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Maintenance as Child Support Income in Light of New Law*

Timothy M. Tippins**

Since the 1989 enactment of the Child Support Standards Act (CSSA) there has been a fair measure of confusion with respect to the treatment of inter-parental maintenance payments vis-à-vis the determination of parental income for child support purposes. The statute is clear that spousal maintenance paid by one parent to the other entitles the payor to a deduction from CSSA income, provided the order contains a specific prospective adjustment of the child support amount at such time as the maintenance obligation may terminate. The impact of that specific adjustment on the parties' right to modification, however, has been somewhat less clear. Additionally, the flip-side of the issue, to wit, whether the maintenance is to be added to the payee's income for child support purposes, has proven particularly vexatious. This article will explore recent legislation that brings greater clarity to these issues.[1]

Maintenance as Income

Domestic Relations Law §240(1-b)(b)(5) defines income for purposes of applying the CSSA. The starting point for determining income is "gross (total) income as should have been or should be reported in the most recent federal income tax return."[2] The statute further directs that other specified income items be added to a party's income where they are not already reflected on the tax return. The specified additions are set forth in DRL §240(1-b)(b)(5)(iii) in clauses "A" through "H." Not included in that list of statutory additions is maintenance paid to a party to the action.

The statute's failure to specify that maintenance paid to a party is an additional income item where it is not yet reflected on the tax return has led a number of courts to hold that the maintenance payments should not be treated as an additional payee income item at the time of decision.[3] Under these precedents, maintenance payments will not be considered payee income until such time as they actually appear on the payee's income tax return. The decision in *Huber v. Huber*[4] exemplifies this position:

> [T]here is no authority in the Child Support Standards Act (CSSA) for adding future maintenance payments to the recipient's income for the purpose of calculating child support. Although the permanent maintenance payments directed in the divorce judgment will or should be henceforth declared as income by plaintiff on her Federal tax returns, such payments, viewed as of the time of decision, did not fall within the definition of 'gross (total) income as should have been or should be reported in the most recent federal income tax return' (Domestic Relations Law §240[1–b][b][5][I]).

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> We conclude that, had the Legislature intended future maintenance payments to be included in the recipient's income, it could have unambiguously so provided simply by using the same language—'alimony or maintenance * * * contained in the order to be entered by the court' —used in Domestic Relations Law §240(1–b)(b) (5)(vii)(C).[5]

Chapter 387 of the Laws of 2015 overrides—quite unambiguously—such decisions by adding a new clause "I" to the list of income items to be added to the maintenance payee's income for CSSA purposes:

> (I) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order *or contained in the order to be entered* by the court, or pursuant to a validly executed written agreement…[6] (Italics added)

The bill that carried this amendment[7] was actually a companion piece to the new maintenance law[8] that was signed by the governor a month before he signed this one. The new maintenance law is also crystal clear in its dictate that any ordered maintenance is to be added as CSSA income at the time the order is being determined.

At no fewer than four points in the new maintenance statute it directs—unequivocally and unconditionally—that the maintenance obligation "shall be calculated prior to child support because the amount of temporary maintenance *shall be subtracted from the payor's income and added to the payee's income* as part of the calculation of the child support obligation."[9] (Italics added)

Thus, the language of both the new maintenance law and the companion legislation here discussed is clear beyond cavil that at the time the court is deciding both maintenance and child support it must first determine how much maintenance is to be paid and then must deduct that maintenance amount from the payor's income and must add it to the payee's income. For reasons that will become apparent below, it is noteworthy that none of these provisions condition the subtraction of maintenance on any requirement that there be a specific adjustment of child support when the maintenance obligation terminates.

It should be noted further that there is an unfortunate and misleading statement in the legislative memo that accompanied the bill amending the CSSA. In reporting that the amendment specifically adds maintenance as an additional item of payee income for CSSA purposes, the memo states:

> This addition would be based upon an amount already paid, e.g., an amount reported on the recipient spouse's last income tax return, and would not simply be an estimate of future payments. In that respect, it codifies several appellate cases. [See, e.g., *Simon v. Simon*, 55 A.D.3d 477 (1st Dept. 2008); *Krukencamp v. Krukencamp*, 54 A.D.3d 345 (2d Dept. 2008); *Lee v. Lee*, 79 A.D.3d 473 (2d Dept. 2005); *Huber v. Huber*, 229 A.D.2d 904 (4th Sept. 1996)].[10]

This actually is the precise opposite of what the amendment accomplishes. The cited cases are the decisions that held that maintenance is income to the payee only when it appears on the payee's income tax return. The amendment does not codify those decisions; it casts them off to a well-deserved place in oblivion.

The misstatement in the memorandum should cause little judicial consternation, however, because the language of both the maintenance law and the CSSA amendment is utterly unambiguous on this point. It is a well-settled principle of statutory construction that courts resort to "extrinsic aids to determine legislative intent, such as legislative history" only when a statute is ambiguous.[11] This one is not. Thus, bench and bar should simply ignore the misleading language in the memorandum.

CSSA Income Deduction

DRL §240(1-b)(b)(5)(vii) provides for certain specific deductions to be taken from a party's income for CSSA purposes, one of which is maintenance paid to a party to the action. DRL §240(1-b)(b)(5)(vii)(C) provides for the deduction of

> alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, provided the order or agreement provides for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse.

In application, the provision works in the following fashion. Assuming the non-custodial parent has $100,000 of annual income and that he or she will be directed to pay the custodial parent maintenance in the sum of $20,000 per year, the $20,000 maintenance is deducted from the non-custodial parent's income so that the child support percentage, say 25 percent for two children, will be applied to $80,000 of income, not $100,000. This will result in a child support obligation of $20,000 per year in addition to the $20,000 per year paid to the non-custodial parent as maintenance.

The court must then provide in the order that upon the termination of the maintenance obligation the child support amount would automatically be adjusted to the level it would have been had there been no maintenance deduction. In this example that would be $25,000 per year.

The purpose of the specific adjustment is to relieve "the custodial parent of the burden of moving for a modification of the child support order upon the termination of maintenance."[12] The 1989 statute left open the question of whether either party could properly seek modification of the child support obligation prior to the termination of maintenance. The 2015 amendment makes clear that either party can do so, specifically providing "that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification" pursuant to the provisions of DRL §236(B)(9)(b)(2).[13] Thus, if circumstances change substantially or one of the other statutory bases for modification has occurred before the maintenance obligation terminates, the courthouse door remains open to seek appropriate relief.

Durational vs. Non-Durational

There is another problem related to the maintenance deduction for CSSA purposes that is not explicitly addressed by the 2015 amendment. A number of courts have held, quite astonishingly, that the statutory deduction of maintenance paid to a party applies only in cases where the maintenance is ordered for a specified period of time that is shorter in duration than the expected duration of the child support obligation. Under this decisional line, there is no deduction of maintenance and no corresponding specific adjustment where the "maintenance will outlast child support."[14] This proposition is misguided and without basis in either logic or statutory construction.

Logically considered, it makes no sense that a party who pays maintenance for a short period of time should get the benefit of the deduction while a party who is ordered to pay for a longer period of time does not. Indeed, irrespective of the duration of the award, the statute is designed to "reflect the fact that spousal maintenance is money no longer available as income to the payor, but constitutes income to the payee so long as the order or agreement for such maintenance lasts."[15]

In terms of statutory construction, the position is equally infirm. The statute does not say that the deduction and corresponding adjustment is to be made only where the child support will outlast the maintenance. Nor does it say that the deduction/adjustment mechanism applies only where the maintenance obligation is ordered for a specific duration. Rather, it says that the adjustment should reflect the higher amount of child support that will be "payable upon the termination of alimony or maintenance to such spouse."[16] The critical point that seems to elude the appellate courts is that even a non-durational maintenance award can terminate by operation of law prior to the expiration of the child support obligation where the maintenance payee remarries.[17]

Although the 2015 legislation does not expressly address this issue, it bestows an opportune moment for the courts to recalibrate their position. The unqualified language of the new maintenance law dictates that maintenance must be added to the payee's income and subtracted from the payor's income for CSSA purposes—period! Its unqualified mandate is unencumbered by any reference to the duration of the award and it imposes no proviso requiring any specific adjustment. Thus, it affords a new statutory basis upon which the courts can anchor a long overdue disavowal the errant line of cases negating the deduction in cases where non-durational maintenance is ordered.

Conclusion

The 2015 CSSA amendment discussed above clarifies significant issues with respect to the interrelationship between maintenance and child support. Together with the new maintenance law, it also provides the courts a unique opportunity to further clarify and correct their position with respect to the deduction of non-durational maintenance. One must hope that they take advantage of it.

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Endnotes:

1. Laws of 2015, Ch. 387.

2. DRL §240(1-b)(b)(5)(i).

3. See, e.g., *Simon v. Simon*, 55 A.D.3d 477 (1st Dept. 2008); *Krukencamp v. Krukencamp*, 54 A.D.3d 345 (2d Dept. 2008); *Lee v. Lee*, 79 A.D.3d 473 (2d Dept. 2005); *Huber v. Huber*, 229 A.D.2d 904 (4th Dept. 1996).

4. *Huber v. Huber*, 229 A.D.2d 904, 645 N.Y.S.2d 211 (4th Dept. 1996)

5. *Huber v. Huber*, 229 A.D.2d 904, 645 N.Y.S.2d 211 (4th Dept. 1996).

6. DRL §240(1-b)(b)(5)(iii)(I).

7. A.7637 (2015).

8. Laws of 2015, Chapter 269.

9. DRL §236(B)(5-a)(c)(1)(f); DRL §236(B)(5-a)(c)(2)(f); DRL §236(b)(6)(c)(1)(g); DRL §236(B)( )(6)(c)(2)(f).

10. Legislative memo, reported at: http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A07637&term=2015&Summary=Y&Actions=Y&Memo=Y&Text=Y.

11. Sutherland Statutory Construction Vol. 3A, §74:8 (7th ed.).

12. Legislative memo, reported at: http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A07637&term=2015&Summary=Y&Actions=Y&Memo=Y&Text=Y.

13. DRL §240(1-b)(b)(5)(vii)(C) (as amended).

14. *Huber v. Huber*, 229 A.D.2d 904, 645 N.Y.S.2d 211 (4th Dept. 1996); see also, *Fendsack v. Fendsack*, 290 A.D.2d 682, 684 (3d Dept. 2002); *Kaplan v. Kaplan*, 130 A.D.3d 576, 13 N.Y.S.3d 184 (2d Dept. 2015); *Lazar v. Lazar*, 124 A.D.3d 1242, 999 N.Y.S.2d 626 (4th Dept. 2015); *Alecca v. Alecca*, 111 A.D.3d 1127, 975 N.Y.S.2d 801 (3d Dept. 2013).

15. Legislative memo, reported at: http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A07637&term=2015&Summary=Y&Actions=Y&Memo=Y&Text=Y.

16. DRL §240(1-b)(b)(5)(vii)(C).

17. *Y.G. v. K.L.*, 8 Misc.3d 1023(A), 803 N.Y.S.2d 21 (Table), 2005 WL 1845667 (N.Y.Sup.), 2005 N.Y. Slip Op. 51244(U) (Sup.Ct., Nassau Co., Falanga, J.).

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

NEWS BRIEFS

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

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

On October 6, 2015, the Appellate Division, Second Judicial Department, Hon. Randall T. Eng, Presiding Justice, and the Office of Attorneys for Children co-sponsored introductory training on the ***Crossover Youth Practice Model - Part II.*** The presenters were Angela Conti, Esq., Attorney in Private Practice; Lisa M. Donovan, Esq., Attorney in Charge, New York Law Department Family Court Division, Staten Island; Dan Greenbaum, Esq., Attorney in Charge, Legal Aid Society, Juvenile Rights Practice, Staten Island; Krista Larson, LCSW, Director, Center on Youth Justice at the Vera Institute of Justice; and Dea Danielle Weisman, Esq., Administration for Children's Services, Staten Island. This seminar was held at the Staten Island Youth Justice Center, Staten Island, New York.

On October 19, 2015, 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 ***Case Law and Legislative Update***; and Professor Theo Liebmann, Director, Hofstra Law School Clinic, presented ***Special Immigrant Juvenile Status - Advocating Effectively for Child Clients***. This seminar was held at Brooklyn Law School, Brooklyn, New York.

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

On October 23, 2015, 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 ***Case Law and Legislative Update***; Marsha Kline Pruett, Ph.D., M.S.L., presented ***Young Children and Parenting Plans***; and Tracy Spencer Walsh, Esq., Adjunct Law Professor, Fordham Law School, presented ***Educational Law and Special Education***. This seminar was held at the Westchester County Supreme Court, White Plains, New York.

Tenth Judicial District (Nassau County)

On November 12, 2015, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. Margaret A. Burt, Esq., Attorney at Law, presented ***Case Law and Legislative Update***; and William H. Kaplan, M.D., Psychiatrist in Private Practice, presented ***Interviewing Techniques - A Role Playing Simulation***. This seminar was held at Hofstra University Law School, Hempstead, New York.

Tenth Judicial District (Suffolk County)

On November 17, 2015, the Appellate Division, Second Judicial Department, and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. The Hon. Randall Hinrichs, District Administrative Judge, Suffolk County Supreme Court, and the Hon. Andrew Crecca, Suffolk County Supreme Court presented ***Part 36 Rules of the Chief Judge***; Margaret A. Burt, Esq., Attorney at Law, presented ***Child Welfare Law Update***; and Randy Hertz, Esq., Professor, New York University Law School, presented ***Juvenile Delinquency Motion Practice***. This seminar was held at the Suffolk County Supreme Court, Central Islip, New York.

The Mandatory Fall 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

Liaison Committees

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts met on Friday, October 30,

2015 at the Office of Attorneys for Children in Albany, NY. The committees provide a means of communication between panel members and the Office of Attorneys for Children. If you have any questions about the meetings, kindly contact your liaison committee representative, whose name can be found in our Administrative Handbook, pp. 18-22, http://www.nycourts.gov/ad3/oac/AdministrativeHandbook

Training News

Training dates for Spring 2016 are listed below and are available on our web page at: http://www.nycourts.gov/ad3/oac/Seminar_Schedule.html.

Introduction to Effective Representation of Children (for new and prospective panel members)

Thursday, April 14 & Friday, April 15, 2016
Rochester, NY

Topical Conference - Focus on Trauma and Family Court Practice

Friday, April 29, 2016
Albany Law School - Albany, NY

Topics will include the effect of trauma on children involved in high-conflict custody cases and vicarious trauma experienced by Family Court practitioners. Nationally recognized faculty will offer practice techniques and methods for recognizing the effects of and how to effectively deal with this prevalent and difficult issue.

Children's Law Update 2016

Friday, May 6, 2016
Crowne Plaza Resort - Lake Placid, NY

Collaborative Seminar with the Fourth Department Office of Attorneys for Children (Child Welfare)

Friday, June 3, 2016
Cornell University - Ithaca, NY

Additional seminar dates and agendas will be posted on the program's web page when available.

Know the Law

This series of short video presentations is designed to provide panel members with a basic working knowledge of specific legal issues relevant to Family Court practice. There are modules for a variety of proceeding types including custody/visitation, juvenile justice and child welfare.

There are three new segments presented by Margaret A. Burt, Esq., are now available at http://www.nycourts.gov/ad3/oac/cle.html

"Indian Child Welfare Act" (2.0 CLE),

"Article 10 Evidentiary Issues" (1.0 CLE), and

"Advocating for Older Youth in Foster Care" (1.0 CLE).

If you would like to suggest a topic for inclusion in this series, please contact Jaya L. Connors, Esq., the Assistant Director of the Office of Attorneys for Children at (518) 471-4850 or by e-mail at jlconnor@nycourts.gov.

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, the 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 Department on children's law matters, updated weekly. The *News Alert* feature currently includes recent Administrative Memos from NYS OCFS on Transitional Planning for Foster Youth in order to Ensure Successful Discharge and Information on Ensuring "Normative Experiences" for Youth in Foster Care.

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 14-15, 2016

Fundamentals of Attorney for the Child Advocacy I– Juvenile Justice Proceedings
Fundamentals of Attorney for the Child Advocacy 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 (except the agenda for the Ithaca seminar, which is in-progress) 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 31, 2016

Topical Seminar on Ethics

DoubleTree Rochester
Rochester, NY

May 4, 2016

Topical Seminar on Domestic Violence

Center for Tomorrow (University of Buffalo)
Buffalo, NY

June 3, 2016

Joint Seminar With Third Department (Limited Seating)

Cornell University
Ithaca, 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, 2016, to remain eligible for panel designation, you should have received a letter to that effect in November 2015. 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, 2016.** 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

7th Judicial District

Hon. James Vazzana, Monroe
County Family Court

Hon. James Piampiano, Monroe
County Supreme Court

Hon. Judith Sinclair, Monroe
County Supreme Court

Hon. William Taylor, Monroe
County Supreme Court

8th Judicial District

Hon. Brenda Freeman, Erie County
Family Court

Hon. David W. Foley, Chautauqua
County Family Court

Hon. Emilio Colaiacovo, Erie
County Supreme Court

Hon. Frank A. Sedita III, Erie
County Supreme Court

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Convention, 28 J. Am. Acad. Matrim. Law. 249 (2015)

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Mikayla K. Consalvo, *Support With a Catch: New York's Persons in Need of Supervision and Parental Rights,* 90 N.Y.U. L. Rev. 1688 (2015)

FEDERAL COURTS

Where Plaintiffs' Challenges Did Not Relate to School's Capacity to Implement IEP, but Rather the Appropriateness of IEP's Substantive Recommendations, School District Did Not Have Burden to Produce Evidence Demonstrating School's Adequacy

D.O., the son of M.O. and G.O. was a twelve-year-old child with a speech or language impairment. During the 2010-2011 school year, D.O. attended second grade at P.S. 41, in an integrated co-teaching class with one general education teacher and one special education teacher. D.O.'s individualized education program (IEP) for the 2011-2012 school year classified D.O. as a student with a speech or language impairment and recommended that he repeat the second grade in a 12:1:1 special placement classroom in a community school. By letter dated June 29, 2011, M.O. and G.O. rejected D.O.'s placement for the 2011-2012 school year at P.S. 213 because P.S. 213 did not have a second grade classroom, and the third grade classroom had both third and fourth grade students. The letter also informed the Department of Education (DOE) that it was M.O. and G.O.'s intention to send D.O. to the Lowell School, a state-authorized private education day school, and seek tuition reimbursement if an appropriate placement was not offered. The DOE subsequently reassigned D.O. to P.S. 159. M.O. was unable to visit P.S. 159 because the school was not in session during the summer months. M.O. and G.O. rejected D.O.'s placement at P.S. 159 because they had no idea whether the school was appropriate. D.O. attended third grade at the Lowell School for the 2011-2012 school year. In September 2011, M.O. and G.O. initiated their reimbursement action for D.O.'s unilateral placement in the Lowell School by filing a due process complaint and request for a hearing before an Impartial Hearing Officer (IHO). The IHO determined that D.O. was not denied a free and appropriate education (FAPE), and that M.O. and G.O. were therefore not entitled to a reimbursement for their unilateral placement of D.O. in the Lowell School. M.O. and G.O. appealed the IHO's decision to a New York State Review Officer (SRO), who affirmed the IHO's decision and dismissed G.O. and M.O.'s appeal. M.O. and G.O. filed an action challenging the SRO's decision in the United States District Court for the Southern District of New York. The parties cross-moved for summary judgment, and the district court granted summary judgment in favor of the school district. The district court observed that, under *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167 (2d Cir. 2012), evaluation of whether a child was denied a FAPE must focus on the written plan offered to the parents. Speculation that the school district would not adequately adhere to the IEP was not an appropriate basis for unilateral placement. M.O. and G.O.'s contention was rejected that the DOE was required to present evidence to the IHO on P.S. 159's ability to implement D.O.'s IEP. It was inconsistent with *R.E.* to require the DOE to proffer evidence of the actual classroom D.O. would have attended, where it became clear that D.O. would attend private school and not be educated under the IEP. The Second Circuit affirmed on a different basis. The school district contended that, under *R.E.*, a child must physically attend a proposed placement school before challenging that school's ability to implement the child's IEP. The SRO and district court appeared to have agreed. However, *R.E.* did not foreclose all prospective challenges to a proposed placement school's capacity to implement a child's IEP. Nonetheless, the due process complaint's challenges to P.S. 159 were not of the type permitted by *R.E.*, to wit, prospective challenges to P.S. 159's capacity to provide the services mandated by the IEP. They were, instead, substantive attacks on D.O.'s IEP that were couched as challenges to the adequacy of P.S. 159. Therefore, the school district was not required to present evidence regarding the adequacy of P.S. 159 at the impartial hearing, and the school district provided D.O. a FAPE. Accordingly, M.O. and G.O were not entitled to reimbursement for their unilateral placement of D.O. at the Lowell School for the 2011-2012 school year.

M.O. v New York City Dept. of Educ., 793 F.3d 236 (2d Cir. 2015)

Federal Court Action Challenging the Constitutionality of New York Laws That Authorized State Judges to Order Parents to Pay for Attorneys Appointed for Their Children Properly Dismissed

Plaintiff father sued his wife for divorce and sought custody of their two children in New York State Supreme Court. At a preliminary conference, the parties agreed to the appointment of an attorney to represent the couple's children, but they disagreed about how the attorney would be paid. Although plaintiff contended that he could not afford to do so, the State court ultimately ordered plaintiff and his wife each to pay half of the attorney's retainer and fees, subject to reallocation at trial. When plaintiff failed to comply with the order, the State court ordered him to show cause why he should not be held in contempt. During the course of the divorce proceedings, plaintiff commenced an action in federal court under 42 U.S.C. § 1983 challenging the constitutionality of New York laws that authorized State judges to order parents to pay for attorneys appointed for their children. The district court, relying entirely on *Spargo v New York State Commission on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003), granted defendants' motion to dismiss the complaint on the abstention doctrine announced in *Younger v Harris*, 401 U.S. 37 (1971). The Second Circuit affirmed. On de novo review, the Court concluded that plaintiff's case presented circumstances that qualified as "exceptional" under *Sprint Communications, Inc. V Jacobs*, - U.S. - , 134 S.Ct. 584 (2013), and that adherence to the abstention doctrine announced in *Younger* was therefore warranted. In *Spargo*, the Court held that district courts must abstain whenever the three conditions identified in *Middlesex County Ethics Committee v Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515 (1982) were satisfied: (1) there was a pending state proceeding, (2) that implicated an important state interest, and (3) the state proceeding afforded the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claim. Without completely casting aside the *Middlesex* conditions, in *Sprint*, which was decided after *Spargo*, the Supreme Court clarified that district courts should abstain from exercising jurisdiction only in three "exceptional circumstances" involving (1) ongoing state criminal prosecutions, (2) certain civil enforcement proceedings, and (3) civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions. Plaintiff's federal lawsuit implicated the way that New York courts managed their own divorce and custody proceedings – a subject in which the states had an especially strong interest. Although there was some disagreement among New York courts about whether the fees for such court-appointed counsel should be borne by the public or by the parents, there was no discernible disagreement that orders relating to the selection and compensation of court-appointed counsel for children were integral to the State court's ability to perform its judicial function in divorce and custody proceedings.

Falco v. Justices of the Matrimonial Parts of the Supreme Court of Suffolk County, 805 F.3d 425 (2d Cir. 2015)

Government's Motion Granted to Transfer Murder/ Conspiracy Prosecution to Federal Court to Prosecute Defendant as an Adult

In a murder/conspiracy prosecution, the Government moved for a transfer to district court in order to prosecute defendant as an adult. The District Court granted the motion. The government met its burden of proving by a preponderance of the evidence that defendant's transfer to adult status was warranted pursuant to 18 U.S.C. § 5032. First, the nature of the alleged offense - the brutal, premeditated murder of an individual believed to be a member of a rival gang - overwhelmingly favored, in the interest of justice, transferring the case to district court so that defendant could be prosecuted as an adult. Moreover, the murder was alleged to have been committed as part of defendant's participation in the racketeering activity of a violent street gang. Thus, the nature of the alleged offense was entitled to special weight. The juvenile justice system, including the limited sentencing options available in that system if defendant was found guilty (such as the statutory maximum of five years' incarceration), was simply ill-equipped and woefully insufficient, under the circumstances, to adequately address the grave charges when considered in conjunction with the other statutory factors. Second, defendant allegedly committed the offense when he was approximately 17 years and 10 months old, and he was 20 years and 11 months old at the time of the hearing. Defendant was born in El Salvador until he was fourteen, when he came to the United States and moved in with parents he met for the first time upon his arrival. After dropping out of school and being turned out of the house by his father, defendant joined the gang. Although his background only slightly weighed in favor

of transfer, both his age at the hearing and his age at the time of the commission of the offense strongly weighed in favor of transfer. Third, defendant's prior juvenile record, which consisted only of an arrest for petit larceny when he was sixteen years old, weighed against transfer. However, defendant's conviction for illegally possessing a firearm several months after his eighteenth birthday and the alleged murder weighed in favor of transfer. Fourth, defendant's present intellectual development and psychological maturity weighed in favor of transfer. A defense psychologist determined that defendant had no cognitive impairments or significant deficits and his intellectual functioning was estimated to be in the average range, and he had a moderate degree of cognitive maturity and no significant defects in emotional maturity. Fifth, the factor regarding past treatment efforts was a neutral factor because there was no specific information in the record relating to the existence or nature of past treatment efforts. Finally, although the sixth factor weighed against transfer, given the apparent availability of out-of-state juvenile facilities with programs designed to treat defendant's behavioral problems, this factor did not outweigh the other factors.

United States v. Male, ___ F.3d ___, 2015 WL 6550344 (EDNY 2015)

COURT OF APPEALS

Grandparent May Show Extraordinary Circumstances Even Where Child Spent Time With Parent While Living With Grandparent

The child at issue lived with his paternal grandparents from the time he was less than 10 days old until he was almost 10 years old. The child's mother lived about 12 miles from the grandparents for the child's first few years, until the grandparents moved the mother to a trailer park across the street from their residence, so she could be close to the child. Although in a 2006 proceeding in which the grandparents were not involved, the child's parents obtained a consent order awarding the parents joint custody, with primary residential custody to the mother, the reality was that the child continued to reside with the grandparents. In 2006, the grandparents moved to an adjoining county and the mother had less contact with the child until late 2008, when the grandparents helped the mother move closer to them. The grandparents kept the mother informed of the child's activities almost daily and the mother saw the child regularly. In 2012, after the father sought custody from the mother and a termination of his child support payments, the mother refused to return the child to the grandparents, relying on the 2006 order. Thereafter, the grandparents commenced this proceeding, seeking primary custody of the child. After a hearing, Family Court concluded that the grandparents established extraordinary circumstances and that it was in the child's best interests to grant the grandparents and father joint custody, with primary physical custody to the grandparents and visitation to the parents. The Appellate Division reversed, determining that the grandparents failed to demonstrate extraordinary circumstances, in light of the mother's presence in the child's life. The Court of Appeals reversed, holding that grandparents could demonstrate standing to seek custody based upon extraordinary circumstances where the child had lived with the grandparents for a prolonged period, even where, during that time, the child had contact with, and spent time with a parent. Domestic Relations Law § 72 (2) (a), which pertains to grandparents, provided, among other things, that an extended disruption of custody "shall" constitute extraordinary circumstances and that an extended disruption in custody included a prolonged separation of parent and child for at least 24 continuous months, during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the grandparent. Lack of parental contact is not a necessary element of a prolonged separation. Rather, the quality and quantity of contact between the parent and child are factors to be considered in determining whether the parent voluntarily relinquished care and control of the child and whether the child actually resided with the grandparent for the requisite period of time. Here, the mother freely signed over virtually all decision-making authority indefinitely and she did not limit permission to times when she was unavailable, which demonstrated her intent that the grandparents permanently assume the parental responsibility for caring for the child. The evidence supported Family Court's conclusion that the grandparents made all decisions about the child and merely kept the mother informed of the decisions. Further, although there arguably may have been reason for the mother to refrain from seeking custody before 2009, there was no reasonable explanation for her failure to do so thereafter. Thus, because the mother effectively transferred custody of the child to the grandparents for a prolonged period of time, the circumstances rose to the level of extraordinary, conferring standing to petition for legal custody. Because the Appellate Division did not reach the issue of best interests of the child, the case was remitted for that purpose.

Matter of Suarez v Williams, ___ NY3d ___ (2015)

APPELLATE DIVISIONS

ADOPTION

Family Court Erred in Denying Respondent's Request for DNA Testing

The order appealed from, after a hearing, determined that the respondent was the putative father and had abandoned the subject child, and terminated his parental rights. The Appellate Division reversed. The Family Court should have granted the respondent's request for DNA testing to determine if he was the biological father of the child. If the results of such testing demonstrated that the respondent was not the child's biological father, then there would have been no need to commence a termination of parental rights proceeding against him. However, if the results of the DNA testing demonstrated that the respondent was the biological father, they would have supported the Family Court's conclusion that he was not a "consent father" under DRL § 111 (1) (d), or that his consent would otherwise have been required but his right thereto has been forfeited by his abandonment of the child pursuant to SSL § 384-b (4) (b). Neither determination could be properly reached absent the DNA evidence, which the respondent had requested. Without the benefit of DNA testing, the respondent was subject to the stigma of an abandonment finding as to a child for whom he may not have had any parental rights or responsibilities. Moreover, such finding might negatively affect the respondent's status in potential future court proceedings.

