parenting skills. The evidence showed respondent failed to comply with many of the provisions, including recommendations on how to handle visitation with the child, such as feeding him healthy snacks, staying away from places that might cause him distress and creating a stable and safe home environment. She also encouraged the child to disobey the agency case worker and run away from the worker. Furthermore, respondent was arrested and incarcerated during the relevant period and remanded to the local jail. She failed to inform the agency of the arrest and as a result of her incarceration, she missed numerous mental health appointments for herself and the child, which negatively affected the child's behavior. Given this evidence, there was a sound and substantial basis in the record for the court's determination and it was in the child's best interest to terminate respondent's parental rights.

Matter of Alexsander N., 146 AD3d 1047 (3d Dept 2017)

Family Court Properly Determined Respondent's Failure to Identify Resources Constituted Failure to Plan

This case had been before the Appellate Division earlier and the court's termination of the incarcerated father's rights had been reversed because the Appellate Division determined an evidentiary hearing was necessary on certain issues related to respondent's compliance with the stipulation concerning his admission of permanent neglect and agreement to a suspended judgment. Thereafter, Family Court held a

hearing and determined the incarcerated father had failed to provide the agency with the names of appropriate resources and this failure constituted a failure to plan for the children's future and the children were permanently neglected. Based on the evidence, there was a sound and substantial basis in the record for court's decision. Here, the record showed respondent, whose initial parole hearing was scheduled for 2022 with a conditional release date of 2015, failed to identify any resource other than the children's mother, whose rights had been terminated. He only provided names of other possible resources after the agency had filed its application to revoke the suspended judgment. Although respondent provided the agency with the names of two friends as resources, he later conceded the individuals were not biologically related and had not formed any meaningful relationship with the children. Although respondent challenged the dispositional order, arguing the agency failed to make diligent efforts to facilitate his relationship with the children by failing to arrange prison visits during his incarceration, that argument was not properly before the Court since respondent had consented to the entry of the suspended judgment and thereafter failed to move to vacate his stipulated admissions of permanent neglect. Even if this argument had been preserved it had no merit since the agency did not have to facilitate visitation with an incarcerated parent if it determined it was not in the children's best interests due to factors such as distance or the children's youth. Respondent's incarceration would prevent him from caring for them for many years and the children, aged one and two at the time of removal, had resided with the same foster family since 2009 and were thriving in their care and the foster family wished to adopt them.

Matter of Bayley W., 146 AD3d 1097 (3d Dept 2017)

New Dispositional Hearing Needed

Family Court determined respondent mother had permanently neglected the four subject children and terminated her parental rights. The Appellate Division affirmed the finding of permanent neglect but remitted the matter for a new dispositional hearing. Petitioner agency met its burden of showing, by clear and convincing evidence, that it made diligent efforts to strengthen the parent and child relationship. Here, the three older children were removed from respondent's care and placed with the grandmother after the suspicious death of another one of respondent's children and soon thereafter, respondent was incarcerated. Thereafter, she gave birth to the fourth subject child who was then removed by the agency. Respondent was later convicted of murder in the second degree and sentenced to 25 years to life in prison. Prior to respondent's incarceration, the agency planned for return of the children to respondent. However, respondent was only in the area sporadically and failed to tell the caseworker where she was living. Despite this, the agency, among other things, set up parenting classes, domestic violence training, counseling and supervised visitation. After respondent's incarceration, the attempts to strengthen the parental relationship continued. The grandmother was responsible for coordinating visitation between respondent and the children but respondent did not want visitation. By the time respondent requested visitation, the children had been moved to a foster home and difficulties with adjustment made visitation not advisable. Additionally, she failed to develop a realistic plan for the children's future. Moreover, respondent did not advise the agency of the services she was engaged in while incarcerated and failed to provide the agency with contact information for individuals whom she felt could take care of the children. Based on this, there was adequate support for the finding of permanent neglect. However, since the Appellate Division reversed respondent's murder conviction and the underlying indictment, a new dispositional hearing was necessary since respondent was not facing the lengthy term of imprisonment anticipated at the time the dispositional order was issued.

