# NEW YORK CHILDREN'S LAWYER

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

**December 2017** **Volume XXV, Issue III**

## Cross-Gender Supervision of Children in Residential Group Homes*

**Julia Sands and Daniel Pollack****

Children in residential group home settings have usually experienced trauma or abuse. The therapeutic setting they need must be safe, informed by an understanding of impaired attachment and developmental needs. Toward that end, children's group homes offer a 24-hour residential environment with targeted therapeutic informed models of care. Staff oversight may include such things as having general supervisory responsibility of clients during the day or night, while clients are active, stationary, or involved in private functions.

Excellent staff supervision is essential, and can be challenging. Particularly challenging is cross-gender supervision. Numerous concerns arise:

- Will inappropriate relationships develop?
- Given their own history of sexual trauma, is cross-gender supervision therapeutically contraindicated if clients feel unduly uncomfortable?
- What limitations on cross-gender supervision make sense?
- What meaningful oversight mechanisms should be put in place?

There have been numerous legal cases in the corrections field dealing with cross-gender supervision that may be instructive for the residential group home arena. For instance, the Ninth Circuit has held that a cross-gender strip search in the absence of an emergency violates a pretrial detainee's Fourth Amendment rights. *Byrd v. Maricopa Cty. Sheriff's Dep't* , 629 F.3d 1135 (9th Cir. 2011) (en banc). The Prison Rape Elimination Act National Standards echo this perspective.[1] The Fifth Circuit recently held that the trial court properly found that a visual strip and cavity search of a 12-year-old juvenile who was involved in a fight at school was reasonable as part of juvenile detention facility's routine intake procedures. The court held that the search of the juvenile did not violate the Fourth Amendment. The court explored the interests of the institution against the privacy interest of the juvenile and came down on the side of the importance of safety for the institution.

The court cited Florence v. Board of Chosen Freeholders , 132 S. Ct. at 1513, and found that because the juvenile's attorney failed to show the detention center's search policy was an exaggerated or irrational response to the need for security, the court was not able to assess the appropriateness of the center's policy. *Nicole Mabry v. Lee County , 849 F.3d 232* (5th Cir. 2017). Courts have seemingly struck a balance between

**CONTENTS**

| | | |
|---|---|---|
| News Briefs | Page | 6 |
| Recent Books & Articles | Page | 10 |
| Federal Cases | Page | 14 |
| Court of Appeals | Page | 16 |
| Appellate Divisions | Page | 18 |

the importance of the individual child's protection versus the need to uphold the standards and policies of the institution in order to keep the environment safe.

Snapshot of the Industry

The National Conference of State Legislatures (NCSL) reports that just over 400,000 children live in foster care and approximately 50,000 reside in placements known as "congregate care," which includes group homes, residential treatment facilities, psychiatric institutions, and emergency shelters. According to NCSL's data collected between 2009 and 2013, approximately 62 percent of children in congregate care are male, and 37 percent are female. "Congregate Care, Residential Treatment and Group Home State Legislative Enactments 2009-2013," National Conference of State Legislatures, Feb. 10, 2017. The data is silent as to the gender percentages among the staff members employed by these facilities.

According to IBISWorld, which defines itself as "a provider of fully researched, dependable and up-to-date industry and procurement intelligence …, most industry operators are small local organizations. This is because this industry provides residential care facilities primarily through group homes, children's villages, halfway homes and boot camps, which tend to be operated in a local sphere. In 2016, there [were] an estimated 7,614 organizations in this industry, of which 56.8% have less than 20 employees."

**Child Protection Versus Employment Discrimination**

Children in residential group home settings are particularly vulnerable. Due to their immense need for behavioral adjustments and in an attempt to avoid future incarceration, these children need guidance, structure and protection.

The adults charged with the duty to provide care for children in residential group homes bear a great responsibility. The staff must be especially mindful while caring for children, in particular when the staff member is the opposite gender than the child. The children in these settings are entitled to a safe, protective environment and the staff members must constantly weigh whether a cross-gender care situation is improper or not, with even the appearance of impropriety possibly making a situation improper. This concept makes the cross-gender supervision issue a potentially complicated one to navigate for both staff and children.

Some children in group homes have a tendency to push the limits and boundaries through their actions, attitudes, and behavior, potentially opening the door for staff members to behave or react in inappropriate and damaging ways. Just as children are entitled to protection, staff members and employees of residential group homes are entitled to certain legal protections as well. Employees are entitled to protection against employment discrimination, both gender-based and otherwise.

Staff members in residential group homes face particularly challenging situations. Not only are they responsible for caring for the children, they must also anticipate how their actions appear to the children, their superiors, and the public.

Discrimination based on gender in many settings is illegal. However, because this is a particularly sensitive and vulnerable population to work with, there is a potentially tricky balance between steering clear of discrimination while hiring and/or assigning work shifts, and ensuring that children in the group home remain safe. As previously stated, although the law is curiously silent as to cross-gender supervision of children in residential group home settings, principles may be inferred from issues that have arisen in the corrections world. This may inevitably result in greater vigilance, stressors at work, and increased vulnerability to false allegations. For example, in the complaint and jury demand in the case of *Samone Walker and Dashawn Walker v. City and County of Denver, Denver Sheriff Department*, Case 1:15-cv-02539-MSK, filed 11/18/15, (D. Colo.), an issue arose when female corrections officers felt discriminated against as a result of an unbalanced policy assigning them to supervise male inmates disproportionately compared to the frequency of male corrections officers being assigned to supervise female inmates. The female corrections officers asserted that this practice exposed them to sexual harassment from male inmates and put their safety and employment at greater risk than their male counterparts. So as not to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, plaintiffs

suggested that the lawful and reasonable response was not to abolish cross-gender supervision in the corrections setting, but to equally and proportionately distribute the burden of cross-gender supervision between deputies of both genders.

**A State Example**

In New York state, the Office of Children and Family Services exercises control and enforcement powers which may apply to residential facilities authorized by article 19-G of the executive law. McKinney's Social Services Law §462-b [Responsibility for Enforcement]. Both sources are silent as to cross-gender supervision of children in residential group home settings.

States are generally not responsible for running group homes or writing the manuals for the facilities to follow. The state does, however, provide licensing policies. According to New York state regulations, 18 NYCRR 448.1(a), a "*child*" is defined as a person who has not attained their 21st birthday, and, except for a sibling or a child whose mother is placed in the same facility, is at least five years of age.[2]

Section 448.2 outlines the conditions of operation of a group home program and mandates that only a professionally trained social worker, a person with experience in child welfare, or a person holding a master's degree in a related field who is in the employ of the agency shall supervise the group home program. Moreover, the agency must establish a procedure to obtain background and other information on each applicant for employment or volunteer and must inquire whether certain persons who may have regular and substantial contact with children being cared for by the group home are the subjects of indicated reports of child abuse or maltreatment. There is no specific mention of gender included in this provision.[3]

Section 448.3 outlines the requirements for each group home, including the meaning of adequate supervision, qualifications of child-care staff, staff member applications and background checks, etc. This section mandates that except for mothers and their children, children of different sexes over the age of five shall not sleep in the same room, that each child shall have a separate bed spaced at least two feet apart from other beds, and that staff members shall be provided with sleeping quarters separate from those of children. 18 NYCRR 448.3, 18 NY ADC 448.3. Aside from provisions mandating that children and staff members sleep in different rooms, there is no specific mention of gender differences or precautions addressed directly.

**Supervision at Night**

When determining which individual staff members will supervise during overnight shifts, there are several theoretical, practical and safety considerations that must be taken into account.

Many residences allow cross-gender supervision. Each residence must put policies in place to safeguard both the residents of the house as well as the staff members. Finances permitting, residential facilities often try to assign more than one staff person to work an overnight shift.

Moreover, most residences follow a different set of procedures at night than during the day because of the obvious potential for malfeasance. Ideally, children should be sleeping during most of the night shift. But issues arise when they are either unexpectedly awake, ill or upset, or unable to sleep. For these reasons, staff on night duty are tasked with staying awake at all times in order to maintain an active supervisory role.

One way to combat safety issues stemming from cross-gender supervision is to assign at least one staff member of each gender when dealing with a mixed gender residence. Security measures may also be taken such as the installation of recording devices throughout the residence in order to deter improper behavior by either the residents or staff members.

Room restrictions may also be put in place, prohibiting staff members from entering the room of a child of the opposite gender (or even the same gender) except for good cause. Policy can direct that cross-gender supervision must take place in common areas. Of course, for safety or good-cause reasons, exceptions can be made.

## Conclusion

Steering between being "gender-blind" and "gender-sensitive" is not an easy course to navigate. Supervision requirements do not lessen when residents are participating in "private" events, such as showering or engaged in personal hygiene. The concerns that may follow from cross-gender supervision include humiliation, invasion of privacy, retraumatization, and boundary violations.

Although there is sparse case law specifically deciding issues arising out of cross-gender supervision of children in residential facilities, there is much authority regarding cross-gender supervision in the correctional field. Many of the approaches taken in that field may be applicable to the cross-gender supervision of children in group home settings.



**Julia Sands, a New York attorney, can be reached at jmsandslaw@gmail.com. Daniel Pollack, a professor at Yeshiva University's School of Social Work in New York City and a frequent expert witness in child welfare cases, can be reached at dpollack@yu.edu.

**Endnotes:**

1. See 28 CFR 115.215—Limits to cross-gender viewing and searches.

§115.215 Limits to cross-gender viewing and searches.

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) As of August 20, 2015, or August 21, 2017 for a facility whose rated capacity does not exceed 50 residents, the facility shall not permit cross-gender pat-down searches of female residents, absent exigent circumstances. Facilities shall not restrict female residents' access to regularly available programming or other outside opportunities in order to comply with this provision.

(c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female residents.

(d) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where residents are likely to be showering, performing bodily functions, or changing clothing.

(e) The facility shall not search or physically examine a transgender or intersex resident for the sole purpose of determining the resident's genital status. If the resident's genital status is unknown, it may be determined during conversations with the resident, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex residents, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

2. 18 NYCRR 448.1, 18 NY ADC 448.1:

(a) *Child* shall mean a person who has not attained his 21st birthday, and, except for a sibling or a child whose mother is placed in the same facility, is at least five years of age.

(b) *Sibling* shall mean a child who has a common parent with another child.

3. 18 NYCRR 448.2, 18 NY ADC 448.2: An authorized agency shall operate a group home program only after obtaining an operating certificate for such program. An operating certificate will be issued by the department only when the conditions of this Part and Parts 476 and 477 of this Title are met.

(a) A professionally trained social worker, a person with experience in child welfare, or a person holding a master's degree in a related field who is in the employ of the agency shall supervise the group home program.

(b) The determination as to the children to be placed in each group home shall be made by the person designated to supervise the program or by an interdisciplinary team, when it is the general practice of the agency to use such services.

(c) The agency must establish a procedure to obtain background and other information on each applicant for employment or to be a volunteer in the group home and to evaluate each such applicant as to his/her personal, employment and experiential qualifications in accordance with the requirements of this Part.

(d) The agency must inquire, in accordance with the provisions of section 448.3(c) of this Part, whether certain persons who may have regular and substantial contact with children being cared for by the group home are the subjects of indicated reports of child abuse or maltreatment on file with the Statewide Central Register of Child Abuse and Maltreatment or are found on the Register of Substantiated Category One Cases of Abuse or Neglect ("staff exclusion list") maintained by Vulnerable Persons' Central Register ("VPCR"), as required by section 495 of the Social Services Law.

**New York**
**Children's Lawyer**

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

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

# NEWS BRIEFS

**SECOND DEPARTMENT NEWS**

**Announcement:** The Director and staff of the Attorneys for Children Program, Second Judicial Department, extends their heartfelt congratulations to the Hon. Randall T. Eng, Presiding Justice, on his retirement at the end of this year. It has been with the support and guidance of Justice Eng, who was appointed as Presiding Justice on October 1st, 2012, that we have maintained our efforts toward the long-term goal of ensuring the best possible legal representation for children.

**Continuing Legal Education Programs**

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

On August 16, 2017, the Appellate Division, Second Judicial Department and the Attorneys for Children Program sponsored ***an Overview and Discussion of the Implications of Chapter 35 of the Laws of 2017: Amended Legislation Which Prohibits Marriages of Minors under the Age of 17 and Raises the Age of Consent to Marriage to the Age of 17.*** The speakers were Dorchen A. Leidholdt, Esq., Director, Center for Battered Women's Legal Services, Sanctuary for Families, New York City, and Fraidy Reiss, Executive Director, Unchained at Last.

On October 2, 2017, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. Gary Solomon, Esq., Legal Aid Society, NYC, Juvenile Rights Practice, presented ***Caselaw and Ethics Decisions Update***. Rachel D. Godsil, Esq., Professor of Law and Chancellor's Scholar, Rutgers Law School, and Co-Founder and Director of Research, Perception Institute, presented ***Insights from Implicit Bias, Racial Anxiety, and Stereotype Threat***. This seminar was held at Brooklyn Law School, Brooklyn, New York.

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

On November 3, 2017, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. Gary Solomon, Esq., Legal Aid Society, NYC, Juvenile Rights Practice, presented ***Caselaw and Legislative Update***; Richard M. Maltz, Esq., Counsel, Frankfurt, Kurnit, Klein & Selz, PC, presented ***Lawyers in the Cloud; Ethical Pitfalls in the Electronic Age***; Lloyd M. Eisenberg, Esq., Eisenberg & Carton, Presented ***Electronic Evidence; Admissibility and Evidentiary Issues***. This seminar was held at the Westchester County Supreme Court, White Plains, New York.

**Tenth Judicial District (Nassau County)**

On November 14, 2017, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. Martin Feinman, Esq., Director of Juvenile Justice Training, Legal Aid Society, New York City, Juvenile Rights Practice, presented ***Juvenile Delinquency Proceedings; Arrest to Disposition***. This seminar was held at Hofstra University Law School, Hempstead, New York.

**Tenth Judicial District (Suffolk County)**

On October 24, 2017, the Appellate Division, Second Judicial Department, and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. The Hon. Andrew Crecca, Supervising Judge of the Matrimonial Parts of the Suffolk County Supreme Court, and Stephen Gassman, Esq., Gassman, Baiamonte, Gruner, PC, co-presented ***Examination of Expert Witnesses: Mental Health Professionals***. This seminar was held at the Suffolk County Supreme Court, Central Islip, New York.

The seminars described above, together with accompanying handouts, can be viewed on the Appellate Division Second Department's website. Please

contact Gregory Chickel at gchickel@nycourts.gov to obtain access to these programs.

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

## THIRD DEPARTMENT NEWS

### Hon. Karen K. Peters Retiring

On behalf of the Appellate Division, Third Judicial Department, Office of Attorneys for Children, we would like to extend our heartfelt congratulations to Presiding Justice Karen K. Peters on the occasion of her retirement at the end of 2017. We are so grateful to Presiding Justice Peters for her leadership and support, as well as her many decisions that respected the voice of the child and improved and impacted the legal representation of children.

### New Advisory Committee Member

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 the Hon. Paul Pelagalli, Saratoga County Family Court, has been appointed to the Advisory Committee for the Office of Attorneys for Children, effective November 1, 2017. Prior to his election to the bench, Judge Pelagalli served as an AFC panel member in Saratoga County and as Assistant District Attorney, Assistant County Attorney, and Assistant Public Defender in Saratoga County, as well as Town Attorney for Clifton Park. We welcome Judge Pelagalli and very much look forward to working together to insure the highest quality legal representation by attorneys for children.

### Liaison Committees

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

### 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

**SAVE THE DATES:** Training dates for Spring 2018 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.

*Annual Topical Conference*

**Friday, April 27, 2018**
(Presentation of the Hamilton Award)
Location and Agenda To Be Determined

*Children's Law Update 2018*

**Friday, May 11, 2018**
Crowne Plaza Resort, Lake Placid
Agenda To Be Determined

*Raise the Age*

For Third and Fourth Department AFC Panel Members

**Thursday, May 31, 2018**

Sheraton Syracuse University Hotel & Conference Center
Agenda To Be Determined

## FOURTH DEPARTMENT NEWS

### Re-certification Form

The Appellate Division, Fourth Department Court Rules require current panel members to submit a Panel Re-Designation Application to the Office of Attorneys for Children annually, in order to be eligible for re-designation on April1st of each year. A copy of the Panel Re-Designation Application was recently provided to all panel members. The Panel Re-Designation Application was designed to reflect and document your desire to continue serving on the panel, your knowledge of and compliance with the Summary of Responsibilities of the Attorney for the Child and any significant information that our office should be aware of concerning your standing as a panel member.

### Spring Seminars/Seminar Dates

### Seminars for Prospective Attorneys for Children

**April 12-13, 2018**

*Introduction to Effective Representation of Children II – Child Protective & Custody Proceedings*

East Avenue Inn & Suites

Rochester, NY

Offered in collaboration with the Third Department AFC Program, Fundamentals I and II are basic seminars designed for prospective attorneys for children. The Program requires prospective attorneys for children to attend both seminars. A light breakfast and lunch will be provided to all each day.

### Seminars for Attorneys for Children

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

**March 29, 2018**

*Topical Seminar on Child Welfare*

DoubleTree Rochester

Rochester, NY

**May 3, 2018**

*Update*

Center for Tomorrow (University of Buffalo)

Buffalo, NY

**May 31, 2018**

*Topical Seminar on Advanced JD Practice* (3rd and 4th Depts.)

Sheraton

Syracuse, NY

### Your Training Expiration Date

If you need to attend a training seminar or watch at least 5.5 hours of approved videos on the AFC website before April 1, 2018, to remain eligible for panel designation, you should have received a letter to that effect in October 2017. Please remember, however, that it is your responsibility to ensure that your training is up-to-date. Because of the new video option, there will be no extensions.

If you are unable or do not want to attend live training you may satisfy your AFC Program training requirement for recertification by watching at least 5.5 hours of CLE video on the Attorneys for Children Program link to the Appellate Division, Fourth Department website at http://nycourts.gov/ad4 . Once on the AFC page, click on "Training Videos" and then "Continuing Training." Authority to view the online videos and access training materials is restricted to AFC and is password protected. For both videos and materials, your "User Id" is AFC4 and your "Password" is DVtraining.

You may choose the training segments that most interest you, but the segments you choose must add up to at least 5.5 hours. We are unable to process applications for AFC Program or NYS CLE for less than 5.5 hours credit. If you choose the video option instead of attending a live seminar, you must correctly fill out an affirmation and evaluation for each segment and forward all original forms together to Jennifer Nealon, AFC Program, 50 East Avenue, Rochester, NY 14604 **by March 1, 2018.** Incorrect or incomplete affirmations will be returned.

There are directions on the "Continuing Training" page of the AFC website. Please read the directions carefully before viewing the videos. You are not entitled to video CLE credit if you attended the live program. Effective January 1, 2016, attorneys admitted less than two years may receive NYS CLE credit in the areas of Professional Practice and Law Practice Management for viewing on-line videos. However, attorneys admitted less than two years remain ineligible to receive NYS CLE credit in the areas of Ethics and Skills for viewing online videos. Please retain copies of your affirmations and your CLE certificates. We are unable to tell you what videos you viewed.

**Congratulations to New Judges**

**5th Judicial District**

Hon. Paul M. Deep
Oneida County Family Court

Hon. Mary Keib Smith
Onondaga County Surrogate Court

**7th Judicial District**

Hon. John B. Gallagher, Jr.
Monroe County Supreme Court

Hon. Patrick McAllister
Steuben County Surrogate Court

Hon. Philip Roche
Steuben County Family Court Judge

**8th Judicial District**

Hon. Acea M. Mosey
Erie County Surrogate Court

Hon. Erin DeLabio
Niagara County Family Court

Hon. Sanford Church
Orleans County Family Court

# RECENT BOOKS AND ARTICLES

**CHILD SUPPORT**

Nancy Chausow Shafer, *Income Shares is Here: Now What? Implementation Issues and Some Possible Solutions,* 30 DCBA Brief 26 (2017)

Jane C. Venohr, *Differences in State Child Support Guidelines Amounts: Guidelines Models, Economic Basis, and Other Issues,* 29 J. Am. Acad. Matrim. Law. 377 (2017)

**CHILD WELFARE**

Elizabeth Fordyce, *Too Young to Understand, but Old Enough to Know Better: Defining the Rights of Transition-Age Youth in the Child Welfare System,* 94 Denv. L. Rev. 567 (2017)

Emma McMullen, *For the Good of the Group: Using Class Actions and Impact Litigation to Turn Child Welfare Policy Into Practice in Illinois,* 37 Child. Legal Rts. J. 236 (2017)

Jennifer Miller, *Creating a Kin-First Culture in Child Welfare,* 36 No. 4 Child L. Prac. 83 (2017)

Sara Schleicher, *Tennessee Court Supports Infants in the Child Welfare System,* 36 No. 5 Child L. Prac. 116 (2017)

**CHILDREN'S RIGHTS**

Emily A. Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color,* 41 Harv. Envtl. L. Rev. 493 (2017)

Devan Byrd, *Challenging Excessive Force: Why Police Officers Disproportionately Exercise Excessive Force Towards Blacks and Why This Systemic Problem Must End,* 8 Ala. C.R. & C.L. L. Rev. 93 (2017)

Alexandra M. Franco, *Transhuman Babies and Human Pariahs: Genetic Engineering, Transhumanism, Society and the Law,* 37 Child. Legal Rts. J. 185 (2017)

Kajal Patel, *Child Prostitutes or Sexually Exploited Minors: The Deciding Debate in Determining How Best to Respond to Those Who Commit Crimes as a Result of Their Victimhood,* 2017 U. Ill. L. Rev. 1545 (2017)

Lori Probasco, *Around the World: The Rights of Children in Our Changing Climate,* 37 Child. Legal Rts. J. 257 (2017)

Dorit Rubinstein Reiss, *Decoupling Vaccine Laws,* 58 B.C. L. Rev. E-Supplement 9 (2017)

**CONSTITUTIONAL LAW**

Katrina V. Berroya, *Bullying Beyond the Schoolhouse Gate: How School Districts Can Constitutionally Regulate Off-Campus Cyberspeech,* 46 Sw. L. Rev. 445 (2017)

Dianna Felberbaum, *Boys Will be Girls, and Girls Will be Boys: Urging the Supreme Court to Recognize a Transgender Student's Right to Use the Appropriate Facilities in a Federally Funded School,* 33 Touro L. Rev. 1043 (2017)

Hillel Y. Levin, *Why Some Religious Accommodations for Mandatory Vaccinations Violate the Establishment Clause,* 68 Hastings L. J. 1193 (2017)

Genevieve Vince, *With Liberty and Justice for Some: Denial of Meaningful Due Process in School Disciplinary Actions in Ohio,* 65 Clev. St. L. Rev. 259 (20170

**COURTS**

Maria Lourdes Asención, *Classified Websites, Sex Trafficking, and the Law: Problem and Proposal,* 12 Intercultural Hum. Rts. L. Rev. 227 (2017)

Gallant Fish, *No Rest for the Wicked: Civil Liability Against Hotels in Cases of Sex Trafficking,* 23 Buff. Hum. Rts. L. Rev. 119 (2016-2017)

Sean Hannon Williams, *Wild Flowers in the Swamp: Local Rules and Family Law,* 65 Drake L. Rev. 781 (2017)

**CUSTODY AND VISITATION**

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)

Margaret Ryznar, *The Empirics of Child Custody,* 65 Clev. St. L. Rev. 211 (2017)

**DOMESTIC VIOLENCE**

Elie A. Maalouf, *Tougher Measures: How the New Massachusetts Strangulation Law Demonstrates the Need for Stricter Penalties and "No-Drop" Prosecution Policies in Domestic Violence Disputes,* 50 Suffolk U. L. Rev. 295 (2017)

Kelly Morgan, *Circumstances Requiring Safeguards: Limitations on the Application of the Categorical Approach in* Hernandez-Zavala v. Lynch, 58 B.C. L. Rev. E-Supplement 243 (2017)

**EDUCATION LAW**

Jeremy M. Brooks, Tinkering *With Students' Free Speech Beyond the Schoolhouse Gate During the Digital Age,* 43 Rutgers Computer & Tech. L. J. 141 (2017)

Kevin Brown, *The Enduring Integration School Desegregation Helped to Produce,* 67 Case W. Res. L. Rev. 1055 (2017)

Cara Duchene, *Rethinking Religious Exemptions From Title IX After* Obergefell, 2017 B.Y.U. Educ. & L. J. 249 (2017)

James Eastman, *Regaining Trust in Nonprofit Charter Schools: Toward Benefit Corporation Branding for For-Profit Education Management Organizations,* 2017 B.Y.U. Educ. & L. J. 285 (2017)

Samuel T. Jay, *A Higher Power Produces Greater Problems: How Religious Honor Codes and Religious Schools Exacerbate Campus Sexual Assault,* 25 Am. U. J. Gender Soc. Pol'y & L. 179 (2017)

Nat Malkus & Tim Keller, *Federal Special Education Law and State School Choice Programs,* 18 Federalist Soc'y Rev. 22 (2017)

Joshua T. Mangiagli, *The Next Step: Protecting LGBTQ Students in Our Schools,* 95 Denv. L. Rev. Online 23 (2017)

Elizabeth A. Shaver & Janet R. Decker, *Handcuffing a Third Grader? Interactions Between School Resource Officers and Students with Disabilities,* 2017 Utah L. Rev. 229 (2017)

Thomas R. Smith, *Not Throwing in the Towel: Challenging Exclusive Interscholastic Transgender Athletic Policies Under Title IX,* 24 Jeffrey S. Moorad Sports L. J. 309 (2017)

Lauren Tonti, *Food for Thought: Flexible Farm to School Procurement Policies can Increase Access to*

*Fresh, Healthy School Meals,* 27 Health Matrix 463 (2017)

Kevin Woodson, *Why Kindergarten is Too Late: The Need for Early Childhood Remedies in School Finance Litigation,* 70 Ark. L. Rev. 87 (2017)

**FAMILY LAW**

Leslie Joan Harris, Obergefell's *Ambiguous Impact on Legal Parentage,* 92 Chi.-Kent L. Rev. 55 (2017)

Kyle Kennedy, *How to Combat Prenatal Substance Abuse While Also Protecting Pregnant Women: A Legislative Proposal to Create an Appropriate Balance,* 70 Ark. L. Rev. 167 (2017)

Kevin Maillard, *Other Mothers,* 85 Fordham L. Rev. 2629 (2017)

Solangel Maldonado, *Sharing a House but not a Household: Extended Families and Exclusionary Zoning Forty Years After* Moore, 85 Fordham L. Rev. 2641 (2017)

Major Michelle D. Marty, *Thinking Outside the Five-Sided Box: An Analysis of the Department of Defense's Parental Accommodations,* 77 A.F. L. Rev. 85 (2017)

Christina Potter-Bayern, *The Changing Needs of the Workplace: Looking to State Statutory Expansions for Guidance on FMLA Reform,* 7 Am. U. Lab. & Emp. L.F. 1 (2017)

David A. Prentice, *3-Parent Embryos, Gene Edited Babies and the Human Future,* 32 Issues L. & Med. 233 (2017)

Robert L. Rabin, *Dov Fox on Reproductive Negligence: A Commentary,* 117 Colum. L. Rev. Online 228 (2017)

Lauren R. Roth, *Reproductive Selection Bias,* 27 Health Matrix 263 (2017)

Mark Walsh, *Married With Kids,* 103-SEP A.B.A. J. 20 (2017)

**FOSTER CARE**

Mary Bissell, *Recruiting and Supporting Kinship Foster Families,* 36 No. 4 Child L. Prac. 88 (2017)

Matthew W. Dietz, *Assistance Animals in Foster Care,* 91-OCT Fla. B. J. 40 (2017)

**IMMIGRATION LAW**

Michael J. Higdon, *State Misdemeanant, Federal Felon: Adolescent Sexual Offenders and the INA,* 2017 U. Ill. L. Rev. 963 (2017)

**INTERNATIONAL LAW**

Megan Rossman, *The War on Syrian Girls: Supporting the Criminalization of Sex-Related Violence and Trafficking of Minor Refugees,* 37 Child. Legal Rts. J. 219 (2017)

**JUVENILE DELINQUENCY**

Patrick Harty, *The Moral and Economic Advantages of Raising the Age of Criminal Responsibility in New York Among Juvenile Offenders, and Plans for Rehabilitation,* 33 Touro L. Rev. 1099 (2017)

Erin Mower Adams, *Noncitizen Youth in the Juvenile Justice System: The Serious Consequences of Failed Confidentiality by ICE Referral,* 2017 B.Y.U. L. Rev. 385 (2017)

Marsha Levick, *Through Rose-Colored Glasses: The Twenty-First Century Juvenile Court,* 42 Hum. Rts. 23 (2017)

Shandra Monterastelli, *Every Hand's a Loser: The Intersection of Zero-Tolerance Policies, Mental Illness in Children and Adolescents, and the Juvenile Justice System,* 41 Law & Psychol. Rev. 209 (2016-2017)

**TERMINATION OF PARENTAL RIGHTS**

Rachel Turetsky, *Prohibiting Child-Parent Visitation After Parental Rights are Terminated by Trial in New York: Denial of Parental Due Process,* 38 Cardozo L. Rev. 2233 (2017)

# FEDERAL COURTS

**Because Officer Had Objectively Reasonable Suspicion to Detain Plaintiff, and Because Officer's Detention of Plaintiff Did Not Ripen Into an Arrest, Officer Was Entitled to Qualified Immunity**

Plaintiff, a teenaged train enthusiast, was stopped and handcuffed after police received a 911 report that someone holding an electronic device was bending down by the tracks at a rail crossing. After a search of the tracks by the Metropolitan Transit Authority ("MTA"), the police officers turned plaintiff over to the MTA officers, who detained him and charged him with trespass. After the trespass charge was dismissed, plaintiff sued all concerned. The only remaining defendants were the police officers. Plaintiff alleged false arrest, failure to intervene, and failure to supervise. The district court denied the police officers' motion for qualified immunity. The Second Circuit reversed. Qualified immunity protected officials from liability for civil damages as long as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Rights must be clearly established in a particularized sense, rather than at a high level of generality. Such rights were only clearly established if a court could identify a case where an officer acting under similar circumstances was held to have acted unconstitutionally. The qualified immunity standard was forgiving and protected all but the plainly incompetent or those who knowingly violated the law. Plaintiff's unlawful arrest claimed failed because his handcuffing was an investigatory detention (otherwise known s a "*Terry* stop") that never ripened into an arrest. The officer had reasonable suspicion to stop plaintiff either for unlawful interference with a train or for trespass. Less than a month earlier, the officer had received a training circular advising that someone had attempted to sabotage a railroad in nearby Patterson, New York, using "a homemade device, wrapped in black tape with a radio-control antenna affixed." The dispatcher called in a tip from an observer that someone was "bending down by the tracks with a remote control object in his hands," and the officer saw someone matching the observer's description with various electronic devices, some more familiar than others. Plaintiff told the officer he was a train buff and had received permission from the MTA to take photographs as long as he was not on MTA property, but the officer was not required to credit an innocent explanation that seemed implausible given his knowledge at the time. Handcuffing was ordinarily not incident to a *Terry* stop, and tended to show that a stop had ripened into an arrest. However, it was not unreasonable for the officer to handcuff plaintiff in order to ensure that he could not press a detonator button on any electronic device until the tracks could be searched. The officer's intent to handcuff plaintiff for protection rather than pursuant to arrest was clear. The officer never administered a Miranda warning, and he explained to plaintiff that he was handcuffing him "for my safety and your safety...[u]ntil I find out what's going on." Because the officer had an objectively reasonable suspicion to detain plaintiff, and because the officer's detention of plaintiff did not ripen into an arrest, the officer was entitled to qualified immunity on the false arrest claim. Plaintiff's remaining claims were without merit. The dissent asserted that this was a full-blown arrest without probable cause.

*Grice v. McVeigh*, 873 F.3d 162 (2d Cir. 2017)

**Government's Motion for Federal Prosecution of Juvenile as Adult Granted**

The government filed a Juvenile Information against defendant, a member of the MS-13 gang, charging him with one count of conspiracy to murder in aid of racketeering, one count of attempted murder in aid of racketeering, and one count of assault with a dangerous weapon, as well as one count of brandishing and discharging a firearm(s) in furtherance of a crime of violence. These charges related to the alleged attempted murder of a member of a rival gang, Goon Squad, when defendant was sixteen years and six months old. The government filed a Superceding Juvenile Information, charging defendant with the counts contained in the initial Information, as well as additional racketeering charges and murder in the aid of racketeering. The additional charges related to the alleged brutal murder of a fellow MS-13 gang member

suspected of cooperating with law enforcement and violating the rules of the MS-13 gang, when defendant was nearly seventeen years old. The government subsequently moved, pursuant to 18 U.S.C. Section 5032, to transfer the case to a district court in order to prosecute defendant as an adult. The district court granted the government's motion. A juvenile fifteen years of age or older who was alleged to have committed an act after his fifteenth birthday which, if committed by an adult, would be a felony that was a crime of violence, may be proceeded against as an adult where a district court found that it was in the interests of justice to grant a transfer. The government met its burden of proving by a preponderance of the evidence that defendant's transfer to adult status was warranted. The callous attempted murder and murder were alleged to have been committed as part of defendant's alleged participation in MS-13. Thus, the nature of the alleged offense was entitled to special weight, and the types of serious crimes alleged weighed strongly in favor of transfer. Despite his lack of a criminal record and no indication of past treatment efforts, the record demonstrated that defendant was not likely to respond to rehabilitative efforts. Defendant was already eighteen years old, and that also strongly suggested that he was not likely to respond to juvenile-type rehabilitation programs. Additionally, defendant qualified for a diagnosis of adolescent antisocial behavior, which also weighed strongly in favor of transferring the case.

*U.S. v. Juvenile Male*, __ F.3d ___, 2017 WL3913174 (EDNY 2017)

# COURT OF APPEALS

**Record Supported Finding of Neglect**

Court of Appeals affirmed order and answered certified question in the affirmative in Matter of Ruth Joanna O.O., 149 AD3d 32 (1st Dept 2017) [see below]. The record supported the affirmed findings that Melissa O. committed acts constituting child neglect and the child was a neglected child as defined by Family Court Act §1012.

