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Representing Children on Appeal: Changed Circumstances, Changed Minds*

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I. INTRODUCTION

There is an inherent tension between appellate practice and the representation of children. An appeal is normally a review of a record that is frozen at the time the record is made. The lives of children, however, are not static and the circumstances and conditions of their lives, and those of their families, are constantly changing. Moreover, the changes that time has wrought, including a change in the child's experience and maturity, can also result in a change in the child's position in the case. Thus, appellate attorneys representing children are not infrequently confronted with situations in which circumstances have changed significantly from the time of the order appealed from or in which the child has changed his or her position.

Rules and Standards for children's attorneys make clear that attorneys for children must "zealously advocate the child's position"[1] and "follow the child's direction throughout the course of litigation."[2] This is true even when the reasons for the child's positions or desires may not be evident, or may perhaps seem unwise, to his or her attorney. Although an attorney may also be skeptical of the wisdom of an adult client's goals, when children are the clients, the attorney's understandable impulse to protect the child may make it difficult to respect the child's choices and decisions.[3] However, only when the attorney is guided by his or her client's desires and advocates zealously for them will the child's perspective be presented to the court.

Although this mandate applies with equal force to appellate attorneys,[4] its application can be problematic. The appellate process, by its nature, is a deliberative one. Its purpose is to provide a review of the record and an impartial determination by a panel of judges as to whether error occurred during the trial and whether that error requires a reversal of the judgment at trial. Appellate lawyers comb through the record and fashion arguments for and against reversal. The appellate judges review their briefs and the records, discuss the issues among themselves, and then issue an opinion. Such a process is—and should be—careful and thoughtful. As a result, the appellate process is usually a relatively lengthy one. However, the length of time involved in an appeal can create difficulties when the lives of children are at stake. It is certainly not surprising that changes can occur in a child's circumstances or that such changes or a child's growing maturity will result in a change in the child's position on appeal. Dealing with these changes in the context of an appeal can pose some of the most thorny challenges for an appellate attorney representing children.

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To a certain extent, as will be discussed below, there are a variety of options built into the structure of statutes and case law to deal with a change in the child's circumstances. A change in the child's position from the time of the Family Court order to the time of the appeal can be somewhat trickier. An appellate attorney will have to untangle the reasons and motivations behind the child's change in position. The child's change in position may very well be due to objective changes in the child's circumstances. Or, the change could be due to the child's growth and maturity in the intervening period which lead the child to have a different conception and understanding of the proceedings in which he or she is involved.

This article addresses the dilemmas raised for appellate attorneys by changes in a child's circumstances or changes in a child's position and discusses the ways in which appellate attorneys can both ethically and zealously represent their child clients in such situations.[5] Section II addresses changes in circumstances between the time of the Family Court proceedings and the time the appeal is heard in the appellate court. Section III deals with situations in which the position taken by the attorney for the child has changed between the time of the Family Court proceedings and the appeal. Section IV discusses ways in which the attorney for the child can zealously represent the child on appeal as well as some other ethical considerations relevant to these situations.

II. Changed Circumstances

The Court of Appeals addressed the issue of changed circumstances directly in *Matter of Michael B.*,[6] a case in which the appellant was the child's biological father. Michael had been voluntarily placed in foster care, but many years later, after a finding that his father was fit, the Family Court ordered that Michael be returned to his care. By that time, the father also had in his care other children besides Michael. Michael, however, had been in foster care since his birth and there was evidence that he might suffer psychological trauma if removed from his foster home. The Appellate Division found that Michael's lengthy stay in foster care and his psychological bonding with his foster family gave rise to extraordinary circumstances and awarded custody to Michael's foster parents over his biological father.[7]

The Court of Appeals ruled that when there is a fit parent, the state cannot grant custody to a foster parent. The last two paragraphs of the opinion, however, directly addressed the problem of changed circumstances in these types of cases. The opinion noted that the Court was informed that during the pendency of the appeal, the appellant father was charged with, and admitted to, neglect of the other children in his care. Appellant argued that the Court could not take account of these new developments because they were outside the record. The Court's response was that to ignore these new developments "would exalt the procedural rule—important though it is—to a point of absurdity."[8] The Court went on to state that it

> would therefore take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining appellant's fitness and right to custody of Michael, and remit the matter to Family Court for a new hearing and determination of those issues.[9]

In the years since *Michael B.* was decided, the Appellate Divisions in all four departments have remanded Family Court cases on appeal when circumstances have so radically changed that the record was no longer sufficient to determine the issue on appeal. An analysis of the kinds of cases that are remitted and the ways in which courts are willing to consider changed circumstances on appeal provides some guidance in determining how to proceed in these situations; these kinds of cases and the various options available to appellate attorneys when circumstances have changed are discussed below.

A. The Appropriate Forum for Changed Circumstances

First of all, it is important to note that an acknowledgment of the changing nature of children's lives and its impact on court cases is, for the most part, incorporated into the statutes and case law dealing with these kinds of cases. Thus, for example, a change in circumstances can give rise to a modification of custody.[10] In cases involving abuse or neglect, the Family Court Act permits the Family Court to modify or vacate a prior order "for good cause shown,"[11] and

certainly, a change of circumstances should constitute good cause.[12] Moreover, permanency hearings, which are held every six months while a child remains in foster care, also provide a forum in which changes in circumstances can result in a change in status of the child, such as the child's return home or some other change in placement.[13]

Therefore, when circumstances have changed significantly enough from the time the order on appeal was rendered, and there is a statutory means of re-opening the matter, the parties should attempt to do so before the trial court. Whether the changed circumstances are indeed significant and whether they warrant a change of the original order are matters best decided by the trial court. If a new order is issued, that generally will moot out the appeal. If the trial court decides that the change of circumstances does not warrant a change in its order, the movant can usually appeal from that determination as well. By moving to consolidate both appeals, the record reflecting the change in circumstances will be brought to the appellate court's attention.

However, although Article Ten proceedings[14] involving abuse and neglect provide statutory options in the Family Court to revisit prior decisions, until recently, no such option existed in cases involving termination of parental rights.[15] In these kinds of cases, therefore, appellate courts have shown themselves to be particularly hospitable to arguments that significant changes in circumstances require remanding the case for a new hearing on the best interests of the child.[16] Before the passage of a law permitting restoration of parental rights, there had been no clear means of re-opening cases involving termination of parental rights—even when circumstances had changed drastically.[17] Such radical events as the death of an adoptive parent, or the refusal of a child over the age of fourteen to consent to the adoption (which would make the child a legal orphan) could only be taken into account on appeal.

Despite the enactment of a statutory procedure enabling the restoration of parental rights for a very limited set of parents whose rights had previously been terminated,[18] the need for flexible appellate review in these cases continues. The finality entailed in termination of parental rights proceedings makes them fundamentally different from neglect and abuse proceedings. Even after a finding of neglect or abuse and placement in foster care, children may still be returned eventually to their parents.[19] Terminating parental rights completely cuts off the legal relationship between children and their parents forever. Therefore, when events have changed from the time that an order terminating parental rights was issued, and those events affect the children's lives, the appellate court must take those events into consideration in order to fulfill its *parens patriae* duty to ensure that the best interests of the child are met. Appropriately, therefore, appellate courts have generally taken into consideration arguments that changed circumstances after parental rights have been terminated require a remittal to the Family Court for a new hearing on the best interests of the child.[20]

B. Alerting the Appellate Court to Changed Circumstances

Circumstances may change significantly from the time of the order appealed from in any case involving children, not just cases involving termination of parental rights. When circumstances have changed significantly since the time the original order was issued, an appellate attorney representing a child is faced with the question of whether and how such circumstances, which are not part of the record below, can be made known to the appellate court. Although, as noted above, most changes of circumstances are best handled by moving to reopen in the lower court, there are situations where such a motion may not be available or appropriate. In such cases, attorneys sometimes have formally moved to enlarge the record on appeal to include the new information. Such motions are tricky, however. The information sought to be included must be reliable, it must be relevant to the issue before the court, and it must be clear why moving to enlarge the record, rather than moving in Family Court, is the proper procedure.[21]

As a general rule, if the circumstances can be described as controversial or contested, they should not be drawn to the attention of the appellate court. For example, that a parent is not "cooperating" or that the parent's relationship with the child has "improved," are assertions that might very well be contested by another party. In contrast, information of which the court can

take judicial notice, even if it is not part of the record below, is acceptable.[22] Examples of such information would be the fact that a parent has made a subsequent admission to neglect or has subsequently been found to have committed neglect or abuse of other children, or that the parent has made an admission in criminal court to the abuse of a child.[23] Appellate courts have also accepted other kinds of information that are generally non-controversial, such as the death of a foster parent[24] or the fact that there is no longer an adoptive resource available to the child.[25] Or, in the case of a child who is fourteen or near to fourteen years old, appellate courts have accepted information that the child will not consent to be adopted. The consent of a child fourteen years or older must be sought for an adoption.[26] If the child will not consent, it is unlikely that an adoption will be granted, and an affirmance of an order terminating parental rights could result in the creation of a legal orphan. The information that a child will not consent to an adoption, even if that decision comes subsequent to the proceedings involving termination of parental rights, is thus crucial information on an appeal, and, as an officer of the court, the attorney for the child may make such a representation to the appellate court on appeal.[27]

The practice of appellate attorneys representing children at The Legal Aid Society is to include an "update" section in the brief after the statement of facts. This section is very short, and, as described above, includes only non-controversial or non-contested facts. If the child has decided that he or she will not consent to adoption, this information will be provided to the court. Including this updated information can also be important even when the circumstances have not changed. Since, at the time the appeal is considered, a year or more may have passed from the issuance of the order being appealed, it is understandable that the appellate court would want to be assured that, for instance, the child is still being cared for in the same foster home and that that foster parent intends to adopt the child. Moreover, in cases where a child was removed from his or her parent pending ongoing neglect or abuse proceedings and the attorney for the child is advocating that the Family Court order be reversed and the child be sent home, the reviewing appellate court would want to know that there have been no significant changes in circumstances since the Family Court's order so that, if there is a reversal, the parent is capable of resuming care of the child.

It is worth noting that an attorney is not obligated to report changed circumstances to a court if the change in circumstances is adverse to the client's position.[28] However, if the attorney appears at oral argument and is specifically questioned about current circumstances, the attorney may not dissemble: New York Rules of Professional Conduct mandate that an attorney may not "make a false statement of fact or law to a tribunal."[29]

III. Changed Position

Sometimes the difficulty in representing children on appeal arises not from, or not only from, changed circumstances, but also from the child's change in position. The passage of time, maturity, or a new environment may mean that by the time an appeal is perfected, the child's position is different from the one the child's attorney advocated at the hearing below. Obviously, if the child is the appellant but no longer disagrees with the result below, the attorney may move to withdraw the appeal. Representing the child client who is not the appellant, but who has changed her or his position can be extremely challenging. If neither the petitioner nor the respondent wishes to settle the case, the child's ability to obtain or influence a settlement may be minimal. In those situations, the appellate attorney for the child may find herself in the awkward position of being forced to advocate for a result different from the one that was advocated below on the record. Changing position on appeal raises a host of questions, not the least of which is the application of the doctrine of judicial estoppel.

Judicial estoppel is used to prevent a party who has assumed a certain position in a legal proceeding from assuming a contrary position in another proceeding[30] or to prevent "a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."[31] This doctrine "rests upon the principle that a litigant 'should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.'"[32] However, as the Supreme Court has noted, "this estoppel doctrine is equitable and thus cannot be reduced to a precise formula or test."[33] The unusual position of a child in an appeal from Family Court litigation means that this

doctrine must be very carefully applied in cases of this type and overly technical applications of the doctrine have no place in an appeal in which a child has changed position because of changed circumstances or his or her evolving maturity.

For example, judicial estoppel seems completely inappropriate when the change in the child's position is due to the fact that the child has reached an age at which he or she can express his or her wishes. There are cases in which the attorney for the child at the Family Court proceedings had to formulate a position because the child was too young to express his or her wishes or was incapable of understanding the proceeding, but at the time of the appeal, the child has matured enough to have the capacity to make an informed decision about his or her position in the litigation. At the time of the appeal then, the child's position may differ from the one taken by his or her attorney at the Family Court proceedings. Technically, the position of the child has changed during the course of the litigation, yet one cannot really say that the child himself or herself has changed position. In these kinds of cases, it would not be fair to hold those children to the original position advocated by their attorney and judicial estoppel should not be used to prevent an appellate attorney from representing the child's current position on appeal.

Other considerations as well make the application of the doctrine of judicial estoppel inappropriate for children.[34] Time alone can have a significant impact on a child's position in a case, as the child matures and becomes capable of a more sophisticated understanding of acts and consequences. That a growing maturity may change the child's position in a case should not be surprising as it is part of what we all understand to be the process of growing up. A child's changing of position in the course of a Family Court proceeding will therefore likely have nothing to do with attempting to "derive an unfair advantage or impose an unfair detriment on the opposing party"[35] Rather, it is reflective of a greater maturity, understanding, and ability of the child. The "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings" that underlie the doctrine of preclusion of inconsistent positions[36] are not violated when a child—due to greater maturity, or perhaps changes in his or her circumstances—changes position on appeal.

Indeed, it is almost impossible to untangle the changes in circumstances in a child's life from the changes in a child's position. A child who may have originally supported a finding and removal from the home, may, by the time the case is appealed, be unhappy in foster care and very much want to return home. In such a case, it is reasonable for that child's attorney to argue that the best interests of the child no longer require removal.

Moreover, a child may have many reasons for changing position, including, as discussed above, a more mature attitude about the events, or about the child's own circumstances. In any event, assuming the child has been properly counseled, and there is a reasonable basis for the child's change of position, there is no reason that the attorney for the child should not be representing that child's position on appeal. A court's receptivity to such a change in position should therefore depend on a number of factors. The reason for the child's change in position, if it can be revealed, will be pertinent. If, on appeal, the child is adopting an argument made by another party below, then there is no strong reason to apply judicial estoppel on the grounds that the child's argument would constitute a disregard for the "orderly administration of justice" or "the dignity of judicial proceedings,"[37] for both sides of the case are already being presented to the appellate court. Certainly in no case in which the child's position has changed because the child's attorney initially took a position on the child's behalf due to the child's age, and the now-older child has taken a different position, should judicial estoppel be applied. If a party raises the doctrine of judicial estoppel, the court will have to determine whether, in that particular case, its application would be appropriate.

Because children's positions, and their circumstances, may change during the time between the Family Court proceedings and the appeal, and because the purpose of any Family Court proceeding is the best interest of the child, it would seem the better course for appellate courts to be as liberal as possible in allowing the child to present his or her position on appeal. A rigid approach can even result in the denial of appellate relief to children. In *Matter of Zanna E.*,[38] the court dismissed the appeal of the respondent-father's stepdaughter, stating that because the child had testified at the fact-

finding hearing that she was abused, she could not be "aggrieved" by the order determining that the abuse had occurred and therefore could not urge reversal on appeal.[39] It is not clear from the opinion, however, whether the child was supporting a finding below or even on whose behalf she had testified below. If the child did not support a finding, but testified because she was called as a witness, it would be unfair to conclude that she could not be aggrieved by the finding. Certainly a child could testify as to the existence of certain facts and assert at the same time that those facts do not legally constitute abuse or neglect.[40]

In sum, restricting the appellate attorney to the arguments made in the trial court may very well mean that the interests and wishes of the child will not be represented on appeal. The expectation that a party maintain a consistent position during the course of the litigation—an expectation that is inconsistent with the reality of the representation of children—cannot be reconciled with the zealous representation of a child at every juncture of the litigation.

IV. Finding the Path to Zealous Representation

Each individual case poses its unique challenges, and the appellate attorney, in every case, must be working with the client to determine the most efficient route to achieving the client's goals in the litigation. For example, if there has been a finding of abuse or neglect below resulting in the child's placement in foster care and the child's objective at the time of the appeal is to return home, the appellate attorney should investigate whether this may be accomplished through avenues other than obtaining a reversal on appeal, which is always a rare event. If the parent has completed or is involved in services addressing the original problem, it may be appropriate, and more desirable, to move in the Family Court to advocate for the child's return home.

Clearly, effective and sensitive counseling of the client is just as important a component of representing a child on appeal as it is in the Family Court. The appellate attorney has to explain the ramifications of the appeal and review the possible options available for the child. For example, the client might want the attorney to advocate for the child's return home, yet also understand that the existence of a finding of neglect means that the child's parent has to comply with services and that there will be oversight of the home—which might be to the child's advantage. If so, on appeal, the attorney could be advocating that the dispositional order placing the child in foster care was not in the child's best interest and should be reversed or remanded, but that the finding of neglect was proper and based on a preponderance of the evidence.

Because the issue for the court in the dispositional phase of the case is always the best interests of the child, it is not logically inconsistent to argue on appeal that, given the time that has passed since the entry of the original order, the best interests of the child are no longer served by the dispositional order on appeal. Although the passage of time alone will not usually be sufficient to make such an argument, counsel may be able to rely on evidence presented below that would support such a conclusion, or there may be changed circumstances which indicate that the record below is no longer sufficient to determine the issue on appeal.

Situations in which a child changes his or her position between the trial and appeal may require serious counseling of the client. Suppose, for example, that a twelve-year-old female client made allegations of sexual abuse against her father. A year later, at the time of the appeal, she tells her attorney that the allegations were not true and that she wants her father to come home. There may be many reasons for the child's recantation, and these must be explored with the child before determining a legal strategy.[41] A lawyer may not knowingly use false evidence, but the commentary to the applicable rule advises that the prohibition applies "only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that the evidence is false does not preclude its presentation to the trier of fact."[42] If the client is insisting that the events upon which the finding below is based are not true, and the attorney does not *know* that the child's statements are false, then the attorney's duty to the client is to advocate her position zealously to the court. Again, because the recantation creates a change in circumstances, this may be a situation where moving in Family Court to reopen the hearing below should be contemplated.

Another important ethical consideration is that a client's confidences or secrets may not be revealed unless the client has consented to such disclosure.[43] There are exceptions to this rule, but its application can

be particularly tricky with young clients. For example, a fifteen-year-old female client may tell her attorney that she prefers to remain in foster care and not return to the care of her mother. However, the client does not want this wish revealed; she still loves her mother and wants a continued relationship with her, and does not want to hurt her mother's feelings and further damage their already fragile relationship. This client may direct her attorney not to file a brief on appeal: To file a brief challenging the neglect finding and her placement in foster care would not represent her position; on the other hand, to file a brief supporting the finding and the placement in foster care would be disclosing information she does not want revealed. The appellate attorney must evaluate in each situation how best to accomplish the goals of the child client.

V. Conclusion

Changed circumstances are almost always a legitimate basis for seeking renewed review in the Family Court or arguing on appeal that the matter should be remanded so that the Family Court can take account of the new circumstances. A change in the child's position, although it may be uncomfortable for the appellate attorney, must also be analyzed carefully to determine whether such a change is necessary in order to zealously represent the child on appeal. In representing children, whose lives—and whose minds—change more quickly than the legal process can proceed, it is important that the child's attorney be flexible in considering how to advocate for the client. Whether to move in Family Court to reopen a case, to reveal the reason for the change of position on appeal, or to argue that the evidence is now insufficient to determine the child's best interests are all strategic questions for the attorney in determining how best to represent his or her client. The important thing to keep in mind is not the attorney's discomfort with the position, but how tactically to act in order to achieve the client's goal. Appellate courts are well aware of the tension between a traditional appellate review of a record on appeal and the need for an order on appeal to reflect the current reality of the lives of children involved in a particular case. In their struggle to reconcile and balance these tensions, New York courts and lawyers have cobbled together a practice that attempts to respect the construct of appellate review and, at the same time, to ensure that appellate review is meaningful to the lives of the children it is meant to protect.