Matter of Heaven A.A., 130 AD3d 10 (2d Dept 2015**)**

Family Court Properly Granted Agency's Motion to Adjudicate Father as Notice Father

Family Court, in an adoption proceeding, granted the agency's motion pursuant to SSL § 383-c, to adjudicate the father as a notice father. The Appellate Division affirmed finding there was no need to disturb the court's determination. The incarcerated father did not dispute he had failed to provide support for the child and he agreed he had not previously attempted to contact the mother or petitioner regarding the child. He blamed these circumstances on his incarceration and offered no proof to show he was financially unable to provide some support for the child. Although he filed a paternity petition shortly after the child's birth, his assault of the mother during her pregnancy showed his lack of fitness as a parent. Additionally, he failed to offer any placement resources for the child during his incarceration and there was no evidence he wanted custody of the child.

Matter of Maurice N., 128 AD3d 1117 (3d Dept 2015)

Father's Consent to Adoption Was Not Required

Family Court determined that pursuant to DRL §111(1)(d), the father's consent to the adoption of the four-year- old subject child by the child's aunt, was not required. The Appellate Division affirmed finding there was ample support for the court's determination. A biological father's consent for adoption of a child over six-months-old is only required if the father "maintained substantial and continuous contact with the child as manifested by payment of reasonable child support and either monthly visitation or regular communication with the child or custodian". Diligent efforts by the agency to "encourage the father to perform the acts" is not mandated. Here, despite the father's incarceration for a large portion of the relevant time period, this did not relieve him from his obligation to provide some support for the child to the extent of his ability, and he failed to provide any evidence to show he was unable to pay anything. Additionally, his last contact with the subject child was when she was a little over a year old and he made no effort during the intervening three year period to maintain communication with the child. Although he stated he lost the aunt's phone number and did not have her address, and that the agency refused to help him obtain this information, he failed to make even minimal effort to find the information himself by looking in the local phone book or searching the internet or asking family members. Furthermore, even though the agency advised him he needed to file a petition in family court to obtain visitation or receive information about the subject child, he waited three years before pursuing visitation.

Matter of Bella FF., 130 AD3d 1187 (3d Dept 2015)

Consent of Biological Father Not Required

Family Court determined that respondent was not a father whose consent to the adoption of the subject children was required. The Appellate Division affirmed. Section 111 (1) (d) of the Domestic Relations Law provided that 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 (emphasis supplied by the Court). It was undisputed that respondent paid only $99.99 in child support since July 2003, and paid nothing between 2006 - 2012, notwithstanding a prior order directing him to pay at least $25.00 per month. Thus, regardless whether respondent visited the child monthly or regularly communicated with the child, the court properly determined that he was a mere notice father whose consent was not required for the adoption of the subject children.

Matter of Makia R.J., 128 AD3d 1540 (4th Dept 2015)

CHILD ABUSE AND NEGLECT

Finding of Neglect Affirmed

Family Court, upon a fact-finding order, found that respondent mother neglected her child. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. Respondent, who tested positive for cocaine in 2011 and completed a drug treatment program in early 2012, tested positive for marijuana in May 2012, while she was four months pregnant with the subject child. The court also properly relied upon respondent's failure to appear for at least one-third of the twice monthly random drug tests and to find adequate housing pursuant to court orders that had been issued in 2012 as a result of prior neglect findings in 2001 and 2006, involving her other children. At the time of the subject child's birth, respondent had not resolved the conditions that led to the prior neglect findings. Respondent's failure to testify warranted the strongest negative inference against her.

Matter of Dahan S., 128 AD3d 453 (1st Dept 2015)

Mother Neglected Children by Failing to Protect Them From Father's DV Against Her

Family Court, after a fact-finding hearing, found that respondent mother neglected her children. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence that the mother failed to protect the children from the father's domestic violence against her. Police testimony showed that the father threatened the family with a knife and a cleaver and that the mother ran into the bathroom with the children to escape the attack. The progress notes showed that one of the children expressed fear of the father and that was sufficient to show that his emotional health was placed at risk by the mother's failure to act to enforce the orders of protection on behalf of her and the children. There was no basis to disturb the court's credibility determination regarding the mother's claim that she believed the orders of protection had expired. The mother's claim that the court relied on evidence not in the petition was not preserved, and, in any event, the evidence was necessary to determine whether the mother's judgment in allowing the father to live in the apartment, given his history of domestic violence, was reasonable.

Matter of Valentino R., 128 AD3d 562 (1st Dept 2015)

Finding of Neglect Affirmed

Family Court found that respondent mother neglected her child. The Appellate Division affirmed. The findings of neglect were supported by a preponderance of the evidence, including evidence of the mother's misuse of drugs. The youngest child tested positive for marijuana at birth and the mother admitted that she had used marijuana once during her pregnancy with that child, and that she failed to obtain any prenatal care or plan for the future of that child. There also was evidence that the mother failed to ensure that her rent was paid.

Matter of Omarion T., 128 AD3d 583 (1st Dept 2015)

Respondent's Alcohol Abuse Impaired Children's Condition

Family Court, upon a fact-finding determination that respondent mother neglected her children, granted custody of the children to their respective fathers. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence, which demonstrated that respondent's alcohol abuse impaired the children's physical, mental or emotional condition or placed them at imminent risk of impairment. The children wore tattered, dirty clothing and gave off an odor, and one of the children's classmates refused to sit near one of the children. Further, one of the children, who was autistic, missed an excessive number of school days to his detriment. It was in the children's best interests to be in the custody of their respective fathers. Both fathers expressed a willingness to ensure that the siblings enjoyed frequent contact with each other.

Matter of Naqi T., 129 AD3d 444 (1st Dept 2015)

Respondent's Drug and Mental Health Problems Supported Neglect Finding

Family Court found that respondent mother neglected her children. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence, including evidence of the mother's failure to comply with court-ordered drug and mental health problems that led to prior neglect findings against her. The mother tested positive for cocaine and showed symptoms of being impaired shortly before the filing of the petition. She displayed flawed judgment when she left her toddler sleeping in their room at a homeless shelter to engage in a violent altercation with her pregnant neighbor, which resulted in the mother's arrest. She also neglected her child by failing to arrange care for him, or even show that she was concerned about his care, following her arrest.

Matter of Star Marie S., 129 AD3d 499 (1st Dept 2015)

No Conflict in AFC Representation of Client Where Legal Aid Society (LAS) Previously Represented Mother

Family Court found that respondent mother neglected her child. The Appellate Division affirmed. Preliminarily, the court properly determined that there was no conflict in the LAS representation of the child, even though one of its staff attorneys had represented the mother when she was a child in a neglect proceeding. LAS demonstrated that because of its size and the screening procedures it had in place, there was no risk that the LAS attorney representing the child here acquired or could acquire any confidences or secrets the mother shared with the LAS attorney who previously represented her. A preponderance of the evidence supported the finding that the pattern of domestic violence between the parents, and the proximity of the child's bedroom to the physical and verbal fighting that occurred, placed the child at imminent risk of emotional and physical impairment. The evidence that the mother had a mental illness for which she did not seek treatment supported the neglect finding because it showed that the mother had a lack of insight into her understanding of the effect of her illness on her child. The finding of the father's derivative neglect was supported by the record. The father refused to comply with court-ordered services in an order entered upon findings of sexual abuse of an older child the and neglect of other children, which involved domestic violence and excessive corporal punishment.

Matter of Jalicia G., 130 AD3d 402 (1st Dept 2015)

Family Court's Order Granting Mother's § 1028 Application Reversed

The order appealed from, after a hearing, granted the mother's application pursuant to Family Court Act § 1028 for the return of the subject child to her custody. Upon reviewing the record, the Appellate Division could not find a sound and substantial basis for the Family Court's determination. In particular, the evidence established, among other things, that the mother had failed to address or acknowledge the circumstances that led to the removal of the child. Although the mother complied with the petitioner's service requirements (which was noted in the dissenting

opinion), she was still prone to unpredictable emotional outbursts, even during visits with the children, and she was easily provoked and agitated. Indeed, the case planner testified that she had not seen any improvement in the mother's conduct even after the mother participated in the mandated services. Finally, the case planner testified that the agency could provide "homemaking" services, but those services would not be preventative and, in any event, would only be for several hours a day. In sum, until the mother was able to successfully address and acknowledge the circumstances that led to the removal of the other children, the Appellate Division could not agree that the return of the subject child to the mother's custody, even with the safeguards imposed by the Family Court, would not have presented an imminent risk to the subject child's life or health.

Matter of Julissia B., 128 AD3d 690 (2d Dept 2015)

Petitioner's Motion for Summary Judgment Properly Granted

The petitioner established, prima facie, that the father abused K.L. and derivatively neglected and abused K.L.'s sibling by demonstrating that the father was convicted of manslaughter in the first degree in connection with allegations concerning the death of K.L. This act established a fundamental defect in the father's understanding of his parental duties relating to the care of children and demonstrated that his impulse control was so defective as to create a substantial risk of harm to any child in his care. In opposition to the petitioner's prima facie showing, the father failed to raise a triable issue of fact. Specifically, despite his contentions to the contrary, the father failed to raise a triable issue of fact on the issue of whether he had a full and fair opportunity to litigate the criminal matter resulting in his conviction of manslaughter in the first degree for the death of K.L. It was immaterial that the father had taken an appeal from his criminal conviction, since the determinative issue was whether the father had a full and fair opportunity to litigate his conduct during the course of his criminal trial, not whether he had exhausted every avenue of appeal from his conviction. Accordingly, the Family Court properly granted that branch of the petitioner's motion which was for summary judgment on its petition alleging that the father abused K.L., and should have granted that branch of the petitioner's motion which was for summary judgment on its petition alleging that the father derivatively abused K.L.'s sibling.
Matter of Khalil L., 128 AD3d 698 (2d Dept 2015)

Harmless Error to Exclude Criminal Complaint at Fact-Finding

The order of fact-finding and disposition, after a hearing, found that the respondent abused the subject child, and derivatively abused four other children. The record revealed that the respondent, during the fact-finding hearing, attempted to introduce a criminal complaint into evidence, arguing that the complaint would reveal that the subject child had made certain prior inconsistent statements to a police detective. Since the criminal complaint was part of a sealed record, the Family Court refused to admit it into evidence. The Appellate Division agreed with the respondent that it was error for the Family Court to exclude the criminal complaint on this ground (*see* CPL 160.50 [1] [d]). Nevertheless, the error was harmless, as the respondent was able to enter into evidence a portion of his case record, which contained a summary of the subject child's interview with the police detective, including the inconsistent statements identified by the respondent (*see* CPLR 2002). Any inconsistencies in the subject child's testimony were insufficient to render the whole of her testimony unworthy of belief. Order affirmed.

Matter of Elijah P., 128 AD3d 830 (2d Dept 2015)

Record Did Not Support Finding of Neglect Based upon Domestic Violence

The petitioner appealed from an order of the Family Court, which, granted the father's motion to dismiss the petition, after the petitioner presented its case, on the ground that the petitioner failed to make out a prima facie case that he neglected the subject child. The Appellate Division affirmed. Apart from an improperly admitted narrative from an Oral Transmission Report, there was no evidence introduced at the fact-finding hearing that the father neglected the child within the meaning of FCA § 1012 (f). Although domestic violence may in some circumstances support a finding of neglect, those circumstances were not established by the properly admitted evidence here. There was no

evidence that the infant child was aware of the father's violence toward the mother, and there was no competent evidence that those acts of violence presented any risk of harm, much less actual harm, to the child. Accordingly, the father's motion to dismiss the petition after the petitioner presented its case was properly granted.

Matter of Anthony S., 128 AD3d 969 (2d Dept 2015)

Father's Taking of Newborn Child and Ensuing Travels Between His Workplace and Home Did Not Support Finding of Neglect

The record revealed that on March 26, 2013, on a sidewalk in Queens, the father had a dispute with the subject child's now-deceased mother over the care and well-being of the subject child, who was then three weeks old (hereinafter the baby). The father took the baby from the mother and walked away with the baby and an empty baby bottle. The baby was dressed in a "one-piece" and wrapped in a winter blanket. With the baby in his arms, the father took a van and subway to a workplace in Jackson Heights, Queens, and then began a commute via public transportation to his home in Staten Island where he had food, diapers, and other items for the baby. En route to his home, the father, traveling with the baby on a public bus, was stopped by police just four miles from his home. The mother had called 911 and reported that the father had taken the baby. The baby was uninjured. Thereafter, a neglect petition was filed against the father alleging, among other things, that the father grabbed the baby out of her stroller following an argument with the mother, and then "absconded" with the baby. Following a fact-finding hearing, the Family Court found that the father neglected the baby. A dispositional hearing was subsequently held, and a dispositional order issued. The father appealed. The Appellate Division found that the Family Court's finding of neglect was not supported by a preponderance of the evidence (*see* FCA § 1046 [b] [I]) and reversed the order of dispostion. Here, the evidence established that the baby was in a "one-piece," wrapped in a winter blanket, and held in the father's arms for the duration of the three-hour commute. Although the father did not take any formula for the baby, the father testified that the baby had just eaten before he had taken her and that he had food for her at his home in Staten Island. He also met the baby's needs when she became hungry en route by accepting formula given to him while at the ferry terminal and feeding it to her. Although the father did not change the baby's single soiled diaper with a clean diaper he also obtained at the ferry terminal, he testified that he did not do so because he believed it was inappropriate to change her in public and had intended to do so when he arrived home. Under these circumstances, the father's taking of the child and ensuing travels, although impulsive and misguided, did not depict lack of attention to the special needs of a newborn.

Matter of Milagros A.W., 128 AD3d 1079 (2d Dept 2015)

Dismissal of Proceedings Before Completion of Fact-finding Hearing Held Improper

The Administration for Children's Services (hereinafter ACS) commenced a child protective proceeding alleging that the subject child had been neglected by her legal guardian. Although the subject child attained the age of 18 during the pendency of the proceeding, she consented to the extension of her placement and the Family Court retained jurisdiction to adjudicate the neglect proceeding (*see* FCA §§ 1013 [c]; 1055 [e]). On the third day of the fact-finding hearing, before ACS completed the presentation of its case and before the attorney for the child presented any evidence, the Family Court dismissed the petition pursuant to FCA § 1051 (c), on the ground that the aid of the court was not required. ACS appealed. The Appellate Division reversed. The information received by the Family Court indicating that the subject child was failing to participate in services offered by ACS and absconding from foster care did not provide a valid basis for determining that the aid of the court was not required within the meaning of FCA § 1051 (c). Bearing in mind the court's parens patriae role in a child protective proceeding, the fact that a subject child may not be fully receptive to the court's aid does not mean that such aid is not required. ACS presented testimony demonstrating that the subject child was in need of, among other things, mental health services, which were not being adequately provided by the legal guardian. Consequently, and in view of the Family Court's failure to permit the full development of the record in this case, dismissal of the petition was inappropriate. Accordingly, the order was reversed, the petition was

reinstated, and the matter was remitted for a continued fact-finding hearing, which was to be completed on an expedited basis, and a new determination on the petition thereafter.

Matter of Vernice B., 129 AD3d 714 (2d Dept 2015)

Violation of Order of Protection, Standing Alone, Was Insufficient to Establish Neglect

In July 2013, the subject child was removed from the mother's custody after the petitioner received photographs from the child's family members depicting the child, mother, and father sitting together on the front stoop of a building during a family barbeque, in violation of an order of protection that had been issued directing the father to stay away from the child. The petitioner then commenced a child protective proceeding against the mother and father, alleging that the mother neglected the subject child by permitting her to have contact with the father in violation of the order of protection. After a fact-finding hearing, the Family Court, in an order of fact-finding dated December 4, 2013, found that the petitioner established by a preponderance of the evidence that the mother neglected the child by allowing the contact between the child and the father, despite having obtained an order of protection prohibiting such contact. In a subsequent order of disposition, dated December 16, 2013, the Family Court continued the placement of the child in the custody of the petitioner. The mother appealed. Upon reviewing the record, the Appellate Division found that the petitioner failed to establish by a preponderance of the evidence that the child's physical, mental, or emotional condition had become impaired or was in imminent danger of becoming impaired as a result of her contact with the father at a family barbeque. Although the mother permitted the contact despite having obtained a temporary order of protection against the father, the violation of the order of protection, standing alone, was insufficient to establish neglect.

Matter of Abbygail H.M.G., 129 AD3d 722 (2d Dept 2015)

Corroboration of Child's Out-of-Court Statement Found Insufficient

The petitioner agency (hereinafter the agency) appealed from an order of the Family Court, which, after a hearing, dismissed the petitions alleging that the subject children were abused and neglected. The Appellate Division affirmed. The Family Court did not err in dismissing the petitions. The agency acknowledged at a hearing that it failed to prove by a preponderance of the evidence that the subject children were abused. The agency also failed to prove by a preponderance of the evidence that the subject children were neglected (*see* FCA § 1046 [b] [I]). A child's prior out-of-court statements may provide the basis for a finding of abuse or neglect, provided that these hearsay statements are corroborated so as to ensure their reliability. Any other evidence tending to support the reliability of the child's previous statements shall be sufficient corroboration (*see* FCA § 1046 [a] [vi]), provided that the evidence has met a threshold of reliability. The Family Court has considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated. Here, the Family Court did not improvidently exercise its discretion in determining that the statements of the subject child A.W. were insufficient to corroborate the statements of the subject child S.W. as to the alleged sexual abuse perpetrated upon her. Furthermore, the agency failed to establish that the mother knew or should reasonably have known that S.W. was in imminent danger of becoming a victim of sexual abuse.

Matter of Gerald W., Jr., 129 AD3d 979 (2d Dept 2015)

Record Supported Finding of Abuse and Neglect

A preponderance of the evidence supported the Family Court's determination that the mother abused the child, L., by failing to protect him from being sexually abused by his older brother, M., and neglected M. by failing to exercise a minimum degree of care in providing him with proper supervision and guardianship (*see* FCA § 1012 [e] [iii]; [f] [I]). The evidence presented at the fact-finding hearing established that, in July and August 2012, then-13-year-old M. and his younger brother, then-seven-year-old L., made independent and consistent out-of-court statements to several individuals

describing three separate incidents when M. sexually abused L. Although the mother denied that she had any knowledge of abuse that occurred prior to July 9, 2012, the court's determination that she lacked credibility was entitled to deference and was fully supported by the record. Moreover, although the mother separated the subject children by arranging for L. to reside with the maternal aunt on July 9, 2012, and sought treatment for M. concerning his sexually abusive conduct on July 10, 2012, the evidence also demonstrated that the mother failed to take any steps to disclose the abuse or seek treatment for M. prior to that time.

Matter of Michael B., 130 AD3d 619 (2d Dept 2015)

Parents and Grandmother Were Given Sufficient Notice of Court's Decision to Conform the Pleadings to the Proof to Include Allegations of Medical Neglect

The Family Court, after a fact-finding hearing, inter alia, dismissed the petitions alleging that the mother, the father, and the maternal grandmother physically abused R. and thereby derivatively neglected S, and dismissed the petition against the father alleging that he neglected the children by his misuse and abuse of prescription medication. However, the court found that the mother neglected the children by reason of her misuse and abuse of prescription medication. The court also, in effect, conformed the pleadings to the proof to include allegations of medical neglect, and thereupon found that the parents and the maternal grandmother medically neglected R. when they failed to seek timely medical attention for R. after he suffered a perforated bowel and fractures to his left leg and left arm. The mother, the father, and the maternal grandmother argued on appeal that the Family Court improperly made the medical neglect determination with respect to R. and the related derivative neglect determination with respect to S., because the petitions did not specifically allege medical neglect, and the Family Court did not give them adequate notice of its decision to conform the pleadings to the proof in this regard. Pursuant to FCA § 1051(b), if the proof adduced during the fact-finding hearing does not conform to the specific allegations of the petition, the court may amend the allegations to conform to the proof; provided, however, that in such case the respondent shall be given reasonable time to prepare to answer the amended allegations. Here, the petitioner and the attorney for the children requested, without objection, during closing arguments following the fact-finding hearing, that the Family Court make a medical neglect determination with respect to R. and a related derivative neglect determination with respect to S. The court then gave the parties approximately two months to make any further applications they deemed appropriate. However, neither the mother, the father, nor the maternal grandmother did so and, accordingly, their contention that the Family Court, in effect, improperly conformed the pleadings to the proof was not preserved for appellate review. In any event, under these circumstances, the parents and the maternal grandmother were given sufficient notice to amend their answer and an opportunity to secure a continuance of the hearing. Accordingly, the Family Court properly found that the mother, father, and maternal grandmother medically neglected the subject child, R., and thereby derivatively neglected the subject child's sibling, S., when they failed to seek timely medical attention for R. after he suffered a perforated bowel and fractures to his left leg and left arm. Although R.'s injuries were allegedly nonaccidental in nature, the court's assessment of the credibility of the experts who provided conflicting testimony was entitled to deference (*see* FCA § 1012(f)(i)[A]).

Matter of Richard S., 130 AD3d 630 (2d Dept 2015)

Record Supported Finding That Father Sexually Abused Daughter

The Family Court's finding that the father sexually abused his daughter, S., was supported by a preponderance of the evidence (*see* FCA §§ 1012 [e] [iii]; 1046 [b] [i]; Penal Law §§ 130.00 [3], [10]; 130.52, 130.55, 130.60, 130.65, 130.80). The evidence at the fact-finding hearing established that in 2012, then-9-year-old S. made consistent, detailed out-of-court statements to several individuals describing incidents of sexual abuse by the father that had occurred regularly since she was six years old. Her out-of-court statements were corroborated by, inter alia, the testimony of her adult sister that the father had sexually abused her in a similar manner years earlier, which the Family Court did not err in admitting into evidence (*see* FCA § 1046 [a] [i], [vi]). While a finding of sexual abuse of one child does not, by itself, establish that other children in the household have been derivatively

neglected, here, the father's sexual abuse of S. evinced a flawed understanding of his duties as a parent and impaired parental judgment sufficient to support the Family Court's finding of derivative neglect of K.D.C. and K.S.C. (*see* FCA § 1046 [a] [I]).

Matter of Sha Naya M.S.C., 130 AD3d 719 (2d Dept 2015)

Record Supported Finding of Derivative Neglect

The petitioner established that the subject child was derivatively neglected by the mother. The petitioner demonstrated, inter alia, that the mother failed to seek mental health counseling, complete drug treatment and domestic violence counseling programs, and attend parenting classes as required by orders of disposition issued in connection with prior neglect findings against her as to an older sibling, and that the conduct that formed the basis of the most recent neglect finding was sufficiently proximate in time to the derivative neglect proceeding that it could reasonably be concluded that the condition still existed. The mother failed to rebut the petitioner's prima facie case or establish that the condition could not reasonably be expected to exist currently or in the foreseeable future. Moreover, the evidence adduced at the hearing established that the subject child was in imminent danger of becoming physically, mentally, or emotionally impaired as a result of the mother's mental illness. Accordingly, the Family Court properly found that the mother derivatively neglected the subject child.

Matter of Dayyan J.L., 131 AD3d 1243 (2d Dept 2015)

No Reason to Disturb Court's Decision

Family Court determined respondent uncle and his wife had abused and neglected the subject child. The Appellate Division affirmed. Here, the child testified that shortly after respondent uncle obtained custody of her, he began to sexually abuse her on a regular basis. She also described his sexual abuse of her female friend. The friend confirmed the child's testimony and their testimony corroborated the prior statements they had give the agency caseworker and law enforcement. Additionally, the child's statements regarding a sexual toy respondent used along with information about his marihuana growing operation were corroborated by physical evidence found in his house. Although there were some minor inconsistencies in the children's testimony and although physical examination of the subject child was inconclusive, deference was given to the court's credibility determinations and a review of the record supported the court's finding. Furthermore, Family Court properly determined respondent's wife was also culpable. Respondent's former paramour testified she had told the wife that respondent had abused her 10-year old daughter and that she had advised respondent's wife to be careful with the subject child given her own child's experiences. The paramour's daughter also testified about the abuse. Based on the evidence, there was no reason to disturb the court's determination.

Matter of Penny Y., 129 AD3d 1117 (3d Dept 2015)

Mother's Unsafe and Unsanitary Home Along With Her Failure to Protect Her Children From Sex Offenders, Supports Family Court's Neglect Determination

Family Court determined the subject children had been neglected by respondent parents but not by mother's boyfriend. The mother appealed and the Appellate Division affirmed. The evidence showed the mother's home was unclean and unsafe. Three child protective caseworkers testified that despite their continual instructions to the mother, over a two-year period, to clean up her unsanitary and unsafe apartment, which, among other things, was strewn with garbage and insects, had no proper sleeping accommodations for the children and had medications within the children's reach, the mother failed to do so. Additionally, the mother had exposed the children to known, untreated sex offenders and she admitted that one of her children had been sexually abused by a man whom the mother had allowed to move into her home one week after she had met him. At the time of the court proceeding, the mother was living with a man who she was aware had a history of abusing other children. Although the mother stated she never left the children alone with her boyfriend, a social worker at the children's school testified she had seen the boyfriend alone with the children on many occasions.

Matter of Zachary D., 129 AD3d 1121 (3d Dept 2015)

Proof of Drug Misuse is Prima Facie Evidence of Neglect

Family Court determined respondent mother had neglected her children based upon her drug use and her failure to obtain proper substance abuse treatment. The Appellate Division affirmed. Pursuant to FCA§ 1044, "proof that a person repeatedly misuses a drug or drugs...shall be prima facie evidence that" the child of such person is a neglected child". Here, although the children had been removed from respondent's custody prior to the instances of drug use underlying the neglect petition, as a parent she had a continuing obligation to affirmatively address her ongoing misuse of drugs. Additionally, respondent was the subject of two prior neglect proceedings, one which involved drug use, and Family Court took judicial notice of these proceedings. Furthermore, two case workers testified about respondent's drug use. One testified respondent admitted to using cocaine after a drug test came back positive for cocaine and oxycodone and the other testified about a situation where she observed respondent to be under the influence of "something". Moreover, given respondent's admission that she had not pursued any substance abuse treatment from the time the children were placed in the agency's custody until the fact-finding hearing, the court's decision was supported by a preponderance of the evidence.

Matter of Kasiana UU., 129 AD3d 1150 (3d Dept 2015)

Respondents' Pattern of Neglect of Four Older Children Sufficient to Find They Derivatively Neglected Two Younger Children

Family Court properly found respondent parents had derivatively neglected the two subject children. Here, the respondent parents' rights had already been terminated with regard to their four older children. During the pendency of the terminations proceedings, the two subject children were born. The agency removed the subject children and filed derivative neglect petitions against respondent parents. Thereafter, the agency successfully moved to have Family Court take judicial notice of a permanency report and certain decisions issued after the filing of the neglect petitions and also moved to amend its neglect petitions to include post-petition proof. The agency correctly followed the procedure to amend the neglect petitions to conform to the proof pursuant to FCA §1051. Respondents, as parties to the proceedings, were fully familiar with the facts and issues addressed and received reasonably advanced notice that this proof would be considered by the court. The documents were specifically discussed during conferences and copies were provided to their counsel. Based on these circumstances, Family Court did not abuse its discretion by allowing the petitons to be amended. Additionally, the agency met its burden by showing that respondents' persistent pattern of neglect of the four older children showed that there were "fundamental flaws" in their understanding of parenting and any child placed in their care would be at substantial risk of harm. Respondents' failure to testify allowed the court to draw the strongest possible negative inference against them. Furthermore, the prior decisions and orders regarding the four older children were "sufficiently proximate in time such that it could be reasonably concluded that such conditions still existed".

Matter of Alexander Z., 129 AD3d 1160 (3d Dept 2015)

Court Had Sound Basis to Extend Order of Supervision

Family Court determined respondent had neglected his two younger children, placed respondent under the agency's supervision for 12 months and thereafter, annually, extended the order of supervision. Although respondent's appeal from the order extending supervision had expired, thereby rendering it moot, the Appellate Division determined even if it were not so, there was no merit to respondent's argument since Family Court is authorized to make successive extensions of supervision. Here, given the evidence presented which included, among other things, that respondent's home was cluttered and filthy and respondent had made minimal efforts at basic cleanliness, the court had sound basis to extend the order of supervision.