*Matter of Ruth Joanna O.O.*, __ NY3d ___, 2017 WL 5485374 (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 Neglect Petition Terminated Court's Jurisdiction to Conduct Permanency Hearing Under FCA Article 10-A**

One week after the subject child's birth, at the request of the Department of Social Services, Family Court directed the temporary removal of the subject child from respondent mother's custody pursuant to an ex parte pre-petition order under Family Court Act (FCA) § 1022. More than a year later, on the eve of the fact-finding hearing, the court denied the Department's motion to amend its neglect petition to conform the pleadings with the proof. The court subsequently found that the Department failed to prove neglect, and therefore dismissed the petition. However, the court did not release the child into her mother's custody. Instead, at the Department's insistence, and over the mother's objection, it held a second permanency hearing, which had been scheduled as a matter of course during the statutorily required first permanency hearing. The court and the Department contended that, even though the Department had failed to prove any legal basis to remove the child from her mother, Article 10-A of the FCA gave the court continuing jurisdiction over the child, and entitled it to continue her placement in foster care. Solely to expedite her appeal, the mother consented to a second permanency hearing order denying her motion to dismiss the proceeding and continuing the child's placement in foster care. The Appellate Division, with two Justices dissenting, affirmed the second permanency order. The Court of Appeals reversed and held that the Family Court did not retain subject matter jurisdiction to conduct a permanency hearing under FCA Article 10-A once the underlying Article 10 neglect petition had been dismissed for failure to prove neglect. The Department's contention was rejected that the appeal had been rendered moot because the second permanency hearing order (from which the appeal was taken) was superseded by a third order, a fourth permanency hearing was scheduled, a proceeding to terminate the mother's parental rights was commenced and stayed pending the result of the appeal, and a

second neglect petition was filed. None of those occurrences resolved the conflict between the parties, and each permanency hearing remained subject to the same jurisdictional objection as its predecessor. Even if the appeal was moot, the exception to that doctrine would apply. As to preservation, the mother's eventual consent to the second permanency order was expressly understood by all parties and by the court as a means of expediting appellate review, not a waiver of the alleged defect. The authority in FCA § 1088 to maintain jurisdiction until the Family Court discharged a child from foster care was to be considered in the light of § 1088's place in the statutory scheme, the legislative history of Article 10-A, and parents' and children's constitutional rights to remain together. Article 10 erected a "careful bulwark" against unwarranted state intervention into private family life. Neglect findings could not be casually issued, but required proof of actual or imminent harm to the child as a result of a parents' failure to exercise a minimum degree of care. This prerequisite ensured that the court, in deciding whether to authorize state intervention, would focus on serious harm or potential harm to the child, not on what might be deemed undesirable parental behavior. Adopting the Department's interpretation of § 1088 would permit a temporary order issued in an ex parte proceeding to provide an end-run around the protections of Article 10. Nothing in the legislative history of Article 10-A suggested that the drafters intended to overturn the long-established rule that the dismissal of a neglect petition divested the court of jurisdiction to issue further orders or impose additional conditions on a child's release.

*Matter of Jamie J.*, __ NY3d __, 2017 WL 5557887 (2017)

# APPELLATE DIVISIONS

## ADOPTION

### Birth Father's Consent Not Required for Adoption of Child

Surrogates Court appropriately determined that the father's consent was not required for the adoption of his child. The subject child was born in June, 2015 and the mother immediately signed an extra-judicial consent permitting the child to be adopted. The father failed to make the necessary showing that he took any meaningful steps in the six months preceding the child's birth and placement for adoption, for purposes of showing his willingness to assume full custody of the child. The father had a criminal history and was repeatedly incarcerated before and after the child's birth. The father had also done little to assist the mother of the child with prenatal care. The father also provided limited financial support for the child, did not have a support network of friends or family, did not have any job prospects or a driver's license. Consequently, since the father failed to show a "realistic commitment to assume custody" of the child, his consent was not necessary or required for the child to be adopted.

*Matter of Hudson LL.,* 152 AD3d 906 (3d Dept 2017)

### Consent of Biological Father Not Required

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

*Matter of Kolson (Janna A. – Michael T.)*, 153 AD3d 1665 (4th Dept 2016)

## APPEAL

### No Appeal Lies From Non-Dispositional Order in Permanent Neglect Proceeding

Family Court granted petitioner's application to adjudicate the subject children to be permanently neglected. The Appellate Division dismissed the appeal. Petitioner commenced this proceeding alleging that respondent father permanently neglected the children due, in part, to his substance abuse issues and incarceration. At the beginning of the fact-finding hearing, respondent's counsel was unable to explain respondent's absence. It then came to light that respondent had relapsed and tested positive for cocaine and heroin use. Before the hearing, respondent's parole office advised respondent to turn himself in because there was a warrant for his arrest. After the hearing, the court determined that petitioner established, by clear and convincing evidence, that respondent permanently neglected the children. Thereafter, a dispositional hearing was held, respondent's parental rights were terminated, and the children were freed for adoption. Respondent's appeal from the order of fact-finding was dismissed inasmuch as no appeal lies of right from a nondispositional order in a permanent neglect proceeding. Given respondent's default at the hearing and the apparent lack of merit in his appellate brief, his notice of appeal would not be treated as a request for permission to appeal.

*Matter of Melijah NN.,* 150 AD3d 1348 (3d Dept 2017)

## ATTORNEY CLIENT RELATIONSHIP

### Disqualification of Mother's Attorney Warranted

In custody modification proceeding, Family Court correctly disqualified the mother's attorney's law firm from representing her where an associate attorney in the mother's attorney's firm had previously represented the father in a prior custody proceeding involving the same parties and the same child. Since the father had established that (1) there was a prior attorney client relationship between the father and the associate, (2) that the matters in both representations were substantially similar and (3) the interests of the mother and father were materially adverse, the associate was disqualified from representing the mother. While the principal attorney in the mother's attorney's law firm opposed disqualification of himself, arguing that the associate would not have any involvement with the mother's file, Family Court was justifiably unpersuaded. In disqualifying the mother's attorney's entire law firm, the court noted that the associate previously signed a bill of particulars during the course of the litigation and the law firm was small with an informal environment. Consequently, Family Court was justified in finding that a sufficient firewall did not exist necessitating disqualification of the entire law firm.

*Matter of Yeomans v. Gaska,* 152 AD3d 1040 (3d Dept 2017)

## CHILD ABUSE AND NEGLECT

### Mother Neglected Daughter and Derivatively Neglected Son

Family Court found that respondent mother neglected her daughter and derivatively neglected her son. The Appellate Division affirmed. The finding of neglect and derivative neglect were supported by a preponderance of the evidence inasmuch as the record showed that the mother inflicted excessive corporal punishment on her daughter by striking her with her hand and a plastic softball bat, causing bruising all over the child's body. The mother also forced the child to remain in a bathroom for two days and unevenly shaved parts of the child's head, which seriously threatened the child's emotional well-being. The son was derivatively neglected inasmuch as the physical and emotional abuse towards the daughter demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for the son in the mother's care.

*Matter of Naitalya B.*, 150 AD3d 441 (1st Dept 2017)

### Father Neglected Infant by Allowing Mother to Return Home

Family Court determined that respondent father neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the father neglected the children. The record showed that the father allowed respondent mother to return to the family home despite her assaults on the father leading to the issuance of an order of protection, and despite her arson conviction for setting the father's apartment on fire. The father also engaged in an act of domestic violence in proximity to the child.

*Matter of Serina C.,* 150 AD3d 463 (1st Dept 2017)

### Respondent Sexually Abused Daughter and Neglected Other Child

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

Petitioner demonstrated, by a preponderance of the evidence, that the father sexually abused his daughter and derivatively neglected another child, based upon his daughter's testimony, the testimony of the social worker, and the records of the advocacy center. The daughter's testimony did not require corroboration because she testified in open court and was subjected to cross-examination. Although the court noted discrepancies in the daughter's reports of abuse to others, it found her explanations believable, and expert testimony was not

required under the Family Court Act. The court properly found that the father's sexual abuse of the daughter showed such an impaired level of parental judgment as to create a substantial risk of harm to the other child, despite the passage of time.

*Matter of Genesis A.,* 150 AD3d 616 (1st Dept 2017)

**Child Neglected by Exposure to Parental DV**

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding of neglect. The record showed that the child was subject to actual or imminent danger of injury or impairment to his emotional and mental condition from exposure to repeated incidents of domestic violence between his parents in close proximity to the child. The mother refused referrals for assistance with the domestic violence, denied that it occurred, and allowed the father to care for the child while she worked, after learning that the father left the child alone in their apartment. The mother also knew or should have known of the father's mental illness and failed to protect the child from consequent risk.

*Matter of Toussaint E.*, 151 AD3d 417 (1st Dept 2017)

**Child Neglected on Account of Mother's Mental Illness**

Family Court found that respondent mother neglected the subject child. The Appellate Division affirmed. The evidence supported the court's finding that the mother's untreated mental illness harmed the child and put her at imminent risk of further harm. As a result of her mental illness, the mother removed the child from school and kept her socially isolated. Also, the mother's unfounded fear of radioactive contamination in her home caused dozens of emergency personnel to enter the home and the child was transported to the hospital for an unnecessary medical evaluation, which the child told caseworkers made her nervous. The mother's delusion also caused her to throw away the child's toys, clothing, furniture items, and all the family's food, causing the mother and child to not eat.

*Matter of Catherine M.,* 151 AD3d 517 (1st Dept 2017)

**Mother Neglected Child by Placing Child in Home of Person Mother Never Met**

Family Court found that respondent mother neglected the subject child. The Appellate Division affirmed.

A preponderance of the evidence showed that the mother neglected the child by allowing the child to live in the home of a person she had never met and whose full name and address were unknown to her; failing to provide that person with documentation necessary for the child to obtain dental treatment; failing to provide the child with financial support; and failing to act after learning that the child was homeless for months.

*Matter of Alonzo R.*, 151 AD3d 578 (1st Dept 2017)

**FCA Does Not Prohibit Family Court from Granting Retroactive Suspended Judgment**

Family Court granted respondent mother's motion to modify an order of disposition to the extent of entering in its stead a suspended judgment, dismissing the neglect petition, vacating the finding of neglect, and releasing the subject children to the mother's care. The Appellate Division affirmed. For the reasons explained in *Matter of Leenasia C.,* 154 AD3d 1 [see below], the argument that the court was not authorized to modify the dispositional order to the extent of granting a retroactive suspended judgment, was rejected. The mother's strict compliance with the dispositional order, and her clear dedication to ameliorating the conditions that led to the neglect finding, constituted "good cause" warranting the requested relief. In vacating the neglect finding, the court properly took into account the mother's ability to find work in her chosen field, inasmuch as the mother's employability was in the best interests of the children.

*Matter of Daniella A.,* 153 AD3d 426 (1st Dept 2017)

**Mother and Grandmother Abused Child, Causing Her Death**

Family Court found that respondents mother and grandmother abused the child S. and derivatively abused the child Q. The Appellate Division affirmed. A preponderance of the evidence supported the court's conclusion that S's injuries were inflicted and not accidental. S suffered a traumatic brain injury resulting in anoxic encephalopathy and subdural hematoma, causing her death. A pediatrician qualified as an expert in child abuse pediatrics, opined that S's injuries were the result of a shaking event. S had no skull fracture and, as one expert testified, without a skull fracture, the most likely explanation for the injuries was shaking. The testimony of petitioner's experts ruled out the possibility that the injuries were caused, as respondents claimed, by a short fall from a mattress to the floor. Respondent's own experts testified that it would be unusual and extremely rare for a child such as S to suffer such injuries from a short fall. The failure of petitioner's expert in child abuse pediatrics to review certain hospital records did not require the court to reject her testimony. The court carefully weighed all the expert testimony and there was no basis to disturb the court's finding that respondent's experts were less persuasive than petitioner's experts.

*Matter of Syriah J.,* 153 AD3d 430 (1st Dept 2017)

**FCA Does Not Prohibit Family Court from Granting Retroactive Suspended Judgment**

Family Court granted respondent mother's motion to modify an order of disposition to the extent of entering in its stead a suspended judgment, dismissing the neglect petition, and vacating the finding of neglect. The Appellate Division affirmed. The article 10 neglect proceeding was commenced after police found PCP, cartridges, and marijuana cigars in the vermin-infested apartment the mother shared with the children and her allegedly abusive boyfriend. The petition alleged that the mother admitted leaving her children in the care of her boyfriend, that she occasionally used PCP and marijuana, and that she did not manage medications for her eldest daughter. The children were eventually transferred to the kinship foster care home of the mother's great aunt. After the abusive boyfriend was removed from the home, the mother moved for the children's return. The court denied the motion, but granted supervised visitation. Thereafter, the mother consented to a neglect finding and shortly thereafter, when the agency reported that the mother continued to test negative for drugs, that she was cooperative and engaged, that the children were doing well at school and were very excited to be in the home, which had ample food, proper bedding and no insect infestation, the court released the children to the mother, under the supervision of ACS. After several more favorable reports about the mother's progress were submitted to the court, the mother brought a motion to change the dispositional order to a suspended judgment, to vacate the fact-finding order, and to dismiss the neglect petition. Family Court Act § 1061 applies to both fact-finding and dispositional orders and authorized the court to modify or vacate any order issued in an article 10 proceeding upon a good cause showing that the modification promoted the best interest of the child. Thus, the Family Court Act did not prohibit the court from granting a retroactive suspended judgment in order to vacate a finding of neglect and dismiss a neglect proceeding. Further, because there was no statutory presumption of compliance with the terms of a suspended judgment, the judgment itself did not expire by operation of law. Therefore, the court retained jurisdiction over the neglect proceeding to determine compliance with the terms and conditions, and could enforce, modify, or vacate an article 10 fact-finding or dispositional order at any time, upon a proper factual showing of compliance or noncompliance with the order and a showing of good cause. Here, the mother substantially complied with the dispositional order, she had no prior history of neglect, the children were not actually harmed, the mother testified negative for drugs in random screenings, and she displayed an unwavering commitment to be reunited with her children. The court properly considered the practical effect of vacating the neglect finding, i.e., the removal of a barrier to the mother's ability to find work in her chosen field, which was in the best interest of the children.

*Matter of Leenasia C.,* 154 AD3d 1 (1st Dept 2017)

**Evidence Was Insufficient to Establish, Prima Facie, Derivative Neglect**

The order appealed from, granted those branches of the petitioner's motion which were for summary judgment determining that the father neglected the child B. and derivatively neglected B.'s siblings. The father appealed. The Appellate Division modified. On or about April 11, 2012, the Administration for Children's Services (hereinafter ACS) commenced proceedings alleging that, on or about April 4, 2012, the father abused and neglected B. and B's five siblings. The father was subsequently arrested and indicted on four counts of sexual abuse in the first degree, four counts of sexual abuse in the second degree, and four counts of endangering the welfare of a child, with each count of the indictment identifying B. as the alleged victim. The father pleaded guilty to one count of endangering the welfare of a child (*see* PL § 260.10 [1]), in full satisfaction of the indictment. During his plea allocution, the father admitted that, on or about April 4, 2012, he knowingly acted in a manner likely to be injurious to the physical, mental or moral welfare of B. The Supreme Court noted on the record that the father was not being asked to admit to the particular acts that made him guilty of endangering the welfare of a child in view of the pending Family Court child protective proceeding. On May 21, 2014, the Supreme Court sentenced the father to three years of probation, and entered an order of protection directing him to, inter alia, stay away from B. for a period of five years. Based upon the father's plea, ACS moved for summary judgment on its petitions. The Family Court denied those branches of ACS's motion which were for summary judgment determining that the father abused B. and derivatively abused her siblings. However, the Family Court granted those branches of ACS's motion which were for summary judgment determining that the father neglected B. and derivatively neglected her siblings. Here, since the father's conviction for endangering the welfare of a child was based upon the same acts alleged to constitute neglect, the father's conviction established, prima facie, that B. was a neglected child. In opposition to ACS's prima facie showing, the father failed to raise a triable issue of fact. Accordingly, the Family Court properly granted that branch of ACS's motion which was for summary judgment determining that the father neglected B. However, the Family Court erred in granting that branch of ACS's motion which was for summary judgment determining that the father derivatively neglected B.'s siblings. Under the particular circumstances of this case, the father's limited plea allocution, in which he admitted solely to the statutory elements of endangering the welfare of a child, and that B. was the victim, was insufficient to establish, prima facie, that he derivatively neglected B.'s siblings. Accordingly, the matter was remitted to the Family Court for a fact-finding hearing on the issue of whether the father derivatively neglected these children.

*Matter of Samuel M.*, 150 AD3d 1006 (2d 2017)

**Record Did Not Support a Finding of Severe Abuse**

The children appealed from an order of fact-finding, which, after a hearing, found that the father did not abuse or severely abuse the child P. and did not derivatively abuse or derivatively severely abuse the child T. The Appellate Division modified. The petitioner made a prima facie showing that the father abused the child P. (*see FCA* §§ 1012 [e] [i]; 1046 [a] [ii]). The father, who testified on his own behalf at the fact-finding hearing and blamed his girlfriend for P.'s injuries, failed to rebut the inference that he was also responsible for the abuse, in that he failed to protect P. from physical danger. Moreover, the evidence demonstrated that the father's judgment and understanding of his parental duties were so defective as to create a substantial risk of harm to the child T. (*see* FCA §§ 1012 [e] [i]; 1046 [a] [ii]). Accordingly, the Appellate Division found that P. was abused by the father, and that T. was derivatively abused by the father. However, the Family Court properly found that there was not sufficient evidence to clearly and convincingly establish that the father acted under circumstances evincing a depraved indifference to human life so as to support a finding that he severely abused P. and derivatively severely abused T. (*see* SSL § 384-b [8] [a] [i]; FCA § 1051 [e]). Order modified.

*Matter of Yasin A.-K.*, 150 AD3d 1225 (2d 2017)

**Mother Failed to Maintain a Prescribed Treatment Regimen for Her Mental Illness**

The petitioner commenced a proceeding alleging that the mother neglected the subject child by placing the child in imminent risk of danger due to the mother's failure to undergo treatment for her mental illness. After a fact-

finding hearing, the Family Court found that the mother had neglected the child. An order of disposition was subsequently issued. The mother appealed. The appeal from the order of disposition which placed the child in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing was dismissed as academic, as that portion of the order had expired. However, the appeal from the portion of the order of disposition which brought up for review the finding that the mother neglected the child was not academic, since the adjudication of neglect constitutes a permanent and significant stigma, which might indirectly affect the mother's status in future proceedings. Here, the finding of neglect was supported by a preponderance of the evidence, which demonstrated that the child was at imminent risk of harm as a result of the mother's failure to maintain a prescribed treatment regimen for her mental illness. The Family Court providently exercised its discretion in drawing a negative inference from the mother's failure to testify.

*Matter of Jemima M.*, 151 AD3d 862 (2d Dept 2017)

**Petitions Properly Dismissed as Petitioner Failed to Establish a Prima Facie Case of Neglect**

The petitioner commenced proceedings alleging, inter alia, that the father and the paternal grandmother neglected the subject children. After a fact-finding hearing, the Family Court determined that the petitioner failed to establish that the father was a proper respondent and that the paternal grandmother neglected the subject children, and dismissed the petitions. The petitioner appealed. The Appellate Division affirmed. The Family Court erred in finding that the father was not a proper respondent in this proceeding. A respondent in a Family Court Act article 10 proceeding "includes any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child" (*see* FCA § 1012 [a]). It was undisputed that the father is the biological father of the subject children and his parental rights have not been terminated. As such, he was a proper respondent without regard to whether he was also a person legally responsible for the children's care at the pertinent time. Nevertheless, the petitions were properly dismissed because the petitioner failed to establish a prima facie case of neglect against the father or the paternal grandmother. The evidence adduced at the fact-finding hearing did not establish, by a preponderance of the evidence, that the paternal grandmother medically neglected the subject children by depriving them of adequate medical care. In addition, the petitioner failed to establish a causal connection between the father's mental illness and any impairment or imminent risk of impairment to the children's physical, mental, or emotional health.

*Matter of Nasir A.*, 151 AD3d 959 (2d Dept 2017)

**Record Did Not Support Determination Allowing Father to Reside in Home**

The father appealed from a temporary order of protection, which, among other things, only directed the father to refrain from committing certain conduct against the children who were the subject of the proceeding and permitted the father to reside in the home with the subject children. The Appellate Division reversed. The petitioner commenced child protective proceedings alleging that the father had neglected the five-year-old child A., by slapping her in the face, causing injury to her eye, and derivatively neglected the child C. The children were released to the custody of the nonrespondent mother, and a temporary order of protection was issued on November 4, 2016, requiring the father to stay away from the subject children and the family home. That temporary order was continued, by temporary order dated November 10, 2016. Upon expiration of the November 10, 2016 order, the Family Court issued another temporary order of protection dated November 22, 2016, which, among other things, permitted the father to reside in the home with the mother and the children on condition that the mother would supervise the father's contact with the children at all times. Under the circumstances of this case, the Family Court's determination to permit the father to reside with the children on condition that he never be alone with the children and that his contact with the children be supervised by the mother at all times was an improvident exercise of discretion. Given the nature of the allegations against the father, and the evidence in the record that the mother would not provide proper supervision, the court should have maintained the status quo until final determination of the proceeding. Accordingly, the order was reversed, on the facts, and the

father was directed to stay away from the subject children in accordance with the terms of a temporary order of protection dated November 10, 2016, pending final determination of the proceeding.

*Matter of Stephen C.*, 151 AD3d 979 (2d Dept 2017)

**Family Court Erred in the Court Dismissing Petitions on Ground That No Physical Impairment or Risk of Physical Impairment of the Children Was Established**

The Administration for Children's Services commenced proceedings alleging that the father neglected his four children by his drug use and subjecting the mother to domestic violence in their presence. At the fact-finding hearing, the evidence established that the father engaged in an act of domestic violence against the mother, in the presence of the two oldest children, and within the hearing of the third oldest child, resulting in police being called to the house and the defendant being placed under arrest. Upon the father's arrest, illegal drugs were found on his person, and he later pleaded guilty to two counts of attempted criminal possession of a controlled substance in the seventh degree. The eldest child told a caseworker that the father had hit the mother on prior occasions when he was using drugs, and he could tell when the father was using drugs by his appearance. The second oldest child told the caseworker that he observed the father under the influence of drugs—a state that he recognized when the father nodded while sitting down. The father did not testify at the hearing. At the conclusion of the hearing, the Family Court credited the witnesses' testimony, which the court found established that the father hit and choked the mother in the presence of two of the children, the eldest child was pushed by the father when he attempted to intervene, a third child was not in the room when the incident occurred but heard noise, and the three oldest children reported that they had witnessed the father engage in acts of domestic violence against their mother and had also witnessed the father under the influence of drugs. Nevertheless, the court dismissed the petitions on the ground that no physical impairment or risk of physical impairment of the children was established, nor was the mental state of the children explored. The petitioner appealed. Contrary to the Family Court's conclusion, impairment or an imminent danger of impairment to the physical, mental, or emotional condition of the subject children could be inferred from the father's conduct. A single act of domestic violence in the presence of a child may be sufficient for a neglect finding. In this case, there was evidence of repeated acts of domestic violence while the children were present in the household which the eldest child attributed to the father's drug use. Furthermore, the father did not testify, warranting the strongest negative inference against him. Under these circumstances, the Family Court's findings that the subject children were not neglected were not supported by the record. Accordingly, the Appellate Division reversed the order, reinstated the petitions, found that the children were neglected within the meaning of FCA § 1012 (f), and remitted the matter to the Family Court for a dispositional hearing and determinations thereafter.

*Matter of Fawaz H.*, 151 AD3d 1063 (2d Dept 2017)

**Family Court's Finding of Neglect Against Mother Was Not Supported by the Record**

The petitioner commenced a proceeding alleging that the mother neglected her 16-year-old son by leaving him in the care of an inappropriate caretaker and then refusing to allow the child back into her home. After a fact-finding hearing, the Family Court found that the mother neglected the child. The mother appealed. The Appellate Division reversed. The petitioner failed to establish, by a preponderance of the evidence, that the mother neglected the child. The record demonstrated that the child voluntarily left the mother's home to live with two individuals who were not biologically related to the child, but who had assumed the roles of the child's father and grandmother since the child was 18 months old. While living with these individuals, the child's needs were met and the mother spoke with the child and his caretakers "maybe three or four times" per week. 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 (*see* FCA § 1012 [f] [I]). Accordingly, the Family Court should have denied the petition and dismissed the proceeding.

*Matter of Kymani H.*, 152 AD3d 519 (2d Dept 2017)

**Record Supported Finding of Neglect Based upon the Mother' Mental Illness**

The Family Court issued an order of fact-finding and disposition dated June 2, 2016, in which it found that the mother was suffering from a mental illness that impaired her ability to provide a minimum degree of care and supervision for the subject children, and continued the placement of the children in the kinship foster home of their paternal grandmother. The mother appealed. The Appellate Division affirmed. The appeal by the mother from so much of the order of fact-finding and disposition as continued placement of the children in the kinship foster home of their paternal grandmother until the next permanency hearing was dismissed as academic, as the period of placement had expired. The adjudication of neglect, however, constitutes a permanent and significant stigma which might indirectly affect the status of the mother in potential future proceedings, and, thus, the appeal from so much of the order as determined that the children were neglected was not academic. The Family Court's determination that the mother neglected the children was supported by a preponderance of the evidence, which demonstrated 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. This evidence showed that the mother was hospitalized three times within a period of approximately three months for paranoid delusions, and that each episode of paranoia directly involved the children, either as the focus of the delusion or by the mother struggling to retain physical control of the children during the episode.

*Matter of Michael G.*, 152 AD3d 590 (2d Dept 2017)

**Record Supported Finding That Father Neglected the Subject Child by Inflicting Excessive Corporal Punishment**

In June 2014, the Administration for Children's Services (hereinafter ACS) commenced a proceeding alleging that on June 17, 2014, the father neglected the child, who was then almost eight years old, by inflicting excessive corporal punishment on him. After a fact-finding hearing, the Family Court found that the father neglected the child. In an order of disposition, made after a hearing, the court, inter alia, placed the father under the supervision of ACS until October 8, 2015. The father appealed from the order of disposition. The Appellate Division affirmed. Contrary to the father's contention, a preponderance of the evidence supported the Family Court's finding that the father neglected the subject child by inflicting excessive corporal punishment. The father admitted that on June 17, 2014, he hit the child once with a wooden ruler, and other credible evidence established that the child sustained visible marks and swelling on his left forearm as a result, and that this was not an isolated incident. The Appellate Division could find no basis for disturbing the court's credibility determinations.

*Matter of Walter J.*, 152 AD3d 593 (2d Dept 2017)

**No Appeal as of Right From Fact Finding Order**

In proceeding to adjudicate child to be permanently neglected, appeal was dismissed where mother appealed from the fact-finding order opposed to the dispositional order. Fact-finding orders are not appealable as of right.

*Matter of Justyce HH.,* 151 AD3d 1216 (3d Dept 2017)

**Where Father's Own Testimony Constituted Sufficient Corroboration of Neglect, His Same Testimony Did Not Constitute Sufficient Proof of Corroboration of Sexual Abuse**

Family Court correctly adjudicated the father to have neglected his daughter and derivatively neglected his son. The daughter told a State Police investigator and her counselor that the father, inter alia, bathed with her while they were naked, walked around naked in front of her and sat her on his lap allowing his penis to touch her body. The father admitted to some of this conduct at trial, but asserted that the conduct was nonsexual. Nevertheless, Family Court correctly found that the father's own testimony describing his conduct, provided sufficient corroboration for the daughter's statements and consequently, petitioner had established neglect. Family Court erred, however, in finding that this same conduct constituted sexual abuse. Family Court incorrectly found that the father had testified that he digitally penetrated the

daughter when, in fact, there was no such testimony in that regard. Consequently, the father's statements did not constitute corroboration of the daughter's statements for purposes of finding the father to have sexually abused the daughter. There was also nothing else in the record to support an inference that the father had intimate contact with the daughter as defined by Penal Law §130.00[3] to wit: "any touching of the sexual or other intimate parts of a person for purposes of gratifying [the] sexual desires of either party."

*Matter of Lee-Ann W.,* 151 AD3d 1288 (3d Dept 2017)

**Appeal Dismissed Where Order Entered Upon Default**

In neglect proceeding, mother appeals from Family Court's issuance of a default order of protection based upon her failure to appear at the dispositional hearing. The Court properly dismissed the mother's appeal since it is well settled law that a party cannot appeal an order entered upon a default. Additionally, the mother's claim that she had a reasonable excuse for the default, in that she had given birth around the time of the dispositional hearing, is also unavailing where there was ample evidence that Family Court offered the mother every opportunity to physically appear in court or appear by telephone, neither of which option the mother accepted.

*Matter of Madison P.,* 151 AD3d 1300 (3d Dept 2017)

**Party Not Aggrieved From Delayed Sentencing That She Requested**

In Article 10 neglect proceeding, Family Court issued temporary order of protection requiring the mother to submit to random drug testing. After she tested positive for drugs, a violation petition was filed and the mother entered a plea and made an admission in exchange for a 60-day jail sentence. The jail sentence was delayed pending a compliance conference. At that conference in January 2016, the petitioner requested that mother's sentence be delayed and the respondent and her counsel joined in this request. In an order entered in March 2016, Family Court delayed the mother's obligation to report to jail until June and scheduled another compliance conference for June. At that June conference, Family Court orally directed the mother to report to jail and declined any further delay, however, there was no written order to this effect. Mother appeals from the March order. Because there was no proof as to how or when the March order was served upon the mother, the Court declined to dismiss the appeal as untimely as claimed by respondent and the attorney for the child. However, the appeal was dismissed because the mother was not aggrieved. The mother had received her requested relief. The concurring decision notes the troubling nature of the delayed sentencing format.

*Matter of Amara AA.,* 152 AD3d 845 (3d Dept 2017)

**Delay of Jail Sentence Not Warranted Where Mother Failed to Provide Proof That She Met Certain Conditions in Order of Supervision**

Following an adjudication of neglect, Family Court issued a dispositional order of supervision requiring the mother to comply with various terms. Three months later, a violation petition was filed and the mother admitted to a willful violation. She was sentenced to 90 days in jail and was directed to report at a certain date. If she complied with the order of supervision, which required the production of certain documents to substantiate compliance with the order, Family Court would consider delaying the report date for her to start serving her sentence. When the mother failed to

produce the required documentation, Family Court correctly declined to further delay the mother's sentence.

*Matter of Bryce Q.,* 152 AD3d 889 (3d Dept 2017)

**Finding of Permanent Neglect Appropriate Where Mother Did Not Appreciably Benefit From Services Provided By Petitioner**

Family Court's decision, finding that five of respondent's six children were permanently neglected, as well as their decision to terminate respondent's parental rights relative to three of her children, was supported by clear and convincing evidence. Relative to the court's finding of permanent neglect, the record demonstrated that numerous services were provided to respondent by

petitioner in an effort to address virtually every issue that respondent had which impeded her ability to adequately care for her children. Notwithstanding the aforementioned services and efforts, the court correctly found that respondent's home environment remained unsafe and chaotic, she remained unable to appropriately parent and nurture the children, she was frequently non-compliant, hostile and uncooperative with petitioner, she failed to learn how to manage the children and her household, as well as the fact that she remained unwilling or unable to accept responsibility for her children or her own behavior. Family Court correctly concluded that the aforementioned factors supported a finding of permanent neglect. Regarding the respondent's appeal relative to the termination of her parental rights pertaining to three of her children, having already determined that the children were permanently neglected, Family Court's application of the best interest analysis, which considered the fact that the children were bonded with their foster families, had spent little or no time living with respondent, as well as the fact that respondent had not progressed beyond supervised visits, all justified the termination of her parental rights. Lastly, Family Court did not abuse their discretion in failing to find that a suspended judgment was not in the best interests of the three children. There was insufficient evidence that a brief grace period afforded by said suspended judgment would result in respondent making the necessary progress.

*Matter of Jessica U.,* 152 AD3d 1001 (3d Dept 2017)

**Ample Evidence Supported Court's Determination That Father Neglected Subject Child**

Family Court determined that respondent father neglected his child. The Appellate Division affirmed. The court's finding was supported by a preponderance of the evidence. According to the undisputed evidence, the father abused illicit substances, including heroin. Although the evidence established that the father had voluntarily begun a rehabilitative program, the evidence did not support a finding that he was regularly participating in that program. Rather, the evidence established that he attended only a third of his appointments. Moreover, the fact that the father tested positive for drug use while participating in the program established imminent risk to the child's physical, mental and emotional condition. In addition, the finding of neglect was supported by evidence that the father was aware of the mother's drug use during the time she was responsible for the child's care, and that he failed to intervene. A sample of the mother's breast milk tested positive for morphine, codeine, and heroin metabolites. The father's failure to intervene to prevent the mother from nursing the child was further evidence of neglect. The father's challenge to the admission of hospital records that allegedly contained inadmissible hearsay was unpreserved for appellate review. However, even if the court erred in admitting the alleged hearsay evidence, the error was harmless inasmuch as the record otherwise contained ample evidence supporting the court's determination.

*Matter of Brooklyn S.*, 150 AD3d 1698 (4th Dept 2017)

**No Basis to Disturb Family Court's Conclusion That Children's Best Interests Warranted Their Continued Placement**

Family Court entered four orders concerning the five subject children. In appeal No. 1, an order, entered after an evidentiary hearing, denied respondent mother's motion seeking the return to her custody of three of the children, i.e., Emily W., Evan W., and Kaylee W. In appeal No. 2, an order, entered after a hearing, extended placement of Kaylee W. with her biological father, a nonparty. In appeals Nos. 3 and 4, orders, entered after a hearing, extended the placement of Ava W. and Michael S., Jr. The Appellate Division affirmed all four orders. The mother's appeals were not moot inasmuch as new findings in each appeal may have enduring consequences for the parties. Contrary to the contentions of the Attorneys for the Children in appeals Nos. 2 through 4, whether the order of fact-finding and disposition had expired was immaterial inasmuch as the permanency hearing orders on appeal have superceded that order. With respect to appeal No. 1, the mother failed to carry her burden of proving that it would be in her children's best interests to return them to her custody. The mother had maintained regular contact with the respondent father of Michael S., Jr. (the father), and it appeared from the record that such contact had only reinforced and continued the tumultuous relationship that gave rise to the domestic violence underlying the neglect proceeding.

Furthermore, the mother had prolonged the relationship with the father even though one of her children sought counseling owing to the emotional trauma it caused, and in spite of the father's failure to complete any of the items on his service plan. Although the mother had completed certain counseling and parenting services, the record established that no progress had been made to overcome the specific problems which led to the removal of the children. Thus, there was no basis to disturb the court's conclusion that the children's best interests warranted their continued placement. Similarly, with respect to appeals Nos. 2 through 4, the mother's contention was rejected that the court abused its discretion in extending placement for Kaylee W., Ava W., and Michael S., Jr. The mother's regular interactions with the father indicated that her completion of domestic violence training was a formality that did not result in any meaningful change to her lifestyle. Indeed, the mother admitted to having consented to the modification of an order of protection in her favor and against the father so that they could "be together." The fact that the mother presented conflicting evidence to the court did not require a different result.