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ENDNOTES

1. R.C.J.N.Y. § 7.2(d); *see also* New York State Bar Association Committee on Children and the Law, *Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings* 2, http://www.nycourts.gov/ad3/OAC/2008 CustodyStandards.pdf (summarizing, in commentary to § A-1, the provisions of Rule 7.2, which require, among other things that the "attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests").

2. *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, pt. I, § B-4, http://www.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.authcheckdam.pdf (ABA 1996) (accessed Feb. 23, 2012; copy on file with Journal of Appellate Practice and Process).

3. For purposes of this article, I am assuming that the attorney has determined that the child client has the capacity to comprehend the nature of the proceeding and the issues raised, and to communicate a preference and comprehensible reasons for it; this may be at age seven for most children and even younger for some. *See e.g. Giving the Children a Meaningful Voice: the Role of the Child's Lawyer in Child Protective, Permanency and Termination of Parental Rights Proceedings* 3, http://www.legal-aid.org/media/68451/role/%20of%20jrp%20lawyer%2010-08.pdf (Leg. Aid Socy. of N.Y. Aug. 2010) (noting that "many children have this capacity by the age of seven, eight or nine"); Tamara Steckler & Gary Solomon, *Perspective: New Era in Representing Children*, 240 N.Y. L.J. 2 (Oct. 22, 2008) (discussing the then-new Legal Aid Society policies).

4. *See e.g. Matter of Mark T. v. Joyanna U.*, 64 A.D.3d 1092, 1093 (N.Y. App. Div. 3d Dept. 2009) (pointing out that "whether it be at the trial level or at the appellate level," the lawyer's responsibility to a child client "requires consulting with and counseling the client").

5. Although these issues are discussed here in the context of New York statutory and case law, the same broad themes underlie the relevant law in most jurisdictions, so much of the analysis used in this article should be applicable elsewhere as well. The reader unfamiliar with New York practice should note that the Court of Appeals is New York's highest court; its intermediate appellate courts are the Appellate Divisions of the New York Supreme Court.

6. 604 N.E.2d 122 (N.Y. 1992).

7. *Id.* at 126–27.

8. *Id.* at 133.

9. *Id.*

10. N.Y.F.C.A §§ 467, 652 (requiring a showing of changed circumstances). The official text of the New York Family Court Act is available at http://public.leginfo .state.ny.us. (Click on "Laws of New York," scroll down to "Court Acts," click on "FCT," click on the subdivision containing the desired provision.)

11. N.Y.F.C.A. § 1061.

12. Matter of Angelina AA, 322 A.D.2d 967, 968–69 (N.Y. App. Div. 3d Dept. 1995) (noting that N.Y.F.C.A. §1061 indicates that the court's power to modify an order for good cause shown "expresses the strong Legislative policy in favor of continuing Family Court jurisdiction over the child and family so that the court can do what is necessary in the furtherance of the child's welfare"); *see also Matter of Sarah S.*, 2005 WL 2254083 at 2 (N.Y. Fam. Ct. Monroe Co. 2005) ("It seems clear that 'good cause shown' would mean a 'change of circumstances' to the Fourth Department").

13. N.Y.F.C.A. § 1089 (a), (d).

14. "Article Ten proceedings" are those covered by article 10 of the N.Y.F.C.A., which addresses child-protective proceedings involving abuse or neglect.

15. Upon a showing of good cause, a Family Court may "set aside, modify or vacate any order issued in the course of a proceeding" under Article Ten. N.Y.F.C.A. § 1061. In addition, the permanency hearings, which must be held every six months when a child is in foster care, N.Y.F.C.A. § 1089(a), also allow a court to terminate the placement of the child in foster care, return the child to the parent, place the child with a relative, or place the child for adoption among a variety of permissible orders, N.Y.F.C.A. § 1089 (d). A series of provisions that took effect in 2010 permit restoration of parental rights after their termination, but only under very limited circumstances. *See* F.C.A §§ 635–637.

16. *See e.g.* nn. 24, 25 & 27, *infra.*

17. Prior to the enactment of statutory authority to restore parental rights, the ability of a lower court to change the result of a termination-of-parental-rights case, even when the circumstances cried out for it, was murky at best. *See Theresa O. v. Arthur P.*, 11 Misc. 3d 736 (Fam. Ct. Ulster Co. 2006) (allowing adoption petition by biological mother who had voluntarily surrendered child after adoptive parents refused to allow child to return to their home); *Matter of Frederick S.*, 178 Misc. 2d 152 (Fam. Ct. Kings Co. 1998) (finding that Family Court Act does not give court power to vacate a termination-of-parental-rights order, but such order can be vacated under New York's Civil Procedure Law and Rules because a child's decision to refuse to consent to adoption may be considered "newly discovered evidence," yet nevertheless denying vacatur); *Matter of Anthony S.*, 178 Misc. 2d 1 (Fam. Ct. Kings Co. 1998) (finding that law guardian (i.e., the lawyer representing the child) has no standing to bring motion and further finding no statutory authority for court to vacate order terminating parental rights); *Matter of Tiffany A.*, 171 Misc. 2d 786 (Fam. Ct. Kings Co. 1996) (dismissing petition for custody by biological mother whose rights were terminated for lack of standing even though adoptive parent and child-care agency did not oppose); *Matter of Female S.*, 111 Misc. 2d 313 (Fam. Ct. N.Y. Co. 1981) (finding that Family Court has power to vacate prior termination of parental rights under its *parens patriae* function); *Matter of Rasheed A.*, 238 N.Y.L.J. 27 (Fam. Ct. Referee, King Co. Aug. 3, 2007).

18. N.Y.F.C.A. §§ 635–37.

19. N.Y.F.C.A § 1052(a); *see also* n. 15, *supra.*

20. *See* nn. 24, 25 & 27, *infra.*

21. Attorneys are often caught in a difficult position in these cases. It might be better in some situations to move in Family Court for a re-evaluation of the case due to a change in the child's circumstances. But some Family Court judges are disinclined to entertain such motions when an appeal is pending, and will often tell the attorneys that they will not re-evaluate the order until after the appeal is resolved. In such situations, an attorney may have no option but to attempt to bring the new information before the appellate court.

22. *See e.g. Matter of Chloe Q.*, 68 A.D.3d 1370 (N.Y. App. Div. 3d Dept. 2009) (taking into consideration fact that subsequent to filing of appeal, appellant father consented to an order granting custody of child to grandparents, thus rendering appeal moot).

23. Michael B., 604 N.E.2d at 133 (taking notice of subsequent orders of neglect involving other children based on father's admission to substance abuse, and remitting matter to Family Court for a new hearing); *see also Chow v. Holmes*, 63 A.D.3d 925 (2d Dept. 2009) (holding record no longer sufficient to determine child's best interests in light of new facts indicating that father was awaiting sentencing for attempted assault, and remitting matter to Family Court).

24. See e.g. Matter of Kayshawn E., 56 A.D.3d 471 (2d Dept. 2008) (considering new facts, including that prospective adoptive mother has died and that children over fourteen wish to be reunited with biological mother); *Matter of Antonette Alasha E.*, 8 A.D. 3d 375 (2d Dept. 2004) (holding that significant change in circumstances, including death of proposed adoptive mother and biological mother's progress, warrant remititur to Family Court for new dispositional hearing).

25. *Matter of Samuel Fabien G.*, 52 A.D.3d 713 (2d Dept. 2008); *Matter of Eugene L.*, 22 A.D.3d 348 (1st Dept. 2005); *Matter of Christina Janian E.*, 260 A.D.2d 300 (1st Dept. 1999).

26. N.Y. Dom. Rel. L. §111(a) (providing that "consent to adoption shall be required . . . [o]f the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent").

27. See e.g. Matter of Shad S., 67 A.D.3d 1359 (N.Y. App. Div. 4th Dept. 2009); *Matter of Danielle Joy K.*, 60 A.D.3d 948 (N.Y. App. Div. 2d Dept. 2009); *Matter of Londel Chavis C.*, 41 A.D.3d 843 (2d Dept. 2007); *Matter of Marc David D.*, 20 A.D.3d 565 (2d Dept. 2005).

28. There is no general affirmative duty to disclose adverse facts on appeal. N.Y. R. Prof. Conduct 4.1 cmt.1 ("A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."); *see also* N.Y. R. Prof. Conduct 3.3 cmt. 14 (pointing out that "[o]rdinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party" and also noting that a lawyer has a greater duty in ex parte proceedings). However, the attorney must always and in every case "disclose to the tribunal controlling *legal authority* known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." N.Y. R. Prof. Conduct 3.3(a)(2) (emphasis added).

29. N.Y. R. Prof. Conduct 3.3(a)(1).

30. *N.H. v. Me.*, 532 U.S. 742, 749 (2001).

31. *Pegram v. Hedrich*, 530 U.S. 211, 227, n. 8 (2000).

32. *Environmental Concern, Inc. v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 593 (N.Y. App. Div. 2d Dept. 1984) (quoting Student Author, *The Doctrine of Preclusion against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946)).

33. *Zedner v. U.S.*, 547 U.S. 489, 504 (2006).

34. Indeed, the author has been unable to find any cases in New York that specifically apply this doctrine to a change of position by a child in a Family Court or custody proceeding.

35. *Zedner*, 547 U.S. at 504 (quoting *N.H. v. Me.*, 532 U.S at 751).

36. *Environmental Concern*, 101 A.D.2d at 593 (quoting *Ariz. v. Shamrock Foods Co.*, 29 F.2d 1208, 1215 (9th Cir. 1984)).

37. *Id.*

38. 77 A.D.3d 1364 (N.Y. App. Div. 4th Dept. 2010).

39. *Id.* at 1364.

40. In *Zanna E.*, the court also denied the father's biological daughter the opportunity to appeal the finding of derivative neglect as to her, stating that this child could not "seek affirmative relief" from the finding because she did not file a notice of appeal—this despite the fact that the father himself was appealing the finding. *See id.* at 1364. Given that circumstances may change, or the child's position may change, it seems too restrictive to require the child to file a notice of appeal in order to participate in an appeal filed by another party. Indeed, it appears that the Appellate Division's First and Second Departments have never required that the child file a notice of appeal in order to take a position urging reversal on appeal. This seems to be the better stance, as it provides appropriate flexibility for the attorney to represent the child's position on appeal. However, if the child does not file a notice of appeal and no other party appeals, then of course no appeal can be perfected. If a child is aggrieved by an order of the Family Court, the only way to ensure that the order is appealed is for the child's attorney to file a notice of appeal.

41. The Juvenile Rights Practice is an interdisciplinary practice involving attorneys, social workers, and paralegals. The advantages of working with social workers in counseling clients on these very difficult issues cannot be overstated.

42. N.Y. R. Prof. Conduct 3.3 cmt. 8.

43. N.Y. R. Prof. Conduct 1.6(a)(1).

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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

NOTICE: THE NEW YORK CHILDREN'S LAWYER WILL NO LONGER BE AVAILABLE IN HARD COPY. THIS PUBLICATION WILL BE AVAILABLE ON EACH ATTORNEYS FOR CHILDREN DEPARTMENT WEBSITE TRI-ANNUALLY IN APRIL, AUGUST AND DECEMBER.

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

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

On June 4, 2013, the Appellate Division, Second Judicial Department, and the New York City Family Court Advisory Council to the Administrative Judge Committee for Lesbian, Gay, Bisexual and Transgender Matters, co-sponsored ***Representing Transgender and Gender Non-Conforming Youth in Family Court***. This presentation was given by Sol Davis, Esq., Staff Attorney, The Legal Aid Society, Juvenile Rights Practice, Avgi Saketopoulou, Psy.D, Licensed Clinical Psychologist, Private Practice, and Virginia M. Goggin, Project Coordinator, LGBT Law Project at NYLAG. This program was also held at the Queens County Family Court (presented by Linda Diaz, Senior Staff Attorney, Director, LGBTQ Project at Lawyers for Children, Jennifer Gunnell, LCSW, Social Worker in Private Practice, Marcia Werchol, M.D., Assistant Vice President, Family Court Mental Health Services, NYC Health and Hospitals Corporation), and at the Richmond County Family Court (presented by Kimberly Forte, Supervising Attorney, LGBT Law and Policy Initiative, The Legal Aid Society, Laura Booker, LCSW, Social Worker in Private Practice, and Virginia M. Goggin, Project Coordinator, LGBT Law Project at NYLAG).

On June 6, 2013, the Appellate Division, Second Judicial Department, the Queens County Family Court, the Queens County Bar Association, and the Queens County Family Court Disproportionate Minority Representation Committee, co-sponsored ***Skills for Engagement of Fathers in Child Protective Proceedings***. This presentation was given by the Hon. Maria Arias, Queens County Family Court, Chair, Queens Disproportionate Minority Representation Committee, Ed Parker, Family Advocate, Center for Family Representation, and Scott Leach, CEO/Founder, Daddy's Toolbox. This seminar was held at the Queens County Bar Association, Jamaica, New York.

On June 25, 2013, the Appellate Division, Second Judicial Department, the Kings County Family Court, and the New York State Unified Court System Child Welfare Court Improvement Project, Co-sponsored ***Case Conferencing Guidelines: a Fresh Look at a Current Practice***. The presenters were the Hon. Jeanette Ruiz, Supervising Judge, Kings County Family Court, Martin Feinman, Esq., Borough Supervisor, Legal Aid, Juvenile Rights Practice, Dawn Post, Esq., Co-Borough Director, Children's Law Center, Lauren Shapiro, Esq., Executive Director, Brooklyn Family Defense Project, Alan Sputz, Esq., Deputy Commissioner, Administration for Children's Services, and Brian Zimmerman, Esq., Attorney, Private Practice. This presentation was held at the Kings County Family Court. This progam was also held at the Queens County Family Court (presented by the Hon. Carol Stokinger, Supervising Judge, Queens County Family Court, Michele Cortese, Esq., Deputy Director, Center for Family Representation, Alan Sputz, Esq., Deputy Commissioner, Administration for Children's Services, and Dodd Terry, Esq., Borough Supervisor, Legal Aid, Juvenile Rights Practice), and at the Richmond County Family

Court (presented by Daniel Greenbaum, Esq., Legal Aid Society, Juvenile Rights Practice, Nancy Thomson, Esq., Associate Commissioner, Administration for Children's Services, and Harriet R. Weinberger, Esq., Director, Attorneys for Children Program, Appellate Division Second Judicial Department).

On November 4, 2013, 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***. Carol Robles-Roman, Deputy Mayor for Legal Affairs and Counsel to the Mayor, Wendy Wylegala, Esq., Kids in Need of Defense, Supervising Attorney for Pro Bono Programs, , and Lauren A. Burke, Esq., Executive Director, Atlas: DIY, Developing Immigrant Youth, presented ***A Panel Discussion on Human Trafficking - An Overview of Policy, Legislation, and Representing Child Victims***. This seminar was held at Brooklyn Law School, Brooklyn, New York.

Tenth Judicial District (Nassau County)

On October 23, 2013, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored the Mandatory Annual Fall Seminar. Margaret A. Burt, Esq., Attorney at Law, presented ***Child Welfare Update***; William H. Kaplan, M.D., Psychiatrist, Private Practice, presented ***A Look at Brain Development in the Context of Juvenile Delinquency,*** and Ian Kysel, Esq., Georgetown University Law Center Human Rights Institute, presented ***The Impact of Solitary Confinement on Juveniles.*** This seminar was held at Hofstra University Law School, Hempstead, New York.

Tenth Judicial District (Suffolk County)

On October 16, 2013, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored the Mandatory Annual Fall Seminar. Margaret A. Burt, Esq., Attorney at Law, presented ***Child Welfare Law Update***; the Hon. David Freundlich presented ***The State of the Family Court***, Melissa Macko, LMSW, Director, Halt Program, presented ***An Overview of Domestic Violence Programs***, and Anyela M. Pandolfo, Assistant Bureau Director, Suffolk County Department of Social Services, presented ***Standards and Guidelines for Federal/State Reimbursements for Foster Care Programs***. This seminar was held at the Suffolk County Supreme Court, Central Islip, New York.

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

On October 18, 2013, 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***, Loretta Frederick, Esq., Battered Women's Justice Project, together with Rhonda Weir, Esq., Attorney, Private Practice, presented ***Advocacy for Children in Domestic Violence Cases: Effective Representation of a Child's Position***, Elizabeth Schockmel, Psy.D., Clinical and Forensic Psychologist, presented ***Interviewing Children in the Midst of High Conflict Cases***, and Raymond Griffin, Ph.D., Psychologist, Private Practice, presented ***Dealing with Substance and Alcohol Abuse***. This seminar was held at the Westchester County Supreme Court, White Plains, 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@courts.state.ny.us 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 in October and will meet again in the Spring 2014. The committees were developed to provide a means of communication between panel members and the Office of Attorneys for Children. The Liaison Committees, whose members are nominated by Family Court judges, meet twice annually and representatives are frequently in contact with the Office of Attorneys for Children on an interim basis. If you would like to know the name of your Liaison Committee Representative, it is listed in the Administrative Handbook or you may contact Betsy Ruslander by telephone or e-mail at *oac3d@nycourts.gov*. If you have any issues you would like brought to the attention of the Office of Attorneys for Children, please contact your county's Liaison Representative. Welcome to the new Liaison Representative, Mary Tarantelli from Chemung County with many thanks to David Rynders who served previously for many years.

Training News

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

Annual Topical Conference, this year focusing on custody and visitation will be held on Friday, April 25, 2014 at the Holiday Inn in Colonie;

Children's Law Update '13-'14 will be held on Friday, May 9, 2014 at the Crowne Plaza Resort in Lake Placid; and

Introduction to Effective Representation of Children, the two-day introductory course for panel applicants and new panel members, will be held on Friday and Saturday, June 6-7, 2014 at the Clarion Hotel (Century House) in Latham.

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

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

Website

The Office of Attorneys for Children web page located at *nycourts.gov/ad3/oac* includes a wide variety of resources, including E-voucher information, online CLE videos and materials, the New York State Bar Association Representation Standards, the latest edition (8-27-13 of the Administrative Handbook, forms, rules, frequently asked questions, seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The newest feature is a *News Alert* which will include recent program and practice developments of note.

FOURTH DEPARTMENT NEWS

New Re-certification Form

The Appellate Division, Fourth Department Court Rules were recently amended to require current panel members to submit to the Office of Attorneys for Children annually, a Panel Re-Designation Application 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 Times

Fundamentals of Attorney for the Child Advocacy Seminars

Please note that Fundamentals I and II are basic seminars designed for prospective attorneys for children.

Thursday, March 27, 2014

Fundamentals of Attorney for the Child Advocacy I– Juvenile Justice Proceedings

Reidman Building, 45 East Avenue, Rochester, NY, across the street from the M. Dolores Denman Courthouse, Appellate Division, Fourth Department, 50 East Avenue, Rochester, New York

Friday, March 28 2014

Fundamentals of Attorney for the Child Advocacy II – Child Protective & Custody Proceedings

Reidman Building, 45 East Avenue, Rochester, NY, across the street from the M. Dolores Denman Courthouse, Appellate Division, Fourth Department, 50 East Avenue, Rochester, New York

The Program requires prospective attorneys for children to attend both seminars. In order to accommodate the commute time of attorneys from counties distant from Monroe County, the seminars will not begin until 9:45 A.M. A light breakfast and box lunch will be provided to all each day.