Matter of Zoey O., 147 AD3d 1227 (3d Dept 2017)

Agency Made More Than Sufficient Efforts to Encourage and Strengthen Parent-Child Relationship

Family Court adjudicated the two subject children, who were born during the pendency of permanent neglect proceedings involving their four older siblings, to be permanently neglected and terminated respondent's parental rights. The Appellate Division affirmed. The agency made more than sufficient efforts to encourage and strengthen the parent child relationship by, among other things, helping the family obtain housing, grief and employment counseling for respondent and supervised visitation between respondent and the

children. Despite these efforts, the agency showed, by clear and convincing evidence, that respondent failed to plan for the children's future during the relevant time period. Evidence showed despite ongoing services, respondent was unable to proceed past supervised visitation with the children due to lack of adequate housing and he was unable to properly engage with the children and needed ongoing intervention. Several witnesses testified respondent was difficult to reach, by phone or in person, and he often failed to advise the caseworker of his current shelter or address. Furthermore, respondent failed to attend medical appointments for the children despite being told of the appointments and transportation being provided for the appointments. He also failed to regularly engage in the necessary mental health services. Additionally, the court did not err by terminating respondent's parental rights instead of issuing a suspended sentence. The children had lived with the foster family for nearly their entire lives and an older sibling also lived with the same foster family. The children had developed a strong and loving bond with their foster family, who continued to provide ongoing contact between the subject children and their siblings. Respondent's recent progress after years of inaction was insufficient to prolong the children's unsettled status and it was in their best interests to terminate respondent's parental rights.

Matter of Alexander Z., 149 AD3d 1177 (3d Dept 2017)

Clear and Convincing Evidence To Support Abandonment Finding

Following a fact-finding hearing, Family Court adjudicated the two-year-old subject child, who had been in agency placement since he was five days old, to be abandoned. Thereafter, at the dispostional hearing, the mother executed a judicial surrender and indicated to the court that respondent father, who was incarcerated, would be doing the same. The court issued an order to produce but counsel indicated respondent father was no longer willing to execute a judicial surrender. Family Court dispensed with the dispositional hearing and terminated respondent's parental rights. The Appellate Division affirmed. Here, the agency established, by clear and convincing evidence, that respondent had evinced an intent to forego his parental rights. During the relevant six month period, respondent only sent one letter to the agency caseworker, asking about the child. Due to the child's young age, the caseworker denied respondent's request for visitation, but told him the child was doing well. Respondent sent no other communication to the caseworker or cards or letters to the child; and the agency made no attempt to discourage respondent from communicating with the agency or the child. Similarly, the case planner and parent aide, each of whom had given their contact information to respondent, received no communication from him during the relevant period. Although respondent and the child's mother stated respondent had spoken to the child on "at least 16" occasions, during the time the mother had exercised supervised parenting time with the child, the evidence showed the mother had only had 10 supervised visits with the child during this period and neither of the supervisors could remember if respondent had telephoned during these visits. Respondent's proof only established "sporadic, infrequent and insubstantial contacts," and this was insufficient to defeat a finding of abandonment. The fact that respondent was incarcerated did not excuse him from failing to contact the child. Even though the agency broached the subject of surrender with respondent, this alone did not support the claim that the agency discouraged him, and since this was an abandonment finding, the court was not required to hold a dispositional hearing.

Matter of Isaiah OO., 149 AD3d 1188 (3d Dept 2017)

Court Did Not Abuse Discretion in Limiting Evidence Concerning Whether Subject Child's Foster Parents Were Qualified to Adopt Him

Family Court terminated respondent mother's parental rights with respect to the subject child on the basis of the mother's admission to permanent neglect. The Appellate Division affirmed. Family Court did not abuse its discretion in limiting the evidence concerning whether the subject child's foster parents were qualified to adopt him. It was emphasized that termination of parental rights did not hinge upon a comparison of the relative benefits offered a child by his biological family to those offered by the foster family. The ultimate purpose of the dispositional inquiry was not to determine whether the child was in the best possible foster placement - a determination statutorily entrusted to petitioner - but to decide whether his best interests required termination of the mother's parental rights. Given the evidence that the

child's progress in the foster home was satisfactory, and the lack of any evidence that the mother was capable of offering him a safe home, the court's determination to commit the child's guardianship and custody to petitioner was in his best interests. Moreover, the court did not abuse its discretion in declining to grant a suspended judgment, inasmuch as the mother made only minimal progress in addressing the issues that resulted in the child's removal from her custody.

Matter of James P., 148 AD3d 1526 (4th Dept 2017)

Affirmance of Termination of Parental Rights on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights with respect to the subject children on the ground of permanent neglect, and transferred guardianship and custody of the children to petitioner. The Appellate Division affirmed. Petitioner demonstrated by the requisite clear and convincing evidence that it made diligent efforts to encourage and strengthen the parent-child relationship by developing an appropriate service plan tailored to the situation, regularly updating the father on the children's progress and continually reminding him to comply with the requirements of the service plan. The father's contention was rejected that he planned for the children's return by planning to participate in sex offender treatment, but could not do so because such a program was not offered at the facility where he was incarcerated. Petitioner was not required to provide services and other assistance so that problems preventing the discharge of the children from care could be resolved or ameliorated. The father failed to plan for the children's future by neither acknowledging nor meaningfully addressing the conditions that led to the children's removal in the first place, namely, the underlying sexual abuse of another older daughter, and by failing to provide any realistic and feasible alternative to having the children remain in foster care until his release from prison.