*Matter of Emily W.*, 150 AD3d 1707 (4th Dept 2017)

**Affirmance of Finding of Neglect Where Respondent Father Should Have Known of Respondent Mother's Substance Abuse**

Family Court adjudged that respondent father neglected his daughter. The Appellate Division affirmed. A single incident where the parent's judgment was strongly impaired and the child was exposed to a risk of substantial harm could sustain a finding of neglect. Petitioner established by a preponderance of the evidence that the father neglected the child because he should have known of respondent mother's substance abuse and failed to protect the child. Although the father denied knowledge of the mother's substance abuse, where, as here, issues of credibility were presented, the hearing court's findings were accorded great deference, and there was no reason to reject the court's credibility determinations. The father appealed from a further order in which the court, among other things, awarded custody of the subject child to the nonparty maternal grandmother. The Appellate Division dismissed the appeal. The orders placing the child with her maternal grandmother were issued upon the father's consent. The father's challenges to the dispositional provisions of those orders were not properly before the Court because no appeal lied from that part of an order entered on consent.

*Matter of Lasondra D.*, 151 AD3d 1655 (4th Dept 2017)

**Finding of Neglect Supported By Preponderance of Evidence**

Family Court determined that respondent mother neglected her daughter. The Appellate Division affirmed. The court's finding was supported by a preponderance of the evidence. The undisputed evidence at the fact-finding hearing established, among other things, that the mother left the then-seven-month-old child in the care of a person who she knew to be an inappropriate caregiver, she violated her probation on a felony conviction by smoking marihuana while she had custody of the child, and she had not complied with substance abuse or mental heath treatment on a consistent basis. In addition, the psychologist who evaluated the mother on behalf of petitioner testified that, based upon the combination of the mother's significant substance abuse problems and mental health diagnoses, she was incapable of caring for the child without treatment for those conditions and, in any event, her ability to care for herself and the child was marginal even if she was engaged in such treatment.

*Matter of Monica M.*, 151 AD3d 1705 (4th Dept 2017)

**Court Erred in Issuing Orders of Protection That Did Not Expire Until Children's 18th Birthdays**

Family Court determined that respondent Wilbert J. was a parent substitute who was responsible for the subject children's care and further determined that he neglected the children. After a dispositional hearing, the court issued orders of protection in favor of the children until their 18th birthdays. The Appellate Division modified. The court properly found that respondent was a person legally responsible for the care of the children. The testimony at the hearing established that respondent was at respondent mother's residence on at least a regular

basis, if not actually living there. However, the court erred in issuing orders of protection that did not expire until the children's 18th birthdays. Pursuant to Family Court Act Section 1056 (1), the court may issue an order of protection in an article 10 proceeding, but such order of protection shall expire no later than the expiration date of such other order made under that part, except as provided in subdivision four of that section. Subdivision (4) allowed a court to issue an order of protection until a child's 18th birthday, but only against a person who was a member of the child's household or a person legally responsible..., and who was no longer a member of such household at the time of the disposition and who was not related by blood or marriage to the child or a member of the child's household. Respondent was found to be a person legally responsible for the children and, at the time of the dispositional hearing, he no longer lived with the mother. He was also not related by blood or marriage to the children, but he was related to a member of their household. Petitioner's caseworker testified at the dispositional hearing that respondent was the father of the mother's recently-born child, who lived in the mother's home. Subdivision (4) was therefore inapplicable on its face. Inasmuch as the only other dispositional orders issued with respect to the children at the time the court issued the orders of protection had an expiration date of March 26, 2015, the orders of protection issued in the proceedings were modified to expire on that same date.

*Matter of Nevaeh T.*, 151 AD3d 1766 (4th Dept 2017)

**Mother's Paramour Was Person Legally Responsible for Care of Children**

Family Court adjudged that respondents, the mother of the subject children and the mother's paramour, neglected the subject children. The Appellate Division affirmed. The court properly determined that the mother's paramour was a person legally responsible for the care of the children, and as such, was a proper party to the child protective proceeding, notwithstanding the fact that he was the father of none of the children. The mother's paramour's further contention was rejected that the court erred in determining that he neglected the children.

*Matter of Jayla A.*, 151 AD3d 1791 (4th Dept 2017)

**Order Granting Custody to Grandmother Reversed**

Pursuant to Family Court Act Section 1055-b, Family Court granted to the grandmother a final order of custody under Family Court Act article 6, and ordered that no further review was required on the neglect petition. The Appellate Division reversed and remitted. Petitioner commenced the neglect proceeding against respondent father and respondent mother, and the mother admitted neglecting the child. The father failed to appear at multiple court appearances and, although his attorney appeared at the fact-finding hearing, she elected not to participate. The grandmother thereafter filed petitions for custody against the father and mother, but then withdrew the petition against the father. At a hearing on petitioner's neglect petition and the grandmother's custody petition, the mother consented to custody being granted to the grandmother, but the father's counsel objected. The father's contentions were rejected that the finding of neglect should be vacated because he was denied effective assistance of counsel based on his counsel's failure to participate in the hearing, and he did not have notice of the hearing. Those contentions were not reviewable inasmuch as the finding of neglect was made upon the father's default. However, the court erred in granting custody to the grandmother without first determining whether extraordinary circumstances existed. Pursuant to Family Court Act Section 1055-b, in an article 10 proceeding a court could grant custody to a relative but, if any parent failed to consent to granting the petition for custody, the court must have found, among other things, that the relative demonstrated that extraordinary circumstances existed that supported granting such an order of custody. Here, the court made no such finding.

*Matter of Nevaeh D.J.*, 151 AD3d 1867 (4th Dept 2017)

**Respondent Not Person Legally Responsible For Child**

Family Court found that respondent neglected the subject child. The Appellate Division reversed and dismissed the petition. Even giving deference to the court's credibility determinations, petitioner's witnesses established that respondent and the mother of the child had been living together for an unspecified period of time, but there was

nothing more to show that respondent acted as the functional equivalent of a parent in a familial or household setting. There was no testimony that respondent, the mother, and the child, were living as a family or that respondent provided childcare or financial support, or performed any household duties.

*Matter of Kameron V.,* 153 AD3d 1623 (4th Dept 2017)

**Neglect Finding Based Upon Inadequate Care of Child's Minimal Needs Vacated**

Family Court, among other things, adjudged that respondent father neglected the subject child. The Appellate Division modified by vacating the finding that respondent failed to address the child's minimal needs while the mother was away. The finding of neglect by excessive corporal punishment was supported by a preponderance of the evidence. The court was presented with substantial credibility issues that it resolved against the father and there was no reason to disturb the court's resolution of the issues. The subject child's out-of-court statements that the father caused his bruises and scratches by pushing him to the ground and dragging him to bed were sufficiently corroborated by the caseworker's and his mother's observations of his injuries, the out-of-court statements of his siblings who had seen or heard the altercation, and photographic evidence of the injuries. Petitioner established that the child was in imminent danger of injury or impairment because of the father's behavior. The child's mother testified that the child was hysterical and cried uncontrollably when asked about the incident of excessive corporal punishment, and there was considerable testimony that the child became upset on other occasions because of the father's verbal threats. The court erred, however, in finding that he neglected the child by inadequately caring for his minimal needs when the mother was absent from the home.

*Matter of Bryan O*., 153 AD3d 1641 (4th Dept 2017)

**CHILD SUPPORT**

**Father Willfully Violated Order of Support**

Family Court confirmed the finding that respondent father willfully violated an order of the Magistrate directing him to make weekly payments for child support, and sentenced him to sixty days incarceration with a purge amount of $5000. Although respondent had completed his sentence, the appeal was not academic in light of the enduring consequences that might flow from the finding that he violated the order of support. The father failed to rebut the prima facie evidence of his willful violation because he presented no evidence of his inability to provide financial support for the child, other than his testimony that a medical condition prevented him from obtaining employment. Although it was undisputed that the father lost his employment in 2008, he failed to substantiate his claims about his inability to work with documentation that he suffered from depression and that it affected his ability to work.

*Matter of Angela B. v Gustavo D.*, 150 AD3d 471 (1st Dept 2017)

**Father Not Entitled to Downward Modification**

Supreme Court granted defendant mother's motion to enforce plaintiff father's child support obligation, denied the father's cross motion for suspension or modification of child support, and awarded the mother $15,000 in attorney's fee. The Appellate Division affirmed. The father's reduced income was not an unanticipated change of circumstances warranting modification of the parties' settlement agreement. The father submitted an affidavit to the court in 2011 indicating that his partnership position was at risk. Nevertheless, he committed to paying $10,000 in monthly child support when he signed the stipulation settling the divorce action four months later. The father's contention that he unwittingly depleted his assets two years after his termination in 2012, so that he was unable to meet his expenses or contribute anything to pay his child support obligation, was questionable, particularly given his payment of other large expenses for which he had no legal obligation. The award of attorney's fees was a provident exercise of the court's discretion, given the parties' stipulation that provided for legal fees resulting from a party's default.

*Vitowsky v Strasler,* 151 AD3d 427 (1st Dept 2017)

**Court Properly Imputed Income to Mother**

Supreme Court resolved the parties' financial issues ancillary to the parties' divorce. The Appellate Division affirmed. The court properly imputed income to the mother for, among other things, determining her pro rata share of child support, based upon the testimony and report of the father's vocational expert. Although the Ivy League educated mother left full-time work as a lawyer in 1999 to raise the parties' children, she maintained her law license, continued to engage in professional activities, and did consulting work. Moreover, the court properly precluded the mother, who suffered from three psychiatric hospitalizations in the year preceding the trial, from introducing testimony from a mental health evaluator about her ability to work inasmuch as she waived such expert testimony pursuant to a so-called stipulation entered into by the parties. The court also providently exercised its discretion in applying a combined income cap of $350,000 based on the children's actual needs, rather than the father's income. It was an appropriate exercise of discretion to allocate college costs in accordance with the equitable distribution of non-retirement assets (35%), rather than the division of child support expenses (17%).

*R.S. v B.L.,* 151 AD3d 609 (1st Dept 2017)

**Court Properly Determined Child Support Obligation**

Supreme Court granted defendant father's application for pendente lite relief to the extent of awarding him temporary spousal maintenance and child support and directing that plaintiff mother bear 70% of the child's add-on expenses. The Appellate Division affirmed. The award of temporary child support would not be disturbed. Defendant failed to identify any child-related expense that he had not been, or would not be able to pay as a result of the award. The court properly pro-rated the child's add-on expenses. Defendant failed to identify any expenses that he had not been, or would not be able to pay. Inasmuch as the awards were temporary in nature, they were not, as defendant claimed "open-ended." The court properly declined to require plaintiff to guaranty a renewal lease on the three-bedroom marital residence, where defendant resided, inasmuch as she was willing to guaranty a lease on another apartment for up to $5000 in monthly rent.

*Daza v Leclerc,* 152 AD3d 417 (1st Dept 2017)

**Application For Downward Modification of Child Support Properly Denied**

Supreme Court denied defendant mother's application for a downward modification of child support and for sanctions. The Appellate Division affirmed. The court properly issued an interim child support order, increasing her child support obligation, based upon her testimony and W-2 income statement showing a substantial increase in income since issuance of the preceding interim support order, which provided for nominal support based on the mother's representation that she was unemployed. The mother failed to submit a required net worth statement in support of the instant downward modification order. Further, the mother failed to provide the court with any evidence demonstrating that the amount of support ordered was inappropriate in light of her earning ability, even considering that she was temporarily disabled from working, or that a reduction to the prior nominal child support obligation was warranted or in the child's best interests.

*Lawlor v McAuliffe,* 152 AD3d 427 (1st Dept 2017)

**Record Supported Determination That Plaintiff Was Not Due Any Additional Money for Child Support**

The plaintiff former wife and the defendant former husband were married in 1985 and have two children together. On September 7, 2010, the plaintiff commenced an action against the defendant for a divorce and ancillary relief. The case proceeded to trial. The judgment appealed from was entered on August 12, 2015, and, inter alia, failed to award the plaintiff any retroactive child support. The plaintiff correctly argued that she was entitled to child support for the parties' children until they were emancipated in 2012 and 2013, respectively. However, taking into account the sums paid by the defendant for pendente lite child support and the portion of carrying charges on the marital residence that were attributable to child support, including the money paid to

satisfy two home equity loans, the plaintiff was not due any additional money for child support.

*D'Alauro v D'Alauro*, 150 AD3d 675 (2d Dept 2017)

**Father Did Not Allege Any Substantial and Unanticipated Change of Circumstances That Would Warrant a Downward Modification**

The order dated May 5, 2014, insofar as appealed from, granted the plaintiff's motion for a downward modification of his child support obligation only to the extent of reducing his child support obligation based on the payments he made for the college room and board of the parties' child and directing a hearing only as to the issue of whether income should be imputed to either party for purposes of determining their respective shares of the cost of college. The order dated May 15, 2014, insofar as appealed from, denied those branches of the plaintiff's cross motion which, inter alia, were for a hearing as to a further reduction of his child support obligation and to declare the subject child emancipated or direct a hearing on that issue. The Supreme Court properly denied, without a hearing, those branches of the father's motion which were for a downward modification of child support. In order for a party to be entitled to modification of the child support provisions of a stipulation of settlement which was executed prior to the effective date of the 2010 amendments to FCA § 451 , that party must show that there has occurred a substantial and unanticipated change of circumstances since the time he or she agreed to the support amount. Here, the father did not allege any substantial and unanticipated change of circumstances that would warrant such relief. The fact that the child began college in 2012 could not be considered an unanticipated change in circumstances, and the father set forth no other basis warranting a downward modification of child support. Further, the father did not show that the child was emancipated, such that he would be relieved of his child support obligation, nor did he establish his entitlement to a hearing on that issue. Here, the stipulation provided that emancipation would occur upon the happening of certain events, including where the child establishes a "[p]ermanent residence away from the residence of the Wife for a period in excess of 50 consecutive days." The father failed to show that the child established a permanent residence away from the mother's home for more than 50 consecutive days, or that any other basis for emancipation existed. Thus, he did not show that the child was emancipated, and did not set forth his entitlement to a hearing as to that issue.

*Sanders v Sanders*, 150 AD3d 781 (2d Dept 2017)

**Record Supported Finding That There Was No Basis to Impute Income to Mother for Purposes of Allocating College Costs**

The parties were divorced in 1998, and they entered into a stipulation of settlement that was incorporated but not merged into the divorce judgment. The stipulation provided that the mother was to have primary residential custody of the parties' only child, with the father to pay child support in amounts set forth therein. The stipulation further provided that both parties were to contribute to the cost of college for the child in proportion to their respective incomes as determined by the Child Support Standards Act guidelines. In 2012, the child began college. In response to the father's motion for a downward modification of his child support obligation, the Supreme Court issued an order in March 2013 requiring the father to pay 50% of the college costs pending a final determination of the parties' respective shares of college costs, and to pay child support in accordance with the stipulation, pendente lite. Subsequently, the father cross-moved for a downward modification of his child support obligation, arguing that the child support obligation should have been reduced or eliminated based on his payment of his share of the child's college costs. The father further asserted that income should have been imputed to the mother for purposes of determining child support and the parties' respective shares of college costs. Additionally, he contended that the child should be declared emancipated. By orders dated May 5, 2014, and May 15, 2014, respectively, as relevant here, the Supreme Court modified the father's child support obligation only to the extent of reducing that obligation based on college room and board payments made by the father, and directing a hearing only as to the issue of whether income should be imputed to either party, for purposes of determining their pro rata shares of college costs. The matter was referred to a Judicial Hearing Officer (hereinafter the J.H.O.) for hearing and determination. After a hearing, by order

dated March 25, 2015, the J.H.O. denied that branch of the father's motion which was to impute income to the mother for purposes of determining the parties' pro rata shares of college costs. The J.H.O. did not improvidently exercise his discretion in finding no basis to impute income to the mother for purposes of allocating college costs, as the mother made thorough financial disclosure to the court, and appeared to be earning income consistent with her education and opportunities. The J.H.O. did not err in denying that branch of the father's motion which was to reopen the hearing based on newly discovered evidence, as the record did not show that such evidence contained new matters of fact that would have changed the result of the hearing. Orders affirmed.

*Sanders v Sanders*, 150 AD3d 784 (2d Dept 2017)

**Family Court Properly Denied Father's Objections to Support Magistrate's Order on Procedural Grounds**

In October 2013, the mother filed a petition, inter alia, for child support. Following a hearing, the Support Magistrate directed the father to pay biweekly child support in the sum of $429.50. The father subsequently filed written objections to the Support Magistrate's order, but did not file proof of service of a copy of his written objections upon the mother. In the order appealed from, the Family Court denied the father's objections to the Support Magistrate's order on the ground that he failed to file proof of service of a copy of the objections upon the mother. The Appellate Division affirmed. The issues raised by the father on this appeal were not reviewable. The Family Court properly denied the father's objections to the Support Magistrate's order on the procedural ground that he failed to file proof of service of a copy of the objections upon the mother. FCA § 439 (e) provides, in pertinent part, that "[a] party filing objections shall serve a copy of such objections upon the opposing party," and that "[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal." By failing to file proof of service of a copy of his objections upon the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order and, thus, failed to exhaust the Family Court procedure for review of his objections. Consequently, the father waived his right to appellate review of the merits of his objections.

*Matter of Ndukwe v Ogbaegbe*, 150 AD3d 858 (2d Dept 2017)

**Determination to Have Father Incarcerated for His Willful Violation of Support Order Was a Proper Exercise of Discretion**

The father and the mother have two children together. An order of disposition dated October 16, 2015 (hereinafter the support order), directed the father to pay, among other things, $500 per week in child support. He failed to make payments and in February 2016, the mother commenced this proceeding alleging that the father was in willful violation of the support order. On March 15, 2016, the father appeared before a Support Magistrate and admitted to violating the support order. On the same day, an order of disposition was issued finding the father in willful violation of the support order. The Family Court thereafter, in effect, confirmed the order of disposition and issued an order of commitment. The father's contention that the Family Court should have held a hearing as to whether he willfully violated the support order was unpreserved for appellate review. Nevertheless, the father was not denied a meaningful opportunity to be heard. Moreover, the father's claim that he was deprived of the effective assistance of counsel was without merit. Contrary to the father's contentions, viewed in totality, the record revealed that the father received meaningful representation. Additionally, the Family Court's determination that the father should have been incarcerated was a proper exercise of discretion. The court was not required to consider alternative enforcement measures. Order affirmed.

*Matter of Becker v Guenther*, 150 AD3d 985 (2d Dept 2017)

**Record Supported Denial of Father's Objections**

On a motion to hold a parent in willful violation of an order of child support, proof of failure to pay child support constitutes prima facie evidence of a willful violation (*see* FCA § 454 [3] [a]). Once a prima facie showing of willfulness has been made, the burden shifts to the party that owes the support to offer some

competent, credible evidence of his or her inability to comply with the order. Here, the mother's submission of proof that the father failed to comply with the order of support satisfied her prima facie burden. In opposition, the father failed to submit competent, credible evidence of his inability to pay support as ordered. Thus, the Family Court correctly denied the father's objections to the Support Magistrate's order. By failing to object to the Support Magistrate's determination of his recusal motion, the father failed to preserve any objection to that portion of the Support Magistrate's order. Accordingly, the Family Court correctly denied the father's objections to the Support Magistrate's finding that the father willfully failed to pay child support as ordered. Order affirmed.

*Rafferty v Ettinger*, 150 AD3d 1016 (2d Dept 2017)

**Record Supported an Increase in Father's Contribution Toward Child's College Tuition**

The parties were married on October 7, 1990, and have one child. On August 24, 1999, the parties entered into a stipulation of settlement, and on April 21, 2000, they entered into a supplemental stipulation of settlement. Both the stipulation and the supplemental stipulation were incorporated but not merged into the parties' judgment of divorce dated August 7, 2000. Pursuant to the stipulation and the supplemental stipulation, the parties agreed, inter alia, that the defendant would pay to the plaintiff the sum of $12,289 annually for basic child support, that they would each pay their pro rata share of unreimbursed medical expenses, and that the defendant would pay 58% of the cost of day care. By order to show cause dated July 30, 2014, the plaintiff moved for, inter alia, an upward modification of basic child support, a judgment for medical and child care expenses, and a contribution toward the child's college expenses. The Supreme Court denied that branch of the plaintiff's motion which was for upward modification of basic child support, denied reimbursement for summer camp expenses, and limited the defendant's obligation to pay college expenses to $5,000 per semester. The plaintiff appealed. The Appellate Division modified. Here, the Supreme Court improvidently exercised its discretion in directing that the defendant pay only $5,000 per semester toward the child's college tuition. The circumstances of this case, including the circumstances of the parties, the best interests of the child, and the requirements of justice, warranted an order directing that the defendant pay 50% of the child's total college tuition and expenses, with a credit against his basic child support obligation for payments made towards room and board (*see* DRL § 240 [1-b] [c] [7]). The child's summer camp expenses constituted the functional equivalent of day care expenses covered by the parties' supplemental stipulation of settlement. The defendant's claim that his obligation to pay his share of the child's summer camp expenses was not triggered because he did not explicitly consent to the summer camp chosen by the plaintiff for 11 consecutive summers was without merit. The Supreme Court properly denied that branch of the plaintiff's motion which sought upward modification of the defendant's basic child support obligation. Both the stipulation of settlement and supplemental stipulation of settlement were entered into prior to the effective date of the 2010 amendments to DRL § 236 (B) (9) (b) (2). Therefore, in order to establish her entitlement to an upward modification of the defendant's child support obligation, the plaintiff had the burden of establishing a substantial, unanticipated, and unreasonable change in circumstances resulting in a concomitant need, or that the stipulation of settlement and the supplemental stipulation of settlement were not fair and equitable when entered into. However, the plaintiff failed to demonstrate that there was a substantial, unanticipated, and unreasonable change in circumstances resulting in a concomitant need or that the stipulation and supplemental stipulation were unfair or inequitable when entered into.

*Fiore v Fiore*, 150 AD3d 1205 (2d Dept 2017)

**Defendant Presented No Medical Evidence to Substantiate Claim That His Health Impeded His Ability to Work**

The Supreme Court's determination of the issue of child support was supported by the record. In determining a party's child support obligation, the court need not rely upon a party's own account of his or her finances, but may impute income based upon, among other things, the party's past income, demonstrated future potential earnings, educational background, or money received from friends and relatives. Where a party's testimony regarding his or her finances is not credible, the court is

justified in finding a true or potential income higher than that claimed. The court has considerable discretion in determining whether income should be imputed to a party, and the court's credibility determinations are afforded deference on appeal. Here, although the defendant testified that stress, depression, and anxiety impeded his ability to work, he presented no medical evidence to substantiate these claims. The defendant also failed to meet his burden of establishing that he diligently sought to obtain employment commensurate with his qualifications and abilities, and the evidence presented at the trial demonstrated that he had received financial and other assistance from family members and friends. Accordingly, the Supreme Court properly found that the defendant's assertions that he was incapable of earning income were conclusory and unsupported by the evidence, and providently exercised its discretion in imputing income to him in the sum of $65,000 per year.

*Rudish v Rudish*, 150 AD3d 1291 (2d Dept 2017)

**Father Required to Pay 25 Percent of Monthly Increase in Pension He Received, Not 25 Percent of Lump Sum Made for past Amounts Due**

The parties were married in 1995 and have two children together. They entered into a stipulation of settlement on May 5, 2006 (hereinafter the stipulation), and were divorced on August 15, 2006. The stipulation provided that the father was entitled to receive $4,285 per month from a disability pension, amounting to 53.14% of the total combined parental income. His monthly child support obligation, which was based on the foregoing numbers, was $1,071.25. The stipulation provided, in relevant part, that "[t]he [father's] child support obligation shall be increased by 25% of any increases he receives to his current monthly disability payment of $4,285." The father alleged and the mother did not dispute, that he paid the monthly child support amount called for under the stipulation between May 31, 2006 (the date on which his child support obligations took effect), and April 30, 2008. During that period, however, the father was in fact receiving only $3,785 per month instead of $4,285, pending the determination of his final pension amount by his former employer. In May 2008, the father was informed that his final pension calculation resulted in a net monthly amount of $4,380, i.e., $95 more per month than the amount stated in the stipulation. As a result, he received a lump sum payment, which included amounts previously withheld from him (i.e., the difference between $4,285 per month and $3,785 per month), as well as the retroactive payment of the $95 monthly increase. It was undisputed that the prorated portion of the lump sum payment corresponding to the 701-day period between May 31, 2006, and April 30, 2008, was $13,571.36. In June 2014, the mother filed a petition seeking, inter alia, a portion of the lump sum payment received by the father in May 2008. By order dated November 24, 2015, the Support Magistrate, after a hearing, awarded the mother the entire sum of $13,571.36. The father objected, contending that the mother was entitled only to a small fraction of that amount, corresponding to 25% of the $95 retroactive monthly increase in the father's pension over the 701-day reference period, or approximately $550 in total. By order dated April 19, 2016, the Family Court granted the father's objections only to the extent of stating that the Support Magistrate erred in awarding the mother $13,571.36, and determined that the mother should instead receive 25% of $13,571.36, or $3,392.84. The matter was then remitted to the Support Magistrate, who entered a new order on May 4, 2016, awarding the mother the sum of $3,392.84. The father again filed objections, which were denied by the Family Court on June 15, 2016. The father appealed. The Appellate Division agreed with the father's contention that the mother was not entitled to 25% of $13,571.36. As stated in the stipulation, the mother was entitled only to "25% of any increases [the father] receives to his current monthly disability payment of $4,285." The evidence adduced at the hearing showed that the only increase to the $4,285 amount used as the basis for calculating the father's share of child support was a retroactive increase of $95 per month, which was paid as part of the lump sum the father received in May 2008. The mother was entitled to 25% of that increase, which amounted to approximately $550 over the 701-day reference period. Orders modified.

*Matter of Ludewig v Ludewig*, 151 AD3d 726 (2d Dept 2017)

**Record Supported Revival of Unemancipated Status of 20-Year-Old Child**

The mother and the father are divorced. At issue on appeal was the father's child support obligation for the parties' youngest child, born June 9, 1994. Pursuant to a March 2012 order of support, the father was directed to pay a certain sum toward the support of the subject child. In September 2012, the child, then 18 years old, moved out of the mother's home, established his own residence, and began paying for all of his own expenses. Thereafter, the father filed a petition to terminate his support obligations. By order dated September 28, 2012, the child was declared emancipated and the March 2012 order of support was suspended. In or around September 2013, the child returned to the mother's home. Thereafter, the mother sought to reinstate and modify the March 2012 order of support, alleging that the subject child's return to her home constituted a change of circumstance. During the pendency of this matter, on June 9, 2015, the child turned 21 years old. A hearing was commenced shortly thereafter for purposes of determining the father's retroactive child support obligation, if any. At the conclusion of the hearing, the Support Magistrate determined that the child's unemancipated status had been revived and calculated the father's child support obligation based upon an imputed income of $103,310. In an order dated November 9, 2015, the Support Magistrate directed the father to pay $337 per week, effective September 23, 2013, to June 9, 2015, for an aggregate retroactive amount of $29,752.92. The father filed objections to the Support Magistrate's order, arguing that the Support Magistrate erred in concluding that the child was no longer emancipated and erred in imputing income in the amount of $103,310. By order dated April 2 4, 2016, the Family Court denied the father's objections. The father appealed. The Appellate Division affirmed. The record supported the Support Magistrate's conclusion that the subject child was neither economically nor constructively emancipated. The evidence demonstrated that the child, who was enrolled in and attending college, voluntarily returned to the mother's home in or around September 2013. Although the child was employed part-time and received an annual sum of $30,000 from a personal injury settlement, the uncontroverted evidence demonstrated that the child was saving that money for future use and was not utilizing any of that money toward his own living expenses. The mother paid for all of the household expenses and food, as well as for the child's car insurance, cell phone service, clothing, and personal items. The Family Court also properly denied the father's objection with respect to the Support Magistrate's imputation of income. The record supported the Support Magistrate's imputation of $103,310 in income to the father, and thus, the court properly denied the father's objections.

*Matter of Monti v DiBedendetto*, 151 AD3d 864 (2d Dept 2017)

**Record Supported Determination That Father Willfully Violated Child Support Order**

Pursuant to a 2013 order of support, respondent (hereinafter the father) was required to pay child support to petitioner (hereinafter the mother) for their three children (born in 1997, 1999 and 2004). Thereafter, the mother commenced a proceeding alleging that the father was in willful violation of the support order. On the fourth day of the fact-finding hearing, the father failed to appear and the Support Magistrate denied the request by the father's counsel to adjourn the hearing. The Support Magistrate subsequently issued an order on the father's default finding him in willful violation of the support order and granted the mother a money judgment. The father's motion to vacate his default was denied by the Support Magistrate, and the matter proceeded to Family Court for confirmation of the willful violation finding. After reviewing the evidence admitted before the Support Magistrate, Family Court found, among other things, that the father willfully violated the support order and placed him on probation until the $22,053 in arrears was satisfied or there was no longer an order of support in effect for any of the subject children, whichever event occurred first. The father appealed. The Appellate Division affirmed. In view of the father's previous history of failing to appear in court as well as his failure to provide any medical documentation to support the illness claimed, and given that he was afforded an adequate opportunity to testify and present evidence at the fact-finding hearing, it was not an abuse of discretion to deny his adjournment request. Nor was the father denied due process inasmuch as he was provided with a full and fair opportunity to testify and introduce evidence on his behalf. The Support Magistrate erred, however, in finding the father in default based on his nonappearance on the last day of the fact-finding hearing. The father had appeared on the first three days of the hearing, had already provided substantial testimony in support of his

defense and had been cross-examined by the mother's counsel. Moreover, although the father did not appear on the last day of the hearing, his counsel had made a written request for an adjournment earlier that day and thereafter appeared in court to reiterate such request. Because there was no default, the father was not required to move to vacate the Support Magistrate's order and to file objections to the denial of such motion with Family Court. Accordingly, Family Court properly reviewed the record before the Support Magistrate to determine whether to confirm the finding of a willful violation on the merits. At the fact-finding hearing, the mother presented a document from the child support collection unit indicating the amount of child support arrears owed and testified that the amounts were accurate and that she had not received any child support payments from the father that were not already reflected in the document. This evidence was sufficient to make a prima facie showing of a willful violation and to shift the burden to the father to establish, by competent proof, an inability to pay. To that end, the father testified that he was unable to work due to his various medical conditions and because he was the primary caretaker of the two children he shared with his girlfriend. He did not, however, offer any medical documentation or evidence to substantiate his medical claims. Further, despite his alleged medical issues, the father testified that he drove over 200 miles to New York City each weekend to sell produce and admitted that he worked in the farming industry after he had been diagnosed with cancer and received treatment. Although the father claimed that he had given his farm to his girlfriend, he admitted that he did not legally assign the farm to her and there was no evidence that he received any consideration for it. In fact, the father continued to work for the farm without receiving any compensation. Moreover, the father failed to show that he made a good-faith effort to obtain employment, as evidenced by his own testimony that his job search was limited to an Internet inquiry and that he had not applied for any such jobs. The father's pending application for Social Security disability benefits did not preclude Family Court from finding that he was capable of working. Furthermore, having failed to appear on the last day of the fact-finding hearing, the father could not then argue that he should have been allowed to present additional evidence in support of his defense. Accordingly, there was ample support in the record for the Family Court's determination that the father willfully violated the support order.

*Matter of Dench-Layton v Dench-Layton*, 151 AD3d 1199 (2d Dept 2017)

**Record Did Not Support Conclusion That the Father's Presumptive Pro Rata Share Was Unjust or Inappropriate**

The parties are the parents of one child, born in 2003. In June 2015, the mother filed a petition for child support. After a hearing, the Support Magistrate determined that the father's basic child support obligation would be $572 biweekly. In making that determination, the Support Magistrate imputed annual income of $43,000 to the mother for the purpose of calculating the father's child support obligation. The Support Magistrate then awarded the father a biweekly credit against this child support obligation in the sum of $168 to compensate him for the "extraordinary" expenses associated with visitation, and directed him to pay child support in the sum of $404 biweekly. The mother appealed. The Appellate Division modified. The Support Magistrate properly imputed income to the mother based upon her prior income, her choice to engage in only part-time employment, and her current living arrangement, in which she did not pay rent or related housing expenses (*see* FCA § 413 [1] [b] [5] [iv], [v]). However, the Support Magistrate improvidently exercised its discretion in awarding the father a credit against his child support obligation in the sum of $168, to be applied biweekly, for "extraordinary" expenses associated with visitation, which included the sum of $67 for travel expenses. Pursuant to FCA § 413 (1) (f), the court must direct the noncustodial parent to pay his or her pro rata share of the basic child support obligation unless it finds that the pro rata share is "unjust or inappropriate" (*see* FCA § 413 [1] [f]), based upon consideration of factors such as "extraordinary expenses incurred by the non-custodial parent in exercising visitation" (*see* FCA § 413 [1] [f] [9] [I]). Here, the record did not support the conclusion that the father's presumptive pro rata share was "unjust or inappropriate" so as to warrant a credit against his child support obligation for the cost of meals and entertainment during visitation (*see* FCA § 413 [1] [f]). Furthermore, although the Support Magistrate improvidently exercised its discretion to the extent that it awarded the father a biweekly credit in the sum of $67 against his child support obligation for extraordinary travel expenses incurred in exercising his visitation, the record supported

the award of a credit in the sum of $33 for such expenses. Accordingly, the mother was entitled to an award of child support in the total biweekly sum of $539. The Support Magistrate did not improvidently exercise its discretion in denying that branch of the petition which sought to direct the father to contribute to the costs of private school tuition and expenses. The record showed, inter alia, that the child attended public school while living in Suffolk County, and the parties never agreed to share in the costs of private school. There was also no specific testimony in the record as to any particular scholastic needs of the child that would justify such an award. Under these circumstances, the Support Magistrate did not err in denying so much of the mother's petition as sought contributions for private school tuition and expenses. Finally, the Support Magistrate did not err in denying that branch of the mother's petition which sought to direct the father to contribute to the cost of extracurricular activities (*see* FCA § 413 [1] [c] [7]).

*Matter of Decillis v Decillis*, 152 AD3d 512 (2d Dept 2017)

**Father Failed to Provide Documentation as Required by FCA § 424-a**

The order appealed from denied the father's objections to an order of that court, which, after a hearing, granted the Suffolk County Department of Social Services' petition for child support and directed him to pay weekly child support in the sum of $113. The Appellate Division affirmed. The Family Court did not err in denying the father's objections to the Support Magistrate's order granting the petition for child support and directing him to pay weekly child support in the sum of $113 (*see* FCA § 424-a [b]). Where a respondent in a child support proceeding fails, without good cause, to comply with the compulsory financial disclosure mandated by FCA § 424-a, "the court on its own motion or on application shall grant the relief demanded in the petition or shall order that, for purposes of the support proceeding, the respondent shall be precluded from offering evidence as to respondent's financial ability to pay support" (*see* FCA § 424-a [b]). While the father submitted a sworn financial affidavit, he failed to accompany the affidavit with any of the documentation required by FCA § 424-a. Since the father failed, without good cause, to comply with the compulsory financial disclosure mandated by FCA § 424-a, the Family Court did not err in precluding him from offering evidence as to his financial ability to pay (*see* FCA § 424-a [b]), and providently exercised its discretion in determining the amount of support based on the needs of the child, which were established by the petitioner as the customary grant for one child on public assistance (*see* FCA § 424-a [b]).