Seminars for Attorneys for Children

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

March 19, 2014

Update for Attorneys for Children (half day)
Center for Tomorrow
(University of Buffalo)
Buffalo, NY

April 25, 2014

Update for Attorneys for Children (half day)
Chautauqua County

June 2014

Update for Attorneys for Children (half day)
Oneida County

Resort Seminar 2014

The Third and Fourth Department Attorneys for Children Programs are planning to host a "resort" seminar at the Gideon-Putnam Resort in Saratoga Springs on October 17-18, 2014. Those of you who attended any of the previous "resort" seminars know that the upstate conferences are a great opportunity for attorneys for children in the Third and Fourth Departments to get together for training, talk, and some much-deserved relaxation in great locations. If you are not familiar with the historic Gideon-Putnam Resort Hotel, and the beauty and recreational possibilities of Saratoga Springs, we urge you to check them out, starting with the hotel website at www.gideonputnam.com. Accommodations at the hotel start at $104 per night for a standard room. Meals at the hotel - menus are given on the website - are very reasonably priced. The Attorneys for Children Programs will host a reception (cash bar) on Friday evening with complementary hors d'oeuvres. On Saturday we will provide a full day of free CLE.

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, 2014, to remain eligible for panel designation, you should have received a letter to that effect in November 2013. 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, 2014.** 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, and you must be admitted at least two years to receive NYS CLE credit. Please retain copies of your affirmations and your CLE certificates. We are unable to tell you what videos you viewed.

Recent Books and Articles

ADOPTION

William Giacofci, *Curbing Intercountry Adoption Abuses Through the Alien Tort Statute,* 18 Roger Williams U. L. Rev. 110 (2013)

Deleith Duke Gossett, *If Charity Begins at Home, Why do we go Searching Abroad? Why the Federal Adoption Tax Credit Should Not Subsidize International Adoptions,* 17 Lewis & Clark L. Rev. 839 (2013)

Dawn J. Post, *Permanency to Majority: The Potential Cost of Older Parent Adoptions,* 32 No. 9 Child L. Prac. 129 (2013)

Elizabeth J. Samuels, *Surrender and Subordination: Birth Mothers and Adoption Law Reform,* 20 Mich. J. Gender & L. 33 (2013)

Katherine A. West, *Denying a Class of Adopted Children Equal Protection,* 53 Santa Clara L. Rev. 963 (2013)

ATTORNEY FOR THE CHILD

Cara Drinan, *Getting Real About* Gideon: *The Next Fifty Years of Enforcing the Right to Counsel,* 70 Wash. & Lee L. Rev. 1309

Ike Vanden Eykel & Emily Miskel, *The Mental Health Privilege in Divorce and Custody Cases,* 25 J. Am. Acad. Matrim. Law. 453 (2013)

Jamie Rosen, *The Child's Attorney and the Alienated Child: Approaches to Resolving the Ethical Dilemma of Diminished Capacity,* 51 Fam. Ct. Rev. 330 (2013)

CHILD WELFARE

Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America's Sex-Trafficked Children,* 44 Colum. Hum. Rts. L. Rev. 619 (2013)

Christopher T. Fell, *Crying out for Change: A Call for a New Child Abuse Hearsay Exception in New York State,* 76 Alb. L. Rev. 1853 (2012-2013)

Cynthia Godsoe, *Parsing Parenthood,* 17 Lewis & Clark L. Rev. 113 (2013)

Claudia M. Gold, *Child Protection and Infant Mental Health: An Essential Partnership,* 115 W. Va. L. Rev. 1127 (2013)

Rachel Goldenberg, *Unholy Clergy: Amending State Child Abuse Reporting Statues to Include Clergy Members as Mandatory Reporters in Child Sexual Abuse Cases,* 51 Fam. Ct. Rev. 298 (2013)

Gurjot Kaur, *A Case of Neglect? Representation for Children in the Florida Dependency System,* 87-JUN Fla. B. J. 94 (2013)

Joan Owhe, *Indicated Reports of Child Abuse or Maltreatment: When Suspects Become Victims,* 51 Fam. Ct. Rev. 316 (2013)

Christine Rainville, *Prosecuting Cases for Children on the Autism Spectrum,* 32 No. 4 Child L. Prac. 49 (2013)

Ryan Seelau, *Regaining Control Over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, an Juvenile Justice that Targeted Native American Youth,* 37 Am. Indian L. Rev. 63 (2012-2013)

Starla J. Williams, *Reforming Mandated Reporting Laws After Sandusky,* 22-SPG Kan. J. L. Pub. Pol'y 235 (2013)

CHILDREN'S RIGHTS

Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment,* 34 Cardozo L. Rev. 2261 (2013)

David Gan-wing Cheng, Wisconsin v. Yoder:

Respecting Children's Rights and Why Yoder *Should be Overturned,* 4 Charlotte L. Rev. 45 (2013)

Edith Rosario, *Making it Better Now: Working Toward Substantive Equality for LGBT Youth,* 22 Tul. J.L. & Sexuality 147 (2013)

CONSTITUTIONAL LAW

Jessica K. Boyd, *Moving the Bully From the Schoolyard to Cyberspace: How Much Protection is Off-Campus Student Speech Awarded Under the First Amendment?,* 64 Ala. L. Rev. 1215 (2013)

Lindsay J. Gower, Blue Mountain School District v. J. S. Ex Rel. Snyder: *Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?,* 64 Ala. L. Rev. 709 (2013)

Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women's Reproductive Rights,* 15 Berkeley J. Afr. Am. L. & Pol'y 117 (2013)

Elizabeth Redpath, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records,* 62 Emory L. J. 639 (2013)

Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education,* 34 Cardozo L. Rev. 1163 (2013)

Aryn Seiler, *Buried Alive: The Constitutional Question of Life Without Parole for Juvenile Offenders Convicted of Homicide,* 17 Lewis & Clark L. Rev. 293 (2013)

Steve Varel, *Limits on School Disciplinary Authority Over Online Student Speech,* 33 N. Ill. U. L. Rev. 423 (2013)

COURTS

Jessica Feierman, *Stemming the Tide: Promising Legislation to Reduce School Referrals to the Courts,* 51 Fam. Ct. Rev. 409 (2013)

Jerry Foxhoven, *In Search of Federal Remedies for LGBTQ Students who are Victims of Assault and Harassment in School,* 21 Buff. J. Gender, L. & Soc. Pol'y 45 (2012-2013)

Casey Holder, *All Dogs go to Court: The Impact of Court Facility Dogs as Comfort for Child Witnesses on a Defendant's Right to a Fair Trial,* 50 Hous. L. Rev. 1155 (2013)

Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent,* 64 Ala. L. Rev. 533 (2013)

Corey Shdaimah & Alicia Summers, *Baltimore City's Model Court: Professional Stakeholders' Experience With Baltimore City's One Family, One Judge Docketing,* 51 Fam. Ct. Rev. 286 (2013)

CUSTODY AND VISITATION

William G. Austin, et. al., *Parental Gatekeeping and Child Custody/Child Access Evaluation: Part 1: Conceptual Framework, Research, and Application,* 51 Fam. Ct. Rev. 485 (2013)

Erin Bajackson, *Best Interests of the Child-A Legislative Journey Still in Motion,* 25 J. Am. Acad. Matrim. Law 311 (2013)

Sacha M. Coupet, *The AAML Child Custody Evaluation Standards: Bridging Two Worlds,* 25 Am. Acad. Matrim. Law 295 (2013)

David A Martindale & Jonathon W. Gould, *Deconstructing Custodial Evaluation Reports,* 25 J. Am. Acad. Matrim. Law 357 (2013)

Steven N. Peskind, *Evidentiary Opportunities: Applicability of the Hearsay Rules in Child Custody Proceedings,* 25 J. Am. Acad. Matrim. Law 375 (2013)

Michael Singer, *Across the Border and Back Again: Immigration Status and the Article 12*

"Well-Settled" Defense, 81 Fordham L. Rev. 3693 (2013)

Phillip M. Stahl, *Emerging Issues in Relocation Cases,* 25 J. Am. Acad. Matrim. Law 425 (2013)

DIVORCE

Lea C. Boelke, *Children's Involvement in Divorce,* 76 Tex. B.J., 489 (2013)

Jill S. Jurries, *Avoiding the Hollywood Drama: The Evolution of Mediation in Divorce,* 56-MAY Advocate (Idaho) 20 (2013)

DOMESTIC VIOLENCE

Amy L. Cosentino, *"She Said What?" What to do in Civil Domestic Violence Proceedings With Child Hearsay,* 87-Oct Fla. B. J. 42 (2013)

Luisa Johnson, *Jack the Ripper Lives On...The Need to Recognize Prostitutes as Domestic Violence Victims,* 21 Buff. J. Gender, L. & Soc. Pol'y 157 (2012-2013)

Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence,* 20 Mich. J. Gender & L.1 (2013)

Robin R. Runge, *The Evolution of a National Response to Violence Against Women,* 24 Hastings Women's L. J. 429 (2013)

Kathryn Gillespie Wellman, *Taking the Next Step in the Legal Response to Domestic Violence: The Need to Re-examine Specialized Domestic Violence Courts From a Victim Perspective,* 24 Colum. J. Gender & L. 444 (2013)

Alissa Pollitz Worden et. al., *Sidestepping Justice? Adjournments in Contemplation of Dismissal in Misdemeanor Court,* 76 Alb. L. Rev. 1713 (2012-2013)

Claire Wright, *Torture at Home: Borrowing From the Torture Convention to Define Domestic Violence,* 24 Hastings Women's L. J. 457 (2013)

EDUCATION LAW

Jose M. Delgado, *"Chill Out" Mrs. Robinson: First Amendment Implications of Limiting Private Teacher-Student Electronic Communication,* 45 Ariz. St. L. J. 299 (2013)

Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?,* 81 Fordham L. Rev. 2729 (2013)

William M. Fischer, *Conditional Welfare Grants to Address Truancy and Child Educational Neglect: United States' Experiments and Ecuador's Mandates,* 42 J. L. & Educ. 275 (2013)

Irving Joyner, *Pimping* Brown v. Board of Education: *The Destruction of African-American Schools and the Mis-Education of African American Students,* 35 N. C. Cent. L. Rev. 160 (2013)

R. Stewart Mayers & Mike F. Desiderio, *Not LOL: Legal Issues Encountered During One High School's Response to Sexting,* 2013 B.Y.U. Educ. & L. J. 1 (2013)

Jeremiah R. Newhall, *Sex-Based Dress Codes and Equal Protection in Public Schools,* 12 Appalachian J. L. 209 (2013)

Sarah Wieselthier, *Judicial Clarity: Giving Teeth to the Application of Federal Disability Laws in Charter Schools,* 2013 B.Y.U. Educ. & L. J. 67 (2013)

FAMILY LAW

Hon. Peter Boshier, et. al., *The Role of the State in Family Law,* 51 Fam. Ct. Rev. 184 (2013)

Herbert Fain & Kimberly Fain, *Socio-Economic Status and Legal Factors Affecting African American Fathers,* 21 Buff. J. Gender, L. & Soc.

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Michal Gilad & Tal Gat, *U.S. V. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women,* 37 N.Y.U. Rev. L. & Soc. Change 371 (2013)

Hope Lu, *Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions From Mandatory Vaccination,* 63 Case W. Res. L. Rev. 869 (2013)

Sara Maeder, *Divorcing Marriage from its Incidents: Framing* Perry *as a Celebration of Family Self-Determination,* 37 N. Y. U. Rev. L. & Soc. Change 275 (2013)

Asifa Quraishi-Landes, *Rumors of the Sharia Threat are Greatly Exaggerated: What American Judges Really do With Islamic Family Law in Their Courtrooms,* 57 N. Y. L. Sch. L. Rev. 245 (2012/2013)

Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law,* 101 Cal. L Rev. 609 (2013)

JUVENILE DELINQUENCY

Katherine Lazarow, *The Continued Viability of New York's Juvenile Offender Act in Light of Recent National Developments,* 57 N.Y. L. Rev. 595 (2013)

James Donald Moorehead, *What Rough Beast Awaits?* Graham, Miller, *and the Supreme Court's Seemingly Inevitable Slouch Towards Complete Abolition of Juvenile Life Without Parole,* 46 Ind. L. Rev. 671 (2013)

Jason Nance, *Random, Suspicionless Searches of Student's Belongings: A Legal, Empirical, and Normative Analysis,* 84 Colo. L. Rev. 367 (2013)

Krisztina Schlessel, Graham's *Applicability to Term-of-Years Sentences and Mandate to Provide a "Meaningful Opportunity" For Release,* 40 Fla. St. U. L. Rev. 1027 (2013)

Jennifer A. L. Sheldon-Sherman, *The Idea of an Adequate Education for All: Ensuring Success for Incarcerated Youth with Disabilities,* 42 J. L. & Educ. 227 (2013)

Zachary Baron Shemtob, *From* Weems *to* Graham: *The Curious Evolution of Evolving Standards of Decency,* 49 No. 3 Crim. Law Bulletin ART 5 (2013)

Richard B. Teitelman & Gregory J. Linhares, *Juvenile Detention Reform in Missouri: Improving Lives, Improving Public Safety and Saving Money,* 76 Alb. L. Rev. 2011 (2012-2013)

PATERNITY

Lauren Gill, *Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation,* 54 Wm. & Mary L. Rev. 1715 (2013)

TERMINATION OF PARENTAL RIGHTS

Meg Buice, *A Father's Right to Counsel in Georgia Juvenile Court Legitimation Proceedings: Closing the Due Process Loophole,* 29 Ga. St. U. L. Rev. 865 (2013)

Federal Courts

Denial of Father's Petition for Return of Child Pursuant to Hague Convention

The father established a prima facie case of wrongful removal of the child under the Hague Convention and the International Child Abduction Remedies Act. However, the court, citing three Hague Convention defenses, denied the father's petition for return of his almost 15-year-old daughter to Hungary. The court found that the child was well-settled in the United States and that returning her to Hungary for custody proceedings would be harmful and disruptive. Various factors that supported this defense included the child's age, stability of environment, school attendance, and friends and relatives. Although the mother was not employed, she received financial assistance from her mother and her mother's husband. The defense was undercut by the fact that the mother and child were living in the United States as undocumented persons, and faced obstacles to obtaining lawful status. However, it appeared that deportation was unlikely, and this issue did not preclude a finding that the settled defense had been established. With respect to the age and maturity defense, the court concluded that the child was of a sufficient age and maturity that the court should take into account her considered objection to returning. The court also noted that, at 16 years of age, the child would soon age out of the Hague Convention. Regarding the grave risk of harm defense, the court cited, among other things, the father's verbal abuse of the child and physical abuse of the mother, and found that repatriating the child to Hungary would severely damage her psychological and emotional state.

Matter of D.T.J., ___F Supp2d___ , 2013 WL 3866636 (SDNY 2013)

Summary Judgment Granted in Action Brought Against City, ACS and ACS Employees by Respondent in Article 10 Proceeding

Plaintiff brought an action against the City of New York, the New York City Administration for Children's Services, and current and former ACS employees, alleging that her minor daughter was wrongfully removed from her custody in violation of her federal and state constitutional rights. ACS removed the child from plaintiff's custody having determined that the child's safety was in danger because plaintiff exhibited paranoid and delusional behavior and had hallucinations. The next day, ACS filed a neglect petition in Family Court in accordance with Article 10 of the Family Court Act, stating that the child's emergency removal was required because plaintiff suffered from mental illness, which rendered her incapable of providing minimally adequate care for the child. The child was placed with her father. ACS later made an application to withdraw the neglect petition. Although plaintiff was exhibiting bizarre behavior that affected the child at the time, plaintiff subsequently cooperated with ACS supervision and was mentally stable and capable of caring for the child. Over the AFC's objection, the petition was dismissed based on ACS's withdrawal. The child remained in her father's care pending a custody determination. Plaintiff filed the instant suit in District Court seeking declaratory, monetary and injunctive relief. The Court granted defendants' motions for summary judgment, noting, among other things, that ACS was an agency of the City of New York and could not be sued independently; that there was no evidence in the record indicating that any City or ACS policy, custom, or practice resulted in harm to plaintiff; and that plaintiff's intimations that the caseworker lacked sufficient training to identify mental illness did not rise to the level of deliberate indifference and, in any event, no failure by the agency caused it to determine that the child's health and safety were in danger.

Puma-Grippe v. City of New York, ___F Supp2d___ , 2013 WL 4069471 (EDNY 2013)

Court of Appeals

Declaration Against Penal Interest Assessed at Time Declaration Made

Defendants and a female co-defendant were passengers in an automobile that was stopped by the police. All the occupants were charged with second-degree weapon possession after the officers observed a loaded handgun protruding from a handbag near the rear seat where the woman had been sitting. Before trial, the female co-defendant had a conversation with defendant Perrington's lawyer in which she stated that the gun belonged to her. At the co-defendant's separate trial, however, she testified that the firearm was not hers, and she was acquitted of weapon possession. Defendants were tried jointly and they requested that Perrington's former attorney be allowed to testify about the female co-defendant's acknowledgment of ownership under the declaration against penal interest exception to the hearsay rule. Supreme Court determined that the statement was inadmissible because the woman's unavailability had not been proven and the statement lacked reliability. Defendants were subsequently convicted of second-degree weapon possession. The Appellate Division affirmed. The Court of Appeals reversed. The courts erred by focusing on the inconsistency between the female co-defendant's trial testimony and her pretrial statement to Perrington's lawyer. Knowledge that a declaration was against penal interests must be assessed at the time it was made; subsequent recantations generally affect weight and credibility. There was adequate evidence to establish admissibility under the particular facts of the case. The handgun was found in a handbag located in the rear of the automobile directly adjacent to the female co-defendant. She was the only woman in the vehicle, and the circumstances under which the utterance was declared made it clear that the statement was against her interests. Judge Pigott and Judge Smith dissented and concluded that defendants failed to establish the female co-defendant's unavailability, and, when asked by the court if the defense wanted her to testify that the gun was hers, counsel responded, "No, I don't. She will testify the other way, because she's already testified to that."

People v. Shabazz, ___ NY3d ___ (October 15, 2013)

Emergency Doctrine Justified Police Questioning Without Miranda Warnings; Court Properly Denied Suppression of Custodial Statements Made by Defendant to His Female Acquaintance in Presence of Police Investigator

Police officers responding to a 911 call found defendant walking along a public road wearing a one-piece camouflage hunting outfit and a white hood. Defendant was covered in fresh, wet blood, and the officers' reasonable inquiries regarding the source of the blood were met with inconsistent responses by defendant, who refused to state whether the blood was from a human or an animal. A deputy drove defendant to his van and discovered blood inside and outside of defendant's vehicle. Defendant asked to speak with his divorce lawyer. The unusual circumstances caused the deputies to believe that a person may have been injured, so they continued to question defendant despite his request for legal assistance. Defendant repeated that he could not answer the officers' inquiries. Eventually, police officers went to the residence of defendant's business partner and discovered the business partner lying dead in his driveway. In the meantime, the police impounded defendant's van and took him to the sheriff's office. A few hours later, a female friend (a former co-worker of defendant) arrived at the police station and asked to speak with defendant. After initially rebuffing the woman, the investigator allowed her to meet with defendant after explaining that he would remain in the room while they spoke and he would take notes. During the meeting, with the investigator only a few feet away, defendant stated that the case did not involve an animal and that he would be going to

jail, among other things. Defendant was indicted for second-degree murder. He moved to suppress the statements he made to the police and his female acquaintance. County Court determined that the detention and questioning of defendant were justified under the emergency doctrine. A jury convicted defendant of second-degree murder and he was sentenced to a prison term of 15 years to life. The Appellate Division affirmed. The Court of Appeals affirmed. Although the police did not know definitively whether a crime had occurred or the identity of the potential victim, the emergency doctrine was premised on reasonableness, not certitude. There was support in the record for the determination that the emergency doctrine justified police questioning without Miranda warnings. Moreover, the court properly denied suppression of custodial statements made by defendant to his female acquaintance in the presence of a police investigator after defendant had invoked his right to counsel. Defendant's contention was rejected that the police used the woman to conduct the functional equivalent of a custodial interrogation. The investigator did not converse with or question defendant during this encounter. The investigator initially refused to allow the woman to meet with defendant, and relented only after she persistently demanded to speak with defendant. She was specifically informed that the investigator would be in the room taking notes of the conversation, and defendant knew that the investigator was only a few feet away. In her dissent, Judge Rivera noted that, once the body was discovered, the emergency ended. Thus, no reasonable basis existed for the continuation of the application of the emergency exception to the defendant. At that time, defendant, who had previously asked for counsel, was entitled to the termination of all custodial questioning, and to speak with an attorney. Judge Rivera also rejected the majority's conclusion that the investigator's actions were not a subterfuge to circumvent the attachment of the indelible right to counsel.