Matter of Skye N., 148 AD3d 1542 (4th Dept 2017)

Court Did Not Err in Admitting Forensic Psychologist's Report in Evidence at Fact-finding Hearing on Permanent Neglect Petition

Family Court adjudicated the subject child to be permanently neglected and terminated respondent mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. In a prior appeal, the Appellate Division determined that Family Court erred in admitting in evidence at a fact-finding hearing on a neglect petition a 2012 evaluation of the mother by a forensic psychologist who did not testify at the hearing. On this appeal, the mother contended that the court erred in admitting the same report in evidence at a fact-finding hearing on a permanent neglect petition. Although the admission of such reports in neglect proceedings was governed by the rules of evidence set forth in Family Court Act Section 1046 (a) (iv), the admission of such reports in termination proceedings under Social Services Law Section 384-b was governed by CPLR 4518. Even if petitioner did not meet the foundational requirements for admission of the report, any error was harmless because the result reached would have been the same even if it had been excluded. Unlike the prior appeal, the court in this matter did not base its determination on findings contained within the report. Thus, even without reference to the report, the evidence at the fact-finding hearing established that petitioner made the requisite diligent efforts, and that the mother did not comply with her service plan.

Matter of Chloe W., 148 AD3d 1672 (4th Dept 2017)

Court Properly Terminated Mother's Parental Rights on Ground of Permanent Neglect

Family Court adjudicated the subject children to be permanently neglected and terminated respondent mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established, by the requisite clear and convincing evidence, that it fulfilled its duty to exercise diligent efforts to encourage and strengthen the mother's relationships with her children. Petitioner established that it arranged visitation between the mother, who was incarcerated, and the subject children, transported the children to those visits, explored the planning resources suggested by the mother, and kept her apprised of the children's progress. Thus, given the circumstances, petitioner provided what services it could. The court properly concluded that the mother permanently neglected the subject children. There was no evidence that the mother had a realistic plan to provide an adequate and stable home for the children. The mother's contention was rejected that the court erred in

denying her request for a suspended judgment. There was little chance that the mother could continue to control her addictions or gain insight into how her choices were impacting the children, and the court's assessment that the mother was not likely to change her behavior was entitled to great deference.

Matter of Christian C.-B., 148 AD3d 1775 (4th Dept 2017)

Affirmance of Termination of Parental Rights on Ground of Abandonment

Family Court terminated respondent mother's parental rights on the ground of abandonment. The Appellate Division affirmed. The mother's contention was rejected that her period of hospitalization and her repeated drug use constituted valid defenses to the claim of abandonment. Hospitalization did not automatically excuse a parent from maintaining the contacts required under the Social Services Law, and the mother failed to submit any supporting documentary evidence to substantiate the length, severity, or extent of her purported illness and hospitalization. The mother failed to show that her hospitalization so permeated her life that contact was not feasible. Moreover, the mother's vague and conclusory testimony failed to establish that her alleged health problems and other hardships permeated her life to such and extent that contact was not feasible. Furthermore, the mother's period of incarceration did not excuse her failure to contact the child or petitioner. Insofar as there appeared to be a week prior to the filing of the petition when the mother was not incarcerated, there was no evidence in the record of any attempt by the mother to contact or communicate with petitioner, the child, or the child's foster parents during this time.

Matter of Madelynn T., 148 AD3d 1784 (4th Dept 2017)

Reversal of Termination of Parental Rights on Ground of Abandonment

Family Court terminated respondent father's parental rights on the ground of abandonment. The Appellate Division reversed. Petitioner failed to establish by clear and convincing evidence that the father abandoned the subject children. A child was deemed abandoned where, for the period of six months immediately prior to the filing of the petition for abandonment, a parent evinced an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or petitioner, although able to do so and not prevented or discouraged from doing so by petitioner. The evidence established that the father, who was incarcerated for most of the six-month period immediately prior to the filing of the petition, contacted the children or petitioner every month during that period. The father wrote letters to the children and called, met with, and wrote letters to the children's caseworker. The father's contacts were not minimal, sporadic or insubstantial. Moreover, during that period, the father filed a petition seeking custody or visitation with the children, which indicated that he did not intend to forego his parental rights. Although the court's finding that the father failed to offer a meaningful plan for the children's future was relevant to a termination proceeding based on permanent neglect, it was not relevant to a termination proceeding based on abandonment.

Matter of John F., 149 AD3d 1581 (4th Dept 2017)

YOUTHFUL OFFENDERS

Youthful Offender Status Not Properly Considered

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 whether the defendant should be afforded youthful offender status. Under these circumstances, the sentence was vacated and the matter was remitted to the Supreme Court to determine whether the defendant should be afforded youthful offender treatment.

People v Miller, 147 AD3d 783 (2d Dept 2017)

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.