Matter of Cheyenne BB., 129 AD3d 1164 (3d Dept 2015)

Respondent's Appeal Deemed Moot

Family Court determined respondent father had neglected the two subject children and provided him with supervised visitation. Respondent's only argument on appeal was that the court did not have a sound and substantial basis in the record to name the agency as the supervisor of his visits. However, by the time the appeal was heard, Family Court had determined the father had permanently neglected the children and terminated his parental rights. Since those orders were not appealed, respondent's appeal was deemed moot.

Matter of Kylee Y., 129 AD3d 1221 (3d Dept 2015)

Grandmother Was Provided With Effective Assistance of Counsel

Family Court determined the children, then aged six, four, and one, were abused and neglected by the mother and grandmother and changed their permanency goal from return to parent to placement for adoption. The grandmother appealed arguing, among other things, that she was denied effective assistance of counsel due to counsel's failure to retain an expert to review and refute the testimony of the agency's experts. The Appellate Division affirmed. Here, the children were initially placed in the temporary custody of the grandmother after neglect findings were made against the mother. Thereafter, abuse and neglect proceedings were initiated against the grandmother and the mother after the youngest child was taken to the hospital where it was shown the child was suffering from a fractured thigh bone, which had occurred within the prior four to seven days, and the child also had additional multiple fractures to the shin bone, wrist and ribs that were in various stages of healing and which had not received prior treatment. All three children were living with and being cared for by respondents and the mother's boyfriend during the relevant period. Multiple experts for the agency testified the injuries to the youngest child were caused by nonaccidental and significant trauma and any caregiver would have known the child was in distress based on the pain the child would have experienced, evidenced by her crying, swelling of the area and limited mobility. Additionally, expert testimony ruled out osteogenesis imperfecta or brittle bone disease as a cause of the youngest child's injuries. Furthermore, the older two children reported many acts of physical and emotional abuse. Grandmother's counsel provided her with meaningful representation by working jointly with the mother's counsel and placing the blame for the child's injuries on the boyfriend, who had entered a criminal plea admitting he had caused some of the injuries to the youngest child. Counsel for the grandmother cross-examined all the witnesses, established that the grandmother worked full-time outside the home during the relevant period when the abuse occurred. While the grandmother's counsel did not call favorable medical experts to rebut the agency's experts, failure to call particular witnesses did not necessarily constitute ineffective assistance of counsel, and the grandmother had not shown there were relevant experts who would have testified favorably on her behalf.

Matter of Julian P., 129 AD3d 1222 (3d Dept 2015)

Mother's Constitutional Right to Parent Was Not Absolute and Needed to be Balanced Against Child's Best Interests

Supreme Court properly adjudicated the subject child to be neglected by respondent mother and placed her in foster care. Although the mother argued her liberty interests as a parent in raising her child were constitutionally protected, those rights were not absolute and needed to balanced against the best interests of the child. The evidence showed the mother became angry with the child because of the way the child had performed a chore and threatened her with a machete. The then 14-year-old child defended herself by picking up a knife. Both parties then put down their weapons and the child left the home. The respondent locked the child out of the house in the middle of winter for about 45 minutes, and brought the police to the home. She claimed the child had threatened her, blamed the child for the incident and agreed to sign away her parental rights. The police officer who saw the mother at the police station following the altercation determined the mother was a danger to the child or herself and arrested her pursuant to Mental Hygiene Law. Additionally, the police officer testified she knew the mother because the mother had made other complaints to the police about the child and had asked them, on prior occasions, to remove the child from the home. Once she asked the police to remove the child from the home because the child wouldn't stop reading

a book. The mother had made numerous complaints against others in her community alleging they had threatened or harassed her, but there was no evidence of this. Respondent had also threatened she would "slash somebody" and the police would have to find "body parts". The psychiatrist who had evaluated the mother testified she had a delusional disorder of a persecutory type which would cause her to believe she was constantly being harassed by others and would see ordinary events, such as her car failing to start, as intentional sabotage. The psychiatrist noted this condition was treatable but the sufferer needed to recognize the disorder and seek treatment. Additionally, the psychiatrist testified this mental condition in the parent would have a profound, negative effect on the child's mental and emotional condition. Furthermore, the evidence showed that until recently, the child and mother had been living in a tarp covered shelter constructed by the mother and child. The mother had refused to allow the agency to inspect the home but eventually it was inspected and the evidence showed that in addition to safety concerns, the interior of the home smelled of urine and feces and was cluttered with, among other things, live chickens in plastic containers. The child testified that solar panels supplied electricity and a propane stove was the source of heating and cooking. There was no running water and a bucket served as the toilet. While the child indicated the mother was doing her best she also indicated she was afraid to return home in case there were further altercations and someone would get injured or arrested. The child was doing exceedingly well academically and wanted to attend college. Considering the evidence and the record as a whole, there was ample support for Supreme Court's neglect determination.

Matter of N. KK., 129 AD3d 1245 (3d Dept 2015)

Reasonable Explanation for Child's Severe Head Trauma Did Not Implicate Respondent Father

Family Court found the father had abused and neglected his younger child, then about seven weeks old, by causing the child to suffer severe head trauma also known as shaken baby syndrome, and derivatively abused and neglected the older child. The Appellate Division reversed. Here, the expert for the agency and the father's expert disagreed as to reason for the cause of the child's injuries. The experts disagreed whether the child showed signs of a fever, and if so, what weight such a factor would mean in terms of reasonably diagnosing the child's condition was consistent with non-abuse. Additionally, the experts disagreed whether the child's one-sided retinal hemorrhage indicated abuse rather than non-abuse and also disagreed as to whether the child's white blood cell count was abnormally high which could mean her blood clotted slower than that of an average infant. Although the agency's expert concluded the child's injuries, which included retinal hemorrhages, bleeding around the brain and brain swelling but did not include any external injuries such as broken bones or neck injuries, could only have been caused by the father's actions, as the child was in his care during the relevant period, the father's expert, whose conclusions were consistent with that of the child's treating physicals as well as crucial information contained in her medical records, offered a reasonable diagnosis that the child suffered from venous thrombosis.

Matter of Natalie AA., 130 AD3d 50 (3d Dept 2015)

Family Court Properly Determined Respondents Had Abused and Neglected Subject Child

Family Court properly determined the agency had proven, by a preponderance of the evidence, that respondent mother and her fiancé had abused and neglected the mother's then six-month old child and derivatively abused and neglected the fiance's child. Here, the record showed the child woke up crying at 4:00 a.m. at which time the mother noticed for the first time that the infant was not able to use her arm properly. Respondents took the child to the emergency room and it was revealed the child had suffered a transverse fracture of her left humerus bone. Testimony from the child's pediatrician, who had later examined the child, established the injury was non-accidental, recent and it had occurred on the day the child was rushed to the emergency room, between 1:00 a.m. to 4:00 a.m. During the relevant period of time, the child had been in the care of respondents. The mother offered no explanation as to how the injury occurred. Additionally, the fiance's mother, who admitted to being afraid of her son, testified the fiancé had told her that when the subject child was three-months-old, he had picked her up "shook her and threw

her into the crib" because she wouldn't stop crying. The agency caseworker testified the fiancé had confessed to the police that he had previously shaken the child. Both the mother and the fiancé's mother agreed the fiancé should not be left alone to take care of the subject child. However, the mother failed to offer any explanation for the child's injuries and the fiancé denied culpability, although he did admit to past violent acts involving family members including his son. Furthermore, neither respondent disputed the pediatrician's testimony regarding the non-accidental nature of the injury. Their explanation that it could have happened the day prior to their notice of the injury, when the child was in the fiance's mother's care, was found not credible. Furthermore, the court did not abuse its discretion in denying the fiancé, who was not the child's biological father, visitation with the child and correctly limited the mother's access to supervised visits. The court's determination that the fiancé had derivatively abused and neglected his child was proper given his impaired level of parental judgment and any child left in his care would be at risk of substantial harm.

Matter of Ashlyn Q. 130 AD3d 1166 (3d Dept 2015)

Court Did Not Err In Denying Motion to Strike Evidence

Family Court determined that respondent father neglected the subject children by, among other things, inflicting excessive corporal punishment. The Appellate Division affirmed. The father's contention was rejected that Family Court denied him due process by allowing the children's mother, who was not a respondent in the neglect proceeding, to participate in the fact-finding hearing as a party even after she withdrew her custody petition. The father did not timely object to the mother's participation. Thus, the objection was unpreserved for review. The father's related contention was rejected that the court erred in denying his motion to strike evidence elicited by the mother inasmuch as other evidence amply supported the finding of neglect.

Matter of Cyle J.F., 128 AD3d 1364 (4th Dept 2015)

Reversal of Order Directing Return of Subject Child to Respondents

Family Court directed the return of the subject child to respondents. The Appellate Division reversed and remitted the matter to Family Court for further permanency proceedings. Family Court's determination that there was no evidence that the child would face the possibility of future neglect or abuse while in respondents' care was not supported by a sound and substantial basis in the record. Petitioner commenced the proceeding alleging that the two-month-old subject child and 14-month-old Makynzie G. were severely abused children. The petition alleged that, while in the care of respondent father, Makynzie suffered a hypoxic brain injury, which was fatal. With respect to the subject child, the amended petition alleged that a full skeletal bone scan revealed that he had a spiral fracture of the upper left arm. Family Court erred in refusing to admit in evidence the amended autopsy report and the records of the pediatric orthopedist who examined the subject child. Although those uncertified records constituted hearsay evidence, evidence that was material and relevant was admissible at a permanency hearing, and the evidence was material and relevant. Despite an otherwise good relationship between respondents and their child, their inability to acknowledge his and/or her previous behavior supported the conclusion that they had a faulty understanding of the duties of parenthood sufficient to infer an ongoing danger to the subject child. The record established that, while in respondents' care, 14-month-old Makynzie died as a result of smothering, that the two-month-old subject child sustained a non-accidental, traumatic spiral fracture, and that the court lacked sufficient information to determined who caused the death and fracture. Although respondents complied with court-ordered services, without explaining the circumstances which led to Makynzie's death and the subject child's fracture, respondents could not effectively address the underlying parenting problems. Respondents' willingness to vaguely accept responsibility for the death and injury was not sufficient to support a determination that the subject child's best interests were served by returning him to the care and custody of respondents.

Matter of Carson W., 128 AD3d 1501 (4th Dept 2015)

Court Erred in Entering Order of Protection Preventing Respondent From Having Unsupervised Visits With His Biological Children Until Youngest Biological Child Turns 18

Family Court found that respondent sexually abused the daughter of his longstanding live-in girlfriend, and derivatively abused and neglected the girlfriend's son (appeal No. 2). Family Court further determined that, based on respondent's abuse of his girlfriend's daughter, he derivatively abused and neglected his three biological children, and issued an order of protection directing respondent to stay away from his biological children, with periodic supervised access, until September 11, 2027, the date his youngest biological child would turn 18 (appeal No. 1). The Appellate Division modified by providing that the order of protection would expire September 26, 2014. In appeal No. 2, Family Court's finding of repeated sexual abuse of the girlfriend's daughter was supported by clear and convincing evidence. The child's out-of-court statements were sufficiently corroborated by the testimony of the child protective services caseworker to whom the child described the repeated abuse, as well as the testimony of petitioner's expert witness. Moreover, the court properly determined that respondent derivatively abused and neglected his girlfriend's son, and his three biological children. However, in appeal No. 1, the court erred in entering an order of protection preventing respondent from having unsupervised visits with his biological children before September 11, 2027. Family Court Act Section 1056 (1) prohibited the issuance of an order of protection that exceeded the duration of any other dispositional order in the case, and the dispositional order which placed respondent under the supervision of petitioner expired on September 26, 2014. Therefore, the expiration date of the order of protection entered with respect to respondent's biological children was also September 26, 2014.

Matter of Ishanellys O., 129 AD3d 1450 (4th Dept 2015)

Grandmother Neglected Child By Feeding Mother's Known Drug Addiction

Family Court determined that respondent grandmother neglected her granddaughter. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that the grandmother, who was a person legally responsible for the child, neglected the child. A child may be adjudicated to be neglected when a parent or caretaker knew or should have known of circumstances which required action in order to avoid actual or potential impairment of the child and failed to act accordingly. The evidence established that the grandmother knew that the mother was addicted to opiates and that the grandmother either illegally purchased suboxone for the mother or provided the mother with money knowing that the mother was going to use that money to buy suboxone herself. During this same period of time, the grandmother, who had informal custody of the child, allowed the mother to care for the child during the day.

Matter of Crystiana M., 129 AD3d 1536 (4th Dept 2015)

Court Properly Refused to Include Transcript in Record

Family Court entered an order of fact-finding and disposition on consent of the parties and the AFC that determined that respondent mother neglected the child (appeal No. 1). In a subsequent order settling the record on appeal, Family Court refused to include in the record on appeal the transcript of a proceeding before a court attorney referee two months after the court's determination, wherein respondent told the referee that she consented to the order because she was coerced by her attorney to do so (appeal No. 2). In appeal No. 2, the court properly refused to include the transcript in the record inasmuch as the court's determination in appeal No. 1 was not based upon that information. Because the order at issue on appeal No. 1 was entered upon consent of the parties, appeal No. 1 was dismissed.

Matter of Annabella B.C., 129 AD3d 1550 (4th Dept 2015)

Mother's Motion to Vacate prior Orders Properly Denied

Family Court denied respondent mother's motion to vacate various orders. The Appellate Division affirmed. The court properly denied the motion without a hearing

because there was insufficient evidence on the issue of good cause to vacate the prior order. The mother could not properly assert the alleged violation of the father's due process rights. The mother also failed to show that a progress note was not disclosed during discovery of the underlying abuse and neglect proceeding against the father, and therefore, this evidence was not newly discovered. Further, the progress note would likely not have produced a different result in light of the evidence that the father sexually abused the subject children.

Matter of Arkadian S., 130 AD3d 1457 (4th Dept 2015**)**

CHILD SUPPORT

Respondent's Motion to Vacate Support Order Properly Denied

Family Court denied respondent's motion to vacate an order of support on default. The Appellate Division affirmed. Respondent failed to show either a reasonable excuse for his default or a meritorious defense. Although respondent's excuse was that he was not served with notice of entry of a prior order, court files indicated that the order was mailed to him at the Riker's Island address that he had provided at a previous court appearance. In any event, respondent had no defense to petitioner's claim that he was not entitled to an adjustment in accrued child support arrears before the filing of the instant petition. Child support arrears cannot be modified retroactively.

Matter of Commissioner of Social Servs. v Juan H.M., 128 AD3d 501 (1st Dept 2015)

Father Entitled to Reduced Child Support Obligation When Children Are Living Away at College

The Supreme Court properly directed the defendant to pay a proportionate share of the children's college expenses as part of the child support award (*see* DRL § 240 [1-b] [c] [7]). However, the child support award should have included a provision either directing that, when a child is living away from home while attending college, the defendant's monthly child support obligation shall be reduced, or awarding the defendant a credit against his child support obligation for any amounts that he contributes toward college room and board expenses for that child during those months. Accordingly, the matter was remitted to the Supreme Court for a determination of the defendant's child support obligation for any time periods that one or more of the parties' children would be living away from home at college.

Sawin v Sawin, 128 AD3d 663 (2d Dept 2015)

Father's Testimony Regarding His Income Lacked Credibility

Here, the Family Court properly denied the father's objections to the Support Magistrate's order which granted the mother's petition for an upward modification of the father's monthly child support obligation as set forth in a prior order. The evidence presented at the hearing demonstrated that the mother established a change in circumstances due to increased needs of the children, a decrease in her income, and a substantial improvement in the father's financial condition. Income was properly imputed to the father based upon the determination that his testimony concerning his income and expenses lacked credibility and upon evidence that his finances were mingled with those of friends or family.

Funaro v Kudrick, 128 AD3d 695 (2d Dept 2015)

Petition Should Have Been Dismissed Without Prejudice

Here, the record supported the Support Magistrate's determination that the father failed to demonstrate a substantial change in circumstances warranting a downward modification of his child support obligation. The father failed to adduce sufficient evidence to satisfy his burden of establishing that he diligently sought employment commensurate with his qualifications and experience. Thus, the Family Court properly denied the father's objections to the Support Magistrate's finding that he was not entitled to a downward modification of his child support obligation. However, under the circumstances of this case, the petition should not have been dismissed "with prejudice" to the filing of any subsequent petition for modification of child support. The Family Court has continuing jurisdiction to modify a prior order of child support upon a proper showing of statutorily

enumerated circumstances (*see* FCA § 451 [2] [a], [b] [i], [ii]). Therefore, the Family Court should have granted the father's objection to the words "with prejudice" in the order, and thereupon substituted the words "without prejudice" for the words "with prejudice" in that order.

Rolko v Intini, 128 AD3d 705 (2d Dept 2015)

Father's Income Miscalculated

The Family Court's award of child support was based upon, inter alia, the Support Magistrate's calculation of the father's annual income. In calculating the father's income, the Support Magistrate relied upon the year-to-date figures on a pay stub for a two-week period ending on July 13, 2013, but failed to take into account that the father began his employment on March 28, 2013. Under these circumstances, the Support Magistrate should have taken the pay stub's pay period figure and multiplied that figure by 26 to determine the father's annual income, rather than rely upon the year-to-date figure. Since the Support Magistrate miscalculated the father's income in determining the father's child support obligation, the Family Court should have granted the mother's objection and recalculated the father's income. Therefore, the matter was remitted to the Family Court to recalculate the father's annual income and his child support obligation.

Thompson Fleming v Fleming, 128 AD3d (2d Dept 2015)

Issue of Whether Defendant Willfully Violated Order Not Properly Before the Appellate Division

The plaintiff appealed from an order of the Family Court dated January 6, 2014 (hereinafter the January 6th order), and (2) an order of that court, dated September 27, 2013 (hereinafter the September 27th order). The January 6th order denied the objections of the defendant to the September 27th order, which, after a hearing, inter alia, found her in willful violation of a prior order of child support, recommended that she be incarcerated, and referred the matter to the Family Court for confirmation. The only issues raised by the defendant on her appeal from the January 6th order were that the Family Court erred in finding that she had willfully violated an order of child support and in recommending that she be subject to a term of incarceration. However, the Support Magistrate's finding of willfulness, and her recommendation that the defendant be subject to a term of incarceration, had no force and effect until confirmed by the Family Court Judge (*see* FCA § 439 [e]). Despite denying the defendant's objections, the January 6th order did not confirm the Support Magistrate's determination that the defendant willfully violated the support order. To challenge the determination that she willfully violated a support order, the defendant's sole remedy was to await the issuance of a final order or an order of commitment of a Family Court Judge confirming the Support Magistrate's determination, and to appeal from that final order or order of commitment. Accordingly, the issue of whether the defendant willfully violated an order of child support was not properly before the Appellate Division.

Schwoerer v Schwoerer, 128 AD3d 828 (2d Dept 2015)

Father Failed to Submit Any Competent Medical Proof of Injury and Incapacity to Work

The first order appealed from, entered June 17, 2014, granted the father's objections to so much of the Support Magistrate's order entered April 8, 2014, as amended on May 29, 2014, which denied his petition for a downward modification. Upon reviewing the record, the Appellate Division found that the father did not establish a substantial change in his circumstances during the three-month period he was purportedly prevented from working because of an injury. He failed to submit any competent medical proof of the extent of his injury and incapacity to work, his uncertified medical records were never introduced into evidence, nor could they have been, and he did not accept Support Magistrate's offer to have his attending physician testify by phone (*see* CPLR 4518; FCA § 451(3)[a]). Therefore, the Family Court erred in granting the father's objections and modifying the Support Magistrate's order. The second order appealed from, entered September 16, 2014, denied the mother's objections to the amended order of the Support Magistrate entered May 29, 2014, which, inter alia, denied the mother's request for certain child care arrears, modified the order of support by directing the father to pay only 60% of child care expenses directly to the mother, and directed the father to make payments

of $50 weekly to the mother, through the New York State Support Collection Unit (hereinafter SCU), to repay support arrears. The Support Magistrate erred, in the amended order, in failing to continue the order of support dated September 27, 2012, in the sum of $147.12 per week toward child care expenses, payable to the mother through the SCU, and directing instead, effective February 13, 2013, that the father pay 60% of child care expenses directly to the mother. Absent a petition to modify the terms of the existing order of support with respect to child care, the Family Court had no authority to discontinue the father's weekly payment of $147.12 to the mother through the SCU. If the parties' circumstances had changed and the actual costs of child care were less than what had been determined at the time of the divorce in September of 2012, the father could have petitioned the court for a downward adjustment of the weekly sum to be paid through the SCU.

Pepe v Pepe, 128 AD3d 831 (2d Dept 2015)

Court Failed to Articulate its Reasoning in Determining Award of Child Support

The defendant father appealed from stated portions of a judgment of divorce of the Supreme Court, entered March 14, 2012. The judgment, inter alia, directed that the defendant's monthly payments to the plaintiff for maintenance and child support be made retroactive only to February 1, 2012. In awarding the plaintiff $3,100 per month in child support, the Supreme Court failed to articulate its reason or reasons for using half of the normal percentage applicable to combined parental income over $130,000. The Child Support Standards Act (*see* DRL § 240 [1-b]) sets forth a formula for calculating child support by applying a designated statutory percentage, based upon the number of children to be supported, to combined parental income up to the statutory cap that is in effect at the time of the judgment, here, $130,000 (*see* SSL § 111-i [2] [b]). When the combined parental income exceeds that amount, the court has the discretion to apply the statutory child support percentage, to apply the factors set forth in DRL § 240 (1-b) (f), or to utilize some combination of both methods. The reasons for the court's determination should reflect a careful consideration of the stated basis for its exercise of discretion, the parties' circumstances, and its reasoning why there should or should not be a departure from the prescribed percentage. Here, the Supreme Court did not articulate any of its reasoning in determining the child support award. Accordingly, the matter was remitted to the Supreme Court for a new determination of the amount of the defendant's child support. In addition, the Supreme Court incorrectly directed the defendant's maintenance and child support obligations to commence on February 1, 2012, the date of the divorce judgment. A party's maintenance and child support obligations commence, and are retroactive to, the date the applications for maintenance and child support were first made, which, in this case, was December 28, 2007 (*see* DRL § 236 [B][6][a]; [B][7][a]). Judgment affirmed as modified.

Schack v Schack, 128 AD3d 941 (2d Dept 2015)

Mother's Gross Income Miscalculated

In September 2013, the mother filed a petition in the Family Court alleging that the father was chargeable with child support. The father's basic child support obligation was set, after a hearing, at $579 semi-monthly. The father filed objections to the order of support, arguing, inter alia, that the Support Magistrate incorrectly calculated his income and the mother's income when determining the basic child support obligation. The court denied the father's objections. The father appealed. Contrary to the father's contention, the Support Magistrate properly calculated the father's income. However, the Support Magistrate's calculation of the mother's income was incorrect. The Child Support Standards Act (DRL § 240 [1-b]) requires the court to establish the parties' basic child support obligation as a function of the "gross (total) income" that is, or should have been, reflected on the parties' most recently filed income tax return (*see* FCA § 413 [1] [b] [5] [i]). The Support Magistrate, applying the information set forth on the mother's 2012 W-2 form, found that her income was $70,439, but her 2012 federal income tax return showed that her income was $92,846. Thus, the Support Magistrate should have calculated the mother's gross adjusted income based upon her reported income of $92,846. Rather than remit the matter to the Family Court, the Appellate Division, recalculated the father's support obligation in the interest of judicial economy. Having made the appropriate adjustments, and applying the statutory percentage of 17% to the capped parental income of

$141,000, as did the Family Court, the father's pro rata share of the combined parental income was determined to be 51%, and his child support obligation was $510 semi-monthly. Accordingly, the order was reversed and the father's objections were granted to the extent of awarding the mother child support in the sum of $510 semi-monthly.

Cordwell v Clarke, 128 AD3d 956 (2d Dept 2015)

Father Obligated to Pay His Proportionate Share of College Expenses for Parties' Oldest Child

Contrary to the father's contention, the Family Court properly determined that he was obligated to pay his proportionate share of the college expenses for the parties' oldest child. The parties' amended judgment of divorce expressly provided that the father was obligated to pay 65% of the cost of the children's college education, up to the "SUNY cap," without any conditions or limitations. While the father argued that his obligation to pay college expenses was not triggered because the mother failed to consult with him regarding the child's college plans, his reliance upon a certain provision in a stipulation relating to custody and visitation, dated July 20, 2005, was unavailing. That provision contained no requirement that the parties consent to the selection of a school for the children, and it did not pertain to the parties' shared obligation to pay the college expenses of their children. The Family Court also properly awarded child support to the father for the parties' youngest child retroactive to November 26, 2013, the date he filed his petition for child support, rather than to December 24, 2012, when he filed a separate petition seeking to modify his child support obligations. In his modification petition, the father did not seek an award of child support from the mother.

Davidson v McLoughlin, 128 AD3d 960 (2d Dept 2015)

Recalculation of Father's Pro Rata Share of Education Expenses Warranted

On or about January 1, 2013, the father and the mother filed petitions seeking to modify the child support obligation effective January 1, 2013. After a hearing, the Support Magistrate directed the father to pay $400 per week in child support, plus 46% of unreimbursed health related expenses. The $400 payment consisted of $302.69 in basic child support, $55.29 in child care costs, and $42.02 in educational expenses. In the order appealed from, the Family Court denied the mother's objections. The mother argued that the Support Magistrate improperly granted the father a downward modification of his child support obligation, without establishing a substantial change in circumstances, and failed to properly calculate the father's obligation with regard to educational expenses. Contrary to the mother's contention, the Support Magistrate did not downwardly modify the father's child support obligation, but rather recalculated his child support obligation as provided for by the parties' stipulations. The father was not required to establish a change in circumstances, as the parties agreed, by contract, to recalculate the support obligation anew as of January 1, 2013. Pursuant to the terms of the stipulations, the parties contemplated that the father would pay his pro rata share of educational expenses. In calculating the father's pro rata share of these expenses, the Support Magistrate should have included the sum of both children's educational expenses for the entire school year. However, the Support Magistrate included only the sum of $4,750 in making this calculation, which was the amount that the mother testified she had paid thus far toward one of the children's tuition for the 2013-2014 school year. Although the mother submitted invoices indicating that the educational expenses for both children were more than $14,000 per year, those invoices included child care expenses attributable to "extended-day" services. Therefore, the order was modified, and the matter was remitted to the Family Court to recalculate the father's 46% pro rata share of educational expenses, exclusive of child care expenses, and any arrears of the father's child support obligation which may have accrued retroactive to January 1, 2013.

Noah v Feld, 128 AD3d 1071 (2d Dept 2015)

Court Not Required to Rely on Defendant's Account of Finances in Calculating Child Support

The parties were divorced by judgment dated September 10, 2013. The judgment, insofar as appealed from, awarded the plaintiff $2,303 per month in child support. The defendant appealed. Contrary to the defendant's contention, in calculating child support, the Supreme Court did not err in imputing $110,000 in annual income to the defendant based on his past

income and demonstrated earning potential as a mortgage consultant. The court was not required to rely on the defendant's account of his finances.

Diaz v. Diaz, 129 AD3d 658 (2d Dept 2015)

Father Failed to Demonstrate Child's Emancipation

On August 7, 2013, the father filed a petition to terminate his child support obligation. He contended that, pursuant to the stipulation, the parties' child was emancipated and, as a result, he was relieved from his obligation to provide the mother with child support. The father's petition also alleged, in effect, that the child was constructively emancipated. Following a hearing, the Support Magistrate concluded that the child's residence at his maternal aunt's home while completing his high school education was temporary and, thus, the child was not emancipated under the stipulation. In an order dated June 23, 2014, the Support Magistrate, among other things, dismissed the father's petition. Subsequently, the father filed objections to so much of the order as dismissed his petition, and the Family Court denied the objections. The father appealed. Upon reviewing the record, the Appellate Division found that the evidence at the hearing supported the Support Magistrate's determination that the child did not establish a permanent residence away from the mother's residence. The father did not meet his burden of demonstrating that the child was emancipated pursuant to the subject provision in the stipulation. In addition, contrary to the father's contention, he failed to establish that, pursuant to the terms of the stipulation, he was entitled to a suspension of his child support obligation for the duration of the child's temporary stay away from the mother's residence. Moreover, the father failed to meet his burden of establishing that the child was constructively emancipated. The subject child here was not "of employable age" during the relevant time period. Further, the evidence at the hearing failed to demonstrate that the father "made sufficient attempts to maintain a relationship with the child, or that the child abandoned the relationship with him". Accordingly, the Family Court properly denied the father's objections. Order affirmed.