People v. Doll, ___ NY3d ___ (October 17, 2013)

Appellate Divisions

ADOPTION

Consent to Adoption Not Required

The Family Court's determination that the respondent's consent to the adoption was not required was supported by clear and convincing evidence. The respondent failed to meet his burden of establishing that he maintained substantial and continuous or repeated contact with the child through the payment of support and either regular visitation or other communication with the child (*see* DRL § 111[1][d]). Moreover, his "incarceration did not absolve him of the responsibility to provide financial support for the child, according to his means, and to maintain regular contact with the child or the petitioner".

Matter of De'Von M.F.C., 105 AD3d 738 (2d Dept 2013)

CHILD ABUSE AND NEGLECT

Preponderance of the Evidence Supported Court's Finding

Family Court adjudged that respondent father abused one of the subject children and derivatively neglected the others. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that respondent had sexual contact with one of the children. Respondent admitted to two caseworkers that he had touched the child's breast and kissed her on her lips. Additionally, the witnesses' out-of-court statements were corroborated by the social worker's notes and the hospital records which contained the same allegations, and testimony of each witness corroborated the testimony of the others. Furthermore, the court properly inferred that the purpose of respondent's conduct was for sexual gratification based on the conduct itself.

Matter of Karina L., 106 AD3d 439 (1st Dept 2013)

Neglect Finding Reversed

Family Court adjudged that respondent father had neglected the subject child. The Appellate Division reversed. Although the issue was not preserved, Family Court improperly based its determination on medical neglect, which was not raised in the petition, and therefore did not afford respondent a reasonable opportunity to prepare an answer. Additionally, the agency failed to demonstrate, by a preponderance of the evidence, that the subject child was impaired or at risk of impairment due to respondent's failure to seek immediate medical attention for a bump on the child's head, which was not shown to be a significant injury.

Matter of Vallery P., 106 AD3d 575 (1st Dept 2013)

Findings of Sexual Abuse and Derivative Abuse Affirmed

Family Court adjudged that respondent father had sexually abused his daughter and derivatively abused his two sons. The Appellate Division affirmed. The daughter's testimony at the fact-finding hearing was competent evidence and any inconsistencies in her testimony were peripheral. The caseworker testified that both of the subject child's brothers told her that during the relevant time period, respondent would send them to the park but keep the daughter in the apartment. Such testimony supported the daughter's testimony that respondent would arrange to be alone with her before he abused her. Furthermore, the court properly drew a negative inference against respondent upon his failure to testify . Additionally, the finding of derivative neglect was supported by respondent's actions, which showed a fundamental defect in his understanding of his parental obligations.

Matter of Ashley M.V., 106 AD3d 659 (1st Dept 2013)

Violation of Order of Protection Supports Neglect Finding

Family Court adjudged that respondent father had neglected his children and placed them in the custody of the Agency. The Appellate Division affirmed. Respondent violated an order of protection, which directed supervised contact between the mother and one of the subject children, by cohabiting with the mother and the subject child. Although the caseworker admitted she misunderstood whether cohabiting was permitted, the order itself was clear and it was respondent's responsibility to ensure the safety of his child**.** Family Court properly removed the children from respondent's care based on the violation of the order of protection.

Matter of Beautiful B., 106 AD3d 665 (1st Dept 2013)

AFC's Motion for Summary Judgment Properly Granted

Family Court determined that respondent mother derivatively neglected the subject child. The Appellate Division affirmed. The court properly granted the motion for summary judgment made by the attorney for the child. The prior findings that respondent neglected her six other children were entered only 10 months prior to the filing of the instant petition. The prior findings of neglect, based in part on respondent's daily use of marijuana, were sufficiently close in time to the derivative proceeding to support the conclusion that respondent's parental judgment remained impaired. Moreover, in two subsequent permanency orders, the court found that the best interests and safety needs of the subject child's siblings required their continued placement. Respondent admitted to daily use of marijuana for more than 19 years, failed to complete drug treatment, and refused to submit to drug testing.

Matter of Camarrie B., 107 AD3d 409 (1st Dept 2013)

Court Properly Allowed Child to Testify In Camera

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. The court properly permitted one of the children to testify at the fact-finding hearing in camera. The court properly balanced respondent's due process rights with the emotional well-being of the child by permitting the child to testify outside of respondent's presence, but subject to contemporaneous cross-examination by respondent's attorney following consultation with respondent. The affidavit of the social worker submitted in support of the application sufficiently established the potential trauma to the child, which would likely interfere with her ability to testify accurately and without inhibition concerning the allegations of excessive corporal punishment. Respondent's assertion that the social worker lacked sufficient experience or expertise goes to the weight to be accorded the opinion, not its admissibility.

Matter of Moona C., 107 AD3d 466 (1st Dept 2013)

Neglect and Derivative Neglect Found Where Respondents Locked Out of Home Two of Their Three Children

Family Court determined that respondent mother and respondent father neglected the subject children, Amondie T. and Brittany H., and derivatively neglect a third child, Tatiana F. The Appellate Division affirmed. The findings of neglect were supported by a preponderance of the evidence. The record established that between March 2010 and May 2010, on several occasions, respondent mother locked her 17-year-old son and 15-year-old daughter out of the home for substantial periods of time, or overnight, and did not provide them with money, clothing or food. A preponderance of the evidence demonstrated that respondent father also neglected the children because he knew or should have known that the mother was locking them out of the home and did

not provide them with financial support, clothing or food. The fact that respondent father worked nights and allowed respondent mother to be in charge of disciplining the children was not a defense to the charge of neglect. The determination that respondents derivatively neglected their 16-year-old daughter by locking out of the home their 17-year-old son and 15-year-old daughter was supported by a preponderance of the evidence. Respondents' actions showed that they had a fundamental defect in their understanding of their parental obligations.

Matter of Amondie T., 107 AD3d 498 (1st Dept 2013)

Mother Engaged in Altercation in Children's Presence; Determinations of Neglect and Derivative Neglect Supported By Preponderance of Evidence

Family Court determined that respondent mother neglected the subject children, Leeana P. and Shamiah P., and derivatively neglect a third child, Nia J. The Appellate Division affirmed. The record demonstrated by a preponderance of the evidence that respondent neglected Leeana and Shamiah by engaging in an altercation with a man in front of the children while she held two knives. A security guard's observations that the children were sitting on the bed and appeared to be crying and that one child was shaking was sufficient to demonstrate by a preponderance of the evidence that their emotional well-being was impaired by the altercation they witnessed. In addition, a preponderance of the evidence demonstrated that respondent subsequently neglected Leeana and Shamiah by failing to promptly pick them up from a caseworker who agreed to watch them while respondent traveled back from the agency. Further, a preponderance of the evidence supported the court's determination that respondent derivatively neglected Nia, even though the child did not live with respondent when the neglect occurred, because respondent suffered from such an impaired level of parental judgment that a substantial risk of harm was created for any child in her custody.

Matter of Nia J., 107 AD3d 566 (1st Dept 2013)

Mother Refused to Seek Medical Treatment for Mental Illness

Here, contrary to the mother's contention, the Family Court properly found that she neglected the subject children. The evidence at the fact-finding hearing established, inter alia, that the mother exhibited erratic behavior which included leaving the subject child A., who was then 16 years old, home alone while she traveled to North Carolina with the subject child B., without knowing how long she would be away, without a place to stay, and without sufficient funds to return home. Prior to leaving, the mother told A. that she had to leave because "the government was going to kill her." While in North Carolina, the mother refused to seek medical treatment for B., who had hurt himself, resulting in a report from the Central Register of Child Abuse and Maltreatment of the New York State Office of Children and Family Services. In addition, A. testified that, in traveling to North Carolina, the mother spent the money that was supposed to be for school clothing, transportation, and supplies for A. and her brother. Further, the child protective services caseworker testified that the mother believed that people were out to kill her, and that the mother said that her sister-in-law had put out a hit on her, that she was on "the terrorist list," and that the CIA was out to get her. The mother indicated that she was "tired of living this life where people are constantly after her." A. told the caseworker that as a result of the mother's fear of the neighborhood in which she lived and "constantly thinking someone's out to get her," the mother "wastes the money on going [to] motels." Thus, a preponderance of the evidence at the hearing established that the children's physical, mental, or emotional condition had been or was in imminent danger of becoming impaired as a result of the mother's conduct (*see* FCA §§ 1012[f][I]; 1046[b][i]).

Matter of Assata P., 105 AD3d 746 (2d Dept

2013)

Paternal Grandmother Neglected Subject Child

The respondent paternal grandmother appealed from an order of fact-finding of the Family Court, which, after a hearing, found that she neglected the subject child. Contrary to the respondent's contention, the Family Court properly found that she was a "[p]erson legally responsible" for the care of the subject child and, as such, was a proper party to the child protective proceeding (*see* FCA § 1012 [g]). Furthermore, the petitioner proved by a preponderance of the evidence that the child was neglected by the respondent (*see* generally FCA § 1046 [b][I]). The evidence established that because of the respondent's mental condition and her resistance to efforts to help her care for the child, the child was neglected within the meaning of FCA § 1012 (f).

Matter of Dior W., 105 AD3d 753 (2d Dept 2013)

Father Engaged in Acts of Domestic Violence Against Mother in Presence of Children

Contrary to the father's contention, the Family Court's finding of neglect is supported by a preponderance of the evidence (*see* FCA §§ 1012[f][i][B]; 1046[a][iii]; [b][I]). The evidence presented at the fact-finding hearing was sufficient to show that the father neglected the subject children by engaging in certain acts of domestic violence against the mother in their presence that impaired, or created an imminent danger of impairing, their physical, emotional, or mental conditions). Additional evidence established that the father had engaged in a pattern of intimidation against the mother.

Matter of Alexandria S., 105 AD3d 856 (2d Dept 2013)

Mother Granted Unsupervised Visitation During Pendency of Abuse Proceeding

The respondent appealed from an order of the Family Court, Kings County, which, after a partial hearing pursuant to FCA § 1028, awarded the mother unsupervised visitation with the subject child three times per week for up to four hours each visit. During the pendency of an abuse proceeding, a respondent whose child is in the temporary custody of a social services official pursuant to Article 10 of the FCA, shall "have the right to reasonable and regularly scheduled visitation" (FCA § 1030 [a]) with the child and shall "be granted reasonable and regularly scheduled visitation unless the court finds that the child's life or health would be endangered thereby" (FCA § 1030 [c]). The record revealed that during the course of the hearing held upon the mother's application for the return of the subject child pursuant to FCA § 1028, the mother sought unsupervised visitation with the subject child. Contrary to the respondent's contention, under the circumstances of this case, the Family Court providently exercised its discretion in awarding the mother unsupervised visitation three times per week for up to four hours each visit (*see* FCA § 1030 [c]).

Matter of Nyla W., 105 AD3d 861 (2d Dept 2013)

Child's Out-of-Court Statements Insufficiently Corroborated

The Family Court properly found that the record as a whole did not support a finding that the respondent father abused N.G. and derivatively neglected D.G. because N.G.'s out-of-court statements regarding various incidents of the father's abusive conduct, made when she was 14 years old, were insufficiently corroborated by other evidence tending to support their reliability. The witnesses' testimony at the fact-finding hearing established that N.G. divulged the same incidents to the social worker at her school, the investigating detective, and a child protective services caseworker, and a handwritten narrative by N.G. which conformed to these disclosures was admitted into evidence. However, N.G. adamantly refused to testify at the fact-finding hearing, even after being served with a subpoena. Although the

witnesses essentially cross-corroborated each other's testimony, the respondent was required to establish competent, nonhearsay, relevant evidence to reliably corroborate, or "validate," the out-of-court disclosures. The respondent's expert in child sexual abuse who interviewed N.G. was unable to provide the requisite corroborating evidence. The expert failed to identify the generally accepted professional protocols adhered to in the mental health and medical communities and compare them to the protocol she employed. The expert opined that N.G.'s "behavior" and "affect" were consistent with that of a sexually abused child, but she did not render a professional opinion with a reasonable degree of certainty that it was likely the abuse occurred. As the allegations of abuse were not established by a preponderance of the evidence, the Family Court did not err in denying the petitions and dismissing the proceedings.

Matter of Nicole G., 105 AD3d 956 (2d Dept 2013)

Children Encouraged by Mother to Make False Allegations of Sexual Abuse Against Father

The evidence presented at the fact-finding hearing established, by a preponderance of the evidence (*see* FCA § 1046[b][i]), that the mother encouraged the subject children to make false allegations of sexual abuse against the father, which resulted in the father's alienation from the children. Accordingly, the Family Court properly found that the mother neglected the subject children (*see* FCA § 1012[f][i][B]).

Matter of Ceanna B., 105 AD3d 1044 (2d Dept 2013)

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

The evidence supported the Family Court's determination that the father neglected the children E.C. and J.C. by having engaged in acts of domestic violence against the mother of those children in their presence which impaired, or created an imminent danger of impairing, their physical, emotional, or mental conditions (*see* FCA § 1012 [f][i][B]). Contrary to the father's contention, the Family Court properly credited the mother's testimony, which established a pattern of domestic violence and intimidation perpetrated by the father. The Family Court also properly concluded that a preponderance of the evidence demonstrated that the neglect of E.C. and J.C. was " 'so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exist[ed]' " (*see* FCA § 1046 [a][I]), and that the neglect of E.C. and J.C. evinced a "fundamental defect in [the father's] understanding of the duties of parenthood". Since the father presented no evidence that the circumstances giving rise to the neglect of E.C. and J.C. no longer existed, the Family Court properly made a finding of derivative neglect with respect to J.J.

Matter of Jaden J., 106 AD3d 822 (2d Dept 2013)

Finding of Educational Neglect Was Supported by the Record

The Family Court's determination that the mother had neglected the child was supported by a preponderance of the evidence. The Family Court properly admitted into evidence the subject child's school attendance records for the year 2010-2011 because they were properly certified business records (*see* FCA § 1046 [a][iv]). The finding of educational neglect was based on evidence that the child's excessive unexcused absences from school had a detrimental impact on her education insofar as she was retained in the sixth grade (*see* FCA §§ 1012 [f] [i] [A]; 1046 [b]). In addition, the Family Court properly determined that the mother's failure to ensure that the child continued in psychotherapy to treat an anxiety disorder contributed to those excessive absences, and also constituted neglect upon the ground of inadequate supervision and guardianship (*see* FCA § 1012 [f] [i] [B]).

Matter of Teresa L., 106 AD3d 1008 (2d Dept 2013)

Family Court Improperly Relied upon Evidence Relating to Additional Incidents of Domestic Violence Not Alleged in Petitions

The petitions in this matter alleged that the mother abused or neglected the three subject children, based on an incident occurring on September 9, 2010. At the fact-finding hearing, the petitioner presented evidence of additional incidents of domestic violence in the home that occurred prior to the incident of September 9, 2010. In finding that the mother neglected the subject children, the Family Court improperly relied upon the evidence relating to the additional incidents of domestic violence in the home, which were not alleged in the petitions (*see* FCA § 1051 [b]). Since the Family Court failed to amend the petition or give the mother time to prepare an answer to the new allegations, and the evidence presented at the fact-finding hearing did not support a finding of neglect based on the mother's actions on September 9, 2010, the order of disposition was reversed, the fact-finding order was vacated, and the proceedings were dismissed.

Matter of Amier H., 106 AD3d 1086 (2d Dept 2013)

Father Engaged in Inappropriate Physical Contact with Child

The father appealed from a fact-finding order of the Family Court, which, after a hearing, found that he neglected the subject child. The Appellate Division affirmed. Contrary to the father's contention, the Family Court providently exercised its discretion in conforming the pleadings to the proof (*see* FCA § 1051[b]). In a child protective proceeding, the petitioner has the burden of proving neglect by a preponderance of the evidence (*see* FCA § 1046[b][I]). Here, the Family Court's finding of neglect based upon the father engaging in inappropriate physical contact with the subject child was supported by a preponderance of evidence.

Matter of Seth G., 107 AD3d 711 (2d Dept 2013)

Derivative Neglect Based upon Use of Excessive Corporal Punishment on Child's Sibling

Contrary to the mother's contentions, the Family Court's finding that she derivatively neglected the child J.P. was supported by a preponderance of the evidence. A caseworker and police officer testified at the fact-finding hearing that the mother admitted to them that she struck J.P.'s sibling, the child K.W., several times with a belt, and as to their personal observations of Keith W.'s injuries. Accordingly, the Family Court's determination that the mother derivatively neglected J.P., based upon her use of excessive corporal punishment upon Keith W., was supported by the record (*see* FCA § 1046[a][I]). Absent extraordinary circumstances, such as where visitation would be detrimental to the child's well-being, a noncustodial parent has a right to reasonable visitation privileges. Here, the Family Court improvidently exercised its discretion in failing to provide the mother with any visitation, either unsupervised or supervised, with K.W., since there were no extraordinary circumstances justifying the denial of the mother's right to reasonable visitation.

Matter of Jacob P., 107 AD3d 719 (2d Dept 2013)

Evidence Failed to Establish Causal Connection Between Mother's Bipolar Disorder and Actual or Potential Harm to Children

In this case, the Administration for Children's Services (ACS), adduced evidence at the fact-finding hearing which established that the mother suffered from bipolar disorder at the time each of the two subject children were born. "A finding of neglect may be predicated upon proof that a child's physical, mental, or emotional condition is in imminent danger of becoming impaired as a result of a parent's mental illness" (*see* FCA § 1012 [f] [I]). However, "proof of mental illness alone will not support a finding of neglect"; the evidence "must establish a causal connection between the parent's condition, and actual or potential harm to the children"). Here, ACS failed to establish, by a preponderance of the evidence, the existence of a

causal connection between the mother's bipolar disorder and actual or potential harm to the subject children. Contrary to the contention of the ACS and the attorney for the children, ACS also failed to establish, by a preponderance of the evidence, that the subject children were derivatively neglected by reason of prior neglect findings against the mother, which were entered before the subject children were born. ACS failed to establish, by a preponderance of the evidence, that the conduct underlying the prior neglect findings was "so proximate in time to the derivative [allegations] that it can reasonably be concluded that the condition still exist[ed]".