*Matter of Suffolk Cty. Dep't of Soc. Servs. v Block*, 152 AD3d 529 (2d Dept 2017)

**Record Supported Denial of Father's Objections**

The father and the mother have one child together. In an order dated July 31, 2014, entered on consent, the father was directed to pay, inter alia, 40% of the child's camp, child care, and unreimbursed health-related expenses, and biweekly child support in the sum of $228.50. In September 2014, the mother filed a petition seeking, among other things, in effect, to direct the father to pay his share of these expenses. In October 2014, the father filed a petition seeking a downward modification of his child support obligation. Following a hearing, the Support Magistrate, inter alia, granted the foregoing branch of the mother's petition, directed the father to pay his share of these expenses in the sum of $3,468, and, in a separate order, denied the father's petition. The Family Court denied the father's objections to the Support Magistrate's orders. The father appealed. The Appellate Division affirmed. Contrary to the father's contention, the Family Court properly denied his objections to so much of the Support Magistrate's order as directed him to pay his share of the camp, child care, and unreimbursed health-related expenses in the sum of $3,468 as, at the hearing, the mother offered evidence regarding the expenses incurred, which was not contested by the father. The court also properly denied his objections to the Support Magistrate's order dismissing, without prejudice, his petition for downward modification of his child support obligation, since the father failed to demonstrate that he lost his employment through no fault of his own and that he diligently sought re-employment commensurate with his earning capacity (*see* FCA § 451 [3] [b] [ii]).

*Matter of Arjara v Spence*, 152 AD3d 581 (2d Dept 2017)

**Father Met His Burden of Establishing That the Petitioner Child Voluntarily Abandoned Her Home**

The petitioner child appealed from (1) an order of the Family Court, dated April 21, 2016, and (2) an order of that court, dated July 1, 2016. The order dated April 21, 2016, after a hearing, denied the petition for child support and dismissed the proceeding. The order dated July 1, 2016, denied the petitioner's objections to the order dated April 21, 2016. It is fundamental public policy in New York that parents are responsible for their children's support until age 21 (*see* FCA § 413 [1] [a]). Nevertheless, under the doctrine of constructive emancipation, where a minor of employable age and in full possession of his or her faculties, voluntarily and without cause, abandons the parent's home, against the will of the parent and for the purpose of avoiding parental control he or she forfeits his or her right to demand support. The burden of proof as to emancipation is on the party asserting it. Here, the respondent father testified that the petitioner voluntarily left her home, against the father's will, after they had an altercation. He further testified that he thereafter repeatedly told the petitioner that she was welcome to come home if she agreed to certain conditions (which the Appellate Division found were reasonable), however, the petitioner refused. Although the petitioner offered a different version of events, the Appellate Division could discern no reason to disturb the Support Magistrate's decision to credit the father's testimony. Accordingly, the father met his burden of establishing that the petitioner voluntarily abandoned her home to avoid her parental discipline and control, thereby forfeiting her right to support. Contrary to the petitioner's contention, the Support Magistrate providently exercised her discretion in denying the petitioner's request for an adjournment of the hearing, and the petitioner's fundamental rights were not affected by the denial (*see* FCA § 435 [a]). Accordingly, the Family Court properly denied the petitioner's objections to the Support Magistrate's order denying the petition and dismissing the proceeding.

*Matter of Dejesus v Dejesus*, 152 AD3d 585 (2d Dept 2017)

**Father's Evidence Concerning His Income Lacked Clarity and Credibility**

The parties, who were divorced by a judgment of divorce dated January 28, 2011, have one child. Pursuant to the parties' amended separation agreement, dated May 28, 2008, which was incorporated but not merged into the judgment of divorce, the father was required to pay the sum of $600 in monthly child support. In August 2014, the father petitioned for a downward modification of his child support obligation. Following a fact-finding hearing, the Support Magistrate found that the father had not met his burden of demonstrating his entitlement to a downward modification and, therefore, denied his petition. The father filed objections, which were denied by the Family Court. The father appealed. The Appellate Division affirmed. Contrary to the father's contentions, the Family Court properly denied his objections to the Support Magistrate's determination that he failed to establish a change in circumstances that would warrant a downward modification of his child support obligation. The parties' separation agreement was executed prior to the effective date of the 2010 amendments to FCA § 451. Therefore, in order to establish his entitlement to a downward modification of his child support obligation, the father had the burden of showing a substantial and unanticipated change in circumstances since the time the support amount was agreed to. A party who fails to credibly and clearly disclose his or her financial circumstances will be unable to establish that there has been a substantial change in circumstances warranting a downward modification of child support. The credibility determinations of the hearing court are entitled to great weight on appeal and will not be disturbed if supported by the record. In light of the Support Magistrate's finding, which was supported by the record, that the father's evidence concerning his income lacked clarity and credibility, the father failed to satisfy his burden of proving a substantial and unanticipated change in circumstances so as to warrant a downward modification.

*Matter of Baez v Ortiz*, 152 AD3d 678 (2d Dept 2017)

**Record Supported Determination That Father Did Not Testify Credibly Regarding His Inability to Satisfy His Support Obligations**

In an order dated April 24, 2014, upon the parties' consent, the Family Court directed the father to pay child support for the parties' child in the amount of $2,190 per month. In September 2015, the father filed a petition for a downward modification of his child support obligation, alleging, as a substantial change in circumstances, that his income had decreased. At a hearing, at which the father appeared pro se, the Support Magistrate directed the father not to testify from a document he prepared for the hearing. Following the hearing, the Support Magistrate determined that the father failed to present credible evidence demonstrating that a substantial change of circumstances had occurred and issued an order denying the petition. The father filed objections to the Support Magistrate's order, arguing that the Support Magistrate deprived him of a fair hearing by directing him not to use documents in support of his case and that the denial of the petition was improper because he presented credible evidence that his income had dropped, that he was unable to find suitable alternative employment, and that he had been forced to liquidate significant assets to pay expenses. The Family Court denied the father's objections to the Support Magistrate's order. The father appealed. The Appellate Division affirmed. Contrary to the father's contention, he was not denied his right to a fair hearing because the Support Magistrate directed him not to read from a document that he prepared for the hearing. Moreover, the Family Court correctly denied the father's objections to the Support Magistrate's denial of his petition for a downward modification of his child support obligation. Since the current child support order was issued in April 2014, the father's petition must be analyzed in the context of the 2010 amendments to Family Court Act § 451. Section 451 of the Family Court Act allows a court to modify an order of child support, without requiring a party to allege or demonstrate a substantial change in circumstances, where either party's gross income has changed by 15% or more since the order was entered or modified (*see* FCA § 451 [3] [b] [ii]), or where three years or more have passed since the order was entered, last modified, or adjusted (*see* FCA § 451 [3] [b] [I]). Here, the Support Magistrate should have considered whether the father was entitled to a downward modification of his child support obligation pursuant to FCA § 451 (3) (b) (ii). Nevertheless, the Support Magistrate properly placed the burden on the father to provide evidence in support of his petition, including specific evidence that his loss of income was involuntary and that he made a diligent, good faith effort to secure other employment commensurate with his education, ability, and experience, and he failed to satisfy this burden. The record supported the Support Magistrate's determination that the father did not testify credibly regarding his ability to satisfy his support obligations. Contrary to the father's contention, he failed to adduce sufficient credible evidence that his income had decreased through no fault of his own and that he had made a diligent, good faith effort to secure other employment commensurate with his education, ability, and experience. Thus, 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.

*Matter of Rizzo v Spear*, 152 AD3d 774 (2d Dept 2017)

**Supreme Court Should Have Imputed Additional Income to Defendant**

In determining a parent's child support obligation, a court need not rely upon the parent's own account of his or her finances, but may impute income based upon the parent's past income or demonstrated earning potential. The court may impute income to a party based on his or her employment history, future earning capacity, educational background, or money received from friends and relatives. Here, the defendant testified that, in addition to his full-time employment with a bank, he worked an average of four five-hour shifts per month as an emergency medical technician, earning $17.85 per hour. Upon consideration of this testimony, the Supreme Court should have imputed an additional $4,284 in annual income to the defendant, and the defendant's child support obligation should have been increased to the sum of $491.86 per week. Judgment modified.

*Margolis v Cohen*, 153 AD3d 1390 (2d Dept 2017)

**Support Magistrate Acted Within Her Authority in Ordering Father to Participate in Rehabilitative Services**

The Support Magistrate, among other things, granted the objection to that part of an order directing respondent

father to report to a career center because, as a resident of another county, respondent was not eligible for the services. Family Court sustained the objection and directed petitioner to submit a new order striking the requirement and adding a provision that the matter be referred to Family Court. The Appellate Division modified by reversing that part of the order directing petitioner to submit a new order referring the matter to the court. The court erred by ruling that the Magistrate was without authority to impose sanctions for respondent's willful violation of the support order and by requiring that the matter be referred to the court for that purpose. Under the Family Court Act, the Magistrate was within her authority to impose a sanction that required respondent to participate in rehabilitative services. Moreover, Family Court Act § 439 (a) requires confirmation by the court only where the Magistrate recommends the commitment of a respondent, who has willfully violated a support order, to a period of incarceration.

*Matter of Cortland County Dept.of Social Servs. v. Perry,* 150 AD3d 1351 (3d Dept 2017)

**Default Judgment Inappropriate Where Substantial Participation at Hearing by Father**

In this child support violation proceeding in Family Court, the Support Magistrate did not err in denying the father's request for an adjournment of the fourth day of a fact-finding hearing. The father failed to appear on the fourth day and requested an adjournment because of an alleged illness in his family. In denying the adjournment request, the Support Magistrate noted that the father failed to present any documentary evidence of the alleged illness in his family and he further had a history of failing to appear for scheduled court appearances. After denying the father's adjournment request, the Support Magistrate proceeded to enter a default order finding that the father was in willful violation of the support order, which finding was later confirmed by Family Court. The Support Magistrate erred, however, in finding the father in default based upon his non-appearance on the last day of the four day hearing, particularly where the father's attorney was present and continued to participate in the hearing. Notwithstanding the fact that the father failed to appear on the fourth day of the hearing, the father participated at the first three days of the hearing, including having testified and been cross examined by the mother's attorney, and consequently, there was ample support in the record to support Family Court's determination on the merits, that the father willfully violated the support order.

*Matter of Dench-Layton v. Dench-Layton,* 151 AD3d 1199 (3d Dept 2017)

**Child Support Provisions of Separation Agreement Invalid Where No Distinction as to What Portion of Monthly Amount is Child Support Opposed to Maintenance**

In divorce action, Supreme Court improperly denied the wife's request to find the maintenance and child support provisions of the parties' separation agreement to be invalid. The separation agreement, which did not comply with the requirements of the Child Support Standards Act (CSSA), included only one monthly amount ($1,475 per month) which the husband was to pay to the wife and which amount was referred to in the agreement only as "support." The Court noted that despite having the authority to make a pendente lite child support and maintenance award, the record was devoid of important and up to date information about, inter alia, the parties' respective incomes. Consequently, the Court could not make such an award which required the matter to be remitted back to Supreme Court to address the issue of pendente lite child support and maintenance.

*Matter of Cummins v. Lune,* 151 AD3d 1258 (3d Dept 2017)

**Mother Denied Reimbursement for College Expenses Where She Failed to Present Proof of Payment**

Supreme Court providently denied plaintiff's motion to enforce provisions of the parties' 2010 separation agreement, which was subsequently incorporated without merger into their judgment of divorce, that addressed the payment of college expenses for their two children. The parties' agreement required them to "equally share" their children's college expenses by each co-signing 50% of the

children's college loans and to pay back the loans in "equal proportions". The mother alleged that she co-signed more than 50% of the loans relying upon the father's oral promise to pay her back. In denying the mother's motion, the court determined that the mother had failed to submit proof substantiating the existence of the loans that she claimed she incurred. The mother's testimony was limited to a spreadsheet that she prepared that documented payments that she allegedly made towards the repayment of the loans. Supreme Court also denied the mother's motion on the basis that her claim arose from an alleged oral modification of the parties' agreement, despite the fact that the agreement requires any modifications to be in writing and there was no evidence of any such writing.

*Matter of Bell (k/n/a Landers) v. Bell,* 151 AD3d 1529 (3d Dept 2017)

**No Appeal as of Right From a Default Judgment and Denial of Motion to Renew and Reargue Appropriate Where Nothing New Set Forth in Motion**

Parents of two children were parties to orders of support issued in 2003, 2007 and 2011. In 2015, an order was entered upon respondent's default adjudicating him to have willfully violated the 2011 order and a money judgment was entered. Respondent then filed an order to show cause seeking to vacate the previous orders and the money judgment. Pursuant to an order entered in 2016, Family Court declined to grant the relief requested in respondent's order to show cause finding that respondent failed to file timely written objections to the previous orders and relative to the money judgment, failed to establish a reasonable excuse for his default. Respondent's appeal from the denial of the relief requested in his order to show cause was dismissed by the Court "as such order is not appealable as of right." Respondent also appeals from an additional motion filed in Family Court seeking to renew and reargue as relates to the court's 2016 order. Family Court properly denied the motion as the respondent failed to set forth any new facts or changes in the law or new arguments that would have entitled him to relief.

*Matter of St. Lawrence County Support Collections Unit v. Bowman,* 152 AD3d 899 (3d Dept 2017)

**Failure of Support Magistrate to Issue Money Judgment for Counsel Fee Award Was Appealable Deviation From Parties' Stipulation**

In child support violation proceeding in Family Court, the parties entered into a stipulation agreeing that the father willfully violated a 2013 support order for failing to pay his share of child care expenses incurred by the mother for the parties' son. The parties further agreed that a money judgment would be entered against the father for the arrears owed and that while the mother was entitled to counsel fees, the amount of said fees would be determined by the Support Magistrate and also reduced to a money judgment. The Support Magistrate ultimately awarded the mother less in counsel fees than she requested and failed to direct that the award be reduced to a money judgment. The mother filed written objections arguing that the amount of counsel fees was inadequate and further arguing that the Support Magistrate erred in not directing the counsel fee award to be reduced to a money judgment. Family Court erroneously denied the mother's objections, claiming that she could not challenge an order entered upon consent. The mother's appeal ensued. Family Court erred in failing to consider the mother's written objections on the merits, since the support magistrate's decision not to reduce the fee award to a money judgment and was a deviation from the terms of the parties' stipulation.

*Matter of Jordan v. Horstmeyer,* 152 AD3d 1097 (3d Dept 2017)

**Affirmance of Adjudication That Respondent Father Willfully Violated Order of Support**

Family Court adjudged that respondent father willfully violated the order of support, ordered the father to pay child support in the amount of $50 per month, and denied his cross petition seeking a downward modification of the child support order. The Appellate Division affirmed. The father failed to meet his burden of establishing a change in circumstances sufficient to warrant a downward modification of the prior order inasmuch as he did not

provide competent medical evidence of his disability or establish that his alleged disability rendered him unable to work. Although the court misstated the amount of arrears, that misstatement did not require reversal or modification because the court did not order the father to pay any arrears and thus the father was not aggrieved thereby. The father's contention that the arrears should be limited to $500 pursuant to Family Court Act Section 413 (1) (g) was not properly before the Court because it was raised for the first time on appeal. In any event, the father failed to establish that his income was below the federal poverty income guidelines when the arrears accrued.

*Matter of Kelley v Holmes*, 151 AD3d 1704 (4th Dept 2017)

**Court Erred in Increasing Father's Child Support Obligation; Sum Awarded to Mother for Attorney's Fees Excessive**

Supreme Court increased the child support obligation of defendant father, modified the father's visitation, and awarded plaintiff mother attorney's fees. The Appellate Division modified and remitted. The court erred in increasing the father's child support. The mother failed to demonstrate a substantial change in circumstances warranting an upward modification of child support. In her affidavit supporting her request for increased child support and during her hearing testimony, the mother stated only that the father failed to pay his share of the expenses for the children's extracurricular activities. She admitted during her hearing testimony, however, that the children's basic needs were being met. Inasmuch as the mother's remedy for the father's failure to pay his share of the expense was to seek enforcement of the parties' agreement, the court erred in increasing the father's child support obligation as a substitute for that relief. The court's determination that a modification of the visitation schedule was in the children's best interests was supported by a sound and substantial basis in the record. The father's constantly changing work schedule resulted in his inability to see the children for visitation on certain days and had created animosity between the parties. Thus, the court's new schedule providing for visitation with the father on alternating weekends, instead of Mondays and Fridays, was in the children's best interests. However, the court's order was ambiguous regarding the timing of his visitation. Therefore, the order was modified to clarify that the father will pick up the children at 7:30 p.m. on Fridays, and drop them off at 7:30 p.m. on Sundays, on alternating weekends, year-round. The court abused its discretion in awarding the mother $11,336.94 in attorney's fees, costs and disbursements, and the order was further modified accordingly. The father was not provided a meaningful opportunity to object to, or request a hearing on, the mother's attorney's affirmation requesting fees. Although the parties' agreement regarding child support contained an attorney's fees provision, the majority of the hearing was spent on the mother's request for sole custody, which was denied. Accordingly, the sum awarded was excessive. Therefore, the matter was remitted for a determination of reasonable attorney's fees, costs, and disbursements, in accordance with the parties' agreement, after the father has been afforded an opportunity to oppose the application.

*Provenzano v Provenzano,* 151 AD3d 1800 (4th Dept 2017)

**Support Magistrate Erred in Dismissing Mother's Cross Petition for Downward Modification of Child Support**

Family Court denied the mother's objection to orders issued by the Support Magistrate. The Appellate Division modified by granting the objection in part, reinstating the mother's cross petition for a downward modification of child support, and remitting. The court did not err in imputing income to the mother in denying her objections to the denial of her cross petition for a downward modification of child support. The record supported the determination that the mother had access to, and received, financial support from her paramour, with whom she resided. Furthermore, the court did not err in failing to impute income to the father when addressing the mother's initial burden on her cross petitions for a downward modification of child support. A party seeking a downward modification of his or her child support obligation must establish a substantial change in circumstances. The mother alleged that the change in circumstances was a reduction in her income level. Thus, the father's income or imputed income would have

become relevant only if the mother met her initial burden of establishing a reduction in her income. The Support Magistrate was not bound by the account provided by the mother of her own finances, and was therefore entitled to impute income to the mother from support provided by her paramour in determining whether the mother had established a substantial change in circumstances. The mother's contention was rejected that the Support Magistrate was biased and had prejudged her cross petition. Absent a legal disqualification under Judiciary Law Section 14, which was not at issue here, the Support Magistrate was the sole arbiter of recusal, and his or her decision, which lied within the personal conscience of the Support Magistrate, would not be disturbed absent an abuse of discretion. Here, there was no such abuse of discretion. However, the Support Magistrate erred in dismissing the mother's cross petition for a downward modification of child support. The sole justification for that dismissal was the mother's failure to provide financial disclosure from her paramour, a nonparty, who had filed an affidavit stating that he refused to provide financial disclosure to the court. While certain penalties or sanctions could be appropriate for the individual conduct of the mother, it was apparent that the actions of a nonparty weighed heavily in the decision to invoke the ultimate penalty.

*Matter of Deshotel v Mandile*, 151 AD3d 1811 (4th Dept 2017)

## CUSTODY AND VISITATION

### Denial of Unsupervised "Sandwich Visits" Between Respondent and Child Reversed

Family Court denied respondent father's motion for expanded visitation. The Appellate Division reversed, granted the motion, and awarded respondent one-half hour of unsupervised "sandwich" visitation with the child during his twice weekly supervised visits. In 2012, the court found that respondent and the child's mother neglected their 14-month-old son by failing to provide safe living conditions. The child had been in foster care since 2013. In 2015, the permanency goal for the child was changed from family reunification to adoption. A petition was filed to terminate respondent's parental rights on the ground that he permanently neglected the child by failing to maintain contact with him. While the permanency proceeding was pending, respondent had supervised visitation with the child from 4 p.m. to 6 p.m. Wednesdays and Thursdays. In 2016, respondent moved to be granted one-half hour of unsupervised visitation sandwiched into his supervised visitation. In support, he presented letters indicating that he was working full-time and receiving therapy and drug treatment. He also argued that he was visiting the child regularly and that since his parental rights might not be terminated, moving from supervised to unsupervised visitation was essential for reunification. The agency and AFC opposed the motion. Respondent demonstrated good cause to expand visitation. The record established that he did not present any risk of physical harm to the child and that he made significant progress since the inception of the proceeding. Neither the agency nor the AFC provided any evidence that the extra visitation would cause the child greater confusion and emotional harm than would already occur if respondent's parental rights were terminated. The dissent would have affirmed on the ground, among others, that should respondent's parental rights be terminated, all the majority would have done was to confuse and disorient the child by encouraging him to develop a deeper attachment to a person whose relationship with him would likely end.

*Matter of Gerald Y.-C. v Cynthia H.,* 150 AD3d 457 (1st Dept 2017)

### Sole Custody to Mother and Relocation to Gambia Affirmed

Family Court denied the father's petition for sole legal and physical custody of the parties' child, and granted respondent mother's cross petition for custody and relocation, with parenting time to the father. The Appellate Division affirmed. The determination that the child's best interests were served by awarding the mother sole custody and allowing her to relocate with the child to Gambia had a sound and substantial basis in the record. The mother had been the child's primary caretaker since his birth, and the father played , at best, a peripheral role in the child's life. After the father moved out of the parties' apartment when the chid was three months old, he did not have any contact with the child until the child was

two years old. Even then the father's visitation with the child was sporadic. When the child was almost three years old, the mother, who was originally from South Africa, moved with the child to Gambia, where she had family living close by. At the time of the hearing, the child was living in Gambia in a stable, loving home with the mother, his stepfather, and his half brother; he had his own bedroom and bathroom and ample room to play; he attended a respected international school; and, unlike in New York, the mother had a work schedule that allowed her to spend significant time with her children.

*Matter of Ousmane D. v Halimatou B.,* 150 AD3d 509 (1st Dept 2017)

**Modification of Visitation Order Not Warranted**

Family Court dismissed the father's petition to modify a final visitation order. The Appellate Division affirmed. The father failed to establish that there had been a change of circumstances such that a modification would have been in the child's best interests. Although the father maintained that he had relocated to New York, the court's finding to the contrary was entitled to deference. Regardless, the father did not have a residence of his own, but slept on his mother's couch. The father also failed to show that expanding visits would be in the child's best interests. The court found that the child's needs were met in the mother's primary care and that the change proposed by the father would virtually eliminate all the mother's leisure time with the child. Further, the child, who was 13 at the time of the hearing, did not wish to visit the father more.

*Matter of Jose M.C. v Liliana C.,* 150 AD3d 514 (1st Dept 2017)

**Grant of Petition Seeking Return of Children to Norway Reversed**

Family Court granted the father's petition to direct respondent mother to return the parties' two children to Norway. The Appellate Division reversed, denied the petition and dismissed the proceeding. Although the record supported the court's determination that the parties' shared last intent was to return to Norway, the court failed to consider the mother's evidence that the children had acclimatized to New York, and whether that evidence trumped the parties' shared intent. Moreover, the mother met her burden to show, by clear and convincing evidence, that the children's return to Norway would result in a grave risk of harm to them. She presented detailed testimony of multiple acts of domestic violence towards her by the father, sometimes in the presence of the children. She also presented corroborating evidence, including testimony of the maternal grandmother, who witnessed two of the violent episodes, and testified to visible signs of injury to her daughter, which were also noted in the Domestic Incidence Report. The mother also submitted text messages sent by the father threatening the mother's life and made a showing that the father had a propensity for violent abuse, as demonstrated by his violent acts, jealous rages, and forceful treatment of the older daughter. The father acknowledged that the parties fought over the mother's infidelity, but broadly denied the mother's claims, other than admitting to pushing or grabbing the mother to restrain her. However, his testimony was uncorroborated. Finally, the mother presented evidence that, as a noncitizen of Norway, there would be minimal, if any, domestic violence resources available to her if she were to move there with the children, and that, because of her immigration status, she would not be allowed to live there for more than 90 days.

*Matter of Oliver A. v Diana Pina B.,* 151 AD3d 485 (1st Dept 2017)

**Error to Modify Custody Without a Hearing**

Family Court modified respondent mothers' weekly, holiday and summer parenting time and restricted her access to information about the child's education, health care, school events, and medical treatments. The Appellate Division reversed and remanded for a hearing. The court did not conduct a hearing before its modification of the parties' custody agreement with respect to visitation. It also effectively barred the mother from access to the child's school officials and events and medical visits and treatment without the father's consent, over the AFC's objection, based upon an incident where the mother objected to how the child's name was

registered and the father's failure to identify the mother as a parent. The determination was not rendered on an emergency basis. Thus, in view of the conflicting factual accounts in the parties' papers, the court should not have modified the agreement without a hearing, at which the mother and the AFC would have had an opportunity to present testimony and evidence. Also, in light of an Appellate Division decision on a prior appeal, which revoked the court's order suspending the mother's Wednesday overnight visits without a hearing, the court erred in failing to reinstate visitation, inasmuch as it had not received competent evidence that it would not be in the child's best interests to do so. As the AFC indicated, that issue required further exploration at a hearing.

*Matter of Lela G. v Shoshanah B.,* 151 AD3d 593 (1st Dept 2017)

**Jurisdiction Under Domestic Relations Law § 76-a Properly Declined**

Family Court dismissed the father's petition seeking to modify a custody order and to enforce a visitation order. The Appellate Division affirmed. The court properly declined to exercise its continuing jurisdiction under Domestic Relations Law § 76-a (1) (a), inasmuch as the record supported its determination that neither the child nor the mother had a significant connection to New York and that substantial evidence was no longer available in New York concerning the child's care, protection, training and personal relationships. The child had been living continuously with his mother and maternal grandparents in Mississippi since 2013, and had no continued significant connection to New York, aside from his father living in New York. Although the father testified that he lived at the same address for eight months, the record showed that his visits with the child after the child's relocation to Mississippi generally involved trips outside New York State. The court properly determined that evidence related to the allegations in the father's petition concerning the mother's conduct and the child's welfare were located in Mississippi.

*Matter of Kevin McK. v Elizabeth A.E.,* 151 AD3d 600 (1st Dept 2017)

**Court Properly Modified Custody Order**

Family Court granted the mother's petition to modify a custody order and awarded her sole legal and physical custody of the parties' children, subject to visitation with respondent father on alternate weekends. The Appellate Division affirmed. The court properly determined that a full evidentiary hearing was not necessary because it possessed sufficient information to render an informed decision on the children's best interests and because the father made no offer of proof that would have affected the outcome. Both parties and the AFC were provided ample opportunities to present their positions, and the court made the factual basis for its determination on the record. The court's determination to modify custody based upon a change of circumstances had a sound and substantial basis in the record. The children stated that they wanted to live with their mother for reasons that included verbal abuse by the father, the father's failure to provide food and clothing on a consistent basis, and an incident of domestic violence in their presence that resulted in the police being called.

*Matter of Martha V. v Tony R..,* 151 AD3d 653 (1st Dept 2017)

**Mother Properly Denied Permission to Relocate to Florida With Parties' Child**

Family Court denied the mother's petition to relocate with the parties' child to Florida. The Appellate Division affirmed. The denial of the mother's request to relocate had a sound and substantial basis in the record. The mother was unable to say exactly which town in Florida she would be moving to, and, at the time of the hearing, she was unemployed and failed to provide any details or proof of job availability in Florida. Although the father was in arrears with respect to his child support obligations and he was not actively involved in the child's education or school events and had to reschedule certain of his visitation dates and times, he testified that the child had a strong attachment to him and the child saw his paternal grandmother on alternate weekends when the child stayed with her while the father was working. Both relationships would suffer if the child moved to Florida, raising the issue regarding the father's ability to maintain

meaningful access to the child. The father's work schedule and demands precluded him from having the flexibility to allow for frequent visits to Florida and/or extended visits by the child to New York.

*Matter of Salena S. v Ahmad G.,* 152 AD3d 162 (1st Dept 2017)

**Petitioner Showed Extraordinary Circumstances Sufficient to Overcome Father's Presumption to Entitlement of Custody of His Son**

Family Court awarded custody of the subject child to petitioner maternal cousin. The Appellate Division affirmed. The court properly found that the father's presumptive entitlement to custody of his son was overcome by petitioner's showing of extraordinary circumstances based upon the facts that the father never assumed a primary parental role in the child's life, had not obtained adequate housing, failed to contribute to the son's support, and that the child was afraid of him. The award of custody to petitioner was supported by a preponderance of the evidence. The record showed that she supported the child, gave structure to his life, took care of his medical and educational needs, and provided him with a stable and loving home where he was thriving.

*Matter of Elisha W-B. v Aiden W.,* 152 AD3d 409 (1st Dept 2017)

**Child's Visitation With Mother Would be Destructive**

Family Court, after a hearing, issued an order of protection against the mother on behalf of the child, and denied the mother supervised visitation with the child. The Appellate Division affirmed. The court's determination that visitation would be detrimental to the child had a sound and substantial basis in the record. The father presented substantial evidence that the mother masterminded a plot to murder him in order to access the proceeds of the father's $1.5 million dollar life insurance policy, for which she was named the irrevocable trustee. Photos revealed the mother and her cousin buying a sledgehammer at Home Depot the day before the cousin attacked the father with the same sledgehammer. The father also presented phone records showing that the mother and her cousin were in communication on the day of the attack, and a hand drawn map found with the cousin at his arrest, which depicted points of entry and egress in the father's building, was determined to be in the mother's handwriting. The knife found at the scene came from the mother's apartment. Also, the mother sought to alienate the child from the father, falsely claiming that the father was trying to put her in jail, and pressing the child for personal details about the father's life.

*Matter of Evan W. v Pamela Lyn B.,* 152 AD3d 414 (1st Dept 2017)

**Record Supported Determination Awarding Sole Legal and Physical Custody to Plaintiff**

The judgment appealed from awarded the plaintiff sole legal and physical custody of the parties' child and failed to impute additional income to the plaintiff. The Appellate Division affirmed.

In a matrimonial action, a nonjury trial was held on the issues of custody of the parties' child and the equitable distribution of assets. Contrary to the defendant's contention, the Supreme Court did not err in awarding the plaintiff sole legal and physical custody of the child. The Supreme Court determined that the plaintiff's testimony at trial was credible and that the defendant's testimony was not credible. There was no basis in the record to disturb that determination. Considering the totality of the circumstances, it was in the child's best interests to award sole legal and physical custody to the plaintiff. The court was not required to follow the recommendation of the forensic evaluator that primary physical custody remain with the defendant. His recommendation was but one factor to be considered and was entitled to some weight, but was not determinative and did not usurp the judgment of the court.

*Cunningham v Brutman*, 150 AD3d 815 (2d 2017)

**Family Court Properly Determined That it Should Relinquish Jurisdiction Pursuant to UCCJEA**

Father appealed from an order which dismissed his petitions to modify two orders of custody and visitation regarding the parties' two minor children. The Appellate Division affirmed. Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ( hereinafter UCCJEA), a court in this State that has made an initial custody determination has exclusive continuing jurisdiction over that determination until it finds, as was relevant here, that the child does not have a "significant connection" with New York, and "substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships" (*see* DRL § 76 [a] [1] [a]). Here, the Family Court properly determined that it should relinquish jurisdiction where the subject children, who have lived with the mother in Colorado since October 2014, did not have a significant connection with New York, and substantial evidence was no longer available in this State concerning the children's care, protection, training, and personal relationships (*see* DRL§ 76-a [1] [a]).

*Matter of Ryan V. Daniels*, 150 AD3d 850 (2d 2017)

**Petitioners Sustained Their Burden of Demonstrating Extraordinary Circumstances**

The order appealed from, after a hearing, granted the petition of the maternal aunt and uncle to be appointed guardians of the subject child. The Appellate Division affirmed. In September 2009, the subject child was placed in foster care with his maternal aunt and uncle (hereinafter together the petitioners) following the commencement of a neglect proceeding against the mother. In April 2010, the Family Court found that the mother neglected the child. In July 2014, the petitioners filed a petition to be appointed guardians of the child, which was opposed by the mother. In an order dated October 15, 2015, made after a hearing, the court granted the guardianship petition. 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 other like extraordinary circumstances, and where extraordinary circumstances are present, the court must then consider the best interests of the child. The burden of proof is on the nonparent to prove such extraordinary circumstances. Here, the Family Court properly determined that the petitioners sustained their burden of demonstrating extraordinary circumstances based on evidence that the mother suffered from a mental illness which had contributed to the child's placement in foster care, that the mother lacked insight into her condition, and that the child was separated from the mother for an extended period of time and was closely bonded to the petitioners. Further, the court's determination that an award of guardianship to the petitioners was in the best interests of the subject child was supported by a sound and substantial basis in the record. Accordingly, the Family Court properly granted the petition to appoint the petitioners as the subject child's guardians.

*Matter of Kaylub T.*, 150 AD3d 862 (2d 2017)

**Record Supported Determination Denying Mother's Petition for Sole Custody of Children and Permission to Relocate**

The order appealed from, after a hearing, granted the father's petition for sole custody of the subject children and denied the mother's petition for sole custody of the subject children and for permission to relocate with them to North Carolina. The mother appealed. The Appellate Division affirmed. The mother and the father, who never married each other, have two children together. In July 2015, the father commenced a proceeding seeking sole custody of the children. Thereafter, in October 2015, the mother filed her own petition for sole custody of the children and for permission to relocate with them to North Carolina. After a hearing, the Family Court denied the mother's petition and granted the father's petition. Upon reviewing the record, the Appellate Division found that the Family Court's determination was supported by a sound and substantial basis in the record.