McCarthy v. McCarthy, 129 AD3d 970 (2d Dept 2015)

Downward Modification of Father's Child Support Obligation Not Warranted

The defendant's motion for a downward modification of his child support obligation was filed in June 2013, only eight months after the parties' 2012 postjudgment order had been entered. Accordingly, the defendant was precluded from contending that a substantial change in circumstances had occurred under the three-year passage of time provision of the statute (*see* FCA § 451 [3] [b] [ii]; DRL § 236 [B] [9] [b] [2] [ii] [B]). The defendant also failed to provide any evidence to show that there was a change in either party's gross income by 15% or more since the 2012 postjudgment order was entered (*see* FCA § 451 [3] [b] [ii]; Domestic Relations Law § 236 [B] [9] [b] [2] [ii] [B]). The evidence submitted by the defendant contrasting his 2012 income with his 2009 income was not relevant to the court's analysis. The appropriate inquiry was whether there was a 15% or more change in gross income of either party in the eight months between the 2012 postjudgment order and the defendant's June 2013 motion for a downward modification of child support. The evidence submitted as to that time period did not establish that there was a 15% change in gross income. Moreover, the defendant failed to make any showing that any reduction he may have had in his income in that eight-month time period was involuntary, or that he had made diligent attempts to secure employment commensurate with his education, ability, and experience. Order affirmed.

Raab v. Raab, 129 AD3d 1050 (2d Dept 2015)

Mother's Objections Properly Denied as Untimely

Objections to an order of a Support Magistrate must be filed within 35 days after the date on which the order is mailed to the objecting party (*see* FCA § 439 [e]). Contrary to the mother's contention, the Clerk of the Court was not required to mail copies of the findings of fact and orders of the Support Magistrate to her attorney (*see* FCA § 439 [e]). Since there is no provision in FCA § 439 (e) that addresses the issue of whether the Clerk of the Court is mandated to mail copies of the findings of fact and orders of the Support Magistrate to a party's counsel when the party is represented, the procedure shall be in accord with 22 NYCRR 205.36 (b), which provides, in relevant part,

that at the time of the entry of an order of support, the Clerk of the Court "shall cause a copy of the findings of fact and order of support to be served either in person or by mail upon the parties to the proceeding or their attorneys." Here, the findings of fact and orders of the Support Magistrate were mailed to the mother on July 24, 2013, but her objections were not filed until 41 days later. Accordingly, the Family Court, upon reargument, properly adhered to its prior determination denying the mother's objections as untimely.

Matter of Odunbaku v Odunbaku, 131 AD3d 617 (2d Dept 2015)

Supreme Court Properly Determined Parties' Pro Rata Shares of Combined Parental Income

The Supreme Court properly imputed $75,000 in annual income to the plaintiff, based upon her education and experience, and her admission that she was capable of earning $80,000 as a registered nurse. In determining a child support obligation, a court need not rely on a party's own account of his or her finances, but may, in the exercise of its considerable discretion, impute income to a party based upon his or her employment history, future earning capacity, and educational background, and what he or she is capable of earning, based upon prevailing market conditions and prevailing salaries paid to individuals with the party's credentials in his or her chosen field. Contrary to the defendant's contention, the Supreme Court's imputation of income to him of $225,000 annually was supported by evidence of his past earning history and his future earning capacity. Contrary to the plaintiff's contention, the Supreme Court properly calculated her pro rata share of the basic child support obligation. Pursuant to the Child Support Standards Act (*see* DRL § 240[1–b]), the court was required to deduct the defendant's maintenance obligation from his income prior to the calculation of child support (*see* DRL § 240[1–b][b][5][vii][C]). Here, after deducting from the defendant's gross income the amount that he paid in maintenance each year, the Supreme Court properly determined the parties' pro rata shares of the combined parental income.

Dougherty v Dougherty, 131 AD3d 916 (2d Dept 2015)

Award of Pendente Lite Child Support Was Insufficient to Sustain the Children's Standard of Living

In awarding pendente lite child support, the Supreme Court did not provide any reason for declining to perform the calculation in accordance with the Child Support Standards Act (hereinafter the CSSA) or consider the various factors enumerated in the CSSA, and it ultimately failed to provide any explanation as to how it determined the amount of the award. Further, the pendente lite child support award was an improvident exercise of discretion in light of the children's prior standard of living and the great disparity between the parties' financial positions. The goal of child support is to continue the status quo and to satisfy the overwhelming need to maintain a sense of continuity in the children's lives. When considered in light of the plaintiff's responsibilities as the custodial parent of two teenagers who had been raised in comfortable accommodations and had been provided with expensive clothing, recreation, and education, the Supreme Court's award failed to provide the means to maintain the sense of continuity that the pendente lite award of child support was supposed to provide.

Kaufman v Kaufman, 131 AD3d 939 (2d Dept 2015)

Record Supported Suspension of Father's Child Support Obligation

The evidence adduced at the hearing demonstrated that despite the fact that the child had participated in therapy for several months in an effort to foster a relationship with his father, the child remained vehemently opposed to any form of visitation with the father. The Family Court was entitled to place great weight on the child's wishes, since he was mature enough to express them. The court's finding that further attempts to compel the child, who was then 13 years old, to engage in visitation would have been detrimental to the child's emotional well being, had a sound and substantial basis in the record. However, contrary to the conclusion of the Family Court, the evidence adduced at the hearing justified a suspension of the father's obligation to make future child support payments. The forensic evaluator testified that there was a "pattern of alienation" resulting from the mother's interference with a regular schedule of visitation. The

evaluator was unable to complete her evaluation because the mother refused to consent to the evaluator's request to speak with mental health providers or school officials, and the child did not appear for his interview. Moreover, after the father's last visit with the child, which occurred on February 7, 2010, the father continued to go to the exchange location on visitation days for several months. On one occasion, the mother and child appeared, but the mother said the child would not come out of the car. On the other occasions, neither the mother nor the child appeared, nor did the mother communicate with the father. The father was never told about the child's medical needs or that the child had been hospitalized until after the fact, nor was he advised of any information about the child's school or school events. Further, the record revealed that the mother, who represented herself before the Family Court, assumed an inappropriately hostile stance toward the father and witnesses who testified in his favor. The Family Court noted in its decision that the mother stated "many times, that she will never allow [the father] to see the subject child and that she would do whatever it takes to keep the subject child away" from him. Under these circumstances, it was appropriate to suspend the father's child support obligations.

Coull v Rottman, 131 AD3d 964 (2d Dept 2015)

Hearing Not Required on Issue of Changed Circumstances

Contrary to the father's contention, a hearing was not required on the issue of changed circumstances. Upon an application to set aside or vacate an order of support, no hearing shall be required unless such application shall be supported by affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested (*see* FCA § 451 [1]). A hearing is necessary on the issue of changed circumstances where the parties' affidavits disclose the existence of genuine questions of fact. Here, the mother attached documentation to her motion to dismiss the petition demonstrating that she had been terminated from her job and was consequently unemployed again, just as she was at the time of the parties' stipulation. The father did not dispute that the mother was unemployed. Since the undisputed evidence refuted the allegations in the petition and showed that there was no substantial change in circumstances, there was no genuine issue of fact that would have necessitated a hearing. Under these circumstances, the Family Court did not err in disposing of the matter without conducting a hearing and without enforcing the petitioner's right to compulsory financial disclosure by the respondent (*see* FCA § 424-a). Accordingly, the Family Court properly denied the father's objections to the Support Magistrate's order granting, without a hearing, that branch of the mother's motion which was to dismiss the petition for a downward modification of his child support obligation.

Lagani v Wenzhu Li, 131 AD3d 1246 (2d Dept 2015)

Counsel's Failure to Provide Meaningful Representation Results in Reversal

Family Court determined respondent wilfully violated a prior support order and committed him to jail for six months, to be suspended after 30 days if he made specified payments, and issued an order directing entry of a money judgment. Although respondent conceded the mother had made a prima facie case of his willful failure to pay child support, he argued his assigned counsel failed to provide meaningful representation by failing to present sufficient evidence to show his inability to pay based on his ongoing medical issues during the relevant period. The Appellate Division agreed and reversed. The record showed that during the period at issue, the father had ongoing medical treatment for back problems and had a pending disability benefits claim for which he was awaiting a hearing. Additionally, there were several periods where he was advised not to work by his treating physicians. The father's medical records were submitted in an unsorted mass and while the court made an effort to conduct meaningful review of the records, there were certain deficiencies in them that respondent's counsel should have addressed prior to the hearing. Additionally, when the court stated the records failed to show a "permanent disability", respondent's counsel failed to object that this was an incorrect standard. "At a minium, an attorney may be expected to organize and present the disability found within a medical file, accompanied with explanatory argument as to the legal significance" of the documents. Here, respondent's counsel failure to adequately compile the evidence and present an available defense fell below the requisite standard of meaningful representation. Had the proof

been properly presented, the father may have been able to support his testimony that for at least a part of the relevant period, he was unable to work and, at a minimum, the penalty might have been mitigated.

Matter of Albert v Terpening, 128 AD3d 1133 (3d Dept 2015)

While Imputation of Income Was Proper, the Amount Imputed Was Not Correct

The parties initally had a shared custody order therefore neither had to pay child support. The children then began to reside primarily with the mother and she pursued child support. The Support Magistrate imputed income to the father in the amount of $54,000, calculated his support obligation based on this income and ordered bi-weekly payments. Family Court dismissed the father's objections. The Appellate Division agreed while the imputation of income was proper, the amount imputed was not correct. The record showed the father did earn $54,000 four years earlier, however, since that time, his earnings had varied and the record was limited as to the father's work history. There was no evidence of the type of work the father was trained to do nor was there any information to conclude whether, based on his educational background, someone like him had the ability to earn $54,000 per year. Accordingly, the Court imputed his income to what he had reported on his financial disclosure affidavit, which was $1,373 bi-weekly, and issued an order of support in the amount of $310 bi-weekly.

Matter of D'Andrea v Prevost, 128 AD3d 1166 (3d Dept 2015)

Order Issued On Consent Not Appealable

Respondent admitted he had wilfully violated the support order, agreed to an order of disposition and consented to serve 90 days in jail. Thereafter, respondent appealed arguing Family Court abused its discretion by issuing an order of disposition without a hearing. However, since respondent had consented to the order, it was not appealable. His argument that his consent was involuntary due to ineffective assistance of counsel should have been raised via a motion to vacate the underlying order.

Matter of Commissioner of Social Services v Karcher, 129 AD3d 1351 (3d Dept 2015)

Affirmance of Child Support Order

Family Court denied petitioner's objection to the order of the Support Magistrate. The Appellate Division affirmed. The Support Magistrate's findings were entitled to great deference. The record supported the determination that the father failed to demonstrate a substantial change in circumstances that would justify a downward modification of his support obligation because he did not present sufficient evidence establishing that he diligently sought re-employment commensurate with his former employment.

Matter of Perez v Johnson, 128 AD3d 1469 (4th Dept 2015)

Reversal of Denial of Objections to Order of Support Magistrate

Family Court denied the objections of petitioner to an order of the Support Magistrate. The Appellate Division reversed, granted the objections, granted the petition and directed respondent to pay child support in the amount of $26 per week retroactive to September 12, 2013, the date on which the children became eligible for public assistance. The Support Magistrate calculated respondent's presumptive support obligation at $26 per week, but determined that respondent was not obligated to pay support because he had physical custody of the children for a majority of the time under his custody arrangement with the mother, and thus was not a noncustodial parent within the meaning of Family Court Act Section 413 (1) (f) (10). The custody order between respondent and the mother was intended to divide physical custody of the children equally. Respondent, as the parent with the higher income and greater pro rata share of the child support obligation, was therefore the noncustodial parent for support purposes, and should have been ordered to pay child support to the mother. In addition, the children's receipt of public assistance precludes respondent from obtaining any reduction of his support obligation based on expenses incurred while he had custody of the children.

Matter of Oneida County Dept of Social Servs v Benson, 128 AD3d 1524 (4th Dept 2015)

Child's Return to Noncustodial Parent's Supervision and Control Did Not Preclude Revival of Unemancipated Status

Supreme Court denied that part of defendant father's motion seeking an award of child support. The Appellate Division reversed, granted that part of the father's motion seeking child support, and remitted the matter to Supreme Court to calculate the amount of child support owed by plaintiff mother to the father. The court erred in concluding that the child's return to parental custody and control neither revived his unemancipated status nor reinstated the support obligations of his parents. The record established, and the parties stipulated, that the child was constructively emancipated in June 2012 when he moved out of the mother's residence and into an apartment with friends in an effort to avoid the mother's rules requiring him to attend school and not use illicit drugs. The child moved in with his father after being treated for withdrawal. A child's unemancipated status may be revived provided there was a sufficient change in circumstances to warrant the corresponding change in status. Generally, a return to the parents' custody and control has been deemed sufficient to revive a child's unemancipated status. Although most of the cases concerning a revival of a child's unemancipated status involved a child's return to the home that he or she abandoned, verus the home of the noncustodial parent, the return to the noncustodial parent's supervision and control did not preclude a revival of unemancipated status inasmuch as it had generally been held that the move from one parent's home to the other parent's home did not constitute emancipation because the child was neither self-supporting nor free from parental control.

Baker v Baker, 129 AD3d 1541 (4th Dept 2015)

Appeal From Order of Commitment Dismissed

Family Court committed respondent father to jail for six months based on a finding of the Support Magistrate that respondent willfully violated a prior child support order. The Appellate Division dismissed the appeal. Respondent contended that the Support Magistrate erred in finding that respondent's admitted failure to pay child support was willful, inasmuch as he demonstrated at the violation hearing that he was unable to pay the amount due. Because respondent appealed only from the order of commitment, and not from the order finding that he willfully violated the child support order, the appeal was dismissed.

Matter of Rafferty v Rafferty, 129 AD3d 1644 (4th Dept 2015)

Order Determining that Plaintiff Was Not Entitled to Share in Child Tax Credits for Parties' Children Reversed Where Disputed Provision Was Ambiguous

Supreme Court found that, under the unambiguous terms of the parties' separation agreement, plaintiff was not entitled to share in child tax credits for the parties' two children. The Appellate Division reversed and remitted for a hearing to determine the parties' intent with respect to the disputed provision. Fundamental, neutral precepts of contract interpretation provide that agreements are to be construed in accord with the parties' intent, and the best evidence of what the parties intended was what they said in their writings. Courts may consider extrinsic or parol evidence of the parties' intent only if the contract was ambiguous. Article XIX (E) of the separation agreement read: "Commencing with the 2008 tax year the Wife shall share with the Husband fifty percent of any child tax credit, or any such similar tax credit not based upon income or payments that the Wife may have made by or on behalf of a child, that she may receive relating to the filing of her federal and state income tax returns after 2008. The Wife shall also share with the Husband fifty percent of any future economic stimulus or any similar such payment she may receive as a result of her claiming the children on her federal income tax return." Article XIX (E) of the parties' separation agreement was ambiguous because it was reasonably susceptible of more than one interpretation. Plaintiff's interpretation appeared more reasonable than that proffered by defendant, pursuant to which plaintiff was not entitled to share in the child tax credits because they were based on defendant's income. The amount of basic child tax credit was, indeed, always dependent on the income of the person who claimed the credit. Thus, pursuant to the court's interpretation of the provision, plaintiff would never share in the tax credit and, if that were the case, there

would have been no need for the first phrase of the first sentence, i.e., "Commencing with the 2008 tax year the Wife shall share with the Husband fifty percent of any child tax credit." Furthermore, defendant's own attorney, in a letter sent to opposing counsel approximately two years before this proceeding was commenced, acknowledged that plaintiff was entitled to share in the child tax credits.

Colella v Colella, 129 AD3d 1650 (4th Dept 2015)

Referee Erred in Failing to Include Value of Plaintiff's Food Stamps in Her Yearly Income

Supreme Court entered a judgment directing defendant husband to pay maintenance to plaintiff wife and directed plaintiff to pay child support in the amount of $300 per year to defendant. The Appellate Division modified the judgment by vacating the award of child support, and remitted. The Referee, whose Report and Recommendation was confirmed by the court, did not err in excluding plaintiff's maintenance award from her income in calculating her child support obligation. There was no authority in the Child Support Standards Act (CSSA) for adding future maintenance payments to the recipient's income for the purpose of calculating child support. Furthermore, the Referee did not err in declining to impute additional income to plaintiff based on her ability to work. There was no evidence that plaintiff had reduced resources or income in order to reduce or avoid the parent's obligation for child support. However, the Referee erred in failing to include the value of plaintiff's food stamps in her yearly income for purposes of calculating her child support obligation. Food stamps were not public assistance to be deducted from income pursuant to Domestic Relations Law Section 240 (1-b) (b) (5) (vii) (E) inasmuch as Social Services Law article 5, which governs public assistance, refers to "public assistance or food stamps" (Social Services Law Section 131 [12]), thereby distinguishing the two. Because plaintiff's income did not fall below the poverty income guidelines when the value of her food stamps was included, the judgment was modified by vacating the award of child support, and the case was remitted for a recalculation plaintiff's child support obligation in compliance with CSSA.

Lattuca v Lattuca, 129 AD3d 1683 (4th Dept 2015)

Parties' Financial Resources, Including Father's Inheritance, Justified Child Support Award to Mother

Supreme Court, among other things, awarded plaintiff mother child support. The Appellate Division affirmed. Although the roughly equal incomes of the parties and their shared custody arrangement would ordinarily result in no award of child support to either party, after considering the parties' respective financial resources, including defendant father's inheritance, the court properly awarded child support to plaintiff mother.

Vural v Vural, 130 AD3d 1459 (4th Dept 2015)

Matter Remitted Where Court Failed to Direct Retroactive Support Modification

Supreme Court, among other things, denied defendant father's request for reimbursement from plaintiff mother for health insurance premiums paid by him, and granted him a downward modification of child support. The Appellate Division modified and remitted for further proceedings. Although the parties' agreement required plaintiff to provide health insurance coverage, defendant husband failed to establish his entitlement to reimbursement inasmuch as he failed to show how much he actually paid for insurance premiums for a family plan, rather than an individual plan. The court erred in not directing that the child support modification be retroactive to the date of defendant's application and in failing to adjust the parties' pro rata share of health insurance expenses and child care expenses, when it modified defendant's request for a downward modification of child support.

Petroci v Petroci, 130 AD3d 1573 (4th Dept 2015)

CUSTODY AND VISITATION

Grandmother Failed to Establish Extraordinary Circumstances

Family Court dismissed the petition of the subject children's maternal grandmother for custody of the children and denied her motion for leave to amend the petition. The Appellate Division affirmed. Petitioner, who had no relationship with the instant children and had not seen them for more than four years, failed to

meet her burden of establishing extraordinary circumstances in support of her custody application. Because the petition failed to allege sufficient facts to show extraordinary circumstances, the court was not required to hold a hearing. The amended petition did not cure the defects of the petition. Although it alleged that petitioner witnessed evidence of the mother's unfitness years ago, it did not allege that petitioner took steps to gain custody at that time or to see the children on a regular basis.

Matter of Carol H. v Shewanna H., 128 AD3d 490 (1st Dept 2015)

Custody to Mother in Child's Best Interests Consistent With Child's Request

Family Court granted the mother's petition for sole legal and physical custody of the subject child with visitation to respondent father. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination that it was in the child's best interests to award custody to the mother, consistent with the child's request. The father testified that the mother and he were unable to communicate or cooperate with each other and thus joint custody was not a feasible option. The father moved out of state during the proceedings, and an award of sole custody to him would have required the child to be uprooted from her home, siblings, friends, and school, where she was doing well.

Matter of Liliana C. v Jose M.C., 128 AD3d 496 (1st Dept 2015)

Error to Require Mother to Obtain Father's Written Permission Before Taking Children to Religious Service

Family Court awarded respondent father sole decision-making with respect to the children's religious practice and modified the parties' residential access schedule by expanding the father's Wednesday night overnight visitation to a full week every six weeks. The Appellate Division modified by vacating the order insofar as it altered the residential visitation schedule and revised the schedule for religious holidays. The court erred in determining that the father should receive an additional week of parenting time with the children every six weeks. The children would suffer as a result of this expansion of time. There was no reason to impose the requirement that petitioner mother receive written consent from the father before taking the children to religious services or to prohibit her from attending services with them. The parties should share the Jewish holidays despite the father's role in the children's religious development. The mother failed to preserve her contention that the court was biased against her, and, in any event, the record failed to support her allegation.

Matter of Ann D. v David S., 128 AD3d 520 (1st Dept 2015)

Custody to Father Affirmed; Mother Neglected Child

Family Court granted the father's petition for custody of the parties' child Kaylin and the petition of the maternal step great-grandmother for guardianship of the child Nagely. The Appellate Division affirmed. Both determinations had a sound and substantial basis in the record. The combined hearing followed the entry of an order, on consent, finding that respondent mother abused Kaylin and derivatively abused Nagely. The children would be at risk of harm if returned to the mother. The court's determination that the mother's testimony was incredible was accorded great deference. She was not forthcoming about what happened to Kaylin and changed her story several times. Even under the mother's version of events that she did not harm Kaylin intentionally, she exhibited poor judgment by leaving Kaylin, then nine months old, on a bed and then shaking her after picking her up from the floor. Further, even though Kaylin sustained severe, life-threatening injuries at the hands of her mother, the mother's testimony reflected that she did not appreciate the severity of what she did or its long-lasting effects.

Matter of Melvin R. v Luisanny A., 128 AD3d 538 (1st Dept 2015)

Dismissal of Father's Petition For Visitation Affirmed

Family Court dismissed the father's petition for visitation with the subject children. The Appellate Division affirmed. Three days before the father

commenced this visitation proceeding, the Referee had issued, upon the father's default, an order granting respondent mother sole custody of the children and an order of protection directing that the father stay away from the mother and the children for two years. The visitation petition was properly dismissed because the father failed to meet his burden at the hearing on the petition to show there were changed circumstances warranting modification of the order of protection and that visitation would be in the children's best interests. The father's testimony showed that he failed to recognize the effect his actions had on the children and that he had not addressed the issues that led to the order of protection. The Referee was not obligated to order a forensic evaluation because she possessed sufficient information to make a comprehensive and independent review of the children's best interests after having issued the custody order and order of protection just days earlier. The father failed to preserve for review his contention that the Referee erred in relying upon the statements of the AFC concerning the view of the children's therapists. That issue was not reached in the interests of justice, but the Court noted that the better practice would have been for the court to hear directly from the therapist, through testimony or a report. Further, although the better practice would have been for the Referee to conduct an in-camera interview with the children, who were 10 and 11 years old at the time of the hearing, under the circumstances it was appropriate for the AFC to inform the court of the children's preference not to have contact with the father.

Matter of Mohamed Z.G. v Mairead P.M., 129 AD3d 516 (1st Dept 2015)

New York, Not Tanzania Child's Home State

Supreme Court denied the father's motion to dismiss the underlying action on the ground of forum non conveniens. The Appellate Division affirmed. The court did not err in sua sponte retaining jurisdiction over the parties' custody and support issues, even though the divorce action could not be maintained because of a failure to satisfy the residency requirement. The record supported the court's finding that New York was the child's home state because she resided here for more than six months before commencement of the action. Plaintiff wife's relocation to New York with the child without obtaining defendant father's consent did not constitute "unjustifiable" conduct because there was no custody order preventing her from doing so. Defendant, who communicated with the child daily via Skype and was aware of her location, did not take any legal action to secure the child's return before commencement of this action. The relevant statutory factors supported the court's conclusion that New York was not an inconvenient forum. Travel between New York and Tanzania was at least 21 hours, and although defendant argued that this distance and travel time would be burdensome for him, the burden that would be imposed on the parties' very young child was greater. The child had resided in New York for over one year and had attended school here. Evidence concerning her current well-being, personal relationships, and education were located in New York. Further, the child lived in Tanzania for about the first year of her life and then traveled to Dubai, her country of birth, for medical treatment. Therefore, there was little material evidence in Tanzania, where defendant resided.

Valji v Valji, 130 AD3d 404 (1st Dept 2015)

Father Granted Additional Visitation – Child's Wishes Entitled to Great Weight

Family Court, among other things, granted respondent mother's petition for modification of a consent order of joint legal and physical custody, denied the father's petition for modification of the order, and granted the mother sole legal and physical custody of the child, with parenting time to the father. The Appellate Division modified by increasing the father's parenting time. Although the court made a careful and studied review of all the relevant factors, the child's desire that the father be granted custody, or at least more parenting time, while not determinative, was entitled to great weight. Under the circumstances here, it was appropriate to increase the father's parenting time.

Matter of Miguel Angel N. v Tanya A., 131 AD3d 425 (1st Dept 2015)

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

The mother appealed from an order of the Family Court which granted the father's petition for physical custody

of the subject child, with joint legal custody to both parties. The Appellate Division found that the Family Court properly weighed all of the factors in awarding physical custody to the father and did not, as the mother argued, give undue weight to the opinion of the court-appointed forensic psychologist. The Family Court, after evaluating the testimony, considering the recommendations of a forensic expert, home studies, and the custody investigation, interviewing the child in camera, and considering the position of the attorney for the child, determined that the child's best interests would be served by an order awarding physical custody to the father, with the parties sharing joint legal custody. Accordingly, there was a sound and substantial basis for the Family Court's determination.

Matter of Psaros v Ortega, 128 AD3d 703 (2d Dept 2015)

Father Failed to Allege Sufficient Change of Circumstances

The father appealed from an order of the Family Court which, without a hearing, inter alia, granted the mother's motion to dismiss the father's petition. The father sought modification of a final order of custody and visitation entered on consent of the parties in March 2009, when the parties' child was four years old. He alleged, among other things, that the change of circumstances warranting modification was that the parties had reconciled for a number of years between when the custody order was entered and the current petition was filed, and that, during that time, he had become the child's primary caregiver. Upon reviewing the record, the Appellate Division found that the petition failed to allege a sufficient change of circumstances. At the time the parties entered into the custody order, they were living separately, in different counties, and the child was residing with the mother, who was the primary caregiver. At the time the modification petition was filed, the parties were again living separately, in different counties, and the child was residing with the mother, who was her primary caregiver. Therefore, the Family Court properly granted that branch of the mother's motion which was to dismiss the petition without a hearing.

Matter of Valencia v Ripley, 128 AD3d 711 (2d Dept 2015)

Attorney for the Child's Motion to Dismiss Maternal Uncle's Petition Granted

The record supported the Family Court's determination that it was in the subject child's best interests to grant that branch of the motion of the attorney for the child which was to dismiss the petition of the maternal uncle for custody of the child. The record showed that the child had bonded with his foster family and was happy, healthy, and thriving in that home, while the maternal uncle had not visited or communicated with the child for three years, and had failed to make himself available for a court-ordered forensic evaluation. Thus, the court properly found that it was in the child's best interest to be freed for adoption by his foster parents.

Matter of Ender M.Z., 128 AD3d 713 (2d Dept 2015)

Father's Motion to Enforce Nevada Court Order Properly Denied

The father appealed from an order of the Family Court which denied his motion to enforce a temporary order of custody and visitation issued by a Nevada court. Contrary to the father's contention, the Family Court did not err in refusing to enforce the Nevada court order. While the father commenced a proceeding to register that order in New York, it was undisputed that the mother filed timely objections to the petition in that proceeding, and there was nothing in the record indicating that the registration was ever confirmed, either by operation of law or after a hearing (*see* DRL § 77-d). In any event, the record clearly demonstrated that the Nevada court order was subsequently modified by an Arkansas court, which made the initial custody determination, and which retained exclusive, continuing jurisdiction over the matter (*see* DRL §§ 76, 76-a, 76-b). Accordingly, the Family Court properly, in effect, denied the father's motion to enforce the Nevada court order, and dismissed the underlying custody and visitation proceeding.

Matter of Baptiste v Baptiste, 128 AD3d 815 (2d Dept 2015)

Relocation Was in the Child's Best Interests

The order appealed from denied the mother's petition to relocate with the child and granted the father's cross

petition to modify the custody provisions set forth in a stipulation of settlement between the parties so as to award him residential custody of the child. The mother asserted that she had been laid off from her job, that she could no longer afford her apartment in Suffolk County, and that she wanted to move into her parents' home in Richmond County, where she could live without paying rent and where she had, in addition to her parents, extended family in the area. The Family Court's determination that the child's best interests would not have been served by relocating from Nassau County to Richmond County was not supported by a sound and substantial basis in the record. The evidence demonstrated that the child had a good relationship with both parents and that neither parent significantly interfered with the child's relationship or visits with the other parent. Although the mother's relocation with the child to Richmond County might have had some impact upon the father's ability to participate in the child's extracurricular activities, the father, who worked for a family-owned company, had a flexible work schedule, which should have afforded him the opportunity to participate in some of those activities. Moreover, the requested relocation did not prevent the father from having significant parenting time, as the parties had agreed in the initial stipulation of settlement. Under those circumstances, the mere increase in distance between the mother's and the father's residence would not have created an undue burden or otherwise have interfered with the father's relationship with the child. The evidence also demonstrated that the subject child had significant connections with family and friends in Richmond County, and she expressed, through the attorney for the child, who supported the mother's petition, that she wished to relocate to Richmond County with her mother. Thus, the Appellate Division found that the subject child's best interests would have been served by permitting the relocation. Accordingly, the order was reversed, the mother's petition was granted, and the father's cross-petition was denied.