Matter of Alexis S.G., 107 AD3d 799 (2d Dept 2013)

Family Court Properly Granted Motion for Summary Judgement; Doctrine of Collateral Estoppel Was Applicable

The Family Court properly granted that branch of the motion of the Administration for Children's Services (ACS) which was for summary judgment on the issue of the father's derivative abuse. ACS met its prima facie burden of showing that the doctrine of collateral estoppel was applicable. "A determination in a criminal action may be given collateral estoppel effect in a Family Court proceeding where the identical issue has been resolved, and the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct". The father's convictions of course of sexual conduct against a child in the first degree, course of sexual conduct against a child in the second degree, rape in the second degree, and endangering the welfare of a child were based upon the same acts alleged to constitute sexual abuse as set forth in Family Court Act Article 10 petitions (*see* FCA § 1012 [e][iii]). Moreover, the father's convictions for sexual acts against Angelica M. and Shaileen M. 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. Accordingly, the ACS demonstrated, prima facie, that the other children were derivatively abused (*see* FCA §§ 1012 [e] [ii]; 1046 [a] [I]). In opposition, the father failed to raise a triable issue of fact as to either the collateral estoppel effect of his convictions or as to whether the other children were derivatively abused.

Matter of Angelica M., 107 AD3d 803 (2d Dept 2013)

Evidence Did Not Establish That Failure of Baby to Thrive Was Consequence of Mother's Failure to Properly Feed Her

The respondent mother appealed from an order of fact-finding and disposition of the Family Court, which, after fact-finding and dispositional hearings, inter alia, found that she neglected the child J. R. and derivatively neglected the child J.D. The Appellate Division reversed the order of fact-finding and disposition, and dismissed the petitions. The Family Court's finding of neglect against the mother was not supported by a preponderance of the evidence. The evidence presented by the petitioner at the fact-finding hearing did not establish that the failure of the baby J.R. to thrive and adequately gain weight was a consequence of the mother's failure to properly feed her. Since the finding of derivative neglect regarding J.D. was based on the neglect determination with respect to J. R., that finding, too, was unsupported by the evidence. It was noted that the Family Court violated the mother's due process rights when it instructed her not to consult with her attorney during a two-month adjournment of the fact-finding hearing.

Matter of Jaylynn R., 107 AD3d 809 (2d Dept 2013)

Mother's Boyfriend Was a Person Legally Responsible for the Care of the Subject Child

The Family Court adjudged that respondent sexually abused his girlfriend's child. The

respondent argued that he was not a "[p]erson legally responsible" for the care of the child pursuant to FCA § 1012 (g). This contention was without merit as, under the circumstances, he met the statutory definition of a person legally responsible for the care of the subject child (*see* FCA § 1012 [g]). Further, the Family Court's determination that the respondent sexually abused the subject child was supported by a preponderance of the evidence. The subject child's out-of-court statement regarding the acts of sexual abuse upon her was corroborated by an expert in clinical and forensic psychology, with a specialization in child abuse, who evaluated the subject child and concluded that she exhibited behavior indicative of sexual abuse.

Matter of Emani W., 107 AD3d 815 (2d Dept 2013)

Finding of Neglect Not Support by the Record

The petitioner Department of Social Services (DSS) failed to prove at the fact-finding hearing by a preponderance of the evidence that the father neglected his son J. The evidence did not establish that J.'s physical, mental, or emotional condition was impaired, or was in imminent danger of becoming impaired, as a result of the father's refusal to allow DSS Emergency Services workers into his apartment. Moreover, the evidence established that DSS Emergency Services workers found J. to be clean, healthy, and safe. Although there was a small bruise under J.'s right eye, the Family Court found that the evidence relating to that bruise, discovered the day after J. was removed from the father's apartment, was ambiguous, and the court did not base its finding of neglect on the existence of the bruise. Thus, the only basis for the Family Court's determination that J. was neglected, as explained in its decision, was not established by DSS by a preponderance of the evidence. The order of fact-finding and disposition was reversed, the petition was denied, and the proceeding was dismissed.

In re Joshua J., 107 AD3d 893 (2d Dept 2013)

Record Supported Finding of Sexual Abuse and Neglect

Here, the subject child had a torn hymen consistent with vaginal penetration as a result of sexual abuse, and the subject child made out-of-court statements to the mother and the foster mother identifying the father as the perpetrator of the abuse. The Appellate Division could find no reason to disturb the Family Court's determination that the mother testified credibly as to the out-of-court statements made by the subject child. Although the father alleged that the sexual abuse took place while the subject child was in foster care, there was no evidence in the record to support this allegation. Furthermore, the father had access to the subject child during the relevant time period when the sexual abuse could have occurred. Accordingly, the Family Court's findings of sexual abuse and neglect were supported by a preponderance of the evidence.

Matter of Amelia V.M.B., 107 AD3d 980 (2d Dept 2013)

Finding of Abuse and Derivative Neglect Affirmed

Contrary to the respondent's contention, the Family Court correctly found him to be a person legally responsible for his niece, the child B.D., within the meaning of the FCA § 1012 [g]. The petitioner established by a preponderance of the evidence (*see* FCA § 1046 [b] [i]), that the respondent abused the child B.D., by attempting to sexually abuse her (*see* FCA § 1012 [e][iii]; PL §§ 110.00, 130.60 [2]). The record revealed conflicting testimony at the fact-finding hearing, however, the Appellate Division could find no basis to question the Family Court's assessment of the witnesses' credibility. Although a finding of abuse of one child does not, by itself, establish that other children in the household have been derivatively neglected, here, the respondent's attempt to sexually abuse his niece while his two young daughters were home, at a time when he was the sole adult present, 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 his three children.

Matter of Trenasia J., 107 AD3d 992 (2d Dept 2013)

Evidence Did Not Support Finding of Derivative Neglect as to One Child

The Family Court's determination that the petitioner proved by a preponderance of the evidence that the respondent sexually abused his stepdaughter, M.C.M., was supported by the record. As to the Family Court's finding of derivative neglect, a finding of sexual abuse of one child does not, by itself, establish that other children in the household have been derivatively abused or neglected. Here, a derivative finding of neglect as to the child B.J. was warranted since the abuse was perpetrated while he was in the home. However, given the limited duration and nature of the sexual abuse, as well as the remoteness in time between when M.C.M. was abused and when J.A., the respondent's biological son, was born more than four years later, there was insufficient evidence to support the Family Court's determination that the respondent derivatively neglected J.A.

Matter of Monica C.M., 107 AD3d 996 (2d Dept 2013)

Father's Criminal Conviction Was for Offense Arising out of Same Conduct Alleged in Petition

The child, N.B., appealed from an order of the Family Court, which denied the petitioner's motion for summary judgment on the petition alleging that the father neglected N.B., and after a hearing, dismissed that petition. Here, the petitioner, the Administration for Children's Services (hereinafter ACS), satisfied its burden of establishing that the father's criminal conviction was for an offense arising out of the same conduct that was alleged in the petition alleging that the father neglected the child N.B. Thus, the Family Court erred in denying that branch of ACS's motion which was for summary judgment on the petition alleging that the father neglected Nicollette B. Accordingly, the petition was reinstated, the motion granted, a finding was made that the father neglected the child, and the matter was remitted for a dispositional hearing and a disposition thereafter with respect to N.B.

Matter of Tyreek A., 108 AD3d 527 (2d Dept 2013)

Attorney for the Child Authorized to File Petition on Behalf of Child

The Appellate Division rejected the respondent's argument that the attorney for the child lacked statutory authority to file a child abuse petition on behalf of the child, A.A., after the Department of Social Services (DSS) determined that its petition should be withdrawn. Although the primary responsibility for initiating a child neglect or abuse proceeding "has been assigned by the Legislature to child protective agencies" FCA § 1032 also permits such a proceeding to be initiated by "a person on the court's direction." "The requirement for court approval or authorization for proceedings prompted by those other than child protective agencies indicates the Legislature's concern that judicial proceedings touching the family relationship should not be casually initiated and imposes upon the courts the obligation to exercise sound discretion before permitting such petitions to be filed" Contrary to the respondent's contention, the record demonstrated that the attorney for the child was in fact authorized by the Family Court to file a new abuse petition on behalf of A.A., and that the Family Court's decision to authorize him to do so was a provident exercise of its discretion. Further, the fact that the DSS withdrew its previously filed petition did not preclude the Family Court from directing the attorney for the child to determine whether A.A. wanted him to file a new petition on her behalf.

Matter of Amber A., 108 AD3d 664 (2d Dept 2013)

Evidence of Father's Repeated Misuse of Drugs Established Prima Facie Case

The Family Court's finding of neglect is supported by a preponderance of the evidence (*see* FCA §§ 1012 [f] [i] [B]; 1046 [a] [iii]; [b] [i]). Contrary to the father's contention, the evidence adduced at the fact-finding hearing of his repeated misuse of drugs established a prima facie case of neglect and, therefore, neither actual impairment of the child's physical, mental, or emotional condition, nor specific risk of impairment, needed to be established.

Matter of Audrey K., 108 AD3d 717 (2d Dept 2013)

Family Court Properly Granted Summary Judgment Motion of Derivative Neglect

Family Court granted Agency's summary judgment motion and determined that respondent father had derivatively neglected his two children based upon a consent order of neglect issued by another court against respondent, on behalf of four other children who were in his care. The Appellate Division affirmed. Although it is a drastic procedure, Family Court is authorized to grant summary judgment in neglect proceedings where no triable issue of fact exists. Derivative neglect is established where the evidence demonstrates an impairment of parental judgment to the point that it creates a substantial risk of harm for any child left in that parent's care, and the prior neglect determination is sufficiently proximate in time to reasonably conclude that the problematic conditions continue to exist. Here, the summary judgment motion was made less than one month after the neglect determination. The prior consent order of neglect was based upon respondent's use of marihuana and methamphetamine on a daily basis while the children were in his care, allowing drugs to be present in his home and accessible to the children, calling the children derogatory names while under the influence of drugs, and allowing his drug dealer to come into the home to use and sell drugs.

Matter of Alyssa WW, 106 AD3d 1157 (3d Dept 2013)

Family Court Erred in Imposing Separate and Contradictory Permanency Goals

After a permanency hearing, Family Court continued the children's foster care placement, approved the agency goal of return to parent only for the mother, disapproved the goal of return to parent for the father and directed the agency to commence a permanent neglect proceeding against him to terminate his parental rights. The Appellate Division reversed. Family Court lacked authority to impose separate and contradictory permanency goals for the parents. The permanency statute does not permit the court to direct two or more goals simultaneously. The commencement of a termination proceeding against a parent can be imposed only when the goal is placement for adoption. To require termination of one parent's rights and reunification of the children with the other parent is not only inconsistent with the statutory goals but with the overall goal of permanent neglect proceedings, which is to further the children's best interests by freeing them for adoption only when there are no positive parental relationships in their lives. Family Court also erred in suspending the father's supervised visits with the children since the record was devoid of compelling and substantial evidence that the father's visitation would be detrimental or harmful to the children's welfarr. Although the record showed that initially the father's visits were infrequent, after the children's placement in foster care, his visits had been regular and he was described by visit supervisors as being loving, affectionate, engaged and extremely appropriate. Additionally, the court should have engaged in age-appropriate consultation with the children, the oldest of whom was six-years of age at the time of the hearing, since the information concerning their wishes was lacking. While the attorney for the

children opposed the goal of reunification with a parent, he failed to state a basis for this position nor did he indicate the children's preference.

Matter of Julian P. 106 AD3d 1383 (3d Dept 2013)

Sound and Substantial Basis in the Record

Respondent mother admitted to neglect of her older two children and the children were placed in foster care. Thereafter, following a FCA §1028 hearing, her 4-day-old infant was removed from her care and she was afforded visitation with the infant subject to the terms of an order of protection which prohibited her from having anyone in her home during visitation. Two months later, the mother consented to a permanent neglect finding with respect to the two older children and a suspended sentence was issued. The mother then violated the terms of the order of protection. Family Court determined the mother's history of neglect of the older children, which included allegations of excessive corporal punishment and a failure to obtain treatment for her mental illness, constituted derivative and direct neglect of the infant. The Appellate Division affirmed. The record established that the mother had failed to address the conditions which led to the removal of the two older children. Her poor impulse and anger control had caused her to inflict excessive corporal punishment upon her children, including slapping her then two-year-old child and punching her then three-year-old child in the face and back, causing the child injury. At the time of the court proceeding involving the infant, the two older children had been in foster care for 1 ½ years and had not been returned to the mother. Although she had made some progress by the time of the infant's birth, she continued to be frustrated by her children and reacted with inappropriate force and yelling. Viewing the record as a whole and according deference to Family Court's credibility assessments, there was a sound and substantial basis in the record for the neglect determination.

Matter of Shay-Nah FF., 106 AD 3d 1398 (3d Dept 2013)

Severe Abuse Determination Must Include a Finding Pursuant to SSL§ 384-b[8][a][iv]

Family Court adjudged respondent to have neglected his paramour's 7-year-old child, derivatively neglected his paramour's 9-year-old child, and also adjudged respondent to have abused and severely abused his 4-year-old child, and derivatively abused and derivatively severely abused the paramour's 7-year-old and 9-year- old children. The Appellate Division affirmed the findings of neglect and abuse but determined the severe abuse finding was error. The record amply supported the neglect and derivative neglect findings. At the fact-finding hearing, a detective, three caseworkers, the 7-year-old's aunt, a child advocate and the school nurse all testified the 7-year-old had told them respondent had spanked him with kitchen implements. Three of the witnesses testified to seeing the bruises on the child's buttocks, and photographs of the child's injuries were admitted into evidence. The evidence was sufficient to corroborate the out-of-court statements made by the child. The derivative neglect finding was appropriate as respondent's repeated excessive corporal punishment of the 7-year-old demonstrated an impaired level of judgment as to create a substantial risk of harm for any child in his care. Additionally, petitioner demonstrated a prima facie case of child abuse and derivative child abuse, which the respondent failed to rebut by offering a reasonable and adequate explanation. When the 4-year-old left the respondent's home to return to his mother, he was discovered to have various injuries. A pediatrician, who specialized in child abuse, testified that upon examining the 4-year-old, she observed a pattern of healing burns on the child's back, buttocks, abdomen and the backs of both hands and lower arms, not consistent with accidental contact but indicative of the child being pushed or pressed against a hot solid object. There was no sign of medical treatment for the burns. The pediatrician also diagnosed the child with a healing fracture of the distal humerus of his left

arm. No medical treatment had been sought for this injury and the child was unable to straighten his arm when examined by the pediatrician, and expressed pain. There was also bruising on the child's eyelids, ears and face that were not consistent with normal childhood activity and were indicative of maltreatment. However, as the Court of Appeals clarified in *Matter of Dashawn W.,* 21 NY3d 36, a determination of severe abuse requires not only that the court find by clear and convincing evidence the child is an abused child as a result of reckless or intentional acts of the parent as defined in Penal Law §10.00(10), but the court must also make a determination pursuant to SSL § 384-b[8][a][iv] regarding the Agency's diligent efforts. As the court failed to do so, the severe abuse finding could not be sustained.

Matter of Nicholas S., 107 AD3d 1307 (3d Dept 2013)

Respondent's Failure to Provide Proper Nutrition to Infant Child Supports Neglect Finding

Family Court adjudged respondent parents to have neglected their infant child by failing to intervene or otherwise ensure she was receiving proper nutrition and medical care. Respondent father appealed, and the Appellate Division affirmed. The record established the child, who was born eight-weeks premature and weighed less than three pounds at birth, had a cleft palate which made feeding difficult. She remained hospitalized for several weeks after her birth, during which time she gained weight. Upon discharge, the child initially gained weight but then appeared to stall. Thereafter, upon direction by a feeding specialist, respondents took the child to the emergency room but respondent father would not allow the child to undergo any diagnostic tests and before a bed could be secured for the child, who was then being admitted for treatment for failure to thrive, respondents grew impatient and left the hospital against medical advice. When DSS came to remove the child from respondents home, the father made no effort to feed the child prior to her placement in foster care. Additionally, respondent father was advised during many of the child's pediatric appointments that the child needed to be fed consistently and was offered instruction and specific recommendations for different feeding techniques. The father was aware of the child's needs as well as the difficulties associated with providing her adequate nutrition since he lived with the mother and child during the relevant time period. Moreover, the record showed the child was able to gain weight during her stay in the hospital thereby establishing she was not receiving proper nutrition at home.

Matter of Mary YY., 108 AD3d 803 (3d Dept 2013)

CHILD SUPPORT

Respondent's Unavailability Results in Dismissal of His Appeal

Family Court confirmed the Support Magistrate's finding that respondent father had wilfully violated an order of support and set an undertaking in the amount of $6,000. Respondent appealed and the Appellate Division dismissed his argument. Since filing the appeal, respondent had not been in contact with his appellate counsel and had become a fugitive. As respondent was a New Jersey resident, he was beyond the scope of the arrest warrant issued by Family Court in connection with this matter. Since he was unavailable to obey Family Court's mandate in the event of an affirmance, respondent's appeal could not be heard**.**

Matter of Christie S., 106 AD3d 592 (1st Dept 2013)

Court Cannot Use Economic Disparity Between Parties to Determine Custodial Parent in Shared Custody Situations

Supreme Court modified the parties' existing custody order, awarding, among other things, primary physical custody of the child to the father

during the child's school year with parenting time to the mother, and primary physical custody of the child to the mother during summer months with parenting time to the father. The father was awarded decision-making authority over the child's educational and medical needs and the mother was awarded decision-making authority over the child's religious upbringing and summer and extra-curricular activities. Supreme Court denied the father's summary judgment motion to dismiss the mother's child support petition, based on the parties' "parallel legal custody" of the child, which the court found made neither parent the primary custodial parent. Based on the financial disparity between the parties' incomes, the court determined the mother was the primary custodial parent and awarded her child support. While the Appellate Division concluded the custodial arrangement was properly fashioned based on the stability and structure the father could provide and maternal nurturing the mother could provide the child, and the court had sound basis in determining which parent was best suited to have decision-making authority over the child's various needs, the Appellate Division also determined that based on the number of hours, including overnight hours, the child resided with each parent during the calender year, the father was the custodial parent and therefore reversed the denial of the father's summary judgment motion. Based on the plain language of the CSSA, its legislative history and its interpretation by the Court of Appeals in *Bast v Rossoff,* 91 NY2d 732, a custodial parent who has a child the majority of the time cannot be directed to pay child support to a non-custodial parent. Additionally, the court cannot use economic disparity as a basis to determine the custodial parent in shared custody situations.

Rubin v Della Salla, 107 AD3d 60 (1st Dept 2013)

Father Failed to Show He Used Best Efforts to Secure Appropriate Employment

The Family Court properly denied the father's objections to the denial of his petition for downward modification of his child support obligation. The father failed to offer proof of a substantial and unanticipated change in his financial circumstances since the time he agreed to the support amount (*see* FCA § 451[2][a]). Furthermore, contrary to the father's contentions, he failed to show that he used his best efforts to secure employment commensurate with his qualifications and experience (*see* FCA § 451[2][b][ii]).

Matter of Sabini v Sabini, 105 AD3d 749 (2d Dept 2013)

Family Court Properly Confirmed Support Magistrate's Finding of Willfulness

The mother established the father's failure to pay child support as ordered, which constituted prima facie evidence of a willful violation of the support order (*see* FCA §§ 454[3][a]). The burden of proof, therefore, shifted to the father to present competent, credible evidence of his inability to comply with the order. The father, who the Support Magistrate found lacked credibility in his testimony regarding his search for employment, failed to sustain this burden. Although the father asserted that he was unemployed and had no money to pay child support, he did not present competent, credible evidence sufficient to demonstrate that he had actively sought employment and was unable to meet his child support obligation. Accordingly, the Family Court properly confirmed the Support Magistrate's finding that the father willfully violated the support order.