*Matter of Biancoviso v Barona*, 150 Ad3d 990 (2d 2017)

**Record Did Not Support Family Court's Denial of Father's Motion to Vacate Default**

The order appealed from denied the father's motion to vacate two orders and an order of protection of that court,

all dated March 1, 2016, which, upon his failure to appear at a scheduled court date, respectively, (1) dismissed his visitation petition, (2) granted the mother's petition for sole custody of the subject child, and (3) directed him, inter alia, to stay away from the mother and the subject child until and including September 23, 2026. The Appellate Division reversed. A party seeking to vacate a default must establish a reasonable excuse for the default, as well as a potentially meritorious claim or defense. In custody proceedings, the Appellate Division has adopted a liberal policy in favor of vacating defaults. Under the circumstances presented here, and in light of the policy favoring resolution on the merits in child custody proceedings, the father demonstrated a reasonable excuse for his failure to appear on March 1, 2016. The father's absence was not willful. Notably, the father had never missed any prior scheduled Family Court appearances and had been compliant with all of the court's directives. Moreover, there was no indication that a final determination of the petitions pending before the court would occur on the March 1, 2016, date. Finally, the father filed his motion to vacate within two months of the default. Under the totality of these circumstances, the court improvidently exercised its discretion in denying the father's motion to vacate the March 2016 orders on the ground that his excuse for his absence was not reasonable.

*Matter of Lemon v Faison*, 150 Ad3d 1003 (2d 2017)

**The Record Supported Determination That There Had Been a Change in Circumstances Requiring a Transfer of Residential Custody to the Mother**

The parties are the parents of one child, born in 2006. In an order dated March 28, 2011, the Family Court, upon consent, awarded the parties joint legal custody of the child with residential custody to the father. In August 2014, the mother filed a petition to modify the order so as to award her residential custody. In the order appealed from, the Family granted the petition. The father appeals from that portion of the order. The Appellate Division affirmed. Modification of an existing custody order is permissible only upon a showing that there has been a change in circumstances such that modification is necessary to ensure the continued best interests of the child. In determining whether such a change exists, the court must determine whether the totality of the circumstances justifies modification. The factors to be considered in making a determination with respect to the best interests of the child include the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent. In addition to these factors, the court must also consider the stability and continuity afforded by maintaining the present arrangement. Here, contrary to the father's contention, the Family Court's determination that there had been a change in circumstances requiring a transfer of residential custody to the mother in order to ensure the best interests of the child had a sound and substantial basis in the record. Accordingly, the Family Court properly granted the mother's petition.

*Matter of Perez v Brown*, 150 AD3d 1011 (2d 2017)

**Maternal Aunt Established Extraordinary Circumstances**

The order appealed from granted the maternal aunt's petition for custody of the subject child. The Appellate Division affirmed. The subject child was born in November 2014 and, since then, has lived with the petitioner, his maternal aunt. Initially, the mother lived with the child and the petitioner, but she moved out within approximately one month after the child was born, without taking the child with her. After moving out of the petitioner's home, the mother did not visit the child regularly, despite the petitioner's efforts to accommodate visits. A few months later, the petitioner commenced a proceeding for custody of the child, who has significant medical issues. After a hearing, the Family Court determined that the petitioner had established standing to seek custody of the child, and that the child's best interests were served by awarding custody to the petitioner. Accordingly, the court granted the petition. In general, parents are "entitled" to custody of their children. In some cases, however, a nonparent may establish standing to seek custody. To establish standing, the nonparent must demonstrate the existence of

extraordinary circumstances, such as surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time. If the nonparent establishes standing, it must then be determined what custody arrangement is in the child's best interests. Here, the mother admitted at the hearing that she could not care for the child, that she had not acted as a parent since he was born, and that she had provided no support for him. The evidence also established that the mother had not made alternative arrangements for his care, and, indeed, that she was not prepared to assume custody of the child and opposed the petition because she did not want the petitioner to have custody. Finally, the evidence established that the petitioner was well-positioned to care for the child and that his best interests would have been best served by awarding custody to the petitioner. Therefore, the petitioner had standing to seek custody of the child because of extraordinary circumstances, and the child's best interests were best served by awarding custody to the petitioner. Accordingly, the petition was properly granted.

*Matter of Rodriguez v Rodriguez*, 150 Ad3d 1016 (2d 2017)

**Record Did Not Support Determination Awarding Mother Sole Legal and Physical Custody of the Children**

The order, after a hearing, granted the mother's petition for sole legal and physical custody of the subject children, and denied the father's petition for sole legal and physical custody of the children. The father appealed, and the children separately appealed. The Appellate Division reversed. In this case, the Family Court's determination awarding the mother sole legal and physical custody of the children did not have a sound and substantial basis in the record. Specifically, the court's finding that the mother was "better equipped to meet the physical, mental and emotional needs of the children" was not supported by the record. The record also failed to support the court's determination that the father did not indicate a willingness to co-parent with the mother. In addition, while a child's expressed preference in a custody proceeding is not determinative, it is some indication of what is in the child's best interests, particularly where, as here, the court's interview with the sons demonstrated their level of maturity and ability to articulate their preferences. Here, although the children indicated a preference for living with the father, the court merely indicated that it understood their positions without explaining its reasons for rejecting them. Viewing the totality of the circumstances, the Appellate Division found that the best interests of the children were served by awarding the father sole legal and physical custody of the children, with liberal visitation to the mother. Accordingly, the matter was remitted to the Family Court to establish the mother's visitation schedule, and thereafter the effectuation of the transfer of the children from the custody of the mother to the custody of the father, immediately upon the completion of the current school year.

*Matter of Tofalli v Sarrett*, 150 AD3d 1122 (2d 2017)

**Record Did Not Support Determination That the Best Interests of the Children Were Served by Awarding Physical Custody to the Father**

The order appealed from granted the father's petition which was for physical custody of the children. The mother appealed. The Appellate Division reversed. The mother and father are the unmarried parents of two minor children, born in 2007 and 2010. The mother, father, and children lived together in North Carolina until December 2013, when the father moved to New York. The mother and father agreed that the children would go to school in North Carolina and visit the father on holidays and vacations. The children have half-siblings in North Carolina, who they see regularly when they are in North Carolina. In the summer of 2014, while the children were visiting the father in New York, the mother, who was facing eviction, asked the father to keep the children for the 2014-2015 school year. The mother picked up the children in July 2015, and enrolled them in school and extracurricular activities in North Carolina. The father, who commenced these custody proceedings in July 2015 and August 2015, respectively, brought the children back to New York in September 2015, where they have remained. The Family Court conducted a fact-finding hearing and in-camera interviews of the children. Thereafter, the court, among other things, awarded physical custody of the children to the father. The mother

appealed from that part of the order. In this case, the Family Court failed to consider the totality of the circumstances and weigh all the relevant factors. For instance, it failed to accord sufficient weight to the parties' custody arrangement and to evidence that showed that the mother provided a stable home and a home environment generally better suited for the children. The mother also had more available time to spend with the children and to attend to their needs. Further, the children had a close relationship with their half-siblings while living with the mother in North Carolina, but the father had made no effort to foster that relationship while the children were in his care. The court also gave undue weight to what it perceived as misjudgment by the mother in her personal life and erroneously found that the mother abandoned her other children to move to New York with the father and the children. Accordingly, viewing the totality of the circumstances, the Family Court's determination that the best interests of the children were served by awarding physical custody to the father lacked a sound and substantial basis in the record. Thus, the order was reversed, and the matter was remitted to the Family Court to enter an order awarding physical custody of the children to the mother and to establish an appropriate visitation schedule for the father and the effectuation of the transfer of the children. In the interim, and pending further order of that court, temporary physical custody of the children remained with the father.

*Matter of Agyapon v Zungia*, 150 AD3d 1226 (2d Dept 2017)

**Record Supported the Family Court's Determination That There Had Been a Change in Circumstances**

The order appealed from granted the mother's petition to modify the parties' stipulation of settlement so as to award her residential custody of the parties' children, and reduced the father's parenting time with the children. The father appealed. The Appellate Division affirmed. The parties are the divorced parents of two daughters, born in 2004 and 2008, respectively. On November 28, 2012, the parties entered into a stipulation of settlement, which was incorporated but not merged into their judgment of divorce. Under the terms of the stipulation, the parties agreed to joint legal custody and to divide parenting time equally by having the children alternate between each parent's home on a weekly basis. In April 2016, the mother petitioned to modify the parenting time provisions of the stipulation of settlement so as to award her residential custody, alleging that there had been a change in circumstances, which included a change in the father's work location and schedule caused by his transfer from Suffolk County to the Bronx. After conducting a hearing and taking the testimony of the children in camera, the Family Court granted the mother's petition, awarding her residential custody and setting forth a parenting time schedule which reduced the father's parenting time to, inter alia, three weekends per month, and every Tuesday after school or work until Wednesday at 8:00 p.m. Contrary to the father's contention, the record contained a sound and substantial basis for the Family Court's determination that there had been a change in circumstances, including the transfer of his employment from Suffolk County to the Bronx, which made the parties' original equal parenting time schedule unworkable, and required a transfer of residential custody to the mother to ensure the best interests of the children. Moreover, the court's specific modifications of the parenting time provisions of the stipulation of settlement were also supported by a sound and substantial basis in the record and were consistent with the best interests of the children.

*Matter of Bodre v Stimatz*, 150 Ad3d 1228 (2d Dept 2017)

**Record Supported Determination Awarding Mother Sole Physical Custody of Child**

The order appealed from granted the mother's petition for sole physical custody of the parties' younger child. The Appellate Division affirmed. The Family Court properly weighed all of the factors in awarding sole physical custody of the parties' younger child to the mother. The court, after evaluating the testimony, interviewing the child in camera, and considering the position of the attorney for the child, determined that the child's best interests were served by an award of sole physical custody to the mother. That determination had a sound and substantial basis in the record.

*Matter of Castillo v Muniz*, 151 AD3d 961 (2d Dept

2017)

**Record Supported Determination to Grant Mother's Petition to Modify Order of Custody**

The order appealed from denied the father's petition alleging violations of prior orders of custody and visitation of that court dated June 27, 2014, and November 10, 2014, respectively, and granted the mother's petition which was to modify those same orders by changing the father's four-week summer parenting time to two separate two-week periods of parenting time. The Appellate Division affirmed. The Family Court properly denied the father's violation petition, as he did not present clear and convincing evidence that the mother had violated the orders of custody and visitation. Instead, the evidence demonstrated that the father remained a constant and involved presence in his children's lives, and that the mother had not interfered with his scheduled parenting time. Moreover, a determination of visitation is within the sound discretion of the hearing court, based upon the best interests of the child, and its determination will not be set aside unless it lacks a sound and substantial basis in the record. Here, the Family Court's modification of the orders of custody and visitation by changing the father's four-week summer parenting time to two separate two-week periods had a sound and substantial basis in the record.

*Matter of Davis v Ashe*, 151 AD3d 962 (2d Dept 2017)

**Full Evidentiary Hearing on Mother's Petition**

The mother appealed from an order of the Family Court, which, without a hearing, dismissed the mother's petition to modify a prior order of that court, upon her default, and suspended her visitation with the subject child. The Appellate Division reversed. The prior order was entered upon the mother's default, and suspended her visitation without making any findings of fact. Since the original circumstances under which the mother's visitation was suspended were not in the record, summary denial of the mother's modification petition could not be premised on the ground that she failed to show a change in circumstances. Rather, the rule that visitation determinations should be made after a full evidentiary hearing to ascertain the best interests of the child should have been followed in this case. Accordingly, the order was reversed and the matter was remitted to the Family Court for an evidentiary hearing and a new determination thereafter.

*Matter of Izquierdo v Santiago*, 151 AD3d 967 (2d Dept 2017)

**Record Supported Determination Awarding Father Sole Legal and Residential Custody of Child**

The father and the mother are the parents of one child, born in December 2003. In July 2011, the father filed a petition for sole custody of the child. After extensive proceedings and a hearing that included the testimony of both parents and a court-appointed forensic psychologist, the Family Court awarded sole legal and residential custody to the father. The mother appealed. The Appellate Division affirmed. The Family Court, after having had the opportunity to evaluate the testimony, consider the recommendation of the forensic expert, and interview the child in camera, determined that the child's best interests were served by awarding sole legal and residential custody of the child to the father. There was a sound and substantial basis in the record for the court's determination.

*Matter of Taj Ramses Ra El v Aroepa-Hughley*, 151 AD3d 974 (2d Dept 2017)

**Record Supported Determination Limiting Overnight Visitation**

In this custody proceeding, the parties agreed to an award of joint legal custody of the subject child, with sole physical custody to the father. However, the parties were unable to reach an agreement as to whether the mother was entitled to "weekend overnight visits" with the child every weekend, as she sought, or every other weekend. In an order dated September 6, 2016, the Family Court, among other things, awarded the mother "weekend overnight visits" with the child every other weekend. The mother appealed. The Appellate Division affirmed. The

determination of visitation issues is entrusted to the sound discretion of the Family Court and will not be disturbed unless it lacks a sound and substantial basis in the record. Here, the Family Court's determination to limit the mother's "weekend overnight visits" with the child to every other weekend was supported by a sound and substantial basis in the record, as the mother's request for overnight visits every weekend would have deprived the father of significant quality time with the child. Accordingly, the Family Court providently exercised its discretion in awarding the mother "weekend overnight visits" with the child every other weekend.

*Matter of Walden v Hoskins*, 151 AD3d 981 (2d Dept 2017)

**Supreme Court's Modification of Consent Order Improperly Awarded Father Custody of Child**

The parties are the parents of the subject child born in 2007. The parties never married. By order on consent dated February 3, 2012 (hereinafter the consent order), the mother was awarded sole legal and physical custody of the child, with visitation to the father. The father filed a violation petition dated March 11, 2016, alleging that the mother had violated the consent order by relocating with the child and by denying him visitation. After three court appearances, the matter was scheduled for a hearing on August 23, 2016. On that date, the Supreme Court denied a request by the mother to appear by telephone, and, without the father having made an application for custody of the child or the benefit of an evidentiary hearing, awarded the father custody of the child. The court also issued a warrant for the mother's arrest. The child appealed. The Appellate Division reversed. The Supreme Court improperly modified the consent order by changing custody from the mother to the father without the father having sought that relief in the petition, and without any apparent consideration of the child's best interests. The court's award of custody to the father under the circumstances of this case also was improper in light of the father's statements during the proceedings, that he did not have a steady place to live with the child and that he did not wish to make an application for custody. Accordingly, the order was reversed, and remitted to the Supreme Court for further proceedings on the father's violation petition. Notably, the Appellate Division cautioned the Supreme Court to be mindful that determining the best interest of a child is a weighty responsibility, and that it ordinarily should not make such a determination without conducting an evidentiary hearing.

*Noel v Melle*, 151 AD3d 1065 (2d Dept 2017)

**Record Was No Longer Sufficient to Determine Best Interests**

In adjudicating custody and visitation rights, the most important factor to be considered is the best interests of the child, which requires an evaluation of the totality of the circumstances. Here, the Supreme Court, after the trial, awarded custody of the parties' minor children to the defendant. However, on appeal, new developments were brought to the Appellate Division's attention by the attorneys for the minor children, including that, after the judgment of divorce was entered, the child J. moved into the home of the plaintiff and ceased communicating with the defendant. In light of those new developments, the record was no longer sufficient to determine which arrangement were in the best interests of the children. Accordingly, the matter was remitted to the Supreme Court for a hearing, and a new custody determination thereafter. Since the matter was being remitted for a hearing on the issue of custody, the Appellate Division noted that the Supreme Court, relying on the physician-patient privilege, improperly precluded testimony of two witnesses, Drs. Janet Wilkie and Arthur Riesel, regarding the defendant's mental health. Here, since the defendant actively contested custody, and the plaintiff made the requisite showing that resolution of the custody issue required revelation of the protected material, the court should not have precluded the testimony of these witnesses.

*Bruzzese v Bruzzese*, 152 AD3d 563 (2d Dept 2017)

**Record Supported Modification of Parties' Stipulation**

During the pendency of their divorce action, the parties entered into a stipulation of settlement dated August 5, 2014, which was so-ordered by the Supreme Court (hereinafter the stipulation). The stipulation awarded the

parties joint legal custody of their two children, with primary residential custody to the defendant. Thereafter, the plaintiff moved to modify the stipulation so as to award him sole legal and physical custody of the children. In an order entered January 27, 2016, the court, after a hearing, granted the plaintiff's motion. The defendant appealed. The Appellate Division affirmed. The record demonstrated, among other things, that the parties' relationship deteriorated after the stipulation, that the defendant unilaterally made major decisions regarding the children in total disregard of the stipulation, and that the defendant made statements to the children suggesting that the plaintiff did not love them. Accordingly, the Supreme Court's determination that there had been a change in circumstances, and that a transfer of sole legal and physical custody to the plaintiff was in the children's best interests, had a sound and substantial basis in the record.

*Bondarev v Bondarev*, 152 AD3d 482 (2d Dept 2017)

**Record Supported Determination That Visitation Schedule Was in Child's Best Interests**

The mother and the father have one child together. The mother commenced a custody proceeding, seeking sole legal and physical custody of the parties' child. After a hearing, the Family Court awarded the mother sole legal and physical custody of the subject child, with visitation to the father which was for every week from Monday evening until Wednesday evening, and every other weekend. The father appealed. The Appellate Division modified. Contrary to the father's contention, the visitation schedule provided him with meaningful time with the child. The determination that the visitation schedule was in the best interests of the child had a sound and substantial basis in the record. However, the Family Court's determination that it was in the child's best interests to award sole legal custody to the mother lacked a sound and substantial basis in the record. Although it was evident that there was some antagonism between the parties, it was also apparent that both parties generally behaved appropriately with the child and in a relatively civilized fashion toward each other. Further, there was no evidence that they were so hostile or antagonistic toward each other that they would not have been unable to put aside their differences for the good of the child. The parties were able to discuss logistical issues relating to the child's care, and they were able to make accommodations for the father to have additional visits with the child on several occasions. Moreover, the recommendations of court-appointed experts may be considered in making custody determinations, and such recommendations are entitled to some weight, unless the opinion is contradicted by the record. Here, the record did not contradict the mental health evaluator's opinion that joint legal custody was in the child's best interests. Under the circumstances of this case, an award of joint legal custody with final decision-making authority to the mother was in the child's best interests.

*Matter of Spampinato v Mazza*, 152 AD3d 525 (2d Dept 2017)

**Father's Visitation Schedule Warranted Modification**

The parties are the parents of one child, born in 2014. The mother filed a petition for sole custody of the child and subsequently requested permission to relocate with the child to Colorado. After a hearing, the Family Court granted the mother's petition and permitted her to relocate with the child to Colorado. The father appealed. The Appellate Division modified. The Family Court's determination to award sole custody of the child to the mother had a sound and substantial basis in the record. The evidence at the hearing established that the mother had provided consistent care for the child despite undergoing financial difficulties and receiving little regular financial assistance from the father. In addition, by allowing the mother to relocate to Colorado, where she would live with the child's maternal grandmother and have financial and familial support that she does not have in New York, she will be able to provide the child with a stable and nurturing home environment. Accordingly, granting her permission to relocate with the child to Colorado was not an improvident exercise of the court's discretion. However, the father should have been awarded visitation with the child based upon a schedule and terms that were feasible in light of the mother's relocation to Colorado. Therefore, the matter was remitted to the Family Court for a determination of the terms of the father's visitation.

*Matter of Wood v Lozada*, 152 AD3d 531 (2d Dept 2017)

**Record Supported Determination That the Father Should Have Decision-Making Authority with Respect to the Child's Education**

The parties, who were never married, have one child together. In July 2012, the father filed a petition in the Family Court for joint custody of the child and in September 2012, the mother filed a petition in the Family Court for sole custody of the child. The petitions were transferred to the Integrated Domestic Violence Part of the Supreme Court. At the beginning of the fact-finding hearing, the father withdrew his petition for joint custody of the child. The father thereafter re-filed a petition seeking sole legal and residential custody of the child. In an order dated February 17, 2016, the Supreme Court, inter alia, awarded the parties joint legal custody of the child with residential custody to the mother. The court awarded the mother decision-making authority with respect to the child's medical care, and awarded the father decision-making authority with respect to the child's education. The court also found that the maternal grandmother interfered with the father's relationship with the child and was a danger to the child, and directed that the mother not permit the maternal grandmother to be alone with the child. The mother appealed. The Appellate Division affirmed. There was a sound and substantial basis for the Supreme Court's determination that the father should have decision-making authority with respect to the child's education, even though the mother was awarded decision-making authority with respect to the child's medical care. The court was not required to follow the recommendation of the forensic evaluator that the mother should have decision-making authority with respect to the child's education. The evaluator's recommendation, which was made two years before the court rendered its determination, was not determinative and did not usurp the judgment of the court. Contrary to the mother's contention, there was a sound and substantial basis for the Supreme Court to direct that the mother not permit the maternal grandmother to be alone with the child.

*Matter of E.D. v D.T.*, 152 AD3d 583 (2d Dept 2017)

**Record Supported Determination That Award of Residential Custody of the Child to the Father Was in the Child's Best Interests**

The mother and the father each filed petitions for custody of their child. After a hearing, the Family Court awarded residential custody to the father and parenting time to the mother, including three weekends per month, and four weeks during the summer. The mother appealed. The Appellate Division affirmed. The Family Court evaluated the testimony, and considered the position of the attorney for the child, in determining that the child's best interests were served by an award of residential custody of the child to the father, with a parenting time schedule which ensured that both the mother and the father would have quality time with the child when she was not in school. That determination had a sound and substantial basis in the record.

*Matter of Gibson v Greene*, 152 AD3d 592 (2d Dept 2017)

**Record Supported Granting Mother's Amended Petition for Permission to Relocate with Child**

The mother appealed from two orders of the Family Court, both dated June 30, 2016. The first order, after a hearing, denied the mother's amended petition for permission to relocate with the parties' child to Middletown, New York. The second order granted the father's cross petition which was to modify a prior order of custody and visitation of that court, so as to award him custody of the parties' child. The Appellate Division reversed. The Family Court's determination was not supported by a sound and substantial basis in the record. The record established, inter alia, that although both parties are loving and fit parents, the mother has been the child's primary caretaker for all but less than one year of the child's life, the child was 15 years old at the time of the hearing, the child has established a primary emotional attachment to the mother and expressed that she wished to relocate to Middletown with the mother, and the mother's three younger children, and that the mother's and child's life may be enhanced economically by the move to Middletown. Although the mother's relocation would have an impact upon the father's ability to spend time with the child, the record established that the father's contact with the child throughout her life has been inconsistent, that Middletown is only 1½ to 2 hours from the father's residence, and that a liberal visitation schedule would allow for the continuation of a

meaningful relationship between the father and the child, as well as between the child and the father's younger children. Upon weighing the relevant factors, the Appellate Division found that the mother established that the best interests of the child would be served by permitting relocation to Middletown and that the father failed to establish that a change of custody was in the child's best interests. Accordingly, the Family Court should have granted the mother's amended petition for permission to relocate with the parties' child to Middletown, and denied that branch of the father's cross petition which was to modify the prior order of custody and visitation dated November 18, 2003, so as to award him custody of the child.

*Matter of Turvin v D'Agostino*, 152 AD3d 610 (2d Dept 2017)

**No Extraordinary Circumstances - Custody to Aunt Reversed**

In this custody proceeding between respondents mother and father and petitioner maternal aunt, Family Court granted petitioner custody of the subject child. The Appellate Division reversed. In 2015, the mother and maternal aunt entered into an agreement that the aunt would take physical custody of the child for the duration of the school year. About two weeks after the child began living with her, the aunt commenced this custody proceeding alleging, among other things, that the child stated that a bruise on her leg was caused when her father hit her with a belt and had sustained other unexplained injuries while residing with the parents. The court awarded the aunt temporary custody of the child and ordered a child protective investigation. The resulting report stated that the abuse allegations were unfounded, but the allegations of inadequate food, clothing, shelter and guardianship were indicated because of hygiene conditions so extremely poor that the home was uninhabitable for children. The mother and two younger children temporarily relocated while the house was cleaned - after an additional inspection, authorities allowed them to return three days later. After a fact-finding hearing, the court found that petitioner demonstrated extraordinary circumstances and that it was in the child's best interests to award custody to the aunt, with regular parenting time to respondents. That was error. Here, the parents immediately corrected the unsanitary conditions when directed to do so and a caseworker testified that the house exceeded minimal standards after the intervention and that respondents cooperated with child protective authorities throughout the investigation and followed through on everything that was asked of them. Both parents testified that they would not let the unsanitary conditions happen again. No further child protective actions were taken, the child was allowed to return to the parents' home for regular visits, and the younger children remained in the parents' custody without interruption. There was also testimony that the parents intended to relocate with the children to live with the paternal grandparents until they acquired sufficient financial stability to live independently. The grandparents confirmed this plan and the grandparents had a four bedroom home and sufficient resources such that the parents and children could live with them and they would provide financial assistance. Respondents' failure to maintain basic housekeeping standards, standing alone, did not manifest such utter parental indifference and irresponsibility that it rose to the level of extraordinary circumstances allowing an award of custody to a nonparent.

*Matter of Jennifer BB. v Megan CC.*, 150 AD3d 1340 (3d Dept 2017)

**No Abuse of Discretion in Failure to Appoint AFC For Less Than Two-Year-Old Child**

Family Court, among other things, granted petitioner father sole legal and residential custody of the subject child with visitation to respondent mother and, in a separate order, found the mother to be in willful violation of the court's prior order. The Appellate Division affirmed. In April 2015, after a negotiated resolution by the parents of the child, the court awarded sole legal and residential custody of the child to the mother, with visitation to the father. Soon thereafter, a series of modification and violation petitions were filed by both parties. In September 2015, the court awarded the father sole legal and physical custody of the child with visitation to the mother. In a separate order, the court found the mother in willful violation of the April order and she was ordered to be incarcerated for 90 days, with the sentence to be suspended on the condition that she comply with the

September order. Testimony at the fact-finding hearing showed that the mother admitted to frequently violating the prior custody order by disregarding the visitation schedule, unilaterally changing the exchange locations, failing to provide the father with information concerning the child, and failing to keep and exchange the child's medical log. She removed the child from the state in violation of the custody order. She used derogatory language, including racial epithets, towards the father, committed acts of domestic violence toward the father and others in the presence of the child, and generally demonstrated an unmitigated hatred of the father. This significant deterioration of the parental relationship represented a change in circumstances. There was a sound and substantial basis in the record to support the court's determination to award sole legal and physical custody of the child to the father. The court expressly found that the mother had completely failed to understand the child's emotional needs by her expressions of contempt for the father in the presence of the child. The court acknowledged the father's shortcomings, but found that, unlike the mother, he demonstrated a continued desire for the child to form a relationship with the mother and that he was the better parent to attend to the child's physical and emotional needs. Since the child was less than two years old at the time of the proceedings and in the absence of any demonstrable prejudice arising from the failure to appoint an AFC, the failure to so was not an abuse of discretion.

*Matter of Dorsey v De'Loache*, 150 AD3d 1420 (3d Dept 2017)

**Appeal From Order Entered Upon Father's Default Dismissed**

Family Court, among other things, granted maternal grandparents' motion to dismiss the father's modification of custody petition and vacated a temporary order of visitation between the father and the subject child. The Appellate Division dismissed respondent father's appeal. Petitioner parents gave their consent to an order granting respondent maternal grandparents physical custody of the child. In 2014, the father filed a modification petition seeking regular visitation with the child. Shortly thereafter, the grandparents filed a family offense petition against the father and a temporary order of protection was issued against the father. A few months later, the temporary order of protection was amended and the father was granted supervised visitation with the child. At a scheduled hearing in 2015, the father failed to appear. His counsel stated that he had a conference with the father and sent him appointment letters, but he had no idea where the father was and he was unable to take a position. The grandparents moved to dismiss the father's modification petition for failure to prosecute and the court thereafter dismissed the petition. Here, even though the father's counsel appeared, the court did not err in determining that the father was in default. Because no appeal lies from an order entered on default, the father's appeal from the dismissal of his petition was dismissed.

*Matter of Jesse DD. V Arianna EE.,* 150 AD3d 1426 (3d Dept 2017)

**Sound and Substantial Basis to Award Limited Visitation Between Child and Incarcerated Father**

Family Court granted petitioner father's application for visitation with the parties' child. The Appellate Division affirmed. The father was convicted of robbery and had been incarcerated since eight months before the child's birth, with his earliest release date in 2020. In 2015, the father commenced this proceeding, seeking in-person visitation with the child. After a fact-finding hearing, the court concluded that visitation was in the child's best interests and awarded the father three visits per year at the correctional facility where he was housed, with the father responsible for arranging and facilitating the visits, as well as associated transportation costs. Visitation with a noncustodial parent, including an incarcerated one, is presumed to be in the best interests of the child. To overcome the presumption, the party opposing visitation must put forth compelling reasons and substantial proof that visitation would be harmful to the child. Here, the child had some experience with visitation in a prison setting and the father had attempted to maintain a relationship with the child. The court found that the distance to and from the prison was not particularly burdensome and the father was willing to assume responsibility for all transportation costs and arrangements. The father testified that his sister would transport the child and the mother to the prison, as she had done on prior occasions. Neither the mother or the

AFC presented testimonial or documentary evidence to counter the father's representations. The court recognized that the father faced the possibility of deportation when released from prison, but reasoned that this was not a sufficient basis to deny visitation.

*Matter of Dharamshot v Surita*, 150 AD3d 1436 (3d Dept 2017)

**Issue of Permanent Physical Placement of Child Not Properly Before Court**

Family Court granted petitioner father's application to modify a prior order of custody and visitation. The Appellate Division modified and remitted for further proceedings. In January 2016, the parties consented to an order by which they shared joint custody, with primary physical custody to the mother. In February 2016, the mother moved with the child to South Carolina with the father's consent. In April 2016, the father moved by order to show cause for an order granting him temporary physical custody of the child, on the ground that the mother moved to Florida and left the child in South Carolina with her paramour, who sent the child to the father. In an amended order, the court awarded the father temporary physical custody, pending resolution of the matter, and scheduled a return date for an appearance. On that date, the mother did not appear, but counsel appeared on her behalf. The court declared the mother to be in default and issued a final order of custody awarding the father primary physical placement of the child and provided parenting time to the mother as agreed upon by the parties. The mother was not required to seek to vacate the default judgment before appealing because she was not in default. The mother's counsel appeared and advised the court that he communicated with the mother several times by phone and email, that she was at a considerable distance in either South Carolina or Florida, and that she had limited income. Counsel further advised the court of the mother's position and participated by consenting to the child remaining temporarily with the father. Counsel also unsuccessfully requested a continuance and advised that he did not have authority to consent to a final order. Critically, the father's order to show cause requested only temporary physical placement, permission to enroll the child in school, and a prohibition against removal from New York State, with other issues to be scheduled in further proceedings. The record did not contain any petition for modification of the prior order. Thus, the issue of permanent physical placement was not properly before the court and the mother had no notice that such issue might be decided. She was thus deprived of due process and must be allowed a full and fair opportunity to be heard.

*Matter of Linger v Linger*, 150 AD3d 1444 (3d Dept 2017)

**Award of Increased Visitation to Grandparents Lacked Sound and Substantial Basis**

Family Court, among other things, granted petitioner paternal grandparents' application to modify a prior order of visitation with the subject child. The Appellate Division reversed and remitted for further proceedings. In 2013, after the child's father passed away, the court granted the grandparents visitation with the child every Sunday. In 2015, the child's mother commenced a proceeding to modify the 2013 order by reducing the grandparents' visitation with the child to one Sunday, every other month. Also, in 2015, the child's paternal aunt filed a petition seeking visitation with the child. After trial, the matter was adjourned so that the grandparents could submit proof in response to the mother's petition. The court entered a temporary modified order of visitation granting, among other things, the grandparents visitation on the first, fourth and fifth (if applicable) Sunday of every month and the third weekend of every month. On the adjourned date, the court, on its own motion and based upon its "familiarity with the circumstances of the child" fashioned a schedule giving the grandparents more visitation time as compared to the 2013 order and awarded the aunt visitation. The aunt did not have standing to seek visitation. Extraordinary circumstances did not apply in this case inasmuch as the court found that the mother was a loving and responsible parent. Regarding the modification proceedings filed by the mother and grandparents, in light of the deterioration of the relationship between them, a change in circumstances existed to warrant a best interests inquiry. The court's determination to award the grandparents increased visitation lacked a sound and substantial basis in the record. The increased visitation did not stem from any testimony or documentary evidence and the court's familiarity with the parties was not part of the record. The

record consisted mainly of the mother's testimony in support of her petition. The grandparents did not testify after the mother rested and were never given an opportunity to offer any proof in support of their petition. Because the record was not adequately developed enough for the Appellate Division to make an independent determination, the matter was remitted for a best interests hearing.

*Matter of Romasz v Coombs*, 150 AD3d 1495 (3d Dept 2017)

**Evidence Including Father's Attempts to Avoid Registering as Sex Offender Constitute Extraordinary Circumstances**

In custody proceeding between father and maternal grandparents, Family Court correctly determined that extraordinary circumstances existed which justified an award of legal and physical custody of subject children to the maternal grandparents. The father had not had custody of, or lived with, his two oldest children for a period of approximately six years and never had custody of his youngest child. The oldest children had lived with the grandparents for approximately five years while the youngest child had lived with the grandparents since birth. In finding that extraordinary circumstances existed, Family Court also noted that the father was convicted in New York for failing to register as a sex offender, had relocated to Pennsylvania to avoid registering as a sex offender and brought unauthorized third parties to his supervised visits with the children. After a hearing, where the grandparents did not present any proof, Family Court properly found extraordinary circumstances to exist based solely upon the proof submitted by the father.

*Matter of William O. v. Wanda A.*, 151 AD3d 1189 (3d Dept 2017)

**Default Judgment Awarding Custody to Non-Biological Parent Improper Without Showing of Extraordinary Circumstances**

Family Court improvidently exercised its discretion in denying the father's motion to vacate an order of default, which granted the subject children's aunt legal and physical custody of them. The aunt obtained a temporary order of legal and physical custody of her niece and nephew based upon allegations that, inter alia, the father had sexually abused both children. The night before a hearing was to be held to determine whether the aunt would have custody on a permanent basis, the father left a message for his attorney stating that he was not physically well enough to attend the hearing the following day. The following day, the father did not appear in Court for the hearing. Family Court awarded sole legal and physical custody of the children to the aunt. The father then filed a motion to vacate the default judgment, which Family Court wrongfully denied. The Court determined that the father had met his burden of showing a reasonable excuse for failing to appear at the hearing and a meritorious defense. Consequently, the father's motion to vacate the default judgment should have been granted. As part of his motion to vacate the default judgment, the father attached medical documentation and an affidavit setting forth the fact that he had a serious heart condition and had previously had four heat attacks, one of which occurred months before the hearing at issue. The father also explained that he had taken, in accordance with his physician's advice, medication the day before the hearing which left him disoriented. Consequently, the father had shown a reasonable excuse for his failure to appear. The father also demonstrated a meritorious defense to the aunt's request for continued custody of the subject children since Family Court never conducted a hearing to determine the threshold question of whether extraordinary circumstances existed and never engaging in an best interest analysis. The matter was remitted back to Family Court for further proceedings.