Matter of DeCillis v DeCillis, 128 AD3d 818 (2d Dept 2015)

Nongestational Spouse in Same-Sex Marriage Lacked Standing

The order appealed from dismissed the petition for joint custody of the subject child. The Appellate Division affirmed. The Family Court properly dismissed the petition for lack of standing. A nonparent may have standing to seek to displace a parent's right to custody and control of his or her child, but only upon a showing that "the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or other extraordinary circumstances". Here, the petitioner, who was neither an adoptive parent nor a biological parent of the subject child, failed to allege the existence of extraordinary circumstances that would have established her standing to seek custody. Contrary to the petitioner's contention, FCA § 417 and DRL § 24 did not provide her with standing as a parent, since the presumption of legitimacy they create is one of a biological relationship, not of legal status (*see* FCA § 418 [a]), and, as the nongestational spouse in a same-sex marriage, there was no possibility that she was the child's biological parent.

Matter of Paczkowski v. Paczkowski, 128 AD3d 968 (2d Dept 2015)

Record Supported Determination to Award Father Sole Physical Custody

The parties were the parents of two children, born in 1999 and 2000, respectively. By order dated January 16, 2004, the Family Court awarded the mother sole physical custody of the children. In January 2011, the father commenced a family offense proceeding against the mother on behalf of the children, and while that proceeding was pending, the Family Court issued a temporary order of protection dated January 14, 2011, directing the mother to stay away from the children and awarding temporary sole legal and physical custody of the children to the father. The father then commenced a proceeding seeking to modify the order dated January 14, 2011, so as to award him permanent sole legal and physical custody based on a change in circumstances. The Family Court, after a hearing, granted the father's petition. The mother appealed. Upon reviewing the record, the Appellate Division found, contrary to the mother's contention, that the Family Court's determination awarding the father permanent sole legal and physical custody had a sound and substantial basis in the record. There was evidence that the relationship between the mother and the children had deteriorated, that the children wished to reside with the father, and that the father would have been more likely than the

mother to foster a relationship between the children and the noncustodial parent.

Matter of Worner v Gavin, 128 AD3d 981 (2d Dept 2015)

Record Supported Determination to Award Mother Sole Custody of Child

Contrary to the father's contention, the Family Court did not improvidently exercise its discretion in granting the mother's petition to modify the parties' stipulation of settlement dated October 13, 2010, pursuant to which the parties agreed to have joint custody of the subject child, so as to award her sole custody of the child. The record demonstrated that the parties' relationship had deteriorated to the point that they could not communicate and rendered them unable to engage in joint decision-making with regard to their child. Moreover, there was a sound and substantial basis in the record for the Family Court's determination that it was in the best interests of the child to award sole custody to the mother based upon, inter alia, the father's volatile temper, limited insight into his behavior, and tendency to blame the mother for his strained relationship with the child. Furthermore, the father failed to show that the mother violated the visitation provisions of the order dated June 19, 2013, by deliberately frustrating his visitation rights with the child.

Matter of D'Amico v Corrado, 129 AD3d 718 (2d Dept 2015)

Record Supported Determination to Grant Father Sole Custody of Child

The mother appealed from an order, which, after a hearing, granted the father's petition to modify an order of that court dated September 17, 2008, to the extent of awarding him sole residential custody of the subject child and denied the mother's petition to modify the order dated September 17, 2008, so as to award her sole custody of the subject child. The court's finding that the father had the ability to put the child's needs before his own, while the mother was resistant to fostering a relationship between the child and the father, was supported by the evidence at the hearing. The court had the opportunity to observe the parties over an extended period, and received testimony from numerous individuals, including the parties, their current spouses, and a court-appointed forensic psychologist, and interviewed the child in camera. Upon reviewing the record, the Appellate Division found that the Family Court weighed the appropriate factors and properly determined that the father should be awarded sole residential custody.

Matter of Klioutchnikov v. Klioutchnikov, 129 AD3d 969 (2d Dept 2015)

Family Court Properly Considered the Totality of the Circumstances in Determining Award of Sole Legal and Physical Custody to Mother

In March 2013, the mother filed a family offense petition alleging that the father committed acts which constituted, inter alia, the offense of aggravated harassment in the second degree (*see* PL § 240.30 [1]). After a fact-finding hearing, the Family Court granted the family offense petition and issued an order of protection against the father and in favor of the child and the mother. However, in an order dated December 2, 2014, the Family Court vacated the order of protection and dismissed the family offense petition. Accordingly, the father's appeal from the order of protection was dismissed as academic. In May 2013, the mother petitioned for sole legal and physical custody of the child. After a fact-finding hearing, at which the father represented himself, the Family Court issued an order dated April 1, 2014, granting sole legal and physical custody of the child to the mother. The father appealed. Contrary to the father’s contention, the Family Court properly considered the totality of the circumstances and did not base its custody determination primarily on its finding that the father committed the offense of aggravated harassment in the second degree. The evidence presented at the hearing on the custody petition indicated, among other things, that the mother had been the child's primary caregiver throughout the child's life, that the father had a long history of alcohol abuse, that the father voluntarily absented himself from the child for significant periods of time, and that the father suffered from an untreated mental condition which rendered him unable to take proper care of the child in the mother's absence. This evidence, which was properly credited by the Family Court, provided a sound and substantial basis for the

Family Court's determination that an award of sole legal and physical custody to the mother was in the child's best interests.

Matter of Moiseeva v Sichkin, 129 AD3d 974 (2d Dept 2015)

Attorney for the Child Permitted to Appeal Order Entered on Consent of the Parties

The attorney for the children appealed on behalf of her clients from an order of the Family Court which modified a prior order of custody and visitation to the extent of awarding the parties joint physical custody of the children and final decision-making authority to the mother. The order appealed from was entered May 28, 2014, upon the consent of the mother and the father, and embodied the terms of an agreement reached by them in settlement of the underlying proceedings. The attorney for the children argued that the Family Court approved the agreement without having sufficient information to enable it to render an informed determination as to whether the terms of the agreement were in the best interests of the subject children. Contrary to the father's contention, the attorney for the children could appeal from the order entered May 28, 2014. While no appeal lies from an order entered on the consent of the appealing party, the order entered May 28, 2014, was not entered on the consent of the attorney for the children. Rather, it was entered over the objection of the attorney for the children. Upon reviewing the record, the Appellate Division found that under the circumstances of the case, the Family Court did not possess sufficient information to enable it to render an informed and provident determination as to the best interests of the subject children. Accordingly, the matter was remitted to the Family Court for an evidentiary hearing on the issues of physical custody and visitation, including in camera interviews of the children and a new determination thereafter of the petitions. It was also directed that the hearing and determination should be preceded by forensic evaluations of the parties and the children.

Matter of Velez v Alvarez, 129 AD3d 1096 (2d Dept 2015)

Record Supported Determination That Father Failed to Establish Change in Circumstances

Contrary to the contentions of the father and the attorney for the child, the Family Court's determination that the father failed to establish a change in circumstances, since the order of custody and visitation dated March 2, 2011, that warranted a change in custody, was supported by a sound and substantial basis in the record. The child had resided with his mother and half-sisters for his entire life, and the evidence failed to establish that the mother was unfit to continue as the custodial parent. The circumstances relied upon by the father constituted either common parenting issues or isolated events that did not warrant a change in custody. Moreover, a child's preference is not determinative and, in weighing this factor, the court must consider the age and maturity of the child. Therefore, the Family Court providently exercised it discretion in according little weight to the child's stated preference, which was made when he was only eight years old.

Matter of Lao v Gonzales, 130 AD3d 624 (2d Dept 2015)

New Hearing with More Current Evidence and in Camera Interviews with Young Children Required

The Family Court's determination that it was in the best interests of the children to award sole custody to the father lacked a sound and substantial basis in the record. The custody hearing concluded on May 15, 2014, over 20 months after the mother's petition was filed, and the order appealed from was issued 6 months after that. For the most part, the evidence at the hearing was focused upon allegations, events, and circumstances relating to the period of time that preceded the filing of the petition and cross petition, and the parents' acrimonious relationship with each other, with limited evidence about the children's more current circumstances and best interests. Also, under the unique facts of the case, and despite the children's relatively young ages, the court should have conducted in camera interviews with the children. Accordingly, the Appellate Division remitted the matter for a new hearing and directed the Family Court to conduct in camera interviews with the children.

Matter of Middleton v Stringham, 130 AD3d 627 (2d Dept 2015)

Motion to Direct Plaintiff to Undergo Psychiatric Evaluation as Condition of Continued Visitation Properly Denied

The order appealed from denied the defendant's motion to direct the plaintiff to undergo a psychiatric evaluation as a condition of continued visitation with the parties' child. A court hearing a pending proceeding or action involving issues of custody or visitation may properly order a mental health evaluation of a parent, if warranted, prior to making a custody or visitation determination (*see* FCA § 251 [a]). In addition, a court may properly direct a party to submit to counseling or treatment as a component of a visitation or custody order. However, a court may not order that a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights. The rationale underlying this rule is that a court may not properly delegate to mental health professionals the ultimate determination of whether a parent will be awarded visitation rights, a determination that is properly made by the court. Therefore, the Supreme Court properly denied the defendant's motion to direct the plaintiff to undergo a psychiatric evaluation as a condition of continued visitation with the parties' child.

Lajqi v Lajqi, 130 AD3d 687 (2d Dept 2015)

Supreme Court Erred in Summarily Determining That New York Was No Longer the Home State of the Parties' Children

The Supreme Court erred in summarily determining that New York was no longer the home state of the parties' children and an inconvenient forum based solely on the fact that at the time the children lived in California with the mother. Since it made the initial custody determination in this case, in deciding whether it lacks exclusive, continuing jurisdiction pursuant to DRL § 76-a (1), the Supreme Court should have given the parties an opportunity to present evidence as to whether the children maintained a significant connection with New York, and whether substantial evidence was available in New York concerning the children's care, protection, training, and personal relationships (*see* DRL § 76-a [1] [a]). Further, before a court can determine that New York is an inconvenient forum for a custody dispute, it is required to consider the factors set forth in DRL § 76-f (2) (a)-(h) and allow the parties to submit information regarding these factors. Accordingly, the matter was remitted to the Supreme Court for further proceedings to determine whether the court retains exclusive and continuing jurisdiction over the parties' dispute and, if so, whether New York is an inconvenient forum.

Pyronneau v Pyronneau, 130 AD3d 707 (2d Dept 2015)

Error Not to Set a Schedule for Visitation with Mother

Although there was not a full hearing, contrary to the mother's contentions, considering the testimony elicited from, among others, the father, the mother, the maternal grandmother, a visitation supervisor, and the neutral forensic psychologist, as well as the reports received from various professionals and agencies, the Family Court possessed adequate relevant information to enable it, without additional testimony, to make an informed and provident determination as to the best interests of the subject child. Moreover, the court properly determined that the best interests of the child were served by awarding the father sole legal and physical custody in light of the mother's numerous unfounded allegations of sexual abuse against the father and her erratic and inappropriate behavior during the pendency of the proceeding. The record also showed that the father was more likely than the mother to foster a relationship between the child and the noncustodial parent. Considering the repeated unfounded allegations of sexual abuse by the mother against the father, and her continued attempts to undermine the father's ability to form and maintain a relationship with the child, the Family Court's determination that the mother's contact with the child should be limited to therapeutic supervised visitation was also supported by a sound and substantial basis in the record. However, the Family Court erred in failing to set a schedule for therapeutic supervised visitation, implicitly leaving it for the parties and the provider to determine. Accordingly, the order was modified and the matter was remitted to the Family Court to set a schedule of therapeutic supervised visitation.

Matter of Goldfarb v. Szabo, 130 AD3d 728 (2d Dept 2015)

Mother's Misconduct Did Not Dispense with Need for Hearing on Father's Petition to Modify Custody

The Supreme Court erred in modifying the custody order by changing sole custody from the mother to the father in the absence of a hearing. The record did show adequate relevant information which would have enabled the Supreme Court to make an informed and provident determination as to the child's best interests. To the contrary, the court, which was faced with significant factual issues, awarded sole custody to the father because the mother adamantly proclaimed, in open court, that she would not abide by the court's orders with respect to visitation. The mother's disrespect for the court's authority was not a sufficient basis to modify custody in this case where, among other things, the child had been in the mother's sole custody for several years, the father did not yet have overnight visits, and the court repeatedly expressed concerns about the father's ability to care for the child for an extended period of time in his home. Under these circumstances, the mother's misconduct certainly did not dispense with the need for a hearing to determine whether there was a change in circumstances such that modification of the prior order of custody was in the best interests of the child.

Kadyorios v Kirton, 130 AD3d 732 (2d Dept 2015)

Error to Dismiss Mother's Petition for Lack of Jurisdiction

The record revealed that in 1999, the Family Court issued an order awarding sole custody of the subject child to the maternal grandmother. In 2003, the grandmother relocated with the child to Florida. In August 2014, the mother filed a petition in the Family Court to modify the order issued in 1999, so as to award her sole custody of the child, alleging, inter alia, that the child was staying with her in New York after the grandmother had "kicked [the child] out" of her home. In the order appealed from, the Family Court dismissed the mother's petition for lack of jurisdiction, based upon its finding that Florida was the child's home state. Since it was undisputed that the initial child custody determination was rendered in New York, the Family Court erred in, sua sponte, dismissing the mother's petition for lack of jurisdiction, without considering whether it had exclusive, continuing jurisdiction pursuant to DRL § 76-a (1), or affording the mother an opportunity to present evidence as to whether the child had maintained a significant connection with New York, and whether substantial evidence was available in New York concerning the child's "care, protection, training, and personal relationships" (*see* DRL § 76-a [1] [a]). Accordingly, the matter was remitted to the Family Court for a determination of that issue.

Matter of Nelson v McGriff, 130 AD3d 736 (2d Dept 2015)

Nonparent Petitioners Demonstrate Extraordinary Circumstances

In a custody proceeding between a parent and a nonparent, the parent has a 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. The burden is on the nonparent to prove the existence of extraordinary circumstances. Where extraordinary circumstances are found to exist, the court must then consider the best interests of the child in awarding custody. Here, the Family Court properly determined that the nonparent petitioners sustained their burden of demonstrating extraordinary circumstances based upon, inter alia, the mother's prolonged separation from the subject child and lack of significant involvement in the child's life for a period of time, the mother's failure to contribute to the child's financial support, and the strong emotional bond between the child and the nonparent petitioners. Moreover, the Family Court's determination that an award of custody to the nonparent petitioners was in the best interests of the child was supported by a sound and substantial basis in the record.

Matter of Culberson v Fisher, 130 AD3d 827 (2d Dept 2015)

Evidence Presented at Hearing Found Insufficient to Make an Informed Best Interests Determination

The order appealed from, dated December 8, 2014 , denied the mother's motion pursuant to CPLR 5015 to vacate a final order of custody of the same court dated November 10, 2014, which, after a hearing and upon the mother's failure to appear, granted the father's petition for custody of the subject child. The Appellate Division found that the evidence presented at the hearing was insufficient for the Family Court to have made an informed best interests determination. No specific findings of fact were made by the court, the attorney for the child was not afforded an opportunity to meet with her client before custody was decided, and the court failed to award the mother any visitation. The parents in this case did not live in the same state, yet the record did not indicate whether the Family Court fully considered the impact of moving the child away from his mother, who had been the child's primary caregiver since birth, his siblings, and his maternal grandmother, to live with the father and paternal grandparents in Pennsylvania. While the strict application of the factors relevant to relocation petitions is not required in the context of an initial custody determination, the fact that the subject child would have been required to relocate to Pennsylvania upon an award of final custody to the father should have been considered as one of many factors in determining what was in the child's best interests. Moreover, the child had special medical needs, and there was little evidence in the record to show that this factor was adequately considered. While the record indicated that the father's custody petition was prompted by a pending investigation of medical neglect against the mother, the record did not indicate what, if anything, transpired from that investigation, and whether the allegations of neglect against the mother were established. The record revealed neither whether the father was capable of providing an acceptable course of treatment for the child's special medical needs in light of all the surrounding circumstances, nor whether the mother had deprived the child of adequate medical care. It was noted that while the Family Court's concern that the mother was actively seeking to alienate the child from the father was very serious and was required to be viewed as inconsistent with the best interests of the child, this factor alone could not justify the court's custody determination. Under these circumstances, the mother's motion to vacate the final order of custody should have been granted in the interest of justice as the final custody order lacked a sound and substantial basis in the record. Accordingly, the order was reversed, and the matter was remitted for a new hearing and determination.

Matter of Sims v Boykin, 130 AD3d 835 (2d Dept 2015)

Record Found No Longer Sufficient to Make Determination

The order appealed from granted the father's motion to modify prior orders of custody and visitation incorporated into the parties' judgment of divorce so as to award him sole legal and physical custody of the subject child. The Appellate Division reversed. The record revealed that the Supreme Court did not conduct an in camera examination of the child, and relied on a forensic report that, by the date the court issued its determination, was more than 2½ years old. Under these circumstances, including a protracted hearing conducted over the course of 44 nonconsecutive days (*see* 22 NYCRR 202.16 [l]), the delay thereafter in issuing the order after the hearing, and the pace of the psychological development of the child, the Appellate Division found the record no longer sufficient to make a determination.

E.V. v R.V., 130 AD3d 920 (2d Dept 2015)

Error to Dismiss Petition Without a Hearing

The order appealed from, without a hearing, granted the mother's application to dismiss the father’s petition to enforce the visitation provisions of a judgment of divorce dated April 21, 2009, and of an order dated October 24, 2011. In his petition, the father sought, inter alia, to enforce a provision of the judgment of divorce, which awarded him supervised visitation with the parties' two children, and to enforce the order of October 24, 2011, which provided for supervised therapeutic visitation with the children. The supervised visitation occurred until late 2010, and the supervised therapeutic visitation ended approximately in March 2012. In support of his allegation that supervised visitation ceased as a result of the mother's conduct, the father submitted a letter from the president of the agency that supervised the visitation to the effect that the visitation ended due to the children's failure to

attend. Assuming the truth of the allegations in the petition, and according the petitioner the benefit of every favorable inference, the petition stated a valid cause of action to enforce the judgment of divorce providing for supervised visitation and the order providing for supervised therapeutic visitation. Moreover, the Family Court erred in failing to hold a hearing prior to granting the mother's application to dismiss the father's petition. Since a noncustodial parent is entitled to meaningful visitation, the denial of that right must be based on substantial evidence that visitation would be detrimental to the welfare of the child or that the right to visitation has been forfeited. However the 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 substantial basis in the record. Here, the parties disputed the reasons as to why the father's period of supervised visitation and supervised therapeutic visitation ended. Therefore, the Family Court erred in denying the father's petition without an evidentiary hearing. Moreover, the record did not reflect that the Family Court possessed adequate relevant information to have enable it to make a determination as to the best interests of the children in the absence of a hearing. Accordingly, the order was reversed, and the matter was remitted to the Family Court for a hearing to determine whether supervised visitation or supervised therapeutic visitation with the father was in the best interests of the children.

Matter of Seeback v Seeback, 131 AD3d 535 (2d Dept 2015)

Error to Base Decision on Off-the-Record Conferences

The record revealed that the Supreme Court, after holding “extensive” in camera discussions with counsel on the issues of excessive corporal punishment and parental alienation, refused to allow testimony on these controverted issues, stating that they were “sporadic and inconsequential.” Instead, the Supreme Court directed that only “positive” aspects of the parties' parenting be presented on the record. This was error, since the court cannot base a significant portion of its decision on off-the-record conferences. Accordingly, a new trial was required concerning the custody of the child, during which the issue of the best interests of the child was to be more fully examined.

Lee v Xu, 131 AD3d 1013 (2d Dept 2015)

Court Erred in Granting Parents' Motion for Summary Judgment

Family Court erred in granting the parents' motions for summary judgment and dismissed petitioner's application for custody of the six-year-old child. Here, the mother lived with petitioner around the time when the subject child was born and when petitioner moved out the mother consented to the petitioner taking the child with her. The child lived with petitioner for many years and thereafter, the mother consented to petitioner having custody of the child, without prejudice to the child's father, who was then incarcerated. Upon release from prison, the father petitioned to modify custody and the court, without an evidentiary hearing, gave joint legal custody of the almost six-year-old child to the parents with physical custody to the father. The court declined to order visitation to the petitioner and directed all parties to submit papers on whether there were extraordinary circumstances to award custody to petitioner. Thereafter, the father was incarcerated again and both petitioner and the mother filed for physical custody. Once more, without a hearing, the court determined petitioner had failed to show extraordinary circumstances and dismissed her petition. The court's dismissal of petitioner's application based on summary judgment was not appropriate since such relief should only be granted where there are no material facts in dispute sufficient to warrant a trial. Although petitioner had the burden of establishing extraordinary circumstances, the parents' summary judgment motion required them to demonstrate the "absence of triable issues of fact regarding the existence of extraordinary circumstances". Given the undisputed fact that the child had lived with petitioner for most of his life and given petitioner's assertion that she had provided for his needs and she was the only mother he know, the court should have held an evidentiary hearing on this issue.

Matter of Liz WW. v Shakeria XX., 128 AD3d 1118 (3d Dept 2015)

Evidentiary Hearing Unnecessary Where Allegations in Petition are Insufficient

Family Court dismissed incarcerated father's petition to modify visitation in order to have phone contact and written communication with his children. The Appellate Division affirmed. Here, the father's incarceration was due to multiple counts of sex abuse of a female relative. The father's allegation that he had been in counseling, was active in his religion and had completed vocational training and a wellness class in prison did not constitute a change in circumstances sufficient to re-address the best interests of the children and an evidentiary hearing was unnecessary in cases such as this where the allegations in the petition were insufficient to warrant a hearing.

Matter of Hayes v Hayes, 128 AD3d 1284 (3d Dept 2015)

Insufficient Basis to Modify Father's Parenting Time With Children

Family Court dismissed father's petition to modify custody. The Appellate Division affirmed. Here, the prior order awarded the mother sole custody of the party's two children and the father, who had suffered a traumatic brain injury, had visitation with the children supervised by his sister. The father argued that he had recovered sufficiently to be awarded unsupervised parenting time. However, Family Court determined based on the father's testimony and his conduct in court, there was insufficient improvement in his condition to warrant unsupervised parenting time. Giving due deference to the court's credibility determinations, the father failed to establish a sufficient change in circumstances to warrant a modification of the prior order.

Matter of Gilbert v Gilbert, 128 AD3d 1286 (3d Dept 2015)

Filing of Anders Brief Showed Lack of Effective Advocacy

Family Court modified a prior order of custody and awarded sole legal and physical custody of the child to the father. The mother appealed but the mother's appellate attorney asked to be relieved of his assignment arguing there were no nonfrivolous issues to be raised. The Appellate Division disagreed, withheld the decision and appointed another appellate attorney for the mother. The Court noted that it was rare that an Anders brief would be submitted in a contested custody matter such as this one where a full evidentiary hearing had occurred. In addition to the issue of whether the grant of sole legal custody was proper, a review of the record revealed an additional issue of arguable merit, namely whether the restrictions placed on the mother's parenting time were appropriate.

Matter of Reynolds v Van Dusen, 128 AD3d 1294 (3d Dept 2015)

Where Parent Attempts to Regain Custody from Non-Parent, Court First Has to Determine Whether Extraordinary Circumstances Exist

Upon the parties' consent and without determining whether extraordinary circumstances existed, Family Court awarded joint legal custody of the parties' child to maternal grandmother and father, with primary physical custody to the grandmother and supervised visits to the mother. Two years later, the mother and then the father filed petitions to modify the prior order. Family Court dismissed the mother's petition upon the basis that she had failed to show a change in circumstances. However, as to the father's petition, the court determined there were extraordinary circumstances and found it was in the child's best interests to award custody to the father with parenting time to the mother. The mother appealed and the Appellate Division reversed. Since it was the mother who was trying to regain custody of the child, Family Court should have first considered whether extraordinary circumstances existed before placing the burden on the mother to show whether there was a change in circumstances. Although the Appellate Division had the power to independently review an adequately developed record, the order here failed to clearly state the rights of each party. Additionally, since neither the father nor the grandmother appealed from the court's order, it was unclear whether the father was awarded sole legal custody or if a joint custodial arrangement existed between the father and grandmother, or between all three parties.

Matter of Dumond v Ingraham, 129 AD3d 1131 (3d Dept 2015)

No Appeal Lies From Consent Order

After the grandparents had met the burden of showing extraordinary circumstances, the father and the grandparents consented to a joint custody order with physical custody to the grandparents and substantial visitation for the father. One month thereafter, prior to Family Court's signature of the stipulated custody order, the father filed to modify. Family Court dismissed the father's petition and the Appellate Division affirmed. No appeal lies from an order entered on consent. Additionally, the father had failed to make a motion to vacate the order. Finally, the father's petition failed to set forth a sufficient evidentiary showing to warrant a hearing. His allegation that his relationship with his children had deteriorated due to alienation of affection was broad and unsubstantiated, especially so since the prior order had just been issued one month earlier.

Matter of Lowe v Bonelli, 129 AD3d 1135 (3d Dept 2015)

Oral Stipulation Entered by Parties Was Binding and Should Not Have Been Disturbed

Family Court determined respondent mother had violated the prior custody order. The Appellate Division reversed. Here, the record showed the parties, who were both represented by counsel, stipulated in open court that the father would have summer weekend parenting time every other weekend, however, Family Court erroneously issued a written order directing that the father would have summer weekend parenting time every weekend. The oral stipulation entered by the parties in open court had binding effect and should not have been disturbed in the absence of good cause such as fraud, collusion, mistake or duress and in this case, there was no such showing.

Matter of MacNeil v Starr, 129 AD3d 1144 (3d Dept 2015)

Non-Parent Met the Burden of Showing Extraordinary Circumstances

Family Court dismissed the mother's custody modification petition and continued custody of the child with the third party. The mother's only argument on appeal was that Family Court erred in finding there were extraordinary circumstances. The Appellate Division affirmed. Here, the record showed by the time the child was nine-months-old, she had been removed from her mother's care and placed in the care and custody of the third party and the child had remained in the care of the third party for nine years. The mother had not made any effort to regain custody of her child until this time. Additionally, the mother's visitation with the child was very sporadic and the proof showed the mother was addicted to cocaine. Furthermore, the child strongly preferred to live with the non-parent and given all the evidence, the court did not err in finding the non-parent had met the burden of showing extraordinary circumstances.

Matter of Hoch v Wills, 129 AD3d 1146 (3d Dept 2015)

Child's Best Interests to Continue Visits With Grandmother

Paternal and maternal grandmothers of the then one-year-old subject child, obtained joint custody of the child through a Texas court order. The father had joined the military and the mother had substance abuse issues. The child lived with the paternal grandmother for nearly two years after which time the father returned from the military. The father lived with the child and paternal grandmother for about a year and then he relocated with the child to New York. The two grandmothers drafted an affidavit granting the father custody of the child and kept the right to visit with the child for 30 days every summer. Thereafter, upon the father's application, Family Court modified the order by providing sole custody to the father, supervised visitation to the mother and maternal grandmother, which was to occur during the period of time the child had visitation with her paternal grandmother. The father then applied to terminate the paternal grandmother's visits with the child and after a hearing, Family Court ordered, among other things, that the paternal grandmother would have three weeks every summer with the child and the maternal grandmother

would have visitation one week each summer. The Appellate Division affirmed. Here, although the father demonstrated there had been a sufficient change in circumstances due to his deteriorating relationship with the paternal grandmother, the visitation schedule devised by the court was in the child's best interests. The ongoing problems between the parties was based on their inability to compromise. The father used the child "as a pawn" and Family Court properly concluded, after a Lincoln hearing, that the child had been coached by her father and his girlfriend. Additionally, there was ample evidence that the child enjoyed spending time with the paternal grandmother, who had been her primary caretaker for well over a year, and the father's other objections were found to be without merit.

Matter of Layton v Grace, 129 AD3d 1147 (3d Dept 2015)

Sound and Substantial Basis in the Record to Suspend Mother's Supervised Visitation With Children

The mother, against whom there were two prior neglect findings, appealed from an order of Family Court which, among other things, modified a prior order and granted the father and his wife sole custody of the two subject children and suspended the mother's supervised visits with the children. The Appellate Division affirmed. There was a sound and substantial basis in the record to suspend the mother's visitation. Here, the evidence showed the mother had contacted CPS and made allegations against the father and stepmother, which were later deemed unfounded. The reports included allegations that the father had sexually molested the daughter, that the father and his wife had made racist and homophobic remarks to the son and had failed to provide proper food for the children, that the stepmother had struck the daughter in the head and caused her ear to bleed, that she had threatened to poison the children and that she had carved an initial into the son's hair and told him it was a homophobic slur against him. The evidence also showed the daughter experienced great stress when she was removed from her classroom to be questioned about the mother's allegations. Additionally, the mother cancelled visitation with the children on short notice, made inappropriate comments in front of them and also made derogatory remarks to them about the father and stepmother. The children acted out negatively when they had to visit her and both children were traumatized by the turmoil in their lives. The mother had been diagnosed with major depressive disorder, panic disorder without agoraphobia, post-traumatic stress disorder and borderline personality disorder. Although she had made some progress with regard to her mental health issues, she still failed to acknowledge her prior neglect of the children. Furthermore, there was evidence of her marked hostility towards the father, stepmother and child welfare authorities and given these circumstance along with her mental health issues, it was in the children's best interests to suspend her visitation.