Matter of Burns v Sternberg, 105 AD3d 952 (2d Dept 2013)

Recovery Barred by Doctrine of Res Judicata

The parties agreed that the support order governing the father's child support obligations, which was issued by the Court of Common Pleas of Montgomery County, Pennsylvania, and was effective beginning on June 3, 2004 (hereinafter the Pennsylvania support order), was registered in

the Family Court, Suffolk County, pursuant to the Uniform Interstate Family Support Act, on May 26, 2009. The Family Court had jurisdiction to modify the Pennsylvania support order, upon registration thereof (*see* FCA § 580-609), since none of the parties resided in Pennsylvania, the petitioner mother did not reside in New York, and the respondent father, at all relevant times, was subject to personal jurisdiction in Suffolk County. However, the doctrine of res judicata barred the mother from seeking recovery of the same child support arrears that she sought in an earlier Pennsylvania proceeding which was dismissed upon the parties' stipulation, with prejudice. Thus, the Family Court erred in calculating the father's child support arrears to include the period prior to the date of the dismissal of the mother's Pennsylvania petition for modification of the child support order. Accordingly, the matter was remitted to the Family Court for a recalculation of the father's child support arrears for the appropriate period.

Matter of Gowda v Reddy, 105 AD3d 957 (2d Dept 2013)

Award Based on Needs of Child Was Improper

The Support Magistrate improperly awarded child support based on the needs of the child rather than the mother's income, upon concluding that the mother failed to substantiate her income (*see* FCA § 413[1][k]). The record revealed that prior to the hearing at which the Support Magistrate issued the order, the mother had appeared before the Support Magistrate only twice and, on both occasions, the appearances were very brief. The record did not reflect what directives the mother, who was appearing pro se, received regarding the financial disclosure affidavit which she had failed to complete, or what additional documents she was specifically directed to submit to prove her inability to work full-time. Moreover, the Support Magistrate failed to advise the mother that her failure to fill out the financial disclosure affidavit would result in an award of support based on the child's needs, instead of the mother's income. Accordingly, the matter was remitted to the Family Court for a neww hearing on the petition and a new determination.

Matter of Anderson v Pappalardo, 105 AD3d 1043 (2d Dept 2013)

Father's Objections Properly Denied

The Family Court properly addressed the merits of the father's objections to an amended order which denied his motion for a downward modification of his educational support arrears for his daughter. The record lacked any proof of service of the objections on the mother, however, the mother admitted to receiving the objections 13 days after the father filed them with the Family Court, and she was able to file her own rebuttal to the father's objections. Thus, no prejudice resulted. Further, the Family Court properly denied the father's objections to the Support Magistrate's order. Contrary to the father's contention, the record revealed that the father was properly credited for all payments he had made both prior to the date of his request for a downward modification of his educational child support obligations, and during the pendency of the proceeding. The mother's request to declare the father a vexatious litigant and to enjoin him from prosecuting future appeals without first obtaining written approval from the Appellate Division was denied.

Matter of Nash v Yablon-Nash, 106 AD3d 740 (2d Dept 2013)

Award Modified by Applying Statutory Percentage Pursuant to DRL § 240

A modification of the child support award was warranted considering the substantial difference between the parties' income, the fact that the defendant had less income than the plaintiff, and the amount of parenting time which was awarded to the defendant. Under all of the circumstances, it was just and appropriate to have applied the statutory percentage of 29% for the three minor children to the first $150,000 of combined parental

income (*see* DRL § 240[1-b][f]). In view of the ages of the children, it was premature for the Supreme Court to direct the defendant to contribute toward the college expenses of the children.

Mejia v Mejia, 106 AD3d 786 (2d Dept 2013)

Emancipation of One Child Does Not Automatically Reduce Amount of Support Owed

The plaintiff failed to seek appropriate relief by application to the court for a modification of child support payments, and instead reduced the amount of support payments unilaterally. "When child support has been ordered for more than one child, the emancipation of the oldest child does not automatically reduce the amount of support owed under an order of support for multiple children". In addition, a party seeking a downward modification of an unallocated order of child support based on the emancipation of one of the children has the burden of proving that the amount of unallocated child support is excessive based on the needs of the remaining children. Here, the plaintiff did not provide evidence showing that the emancipation of the parties' children made the support obligation excessive. Thus, the plaintiff was not entitled to a reduction of the amount of child support payments or a cancellation of child support arrears.

Lamassa v Lamassa, 106 AD3d 957 (2d Dept 2013)

Downward Modification Not Warranted; Father Was in Willful Violation of Child Support Order

The Appellate Division rejected the father's contention that the Family Court erred in directing him to pay 50% of the child's college tuition as measured by tuition that would be charged for attendance at a State University of New York (SUNY) school. The finding of the Support Magistrate that the father's account of his income and claim that he could not afford to contribute toward the child's college tuition was incredible, was supported by the record. As to the father's petition for a downward modification, in light of the Support Magistrate's finding, which was supported by the record, that the father's evidence concerning his income lacked clarity and credibility, he failed to satisfy his burden of proving a substantial change in circumstances so as to warrant a downward modification. Finally, the Family Court properly, in effect, confirmed the Support Magistrate's finding, made after a hearing, that the father was in willful violation of the child support order. There is a presumption that a parent has sufficient means to support his or her minor children (*see* FCA § 437). Here, the father's undisputed failure to pay the ordered child support constituted prima facie evidence of a willful violation (*see* FCA § 454[3][a]), which shifted the burden to him to come forward with competent, credible evidence that his failure to pay support in accordance with the terms of the order was not willful. The father failed to satisfy that burden and was, therefore, properly found to be in willful violation of the order, and also was properly directed to pay the mother's counsel fees pursuant to FCA § 438 (b).

Matter of Rabasco v Lamar, 106 AD3d 1095 (2d Dept 2013)

Motion for Downward Modification of Pendente Lite Child Support Obligation Properly Denied

The Supreme Court properly denied the plaintiff's motion for a downward modification of his pendente lite child support obligation. " 'Pendente lite awards should reflect an accommodation between the reasonable needs of the moving spouse and the financial ability of the other spouse with due regard for the parties' preseparation standard of living' ". Modifications of pendente lite awards should rarely be made, and then only under exigent circumstances, such as where a party is unable to meet his or her own needs, or where the interests of justice otherwise require relief.

Any perceived inequities in pendente lite awards are best addressed via a speedy trial, at which the parties' economic circumstances may thoroughly be explored. Here, the plaintiff failed to demonstrate any exigent circumstances that would have warranted a modification of the pendente lite child support award. Moreover, the Supreme Court properly directed the plaintiff to pay an attorney's fee to the defendant (*see* DRL § 237 [a]).

Fratello v Fratello, 107 AD3d 667 (2d Dept 2013)

Student Loans Improperly Considered in Determining Child Support Obligation Toward Cost of College

The plaintiff moved to have the Supreme Court direct the defendant to contribute toward the college expenses of the parties' children, including student loans which the children were responsible to repay, up to the monetary cap set forth in the parties' stipulation of settlement that was incorporated by reference but not merged into the judgment of divorce. The Supreme Court denied the motion, reasoning that the amounts of the student loans should be deducted from the college expenses that the parties were required to pay pursuant to the stipulation. Contrary to the Supreme Court's determination, "[i]n the absence of a clear and unambiguous provision to the contrary in the stipulation of settlement concerning the matter, '[i]n determining the parents' respective obligations towards the cost of college, a court should not take into account any college loans for which the student is responsible' ". Here, the parties' stipulation of settlement did not contain a clear and unambiguous provision expressly authorizing the deduction of the children's student loans from the college expenses toward which the parties were required to contribute. Accordingly, the Supreme Court erred in denying the plaintiff's motion. The matter was remitted for a hearing and determination as to the parties' respective obligations for college expenses and for an award of counsel fees to the mother, as provided for in the parties' stipulation of settlement.

Bungart v Bungart, 107 AD3d 751 (2d Dept 2013)

Where a Voluntary Agreement Is Absent, it Is Within the Court's Discretion Whether a Parent Is Obligated to Contribute Toward Child's College Expenses

The mother appealed from an order of the Supreme Court which granted her motion to modify the judgment of divorce to direct the father to contribute toward the subject child's college expenses only to the extent of directing him to pay 20% of those expenses, up to an amount equivalent to that charged by SUNY Stony Brook. "Unlike the obligation to provide support for a child's basic needs, 'support for a child's college education is not mandatory' ". Where a voluntary agreement is absent, it is within the court's discretion pursuant to DRL § 240 (1-b) (c) (7), as to whether a parent is obligated to contribute to a child's college education. Under the circumstances of this case, the Supreme Court properly considered all of the relevant factors, and providently exercised its discretion in limiting the father's contribution to the subject child's college expenses to what it would be if the subject child attended SUNY Stony Brook. Additionally, the Supreme Court providently exercised its discretion in apportioning 20% of the subject child's educational expenses to the father, and 80% to the mother. In reaching its determination, the Supreme Court found the father's testimony to be credible, and found the mother's testimony lacking in credibility.

Silverstein v Silverstein, 107 AD3d 779 (2d Dept 2013)

Support Magistrate Properly Determined Basic Child Support and Retroactive Support

The Family Court's determination that a change in custody was appropriate had a sound and substantial basis in record, and the Support Magistrate properly determined basic child support, including retroactive support. Considering the totality of the circumstances,

including the wishes of the subject child, which were expressed when he was 15 years old, the Family Court's determination that there had been a sufficient change in circumstances requiring a change in custody to protect the best interests of the child had sound and substantial basis in the record. Contrary to the father's contention, the Support Magistrate's determination of basic child support was proper. Since the combined parental income exceeded $136,000, the court, in its discretion, could apply the applicable percentage, in this case 17% for one child, or the factors set forth in FCA § 413(1)(f), or both, to the parental income in excess of $136,000 (*see* FCA §§ 413[1][b][3][i], [c][3], [g]). The Support Magistrate properly applied the percentage to $136,000 of the parties' combined income in determining basic child support. However, the Support Magistrate erred in deducting $3,500 from the mother's retroactive child support for the period of August 19, 2011, to February 23, 2012, and, accordingly, should have awarded the mother $6,723, rather than $3,223, in retroactive child support for that period.

McVey v. Barnett, 107 AD3d 808 (2d Dept 2013)

Supreme Court Failed to Set Forth Factors Considered and Reasons for Determination

The plaintiff appealed from a judgment of the Supreme Court, which, inter alia, upon a decision of the same court, made after a nonjury trial, directed the defendant to pay child support in the sum of only $321.10 per week, and failed to award her arrears for pendente lite child support. 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]). With respect to combined parental income exceeding that amount, the court has the discretion to apply the statutory child support percentage, or to apply the factors set forth in DRL § 240 (1-b) (f), or to utilize "some combination of th[ose] two" methods. The hearing court must " 'articulate its reason or reasons for [that determination], which 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' ". As the record did not reveal the Supreme Court's reasons for its choice not to include income above the statutory cap, the Appellate Division remitted the matter to enable the Supreme Court to set forth the factors it considered and the reasons for its determination.

McCoy v McCoy, 107 AD3d 857 (2d Dept 2013)

Family Court Properly Determined Father's Willful Violation

The father appealed from an order of commitment of the Family Court, which, inter alia, in effect, confirmed an order of the same court, made after a hearing, finding that he willfully violated a prior order of support. The Appellate Division affirmed. Proof of failure to pay child support as ordered constitutes prima facie evidence of a willful violation of an order of support (*see* FCA § 454 [3]). Once a prima facie showing has been made, the burden shifts to the party that owes the support to offer some competent, credible evidence of his or her inability to make the required payments (*see* FCA § 454[3] [a]). Here, the mother presented testimony establishing the father's arrears, and the father admitted the existence of those arrears. Thus, the mother met her prima facie burden. In response, the father offered no "competent, credible evidence of his inability to make the required payments". Therefore, the Family Court properly determined that the father willfully violated an order of child support. Contrary to the father's contention, he was afforded his right to due process in this proceeding, and there was no evidence in the record that the Support Magistrate was prejudiced or biased against him. The father's claim that he was deprived of the effective assistance of counsel was without merit.

Matter of Bianco v Bruce-Ross, 107 AD3d 886 (2d Dept 2013)

Defendant Presented Insufficient Evidence to Establish Income

The trial court properly awarded child support based on the needs of the child as the defendant presented insufficient and incredible evidence to establish his income (*see* DRL § 240 [1-b] [k]). Additionally, the trial court properly directed that the child support award was to be retroactive to the date of the initial pleadings (*see* DRL § 236 [B] [7] [a]).

Halley-Boyce v Boyce, 108 AD3d 503 (2d Dept 2013)

Family Court Abused its Discretion in Directing Mother to Pay 29% of Children's Educational Expenses

In 1997, the parties, who were married in 1984 and had three children, were divorced pursuant to a judgment which incorporated, but did not merge with, their stipulation of settlement. Pursuant to the stipulation of settlement, they agreed that the children were to reside with the father, although the parties would have joint custody. The stipulation, which provided that the mother was to pay child support to the father, was silent with respect to any obligation by the mother to contribute to the children's educational expenses. In 2011, the father commenced this child support proceeding after the mother, who had previously been voluntarily paying child support to the father, ceased paying child support. Although the father had not sought, in his petition, to compel the mother to contribute toward the subject children's educational expenses, the Support Magistrate, inter alia, directed the mother to pay 29% of those expenses. "Unlike the obligation to provide support for a child's basic needs, 'support for a child's college education is not mandatory' " "Pursuant to Domestic Relations Law § 240 (1-b) (c) (7), the court may direct a parent to contribute to a child's education, even in the absence of special circumstances or a voluntary agreement of the parties, as long as the court's discretion is not improvidently exercised in that regard". Here, however, the Family Court improvidently exercised its discretion in directing the mother to pay 29% of the subject children's educational expenses, since the father affirmatively stated that he was not seeking such contribution from the mother.

Matter of Grubler v Grubler, 108 AD3d 535 (2d Dept 2013)

Father Failed to Establish Unanticipated and Unreasonable Change of Circumstances

In March 2011, the parties agreed to transfer custody of their son from the mother to the father. That transfer of custody was an "emancipation event" pursuant to the 2009 stipulation. In 2012, the father moved for an award of child support for the parties' son from the defendant, to be "credited against my child support payments re our minor daughter," on the ground that he was on the verge of personal bankruptcy. The mother, in opposition, asserted that the parties' child support obligations were set by stipulation, and the father failed to establish an unanticipated and unreasonable change in circumstances or that the needs of the child in the plaintiff's custody were not being met. The father in reply noted that his rent was $1,500 per month, and that he had incurred certain unreimbursed medical and educational expenses on behalf of the child in his custody. The Supreme Court denied the motion on the ground that the parties' obligations were set by agreement, and the father had failed to establish an unanticipated and unreasonable change in circumstances, or that the child's needs were not being met. The parties' agreement was binding, unless the father was able to demonstrate an unanticipated and unreasonable change of circumstances, or that the needs of the child in his custody were not being met. Since the stipulation set forth the father's child support obligation in the event of a change of custody of one of the children, a change in custody of one of the

children could not be considered unanticipated. With respect to the child's needs, the father failed to submit a net worth statement. Further, the father's statements with respect to the needs of the child were raised in his reply papers and, therefore, were not properly before the court.

Samuelson v. Samuelson, 108 AD3d 612 (2d Dept 2013)

Child's Reluctance to See Parent Is Not Abandonment

The father claimed that he should no longer be required to pay support because the mother had alienated the child from him. Under the doctrine of constructive emancipation, a child of employable age who actively abandons the noncustodial parent by refusing all contact and visitation may forfeit any entitlement to support. However, a child's reluctance to see a parent is not abandonment. There was no evidence in the record that the child had refused all contact and visitation with the father. The Support Magistrate did not err in excluding testimony regarding events that occurred before the December 13, 2006, order of support. Those events could not show a change in circumstances after the entry of the support order. Additionally, the mother established that the father had willfully violated the order of support. Here, the father acknowledged that he had not paid his share of the child's college tuition, as required by the order of support. The father failed to rebut the presumption of his ability to pay college expenses as ordered (*see* FCA § 437). The fact that the child had taken out student loans, and the father's belief that the mother would use funds earmarked for tuition for other purposes, were irrelevant for the purpose of determining whether the father had violated the order of support.

Matter of Grucci v Villanti, 108 AD3d 626 (2d Dept 2013)

Objections Properly Denied upon Father's Default

The Family Court properly denied the father's objections to the Support Magistrate's orders dated March 3, 2011, entered upon the father's failure to appear for a scheduled court date. The proper procedure to challenge an order entered upon default is to move to vacate the default and, if necessary, to appeal from the denial of that motion (*see* CPLR 5015 [a] [1]). Here, the father failed to move pursuant to CPLR 5015 (a) (1) to vacate his default in appearing for a scheduled court date, thus barring him from raising his arguments on appeal.

Matter of Taurins v Taurins, 108 AD3d 723 (2d Dept 2013)

Father Was Not Obligated to Repay Funds Received from His Family

While the record supported the conclusion that the mother should have shared in the college expenses of the subject children, the Support Magistrate improvidently exercised her discretion by failing to impute additional income to the father for money he received from his family for the subject children's college expenses. The father's testimony established that the funds he received from his family to pay for the subject children's college expenses were not loans that he was obligated to repay. Thus, the mother's objections to the order, which, directed her to pay the father the principal sum of $28,210.02 in arrears for college expenses and to pay for 67% of the subject children's future college expenses should have been granted. The Appellate Division remitted the matter to the Family Court for a new determination of the parties' respective obligations to pay college expenses following a report from the Support Magistrate on the amount of money the father received from his family members for the subject children's college expenses.

Matter of Kiernan v Martin, 108 AD3d 767 (2d Dept 2013)

Modifying Order of Support Absent Complete Financial Disclosure Not an Abuse of Discretion

Parents filed competing child support modification petitions, and while both filed financial disclosure affidavits, neither filed the required paycheck stubs or recent income tax returns as required by FCA § 424-a [a]. After a hearing, the Support Magistrate granted the father's petition, reduced his support obligation to $25 per month, and directed the mother's husband to continue providing the child's health insurance coverage. Family Court denied the mother's objections to the Support Magistrate's order. The Appellate Division affirmed. Although Family Court was entitled to deny the father's requested relief since he failed to file the necessary financial disclosure information, there was no abuse of discretion since the father's sworn statement of net worth and testimony, which was subject to cross-examination by the mother, was sufficient to demonstrate the requisite change in circumstances.

Matter of Mata v Nebesnik, 107 AD3d 1369 (3d Dept 2013)

Court Permitted to Impute Income

The Supreme Court properly calculated respondent mother's child support obligation of $51 per week, and her pro rata share of the children's health care costs. The court was permitted, in its discretion, to impute income and the record supported its determination that respondent was capable of earning $12,090 per year at her current employment. Furthermore, in view of her maintenance award of $1,860 per month, her argument that the child support payment would reduce her income below the poverty income guidelines was unpersuasive.

Matter of Settle v McCoy, 108 AD3d 810 (3d Dept 2013)

Father Not Denied Effective Assistance of Counsel

Family Court confirmed the determination of the Support Magistrate that respondent father willfully failed to pay child support. The Appellate Division affirmed. Respondent failed to submit some competent, credible evidence of his inability to make the required support payments. Also, respondent was not denied effective assistance of counsel and did not suffer any actual prejudice as a result of the claimed deficiency. Although respondent's attorney had difficulty before the Support Magistrate in introducing admissible evidence regarding respondent's alleged disability, the record established that the court considered those documents and admitted them into evidence during its consideration of the penalty to be imposed.

Matter of Davis v Driggs, 106 AD3d 1525 (4th Dept 2013)

Willful Violation of Prior Order of Child Support Affirmed

Family Court confirmed the determination of the Support Magistrate that respondent father willfully violated a prior order of child support. The Appellate Division affirmed. The appeal was not mooted by the fact that respondent completed serving his sentence of incarceration because of the enduring consequences that potentially flowed from an order adjudicating a party in civil contempt. Respondent failed to preserve for review his contention that the petition was not legally sufficient because it did not allege that he willfully failed to comply with a prior order of child support. Nonetheless, the contention was without merit. The petition included, in capital letter and large bold type on the front page, the "warning" that a hearing was being requested, the purpose of which was to punish respondent for contempt of court. The "warning" further advised respondent that the sanction of imprisonment could be imposed.