*Matter of Hannah MM. v. Elizabeth NN.,* 151 AD3d 1193 (3d Dept 2017)

**Evidence of Educational Neglect and Domestic Violence Warrant Change of Custody**

In custody modification proceeding, Family Court's denial of the mother's motion to dismiss the father's petition and further, to change primary physical custody of the parties' two children from the mother to the father, was warranted. The father presented evidence that the mother had enrolled the children in three different schools within a four-month period. He also presented evidence that the

children were frequently tardy and absent from school during the time that the mother had primary physical custody of them. The father also testified that he observed bruises and black eyes on the mother implicating the presence of domestic violence in her household. Consequently, Family Court's change of custody was supported by a sound and substantial basis in the record.

*Matter of William EE. v. Christy FF.,* 151 AD3d 1196 (3d Dept 2017)

**Evidence That Father Obtained More Spacious Home Does Not Constitute Change in Circumstances Sufficient to Trigger Best Interest Analysis**

Family Court properly dismissed the father's custody modification petition against the maternal grandparents, who had legal and physical custody of the father's three children. While the father sought joint legal custody of the children, evidence that the father had obtained a larger apartment closer to the home of the grandparents, did not constitute a change in circumstances sufficient to trigger a best interest analysis. Additionally, evidence that the grandparents referred to the father by his first name in front of the children, did not permit regular phone calls between the father and the children and refused to share the children's medical and educational records with the father, also fell short of constituting a change in circumstances since some of this evidence was before the Court when the last order was entered. The father's argument that Family Court erred in precluding him from offering hearsay statements from a third party at the hearing was also without merit. The father failed to argue at the hearing that the hearsay statement was permitted under any particular hearsay exception. Lastly, there was no error in Family Court's decision not to conduct a Lincoln hearing where the children were of relatively young ages and the attorney for the children adequately conveyed their wishes.

*Matter of William O. v. John A. et al.,* 151 AD3d 1203 (3d 2017)

**Appeal Dismissed Where Parties' Rights Not Directly Affected**

In custody modification proceeding where both parties filed petitions against the other, the mother appeals from the denial of her motion to quash a subpoena duces tecum served by the father upon the psychologist who evaluated the parties' son. The Court dismissed the mother's appeal as moot. A stay, which was issued by the Court after the appeal was filed, resulted in the psychologist declining to produce the requested documents. A hearing was nevertheless held and that hearing addressed the issues raised in the parties' competing petitions. Since a decision on the mother's appeal regarding the denial of her motion would not directly affect the rights of the parties, the appeal was dismissed as moot.

*Matter of Denise L. v. Michael L.,* 151 AD3d 1205 (3d Dept 2017)

**Family Court Did Not Err in Discontinuing Interpreter at Hearing and Directing Supervised Visitation and Travel Restrictions**

In proceeding pursuant to Articles 6 of Family Court Act, Family Court providently awarded the mother sole legal and physical custody of the parties' two children, implemented a visitation schedule for the father and placed restrictions on the mother's ability to travel with the children. Family Court properly ordered the mother to refrain from travelling with the children outside of the United States without the father's consent. The mother had substantial ties to Puerto Rico and a history of leaving New York on short notice and for extended periods of time with only vague plans for returning. The mother also previously attempted to commence a custody proceeding in Puerto Rico and refused to return to New York to attend court until she was instructed to do so by Family Court. These facts, coupled with testimony from the evaluating psychologist that the mother used her status as primary physical custodian to keep the children from the father, justified the travel restrictions imposed by Family Court. Supervised visitation ordered by Family Court for the father was also appropriate considering the positive bond between the child and father, as well as the fact that supervised visitation was recommended by the evaluating psychologist. There was also no error in Family Court's decision to discontinue an

interpreter for the mother during the custody portion of the parties' hearing. Although the mother had an imperfect grasp of the English language, she had previously taken college level classes in the United States and had passed a real estate licensing examination written in English. Furthermore, the mother had told the court appointed psychologist who interviewed the parties and their children, that he first language was English opposed to Spanish.

*Matter of James U. v. Catalina V.*, 151 AD3d 1285 (3d Dept 2017)

**Extraordinary Circumstances Found to Exist Warranting Award of Custody to Paternal Cousin Opposed to Mother**

In custody proceeding between mother and parental cousin (father was deceased), Family Court correctly determined that extraordinary circumstances existed sufficient to award cousin sole legal and physical custody of mother's two children. The mother had a history of substance abuse issues, mental health issues and engaging in acts of domestic violence in the presence of the children, all of which resulted in a finding that the mother had neglected the children. While the mother completed a substance abuse treatment program, she struggled to do so and there were questions about whether her release from treatment was the result of the mother successfully completing the program, or whether she was phased out of the program by the treatment providers. Also, the mother was fixated in her belief that the children were being harmed while in the cousin's care, despite a lack of evidence to support her belief. This resulted in the mother using a portion of her visitation time with the children to interrogate them about potential abuse and inspect and photograph their bodies. Family Court also properly considered the contents of the mother's Department of Social Services case file where the mother offered the case file into evidence during the trial. Family Court also correctly determined that the paternal cousin had a "strong bond" with the children, was better able than the mother to provide the children with consistency and stability, was better able to promote their intellectual and emotional development and had a large extended family, including the children's half siblings, living next store to him. Consequently, there was ample evidence to support Family Court's determination that custody to the children's cousin was in their best interests. Additionally, given the difficulty that the mother and cousin experienced interacting together, there was no error in the visitation schedule fashioned by Family Court which included two consecutive overnight visits for the mother with the children on alternate weekends. Family Court did err in directing holiday visitations between the mother and children to be at the discretion of the cousin and consequently, the matter was remitted to Family Court to establish a holiday visitation schedule.

*Matter of Marcia ZZ. v. April A.,* 151 AD3d 1303 (3d Dept 2017)

**Modification to Father's Parent Time Schedule Warranted Where Children Enrolled in Public School When Previously Home Schooled by the Mother**

In custody modification proceeding where the father resided in North Carolina and the mother and children resided in New York, Family Court properly found a change of circumstances to exist where the children began attending public school when they had previously been home schooled at the time of the parties' 2012 divorce. Consequently, modification to the father's parenting time schedule that was set forth in their Judgment of Divorce was warranted. Despite the father's request for parenting time over all of the children's school vacation, Family Court appropriately determined that this would be "to the detriment of the mother and children having some quality vacation time together" and instead, Family Court fashioned a schedule that provided the father with the majority of the school holidays. When modifying the parenting time schedule, Family Court also correctly refused to consider the father's claim that his contact with the children was reduced given the lack of internet access in the mother's home home, as well as the fact that the mother refused to allow the children to have cell phones. Family Court found the limitations of electronic communication at the mother's home to be part of the parties' "differing lifestyles and parenting choices" and noted the mother had a land line phone on which the father could speak with the children.

*Matter of Williams v. Williams,* 151 AD3d 1307 (3d Dept

2017)

**Change of Custody to Father Warranted Despite Father Living Outside Child's School District**

In custody modification proceeding, Family Court providently changed physical custody of the parties' child from the mother to the father and further modified the parties' 2009 order of custody to award the father sole legal custody of the child, when the parties' previous order provided them with joint legal custody. In arriving at their decision, Family Court considered the deteriorating relationship between the mother and the father. Both parties acknowledged an unwillingness to speak with one another and the mother admitted using the child as a conduit to speak with the father. Testimony was also presented that the mother had falsely accused the father of harassing her on one occasion at the being of the proceedings, when she sought and obtained a temporary order of protection against the father. Evidence was also presented that the mother's relationship with the child, who had various mental health issues, had deteriorated to the point that the mother did not attend the child's counseling sessions because the child preferred the father to attend. Notwithstanding the fact that at the time of the hearing, the father lived outside of the child's school district in a studio apartment and worked as a delivery driver, whereas the mother did not work outside the home and lived in the child's school district. At the hearing, the father testified that he set his own work schedule and would move and/or transport the child to school. Consequently, Family Court's change of custody from the mother to the father was supported by a sound and substantial basis.

*Matter of Quick v. Glass,* 151 AD3d 1318 (3d Dept 2017)

**Court Must Adhere to the Requirements of the Interstate Compact on the Placement of Children (ICPC) When an Article 10 Proceeding is Pending, Notwithstanding the Filing of a Subsequent Article 6 Proceeding**

Grandmother who resided in North Carolina, sought custody of her grandson who lived with his mother in New York. Prior to the grandmother commencing the Article 6 custody proceeding in New York, an Article 10 proceeding had been commenced by the Department of Social Services (DSS) also in New York. In accordance with the requirements of the ICPC, a home study relative to the grandmother was to be conducted by DSS's counterpart in North Carolina to determine whether the grandmother was a suitable resource. The home study revealed that the grandmother was not a suitable resource. Since the ICPC required the approval from the receiving state, in this case North Carolina, before custody was awarded to the grandmother, where said approval was not given by the authorities in North Carolina, dismissal of the grandmother's custody petition was appropriate. Also, while ICPC is inapplicable in Article 6 proceedings, the fact that there was an ongoing Article 10 proceeding required application of the requirements of the ICPC.

*Matter of Dawn N,* 152 AD3d 135 (3d Dept 2017)

**Attorney for Child Justified in Substituting Judgment**

Mother filed to enforce her visitation rights and father filed to terminate visitation based on abandonment and the mother's lengthy history of substance abuse. Following a fact-finding hearing and a Lincoln hearing, Supreme Court awarded the mother unsupervised visitation and the father appealed, arguing only that the AFC improperly advocated a position contrary to the child's stated wishes. The Court held that the AFC properly followed Chief Judge's Rule 7.2. There was ample evidence of parental alienation by the father and if the father and children's wishes were followed, the mother's relationship with the child would be completely severed. The AFC properly informed the court of the child's wishes.

*Matter of Cunningham v Talbot,* 152 AD3d 886 (3d Dept, 2017)

**Appeal Dismissed as Moot Where Subsequent Order of Custody Entered During Appeal**

Court dismissed the mother's appeal of a 2014 Family Court order of custody, where a subsequent 2016 order entered during pendency of appeal, granted the mother

the relief that she was requesting as part of her appeal.

*Matter of Jamie UU. v. David VV.,* 152 AD3d 997 (3d Dept 2017)

**Father Entitled to Unsupervised Parenting Time Where Mother Attempted to Frustrate Supervised Visits**

The father sought modification of a 2011 order of custody by seeking the elimination of the requirement that his parenting time with his daughter be supervised. The father presented evidence at the hearing that he was receiving sexual abuse counseling as required by the 2011 order as related to an incident involving another child. He also presented testimony from his psychologist, who stated that supervised parenting time was unnecessary, as well as the testimony of a co-worker of the father who had supervised some of the visits and who also testified that the interaction between the child and father during the visits was appropriate. The court-ordered psychologist, who evaluated the parties and the child, also testified that unsupervised parenting time was appropriate. Additionally, the father presented testimony about how the mother had frustrated his attempts to find individuals to supervise his parenting time, as well as the fact that the mother changed the child's school without discussing it with him in advance. In light of the aforementioned, Family Court providently found that the father had demonstrated a change in circumstances and that it would be in the best interests of the parties' daughter for him to have unsupervised parenting time. The Court also found that the mother's contention, that Family Court erred in failing to conduct a Lincoln Hearing, was not preserved for appellate review where such a request was never made before or during the hearing.

*Matter of Scott Q. v. Joy R.,* 152 AD3d 1206 (3d Dept 2017)

**Sole Custody to Mother Appropriate Due to Father's Hostility and the Parties' Inability to Communicate**

In custody modification proceeding, the mother sought to modify an August, 2014 stipulated order which provided for the parties to have joint legal custody of their child, with the mother having primary physical custody and the father having parenting time at least three days per week. Approximately three months after the order was entered, the mother sought modification of the order alleging, inter alia, that the father had locked her and the child out of the house they were living in, that the father sent her text messages where he called the mother disparaging names and the father had not completed counseling required by the 2014 stipulated order. Family Court also properly considered an incident which preceded the entry of the August, 2014 order, where the father left the house where the parties had been living with a loaded gun, causing the mother to believe that he was going to harm the mother's sister. Family Court properly considered this prior incident given the pattern of inappropriate and hostile conduct by the father towards the mother. In light of the father's hostile behavior, as well as the parties' worsening ability to communicate and cooperate with one another, sole custody of the parties' child to the mother was appropriate. Lastly, the father's claims that he did not receive the effective assistance of counsel are without merit, where the father's counsel made multiple objections during the hearing, conducted a thorough direct examination of the father and vigorously cross-examined the mother.

*Matter of Tracey L. v. Corey M.,* 151 AD3d 1209 (3d Dept 2017)

**Sole Custody Appropriate Where Mother Shown to be Primary Caretaker**

Family Court properly awarded the mother sole legal and primary physical custody of the parties' two children with supervised parenting time for the father, where evidence at a hearing established that the mother was the primary caretaker for the children. The father only cared for the children for short periods of time and would routinely call or text the mother to leave work so that she could care for the children. Testimony also revealed that when the mother was present, the father would refuse to care for the children, instead telling the mother that the children were her "problem." Additionally, evidence was presented at the hearing that the father was emotionally, verbally and physically abusive to the mother, such that she was fearful of him, thereby preventing effective

communication or cooperation relative to the child. There was no error in Family Court's decision to require the father's parenting time to be supervised where, aside from evidence of domestic violence, there was also evidence that the father became impatient while feeding the children. The father would also strap the children in their car seats and place the children in front of the television to avoid having to chase the children, who were crawling toddlers, around the room. In providing supervised parenting time to the father only four times per year, Family Court correctly took into consideration the fact that the father chose to live outside New York where the mother and children resided and made no attempts to reside near them.

*Matter of Adam E. v. Heather F.,* 151 AD3d 1212 (3d Dept 2017)

**Error to Award Custody to Non-Parent Without Showing of Extraordinary Circumstances**

Family Court erred in awarding the maternal grandmother physical custody of her two grandchildren without first determining whether extraordinary circumstances existed. In April, 2014, the parents consented to an order of custody whereby the maternal grandmother was to have physical custody of the children. The mother subsequently sought modification of the order by requesting primary physical custody of the children. After a hearing, Family Court chose to continue primary physical custody of the children with the maternal grandmother, but did not address whether extraordinary circumstances existed. The Court reversed and remanded the matter back to Family Court to determine whether extraordinary circumstances exist and if so, to also determine what physical custody arrangement is best for the children.

*Matter of Tamika B. v. Pamela C.,* 151 AD3d 1220 (3d Dept 2017)

**Separation of Siblings Appropriate**

The parties entered into an order of custody in 2010 which was incorporated, without merger, into their 2013 judgment of divorce. Pursuant to the terms of said order, the mother was to have sole legal and primary physical custody of the parties' two children. The father, who resided in Virginia, filed a custody modification petition in or about 2015 seeking sole legal and primary physical custody of the parties' two children. After a hearing, Family Court properly awarded the mother sole legal custody of both children. In terms of physical custody, Family Court appropriately awarded primary physical custody of the parties' daughter to the mother and primary physical custody of the parties' son to the father. The father appealed arguing that he should have been granted sole legal and physical custody of both children, or at least sole legal and physical custody of the parties' son. In making their decision, Family Court properly found that the father had a history of undermining the mother as the sole legal custodian of the children, had disregarded court orders by allowing the parties' son to reside with him and failed to inform the mother of issues relating to the children, specifically, issues pertaining to the son's mental health. These factors supported Family Court's award of legal custody of both children to the mother, which was an appropriate exercise of discretion. In terms of physical custody, despite a general preference for keeping siblings together, where, as here, the parties' 15-year-old son was resolute about wanting to live with the father and the parties' daughter was flourishing in the care of the mother, the custodial arrangement fashioned by Family Court was appropriate.

*Matter of Nathanel G. v. Cezniea I.,* 151 AD3d 1226 (3d Dept 2017)

**Sole Custody to Mother Appropriate Where She is Better Able to Foster Relationship Despite Father's Hostility**

In this custody proceeding, Family Court appropriately granted the mother sole legal and physical custody of the parties' son, despite her initial request for joint custody, where evidence at the hearing revealed that the "anger and hostility" exhibited by the father towards the mother, made the prospect of joint custody unworkable. Furthermore, the Family Court properly noted that the evidence revealed that the mother was better able to foster a relationship between the child and the father. The mother had routinely taken steps to ensure ample

communication and contact between the child and the father whereas the father, focused on his own needs and claimed that contact between the mother and child would be "harmful." Family Court was also justified in issuing an order of protection in favor of the mother and against the father, where the mother testified that on one occasion, the father engaged in an argument with her and insisted that the child stay home from school to witness the argument. During this same argument, the father also threw the mother on a bed and tried to rip an engagement ring off of her finger. The mother also testified that on another occasion, the father confronted her and the child in public and screamed obscenities and insults at them. While the father denied the mother's allegations, Family Court properly credited the mother as more credible and found that the preponderance of the evidence established the family offense of harassment in the second degree had been committed by the father against the mother.

*Matter of Vincent X. v. Christine Y.,* 151 AD3d 1229 (3d Dept 2017)

**Denial of Parenting Time While Child Protective Services Investigation Pending Does Not Warrant Change of Custody**

Family Court properly dismissed both parties' respective custody modification petitions for failure to show the requisite change in circumstances sufficient to warrant a best interest analysis. The mother, who was the primary physical custodian pursuant to a 2014 order of custody, first filed her custody modification petitions around the time that a Child Protective Services (CPS) investigation was pending against the father. The father in turn filed a custody modification petition seeking custody of the child after the mother denied him his court ordered parenting time. The denial of the father's parenting time occurred while the CPS investigation was pending. The father appealed the dismissal of his modification petition. The Court determined that the mother's denial of the father's parent time was not done solely to deny him time with his child. Consequently, this denial did not constitute a change in circumstances sufficient to warrant modify of the 2014 order. Family Court also correctly determined that allegations by the father, that the mother's lifestyle was inappropriate, were made prior to the date of the 2014 order of custody and as such, were also insufficient to constitute a change in circumstances.

*Matter of Jessica AA. v. Thomas BB.,* 151 AD3d 1231 (3d Dept 2017)

**Failure to Exercise Allotted Visitation Justifies Suspension of Visitation**

In custody modification proceeding, Family Court appropriately found that the father was not entitled to visitation with his three children. A 2011 order of custody provided the father with two supervised visits per year, as well as telephone contact. At the time that the 2011 order of custody was issued, the father was incarcerated. After he was released from prison in 2013, the father absconded from parole supervision in 2014 and was subsequently re-incarcerated. In 2016, both parties filed custody modification petitions and a hearing was held on both petitions. In suspending the father's visitation, Family Court found that while visitation is usually presumed to be in the children's best interests, the father had not availed himself of all available opportunities for the visitation, thereby causing Family Court to contemplate whether visitation was appropriate at all. Family Court found that the father had impeded the supervised visitation provided to him under the 2011 order and after having absconded from New York in 2013 after his release from prison, the father went nearly two years before informing the children's grandmother, who was also the child's custodian, of his whereabouts after he was re-incarcerated. The father wrote to the children only three times and spoke with them on the telephone only two times over the span of several years. These facts, coupled with the father's status as a level three sex offender and the children's expressed desire to cease visitation with him, justified Family Court's decision to suspended the father's visitation rights.

*Matter of Newman v. Doolittle-Weiss,* 151 AD3d 1233 (3d Dept 2017)

**Where Stepfather Abusive to Mother and Children, Change of Custody to Father Was Appropriate**

In custody proceeding, the father of the parties' one child

was awarded sole legal and physical custody of him by Family Court with the mother being granted visitation. At the hearing, the mother admitted that her husband had a history of domestic violence which rendered her home unsafe. The mother explained that her husband would consume a mixture of alcohol and drugs which made him "terrorize" her and act "like the devil." The mother also testified that her husband called the child the "N-word," that he physically struck another child and that he provided child care for the mother when she was working. The father on the other hand testified that he took the child to the playground, to visit extended family, that he purchased clothing, toys and a crib for the child, that he would visit the child at daycare during his lunch breaks from work and that the child had her own room at the father's house.

*Matter of Paul CC. v. Nicole DD.,* 151 AD3d 1235 (3d Dept 2017)

**Family Court Properly Found Extraordinary Circumstances and Awarded Custody to Third Party Stepmother**

Mother and father are the unwed parents of two daughters. They lived together for three years and then separated. Thereafter, the mother began a relationship with another woman whom she married. In 2012, joint custody of the daughters was granted to the mother and the stepmother. When their relationship ended, each woman sought custody. Following a hearing, at which over 20 witnesses testified, Family Court granted sole legal and physical custody to the stepmother with parenting time to the mother. The evidence showed that the mother was temperamental, quick to anger and verbally and emotionally abusive to her daughters. Child Protective Services was involved and resolved the preventive case favorably for the stepmother, but negatively unresolved as to the mother based upon her failure to recognize her deficiencies in parenting. The children were afraid of the mother but happy with the stepmother. Additionally, the stepmother fostered a relationship with the mother and, unlike the mother, she also fostered a relationship with the father.

*Matter of Cheryl YY.,* 152 AD3d 829 (3d Dept 2017)

**Father Demonstrated Sufficient Change in Circumstances to Warrant Modification of Custody**

The parents shared joint legal custody, by consent order, with the mother having primary physical custody and parenting time to the father. When the father sought sole custody, the mother also filed for the same. The parties both testified to a breakdown of communication which Family Court properly found to be a sufficient change in circumstances to warrant a modification of the consent order of custody. On the issue of best interests, the father had a stable job with regular hours and a wife who worked from home and was available to provide child care. The mother had temporary jobs, depended on others for financial support, and put the child in day care for extended periods of time. Additionally, the father testified about unexplained injuries to the child following parenting time with the mother, prompting him to file reports with Child Protective Services. Finally, the mother refused to cooperate regarding the child's medical appointments and demonstrated an unwillingness to foster a meaningful relationship between the child and the father. Family Court properly awarded sole custody to the father with ample visitation to the mother.

*Matter of David ZZ. v Suzane A.,* 152 AD3d 880 (3d Dept 2017)

**Joint Custody Proper**

The parents each filed custody petitions and following a combined hearing, Family Court properly granted the parties' joint legal and shared physical custody. The mother appealed. The father and the Attorney for the Child argued that the appeal was moot by a subsequent consent order, but the Court held that the alteration to a "sliver of the custodial arrangement" did not demonstrate that the mother relinquished her right to appeal the "superstructure" of the arrangement. In this initial custody determination, the parties testified that they were normally able to communicate regarding the child. Each party had a stable living situation and the child had a loving relationship with both parents. After proper consideration of the relevant factors, Family Court properly granted joint custody as being in the best interests of the child.

*Matter of Paluba v Paluba,* 152 AD3d 887 (3d Dept 2017)

**Failure of Parent to Effectively Communicate Justified Change of Custody Even if Siblings Separated**

In custody modification proceeding, Family Court's award of sole legal and physical custody to father was a sound decision. Parties previously shared legal custody of their child with the mother having primary physical custody and the father having parenting time on alternate weekends pursuant to a January, 2016 order. Approximately two months after the order was entered, the father sought modification of the order seeking sole legal and physical custody by alleging, inter alia, that the mother had denied him his parenting time. After a hearing, Family Court determined that, despite the short duration in which the prior order had been in effect, the parties were unable to communicate cooperatively regarding issues pertaining to the father's court ordered parenting time. Family Court also correctly found that the communication problems that the parties experienced were primarily the fault of the mother, who refused to answer phone calls from the father. The mother also admitted to withholding information from the father and otherwise displayed "aggressive behavior" towards him. Family Court also found that the father had a more stable living environment and employment situation. Despite the fact that the change in physical custody from the mother to the father meant that the child would be separated from his half-sister who lived with the mother, the parenting time schedule fashioned by Family Court for the mother allowed the child to spend ample time with his half-sister.

*Matter of Emmanuel SS. v. Thera SS.,* 152 AD3d 900 (3d Dept 2017)

**Attorney for Children Justified in Seeking Suspension of Father's Visitation Based Upon Statements Made by the Children in Counseling**

Father appeals from an order of Family Court which suspended his visitation with his three children. The children, with the consent of their parents, were in the physical custody of a non-parent third party when a neglect proceedings was commenced. As part of the neglect proceeding, two of the children were directed to undergo counseling because of abuse suffered by the children at the hands of a family friend. Shortly after counseling had commenced, the children revealed additional horrific abuse suffered by all three children at the hands of their father. The Attorney for the Children sought to terminate all visitation between the parents and the children. Family Court appropriately suspended the father's visitation with the children and provided the mother with visitation in a public place. In arriving at their decision, Family Court credited the testimony of one of the children's social workers, who was qualified as an expert witness without objection from the father, that continued contact between the children and the father would be detrimental to the children's mental health.

*Matter of Attorney for the Children v. Barbara N. and Harry M.,* 152 AD3d 903 (3d Dept 2017)

**Hearing on the Issue of Counsel Fees Not Required in Custody Violation Proceeding**

In custody proceeding, Family Court did not abuse their discretion when finding that the mother willfully violated a 2013 order of custody, by denying the father parenting time on Father's Day. Given the fact that the mother admitted that she was aware of the terms of the 2013 order and further acknowledged that the father was indeed denied time on Father's Day, the court was justified in finding that she willfully violated the 2013 order. Family Court was also justified in directing the mother to pay a portion of the father's counsel fees without first holding a hearing where the father proposed that this issue be decided "on papers" and the mother did not object to this request.

*Matter of Michael M.,* 152 AD3d 909 (3d Dept 2017)

**Child Spending School Vacation With Father's Family in Different State Did Not Constitute a Change in Circumstances**

In a custody modification proceeding, the mother appeals from an order of Family Court which appropriately found that she had not established a change in circumstances sufficient to modify the parties' one year old order which was entered upon consent. The mother sought modification of a 2015 order based upon the fact that the father, who was in the Army and was stationed in Colorado, did not exercise all of the parenting time allotted to him during their daughter's 2015 spring break. Instead, the father, who had work obligations that prevented him from exercising the time, allowed the child to spend most of the spring break with his family in Maryland. Family Court noted that there was nothing in the current order or any prior orders, which prevented the father from allowing the child to spend her spring break with the father's family. The court also noted that both before and after the above referenced incident, the father had consistently exercised his parenting time, thereby justifying Family Court's decision that a change of circumstances had not been established by the mother. There was also no abuse of discretion by Family Court where they made certain clarifications to the 2015 order relative to the child's travel to Pakistan, despite neither party seeking such clarifications and the court having already determining that a change of circumstances had not been established. Family Court did err when it imposed restrictions on the mother's ability to travel with the child since neither party had requested such relief or had notice that the court would impose such relief.

*Matter of Rehman v. Sheikh*, 152 AD3d 910 (3d Dept 2017)

**Family Court's Refusal to Exercise Jurisdiction Appropriate Where Another State is More Appropriate Forum**

In custody proceeding, mother appeals from Family Court's refusal to exercise jurisdiction in a child custody dispute where another custody proceeding was pending in the state of Florida. The parties, who are the parents of one child, moved from New York to Florida in 2015 approximately three weeks after the child was born. While in Florida, the father commenced a custody proceeding and the mother returned to New York with the child and commenced a custody and family offense proceeding because of an alleged domestic dispute that occurred between the parties in Florida. Family Court correctly refused to exercise jurisdiction of the parties' custody dispute finding that Florida was the child's home state. However, this Court determined that while Family Court was correct in their decision to decline jurisdiction, the more appropriate reason for that decision was that Florida, opposed to New York, was a more convenient forum. Among the factors in the record that the Court considered was the fact that the child had lived most of his life in Florida, there were allegations of domestic violence between the parties that allegedly occurred in Florida and there was evidence that the Florida Department of Children and Families was investigating the mother. Consequently, remittal was not required and the mother's appeal was resolved by this Court finding that Florida was the more appropriate venue to resolve the issues between the parties.

*Matter of Jamilah DD. v. Edwin EE.*, 152 AD3d 998 (3d Dept 2017)

**Award of Custody to Grandmother Affirmed**

Family Court granted custody of the subject children to respondent maternal grandmother. The Appellate Division affirmed. Petitioner father's contention was rejected that the grandmother failed to establish the requisite extraordinary circumstances. The evidence at the hearing established that, since the father and respondent mother separated in 2007, the father never had primary physical placement of the children and did not file a petition for custody for another seven years. Twice since then, when the mother was unable to have primary physical placement of the children, the father consented to award the grandmother custody of the children. During that time, he played a minimal role in the children's lives and made no contact with them for as long as 1 ½ years at a time. The grandmother, by contrast, had provided the children with a stable home, where they resided with their mother, half brother and uncle. Although the court made no determination with respect to the best interests of the children, the record was sufficient for the Appellate Division to determine that it was in the children's best interests to award the grandmother primary physical custody. The grandmother had continuously provided the children with a stable home whenever needed. The grandmother's country home was recently renovated and

the children had their own bedrooms, whereas the father over the years had resided with a series of paramours and he acknowledged that he did not have a plan if his current living situation changed. While living with the grandmother, the children had developed a close relationship with their half brother, who also lived there. The grandmother had facilitated the children's schooling and extracurricular activities, whereas the father did not know the names of their teachers or pediatrician. Moreover, the grandmother was financially stable, owned her own home, and was employed full time as a registered nurse.

*Matter of Greeley v Tucker*, 150 AD3 1646 (4th Dept 2017)

**Mother's Contentions Rejected Pertaining to Lack of *Lincoln* Hearing**

Family Court dismissed the mother's petition seeking modification of a judgment of divorce that awarded joint custody of the subject children to the parties and primary residential placement to respondent father. The Appellate Division affirmed. The mother's contention was unpreserved for appellate review that the court erred in failing to conduct a *Lincoln* hearing. In any event, the mother's contention was without merit inasmuch as an in camera interview was not warranted where, as here, a court had before it sufficient information to determine the wishes of the children. The mother's contention was rejected that she was deprived of her right to effective assistance of counsel based on her attorney's failure to request a *Lincoln* hearing. There was no indication that he would have succeeded in obtaining a *Lincoln* hearing even if he had requested one. Furthermore, the mother's attorney could have believed that a *Lincoln* hearing would produce harmful evidence against the mother. Therefore, the mother failed to demonstrate the absence of strategic or other legitimate explanations for her attorney's alleged shortcoming in failing to request a *Lincoln* hearing. Contrary to the mother's further contention, the failure to call particular witnesses did not necessarily constitute ineffective assistance of counsel, particularly where the record failed to reflect that the desired testimony would have been favorable. The mother's contention was impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on her behalf.

*Matter of Pfalzer v Pfalzer*, 150 AD3 1705 (4th Dept 2017)

**Matter Remitted to Provide More Definitive Schedule of Visitation for Holidays and School Breaks**

Family Court modified the custodial provisions in the parties' judgment of divorce by awarding petitioner mother residential custody of the parties' son, and awarding respondent father visitation on alternate weekends, among other things. The Appellate Division modified by vacating the fourth ordering paragraph, and remitted the matter to Family Court to provide a more definitive schedule of visitation for holidays and school breaks. As an initial matter, the father's contention that reversal of the order was warranted on the ground that the court was biased against him was unpreserved for appellate review because he failed to make a motion asking the court to recuse itself. Having failed to make a motion seeking the Attorney for the Child's removal, the father likewise failed to preserve his contention that the AFC had a conflict of interest that impacted her representation of the children because of the children's alleged divergent interests. There was a sound and substantial basis in the record to support the court's determination that it was in the best interests of the parties' son that the mother have residential custody. However, given the acrimonious nature of the parties' relationship, including the parties' repeated arguments over visitation, the court's order with regard to visitation for holidays and school breaks was unrealistic to the extent that it required the parties to cooperate in reaching an agreement.

*Matter of Shonyo v Shonyo*, 151 AD3d 1595 (4th Dept 2017)

**No Error in How Court Addressed Wishes of 15-year-old Child**

Family Court denied the father's petition seeking modification of a prior custody order by awarding him sole legal and physical custody of the parties' child. The

Appellate Division affirmed. Although the court did not expressly determine that there was a sufficient change in circumstances to warrant an inquiry into whether the best interests of the child would be served by a change in custody, a review of the record demonstrated unequivocally that a significant change in circumstances occurred since the entry of the consent custody order. The court properly considered the appropriate factors and determined that it was in the best interests of the child to maintain the existing custody arrangement, while affording the father greater visitation in order to reflect a more shared and equal custody access arrangement. Although the parties were hostile to each other, they both believed that the child should maintain a good relationship with each parent, and they have endeavored to achieve that goal for the child's benefit. Indeed, the record established that their relationship was not so acrimonious that they were incapable of putting aside their differences and working together in a cooperative fashion for the good of their child. Furthermore, the wishes of the 15-year-old child were entitled to great weight where the age and maturity of the child would make her input particularly meaningful. The court acknowledged that factor, and noted that it was the only factor that weighed most in favor of the father. However, the court further stated that, while the child was mature and articulate, she was somewhat apprehensive and she carried a heavy burden of being in the middle of her parents' persistent conflict. Because the wishes of the child were not determinative, there was no error in how the court addressed that factor.

*Matter of Aronica v Aronica*, 151 AD3d 1605 (4th Dept 2017)

**Record Supported Court's Determination That it Was in Child's Best Interests to Require That Mother's Visitation Occur in Onondaga County**

Family Court modified a prior order of custody and visitation by awarding petitioner father primary physical custody of the subject child upon stipulation of the parties, and awarding the mother visitation with the child as the parties mutually agree, with the visitation to occur in Onondaga County. The Appellate Division affirmed. There was a sound and substantial basis in the record supporting the court's determination that it was in the child's best interests to require that the mother's visitation occur in Onondaga County rather than to require that the child visit the mother in Florida, where the mother resided. Although a child's wishes were not determinative, to the extent that the court relied upon the in camera interview of the then-13-year-old child, it was entitled to place great weight on the child's wishes, inasmuch as she was mature enough to express them. The court did not improperly delegate to the parties its authority to schedule visitation. Thus, the mother's contention was rejected that the matter should be remitted to the court to fashion a more specific visitation schedule. If the mother was unable to obtain visitation with the child as the parties mutually agree, she could file a petition seeking to enforce or modify the order.

*Matter of Pierce v Pierce*, 151 AD3d 1610 (4th Dept 2017)

**Petitioner Failed to Make Requisite Evidentiary Showing of Change in Circumstances to Warrant Inquiry Into Best Interests of the Children**

Family Court denied the father's petition seeking modification of a prior custody order issued by an out-of-state court that granted respondent mother sole legal and primary physical custody of the parties' son and daughter. The Appellate Division affirmed. The father contended that modification was warranted because the mother failed to provide the children with proper nutrition, failed to ensure that they received proper medical attention and failed to inform the father of the medical care required by the children. However, the evidence at the hearing established that the mother appropriately addressed the children's medical, education and dietary needs. Therefore, the court properly determined that the father failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the best interests of the children would be served by a modification of the prior order.