Matter of Patrick EE. v Brenda DD., 129 AD3d 1235 (3d Dept 2015)

Father's Murder of Mother Supports Presumption that Visitation to Father Not in Child's Best Interests

Family Court properly awarded maternal grandparents custody of the minor child after the murder of the mother and her boyfriend and the father became the prime suspect. By the time the appeal was heard, the father had been convicted of their murders, specifically one count of murder in the first degree and two counts of murder in the second degree, and sentenced to life in prison without the possibility of parole. Since the father had consented to the custody order, he did not have the right to appeal this matter. Furthermore, his murder of the mother created a presumption that it was neither appropriate nor in the child's best interest to have custody or visitation awarded to the father. Although this presumption was rebuttable, the father first had prove visitation would be in child's best interests and in this case he had not done so.

Matter of Rumpel v Powell, 129 AD3d 1344 (3d Dept 2015)

Mother's Appeal Deemed Moot

The mother appealed from a Family Court order, issued on February 2014, modifying a prior custody order and awarding the father sole legal custody. During the pendency of the appeal, a subsequent order was issued

by Family Court on November 2014, suspending and denying any and all parenting time to the mother. The court's order expressly stated that its November 2014 order superceded all prior orders and based on this, the mother's appeal was moot.

Matter of Mosier v Cole, 129 AD3d 1346 (3d Dept 2015)

Insufficient Change in Circumstances

Family Court limited incarcerated father's contact with his children to monthly monitored, written communication based on the emotional harm they suffered due to telephonic contact with their father. Ten months later, the father moved to modify visitation and Family Court properly dismissed his petition. The father's assertions that he had, since the prior order, received a certificate for attending substance abuse meetings, had positive inmate reports and completed vocational training were insufficient to show there had been a change in circumstances. The denial of his request for the children to participate in a prison program was also proper. The fact that the father had utilized prison services did not require a re-examination of the children's best interests, especially where the changes did not address the harmful reaction of the children caused by his telephonic contact with them. Additionally, since the prior order had been issued, the father had only written to the children twice during the ten-month period.

Matter of McIntosh v Clary, 129 AD3d 1392 (3d Dept 2015)

No Error in Family Court's Decision to Not Modify Custody

Family Court issued an order of sole legal custody to the mother and parenting time to the father. Thereafter, both parties filed petitions to modify. The mother sought to have the father's parenting time limited and the father petitioned for more visitation and sole legal custody of the child. Family Court determined neither party had established a change in circumstances and dismissed the petitions. The father appealed and the Appellate Division affirmed. Here, the father argued the court failed to give sufficient weight to the wishes of the child whom he alleged wanted to reside with him half the time. The record, however, indicated that while the child had initially wanted to live with the father, thereafter, she wanted the prior order to continue. Her position was made clear by the attorney for the child, who read a letter from the child to the court, where she indicated she wanted to live with both parents. Additionally, the court held a Lincoln hearing. Although the court was troubled because the child seemed to have a "prepared speech" at the Lincoln hearing, based on the absence of other factors to support the father's position, there was no error in the court's determination not to modify the order.

Matter of Jones v Moore, 129AD3d 1400 (3d Dept 2015)

Sole Legal Custody to Mother Proper Given Father's Domestic Violence History and Failure to Make Efforts to Control His Abusive Behavior

Family Court modified a prior joint legal and physical custody order and awarded the mother sole legal custody with parenting time to the father. The Appellate Division affirmed. Here, the child was in the father's care when an incident of domestic violence occurred between the father and the girlfriend. The evidence showed although the child did not witness the incident, she saw his arrest and was visibly upset. When the police officers came to the the father's home, it was in shambles, multiple police officers were present and the child was checked by an officer to see if she had glass in her hair. The father later plead guilty to harassment in the second degree and was ordered to attend a violence intervention program, which he failed to do. Additionally, the father did not have stable housing for a period of time after this incident since there was a stay away order of protection against him on the girlfriend's behalf. The father later reconciled with the girlfriend and both of them continued to downplay the domestic violence. Based on this evidence, there was a sound and substantial basis in the record to support the court's finding of a change in circumstances. There was also sound and substantial basis to award primary physical custody to the mother. The mother was able to offer stability whereas the father had a history of domestic violence and failed to attend the necessary intervention program.

Matter of Fountain v Fountain, 130 AD3d 1107 (3d Dept 2015)

Sound and Substantial Basis in the Record to Allow Relocation

Family Court granted the mother's petition to relocate from Binghamton to North Carolina. The Appellate Division affirmed. There was a sound and substantial basis for the court's order. Here, the parties had a poor relationship and were unable to effectively communicate on matters involving the child. The mother had bought a home with her husband in North Carolina, where he was living and working as a mental health therapist. The mother and the child had been traveling to see him each month. The mother was unable to find work in Binghamton but had received a job offer in North Carolina, where the cost of living was cheaper than Binghamton. Relocation would mean the mother would not have to maintain two households. Additionally, the evidence showed after the child was allowed to relocate under the terms of a temporary order, he no longer had the behavioral issues he had exhibited at his school in New York and his grades at his new school, with the exception of math, were good. The child's school counselor at his old school testified she had referred the child to a social worker after he reported he was feeling suicidal. The child's social worker, who had met with the child for a period of two years, testified the child wished to relocate and he was "fearful" of his father. A child protective caseworker testified she had received a report that the child had been physically assaulted by the father. Furthermore, the father blamed the mother for his poor relationship with the child and was unable to see that his behavior contributed to their worsening relationship. Although the move would
mean less time for the father with the child during the school year, he had been awarded extensive parenting time in the summer and he could always visit the child if he so wished.

Matter of Rebecca HH. v Gerald HH., 130 AD3d 1158 (3d Dept 2015)

Sound and Substantial Basis in the Record to Award Sole Legal Custody to Mother

The parties entered into a stipulation where the mother was allowed to relocate with the subject child from Onondaga County to Albany County, the father was given parenting time and the mother was given final decision-making authority. Thereafter, both parties filed modification and violation petitions and the mother also filed a family offense petition against the father. After a hearing, Family Court awarded the mother sole legal custody with supervised visitation to the father, granted the mother an order of protection against the father and denied the father's request for attorneys fees. The Appellate Division affirmed, determining there was a sound and substantial basis for the court's award of sole legal custody to the mother and it was in the child's best interests to award supervised parenting time to the father. Although the mother's modification petition was unclear as to whether she was seeking sole legal custody, her testimony clearly stated her position and thus the father was provided with sufficient notice of the mother's intent. The record showed the parties' relationship had deteriorated to the point where they were unable to work together on behalf of the child. Evidence showed the father continued to denigrate and undermine the mother's role in the child's life, placed his needs ahead of the child's needs, discussed court matters with the child, made unfounded accusations about the mother to child protective and law enforcement and tried to undermine the mother's efforts to obtain mental health counseling for the child, which impacted the child's academic performance. The forensic psychologist, who had evaluated the parties and the child, testified the father was focused on convincing the child that life with the mother was not good, that his life in Albany County was not good and the child would only be happy and healthy if he were back with the father. On the other hand, the mother tried to achieve some "peace and harmony" in the child's life and despite all, recognized the importance of the father's presence in the child's life and wanted the father to have parenting time with the child. Moreover, although the order of protection had expired by the time the appeal was heard, the issue was not moot since a finding of the commission of a family offense had enduring consequences. Here, the evidence showed the father committed the family offense of harassment in the

second degree. He had telephoned the mother and stated he would "hunt..[her]..down and take care of [her]", called her a "bitch" and told her she "would be sorry".

Matter of Vanita UU. v Mahender VV., 130 AD3d 1161 (3d Dept 2015)

Child's Best Interests to Award Sole Legal Custody to Father

Family Court modified a prior custody order and awarded sole legal and primary physical custody of the then three-year-old child to the father and parenting time to the mother. The Appellate Division affirmed. Here, the record showed the relationship between the parents had deteriorated so as to make it impossible for them to cooperate for the sake of the subject child. The child had significant health care needs and the evidence showed the mother consistently failed to keep the father apprised of the child's medical appointments. Her failure to do so had resulted in long gaps in the child 's ability to see a particular health care provider. Additionally, the child often returned from the mother's care with physical injuries, including scratches, bruises and a black eye. The mother stated she was unaware of the child's injuries with the exception of the black eye, which she said was caused by the child falling down the stairs with a toy in his hand. Furthermore, the mother had moved to four different addresses since the child's birth whereas the father had lived his entire life in one family home. Giving due deference to the court's credibility determinations, there was a sound and substantial basis for the court's decision.

Matter of Cornick v Floreno, 130 AD3d 1170 (3d Dept 2015)

Father's Refusal to Meaningfully Participate in Supervised Visits With Children Supports Court's Order of Limited Supervised Visits to Father

Five days after a stipulated order of custody and visitation was issued, the father moved to modify visitation and after a hearing, Family Court issued an order of supervised visits to the father. The father argued the court erred in directing his visits be supervised. The Appellate Division affirmed. Since all parties agreed the prior visitation order was unworkable, the only issue was whether the modified visitation order was in the best interests of the children. Here, the evidence provided ample support for the court's order. The father, who was in jail for eleven months, chose not to see his children during this period of time and later, had one supervised visit with them during a six month period where he chose to spend only five minutes with them. Prior to his incarceration, he had only seen the children five or six times during a 13 month period. Additionally, he chose not to have supervised visits with his children at a family resource center and declined the court's offer of a supervised visit. He stated he was aware the children did not know he was their biological father, stated he had limited resources and had a personality disorder for which he had not received treatment. Given the children's limited contact with their father, their unfamiliarity with him and his refusal to meaningfully participate in anything except unsupervised visitation, the court properly exercised its discretion in directing his visits be supervised.

Matter of Sparbanie v Redder, 130 AD3d 1172 (3d Dept 2015)

Sound and Substantial Basis in the Record to Support the Finding of Extraordinary Circumstances

Family Court awarded custody of the subject child to petitioner great-aunt and issued an order of protection on petitioner's behalf against the mother. The mother appealed arguing the court erred in determining petitioner had standing to pursue custody and also appealed the order of protection. The Appellate Division determined there was a sound and substantial basis in the record to support the finding of extraordinary circumstances but there was insufficient evidence to support the court's issuance of an order of protection. Here, the pertinent factors in support of extraordinary circumstances included the difference in the quality of the relationship between the mother and the child as opposed to the petitioner and the child. The mother neglected to maintain a continuous relationship with the then 12-year-old child. While the mother lived with the child at petitioner 's home for periods of time, this was due to her lack of housing rather than an attempt to provide support to the child. Additionally, the mother would leave the child at petitioner's home in

order to live with different paramours for significant periods of time, and she would pull the child's hair and call her "stupid" on occasions where she assisted the child with her homework. The child had lived with petitioner for most of her life and petitioner and the child had a close relationship. However, the court should not have issued an order of protection against the mother since the evidence showed she did not have the mens rea to commit the family offense of disorderly conduct. Although the mother had engaged in a verbal and physical altercation with the grandmother at petitioner's home, there was no evidence to show that she "inten[ded] to cause public inconvenience, annoyance or alarm, or recklessly creat[ed] a risk thereof" pursuant to PL §240.20.

Matter of Sharon K. v Dara K., 130 AD3d 1179 (3d Dept 2015)

Insufficient Evidence to Support Full Custody of Children to Father

Parents of two children, ages one and two, agreed the mother and children would relocate to California and the father would follow a few months later. The mother and children moved and thereafter, the father informed the mother he intended to join them but she advised him to remain in New York. Thereafter, the parties' relationship broke down and all communication ceased. The father filed for custody in New York and the mother filed in California. New York was determined to be the children's home state and after a hearing, where only the mother testified via direct examination, the court granted the father and trial attorney for the child's motion for a directed verdict, awarding the father full custody and no parenting time to the mother. On appeal, the mother and the appellate attorney for the child argued the court's order lacked a sound and substantial basis in the record. The Appellate Division reversed. Family Court erred in granting a motion for a directed verdict based on limited evidence and testimony. An initial award of custody should be based on the children's best interests after a full hearing and in consideration of all relevant factors. The record here was insufficient to permit such an analysis. Furthermore, the court failed to make any provision for contact or communication between the mother and the young children, who had been deprived of contact with their mother for a lengthy period of time. The Appellate Division determined a temporary parenting time order was necessary so that there could be some contact between the mother and children during the pendency of the case. However, due to the sparsity of the record, the matter was remitted to Family Court to issue a temporary parenting time order within 30 days. Additionally, since the manner in which the hearing was conducted showed Family Court had treated the mother with disdain and it was uncertain whether she would be treated impartially if this matter was heard by the same Judge, the case was remitted to a different Judge.

Matter of Varner v Glass, 130 AD3d 1215 (3d Dept 2015)

Sound and Substantial Basis to Find Extraordinary Circumstances

Family Court modified a prior order of joint legal custody between the parents, determined the grandmother had established extraordinary circumstances and awarded her sole legal custody of the minor child**.** The father appealed arguing that Family Court's finding of extraordinary circumstances was not supported by a sound and substantial basis in the record. The Appellate Division disagreed and affirmed. Here, the child had chronic health and dental issues which the father ignored and did not make any effort to obtain the necessary care for the child. On the other hand, the grandmother actively assisted the child in getting medical and dental care. Additionally, the child had eye surgery and the father failed to follow up with the necessary treatment. The grandmother brought the child for the follow-up care. Additionally, there was proof the father was physically and verbally abusive to the mother in the child's presence and was verbally abusive to the child. The ignored parenting responsibilities, abused various drugs and spent money on drugs rather than food and medicine needed by the family. The child had been evaluated in preschool as having special needs but the father failed to participate in any of the child's school meetings. However, the grandmother was in contact with the child's teachers on a weekly basis. The child had been in the grandmother's care for a large part of her life and she fared better when in her care.

Matter of Yandon v Boisvert, 130 AD3d 1257 (3d Dept 2015)

Law Strongly Favors Development and Encouragement of Sibling Bonds

Family Court awarded sole legal custody of the then two-year-old child to the mother, with parenting time to the father at such times when the father's older children were not present. The Appellate Division affirmed the custody determination but found the court had erred in limiting the father's parenting time to periods when the subject child's half-siblings were not present. Sole legal custody to the mother was proper since the child had resided with the mother since birth and the mother, who was a registered nurse, was dedicated to the child. The father had fundamental deficiencies as a parent. Several times he returned the child to the mother with a soiled diaper and rashes, failed to feed the child the frozen breast milk provided by the mother, and once had returned the child, who had a fever, to the mother and later failed to ask how the child was faring. Additionally, he had a history of inappropriately using corporal punishment against his older children, which had resulted in an unspecified prior criminal conviction and an indicated child protective report. However, there was little evidence in the record to support the court's determination that limiting the father's time with the subject child to periods when the half-siblings were not present would lessen the risk of danger to the child and allow the father to focus on the child exclusively. This finding deprived the child of contact with his half-siblings and the law strongly favored the development and encouragement of sibling bonds.

Matter of Demers v McLear, 130 AD3d 1259 (3d Dept 2015)

Children's Best Interests to Award Sole Legal Custody to Mother

Family Court modified a prior order, awarded sole legal custody of the parties three daughters to the mother and granted the father extended parenting time with the children. The Appellate Division affirmed. The mother had been the primary caregiver throughout the children's lives, the father acknowledged he did not visit the children for three years after the parties' separation because he was trying "to find himself" and he showed little interest in the children's health care or education. Additionally, he lived 120 miles away from the mother's residence, worked an all night shift which meant the children would have to be cared for by one of his brothers during this time and the brothers were only 19 and 23-years old. Although the mother showed she was not cooperative with the father, the court had warned her of this factor and the father was also not very cooperative with the mother. Moreover, the mother had a stable home and was actively involved in the children's lives. Given all the evidence, including the Lincoln hearing, the court's decision was in the children's best interests.

Matter of Shokralla v Banks, 130 AD3d 1263 (3d Dept 2015)

Children Should Not Have to Openly Choose Between Parents

Family Court modified a prior custody order and awarded custody of the 16-year-old child to the father with parenting time to the mother. The mother appealed and the Appellate Division affirmed. Here, the mother argued the court erred in not holding a Lincoln hearing. However, the record showed the mother had directly opposed a Lincoln hearing and in fact had argued the child was old enough to testify in open court, although he had not been called as a witness. The Appellate Division noted that confidential Lincoln hearings are necessary in custody cases because "a child who is explaining the reasons for his or her preference... should not be placed in the position of having his or her relationship with either parent further jeopardized by having to publicly relate his or her difficulties with them or be required to openly choose between them" and such considerations should apply with equal force to children of all ages.

Matter of Battin v Battin, 130 AD3d 1265 (3d Dept 2015)

Sound and Substantial Basis in Record to Support Sole Legal Custody to Father

Family Court modified a prior order and awarded sole legal custody to the father and parenting time to the mother. The Appellate Division affirmed. Here, the evidence showed the parties' relationship had

deteriorated to the point where they were unable to communicate effectively regarding the child. Additionally, the mother had interfered with the father's relationship with the child by accusing him of sexually abusing the child although her allegations had been deemed unfounded or unverifiable by CPS, law enforcement, and the psychologist who had conducted a court-ordered mental health evaluation of the parties and the child. Additionally, the mother impeded the father's efforts to obtain mental health counseling for the child. Based on the evidence, there was a sound and substantial basis in the record to support the court's determination.

Matter of Matthew K. v Beth K., 130 AD3d 1272 (3d Dept 2015)

Reversal of Award of Custody to Grandparents

Family Court awarded petitioners, the paternal grandparents of the subject child, joint legal custody with respondent father, with primary physical custody to the grandparents and visitation to the father and respondent mother. The Appellate Division reversed. While the mother allowed petitioners to have primary physical custody of the child for a prolonged period, there were no other factors to show the existence of extraordinary circumstances. The record established that the child was psychologically attached to both petitioners and the mother, and there was no evidence that removing the child from petitioners' primary custody would result in psychological trauma grave enough to threaten the destruction of the child. The record as a whole supported the conclusion that the child was stressed because of the family conflict, and would not suffer if the mother had custody of the child. Petitioners and the AFC contended that Domestic Relations Law Section 72 (2) did not require a showing that the parent relinquished "all" care and control of the child, and the AFC further contended that cases should not be relied on that predate the 2003 amendment to the statute. However, the standard of extraordinary circumstances remained the same as was set forth in *Bennett v Jeffreys,* 40 NY2d 543. Therefore, the AFC's implicit contention was rejected that Domestic Relations Law Section 72 (2) (b) in any way eased a grandparent's burden of showing extraordinary circumstances, and *Bennett* and cases decided thereafter remained good law. In light of the high standard, and in view of the mother's consistent contact with the child and petitioners' constant communication with the mother and reliance on her permission to make decisions about the child, petitioners did not demonstrate extraordinary circumstances sufficient to deprive the mother of custody of her child.

Matter of Suarez v Williams, 128 AD3d 500 (4th Dept 2015), *revd* ___NY3d___ (2015)

Court Erred in Granting Parties Joint Custody Given Evidence of Father's Acts of Domestic Violence

Family Court granted the parties joint custody of their child, and denied the mother's request to relocate with the child to California. The Appellate Division modified. Inasmuch as the case involved an initial custody determination, it could not properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996] need be strictly applied. A court could consider relocation as part of a best interests analysis with respect to a custody determination, but it was one factor among many. Family Court's determination that the child's best interests would be served by awarding joint custody to the parties lacked a sound and substantial basis in the record. Where, as here, domestic violence was alleged, the court must consider the effect of such domestic violence upon the best interests of the child. The evidence of the father's acts of domestic violence demonstrated that he possessed a character that was ill-suited to the difficult task of providing his young child with moral and intellectual guidance, and that the best interests of the child were served by awarding the mother sole legal custody and primary physical custody, with visitation to the father. However, the court properly denied the mother's request to relocate with the child to California. While no basis was discerned for disturbing the parenting schedule in light of the modification of custody, the order was further modified to direct that the exchanges of the child occur at neutral locations.

Matter of Jacobson v Wilkinson, 128 AD3d 1335 (4th Dept 2015)

Award of Sole Legal and Primary Physical Custody to Mother Reversed Where Finding that Father Failed to Provide Child with Medication Was Against the Weight of the Evidence.

Family Court modified a prior consent order by awarding respondent mother sole legal and primary physical custody of the subject child and visitation to the father. The Appellate Division reversed, granted the father sole legal and primary physical custody of the child, granted visitation to the mother, and remitted the matter to Family Court to fashion an appropriate visitation schedule. The court's finding that the father failed to provide the child with required medication was against the weight of the evidence. The father did not dispute that he questioned certain diagnoses and was resistant to giving the child certain medication, especially when multiple pills were sent with the child in a plastic baggie without labels. The father adamantly and consistently testified, however, that he always gave the child the required medication. The court's determination of custody lacked a sound and substantial basis in the record. Aside from the finding that the father failed to give the child required medication, the court found in favor of the father on all other relevant factors. The evidence established that the father was much better able to manage the child's behavior. The mother had resorted to physical discipline in order to control the child when he had anger management issues. As a result, there were at least two indicated child protective services reports against the mother. Although the mother had been the primary residential parent for the past two years, the father was better able to address the child's behavioral issues.

Matter of Gilman v Gilman, 128 AD3d 1387 (4th Dept 2015)

Award of Primary Physical Placement to Father Affirmed

Family Court granted petitioner father primary physical placement of the subject children. The Appellate Division affirmed. The Father established the requisite change in circumstances by showing that the mother's residence had become a harried and chaotic environment that did not provide the subject children with the focused attention and structure they needed. There was a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award primary physical placement to the father.

Matter of Higgins v Higgins, 128 AD3d 1396 (4th Dept 2015)

Affirmance of Award of Sole Legal and Primary Physical Placement to Father

Family Court modified a prior custody order by, among other things, awarding sole legal custody and primary physical placement of the parties' child to petitioner father. The Appellate Division affirmed. Respondent mother's contention was rejected that she was denied effective assistance of counsel inasmuch as she did not demonstrate the absence of strategy or other legitimate explanations for counsel's alleged shortcomings. Furthermore, Family Court did not abuse its discretion in denying her attorney's request for an adjournment and in holding the hearing in her absence. The mother was aware of the hearing date, and her attorney's vague claim that she was unable to attend the hearing due to winter weather conditions was unsupported by any detailed explanation or evidence from the mother.

Matter of Vanskiver v Clancy, 128 AD3d 1408 (4th Dept 2015)

Award of Primary Physical Custody to Mother Affirmed

Family Court awarded petitioner mother primary physical custody of the parties' child. The Appellate Division affirmed. The father's appeal from an order denying his motion for leave to reargue and renew his opposition to Family Court's decision was dismissed to the extent that the Court denied that part of the father's motion for leave to reargue inasmuch as no appeal lies from such an order. The order denying the father's motion was otherwise affirmed inasmuch as the facts presented by the father in seeking leave to renew would not change the prior determination. Family Court properly determined that there was a change in circumstances based on, among other things, the continued deterioration of the parties' relationship. Family Court's determination awarding the mother primary physical custody was in the child's best interests.

Matter of Mehta v Franklin, 128 AD3d 1419 (4th Dept 2015)

Affirmance of Award of Primary Physical Custody to Father Where Mother's Residence Unsanitary and Unsafe, and Child Exposed to Instances of Sexual Abuse

Family Court awarded respondent father primary physical custody of the subject child, and dismissed the mother's family offense petition. The Appellate Division affirmed. Family Court properly determined that the father established the requisite change in circumstances to warrant an inquiry into whether the best interests of the child would be served by modifying the existing custody arrangement. The father presented evidence establishing that the conditions in the mother's residence were unsanitary and unsafe for the child and that the child had been exposed to instances of sexual abuse while under the mother's care and supervision. According due deference to the court's assessment of witness credibility, the court's determination to award primary physical custody of the child to the father was supported by a sound and substantial basis in the record. The court did not err in dismissing the mother' family offense petition and refusing to issue an order of protection. The mother contended for the first time on appeal that the father's actions constituted the offense of menacing in the third degree and disorderly conduct, and therefore, these contentions were not considered. According due deference to the court's credibility determination, the mother failed to establish by a fair preponderance of the evidence that the father engaged in acts constituting harassment in the second degree.

Matter of Voorhees v Talerico, 128 AD3d 1466 (4th Dept 2015)

Award of Custody to Nonparent Affirmed

Family Court awarded custody of the subject children to respondent, a nonparent friend of petitioner father's family, and set forth a schedule for petitioner father's supervised visitation with the children. The Appellate Division affirmed. In 2008, during a neglect proceeding against petitioner with respect to the four subject children, petitioner asked respondent to take custody of the children. Respondent then petitioned for custody of the children. Family Court issued an order pursuant to Family Court Act Article 6 that, among other things, granted respondent's petition and awarded custody of the children to respondent, with visitation to petitioner. Upon the father's consent, the court also issued an order pursuant to Family Court Act Article 10 that contained a finding that the father had neglected the children, placed the father under the supervision of DSS, and ordered the father's visitation to be supervised. Petitioner's contention was rejected that respondent failed to meet her burden of proving that extraordinary circumstances existed to warrant respondent's continued custody of the children. The record established that, in July 2008, petitioner voluntarily surrendered the children to respondent, that in 2009 petitioner made an application to regain custody of the children but his petition was dismissed for failure to prosecute. Petitioner made no further efforts to regain custody of the children until April 2013, when he filed the instant petition. While the children were in respondent's custody, petitioner sporadically attended visitation with the children and, when he did so, behaved inappropriately. Moreover, petitioner admitted that he did not know the children's birth dates, ages, or grade levels at school. Where, as here, the prior order granting custody to a nonparent was made upon the consent of the parties and the nonparent has met his or her burden of demonstrating that extraordinary circumstances exits, the burden shifted to the parent to demonstrate a change in circumstances to warrant an inquiry into the best interests of the children. Petitioner failed to demonstrate a change in circumstances. Even assuming, arguendo, that petitioner demonstrated a change in circumstances, the record established that respondent was more fit to care for the children, and that he continuity and stability of the existing custodial arrangement was in the children's best interests.

Matter of Wilson v Hayward, 128 AD3d 1475 (4th Dept 2015)

Award of Sole Legal Custody to Father Affirmed Where Mother Likely to Undermine Child's Relationship With Father

Family Court awarded sole legal and primary physical custody of the subject child to petitioner father, granted respondent mother final decision-making authority over

medical determinations if the parties are unable to agree, and set a visitation schedule that divided the parties' parenting time into specific blocks of time. The Appellate Division affirmed. Family Court concluded that both parties' testimony was partisan to a fault, unconvincing, lacking in credibility, and significantly devoid of many details, but further concluded that the father was the more stable parent and that the mother was likely to undermine the subject child's relationship with the father. It was well settled that a concerted effort by one parent to interfere with the other parent's contact with the child was so inimical to the best interests of the child as to, per se, raise a strong probability that the interfering parent was unfit to act as custodial parent. Inasmuch as no other factor strongly favored either party, and the court's custody determination, which was based upon its first-hand assessment of the credibility of the witnesses, had a sound and substantial basis in the record, it would not be disturbed. The court fully considered the impact of the evidence concerning acts of domestic violence by both parties in making its determination.

Matter of LaMay v Staves, 128 AD3d 1485 (4th Dept 2015)

Reversal of Award of Sole Legal Custody to Father

Family Court modified a prior order by granting sole legal custody of the parties' daughter to respondent father. The Appellate Division reversed and remitted the matter to Family Court for a new hearing on the best interests of the child. Family Court's determination with respect to custody lacked a sound and substantial basis in the record. A custody determination should be made only after a full and fair hearing at which the record is fully developed. Here, the court made its determination following a hearing at which, apart from an in camera interview of the child, the mother was the sole witness. Although the record contained sufficient evidence to establish that the relationship of the parties had deteriorated to such an extent that the existing joint custody arrangement was no longer feasible, it did not contain sufficient evidence supporting the award of sole legal custody to the father. Indeed, inasmuch as the mother's testimony raised significant questions about the father's parental fitness and the father did not present any evidence, the father failed to establish that it was in the best interests of the child to award sole custody to him. Moreover, the court failed to make any findings concerning the factors that must be considered in making a best interests determination. The court properly denied the mother's motion to remove the AFC. The record established that the AFC properly advocated for the wishes of her client.