Matter of Jasco v Alvira, 107 AD3d 1460 (4th Dept 2013)

Court Erred in Determining Child Was Emancipated

Plaintiff appealed from a judgment of divorce entered by Supreme Court that directed plaintiff to pay maintenance and child support and equitably distributed marital assets, among other things. The Appellate Division modified and remitted the matter for further proceedings. The court erred in concluding that defendant mother met her burden of establishing that the parties' third eldest child was emancipated during the time she resided with plaintiff father. Although the child in question worked two jobs in 2010, defendant did not submit any evidence regarding the child's income in 2011. Further, the fact that plaintiff paid for the subject child's rent and utility costs demonstrated that the child was not economically independent and self-supporting. Inasmuch as the record was insufficient to determine defendant's child support obligation with respect to the subject child, the Court vacated the decretal paragraphs that related to plaintiff's child support obligation, and remitted the matter for consideration of defendant's child support obligation and a recomputation of the parties' respective child support obligations.

Schmitt v Schmitt, 107 AD3d 1529 (4th Dept. 2013)

Court Erred in Confirming Support Magistrate's Finding of Willful Violation Before Counsel Appeared on Father's Behalf

Family Court committed respondent to the Oswego County Correctional Facility for a term of six months upon a determination that he violated probation insofar as he failed to comply with the terms and conditions of his support order. The Appellate Division dismissed as moot the appeal from the order insofar as it concerned commitment to jail, and otherwise modified by striking that part adjudging respondent to be in willful violation of a support order, and, as modified, affirmed. Shortly after an initial appearance on the petition in which the father requested counsel, and before counsel appeared for the father, the Support Magistrate found that the father willfully violated the child support order and referred the matter to Family Court. The court erred in confirming the Support Magistrate's finding before counsel appeared on the father's behalf. The father's challenge to the Support Magistrate's finding of willfulness was not rendered moot because the jail sentence had been served.

Matter of DuBois v Piazza, 107 AD3d 1587 (4th Dept. 2013)

Support Magistrate Erred in Finding Respondent in Default; Court Erred in Confirming Order

Family Court found that respondent father was in willful violation of an order of support, among other things. The Appellate Division reversed and remitted the matter to Family Court for further proceedings. The court erred in confirming the Support Magistrate's order inasmuch as the Support Magistrate erred in finding respondent in default. Although respondent did not appear before the Support Magistrate on the scheduled date for the hearing, his attorney appeared in court. Furthermore, respondent's attorney previously made a written request for an adjournment and reiterated that request on the date of the hearing. A party who was represented at a scheduled court appearance by an attorney did not fail to appear. Additionally, the colloquy with petitioner did not constitute the requisite fact-finding hearing necessary to develop a factual basis for a finding of willful violation.

Matter of Manning v Sobotka, 107 AD3d 1638 (4th Dept. 2013)

Award of Child Support to Father Reversed in Shared Physical Custody Arrangement

Supreme Court granted sole legal custody of the parties' children to plaintiff father, shared physical custody of the children to the parties, and awarded child support to plaintiff, among other things. The Appellate Division modified, vacated the award of

child support to plaintiff, and as modified, affirmed and remitted the matter for further proceedings. The court erred in awarding child support to plaintiff. Instead, child support should have been awarded to defendant mother. In shared residency arrangements, where neither parent had the children for a majority of the time, the party with the higher income was deemed to be the noncustodial parent for purposes of child support. The residency schedule afforded the parties equal time with the children. Thus, neither party had the children for the majority of the time. Inasmuch as plaintiff's income ($134,924.48 annually) exceeded that of defendant (imputed income $25,000; actual income $14,109.53), plaintiff was the noncustodial parent and, as such, he must pay child support to defendant. Plaintiff's decision-making authority did not increase his child-related costs. There was already a significant disparity in the parties' incomes, and an award of child support to plaintiff would only widened that gulf. The children's standard of living should not vary so drastically from one parent's house to the other.

Leonard v Leonard, 109 AD3d 126 (4th Dept. 2013)

CUSTODY AND VISITATION

Extraordinary Circumstances Existed to Permit Grandmother to Petition for Custody

Family Court determined that maternal grandmother had shown extraordinary circumstances to petition for custody and granted her custody of the subject child. The Appellate Division affirmed. Although the father stated he cared about the child, he had not personally taken care of her since she was a one-year-old. The child had lived with the mother and grandmother until the mother's death, and thereafter the grandmother had assumed primary responsibility of the child. The father had moved out of state and his visits with his daughter were sporadic. He spoke with her on the phone about three times per month. The father's prolonged separation from his daughter and his lack of involvement in her life supported the extraordinary circumstances finding. The father's challenge to the court's granting of custody to the grandmother was not appealable as it was entered upon the father's default, and the court's determination was supported by a fair preponderance of the evidence.

Matter of Colon v Delgato, 106 AD3d 414 (1st Dept 2013)

Extraordinary Circumstances Exist to Deprive Father of Custody

Family Court denied the father's petition for custody, determined extraordinary circumstances existed to deprive him of custody, and found it was in the child's best interests to remain with her foster mother. The Appellate Division affirmed. Family Court did not place undue emphasis on the father's past criminal convictions of rape in the first degree and related crimes against four children committed nearly 30 years ago, or his level three sex offender status. The court took into consideration the father's voluntary relinquishment of the child when she had been seven-weeks-old, although the father claimed this was a temporary relinquishment. The court also appropriately considered the bond between the foster mother and the child. The child had lived with the foster mother since she was seven-weeks-old and was now six years of age. The court did not unduly focus on the material advantages the foster mother could provide the child, but also considered the expert's recommendation that the child might suffer harm if removed from the foster mother. Additionally the court took into consideration the father's excitability, evidenced during several incidents when he became unjustifiably enraged in the child's presence. Unlike *Matter of Afton C.,* 17 NY3d 1, Family Court did not rely solely on the father's sex offender status and prior conviction in rendering its decision and there was no basis in the record to disturb it's determination.

Matter of Michaellica Lee W., 106 AD3d 639 (1st Dept 2013)

Mother's Petition for Sole Custody and Sole Medical Decision-making Granted

Family Court denied respondent father's motion to dismiss the mother's petition for custody of the parties' youngest child, and granted the mother's petition for sole custody of, and sole medical decision-making for, the child, and awarded the father visitation. The Appellate Division affirmed. Petitioner met her burden of demonstrating by a fair preponderance of the evidence that respondent was properly served with the petition. Petitioner's coworker, who had seen respondent in the past and knew him to be the child's father, testified that he served the petition on respondent at the child's school. The court found the coworker's testimony to be credible and there was no basis to disturb that determination. The court properly elected to proceed with the custody hearing even though respondent had not received responses to his interrogatories, because he ignored the court's prior instruction to obtain leave of court before seeking such discovery. The record supported the court's determination that the child's best interests were served by awarding petitioner sole custody and sole authority for medical decision-making. The record showed that respondent refused to permit his daughter, the parties' oldest child, to undergo required surgery and refused to comply with the court's directives concerning a psychiatric evaluation for the younger child. Further, the court-appointed psychiatric expert stated that the younger child would benefit from a transfer of custody to petitioner.

Matter of Solangee Z., 107 AD3d 428 (1st Dept 2013)

Father's Modification Petition Dismissed; Child's Best Interests Supported by Remaining in Custody of Mother in Rhode Island

After trial, Family Court dismissed petitioner father's motion for a modification of custody. The Appellate Division affirmed. The determination that it was in the child's best interests to remain in the custody of respondent mother in Rhode Island had a sound and substantial basis in the record. Petitioner failed to establish that there was a change in circumstances warranting a modification of the parties' custody arrangement. The evidence demonstrated that the move did not weaken petitioner's relationship with the child; indeed, that relationship was strained long before the move. The evidence further showed that respondent had always been the child's primary caretaker and that the child had thrived since moving with her to Rhode Island. The child no longer needed specialized education services, made friends and engaged in many social activities, and was happier and calmer than before the move. Further, while not dispositive, the court found that the child preferred to remain in Rhode Island with respondent. The court found that there were many valid reasons for the move, including financial stress, the child's special needs, and the child's anxiety and anger at petitioner.

Matter of Reven W., 107 AD3d 445 (1st Dept 2013)

Grandmother's Application for Custody and/or Visitation Denied

Family Court denied the maternal grandmother's petition for custody of and/or visitation with the child. The Appellate Division affirmed. The record reflected that the court implicitly found that the maternal grandmother had standing to pursue her claim for custody and/or visitation with the child. The record also supported the court's determination that awarding custody and/or visitation to the grandmother was not in the child's best interests. During the fact-finding, the grandmother continued to deny that the child had been abused by the parents, and asserted that the child's injuries were sustained in a voodoo ritual undertaken by ACS and the agency. The grandmother's letters and emails to the court, counsel and others, raised concerns about her mental health. Moreover, the mother, who was found to have a depraved indifference to the child's welfare, lived with the grandmother, and the grandmother refused to acknowledge the mother's

deficiencies as a parent.

Matter of Antoinette McK. v Administration for Children's Servs.-NYY, 107 AD3d 493 (1st Dept 2013)

Award of Primary Physical Custody and Sole Legal Custody to Mother Had Sound and Substantial Basis in the Record

Supreme Court granted primary physical custody and sole legal custody of the parties' two children to defendant mother, with visitation to plaintiff father. The Appellate Division affirmed. The court's determination was based on a thorough assessment of the testimony of the parties and the court-appointed forensic expert, and had a sound and substantial basis in the record. The evidence showed that the acrimony and mistrust between the parties was such that joint custody was not a viable option. Indeed, the parties disagreed on most decisions with respect to the children, including important matters involving education, extracurricular activities and medical care. The record further demonstrated that when a joint custody arrangement was in place during the pendency of the litigation, the father did not maximize the time he spent with the children because he often left them with a caregiver. The court appropriately weighed each party's strengths and weaknesses as a parent. The mother was found to be more willing to accept and address the children's respective special needs, which will be more conducive to their emotional and intellectual development. The mother was also the children's primary caretaker before the commencement of the litigation.

Anonymous v Anonymous, 107 AD3d 531 (1st Dept 2013)

Temporary Emergency Jurisdiction Not Properly Considered

The petitioner appealed from an order of the Family Court, which, sua sponte, dismissed the petition on the ground that the Family Court lacked subject matter jurisdiction to appoint a guardian for the subject child. Upon reviewing the record, the Appellate Division found that the Family Court erred, and reversed the court's order. The record did not reveal any competent evidence which demonstrated that there was an existing child custody determination made by a court of another state. The Appellate Division noted that even if there had been competent proof of the existence of another court's child custody determination, the Family Court should not have dismissed the petition for lack of subject matter jurisdiction without first considering whether it was appropriate to exercise temporary emergency jurisdiction pursuant to FCA § DRL 76-c. The order was reversed and the matter was remitted.

Matter of Milagro T. v Manyolin G.P., 105 AD3d 1052 (2d Dept 2013)

Mother's Petition for Relocation Denied

The parties were divorced by judgment and the stipulation was incorporated but not merged into the judgment of divorce. Less than three months later, the mother commenced a proceeding seeking permission to relocate with the children to North Carolina, where her fiancé was living and working. Thereafter, the father petitioned to modify the custody provisions of the stipulation so as to award him primary residential custody of the children. Following a fact-finding hearing, the Family Court denied the mother's petition, finding that the proposed move was not in the children's best interests. It also denied the father's petition. The mother appealed. Upon reviewing the record, the Appellate Division found that it contained a sound and substantial basis for the Family Court's denial of the mother's petition for relocation. The testimony at the hearing revealed that, although the mother had been the primary custodial parent, both parents had a close and loving relationship with the children and had taken an active role in their upbringing and well-being. Further, the mother failed to demonstrate that relocation was warranted based on economic necessity. Since the mother failed to demonstrate by a preponderance of the

evidence that the proposed relocation would have been in the children's best interests, there was no basis to disturb the Family Court's determination to deny her petition.

Matter of Knight v Knight, 105 AD3d 741 (2d Dept 2013)

Further Hearing on Father's Motion to Dismiss Mother's Application Not Required

The mother appealed from an order of the Family Court, which granted that branch of the father's motion, joined by the attorney for the children, which was to dismiss her application to modify a prior order of the same court, entered on consent of the parties, which terminated the mother's visitation with the parties' children, so as to award her, inter alia, visitation with the parties' children, and granted that branch of the father's motion which was to require the mother to seek permission of the court before filing future custody or visitation applications. The record showed that the Family Court was familiar with the parents from a multitude of court appearances held over the course of several years, permitted the mother to tender expert testimony in an attempt to substantiate the change in circumstances allegedly warranting a modification of the existing visitation arrangement, and reviewed a forensic report from a neutral evaluator. Contrary to the mother's contention, under the circumstances of this case, the Family Court properly granted that branch of the father's motion which was to dismiss her application without conducting a further hearing on the application. Furthermore, while public policy mandates free access to the courts, "a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will". Here, the Family Court providently exercised its discretion in granting that branch of the father's motion which was to require the mother to seek permission of the court before filing future custody or visitation applications. Contrary to the mother's contention, the Family Court's order did not direct that she undergo counseling or treatment as a pre-condition to filing future custody or visitation applications.

Matter of McNelis v Carrington, 105 AD3d 848 (2d Dept 2013)

Visitation with Grandmother Not in Children's Best Interests

In this case, the Family Court should have denied the grandmother's petition for visitation. The death of the children's father provided the grandmother with automatic standing to seek visitation (*see* DRL § 72[1]). Nevertheless, the Family Court improvidently exercised its discretion in granting the petition. The evidence in the record, including, inter alia, the mother's testimony, the forensic report, and the children's apprehension regarding visitation with the grandmother, established that visitation was not in the best interests of the children at the time the Family Court granted the petition.

Pinsky v. Botnick, 105 AD3d 852 (2d Dept 2013)

Evidentiary Hearing Required

Here, the Family Court did not possess adequate relevant information to enable it to make an informed and provident determination as to the children's best interest so as to render a hearing unnecessary. The record revealed that the court was not involved when the parties agreed to the existing custody and parenting agreement, and only became involved in the proceeding after the prior Family Court Judge in this matter retired. Furthermore, although the court had the recommendations of an expert before it, the recommendations of experts are but one factor to be considered and "are not determinative and do not usurp the judgment of the trial judge". Accordingly, the Family Court erred in denying the father's petition and, inter alia, awarding sole physical custody to the mother without first holding an evidentiary hearing on the issue of physical custody and visitation so that it could make an independent determination as to the best interests of the children on the basis of the

evidence presented at such a hearing. The order was reversed and the matter was remitted for an evidentiary hearing, and for a new determination.

Matter of Schyberg v Peterson, 105 AD3d 857 (2d Dept 2013)

Order Denying Petition for Relocation Reversed

The mother appealed from an order of the Family Court, which, after a hearing, denied her petition for permission to relocate with the subject children to Florida. Upon reviewing the record, the Appellate Division found that the mother demonstrated that she could not meet the family's living expenses in New York and that the father did not make regular child support payments. She also demonstrated that, if permitted to relocate, she would accept an offer of employment in her field of experience, and would receive financial assistance, including housing and a car, from extended family members. The contention that the mother would not have honored the visitation schedule after the move was not supported by the record. It was noted that although the mother's relocation would inevitably have an impact upon the father's ability to spend time with the children, a liberal visitation schedule, including extended visits during summer and school vacations, would allow for the continuation of a meaningful relationship between the father and the children. Likewise, an appropriate visitation schedule would allow the children to spend meaningful time with their paternal grandmother, with whom they have a good relationship.

Matter of Tracy A.G. v Undine J., 105 AD3d 1046 (2d Dept 2013)

Record Did Not Support Dismissal of Guardianship Petition for Lack of Subject Matter Jurisdiction

The Family Court erred in, sua sponte, dismissing a guardianship petition on the ground that it lacked subject matter jurisdiction. Although a court of this state may not modify a child custody determination made by a court of another state "unless . . . [t]he court of the other state determines it no longer has exclusive, continuing jurisdiction . . . or that a court of this state would be a more convenient forum" (*see* DRL § 76-b [1]) the record here did not contain any competent evidence demonstrating that there was an existing child custody determination that had been made by a court of another state. Furthermore, even if there was competent proof establishing the existence of an existing child custody determination that had been made by a court of another state, under the particular circumstances of this case, the Family Court erred in, sua sponte, dismissing the petition for lack of subject matter jurisdiction without first considering whether it was appropriate to exercise temporary emergency jurisdiction pursuant to DRL § 76-c.

Matter of Milagro T. v Manyolin G.P., 105 AD3d 1052 (2d Dept 2013)

Maternal Aunt's Petition for Custody Denied

After the death of the subject child's mother, the petitioner, the child's maternal aunt, commenced this proceeding seeking custody of the child. After conducting a hearing on the issue of extraordinary circumstances, the Family Court granted the application of the child's father, made at the close of the petitioner's case, to dismiss the petition. Here, the petitioner failed to establish the existence of extraordinary circumstances sufficient to warrant a hearing with regard to the child's best interests. The petitioner's argument that the Family Court erred in failing to, sua sponte, take judicial notice of prior orders issued in a related Family Court Act article 10 proceeding was unpreserved for appellate review. Nevertheless, the court did consider the petitioner's testimony which related to the orders issued in that case. Under the circumstances presented, the Family Court providently exercised its discretion in declining to conduct an in-camera interview of the child.

Matter of Andracchi v Reetz, 106 AD3d 734 (2d Dept 2013)

Record Supported Award of Permanent Residential Custody to Mother

The Family Court properly granted permanent residential custody to the mother. While both parents had exhibited shortcomings as parents, it was undisputed that the child loved both parents and was happy in the custody of either the mother or the father and that both parents were capable of providing for the child's emotional and intellectual development. However, the Family Court also found that during the period when the child was in the temporary custody of the father, the father had refused to encourage and foster meaningful contact between the child and the mother, and that such conduct was adverse to the child's best interests and had been harmful to the child. The Family Court also found that the mother was the parent more likely to assure meaningful contact between the child and the noncustodial parent. Having found that the court's findings had a sound and substantial basis in the record, the Appellate Division affirmed the order of the Family Court which awarded the mother permanent residential custody of the subject child with visitation to the father.

Matter of Lawlor v Eder, 106 AD3d 739 (2d Dept 2013)

In Camera Interviews with Children Were Needed in Order to Determine Children's Best Interests

The Family Court awarded custody of the children to the father without interviewing the children in camera. Under the particular circumstances of this case, in the absence of in camera interviews, the record was insufficient to allow the Appellate Division to make a fully informed determination as to what custody arrangement would be in the children's best interests. The Court noted that in camera interviews would aid in determining the proper custody arrangement in this case because the children were old enough to provide insight as to their interaction with each parent, and the impact of separating them from their older half-brother, who resided with the mother and with whom they had a close relationship. In addition, the children's preference, while not determinative, might also be indicative of the children's best interests. The order was reversed and the matter was remitted to the Family Court to hold a de novo hearing, and to conduct in camera interviews of the children.