*Matter of Perez v Johnson*, 151 AD3d 1654 (4th Dept 2017)

**Failure of AFC to Request *Lincoln* Hearing and/or to**

**Submit Written Closing Argument Did Not Constitute Ineffective Assistance of Counsel**

Family Court awarded petitioner mother sole legal and primary physical custody of the subject child, with visitation to respondent father. The Appellate Division modified. There was a sound and substantial basis in the record for the court's determination that awarding the mother sole legal and physical custody was in the child's best interests. The contention of the father and the appellate AFC was rejected that the court could not make a proper custody determination without being advised of the child's wishes either through a *Lincoln* hearing or a closing statement from the AFC who represented the child at trial. The contention with respect to the *Lincoln* hearing was not preserved for appellate review. In any event, it was without merit. Although a child's wishes were entitled to great weight, the child was only four years old at the time of the trial. Furthermore, the failure of the AFC who represented the child at trial to request a *Lincoln* hearing and/or to submit a written closing argument did not constitute ineffective assistance of counsel. The court did not abuse its discretion when it limited evidence of the mother's substance abuse to events occurring only after the child's birth. In determining the best interests of the child, the court was vested with broad discretion with respect to the scope of proof to be adduced. However, the court abused its discretion in fashioning a visitation schedule. Therefore, the order was modified by vacating the 5th, 6th and 10th ordering paragraphs and inserting in place thereof and in addition thereto a visitation schedule that reflected a reasonable balance between the court's award of sole legal and primary physical custody to the mother in Florida and the father's residency in Oswego County, New York.

*Matter of Terramiggi v Tarolli*, 151 AD3d 1670 (4th Dept 2017)

**Initial AFC Violated His Ethical Duty to Determine Subject Child's Position and Advocate Zealously in Support of Child's Wishes**

Family Court granted sole custody of the parties' child to petitioner mother, dismissed the father's petition, and denied the father visitation until certain conditions were met, including that the father obtain a report from a counselor or therapist regarding the impact that his visitation would have on the subject child. The Appellate Division modified by vacating the third and fourth ordering paragraphs, reinstated that part of the father's petition seeking visitation, and remitted. Based upon the evidence of the parties' acrimonious relationship, the court did not err in granting the mother sole custody. However, the court erred in eliminating the father's visitation with the subject child and in setting unattainable conditions upon any attempt by him to reinstitute visitation. There was not substantial evidence that the father's visitation was detrimental to the child's welfare. The court's inference that the improvement in the child's anxiety was the result of the cessation of visitation was not supported by the record. Although the counselor recommended that both parents undergo counseling, neither party followed that recommendation. Furthermore, the mother's self-serving testimony was the only evidence of most of the troublesome behavior allegedly exhibited by the child. Also, the mother testified that she wished to eliminate the father from the child's life. Thus, the record established that the mother had made little or no effort to encourage the relationship between the father and the child, the father submitted evidence supporting an inference that the mother was alienating the child from the father, and the court improperly allowed the mother essentially to dictate whether visits would ever occur with the father. In addition, despite numerous allegations that the father had mental health issues, there was no evidence in the record to support a determination that he suffered from a mental health condition that would prohibit him from obtaining visitation with his child. Therefore, the order was modified by vacating the third and fourth ordering paragraphs, and the matter was remitted for further proceedings on the issue of visitation, including a new hearing after mental health evaluations of both parties and the subject child. Also, the initial Attorney for the Child (AFC) violated his ethical duty to determine the subject child's position and advocate zealously in support of the child's wishes, because that AFC advocated for a result that was contrary to the child's expressed wishes in the absence of any justification for doing so. There were only two circumstances in which an AFC was authorized to substitute his or her own judgment for that of the child: when the AFC was convinced either that the child lacked the capacity for knowing, voluntary and considered

judgment, or that following the child's wishes was likely to result in a substantial risk of imminent, serious harm to the child, neither of which was present. In addition, although an AFC should not have a particular position or decision in mind at the outset of the case before the gathering of evidence, the initial AFC indicated during his first court appearance, before he had spoken with the child or gathered evidence regarding the petitions, that he would be substituting his judgment for that of the child. Thus, the child's interests were not represented with respect to visitation. A new AFC had already been substituted for the original AFC, however, and the matter was being remitted for a new hearing regarding visitation for the reasons set forth above. The AFC's erroneous actions implicated only the parts of the order that pertained to the father's request for visitation. Consequently, there was no need to modify the order further, or direct the appointment of a replacement for the new AFC, who had advocated in accordance with the child's wishes.

*Matter of Kleinbach v Cullerton*, 151 AD3d 1686 (4th Dept 2017)

**Affirmance of Order Permitting Mother's Relocation with Parties' Child From Monroe County to Adjacent County**

Family Court granted the mother's petition to relocate with the parties' child from Brockport in Monroe County to Albion in Orleans County, a distance of 13 to 14 miles. The Appellate Division affirmed. The mother established by the requisite preponderance of the evidence that the proposed relocation was in the child's best interests. The court properly weighed the *Tropea* factors in permitting the move. Among the reasons cited in support of the move were the mother's need for mental health treatment, which the prior order in fact directed her to continue, and the much easier access that she would have to such treatment in Albion as opposed to Brockport. The mother further demonstrated that she would have better access to vocational rehabilitation programs, including a job training workshop in Albion, opportunities denied to her in Monroe County because of her lack of transportation and mental health history. The mother also testified to certain other financial benefits of the move. In contrast, the father's reasons for opposing the move were unfounded and arbitrary and, indeed, were appropriately deemed by the court to be outweighed by other factors. The court determined that the permitted relocation would not negatively impact the father's visitation time or otherwise interfere with his important role in the child's life.

*Matter of Fleisher v Fleisher*, 151 AD3d 1768 (4th Dept 2017)

**No Appeal As of Right From Order That Did Not Decide Motion Made on Notice**

Family Court sua sponte dismissed the mother's petition seeking custody of her son, with respect to whom her parental rights had previously been terminated. The Appellate Division dismissed. No appeal lied as of right from an order that did not decide a motion made on notice. The mother had not sought leave to appeal.

*Matter of Kelly v Senior*, 151 AD3d 1775 (4th Dept 2017)

**Reversal of Award of Custody Where Court Did Not Make Express Finding Whether There Had Been Requisite Change in Circumstances**

Family Court denied the mother's two separate petitions to modify a prior custody order and granted in part respondent father's cross petition to modify the prior order by awarding the father primary placement of the parties' child. The Appellate Division reversed and remitted. Although the court determined that the mother had failed to show the existence of a change in circumstances that required or justified a change in custody, the court did not make an express finding whether the father, in support of his cross petition, established that there had been the requisite change in circumstances in the 10 months since entry of the prior order. The Appellate Division declined to exercise its power to independently review the record to ascertain whether the requisite change in circumstances existed, inasmuch as it appeared from the court's decision that it improperly dispensed with the change in circumstances requirement when it stated that "to dismiss the petitions herein without a determination of the best interests of the

child would be to elevate form over substance." Thus, it was not clear on the record what the court would have found had it actually addressed the issue.

*Matter of Austin v Wright*, 151 AD3d 1861 (4th Dept 2017)

**Court Erred in Invoking Doctrine of Equitable Estoppel in Context of Violation Petition**

Family Court dismissed the father's violation petition alleging that respondent mother had not allowed him visitation with their child despite a prior court order that allowed the father visitation at times and places as the parties could agree. The Appellate Division affirmed, but its reasoning differed from that of the court. The court erred in invoking the doctrine of equitable estoppel in the context of a violation petition, and in granting the AFC's motion to dismiss on the ground that the father was equitably estopped from asserting his visitation rights due to his failure to establish a relationship with the child. The law imposed the doctrine as a matter of fairness. Its purpose was to prevent someone from enforcing rights that would work injustice on the person against whom enforcement was sought and who, while justifiably relying on the opposing party's actions, had been misled into a detrimental change of position. Here, there was a prior order establishing the father's visitation rights, and he was alleging that the mother violated that order. He was not seeking visitation rights in the first instance. Nevertheless, because the court proceeded with a full hearing on the merits, there was an adequate record and the merits of the father's violation petition could be determined. The father failed to establish by clear and convincing evidence that the mother willfully violated the order regarding visitation.

*Matter of Young v Rios*, 151 AD3d 1862 (4th Dept 2017)

**Error to Order That Father Complete Anger Management Classes as Condition of His Access to Child**

Family Court awarded respondent mother sole custody of the subject child, granted petitioner father access to the parties' child, and ordered that, as a condition of such access, the father "shall complete a program of anger management classes." The Appellate Division modified. The father's contention was rejected that the court erred in directing that he complete an anger management program. A court could direct a parent to obtain counseling or therapy as one of the aspects of a custody or visitation order, if such intervention would serve the child's best interests. Here, there was an ample evidentiary basis for the court's issuance of such a directive. However, the court erred in ordering that the father complete a program of anger management classes as a condition of his access to the child, instead of as a component of such access.

*Matter of Sanchez v Alvarez*, 151 AD3d 1869 (4th Dept 2017)

**Child, While Dissatisfied With Order, Could Not Force Mother to Litigate Petition That She Had Since Abandoned**

Family Court dismissed the mother's petition seeking modification of a custody order. The Appellate Division dismissed the appeal. The Attorney for the Child representing the parties' oldest child appealed from the order. Inasmuch as the mother had not taken an appeal from that order, the child, while dissatisfied with the order, could not force the mother to litigate a petition that she had since abandoned. A child in a custody matter did not have full-party status, and the Court declined to permit the child's desires to chart the course of litigation.

*Matter of Lawrence v Lawrence*, 151 AD3d 1879 (4th Dept 2017)

**Affirmance of Dismissal of Post-divorce Application to Modify Stipulated Order**

Supreme Court dismissed plaintiff father's post-divorce application to modify a stipulated order by changing his visitation from supervised to unsupervised. The Appellate Division affirmed. The father and the Attorney for the Children's contention was rejected that the court erred in granting the mother's motion to dismiss the

application without a hearing. A hearing was not automatically required whenever a parent sought modification of a custody or visitation order. Upon haven given the pleading a liberal construction, accepted the facts alleged therein as true, and accorded the nonmoving party the benefit of every favorable inference, the father's allegations regarding the unavailability of supervisors and the mother's conduct did not set forth a change in circumstances which would warrant the relief sought, i.e., unsupervised visitation. The father otherwise failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing.

*Carney v Carney*, 151 AD3d 1912 (4th Dept 2017)

**Award of Primary Physical Custody to Mother Lacked Sound and Substantial Basis in Record**

Family Court granted primary physical custody of the parties' child to respondent mother. The Appellate Division modified and remitted. Although the custody determination of the court ordinarily was entitled to great deference, such deference was unwarranted where that determination lacked a sound and substantial basis in the record. Upon a review of the relevant factors, awarding the father primary physical custody was in the child's best interests. Although the mother had been the child's primary caretaker since birth, her living conditions were unstable. The mother and the child had lived in seven different residences over the three years preceding the hearing, which resulted in the child changing schools every year. As the court recognized in its decision, the father was the more stable parent. Concerning the quality of the home environment, the father and his wife owned a home where the child had his own room, his own bed, and age-appropriate toys. In contrast, the mother's chaotic living arrangements had put the child in regular contact with a half-sister who abused drugs and had resulted in the child living in a home that was infested with fleas. Concerning the child's emotional and intellectual development, the father ensured that the child attended school regularly and completed his homework. Since the father began playing a larger role in the child's life, the child's attendance and performance in school had improved dramatically. Also, the father facilitated the child's participation in activities, encouraged him to read, and adjusted his diet to address his medical needs. In contrast, the mother had shown a lack of concern for the child's attendance and performance in school, shielded him from experiences and foods that he found unpleasant, and preferred that he played video games and ate fast food. Concerning the parents' relative financial status, the father's household income was significantly higher and his job was stable. In contrast, although the mother had difficulty affording her expenses and was evicted from prior residences, she continued to bounce from one part-time job to another and testified that she saw no need to work more than 28 hours a week. Concerning the child's wishes, the child told the Attorney for the Child that he wished to remain with the mother. However, the child's wishes were entitled to little weight, particularly given his young age and the mother's overly permissive parenting philosophy. Concerning the child's need to live with siblings, the hearing testimony established that the child often played with two other half-sisters who lived with or near the mother, and that the child had a close relationship with them. Nevertheless, awarding the father primary physical custody was in the child's best interests. Therefore, the order was modified accordingly and the matter remitted to the court to fashion an appropriate visitation schedule with the mother.

*Matter of Braga v Bell*, 151 AD3d 1924 (4th Dept 2017)

**Court Erred in Dismissing Amended Modification Petition Without Hearing**

Family Court granted the motion of respondent mother to dismiss the father's amended petition seeking to modify the custody and visitation provisions of the parenting agreement, and directed the return of the child to the mother. The Appellate Division modified by denying the motion and reinstating the amended petition, and remitting for further proceedings. The court erred in dismissing the amended petition without a hearing. The mother refuted the father's allegation that there was a change in circumstances because she was being investigated for possible drug use and neglect by the Division of Children and Family Services in Georgia (DCFS). In support of her motion to dismiss the amended petition, the mother submitted a letter from DCFS establishing that the investigation had been closed and there were no indications of maltreatment or child abuse and neglect. However, the father made a sufficient

evidentiary showing of a change in circumstances to require a hearing with respect to certain remaining allegations in the amended petition. Considering the mother's history of drug and alcohol addiction, as acknowledged by the parties in the parenting agreement, the allegation that the mother was arrested and was being prosecuted for criminal possession of a controlled substance in Georgia was sufficient to warrant a hearing. Such conduct, including the mother's possible unlawful use of a controlled substance, was plainly relevant to her fitness as a parent. To the extent that the mother disputed the father's allegations regarding her hospitalization and the treatment of her mental health condition, it was well established that determinations affecting custody should be made following a full evidentiary hearing, not on the basis of conflicting allegations. The father also alleged that the mother's boyfriend used a belt to discipline the child, and that the child had made disclosures of such corporal punishment to the father and the paternal grandmother. The allegations of excessive corporal punishment or inappropriate discipline in this case constituted a sufficient evidentiary showing of a change of circumstances to warrant a hearing.

*Matter of Farner v Farner*, 152 AD3d 1212 (4th Dept 2017)

**Court Properly Denied Motion to Remove AFC**

Family Court, among other things, awarded sole custody of the subject child to respondent mother and directed that a third-party supervise the father's overnight visitation with the child. Thereafter, the court issued orders allowing the father to exercise unsupervised visitation. Therefore, the appeal insofar as it concerned visitation was moot and the exception to the mootness doctrine did not apply. The Appellate Division otherwise affirmed. The court properly denied the father's recusal motion. The record did not support the father's allegations that the court treated the attorneys differently because of their racial backgrounds or that the Judge was biased against the father because of her alleged familiarity with his social worker. The court properly denied the father's motion to remove the AFC inasmuch as it was based upon unsubstantiated allegations of bias. The fact that the AFC took a position contrary to the father did not indicate bias.

*Matter of Brooks v Greene*, 153 AD3d 1621 (4th Dept 2017)

**Record Insufficient to Determine Child's Best Interests**

Family Court, among other things, modified a prior order of custody by awarding petitioner father sole custody of the parties' child, with supervised visitation with the mother. The Appellate Division reversed and remitted for a determination of the child's best interests. Here, DSS's allegations of the neglect of the child by the mother and her paramour constituted the requisite change in circumstances to warrant an inquiry into the best interests of the child. However, the court failed to set forth the essential facts of its best interests determination and the record was insufficient to enable the Appellate Division to make an independent determination with respect to that issue. The record was silent on the issue of the well-being of the child and, specifically, the impact that the alleged actions of the mother and her paramour had on the child.

*Matter of Brockel v Martin*, 153 AD3d 1654 (4th Dept 2017)

**Paternal Grandmother Established Extraordinary Circumstances**

Family Court awarded sole custody of the subject child to petitioner paternal grandmother. The Appellate Division affirmed. The finding of neglect based upon excessive corporal punishment against the mother supplied the threshold extraordinary circumstances needed by the grandmother. The finding of extraordinary circumstances was further supported by evidence that the mother had virtually no insight into her mental health problems or the inappropriateness of her disciplinary methods, and that she refused to comply with the court's prior order directing her to obtain a mental health evaluation and enroll in parenting classes. The record supported the court's determination that the award of custody was in the child's best interests. The court was not biased against the mother. Both the mother and grandmother proceeded pro se and the record established that the court treated them evenhandedly and did not undertake the function of an advocate.

*Matter of Jackson v Euston*, 153 AD3d 1655 (4th Dept 2017)

**Grandmother's Appeal Seeking Custody of Child Moot**

In an amended order, Family Court granted custody of the subject child to petitioner mother. Respondent paternal grandmother appealed from that part of the amended order that confirmed the Referee's report recommending granting the petition, based upon the Referee's findings that the grandmother failed to establish extraordinary circumstances warranting an examination whether custody of the child could be awarded to a nonparent. The Appellate Division dismissed the appeal. The amended order also confirmed that part of the Referee's report that found that, even assuming, arguendo, that the grandmother established extraordinary circumstances, the mother established that the best interests of the child would be served by awarding custody of the child to the mother and the grandmother did not challenge that confirmed finding on appeal. Because the only relief the grandmother sought on appeal was a remittal for a best interests hearing and she had already received the benefit of such hearing, her appeal was moot.

*Matter of Smith v Visker*, 153 AD3d 1656 (4th Dept 2017)

**Court Properly Denied Motion to Vacate Order Entered on Default**

In an order, Family Court granted petitioner father sole custody of the subject children upon the mother's default and thereafter denied the mother's motion to vacate the custody order. The Appellate Division dismissed the appeals. No appeal lies from an order entered upon default. With respect to the order denying the motion to vacate the default, the mother did not have a reasonable excuse for the default and, even assuming she did, she failed to show the requisite meritorious defense. Because the mother received default notice and was put on actual notice of a new date for the adjourned proceeding, there was no procedural bar to awarding the father relief on the default when neither the mother nor her attorney appeared on the date of the adjourned proceeding.

*Matter of Roache v Hughes-Roache*, 153 AD3d 1658 (4th Dept 2017)

**FAMILY OFFENSE**

**Court Properly Found That Respondent Committed Family Offense**

Family Court , upon a fact-finding determination that respondent committed a family offense, directed that respondent stay away from the apartment the parties shared until April 2017. The Appellate Division affirmed. A preponderance of the evidence adduced at the fact-finding hearing established that respondent's actions of taking petitioner's belongings, grabbing her by the neck, choking her, and scratching her face with enough force to cause her to bleed, constituted the family offense of harassment in the second degree, assault in the third degree, and criminal obstruction of breathing or blood circulation. Thus, the court properly excluded respondent from the home for six months. The court properly drew a negative inference against respondent for his failure to testify, even though were two unrelated criminal cases pending against him during the family offense proceeding.

*Matter of Charlene R. v Malachi R.,* 151 AD3d 482 (1st Dept 2017)

**Record Supported Denial of Respondent's Motion to Vacate the Order of Protection Entered upon Her Default**

In this family offense proceeding, the Family Court issued an order of protection against the respondent and in favor of the petitioner and the petitioner's children upon the respondent's failure to appear for a scheduled court date. The respondent moved to vacate the order of protection, and the Family Court denied her motion. A respondent seeking to vacate an order of protection entered upon his or her failure to appear on a family offense petition must demonstrate a reasonable excuse for the default and a

potentially meritorious defense to the petition. The determination of whether to relieve a party of an order entered upon that party's default is within the sound discretion of the Family Court (*see* CPLR 5015 [a] [1]). Here, the Family Court providently exercised its discretion in denying the respondent's motion to vacate the order of protection entered upon her default, as the respondent failed to demonstrate a reasonable excuse for her default, and, in any event, failed to demonstrate a potentially meritorious defense to the petition

*Matter of McKinney v Jones*, 151 AD3d 973 (2d Dept 2017)

**Respondent Deprived of Statutory Right to Counsel**

The order of protection, after a hearing, directed respondent, inter alia, to stay away from the petitioner until June 14, 2018. The respondent appealed. The Appellate Division reversed. A party in a proceeding pursuant to FCA article 8 has the right to be represented by counsel (*see* FCA § 262 [a] [ii]), but may waive that right provided that he or she does so knowingly, voluntarily, and intelligently. In order to determine whether a party is validly waiving the statutory right to counsel, the Family Court must conduct a searching inquiry to ensure that the waiver is knowing, voluntary, and intelligent. The waiver is valid where the record reflects that the party was aware of the dangers and disadvantages of self-representation. Here, the record did not indicate that the respondent was advised of, or waived, his right to counsel. Under these circumstances, he was deprived of his statutory right to counsel. Contrary to the respondent's contentions, the Family Court did not err in failing to appoint, sua sponte, a guardian ad litem for him. The record demonstrated that he was capable of understanding the proceedings and defending his rights (*see* CPLR 1201). Accordingly, the order of protection was reversed, and the matter was remitted to the Family Court for a new hearing to ascertain on the record whether the respondent wishes to appear with counsel, or to knowingly, voluntarily, and intelligently waive his right to counsel, and for a new determination on the petition thereafter.

*Matter of Riordan v Riordan*, 151 AD3d 975 (2d Dept 2017)

**Court Declined to Find Aggravating Circumstances After Assessing Credibility of Petitioner**

In proceeding pursuant to Article 8 of the Family Court Act, the mother sought an order of protection against the father alleging that he had committed acts that constituted harassment in the second degree. The mother further contended that aggravating circumstances were present. Family Court found that the father committed the family offense of harassment and issued a two-year order of protection in favor of the mother and against the father. Both parties appealed. Family Court was within their discretion to decline to find that aggravating circumstances existed, but nevertheless award an order of protection after assessing the testimony and evaluating the credibility of the parties' firsthand. The Court rejected the father's claim that he was denied the effective assistance of his attorney who declined to call any witnesses on the father's behalf, including the father himself. In support of his refusal to call witnesses, the attorney for the father claimed that he had an "ethical dilemma" without elaborating more. The implication was that the attorney had some degree of knowledge or suspicion that the father was going to present false testimony. After the attorney's statement, the Family Court properly permitted the father to testify in the narrative form. This coupled with the fact that the father's attorney made appropriate objections during the hearing, cross-examined the mother, presented a "cogent closing argument" and a "plausible defense," the Court determined that the father was not denied the effective assistance of counsel.

*Matter of Yanique S. v. Frederick T.,* 151 AD3d 1222 (3d Dept 2017)

**Family Court Properly Inferred Intent to Harass, Annoy or Alarm Based Upon Respondent's Past Conduct**

Family Court correctly determined that the petitioner had proven, by a preponderance of the evidence, that the respondent had committed the family offense of harassment in the second degree against her when awarding the petitioner a two year order of protection against the respondent. The parties, who are the parents

of three children, resided together for approximately 10 years until the petitioner moved into a domestic violence shelter to escape the respondent's physical abuse of her. Evidence at the hearing established that the respondent had attempted to learn of the petitioner's address by repeatedly calling and texting her over the course of approximately a week, with as many as 18 text messages in one day, along with the fact that the respondent also asked the petitioner's friends for her address. While the petitioner admitted that the respondent's attempts to communicate with her were not "overtly threatening," Family Court was justified in "inferring" that the respondent had "the requisite intent to harass, annoy or alarm", the necessary elements of harassment in the second degree, given the respondent's history of domestic violence against the petitioner, coupled with the recent damage to the petitioner vehicle.

*Matter of Angelique QQ. v. Thomas RR.,* 151 AD3d 1322 (3d Dept 2017)

**Family Offense Petition Dismissed Where Petitioner Failed to Show a Course of Conduct of Harassing Behavior**

In family offense proceeding, Family Court properly dismissed petitioner's petition against the respondent, who was also the petitioner's son, finding that the petitioner failed to establish that the respondent committed acts which constitute harassment in the first degree or harassment in the second degree. The petitioner alleged that the respondent seriously injured him when the petitioner attempted to attend the calling hours for his deceased grandson. The respondent denied the petitioner's claims that he caused serious injuries. Both parties acknowledged that they had not seen each other since the aforementioned incident which occurred in October, 2013. Family Court found that the petitioner failed to establish that the respondent had repeatedly harassed him by engaging in a course of conduct, or repeatedly committed acts which placed the petitioner in reasonable fear of physical injury. After determining that the respondent's testimony was more credible than that of the petitioner, Family Court also found that the petitioner failed to establish, beyond a preponderance of the evidence, that the respondent committed acts which constitute harassment in the second degree.

*Matter of David ZZ. v. Michael ZZ.,* 151 AD3d 1339 (3d Dept 2017)

**Inadequate Proof That Family Offense Committed Where Petitioner Lacked Credibility**

In family offense proceeding, Family Court properly dismissed the petition after a hearing. The petitioner alleged that respondent committed acts against her which constituted several family offenses including, but not limited to, harassment in the second degree and disorderly conduct. The allegations stem from an incident that occurred in October, 2015 at a hospital. Petitioner refused to allow respondent to visit her father who was gravely ill. The testimony at the hearing, which was limited to only the parties, revealed that there was no physical contact between petitioner and respondent during the complained of incident and the incident was limited to a verbal dispute. Respondent made a motion to dismiss petitioner's petition after she rested her case. Family Court reserved a decision on respondent's motion to dismiss until respondent presented her case. Thereafter, Family Court correctly concluded that even if respondent had called her obscene names and made a veiled threat against her, these actions did not constitute harassment in the second degree. The court also correctly concluded that there was inadequate proof that the statements petitioner alleged respondent had made were indeed made in the manner that petitioner claimed. The court noted that petitioner's testimony was "motivated by overriding anger" and likely embellished or fabricated. Consequently, Family Court correctly held that they could not determine whether the family offense of disorderly conducted had been committed by respondent necessitating the dismissal of the petition.

*Matter of Evelyn EE. v. Lorraine B.,* 152 AD3d 915 (3d Dept 2017)

**JUVENILE DELINQUENCY**

**Court Properly Denied Request For ACD**

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 criminal trespass in the second degree and imposed a conditional discharge. The Appellate Division affirmed. The court providently exercised its discretion in denying respondent's request for an ACD, given the seriousness of the offense, which involved a residential burglary and the theft of valuable property, as well as negative factors in respondent's background. Further, the court offered to reconsider the disposition if respondent complied with the terms of his conditional discharge.

*Matter of Anyi M.*, 151 AD3d 500 (1st Dept 2017)

**Claim That Court Did Not Provide Sufficient Record For Denial of Time Spent in Detention Unpreserved**

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 grand larceny in the fourth degree, and placed him with ACS Close to Home program for 18 months. The Appellate Division affirmed. Respondent was required to preserve his claim that the court violated Family Court Act § 353.3 (5) by not providing a sufficient record for its denial of full credit for the time he spent in detention and the Appellate Division declined to review it in the interests of justice. Alternatively, the Appellate Division found that, at the dispositional hearing, the court provided a sufficient basis for the denial of credit.

*Matter of Michael A.*, 151 AD3d 566 (1st Dept 2017)

**Court Properly Denied Respondent's Motion to Vacate JD Adjudication and Seal Records**

Family Court denied respondent's application to vacate his adjudication as a juvenile delinquent and to seal the records of that adjudication. The Appellate Division affirmed. The court properly denied respondent's application to dismiss the petition and vacate the JD adjudication, given the seriousness of the sexual offense and the need for protection of the community. The court also properly denied respondent's application to seal the records of the JD adjudication in the interests of justice, given the serious nature of the underlying assault. Respondent's interests were adequately protected by the confidentiality of Family Court records and the fact that JD adjudications do not entail civil disabilities. Sealing the records could impede their use by law enforcement for legitimate purposes in the event respondent engaged in further criminal activity. Respondent did not substantiate his claim that the adjudication might subject him to sex offender registration if he relocated to another state.

*Matter of Giovanni G.*, 152 AD3d 419 (1st Dept 2017)

**JD Adjudication Based on Legally Sufficient Evidence and Not Against the Weight of the Evidence**

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 forcible touching, criminal possession of a weapon in the fourth degree, menacing in the second degree, and sexual abuse in the third degree, and also adjudicated him a juvenile delinquent based on his admission that he committed an act that, if committed by an adult, would have constituted the crime of petit larceny, and placed him on probation for concurrent terms of 12 months in each case. The Appellate Division affirmed. The determination was based upon legally sufficient evidence and was not against the weight of the evidence. Menacing in the second degree and criminal possession of a weapon in the fourth degree were established by the victim's testimony that she saw respondent display a razor blade, and that she felt it pressed against her neck. Regarding sexual abuse in the third degree, the element of sexual contact for the purpose of sexual gratification could be inferred from respondent's conduct in squeezing the victims breasts and buttocks. Regarding forcible touching, it could be inferred that respondent had a motive to degrade or abuse the victim. Respondent's speedy trial claim was unpreserved and, in any event, counsel consented to the adjournments. The court providently exercised its discretion in adjudicating respondent a JD, rather than granting ACDs, given the seriousness of the underlying behavior, in one case wielding a razor blade and sexual conduct, and in the other breaking into someone's home.

*Matter of Traekwon I.*, 152 AD3d 431 (1st Dept 2017)

**Record Did Not Support Respondent's Claim That the Presentment Agency Failed to Turn over *Brady* and *Rosario* Material**

The Family Court adjudicated the respondent a juvenile delinquent upon determining that he committed acts which, if committed by an adult, would have constituted the crimes of grand larceny in the fourth degree and petit larceny. The respondent appealed. The Appellate Division affirmed. Contrary to the respondent's contention, the showup identification, which was conducted in close geographic and temporal proximity to the incident, was reasonable under the circumstances and not unduly suggestive. Viewing the evidence in the light most favorable to the presentment agency, the Appellate Division found that it was legally sufficient to establish, beyond a reasonable doubt, that the respondent committed acts, which, if committed by an adult, would have constituted the crimes of grand larceny in the fourth degree (*see* Penal Law § 155.30) and petit larceny (see Penal Law § 155.25). The Family Court's fact-finding determination was not against the weight of the evidence (*see* FCA § 342.2[2]). The record did not support the respondent's claim that the presentment agency failed to turn over *Brady* and *Rosario* material. Any delay in doing so did not substantially prejudice the respondent. Therefore, neither a reopening of the *Wade* hearing nor reversal was warranted.

*Matter of Jzamaine E.M.*, 150 Ad3d 738 (2d 2017)

**Record Supported Rejection of Respondent's Application for an Adjournment in Contemplation of Dismissal**

The Family Court adjudicated the respondent a juvenile delinquent upon determining that he committed an act which, if committed by an adult, would have constituted the crime of sexual misconduct, and placed him on probation for a period of 12 months. The respondent appealed. The Appellate Division affirmed. The Family Court providently exercised its discretion in rejecting the respondent's application for an adjournment in contemplation of dismissal, and in imposing a period of probation of 12 months. The offense in this case was a serious sex offense, committed against a nine-year-old child. The Probation Department recommended a disposition of 12 months of probation, to insure adequate supervision of the respondent during that period.

*Matter of Shemar G.*, 152 AD3d 591 (2d Dept 2017)

**Family Court's Fact-Finding Determination Was Against the Weight of the Evidence**

The respondent was adjudicated a juvenile delinquent on the basis of the Family Court's findings that he committed acts which, if committed by an adult, would have constituted the crimes of robbery in the second degree, robbery in the third degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and attempted assault in the third degree. The findings with respect to all of the crimes except for criminal possession of stolen property in the fifth degree depended upon a finding of accessorial liability. On appeal, the respondent, argued, among other things, that the finding of accessorial liability was against the weight of the evidence. The Appellate Division modified. A determination premised upon accessorial liability requires proof beyond a reasonable doubt that the accused acted with the mental culpability necessary to commit the act charged and that, in furtherance thereof, he solicited, requested, commanded, importuned, or intentionally aided the principal to commit such act (*see* PL § 20.00; FCA § 342.2 [2]). A person's mere presence at the scene of the crime, even with knowledge of its perpetration, cannot render him or her accessorially liable for the underlying criminal conduct. Here, the Appellate Division agreed with the respondent that the Family Court's finding of accessorial liability was against the weight of the credible evidence. The respondent is alleged to have been an accomplice with another youth who punched the complainant in the face and took his iPhone. However, at the fact-finding hearing, when asked about the respondent's actions at the time of the assault and robbery, the complainant testified that the respondent was standing near the perpetrator and watched the incident occur. The presentment agency's evidence with respect to the crimes of robbery in the second degree, robbery in the third degree, grand larceny in the fourth degree, and attempted assault in the third degree

established only that the respondent was present at the scene of the offense. Accordingly, the determination of the Family Court with respect to those crimes was against the weight of the evidence.

*Matter of Justin M.*, 152 AD3d 602 (2d Dept 2017)

**Family Court's Fact-Finding Determination Was Not Against the Weight of the Evidence**

The Family Court adjudicated the respondent a juvenile delinquent upon determining that she had committed acts which, if committed by an adult, would have constituted the crimes of assault in the third degree and menacing in the third degree. The respondent appealed. The Appellate Division affirmed. Upon reviewing the record, the Appellate Division found that the evidence was legally sufficient to establish, beyond a reasonable doubt, the respondent's identity as the person who committed the acts which, if committed by an adult, would have constituted the crimes of assault in the third degree and menacing in the third degree. Moreover, the Appellate Division was satisfied that the Family Court's fact-finding determination was not against the weight of the evidence. Contrary to the respondent's contention, the Family Court providently exercised its discretion in adjudicating her a juvenile delinquent and placing her on probation instead of directing an adjournment in contemplation of dismissal (*see* FCA §§ 315.3, 352.1, 352.2). This disposition was appropriate in light of, among other factors, the seriousness of the offenses, the probation department's recommendation, the respondent's poor school record and disciplinary issues at school, and the respondent's refusal to take any responsibility for her actions.

*Matter of Dzahiah W.*, 152 AD3d 612 (2d Dept 2017)

**Record Supported Placing the Respondent on Probation under Enhanced Supervision**

The Family Court adjudicated the respondent a juvenile delinquent, determining upon his admission that he committed an act which, if committed by an adult, would have constituted the crime of attempted assault in the third degree, and placed him on enhanced supervision probation for a period of 13 months. The respondent appealed. The Appellate Division affirmed. The Family Court providently exercised its discretion in placing the respondent on probation under the enhanced supervision program for a period of 13 months, based upon his admission that he committed an act which, if committed by an adult, would have constituted the crime of attempted assault in the third degree. 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 respondent's mother's professed inability to adequately supervise him on her own, the respondent's academic problems, and the evidence demonstrating that he continued to smoke marijuana and stole from his mother after the order of fact-finding was issued.