Matter of Mills v Rieman, 128 AD3d 1486 (4th Dept 2015)

Court Did Not Err in Admitting Evidence Concerning Father's Criminal History and Conduct While Incarcerated

Family Court modified a prior order by awarding respondent mother sole legal and physical custody of the parties' child. The Appellate Division affirmed. Family Court did not err in admitting evidence concerning petitioner father's criminal history and conduct while incarcerated. Inasmuch as a parent's criminal history may militate against an award of custody, that evidence was relevant and properly admitted. In addition, the record established that the court did not place an undue emphasis on the father's past criminal convictions or on his conduct while incarcerated. There was a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award sole custody to the mother. Thus, that determination would not be disturbed.

Matter of Springstead v Bunk, 128 AD3d 1516 (4th Dept 2015)

Court Erred in Sua Sponte Directing that Father Have No Further Contact or Visitation With Child

Family Court sua sponte directed that respondent father was to have no further contact or visitation with the parties' child. The Appellate Division reversed and remitted. The mother filed an amended petition seeking an order directing that the father's visitation with the subject child be supervised by an appropriate agency. Family Court erred in sua sponte granting relief that was not requested by the parties or the Attorney for the Child. The record established that the parties had no notice that such an order might be issued, and they were

not afforded an opportunity to address the necessity for such an order.

Matter of Majuk v Carbone, 129 AD3d 1485 (4th Dept 2015)

Agreement, Signed Only By Mother, Simply a Factor for Court to Consider in Making Its Ultimate Determination

Supreme Court found that a change of circumstances had occurred since the 2007 order, but concluded that it was in the child's best interests to continue joint custody with primary residency with respondent mother. The Appellate Division affirmed. In late 2012, the mother's living situation became uncertain, and petitioner father agreed to have the child live with him. The father prepared an affidavit reciting that the father would have "primary custody" and the child would stay with the father during the week and the mother on weekends. The mother signed the affidavit. In May 2013, the mother requested that the child be returned to her for primary residency, and the father denied the request. The father filed a petition seeking to modify the 2007 order and grant him primary residency of the child, while the mother filed a petition seeking to enforce the 2007 order. The father's contention was rejected that the court erred in not giving effect to the parties' 2012 agreement and that the mother was required to show a change in circumstances from the time that the agreement was signed by the mother. The agreement, signed only by the mother and not reduced to an order, was merely an informal arrangement and simply a factor for the court to consider in making its ultimate determination. The court's determination that the best interests of the child would be served by granting primary residency to the mother was supported by a sound and substantial basis in the record.

Matter of Lugo v Hamill, 129 AD3d 1532 (4th Dept 2015)

Award of Sole Legal and Primary Physical Custody Reversed Upon AFC's Submission of New Information

Family Court awarded petitioner father sole legal and primary physical custody of the parties' children and granted visitation to respondent mother. The Appellate Division reversed and remitted. The AFC submitted new information to the Appellate Division that the children had been living with the mother in Maryland since December 2014, apparently upon the father's consent. In addition, the AFC and the mother noted that the father's living conditions had changed. The Appellate Division court take notice of new facts and allegations to the extent they indicated that the record before it was no longer sufficient for determining the father's fitness and right to sole legal and primary physical custody of the children. Thus, the matter was remitted for an expedited hearing on the issue whether the alleged change in circumstances affected the best interests of the children. In light of this determination, the Court did not consider the contentions of the mother, or the remaining contention of the AFC that the children were denied effective assistance of counsel because their trial attorney did not file a notice of appeal.

Matter of Gunn v Gunn, 129 AD3d 1533 (4th Dept 2015)

Father's Contention Regarding Visitation With Stepchild Moot

Family Court denied the father's petitions for visitation with his two former stepchildren, for modification of the visitation order with respect to his child with respondent mother, and for violation of visitation orders. The Appellate Division dismissed the appeal insofar as it concerned the older stepchild, and affirmed. The father's contention regarding visitation with the older stepchild was moot because he had attained 18 years of age. The father lacked standing to seek visitation with the younger stepchild. The court properly determined that the father failed to show a change in circumstances sufficient to warrant modification of the visitation order and failed to establish that the mother willfully violated a clear mandate of the visitation orders.

Matter of Rossborough v Alatawneh, 129 AD3d 1537 (4th Dept 2015)

Father Not Required to Prove Substantial Change in Circumstances

Family Court awarded respondent father custody of the parties' child. The Appellate Division affirmed. This proceeding involved an initial court determination with respect to custody and, although the parties' informal arrangement was a factor to be considered, the father was not required to prove a substantial change in circumstances in order to warrant a modification. The court's determination to award custody of the child to the father with liberal visitation to the mother was supported by a sound and substantial basis in the record.

Matter of Denise v Denise, 129 AD3d 1539 (4th Dept 2015)

Appeals Rendered Moot

Family Court dismissed petitions where the parties sought, among other things, an order resolving custody and visitation with respect to the subject child. The Appellate Division dismissed the appeals, having taken judicial notice of the fact that, while these appeals were pending, the parties filed further petitions seeking modification of the orders on appeal. An order resolving custody and visitation issues with respect to the subject child was thereafter entered upon consent of the parties, rendering these appeals moot. The exception to the mootness doctrine did not apply.

Matter of Smith v Cashaw, 129 AD3d 1551 (4th Dept 2015)

Award of Sole Legal and Physical Custody to Mother Affirmed Notwithstanding Preference of 13-Year-Old Child to Live With Father

Defendant father and the appellate AFC appealed from a Supreme Court order that awarded plaintiff mother sole legal and physical custody of the subject 13-year-old child, and visitation to the father. In a separate order appealed by the father, the court directed the father to pay counsel fees to the mother's attorney in the amount of $44,977.34, directed the father to pay sanctions in the amount of $7,000, and directed the father's attorney to pay sanctions in the amount of $3,000. The Appellate Division affirmed the custody and visitation order, and modified the order pertaining to counsel fees and sanctions. Supreme Court improperly curtailed the father's cross-examination of the court-appointed expert; erred in prohibiting the father from calling the child's therapist as a rebuttal witness; and erred in admitting certain EZ-Pass records because a proper foundation for their admission was not provided by someone with personal knowledge of the maker's business practices and procedures, and there was no indication that the records were certified to comply with CPLR 4518 pursuant to CPLR 3122-a. However, those errors were harmless inasmuch as the excluded evidence would not have had a substantial influence on the outcome of the case, and the errors did not adversely affect a substantial right of the father. Furthermore, the court did not err in admitting in evidence the reports of the court-appointed expert pursuant to 22 NYCRR 202.16 (g) (2). Although the reports were not submitted under oath, as required by the regulation, when the expert subsequently was called, she testified under oath and was available for cross-examination. The father's and the appellate AFC's contention was rejected that the court's custody determination was not in the child's best interests and that the court failed to give appropriate weight to the child's desire to live with the father. The court's determination that it was in the best interests of the child to remain in the custody of the mother was supported by a sound and substantial basis in the record. Because the wishes of the child were not determinative, no error was perceived in how the court addressed that factor. The appellate AFC's contention was rejected that the AFC at the trial level did not properly present the child's wishes to the court. The AFC at the trial level fulfilled her representational obligations by voicing the child's wishes directly to the court without recommending any finding to the contrary. The court held two *Lincoln* hearings, and the AFC did not prevent the child from voicing his wishes to the court. There was no basis to disturb the visitation schedule fashioned by the court. The court abused its discretion in awarding sanctions because the conduct of the father and his attorney was not frivolous. Counsel fees were reduced due to a mathematical error. The dissent would have modified the custody and visitation order by awarding sole custody to the father with visitation to the mother because the court's determination lacked a sound and substantial basis in the record. Most glaringly, according to the dissent, the

court failed to give sufficient weight to the child's preference to live with the father. Moreover, the dissent noted that the trial AFC's inadequate representation of the child at the trial level further justified reversing the court's custody determination. The dissent agreed with the majority's resolution of the appeal of the order directing payment of counsel fees and sanctions.

Sheridan v Sheridan, 129 AD3d 1567 (4th Dept 2015)

Former Same-Sex Partner of Respondent Lack Standing to Seek Custody of, or Visitation With, Respondent's Child

Petitioner and respondent were former same-sex partners. Family Court dismissed the petition seeking custody and visitation with the son of the respondent on the ground that petitioner was not married to respondent and did not adopt the child, thus petitioner lacked standing to seek custody of, or visitation with, the child. The AFC appealed. The Appellate Division affirmed. The Court of Appeals recently reiterated that a nonbiological, nonadoptive parent did not have standing to seek visitation when a biological parent who was fit opposed it, and that equitable estoppel did not apply in such situations even where the nonparent had enjoyed a close relationship with the child and exercised some control over the child with the parent's consent. Parentage under New York law derived from biology or adoption, that the decision of the Court of Appeals in *Matter of Alison D. V Virginia M.*, 77 NY2d 651, in conjunction with second-parent adoption, created a bright-line rule that promoted certainty in the wake of domestic breakups otherwise fraught with the risk of disruptive battles over parentage as a prelude to further potential combat over custody and visitation. Furthermore, petitioner failed to sufficiently allege any extraordinary circumstances to establish her standing to seek custody as a nonbiological, nonadoptive parent.

Matter of Barone v Chapman-Cleland, 129 AD3d 1578 (4th Dept 2015)

Father's Custody Modification Petition Properly Denied Where Abusive Former Boyfriend No Longer Resided With Mother or Had Relationship With Her

Family Court denied the father's petition to modify a prior custody order that awarded sole legal custody and primary physical custody of the parties' child to respondent mother, except to the extent that the father was awarded additional visitation. The Appellate Division affirmed. The court properly determined that there was a change in circumstances based on, among other things, incidents of domestic violence in the mother's household. However, the court did not err in determining that the existing custodial arrangement was in the child's best interests. The father acknowledged at the hearing that the sole basis for his modification petition was that the mother was the victim of domestic abuse at the hand of her former boyfriend, with whom she had lived for several years. According to the father, the incidents of domestic violence in the mother's home rendered it unsafe for the child to reside there. The evidence at the hearing established, however, that the mother filed criminal charges against her abusive former boyfriend and obtained an order of protection against him. As a result, he no longer resided with the mother and had no relationship with her. The court's refusal to modify the existing arrangement was supported by a sound and substantial basis in the record.

Matter of Schieble v Swantek, 129 AD3d 1656 (4th Dept 2015)

Mother's Persistent and Pervasive Pattern of Alienating Child From Father Likely to Result in Substantial Risk of Imminent, Serious Harm to Child

Family Court awarded sole custody of the subject child to petitioner father, with visitation to respondent mother, and ordered the mother to pay counsel fees to the father's attorney. The Appellate Division affirmed. The mother's contention was rejected that the AFC violated her ethical duty because the AFC advocated for a result that was contrary to the child's expressed wishes in the absence of any justification for doing so. The evidence supported the court's conclusion that to follow the child's wishes would be tantamount to severing her relationship with her father, and that result would not be in the child's best interests. The mother's persistent and pervasive pattern of alienating the child from the father was likely to result in a substantial risk of imminent, serious harm to the child, and the AFC

acted in accordance with her ethical duties. The mother's contentions with respect to her motion to replace the AFC were not before the Appellate Division because the court denied the motion in a prior order from which the mother did not appeal. Furthermore, the court denied the motion on the ground that the mother's motion did not comply with CPLR 2214 (b), and thus, the court's remaining discussion was dicta. On appeal, the mother confined her contentions to the court's remaining discussion concerning the propriety of the actions of the AFC. Inasmuch as no appeal lied from dicta, the mother's contentions with respect to her motion to replace the AFC were not before the Appellate Division. The court's determination to award custody of the subject child to the father was supported by a sound and substantial basis in the record. The mother interfered with the father's relationship with the child by, among other things, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, attempting to instill in the child a fear of the father, and encouraging the child to medicate herself before going to visit the father. The mother's contention was rejected that the father's prior domestic violence toward the mother required that she have primary custody of the child. There was no evidence that the domestic violence was anything other than an isolated incident with no negative repercussions on the child's well-being. Indeed, the domestic violence occurred before the child was born.

Matter of Viscuso v Viscuso, 129 AD3d 1683 (4th Dept 2015)

Order Reversed Where Family Court Did Not Have Jurisdiction

Family Court granted sole custody of the subject child to petitioner father, and suspended the visitation rights of respondent mother. The Appellate Division reversed and granted the mother's motion to dismiss. Pursuant to an order of custody issued by a Texas court, the father had the exclusive right to designate the primary residence of the child. The father, who was in the military, thereafter relocated with the child to Fort Drum in New York, where he was stationed. In May 2013, a petition was filed to modify the custody order by suspending the mother's visitation rights. In August 2013, the mother moved to dismiss the petition for lack of jurisdiction, which the court denied. In October 2013, the court communicated with a Texas court, which declined jurisdiction. In April 2014, the mother indicated by telephone that she would not be able to appear personally for the hearing because of financial constraints. The court disconnected the call, and granted the father's motion for a default order based on the mother's statements. Because the purported withdrawal of counsel was ineffective, the order entered by the court was improperly entered as a default order and appeal therefrom was not precluded. Furthermore, the court erred in denying the mother's motion to dismiss the petition. Texas had exclusive, continuing jurisdiction pursuant to Domestic Relations Law Section 76-a at the time of the filing of the petition, and the father's allegations in the petition were insufficient for the court to exercise temporary emergency jurisdiction pursuant to Domestic Relations Law Section 76-c. Although the court later acquired jurisdiction when it communicated with the Texas court, at the time the court issued its order denying the mother's motion to dismiss, it did not have temporary emergency jurisdiction and had not complied with the requirements of section 76-c.

Matter of Bretzinger v Hatcher, 129 AD3d 1698 (4th Dept 2015)

Order Directing Custody to Remain With Mother Reversed

Family Court directed that respondent mother continue to be the "parent of primary custody." The Appellate Division reversed and remitted for a determination, including specific findings, whether relocation was in the best interests of the child. The court erred in designating the mother the parent of primary residence, which implicitly condoned the mother's relocation to Florida. On remittal, the court must make findings regarding the relevant factors that must be considered in making a relocation determination.

Matter of Lapoint v Pelliciotti, 130 AD3d 1453 (4th Dept 2015)

Appeals Not Rendered Moot Because Child No Longer Wished to Change Schools

Supreme Court, among other things, granted that part of defendant father's motion seeking to change the parties'

child's school. The Appellate Division modified by vacating the ordering paragraph authorizing the change in schools. Contrary to the contention of the AFC, the order was not moot because the child no longer wished to change schools and his parents supported his wishes. The order was adverse to the interests of the mother such that her rights would be adversely affected by the determination. The court erred in granting that part of the motion seeking the change in schools without first conducting a hearing and considering additional extrinsic evidence on the issue whether the parties intended a change in the child's school enrollment to be contemporaneous with his change in primary residence. The court did not err in granting that part of the motion seeking to modify the access schedule. Giving particular weight to the then 16-year-old child's wishes and the adverse effect that the access schedule would have on his time with his brother, the court properly determined that there had been a change in circumstances warranting an inquiry into the best interests of the child. The record established that the adjusted schedule was in the child's best interests.

Matter of Gardner v Korthals, 130 AD3d 1468 (4th Dept 2015)

Sole Custody to Mother Affirmed

Family Court denied respondent father's petition for enforcement of a prior custody order and granted the mother's petition for modification of that order by awarding her custody and primary physical residency of the parties' child. The Appellate Division affirmed. The court properly denied the father's petition, pursuant to which the father sought return of the child from Monroe County, where she was relocated by the mother, to Saratoga County, where the child resided at the time of the custody order and where the order presumed the child would live. The court erred in failing to analyze this matter as a relocation case, but the record was sufficient for the Appellate Division to do so. The mother demonstrated that the relocation was in the child's best interests because the mother's move to Monroe County economically enhanced the lives of the mother and child. Without the relocation, the mother, who was the child's primary caregiver, would have been living in poverty, without a stable home. Additionally, the child was doing well emotionally, socially, and educationally, and was happy with the current arrangement. Further, there was no indication that the relocation had been detrimental to the child relationship with the father. Given the acrimonious relationship of the parties and their inability to communicate, the court did not err in granting the mother sole custody.

Matter of Moredock v Conti, 130 AD3d 1472 (4th Dept 2015)

FAMILY OFFENSE

Insufficient Evidence to Establish Family Offense

Family Court dismissed the petition for an order of protection. The Appellate Division affirmed. Petitioner failed to establish that respondent committed acts amounting to harassment in the second degree. The court's finding that the father touched the mother only to separate her from their child, who was upset by her refusal to stop bathing him, was supported by the evidence and there was no basis to disturb the court's credibility determinations.

Matter of Ramona R. v Morris G.C., 129 AD3d 594 (1st Dept 2015)

Order of Protection Appropriately Addressed Commission of Criminal Mischief in the Fourth Degree

Contrary to the Family Court's finding, the petitioner failed to establish, by a fair preponderance of the evidence, that the respondent committed the family offense of menacing in the second degree, as there was no evidence that the respondent engaged in a course of conduct or repeatedly committed acts which placed or attempted to place the petitioner in reasonable fear of physical injury (*see* PL § 120.14 [2]). Further, the evidence was insufficient to establish that the respondent committed the family offense of assault in the third degree, since there was no evidence that the respondent caused physical injury to the petitioner (*see* PL § 120.00 [1], [2]; PL § 10.00 [9]), or committed the family offense of reckless endangerment in the second degree, as there was no evidence that the respondent engaged in conduct which created a substantial risk of serious physical injury to the petitioner (*see* PL §

120.20). However, the petitioner proved, by a preponderance of the evidence, that the respondent committed the family offense of criminal mischief in the fourth degree (*see* PL § 145.00 [1]). Under those circumstances, the terms and duration of the order of protection were appropriate to address that conduct. Accordingly, the Family Court properly issued the order of protection.

Matter of Riordan v Riordan, 128 AD3d 704 (2d Dept 2015)

Lack of "Intimate Relationship" Between the Parties

Pursuant to FCA § 812 (1), the Family Court's jurisdiction in family offense proceedings is limited to certain prescribed acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household". Members of the same family or household include, among others, persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time (*see* FCA§ 812 [1] [e]). The record revealed that the petitioner and the respondent had no direct relationship and were only connected through a third party who was petitioner's fiancée and the biological father of the respondent's daughter. The record also demonstrated that the petitioner and respondent met for the first time during the course of the court proceedings, and had no ongoing relationship. Accordingly, the undisputed facts established that there was no "intimate relationship" between the parties within the meaning of FCA § 812 (1). Consequently, since the parties did not have an "intimate relationship" within the meaning of FCA § 812 (1) (e), the Appellate Division found that the Family Court lacked subject matter jurisdiction, reversed the order of protection, denied the petition, and dismissed the proceeding.

Matter of Cambre v Kirton, 130 AD3d 926 (2d Dept 2015)

Family Offenses Were Proven by a Preponderance of the Evidence

Family Court properly determined respondent had committed family offenses of harassment in the second degree and aggravated harassment in the second degree and issued a two-year order of protection on behalf of petitioner. Although the court failed to specify the penal law sections under which its findings were based, an independent review of the record supported the findings that respondent committed aggravated harassment pursuant to PL § 240.30, and harassment in the second degree under PL §240.26. The petitioner testified that respondent continuously badgered her by repeat telephone calls and text messages about resuming their relationship although she had asked him several times to stop doing so. Furthermore, every time she saw him he would talk about reconciling and he made repeated threats to take the child from her home. He also complained about her to her employer which made petitioner fear she would lose her job. Based on the evidence and according due deference to the court's credibility determinations, the family offenses were proven by a preponderance of the evidence.

Matter of Lynn TT. v Joseph O., 129 AD3d 1129 (3d Dept 2015)

Stay Away Order of Protection Affirmed

Family Court issued an order of protection upon a finding that respondent willfully violated a prior order of protection issued in favor of petitioner directing respondent, among other things, to refrain from forcible touching. The Appellate Division affirmed. Petitioner met her burden of establishing that respondent was aware of the terms of the prior order of protection, and that he willfully violated it. Respondent's contention was unpreserved for review that Family Court improperly considered testimony regarding an incident not alleged in the petition, and the record did not support that contention in any event. Family Court did not abuse its discretion in issuing a stay away order of protection.

Matter of Burley v Burley, 128 AD3d 1421 (4th Dept 2015)

Dismissal Proper Where Petition Failed to Specify When Alleged Incidents Occurred

Family Court granted respondent's motion to dismiss the petition, without prejudice, pursuant to CPLR 3211 (a) (7). The Appellate Division affirmed. Because the

petition failed to specify when the alleged incidents occurred, Family Court was unable to ascertain whether the allegations were the subject of a December 2011 hearing after which Family Court dismissed the petition for failure to prove the allegations by a preponderance of the evidence. Any allegations concerning events that were the subject of the 2011 hearing were barred by collateral estoppel, and thus the petition would have been properly dismissed to that extent. The Appellate Division was unable to review the propriety of Family Court's decision because petitioner failed to include in the record on appeal either the petition that was the subject of the 2011 hearing or the transcript of that hearing. Petitioner, as the appellant, submitted this appeal on an incomplete record and must suffer the consequences.

Matter of Keicher v Scheifla, 129 AD3d 1500 (4th Dept 2015)

JUVENILE DELINQUENCY

Probation Least Restrictive Alternative

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 assault in the third degree, and placed him on probation for 12 months. The Appellate Division affirmed. Probation was the least restrictive alternative. The court properly concluded that notwithstanding certain positive strides, respondent was still in need of the supervision provided by probation, rather than supervision under an ACD, given the seriousness of the underlying assault and respondent's need for services.

Matter of Brydyn R., 129 AD3d 416 (1st Dept 2015)

Court's Error in Denying Suppression Motion Harmless

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would have constituted the crimes of assault in the second degree (two counts) and obstructing governmental administration, and placed her on enhanced supervision probation for 15 months. The Appellate Division affirmed. Based upon the totality of the circumstances, including respondent's age and the length and circumstances of her detention without *Miranda* warnings, her statement that she punched one of the two teacher victims in the face because he pushed her, should have been suppressed. However, given the overall strength of the case against respondent and the importance of the improperly admitted evidence, the error was harmless. There was overwhelming evidence that respondent did punch the teacher and there was nothing in the court's decision after the fact-finding hearing to suggest that the statement contributed to the finding. Moreover, the statement was essentially exculpatory regarding the issue of intent. The victims' testimony established that respondent punched one teacher in the face, causing his face to swell, and punched and scratched the other teacher, causing him to fall and hurt his back. The obstruction charge was supported by evidence that respondent intentionally obstructed one teacher's performance of an official function when she put her foot in the door to the dean's office, preventing the teacher from carrying out his duty to maintain order, and then punched the teacher in the face when he and the other victim attempted to close the door.

Matter of Jahmeka W., 130 AD3d 437 (1st Dept 2015)

18 Month Placement in Nonsecure Detention Facility Appropriate after Probation Violation

In an order of disposition dated December 10, 2013, the Family Court adjudicated the respondent a juvenile delinquent upon finding, after a hearing, that he committed acts which, if committed by an adult, would have constituted the crimes of robbery in the second degree, menacing in the third degree, criminal possession of stolen property in the fifth degree, and grand larceny in the fourth degree, and placed him on probation. The court subsequently determined that the respondent violated the terms and conditions of his probation, vacated the order of disposition dated December 10, 2013, and entered a new order of disposition dated July 15 2014, placing the respondent in a nonsecure detention facility. The respondent appealed. Upon reviewing the record, the Appellate Division found that the Family Court providently exercised its discretion in directing the respondent's placement in a nonsecure facility for a period of up to 18 months. 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 seriousness of the underlying acts, the respondent's poor school attendance, and the respondent's repeated violations of the terms and conditions of his probation (*see* FCA § 352.2 [2] [a]).

Matter of Dillon R., 130 AD3d 629 (2d Dept 2015)

Placement in Residential Treatment Facility was Least Restrictive Alternative and Consistent With Respondent's Needs

Family Court adjudicated respondent a juvenile delinquent upon his admission that his conduct, if committed by an adult, would constitute the crime of possession of a sexual performance by a child, and following a dispositional hearing, ordered him placed in a residential treatment facility for 12 months. Respondent argued the court abused its discretion by placing him in a residential facility as opposed to the less restrictive alternative of being placed on probation in the custody of his parents. The Appellate Division affirmed. Here, the record showed that respondent viewed nearly 9,000 pictures and videos of prepubescent boys, many of which were sexually graphic. Although respondent engaged in individual and family counseling, the parents were unable to provide the supervision necessary in order for him to remain at home. The parents continued to use alcohol and failed to engage in the recommended alcohol abuse counseling. Additionally, the parents were reluctant to inform the school district about respondent's issues despite the fact that the high school respondent attended was attached to an elementary school. Based on there circumstances, the court's determination was consistent with both respondent's needs and in the best interests and protection of the community.

Matter of Morgan MM., 128 AD3d 1140 (3d Dept 2015)

Family Court's Determination Supported by Weight of the Record

Family Court adjudicated respondent to be a juvenile delinquent and placed him on probation for one year. The Appellate Division affirmed. Here, respondent argued the court failed to conduct a timely initial appearance. However, the record showed respondent was not detained and an initial appearance within the 10-day filing period was attempted but respondent failed to appear. Although it was unclear whether respondent had been served with the petition, his attorney did appear but did not offer any opposition to the court's suggestion of an adjourned date. At the adjourned date five days later, respondent appeared but failed to object to the timeliness of the initial appearance. Respondent also argued the court's determination went against weight of the evidence in several respects. Contrary to his assertions, respondent never disputed the presentment agency's claim he was 15-years-old when the incidents occurred. Additionally, with regard to the first incident, the court properly credited the testimony of the victim that he was chased by respondent and others and was kicked in the ribs and legs. Additionally, as to the second incident, there was no dispute that school officials recovered a knife from respondent's book bag after they learned respondent had been involved in an altercation and "might have a weapon". Given that there was evidence respondent had used a weapon in a prior fight, the court could properly determine respondent was aware the knife was essentially a weapon on that occasion pursuant to PL § 265.05.

Matter of Daniel B., 129 AD3d 1152 (3d Dept 2015)

Court Also Needs to Consider the Need for Protection of the Community

Family Court determined respondent was a juvenile delinquent and placed him in the custody of the agency for one year. The Appellate Division affirmed. Respondent failed to preserve his argument that the court erred in failing to conduct the dispositional hearing within the time limits set forth in FCA § 350.1(3)(a). Even if the contention had been preserved, his argument would have been unsuccessful since the four-day delay was due, in part, to the difficulty of finding respondent an appropriate placement. Additionally, the court did not abuse its discretion by failing to impose a less restrictive alternative. FCA §352.2 requires the court to also consider the needs and best interests of the respondent and the need for protection of the community. Here, given respondent's prior PINS adjudication, his failure to comply with probation conditions, his continued disciplinary

problems at school and inconsistent compliance with house rules, placement with the agency rather than his grandmother was proper.

Matter of Jacob LL., 129 AD3d 1407 (3d Dept 2015)

Order Reversed, Petition Dismissed Where Respondent's Admission Was Defective

Family Court placed respondent in the custody of the Commissioner of Social Services for a period of one year. The Appellate Division reversed and dismissed the petition. Respondent's admission to acts that, if committed by an adult, would constitute the crime of forcible touching was defective because Family Court failed to comply with Family Court Act Section 321.3 (1). Respondent's admission was defective inasmuch as the court failed to ascertain that respondent and his parents were aware of all possible dispositional alternatives, such as the possibility of a conditional discharge or an extension of placement. Because the period of respondent's placement had expired, the petition was dismissed.

Matter of Johnathan B.M., 129 AD3d 1517 (4th Dept 2015)

PATERNITY

Petitioner Equitably Estopped from Denying Paternity

The Family Court providently exercised its discretion in concluding that the petitioner should be equitably estopped from denying paternity. It was undisputed that the Family Court correctly determined, after a hearing, that the petitioner established that he executed the acknowledgment of paternity based upon a material mistake of fact. Contrary to the petitioner's contention, however, the Family Court did not err in further determining, based upon the evidence presented at the same hearing, that the best interests of the child necessitated that the petitioner be equitably estopped from denying paternity. The petitioner had a full opportunity to adduce evidence regarding both the execution of the acknowledgment of paternity and the nature and extent of the subject parent-child relationship within the single hearing, and he in fact presented evidence as to both matters. The hearing evidence demonstrated that the petitioner lived with the child from the time of her birth in March 2005, until 2011. After the parties separated in 2011, the petitioner continued to visit with the child approximately one to two times per week. The child was free to visit with him whenever she wanted, and, although the child knew that the petitioner was not her biological father, she did not refer to or think of anyone else as her father. The child had a strong relationship with the petitioner and wanted to spend more time with him and his son, whom she regarded as her brother. Accordingly, the evidence established that, up to the time of the hearing, there had been a recognized and operative parent-child relationship between the petitioner and the child in existence all of the child's life. Therefore, the Family Court properly dismissed the petition to vacate the acknowledgment of paternity.