*Matter of Anthony W.*, 152 AD3d 707 (2d Dept 2017)

**Appeal Dismissed As Moot Where Subsequent Order of Disposition Entered**

In proceeding where respondent was adjudicated to be a juvenile delinquent, he appealed Family Court's placement decisions set forth in the court's April, 2016 order of disposition and May 2016 amended order of disposition which placed respondent with petitioner. Shortly after the May, 2016 amended order of disposition, petitioner filed a modification petition claiming respondent was uncontrollable and seeking to transfer custody of him to the Office of Children and Family Services (OCFS). Consequently, another amended order of disposition was entered in June, 2016. While respondent appeals Family Court's placement decisions in all three orders, his appeal was dismissed as moot since the June 2016 order superceded the previous two orders and respondent's placement with OCFS, as provided for in the June, 2016 order, had expired by the time of the appeal.

*Matter of Kareem Q.,* 151 AD3d 1321 (3d Dept 2017)

## ORDER OF PROTECTION

### Record Supported Determination That Petitioner Established Good Cause to Vacate Order of Protection Against Mother

In an article 10 proceeding, the petitioner filed a petition on November 16, 2015, inter alia, to vacate a prior order of protection against the mother and in favor of the subject children. The children, through their attorney, opposed the petition. The Appellate Division affirmed. The Family Court, without a hearing, granted the petition and vacated the order of protection. Pursuant to FCA § 1061, the court may modify an order issued during the course of a proceeding under article 10 for "good cause shown" (*see* FCA § 1061). As with an initial order, the modified order must reflect a resolution consistent with the best interests of the children after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record. The court has discretion in determining whether a hearing is necessary upon a motion to vacate an existing dispositional order (*see* FCA § 1064). Where the court possesses information sufficient to afford a comprehensive, independent review, a hearing is not required. Here, the Family Court did not improvidently exercise its discretion in granting the petition without a hearing. Moreover, the record supported the court's determination that the petitioner established good cause to vacate the order of protection against the mother.

*Matter of Sutton S.*, 152 AD3d 608 (2d Dept 2017)

## PATERNITY

### Petitioner Equitably Estopped From Pursuing Paternity Claim

Family Court found that petitioner was equitable estopped from asserting paternity of the subject child and dismissed the petition. The Appellate Division affirmed. Petitioner waited almost four years after the child's birth, after having seen the child approximately four times, before commencing this proceeding, during which time he failed to communicate with the child or provide any financial support, On one occasion, petitioner verbally and physically abused the child's mother in the child's presence, and the mother obtained an order of protection against him. Curiously, approximately two weeks later, petitioner commenced this proceeding. The child was brought up believing that the mother's husband, whom the child calls "daddy" was her biological father, and she identified members of his extended family as her own family. The child only knew petitioner as the man who hit her mother. Therefore, it was not in the child's best interests to interfere with her relationship with the only father she has ever known.

*Matter of Darnel J.P. v Lianna Y.D.*, 150 AD3d 406 (1st Dept 2017**)**

## RIGHT TO COUNSEL

### Family Court Did Not Err in Allowing the Father to Represent Himself

The order appealed from granted the mother's petition, in effect, for sole legal and physical custody of the subject child and denied the father's cross petition for sole custody of the child. The Appellate Division affirmed. The Family Court conducted a sufficiently searching inquiry to ensure that the father's clear and unequivocal waiver of his right to counsel was knowingly, voluntarily, and intelligently made. The court advised the father of the dangers and disadvantages of giving up the fundamental right to counsel, and the father acknowledged his understanding of those perils and repeated his desire to proceed pro se. Accordingly, the court did not err in allowing the father to represent himself. Likewise, there was no merit to the father's contention that the Family Court improvidently exercised its discretion in denying his motion for recusal. Where, as here, no legal basis for disqualification under Judiciary Law § 14 is alleged, a court is the sole arbiter of the need for recusal, and its decision is a matter of discretion and personal conscience. The father failed to set forth any demonstrable proof of the court's bias or prejudice to warrant recusal. Moreover, there was no basis to disturb the Family Court's order awarding sole legal and physical custody to the mother. The court's paramount concern in any custody dispute is to determine, under the totality of

the circumstances, what is in the best interests of the child. Here, the court's determination that the child's best interests were served by awarding sole legal and physical custody to the mother had a sound and substantial basis in the record.

*Matter of Bianco v Bruce-Ross*, 151 AD3d 716 (2d Dept 2017)

**Upon Granting Motion of Father's Assigned Counsel to Be Relieved of His Assignment, the Family Court Should Have Assigned Father New Counsel**

The parties are the parents of one child, born in 1999. In an order dated March 30, 2015, the mother was awarded sole custody of the child. Approximately one month later, the father petitioned for a modification of that order. The Family Court, inter alia, assigned an attorney to represent the father, but in November 2015, that attorney moved to be relieved of the assignment. The court granted the motion, but did not assign a new attorney to represent the father. On the date of the hearing on the modification petition, the court denied the father's request for the assignment of a new attorney, stating that the father could either proceed pro se or have his petition dismissed. The father proceeded pro se and, in the order appealed from, the Family Court dismissed his petition for failure to state a cause of action. The Appellate Division reversed. Under the circumstances presented, where the Family Court granted assigned counsel's motion to be relieved, refused to assign the father a new attorney, and then compelled the father to choose between representing himself or having his petition dismissed, the Family Court violated the father's right to be represented by counsel (*see* FCA §§ 261, 262). The father neither forfeited his right to counsel nor knowingly, voluntarily, and intelligently waived his right to counsel. Moreover, the mere fact that the court granted the motion of the father's first assigned counsel to be relieved did not serve to extinguish the father's right to have another attorney assigned to represent him. Accordingly, upon granting the motion of the father's assigned counsel to be relieved of his assignment, the Family Court should have assigned the father new counsel. Therefore, the order was reversed and the matter was remitted to the Family Court for the assignment of new counsel, a new hearing on the father's petition, and a new determination thereafter.

*Matter of Rosado v Badillo*, 151 AD3d 978 (2d Dept 2017)

**Family Court Erred in Denying Father's Request for an Adjournment**

Pursuant to a judgment of divorce dated November 29, 2011, the parties were awarded joint legal custody of their two children, with the mother having residential custody and the father having visitation. In November of 2015, the mother filed a petition seeking permission to relocate with the children to Arizona and on April 15, 2016, the father appeared with assigned counsel for a scheduled hearing. However, assigned counsel requested to be relieved, informing the Family Court that the father only contacted her the day before and also that she was not sure that the father qualified for assigned counsel. After the court granted assigned counsel's request to be relieved, it adjourned the hearing until June 24, 2016, so that the father could retain counsel. On June 24, 2016, the father told the court that he had retained an attorney but that the attorney could not be in court that day. The court, however, proceeded with the hearing after stating that it had no choice but to proceed. The Appellate Division agreed with the father's contention that he was deprived of his statutory right to counsel (*see* FCA § 262 [a] [v]). Under the circumstances, instead of ordering the hearing to proceed, the Family Court should have granted an adjournment. The father never waived his right to counsel. Accordingly, the order was reversed, and the matter was remitted the matter to the Family Court for a new hearing and new determination thereafter.

*Matter of Charbonneau v Charbonneau*, 151 AD3d 1060 (2d Dept 2017)

**TERMINATION OF PARENTAL RIGHTS**

**Father Permanently Neglected Child**

Family Court determined that respondent father permanently neglected the subject child, terminated his parental rights, and committed custody and guardianship of the children to the Commissioner of Social Services

and The Children's Village 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 by, among other things, referring respondent for parenting skills and anger management programs, random drug screenings, mental health evaluation and services, as well as scheduling visitation with the child and making referrals for a visitation coach. Respondent failed to comply with the required services. The father's behavior during visits only worsened and his visitation never progressed beyond supervised visitation at the agency. Termination of respondent's parental rights was in the child's best interests. Respondent had no feasible plan to care for the child, and the foster mother, who cared for him in a stable and loving home, wished to adopt him.

*Matter of Matthew Louis S.,* 150 AD3d 430 (1st Dept 2017)

**Mother's Consistent Visitation With Child Did Not Preclude Finding of Neglect**

Family Court found that respondent mother permanently neglected the subject child, terminated her parental rights, 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 finding of permanent neglect was supported by clear and convincing evidence of the mother's failure to plan for the child's future. The agency made diligent efforts by, among other things, repeatedly referring the mother to a drug treatment program, drug screenings, mental health treatment and housing services. The mother failed to complete a drug treatment program or obtain mental health services. Her consistent visitation with the child did not preclude a finding of neglect, given her failure to plan for the child's future. It was in the child's best interests to terminate the mother's parental rights. The child had lived with his foster mother since he was seven months old, he was thriving in her care, and the foster mother wanted to adopt him.

*Matter of Raymond C.,* 150 AD3d 476 (1st Dept 2017)

**Court Properly Denied Mother's Motion to Vacate Her Default**

Family Court denied respondent mother's motion to vacate her default. The Appellate Division affirmed. The mother failed to demonstrate a reasonable excuse for her absences from the proceedings despite numerous adjournments. Because she failed to demonstrate a reasonable excuse, the issue whether she presented a meritorious defense did not need to be reached. In any event, she failed to do so, because she did not refute the expert medical evidence establishing that, because of her mental illness, she was presently and for the foreseeable future, unable to provide proper and adequate care for the children.

*Matter of Serenity Victoria M.,* 150 AD3d 486 (1st Dept 2017)

**Father Had No Feasible Plan For Child's Future**

Family Court found that respondent father permanently neglected the subject child, terminated his parental rights, and committed custody and guardianship of the child to petitioner agency and ACS for the purpose of adoption. The Appellate Division affirmed. The agency demonstrated by clear and convincing evidence that the father permanently neglected his child by failing to visit consistently and by failing to plan for her future, despite the agency's diligent efforts. Although the father was made aware of the need to, among other things, attend and complete a drug treatment program and obtain suitable housing, he refused to avail himself of these services. He also failed to consistently visit with the child and acted inappropriately during visits, frightening the child. Overnight, unsupervised visitation with the child was suspended after the child returned from the visits with injuries requiring medical treatment. The child's best interests were served by freeing the child for adoption by her foster mother, with whom the child had lived since she was three days old, and who met all the child's needs and wanted to adopt her.

*Matter of Tiffany N.L.,* 150 AD3d 499 (1st Dept 2017)

**Mother Failed to Gain Insight Into Parental Deficiencies**

Family Court determined that respondent mother permanently neglected the subject children. The Appellate Division affirmed. Clear and convincing evidence supported the determination that respondent mother permanently neglected the subject children by failing to plan for their future, despite the agency's diligent efforts to encourage and strengthen the parental relationship. The agency scheduled regular visitation, referred the mother to alcohol and drug treatment, and parenting skills and mental health services. Although the mother did complete many aspects of her service plan, she failed to gain insight into her parental deficiencies or benefit from the services. The mother continued to display poor parenting skills at visits to the point where both children asked that visits be stopped. The mother's therapist reported that the mother gained little insight since engaging in therapy, and the case planner observed that the mother continually failed to take responsibility for her role in the circumstances that led to the children's placement.

*Matter of Giulio D.,* 150 AD3d 580 (1st Dept 2017)

**Mother Lacked Insight About Ability to Provide Child With Safe Home**

Family Court found that respondent mother permanently neglected the subject child, terminated her parental rights, and committed custody and guardianship of the child to petitioner agency and ACS for the purpose of adoption. The Appellate Division affirmed. The determination of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts by developing a comprehensive service plan to address the mother's hoarding problem, maintaining frequent contact with her, ensuring her participation in scheduled services, and facilitating her visits and contact with the child. Respondent, however, failed to plan for the future of the child by demonstrating a complete lack of insight regarding her ability to provide the child with a safe and appropriate home. She failed to correct the unsanitary and unsafe conditions in her apartment over a four-year period, and failed to account for the well-being of the child in foster care by repeatedly violating visitation orders and making comments to the child about her foster mother.

*Matter of De'Lyn D.,* 150 AD3d 599 (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 children and committed custody and guardianship of them to petitioner agency and ACS for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence supported the determination that respondent was presently and for the foreseeable future unable to care for the children. The evidence included a report and testimony from a court-appointed psychiatrist who, after examining the mother and reviewing medical and other records, opined that the mother suffered from bipolar disorder and alcohol use disorder and that, as a result, if the children were returned to her care in the foreseeable future, they would be at risk of becoming neglected. Where, as here, the expert's opinion was based upon the mother's long history of mental illness, her non-compliance with substance abuse and psychiatric treatment, and the pervasive nature of her deficits, it was not necessary for the psychiatrist to observe interaction between the mother and children. The mother failed to call any witnesses or offer rebuttal evidence, and the court properly drew a negative inference from her failure to testify.

*Matter of Ariella D.,* 150 AD3d 620 (1st Dept 2017)

**Mother Permanently Neglected Child**

Family Court determined that respondent mother permanently neglected the subject child, terminated her parental rights, and committed custody and guardianship of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption and determined that respondent father's consent was not required for the adoption of the child. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The record established that the agency made diligent efforts to encourage and strengthen

the parental relationship by, among other things, formulating a service plan, discussing its importance with the mother, making referrals for services, and facilitating visitation. However, the mother failed to consistently visit the child, was noncompliant with critical services, including drug, alcohol and mental health treatment, and failed to plan for the child's return. The court properly rejected a suspended judgment, especially because the child had special needs and needed stability, which he obtained in the long-term foster home, where he was well cared for and doing well. The father's failure to pay fair and reasonable support for the child according to his means was fatal to his claim that he was entitled to more than notice of the child's adoption.

*Matter of Sydney A.B.,* 151 AD3d 533 (1st Dept 2017)

**Mother's Belated Partial Compliance with Service Plan Was Insufficient to Preclude Finding of Permanent Neglect**

The petitioner commenced proceedings to terminate the mother's parental rights to the subject children on the ground of permanent neglect. After fact-finding and dispositional hearings, the Family Court found that the mother had permanently neglected the children, terminated her parental rights, and transferred custody and guardianship of the children to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother appealed. The Appellate Division affirmed. Contrary to the mother's contention, the Family Court properly found that the petitioner established by clear and convincing evidence that it made diligent efforts to assist the mother in maintaining contact with the children and planning for the children's future, including facilitating visitation, repeatedly providing the mother with referrals for drug treatment programs and mental health evaluations, and advising the mother of her need to attend and complete such programs and of the consequences of her failure to do so. The court also properly found that, despite the petitioner's efforts, the mother failed to consistently maintain contact with the children or adequately plan for the children's future. The mother's belated partial compliance with the service plan was insufficient to preclude a finding of permanent neglect. Accordingly, the court properly found that the mother permanently neglected the children.

*Matter of Lierre J.M.*, 150 AD3d 1009 (2d Dept 2017)

**Mother Failed to Provide a Reasonable Excuse for Her Default**

In a proceeding pursuant to SSL § 384-b, inter alia, to terminate the mother's parental rights on the ground of abandonment, the mother failed to appear at the fact-finding and dispositional hearing held on January 28, 2016, and was found to be in default. The Family Court conducted a fact-finding and dispositional inquest, and, in an order of fact-finding and disposition dated February 16, 2016, inter alia, determined that the subject child was an abandoned child, terminated the mother's parental rights, and transferred custody and guardianship of the subject child to the Commissioner of the Administration for Children's Services of the City of New York and Seamen's Society for Children and Families for the purpose of adoption. Thereafter, the mother moved to vacate her default. The Family Court denied the mother's motion, and the mother appealed. Contrary to the mother's contention, she failed to provide a reasonable excuse for her default. The mother also presented no defense at all in support of her application to vacate her default . Accordingly, the Family Court providently exercised its discretion in denying her motion to vacate the order of fact-finding and disposition entered upon her default. Order affirmed.

*Matter of Clarence D.H.*, 150 AD3d 1113 (2d Dept 2017)

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

In June 2009, when the subject child was four months old, the police were contacted by the maternal grandmother, who observed the mother clutching the child to her chest while pacing and mumbling to herself. When the police responded, it took four officers to safely remove the child from the mother. The mother was then taken to a hospital for psychiatric evaluation and treatment, and the child was placed in foster care. In February 2013, the petitioner commenced this proceeding pursuant to SSL §

384-b to terminate the mother's parental rights on the basis that she was unable to provide adequate care, supervision, and guidance for the child due to her mental illness, and that the child was permanently neglected. After fact-finding and dispositional hearings, the Family Court found that the mother permanently neglected the child, terminated her parental rights, and transferred custody and guardianship of the child to the petitioner for the purpose of adoption. The mother appealed. The Appellate Division affirmed. Contrary to the mother's contention, the petitioner established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen her relationship with the child, which efforts were specifically tailored to the mother's individual situation (*see* SSL § 384-b [7] [a]; [3] [g] [I]). These efforts included, inter alia, making referrals to mental health, parenting, and housing services, following up with those programs, encouraging the mother's compliance with the programs, and facilitating visitation (*see* SSL § 384-b [7] [f]). Despite these efforts, the mother failed to plan for the child's future. The mother failed to successfully complete a mental health program, manage her mental health issues, or gain insight into her previous behavior and the need for services, and she was either late to, or entirely missed, numerous supervised visitations with the child. Thus, there was clear and convincing evidence of the mother's permanent neglect of the child (*see* SSL § 384-b [3] [g]). Moreover, the Family Court properly determined that termination of the mother's parental rights was in the child's best interests (*see* FCA § 631). Contrary to the mother's contention, the entry of a suspended judgment was not appropriate in light of her continued lack of insight into her problems, and her failure to acknowledge and address the issues preventing the return of the child to her care.

*Matter of Shaquan D. M.*, 150 AD3d 1119 (2d Dept 2017)

**Record Supported Finding That Mother and Father Were Unable to Provide Adequate Care for Child**

The order of fact-finding and disposition found that the mother and the father were presently, and for the foreseeable future, unable by reason of mental illness to provide proper and adequate care for the subject child, terminated the mother's and the father's parental rights, and transferred the guardianship and custody of the subject child to the county's Department of Social Services. The mother and father separately appealed. The Appellate Division affirmed. A court-appointed psychologist interviewed and tested the mother and concluded that she suffers from schizoaffective disorder and posttraumatic stress disorder. The psychologist opined that due to, among other things, the mother's acute mental health distress and history of noncompliance with treatment, the mother is presently unable to provide proper and adequate care for the subject child. A licensed psychiatrist interviewed the father and reviewed certain of his medical records. The psychiatrist determined that the father suffers from schizophrenia, paranoid type. The psychiatrist testified that the father lacked insight into his mental illness, and that his prognosis for remedying his mental illness was poor. The evidence provided by the psychologist and the psychiatrist, respectively, established by clear and convincing evidence that the mother and the father are presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child. Accordingly, the Family Court properly terminated the parental rights of the mother and the father on the ground of mental illness.

*Matter of Dieurison T.*, 152 AD3d 609 (2d Dept 2017)

**Mother Failed to Comply with Several Conditions of Her Suspended Judgment**

In 2015, the Orange County Department of Social Services (hereinafter DSS) commenced proceedings to terminate the mother's parental rights based upon her permanent neglect of the subject children. The mother consented to a finding of permanent neglect, and an order of suspended judgment was issued upon certain conditions. Thereafter, DSS filed two separate motions seeking to revoke the order of suspended judgment based upon the mother's alleged failure to comply with the conditions of the suspended judgment. After a hearing, the Family Court revoked the order of suspended judgment and terminated the mother's parental rights. The mother appealed. The Appellate Division affirmed. The Family Court properly found, by a preponderance of the evidence, that the mother failed to comply with several of the conditions of her suspended judgment.

Contrary to the mother's contention, the petitioner was not required to prove that it made diligent efforts to strengthen the parental relationship, since the mother previously admitted that she permanently neglected the subject children and that caseworkers had exercised due diligence in working with her.

*Matter of Hailey B.*, 152 AD3d 677 (2d Dept 2017)

**Respondent Permanently Neglected Children**

Family Court granted petitioner's application to adjudicate respondents' child to be permanently neglected and terminated their parental rights. The Appellate Division affirmed. Petitioner met its initial burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship between respondents mother and father and the child. Petitioner's agents repeatedly encouraged respondents to engage in services for substance abuse, domestic violence and mental health issues and they made the appropriate referrals. They also encouraged respondents to visit with the child, and provided bus passes to facilitate visits. Respondents failed to take advantage of or benefit from offered services and failed to take advantage of numerous opportunities to visit the child. Respondents also failed to develop a realistic plan for his future. Respondents missed or refused drug screenings on a number of occasions, and both tested positive for cocaine and opiates during the relevant time period. Further, despite the role that domestic violence played in the underlying neglect finding, respondents both refused to acknowledge issues with domestic violence in their relationship or the need for treatment.

*Matter of Cordell M.,* 150 AD3d 1424 (3d Dept 2017)

**Mother's Mental Illness Justified Termination of Her Parental Rights**

In proceeding to terminate mother's parental rights, Family Court providently determined that the Department of Social Services met their burden of proof by showing that the mother suffered from mental illness which impaired her ability to adequately care for her children and terminated the mother's parental rights accordingly. The testimony of the court ordered psychologist demonstrated that the mother suffered from a borderline personality disorder and a secondary opioid disorder, both of which resulted in her prioritizing her own needs over that of her children. Also, the manner with which the psychologist conducted the evaluation, including review of materials and interviews, were typically and reasonably relied upon by other professionals in his field to formulate an opinion. Consequently, Family Court's determination was supported by clear and convincing evidence.

*Matter of Jazmyne II.,* 151 AD3d 1123 (3d Dept 2017)

**Termination of Father's Parent Rights Appropriate Despite Ambivalence by Evaluating Psychologist**

Family Court properly terminated the father's parent rights despite the testimony from the psychologist who examined him, that he was "less than one hundred percent sure" that the father would be unable to provide adequate care for the children in the foreseeable future. In response to questioning by counsel, the psychologist also stated that it was a "close call" as to whether the father could adequately care for the children in the future. The psychologist also stated that the father had the "potential to be an adequate parent much of the time." To successfully terminate parental rights due to the mental illness of a parent, it must be shown by clear and convincing proof that the parent is presently and for the foreseeable future, unable to provide proper and adequate care for the children. Despite the psychologist's inability to say for certain that the father could not adequately care for the children in the future, Family Court found the testimony of the psychologist and his comprehensive report sufficient to constitute clear and convincing proof that the father is unable to care for the children in the foreseeable future.

*Matter of Duane II.,* 151 AD3d 1130 (3d Dept 2017)

**Modification to Permanency Plan Impermissible Where Family Court Failed to Comply with Family Court Act 1089(d)**

Family Court erred by modifying the permanency plan for three of the four subject children from return to the parents, to termination of their parental rights, where Family Court failed to conduct the age appropriate consultation with the three youngest children as mandated by Family Court Act 1089(d). The attorney for the three youngest children failed to present evidence indicating their preferences. Consequently, Family Court's decision to modify the parenting plan as related to the three youngest child was reversed and remitted back to Family Court for further proceeding. The requirements of Family Court Act 1089(d) as relates to the oldest child was met where the child's wishes were made know during the closing statement of her attorney and through the testimony of witnesses. Therefore, Family Court properly modified the permanency plan as related to the oldest child. At the time of the permanency hearing, the children's father was incarcerated but supported the return of the children to their mother. Evidence presented at the hearing demonstrated that the mother benefitted little from her participation in anger management classes and parenting classes, refused to participate in higher level parenting classes despite the caseworker's suggestion, and lacked insight as to how her behavior resulted in the children being placed in foster care. During one visit between the mother and the children, the mother became exasperated while attempting to discipline the children to the point that she almost hit one of them. During another visit, the mother once again became frustrated while attempting to discipline the children, which caused her to threaten to leave them thereby causing the children to become upset. The mother also refused to attend the children's medical appointments despite the fact that transportation was provided to her for this purpose. Evidence was also presented at the hearing that the children had significant behavior issues after visits with the mother.

*Matter of Dawn M.,* 151 AD3d 1489 (3d Dept 2017)

**Mother's Frequent Moving and Failure to Address the Child's Mental Health Issues Constitutes Extraordinary Circumstances**

From the time when the subject child was born, he moved with his mother at least 12 times and they would return periodically to live with the child's great-grandmother. When the child was five-years-old, the mother was living with a friend who inappropriately disciplined the child. The mother asked the great-grandmother to take the child when she thought she was going to be arrested and the child remained there. The great-grandmother sought custody and Family Court granted joint custody with the mother and great-grandmother, primary physical custody to the great-grandmother and parenting time to the mother. This order was made without a finding of extraordinary circumstances. Additionally, the mother was instructed to keep away from the child, the person who had previously inappropriately disciplined him. The mother was further instructed not to have any unrelated persons present during her parenting time. The order reserved the mother's right to petition for modification at the end of the school year without a showing of change in circumstances, which she did. After a hearing, Family Court awarded joint legal custody with primary physical custody to the great-grandmother and overnight weekend parenting time to the mother. The Appellate Division affirmed, holding that because the parties agreed that the prior order was made without a finding of extraordinary circumstances, the great-grandmother bore that burden on the mother's modification proceeding. This was clearly shown by a videotape of the inappropriate discipline of the child and testimony that established that the mother failed to keep that person away from the child and that she failed to address the child's mental health issues.

*Matter of Heather U.,* 152 AD3d 836 (3d Dept 2017)

**Mother Not Entitled to Delay of Jail Sentence for Violating Order of Disposition**

In proceeding pursuant to Article 10 of the Family Court Act, respondent's motion to delay a sentence of incarceration was properly denied by Family Court. In 2014, respondent was adjudicated to have neglected her child and an order of disposition was issued placing respondent under the supervision of the Franklin County Department of Social Services. The order further required the respondent to, inter alia, undergo mental health counseling and refrain from consuming alcohol and certain drugs. Approximately three months later, respondent was determined to have violated the order of disposition by missing therapy appointments and consuming prohibited substances resulting in a 90 day jail

sentence. Imposition of the jail sentence was delayed multiple times by the court while respondent claimed progress in addressing her various issues, including but not limited to, engaging in alcohol and drug counseling. Respondent ultimately failed to substantiate the touted progress with documentation and the court's refusal to grant the respondent's motion to delay the jail sentence was "eminently fair and reasonable" under the circumstances of the case.

*Matter of Bryce Q.,* 152 AD3rd 889 (3d Dept 2017)

**Termination of Father's Parental Rights Appropriate Where Diligent Efforts Make to Strengthen Relationship Between Children and Father and Father's Plan for Children's Future Was Inadequate**

Family Court correctly terminated respondent's parental rights relative to his two children. The court properly determined that petitioner made the requisite diligent efforts to encourage and strengthen the respondent's relationship with the children, notwithstanding the fact that he was repeatedly incarcerated. Petitioner's diligent efforts included, but were not limited to, sending respondent updates about the children, facilitating supervised visitation when respondent was not incarcerated and discussing with respondent a plan for getting his children out of foster care. Family Court also properly determined that petitioner failed to plan for children's future when the only plan that he had for them, was to have custody of the children upon his anticipated release from prison in 2019. Also, Family Court correctly determined that terminating the respondent's parent rights was in the children's best interest where they had been in foster care for approximately five years, had a strong bond with their foster family that was also an adoptive resource and respondent continued to have mental health issues, parenting issues and limited contact with his children.

*Matter of Walter DD.,* 152 AD3d 896 (3d Dept 2017)

**Termination of Mother's Parental Rights Appropriate Where She Failed to Benefit From Services Provided by Petitioner and Children Flourished in Foster Care**

Family Court's decision, finding that five of respondent's six children were permanently neglected, as well as their decision to terminate respondent's parental rights relative to three of her children, was supported by clear and convincing evidence. Relative to the court's finding of permanent neglect, the record demonstrated that numerous services were provided to respondent by petitioner to try and address virtually every issue that she had which impeded her ability to adequately care for her children. Notwithstanding the aforementioned services and efforts, the court correctly found that respondent's home environment remained unsafe and chaotic, she remained unable to appropriately parent and nurture the children, she was frequently non-compliant, hostile and uncooperative with petitioner, she failed to learn how to manage the children and her household, as well as the fact that she remained unwilling or unable to accept responsibility for her children or her own behavior. Family Court correctly concluded that the aforementioned factors supported a finding of permanent neglect. Regarding the respondent's appeal relative to the termination of her parental rights pertaining to three of her children, having already determined that the children were permanently neglected, Family Court's application of the best interest analysis, which considered the fact that the children were bonded with their foster families, had spent little or no time living with respondent as well as the fact that respondent had not progressed beyond supervised visits, all justified the termination of her parental rights. Lastly, Family Court did not abuse their discretion in failing to find that a suspended judgment was not in the best interests of the three children. There was insufficient evidence that a brief grace period afforded by said suspended judgment, would result in respondent making the necessary progress.

*Matter of Jessica U.,* 152 AD3d 1001 (3d Dept 2017)

**Revocation of Suspended Judgment Affirmed**

Family Court revoked a suspended judgment entered upon respondent father’s admission that he had permanently neglected the subject child, and terminated the father’s parental rights. Although the record from the hearing on petitioner’s motion to revoke the suspended judgment established that the father made minimal progress on some of the conditions of the suspended judgment, literal compliance with the terms of the

suspended judgment would not suffice to prevent a finding of a violation. A parent must also have shown that progress had been made to overcome the specific problems which led to the removal of the child. The record established that the father failed to demonstrate such progress, and that he continued to deny the existence of the problems that led to the removal of the subject child. The court's finding after a hearing that the father violated the conditions of the suspended judgment was supported by a preponderance of the evidence. The father's contention was rejected that the was denied the right to due process when the court curtailed his cross-examination of a witness at the hearing. The cross-examination that the father's attorney was attempting to pursue was properly excluded as too remote and speculative. The father's further contentions were rejected that the court erred in admitting certain records because they were not certified pursuant to Section 1046 (a) (iv) of the Family Court Act, and also erred in granting petitioner access to his mental health records. By denying that he needed to comply with that part of the suspended judgment directing him to undergo mental health treatment, the father placed his mental health at issue.

*Matter of Joseph M.*, 150 AD3d 1647 (4th Dept 2017)

**Termination of Father's Parental Rights on Ground of Permanent Neglect Affirmed**

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The petition sufficiently specified the requisite diligent efforts to encourage and strengthen the parental relationship, which included arranging visitation with the children, consulting with the father about developing a service plan, and reviewing his progress. The father's admission that he failed to plan adequately for the children's long-term care was sufficient to establish permanent neglect, inasmuch as the failure of an incarcerated parent to provide any realistic and feasible alternative to having the children remain in foster care until the parent's release from prison supported a finding of permanent neglect. Furthermore, in view of the father's admissions of permanent neglect, the court was not required to determine whether petitioner exercised diligent efforts to strengthen and encourage the parental relationship. The father's contention was rejected that the court should have entered a suspended judgment rather than terminated his parental rights. In light of the positive living situation of the children while residing with their foster parents, the absence of a more significant relationship between the children and the father, and the uncertainty surrounding both when the father would be released from prison and where he would reside, the court properly determined that further delay was not in the best interests of the children and that termination of the father's parental rights was warranted.

*Matter of Nataylia C.B.*, 150 AD3d 1657 (4th Dept 2017)

**Affirmance of Termination of Parental Rights on Based Upon Mother's Inability, By Reason of Intellectual Disability, to Provide Adequate and Proper Care for Children**

Family Court terminated respondent mother's parental rights with respect to four of her children. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that the mother was intellectually disabled and that by reason of such disability, she was unable to provide proper and adequate care for the subject children presently and for the foreseeable future. Petitioner presented the testimony of two psychologists who examined the mother and concluded that she had below average intelligence and that, if the children were placed in her care, the children would be at significant risk of neglect for the foreseeable future. Further, petitioner presented evidence that the mother had been unable to improve her parenting skills and would not benefit from any additional support services. The mother's contention was rejected that the determination to terminate her parental rights was not supported by the record and that a suspended judgment would be in the best interests of the children. While a separate dispositional hearing was not statutorily required where, as here, parental rights were terminated based on intellectual disability, the court held such a hearing. Under the circumstances, including the fact that the foster parents planned to adopt three of the children, termination of the mother's parental rights was in the children's best interests. Moreover, there was no statutory authority for a suspended judgment when parental rights were terminated by reason of intellectual disability. A report

from a psychologist who examined the mother on behalf of petitioner was improperly admitted in evidence at the fact-finding hearing. The report did not qualify for the business records exception to the hearsay rule because it was prepared for the purpose of litigation rather than in the ordinary course of business. However, the error was harmless.

*Matter of Akayla M.*, 151 AD3d 1684 (4th Dept 2017)

**Court Properly Determined That Suspended Judgment Unwarranted**

Family Court terminated respondent mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The court did not abuse its discretion in declining to enter a suspended judgment. A suspended judgment was a brief grace period designed to prepare the parent to be reunited with the child, and may be warranted where the parent had made sufficient progress in addressing the issues that led to the child's removal from custody. Here, the credible evidence at the hearing, including the testimony of petitioner's caseworker that the mother's apartment lacked a stove, and a bed or clothes for the child, established that the mother had not made sufficient progress in providing the child with suitable living conditions. Moreover, the court's findings concerning lack of meaningful visitation, lack of transportation, financial concerns, and unsuitable living conditions demonstrated that the court was properly concerned with the child's best interests, and thus the court properly determined that a suspended judgment was unwarranted.

*Matter of Danaryee B.*, 151 AD3d 1765 (4th Dept 2017)

**Order Vacated Where Court Abused Discretion in Denying Mother's Request for Continuance**

Family Court terminated respondent mother's parental rights with respect to the subject children on the ground that mother was intellectually disabled and that by reason of such disability, she was unable to provide proper and adequate care for the subject children presently and for the foreseeable future. The Appellate Division vacated and remitted. The court abused its discretion in denying the mother's request for a continuance when, due to emotional distress, the mother was unable to appear in the afternoon on the final day of her hearing. The determination whether to grant a request for an adjournment for any purpose was a matter resting within the sound discretion of the trial court. Under the circumstances presented, including that the issue was the termination of parental rights, it was an abuse of discretion to deny the mother's request for a continuance. Therefore, the order was vacated and the matter remitted to allow the mother to present evidence at a reopened fact-finding hearing.

*Matter of Destiny G.*, 151 AD3d 1799 (4th Dept 2017)

**Petitioner Made Diligent Efforts**

Family Court terminated respondent mother's parental rights with respect to the subject children. 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, including arranging for a psychological assessment of the mother, developing an appropriate service plan tailored to her situation, notifying the mother of the children's medical appointments, conducting service plan reviews, and encouraging the mother to engage in regular visitation. The mother, however, frustrated petitioner's efforts by, among other things, insisting that visitation occur in her home, but refusing to allow a home inspection. The mother was not denied effective assistance of counsel.

*Matter of Kemari W.*, 153 AD3d 1667 (4th Dept 2017)