Matter of Luis Hugo O. v Paola O., 129 AD3d 976 (2d Dept 2015)

Best Interests of the Child Warranted Application of Equitable Estoppel to Preclude Genetic Marker or DNA Tests

In an order entered March 17, 2014, the Family Court found, based on the doctrine of equitable estoppel, that it was not in the best interests of the child, A., to order genetic marker or DNA tests to determine whether the respondent was A.'s biological father. On the same date, the court issued an order of filiation adjudging the respondent to be the father of A. By order entered May 14, 2014, the Family Court, upon the two orders entered March 17, 2014, directed the respondent to pay child support. The attorney for the child, on behalf of A., appealed. The Appellate Division affirmed. FCA §§ 418 (a) and 532(a) provide, inter alia, that no genetic marker or DNA tests to determine paternity shall be ordered where the Family Court has made a written finding that such testing is not in the best interests of the child on the basis of equitable estoppel. The paramount concern in applying the doctrine of equitable estoppel in paternity and support proceedings is the best interests of the child. Here, the record demonstrated the existence of a long-standing recognized and operative parent-child relationship between the respondent and A., such that it was in the best interests of A. to apply the doctrine of equitable estoppel. Contrary to the

attorney for the child, it was thus proper for the Family Court to enter an order of filiation against the respondent without directing paternity testing.

Matter of Pauline M.B. v Arnoldo B., 130 AD3d 743 (2d Dept 2015)

Court Erred in Applying Res Judicata to Claims in Cross Petition

Family Court dismissed petitioner's cross petition seeking a determination that he was the biological father of the subject child. The Appellate Division reversed and remitted. Respondent signed an acknowledgment of paternity with respect to the child when the child was born in 2000. DNA testing, however, later established that petitioner was in fact the child's biological father. Petitioner filed a custody petition and, by default order, the court awarded petitioner custody of the child. Respondent subsequently filed a petition seeking modification of that order to permit visitation of the child with respondent and the half brother of the child, and petitioner filed a cross petition seeking an order vacating respondent's acknowledgment of paternity, determining that petitioner was the child's biological father, and directing that an amended birth certificate be filed. The court erred in applying the doctrine of res judicata to petitioner's claims in the cross petition. In matter concerning filiation, it was the child's best interests which were of paramount concern. It was in the child's best interests to permit petitioner to be heard on his claims in the cross petition. Petitioner had been the child's legal, full-time caregiver and provider since 2011, and respondent also recognized petitioner as the child's biological father.

Matter of Frost v Wisniewski, 126 AD3d 1305 (4th Dept 2015)

PERSON IN NEED OF SUPERVISION

Family Court Erred in Granting Respondent's Motion and Finding Petitioner in Contempt of Court Without Conducting Hearing

Family Court found petitioner in contempt for failing to comply with an order extending the placement of respondent through June 2014. The Appellate Division reversed and remitted the matter to the court for a hearing. The order extending the placement provided that respondent, who was adjudicated a person in need of supervision in June 2010, was not to be discharged from foster care without the permission of the court. Respondent threatened his foster mother in early January 2014 and, when the police arrived, he threatened them as well, resulting in his arrest and incarceration. When respondent was released from incarceration, petitioner placed him in an emergency homeless shelter for teens and filed a petition seeking to terminate his placement in foster care pursuant to Family Court Act Section 756 (a) (ii) (1). Respondent, who was 18 years old at the time, moved to hold petitioner in contempt. The court erred in granting the motion and finding petitioner in contempt of court without conducting a hearing. To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed; the party to be held in contempt must have had knowledge of the order; and prejudice to the rights of a party to the litigation must be demonstrated. Respondent established those elements. However, petitioner raised a valid defense, i.e. its inability to comply with the order. Petitioner submitted evidence that it contacted numerous foster homes and group homes, and none would accept respondent because of his past violent and disruptive behavior while in foster care. Respondent had a history of not following the rules and using drugs. The agency that eventually accepted respondent after the finding of contempt had denied acceptance at the time of the motion. Respondent's mother would not take him back into her home, and she told the caseworker that there were no friends or family willing to accept respondent. Notably, petitioner did not simply ignore the order when it became apparent that it was unable to comply. Instead, it filed a petition seeking to terminate respondent's placement in foster care. The instant case was distinguishable from *McCain v Dinkins*, 84 NY2d 216 (1994). In the instant case, petitioner argued that it was respondent's own conduct that prevented petitioner from complying with the order. Petitioner was entitled to a hearing to present any such defense.

Matter of Andrew B.,128 AD3d 1513 (4th Dept 2015)

TERMINATION OF PARENTAL RIGHTS

Respondent 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 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 during the relevant time period, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship. Although respondent completed programs in parenting skills and anger management, she behaved disruptively and violently during scheduled visits, failed to complete mental health services and obtain suitable housing, did not gain insight into the obstacles preventing return of the child, and failed to benefit from the programs she attended. A preponderance of the evidence supported the determination that termination of respondent's parental rights was in the child's best interests. The child had lived with his foster mother, his maternal great-grandmother, for over two years, where he was well-cared for and his special needs were met.

Matter of Isaiah Jaysean J., 128 AD3d 438 (1st Dept 2015)

TPR Affirmed; Mother Failed to Overcome Her Anger Management Problem

Family Court, upon fact-finding determinations of permanent neglect, terminated respondent mother's parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The findings of permanent neglect were supported by clear and convincing evidence that despite the agency's diligent efforts, the mother failed to plan for the future of the children. The agency referred the mother to, among other things, parenting skills, anger management, and domestic violence programs, and by scheduling and supervising visitation and therapy. Contrary to the mother's contention, she failed to demonstrate that she had overcome her anger management problems.

Matter of Joshua Manuel G., 128 AD3d 466 (1st Dept 2015)

TPR Based Upon Permanent Neglect Affirmed

Family Court terminated respondent father's parental rights upon a fact-finding determination that his consent was not required for the child's adoption, that the agency was excused from providing diligent efforts, and that the father permanently neglect the child, and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The record demonstrated by clear and convincing evidence that the father's consent to adoption was not required. The father's admission that, after his incarceration, he failed to provide financial support for the child was fatal to his claim. The finding of permanent neglect also was supported by clear and convincing evidence. The court properly excused the agency from making diligent efforts because such efforts would have been detrimental to the best interests of the child given that the father's earliest release date was 2019, when the child would be 20 years old. The father's sole plan for the child, that he remain in foster care, was not realistic and feasible. It was in the best interests of the child to terminate the father's parental rights and free the child for adoption, despite the child's ambivalence about whether he wanted to be adopted.

Matter of Charles Isaac Ansimeon F., 128 AD3d 486 (1st Dept 2015)

Respondent Mother Permanently Neglected Children

Family Court, upon respondent mother's admission that she permanently neglected the subject child, terminated her parental rights and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The court's determination that it was in the child's best interests to terminate respondent's parental rights so the child could be adopted by the foster family he had lived with predominately since birth was supported by a

preponderance of the evidence. Respondent had threatened to kill the child and his foster family and had no insight into why the child was placed in foster care. There was no basis for a suspended judgment. Even if the mother continued on a path to mental recovery, there was no showing that it would be in the child's best interests to be returned to her care. The child was well-cared for and was eager to be adopted by the foster family.

Matter of Sirfire Joseph S., 128 AD3d 614 (1st Dept 2015)

Respondent 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 Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts to strengthen the parental relationship by scheduling visitation, providing referrals for services, and repeatedly encouraging respondent to engage in therapy and to engage in domestic violence counseling. Despite those efforts, respondent failed to complete her service plan after her refusal to engage in domestic violence counseling. That respondent consistently visited the child did not preclude the finding of permanent neglect because she failed to plan for the child's future by not gaining insight into the reasons for the child's placement. Additionally, it was in the child's best interests to terminate respondent's parental rights and free the child for adoption. The child had been living with the foster mother since the child was 10 months old and there was no evidence that respondent had a realistic plan to provide an adequate and stable home for the child.

Matter of Autumn P., 129 AD3d 519 (1st Dept 2015)

Respondent Mother Abandoned Child

Family Court, upon a fact-finding determination, determined that respondent mother abandoned her child, terminated her parental rights, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of abandonment was supported by clear and convincing evidence that during the six-month period immediately before the filing of the petition, respondent evinced an intent to forego her parental rights as manifested by her failure to visit and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. At most, respondent called the agency once or twice during the six-month period before the filing of the petition. She never followed -up, visited in person, or made any other attempts to contact the child. If error occurred in admitting the records of the agency, it was harmless in view of the evidence of abandonment presented through the testimony of the caseworker and respondent herself. It was in the child's best interests to terminate respondent's parental rights and free the child for adoption. The child had lived with her foster family since she was six months old and had only spent a matter of hours with respondent. Notwithstanding respondent's completion of her service plan, she failed to plan for the child's future. The foster mother had cared for the child, addressed numerous health issues, and provided quality care.

Matter of Toteanna M., 129 AD3d 529 (1st Dept 2015)

TPR Based Upon Mother's Mental Illness Affirmed

Family Court, upon a fact-finding determination that respondent was mentally ill and the child would be in danger of becoming a neglected child if placed in or returned to the mother's care and custody, terminated the mother's 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 court properly denied respondent's motion for a *Frye* hearing inasmuch as petitioner's expert's opinion did not involve obviously novel forensic and social science techniques. The court-appointed expert psychologist conducted a thorough, comprehensive, and extensive review of respondent's medical records and court files, and interviewed respondent for more than four hours. The expert testified that respondent suffered from schizophrenia residual type with concurrent bipolar, NOS, had a very poor history of compliance with treatment and had demonstrated a history of placing the child in danger

when experiencing acute symptoms. The expert concluded that respondent suffered from mental illness to the extent that the child, if returned to her care in the foreseeable future, would be at risk of becoming a neglected child.

Matter of Brianna Monique F., 129 AD3d 683 (1st Dept 2015)

Suspended Judgment Not Warranted Based in Part on Mother's Threatening Behavior

The court's determination that it was in the child's best interest to terminate the respondent mother's parental rights, and freeing him for adoption by the foster family he had lived with predominantly since birth, was supported, at a minimum, by a preponderance of the evidence. The mother had threatened to kill the child and his foster family and had no insight into why the child was placed in foster care in the first place. Contrary to the mother's contention, the circumstances presented did not warrant a suspended judgment. Even if the mother were to have continued on a path to mental recovery, there had been no showing that it would have been in the child's best interest to be returned to her care, where the child was well-cared for by his foster family and eager to be adopted.

Matter of Joseph S., 128 AD3d 614 (2d Dept 2015)

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

The Family Court properly found that the father had permanently neglected the subject child. The petitioner proved by clear and convincing evidence that it had fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [7] [a]). The agency proved that, despite those efforts, the father had permanently neglected the child by failing, for a period of more than one year following the date the child came into the care of the agency, to substantially and continuously maintain contact with the child or plan for the child's future, although physically and financially able to do so. The father failed to take steps to correct the conditions that led to the child's removal from the home. The Family Court also properly terminated the father's parental rights. The evidence adduced at the dispositional hearing established that termination of the father's parental rights was in the best interests of the child. A suspended judgment was not appropriate, given the father's lack of insight into his problems and his failure to address the primary issues which led to the child's removal.

Matter of Aaliyah L.C., 128 AD3d 955 (2d Dept 2015)

Record Supported Termination of Mother's Parental Rights of Child with Special Needs

The Family Court properly found that the best interests of the subject child would be served by terminating the mother's parental rights and freeing the child for adoption. The child, who was autistic and had a variety of other special needs, had bonded with his foster family, with whom he had lived for approximately 10 years at the time of the dispositional hearing. In addition, the foster mother was dedicated to developing the child's life skills, responded appropriately to his behavior and his sensory sensitivities, and planned ways to help him reach his full potential. In contrast, the mother had not parented the child from when he was an infant, nor had she expressed any interest in doing so. Under these circumstances, terminating the mother's parental rights and freeing the child for adoption by his foster mother served the child's best interests.

Matter of Charle C.E., 129 AD3d 721 (2d Dept 2015)

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

The orders appealed from, one as to each of the two subject children, after fact-finding and dispositional hearings, inter alia, found that the mother permanently neglected each of the children, terminated her parental rights as to each subject child, and freed the children for adoption. The Family Court properly found that the mother permanently neglected the subject children. The petitioner agency (hereinafter the agency), established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship. The agency also established by clear and convincing evidence that the mother failed, for a period of one year following the children's placement with the agency, to plan for the children's future. The mother failed to develop a realistic and

feasible plan in that she had no permanent address, her visits with the children were problematic, as she was often late by up to two hours for the visits while the children were waiting for her and she had to be refocused on the children by the supervisor during the visits, and she also failed to follow through with mental health treatment as required (*see* SSL § 384-b [7] [c]). The mother was not permitted to appeal from the dispositional portion of each of the orders in light of her default in failing to appear at the dispositional hearing. Orders of fact-finding and disposition affirmed.

Matter of Angelo E.S., 129 AD3d 850 (2d Dept 2015)

Incarcerated Father Failed to Plan for Children's Future Despite Petitioner's Diligent Efforts

The Family Court correctly determined, based on clear and convincing evidence, that the father permanently neglected the subject children (*see* SSL § 384-b [7]). The petitioner demonstrated at the fact-finding hearing that, both prior to and during the father's multiple incarcerations, the petitioner made diligent efforts to encourage and strengthen the parental relationship and to assist the father in maintaining contact with the children by facilitating visitation and planning for their future. Despite the petitioner's efforts, the father failed to plan for the children's future by failing to comply with his service plan, which required him to complete a substance abuse program, to complete an anger management program, and to obtain suitable housing. Thus, the Family Court properly determined that the father permanently neglected the subject children by failing to plan for their return during the almost two-year period following their placement into foster care and in failing to substantially and continuously maintain contact with them. A preponderance of the evidence supported the determination that it was in the best interests of the subject children to terminate the parental rights of the father rather than issue a suspended judgment, and to free them for adoption by their foster parents.

Matter of Maximus K.B., 129 AD3d 951 (2d Dept 2015)

No Abuse of Discretion in Failing to Grant Suspended Judgment

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. Petitioner agency met its burden by showing that diligent efforts were made to strengthen the parent-child bond. Among other things, the agency referred respondent to the necessary services so that respondent could address her alcohol and mental health issues, provided transportation to such services, arranged visitation with the child, provided transportation for visitation purposes and kept respondent apprised of the child's progress. However, despite its efforts, respondent failed to substantially plan for the child's future. Respondent missed half of the scheduled visits with the subject child, missed service plan review meetings, failed or avoided alcohol screens, failed to engage in alcohol or mental health treatment and repeatedly called the caseworker while she was intoxicated. Additionally, respondent's failure to testify at the fact-finding hearing allowed the court to draw the strongest inference against her. Furthermore, the court did not abuse its discretion by failing to grant a suspended judgment. While respondent engaged in some of the needed services, she minimized the role alcohol played in the removal of the subject child and his older sibling who had also been removed from her care, and she had a history of relapsing. The child was thriving in his foster home and petitioner's witness, a psychologist who had evaluated the subject child and respondent's other children, testified it would be "destructive" and "grossly inappropriate" to remove the subject child from the foster home where he had lived for most of his life,
especially given the many behavioral problems shown by the subject child's older siblings, who had been returned to respondent's care. The child was thriving in the foster home and had bonded with the foster parents.

Matter of Kapreece SS., 128 AD3d 1114 (3d Dept 2015)

Court's Failure to Provide Father With Due Process Results in Reversal of TPR Order

Family Court's denial of respondent father's motion to vacate the default order terminating his parental rights was error. Here, respondent father, who was

incarcerated, was provided with the right to be present at the hearing telephonically. However, there was no proof in the record that respondent was notified of the hearing date, either by the court or by his counsel. There was no indication that respondent's attorney had communicated with him or advised him of the hearing date. Since notice is a fundamental component of due process, Family Court's denial of respondent's motion to vacate the default judgment was error.

Matter of Sonara HH., 128 AD3d 1122 (3d Dept 2015)

Subject Children Were Entitled to Appointment of Separate Attorneys for Children

Family Court modified the children's permanency plan and allowed one attorney for the child to represent all three children, then aged 15, 12 and five, despite the fact that the two older children had divergent interests. Since the children were entitled to have counsel represent their specific interests, the permanency order was reversed and the matter remitted for a new hearing.

Matter of James I., 128 AD3d 1285 (3d Dept 2015)

Clear and Convincing Evidence to Support TPR Based on Parent's Mental Illness

Family Court adjudicated the subject child to be the child of a mentally ill parents and terminated respondent parents' parental rights. Respondent mother appealed and the Appellate Division affirmed. In order to terminate parental rights due to mental illness, it must be shown by "clear and convincing evidence that the parent is presently and for the foreseeable future unable, by reason of that mental illness... to provide proper and adequate care for the child". Here, the licensed physician who performed a court-ordered evaluation of both parents testified that both parents suffered from mental illnesses that rendered them unable to properly care for the subject child either now or in the foreseeable future. Additionally, an appropriate foundation was laid for the admission of the expert's report through his testimony. The expert determined respondent mother had a variety of disorders which, among other things, left her feeling "emotionally empty" and caused her to act in a manner detrimental to the child. Moreover, respondent had failed to follow through with treatment, only intermittently believed she needed it and was unlikely to seek out treatment in the future. Given these factors, it was likely she would remain unable to properly care for the child. Furthermore, since there was no expert evidence to
contradict the expert's testimony and according due deference to the court's credibility determinations, there was clear and convincing evidence to support the court's findings.

Matter of Angel SS., 129 AD3d 1119 (3d Dept 2015)

Respondent Failed to Substantially Plan for the Child's Future

Family Court adjudicated the subject child to be permanently neglected by respondent mother and issued a suspended judgment for a period of one year. The Appellate Division affirmed. The Agency's argument that the appeal was moot based on the issuance of the suspended judgment, since this allowed respondent parent within the time period specified to become a safe parent with whom the child could be reunited, was dismissed since no party appeared at oral argument or otherwise updated the Court as to the child's welfare during this period. In any event, since a neglect determination creates a "permanent and significant stigma" which could affect respondent in future proceedings, the matter was not moot. As to the merits of the case, the evidence showed the agency made diligent efforts to reunify respondent with her child. The primary barrier to reunification was respondent's mental capacity to care for her child, who also had mental health needs. The testimony showed the agency provided transport to respondent for visitation purposes, parenting classes, family counseling and mental health counseling. The agency also arranged for another provider when respondent was dissatisfied with her counselor. Additionally, when respondent was discharged from mental health counseling for her failure to comply with certain requirements, the agency took measures to expedite her acceptance to another program. Despite the agency's efforts, respondent failed to substantially plan for the child's future. Although the clinical psychologist ,who had evaluated respondent three years earlier, recommended that she obtain long-term mental health counseling and medication, respondent had been inconsistent in her efforts to receive treatment and in previous years had

resisted treatment. When she did enroll for treatment, she was discharged due to her poor attendance. Furthermore, the evidence showed respondent was combative with caseworkers, cancelled visits with the child, did not consistently attend parenting classes and left the State without informing the agency of her whereabouts.

Matter of Everett H., 129 AD3d 1123 (3d Dept 2014)

Arguments Raised by Attorney for the Child Were Unpreserved for Review

Family Court determined respondent parents had permanently neglected the subject child, issued a suspended sentence against the father, terminated the mother's rights and issued two orders of protection, one barring the mother from contacting the child until his eighteenth birthday and the other directing the father to ensure there was no contact between the child and the mother. The mother appealed from the order of protection issued against her and the attorney for the child appealed from both orders of protection issued against the parents. The Appellate Division dismissed the appeals. The order of protection issued against the father had expired and thus the issue was moot. The attorney for the child's arguments regarding the order of protection issued against the mother were not raised before Family
Court and thus the issues were not preserved for review and even if they had been raised, they would be of no merit.

Matter of Marcus BB., 129 AD3d 1134 (3d Dept 2015)

Family Court Abused its Discretion in Dismissing Mother's Application to Enforce Conditional Judicial Surrender Order

In 2006, Family Court approved a conditional judicial surrender executed by the mother for each of her three children, the terms of which provided her with, among other things, one visit per year with each child as arranged for by the agency, provided the mother was compliant with the conditions set forth in the surrender. The mother waited until 2009 to request visitation, allegedly due to the agency's request that she allow time for the children to bond with their adoptive families. Every year from 2009 until 2014, the mother requested but was never allowed visitation with her children. She then commenced a petition to enforce the terms of her surrender. Family Court dismissed her petition for her failure to comply with DRL §112-b. The Appellate Division determined the court had abused its discretion and reversed. Pursuant to SSL §383-c (1), Family Court can approve a conditional surrender if it deems that it is in the child's best interests. Enforcement of such order, prior to adoption of the child, should be in accordance with FCA §1055-a(b). Once a child is adopted, any enforcement should be in accordance with DRL §112-b. Here, the mother alleged, upon information and belief, that the children had been adopted. However, the record did not reflect the children had in fact been adopted and due to the court's sua sponte dismissal of the enforcement petition, no answering papers were filed by the agency. Additionally, even if the children had been adopted, the conditional surrender executed by the parties included a provision which gave the mother the right to visit even if the children were adopted, and she also had a right to a copy of the order of adoption. No such order of adoption appeared in the record and there was no indication that the mother received such an order. Therefore, she could not be faulted for failing to comply with the terms and conditions of DRL §112-b.

Matter of Siearra L., 130 AD3d 1184 (3d Dept 2015)

Family Court Erred in Terminating Mother's Parental Rights

Family Court erred in terminating respondent mother's parental rights. Here, the mother had maintained meaningful contact with the subject child and had addressed all the issues that had led to the child's removal. The child was returned to the mother on a trial discharge but was removed again once the agency discovered the mother was allowing the father to have unsupervised time with the child when his contact with the child required supervision by the agency. Although the mother showed a lapse in judgment, it was not enough to support a finding of permanent neglect. Additionally, there was no proof the father was under the influence of drugs or alcohol when he did see the child. Moreover, even if a permanent neglect finding was proper, the court erred in terminating the mother's parental rights. The permanency goal for the child was return to father not adoption, and under these

circumstances, the agency knew it wasn't practical to terminate the mother's rights. Furthermore, the fact the mother had been recommended to complete a two-year drug treatment program should not have prevented the court from issuing a suspended judgment on the mistaken belief that she would be unable to comply with the terms and conditions set forth in such judgment.

Matter of Marcus BB., 130 AD3d 1211 (3d Dept 2015)

Voluntary Surrenders Rendered Appeal Moot

Petitioner agency removed the children from the custody of the foster parents and placed them in the custody of the aunt and uncle but failed to file a TPR against respondent parents as directed by Family Court. Thereafter, the court determined the agency had failed to make reasonable efforts to execute a permanency plan of placement for adoption, continued the permanency plan of return to parent and again directed the agency to file a TPR. Respondent parents appealed from that order but before the matter was heard on appeal, both respondents had voluntarily surrendered their parental rights thereby making the appeal moot.

Matter of Alexus SS., 130 AD3d 1266 (3d Dept 2015)

Court Properly Dismissed Respondent's Motion to Vacate Judicial Surrenders

Respondent mother executed judicial surrenders of parental rights. Thereafter, she moved to vacate the surrenders on the basis that her psychiatric problems had prevented her from meaningfully participating in the proceedings. Family Court denied her motion and the Appellate Division affirmed. A surrender of parental rights becomes final in the absence of fraud, duress or coercion. Here, respondent did not claim her surrenders were procured by fraud, duress or coercion. Instead she argued due to her mental capacity, she could not understand the consequences of her actions. However, a review of the record showed she freely and knowingly executed the surrenders. Furthermore, the court did not err in failing to hold a hearing before denying respondent's motion since her motion lacked a legal basis upon which the court could rescind judicial surrenders.

Matter of Brittany R., 130 AD3d 1271 (3d Dept 2015)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner presented the requisite clear and convincing evidence that the assigned caseworker made repeated and diligent efforts to encourage and strengthen the parental relationship between the child and the father, who was incarcerated, including through written correspondence and telephonic communication. Petitioner established that, despite those efforts, the father failed substantially and continuously or repeatedly to maintain contact with or plan appropriately for the child's future. The father's failure to provide an realistic and feasible alternative to having the child remain in foster care until his release from prison supported a finding of permanent neglect.

Matter of Davianna L.,128 AD3d 1365 (4th Dept 2015)

Termination of Parental Rights on Ground of Abandonment Affirmed

Family Court terminated respondent father's parental rights with respect to the subject child on the ground of abandonment. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that respondent abandoned the subject child for the period of six months immediately prior to the date on which the petition was filed, and it was well settled that this lack of contact evinced his intent to forego his parental rights. Even assuming, arguendo, that the father was correct that he visited the child once within a few days after the six-month period commenced, such insubstantial contact was insufficient to defeat the claim of abandonment. The father's contention was rejected that petitioner discouraged contact between the father and the subject child. The father correctly conceded that, in this abandonment proceeding, petitioner was not obligated to contact the father and initiate efforts to encourage his parental relationship with his child. Furthermore, the father failed to establish that he was unable to maintain contact with his child, or that he was prevented or discouraged from doing so by petitioner. The father's further contention

was rejected that Family Court erred in denying his request to award custody of the subject child to the child's paternal grandmother, instead of awarding custody to petitioner so that the child may be adopted by her foster parents. It was well settled that, in the context of a dispositional hearing after the termination of parental rights, a nonparent relative of the child did not have a greater right to custody than the child's foster parents. The fact that the child's grandmother would be a good caretaker was not a sufficient reason to remove the child from the only home she had ever known and from a family with whom she had bonded. Thus, it was in the child's best interests to award custody to petitioner.

Matter of Lundyn S.,128 AD3d 1365 (4th Dept 2015)

Family Court Did Not Abuse Discretion in Refusing to Enter Suspended Judgment

Family Court terminated respondent father's parental rights with respect to his son on the ground of permanent neglect. The Appellate Division affirmed. Family Court did not abuse its discretion in refusing to enter a suspended judgement. Petitioner established that the father failed to complete substance abuse treatment successfully, attend scheduled visitation with the child consistently, or verify that he had obtained stable income and housing. Therefore, the record supported the court's refusal to grant a suspended judgment inasmuch as the record established that the father had no realistic feasible plan to care for the child and that he was not likely to change his behavior.

Matter of David W., 129 AD3d 1461 (4th Dept 2015)

No Error in Revocation of Suspended Judgment

Family Court changed the permanency goal for the subject child to adoption and revoked respondent mother's suspended judgment after a hearing and terminated the mother's parental rights to the child. The Appellate Division affirmed. The mother's contention was rejected that she was denied due process and a fair trial because the court undertook the role of a prosecutor and demonstrated bias against her. The Judge did not exceed his authority to question witnesses or to elicit and clarify testimony, and acting in the best interests and welfare of the child was not a denial of due process to the parent. It was not necessary that a party file a notice of motion and motion to revoke the suspended judgment in order for the court, on its own initiative, to conduct a hearing on that issue. The preponderance of the evidence at the hearing established that the mother knowingly and willfully violated certain conditions of the suspended judgment and that termination of the mother's parental rights was in the best interests of the child.

Matter of Emily A., 129 AD3d 1473 (4th Dept 2015)

Lack of Cooperation From Parent Frustrated Agency's Efforts

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the child. The agency's efforts, no matter how diligent, could be frustrated by the lack of cooperation from the parent, and the record established that such frustration of the agency's efforts occurred in this case. Furthermore, the mother failed substantially and continually to plan for the future of the child.

Matter of Qua'mel W., 129 AD3d 1487 (4th Dept 2015)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the child. Despite her participation in some of the services afforded to her, the mother did not successfully address or gain insight into the problem that led to the removal of the child and continued to prevent the child's safe return. The mother failed to plan for the future of the child, although able to do so. The mother did not comply with her service plan, inasmuch as she did not regularly attend visitation, find stable housing, or consistently engage in mental health treatment. The record supported the court's determination that a

suspended judgment was not in the best interests of the child.

Matter of Zachary H., 129 AD3d 1501 (4th Dept 2015)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondents mother's and father's parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. The Appellate Division affirmed. Petitioner presented the requisite clear and convincing evidence that the agency made diligent efforts to encourage and strengthen the relationship between the parents and child by providing services and other assistance aimed at ameliorating or resolving problems that prevented the child's return and that the parents failed substantially and continuously to plan for the child's future. Although the parents participated in services offered by petitioner, they failed to successfully address or gain insight into the problems that led to the child's removal.

Matter of Alexander S., 130 AD3d 1463 (4th Dept 2015)

Family Court Did Not Abuse Discretion in Declining to Enter Suspended Judgment

Family Court terminated respondent mother's parental rights with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. Family Court did not abuse its discretion in refusing to enter a suspended judgment. The record at the dispositional hearing established that any progress the mother made was not sufficient to warrant further prolongation of the children's unsettled familial status.

Matter of Renyhia A., 130 AD3d 1504 (4th Dept 2015)