Matter of Stramezzi v Scozzari, 106 AD3d 748 (2d Dept 2013)

Joint Legal Custody Not in Child's Best Interests

The mother appealed from an amended order of the Family Court, which, after a hearing, awarded the parties joint legal custody of the subject child, and the father cross-appealed, from the same amended order, which awarded the mother sole physical custody of the subject child. Upon reviewing the record, the Appellate Division found that the Family Court properly considered the totality of the circumstances in determining that the best interests of the subject child would be served by awarding sole physical custody to the mother. As to the award of joint legal custody, the record was replete with examples of hostility and antagonism between the parties, indicating that they were unable to put aside their differences for the good of the child. Accordingly, the Family Court erred in awarding the parties joint legal custody of the subject child. Rather, an award of sole legal custody to the mother was in the child's best interests.

Matter of Wright v Kaura, 106 AD3d 751 (2d Dept 2013)

Hearing Necessary to Determine Children's Best Interests

The plaintiff father and the defendant mother entered into a stipulation of settlement (hereinafter the stipulation), which was so-ordered by the Supreme Court. The stipulation, inter alia, awarded the parties joint legal custody of their then-14-year-old twins (hereinafter together the children), and the plaintiff was awarded residential

custody, with certain unsupervised visitation to the defendant. The plaintiff moved, inter alia, to modify the provisions of the stipulation so as to award him sole legal custody of the children and to suspend the defendant's visitation with the children, unless supervised. The plaintiff alleged, among other things, that the defendant operated a motor vehicle in an impaired state, and that her behavior posed a danger to the safety and well-being of the children. The plaintiff also sought an order directing the defendant to attend and complete programs in drug and alcohol rehabilitation and anger management. Prior to the determination of the plaintiff's motion, the defendant moved to adjudicate the plaintiff in contempt of court for breaching the stipulation. The defendant alleged, inter alia, that the plaintiff failed to pay her $15,683.50 of a lump-sum payment of $160,000 (hereinafter the lump sum payment), as provided in the Stipulation. The Supreme Court, without a hearing, denied the plaintiff's motion, and directed the plaintiff to pay to the defendant the sum of $15,693.50, with statutory interest, representing the unpaid balance of the lump sum payment. The plaintiff appealed. Upon reviewing the record, the Appellate Division found that the plaintiff made the necessary showing entitling him to a hearing regarding those branches of his motion which were to modify the stipulation so as to award him sole legal custody and suspend the defendant's visitation with the children, unless supervised. Furthermore, the record did not demonstrate that the Supreme Court possessed adequate relevant information to have enabled it to make an informed and provident determination as to the children's best interest so as to have rendered a hearing unnecessary. There was no merit to the plaintiff's remaining contention that the Supreme Court erred in directing him to pay the balance of the lump sum payment.

Nusbaum v Nusbaum, 106 AD3d 791 (2d Dept 2013)

No Basis for Finding Willful Violation

The mother appealed from an order of the Family Court, dated February 15, 2012 (the 2012 order), which, without a hearing, denied her petition alleging that the father violated certain provisions of an order of the same court, dated January 29, 2009 (the 2009 order). The Appellate Division affirmed. In the 2009 order, the Family Court, inter alia, granted the father sole custody of the subject child and directed that the mother, who was incarcerated, was entitled to receive letters from the child and respond to the letters. Subsequently, the mother filed a violation petition alleging that the father willfully violated the 2009 order by moving without informing her of his new address. In the 2012 order, the Family Court denied the mother's petition. The mother appealed. The Appellate Division found that the mother's petition was subject to the requirements of CPLR § 3013 and thus, the factual allegations contained therein were required to be "sufficiently particular to give the court and parties notice of the . . . occurrences . . . intended to be proved and the material elements of each cause of action" (*see* CPLR § 3013). Even when liberally construed, the allegations in the petition did not set forth sufficient facts which, had they been established at an evidentiary hearing, could have afforded a basis for finding that the father willfully violated the order appealed from, since that order did not clearly express an unequivocal mandate that the father notify the mother of a change of address.

Matter of Young v Fitzpatrick, 106 AD3d 830 (2d Dept 2013)

Record Did Not Support Award of Custody to Maternal Grandmother

After both of the subject child's parents died in July 2011 when he was three years old, the maternal grandmother and the paternal grandmother of the subject child both sought legal and physical custody of the subject child (*see* FCA § 651 [b]; DRL §§ 72 [1]; 240). After a hearing that took place over the course of three days, the Family Court awarded legal and physical custody of the child to the maternal grandmother. The Appellate Division found that the Family Court's decision

lacked a sound and substantial basis in the record. In awarding the maternal grandmother custody, the Family Court gave undue weight to its finding that the maternal grandmother would be more likely than the paternal grandmother to foster a meaningful relationship between the subject child and the noncustodial grandparent. Furthermore, although the maternal grandmother was a loving grandparent who enjoyed a close bond with the child, the evidence presented at the hearing indicated a troubling history of alcohol and other substance abuse within the maternal grandmother's household. The Appellate Division concluded that the Family Court failed to give sufficient weight to the danger such circumstances posed to the child. Under the totality of the circumstances, the best interests of the child would have been served by awarding the paternal grandmother physical and legal custody.

Matter of Iams v Estate of Iams, 106 AD3d 910 (2d Dept 2013)

Award of Temporary Custody Does Not Constitute an Initial Custody Determination

The mother appealed from an order of the Family Court, which, upon confirming a referee's report, made after a hearing, inter alia, in effect, denied her petition and awarded the father custody of the parties' child. The Appellate Division affirmed the Family Court's order. At the time the child custody proceeding was commenced by the mother in February 2007, there was no custody order in effect. During the pendency of the proceeding, the mother was awarded temporary custody without a hearing. Contrary to the mother's contention, "the award of temporary custody to a parent before a hearing is conducted is only one factor to be considered in awarding permanent custody; the permanent award made after a hearing is treated as an initial custody determination, and the Family Court is not required to engage in a change-of-circumstances analysis before awarding custody to the other parent". Here, the evidence adduced at the hearing presented a sound and substantial basis for the Family Court's award of permanent custody to the father.

Matter of Holohan v Levens, 106 AD3d 1003, (2d Dept 2013)

Mother's Medical Treatment Records Relevant to Court's Determination

Under the particular facts of this case, the Family Court improvidently exercised its discretion when it did not sign a subpoena proffered by the mother so as to permit her the opportunity to present certain medical treatment records to rebut the allegations asserted against her. The subject medical treatment records were relevant to the issue of whether an award of physical custody to the father was in the best interests of the subject child, and should have been considered by the Family Court. However, contrary to the mother's contention, the Family Court providently exercised its discretion in declining to conduct an in-camera interview of the child. The order was reversed and the matter was remitted for a new hearing and a new determination.

Matter of Murphy v Lewis, 106 AD3d 1091 (2d Dept 2013)

Strict Application of Factors Applicable to Relocation Petitions Was Not Required

The parties, who never married, had one child in common. Throughout the parties' relationship, and after it ended, the mother lived with the maternal grandparents and was dependent on them for support of the child and herself. When the child was almost three years old, the maternal grandparents moved from Brooklyn to Philadelphia, and the mother and the child moved with them. Up to that time, neither party had sought any formal custody or visitation determination. Prompted by the move, however, the father, who had previously enjoyed substantial, regular parenting time with the child, filed a petition seeking custody. The mother filed a separate petition. After a hearing, the Family Court awarded the parties joint legal custody, with

primary physical custody to the mother. The father appealed. The Appellate Division affirmed. Although the mother's relocation to Philadelphia precipitated the commencement of the proceedings, this matter concerned an initial custody determination, so a strict application of the factors applicable to relocation petitions was not required. The mother's relocation, therefore, was but one factor for the hearing court to have considered when it determined the child's best interest. The Appellate Division found that the hearing court's determination had a "sound and substantial" basis in the record.

Santano v. Cezair, 106 AD3d 1097 (2d Dept 2013)

Forensic Mental Health Evaluation Indicated Mother Was Not Suitable for Physical Custody

Here, the Family Court's award of sole physical custody to the mother lacked a sound and substantial basis in the record. In awarding the mother custody, the Family Court gave undue weight to its finding that the mother would be more likely than the father to foster a meaningful relationship between the subject children and the noncustodial parent. Furthermore, the Family Court failed to give sufficient weight to the forensic mental health evaluation, which indicated that the mother was not suitable for physical custody of the children and to its own finding that it was in the children's best interests for them to remain away from the mother's live-in boyfriend at all times. Under the totality of the circumstances, including the founded concerns with respect to the mother's live-in boyfriend and the attendant risk his relationship with the mother posed to the safety and well-being of the subject children, it was in the best interests of the children to awarding the father sole physical custody.

A.-S. v. A.-S., 107 AD3d 703 (2d Dept 2013)

Nonparent Petitioner Demonstrated Extraordinary Circumstances

Contrary to the mother's contention, the Family Court properly determined that the nonparent petitioner sustained her burden of demonstrating the existence of extraordinary circumstances. The evidence before the Family Court, which included prior neglect findings against the mother arising from her abuse of alcohol, and testimony regarding the highly unstable and unsafe living situation the mother created for the child through her abuse of alcohol and her acts of domestic violence towards the child, demonstrated the existence of extraordinary circumstances. Moreover, the Family Court's determination that awarding custody to the nonparent petitioner was in the best interests of the subject child was supported by a sound and substantial basis in the record.

Matter of Herrera v Vallejo, 107 AD3d 714 (2d Dept 2013)

Relocation with Mother Was in the Child's Best Interests

Contrary to the contention of the father, the mother established by a preponderance of the evidence that relocation to New Jersey was in the best interests of the parties' child. Here, the mother demonstrated that she was not able to meet her living expenses while residing in Queens, and the father conceded that he did not regularly pay his share of the childcare expenses. The mother also demonstrated that, if she were permitted to relocate, her mother would assist with the childcare and that she and the child would be able to reside, at a reduced rent, in her mother's home, located only blocks from where the child would attend school. While the father's loss of weekly weekday contact with the child was neither trivial nor insignificant, the relocation was not a great distance and the visitation schedule devised by the court allowed for the continuation of a meaningful relationship between the father and the child. Further, the Family Court's determination was in accordance with both the child's stated preference and the position of the attorney for the child.

Matter of Sahagun v Alix, 107 AD3d 722 (2d Dept 2013)

Family Court Properly Denied Father's Petition Without a Hearing

Contrary to the father's contention, the Family Court properly denied his petition for visitation with the subject children without holding an evidentiary hearing, since the Family Court possessed "sufficient information to render an informed determination that [is] consistent with the [children's] best interests". Here, the father was incarcerated for committing the crime of criminal sexual act in the first degree. A criminal court order of protection was issued, inter alia, prohibiting any contact between the father and the subject children until May 29, 2033, subject to Family Court orders of visitation. In rendering its determination, the Family Court considered the order of protection and the circumstances that gave rise to the order of protection. Accordingly, under the circumstances of this case, the Family Court properly denied the father's petition without a hearing.

Matter of Colon v Sawyer, 107 AD3d 794 (2d Dept 2013)

Order Modified to Award Father Sole Custody of Child

Here, the Supreme Court's determination that there had been a change in circumstances since the issuance of the prior custody order, and that it was in the child's best interests to modify that order so as to award the father sole custody of the subject child, had a sound and substantial basis in the record. The evidence presented at the hearing demonstrated that the relationship between the parties had become so antagonistic that they were unable to communicate or cooperate on matters concerning the subject child. Thus, joint custody was no longer an appropriate arrangement in this case. Further, the hearing testimony supports the Supreme Court's finding that the mother willfully interfered with the father's right to visitation. Additionally, the independent forensic evaluator opined that the mother had anger management issues and that the father was more likely to foster a relationship between the subject child and the noncustodial parent.

Matter of Flores v Mark, 107 AD3d 796 (2d Dept 2-13)

Record Did Not Support Awarding Mother Decision-making Authority Regarding Child's Education

The Family Court's determination that it was in the child's best interests to award the mother decision-making authority with respect to the child's education was not supported by a sound and substantial basis in the record. The father researched educational options for the subject child at every stage of his schooling. Once the child started school and began receiving homework assignments, the father supervised his homework, took part in school-related activities, and remained involved with his schooling at every stage. The father contacted the child's teachers regarding issues of concern. The mother was considerably less involved with the child's schooling. She maintained a strong preference for a private-school education at a particular school, attendance at which had been a tradition within her family. However, she failed to demonstrate that the school she preferred was a better choice for the child than public school, or that the tuition at the private school was within the parties' means. Accordingly, the order was modified to award the father decision-making authority with respect to the child's education.

Jacobs v Young, 107 AD3d 896 (2d Dept 2013)

Expanded Visitation with Father Was in Children's Best Interests

Here, the Family Court's determination was supported by a sound and substantial basis in the record. Based on the evidence adduced at the hearing, the court properly found that a change in circumstances in the intervening five years warranted modification of the existing visitation schedule. The Family Court properly determined

that expanded visitation with the father would serve the children's best interests. In this regard, the court correctly, inter alia, accorded great weight to the stated desires of the then-15 and 16-year-old children to spend more time with their father, particularly in light of their notable level of maturity and the legitimate reasons they articulated in support of their preference.

Matter of Nicholas v Nicholas, 107 AD3d 899 (2d Dept 2013)

Record Did Not Support Family Court's Determination to Terminate Father's Visitation with Child

The father appealed from an order of the Family Court, which granted, without a hearing, the mother's petition to modify an order of the District Court of Custer County, Oklahoma, dated August 28, 2008, so as to terminate his visitation with the subject child. Here, the Family Court did not possess adequate relevant information to determine whether the termination of the father's visitation with the child was in the child's best interest. The record revealed, inter alia, although the attorney for the child indicated that the child, who was then 13 years old, did not wish to visit the father, the court failed to conduct an in camera examination of the child to ascertain the child's views. Therefore, under the circumstances of this case, the Family Court improvidently exercised its discretion in granting the mother's petition to modify an order of the District Court of Custer County, Oklahoma, so as to terminate the father's visitation with the subject child, without conducting a hearing.

Matter of Zubizarreta v Hemminger, 107 AD3d 909 (2d Dept 2013)

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

Here, considering, inter alia, the acrimony between the parties, the Supreme Court's determination to award legal custody to the father and residential custody to the mother lacked a sound and substantial basis in the record. Upon reviewing the record, the Appellate Division found that a sufficient change in circumstances had occurred since the December 2004 so-ordered custody stipulation was issued which justified a modification of that so-ordered custody stipulation, and that it was in the child's best interests to award sole legal and residential custody to the father. The child had been residing with the father since 2007 and was thriving in that environment. The Supreme Court, which heard testimony from necessary witnesses and conducted an in camera interview of the child, did not violate Judiciary Law § 21 by continuing the trial, which had previously been conducted before a different Justice, and determining the issues before it. Contrary to the mother's contention, she was afforded a full and fair hearing.

McAvoy v. Hannigan, 107 AD3d 960 (2d Dept 2013)

Grandparents Lacked Standing to Bring Petition for Visitation

The maternal grandparents appealed from an order of the Supreme Court, which, without a hearing, denied their petition for visitation and dismissed the proceeding. While it is undisputed that the petitioners have enjoyed a relationship with their grandson since his birth, they failed to demonstrate that either or both of the parents, who divorced in 2011, terminated or frustrated their visitation with their grandson. It is undisputed that the petitioners had visitation with their grandson on February 4, 2012, just six days before commencing this proceeding. Regarding that particular visit, although the petitioners were upset that they received only Saturday visitation instead of the customary overnight alternate weekend visitation, the mother represented that she encouraged and supported the grandparent-grandchild relationship and had no intention of depriving the petitioners of visitation with their grandson, although at times schedules may have conflicted, which necessitated changes. Under these circumstances, the Supreme Court providently exercised its discretion in

denying the petition and dismissing the proceeding on the ground of lack of standing.

Matter of Bender v Cendali, 107 AD3d 981(2d Dept 2013)

Although Mother Was Not Unfit to Have Custody, Father Was the More Consistently Fit Parent

Here, the Family Court properly found that there was a change in circumstances sufficient to grant the father's petition to modify the custody provisions of the parties' judgment of divorce so as to award him sole legal and residential custody of the parties' child. Contrary to the mother's contention, the court gave proper consideration to her allegations of domestic violence and its effects upon the child (*see* DRL § 240 [1]). Additionally, the court properly considered the underlying allegations in a neglect proceeding filed against the mother. Although the neglect petition was adjourned in contemplation of dismissal, such action was not a determination on the merits and leaves the question of neglect unanswered. Moreover, the court correctly found that although the mother was not unfit to have custody of the child due to her mental illness, the father has been the more consistently fit parent.

Matter of Selliah v Penamente, 107 AD3d 1004 (2d Dept 2013)

Family Court Improperly Relied upon SCPA

Contrary to the Family Court's determination, DRL§ 76 (1) "is the *exclusive* jurisdictional basis for making a child custody determination by a court of this state" (*see* DRL § 76 [2] [emphasis added]). A child custody determination includes an initial determination made in a guardianship proceeding (*see* DRL § 75-a [3], [4]). Consequently, it was improper for the Family Court to rely on Surrogate's Court Procedure Act (SCPA) 1702 (1) to confer jurisdiction to, in effect, modify physical custody of the child so as to direct that the child be relocated to New York under the physical custody of the grandparents. Rather, if New York were to have jurisdiction, that jurisdiction must be predicated on DRL § 76 (1). Since there were issues of fact regarding whether New York had jurisdiction pursuant to DRL§ 76 (1), including when and for how long the subject child was in the custody of a friend of the child's deceased mother, the matter was remitted to the Family Court for a hearing on those issues.

Matter of Hannah B., 108 AD3d 528 (2d Dept 2013)

Grandparents Demonstrated Extraordinary Circumstances

Contrary to the mother's contention, the Family Court properly determined that the paternal grandparents sustained their burden of demonstrating extraordinary circumstances in this case, based upon an extended disruption in parental custody (*see* DRL § 72 [2] [a], [b]). The evidence adduced at the hearing showed that the children lived with the paternal grandparents their entire lives, and the mother made no effort to assist the paternal grandmother in making decisions for them, and had minimum contact with them after leaving the children with the paternal grandparents, where she had lived for a period of time until 2007. The evidence further revealed that the paternal grandmother, who was the children's primary caregiver, established a bond with the children and provided for their needs with little assistance from the mother. Moreover, the Family Court's determination to maintain the current custody arrangement, with the paternal grandparents having physical custody of the subject children, and its determination that this arrangement would be in the best interests of the subject children, was supported by a sound and substantial basis in the record.

Matter of DiBenedetto v DiBenedetto, 108 AD3d 531 (2d Dept 2013)

Modification of Visitation Order Warranted

Here, the submissions of the parties demonstrated

that a change of circumstances had occurred and that modification of the existing award of visitation was in the child's best interests. Despite the directive of the Family Court in the September 2010 order that the mother "shall have additional visitation as the parties agree," the record shows that the father had agreed to almost no visitation other than what was specifically delineated in that order. The father candidly admitted that he left the child with in-laws when he was out of town rather than give the mother any additional visitation time, and, on the Fridays of the mother's alternate weekend visitation, he required the child to take a long bus ride to his home after school before the mother could commence her weekend visitation, thereby having unnecessarily delayed the mother's visitation time. The parties' submissions also showed that the failure of the September 2010 order to specify the exact time that holiday visitation was to begin and end had led to disagreement between the parties, which thereby warranted a modification of the order.

Matter of Grunwald v Grunwald, 108 AD3d 537 (2d Dept 2013)

Ample Evidence in the Record That Contact with the Father Would Be Detrimental to Children

The father appealed from an order of disposition of the Family Court, which, after a dispositional hearing, denied his application for therapeutic visitation with the subject children. The Family Court properly exercised its discretion in determining that therapeutic visitation between the father and the children was not warranted. The issue of visitation was fully litigated during the dispositional hearing, thereby providing the Family Court with sufficient information to render an informed determination that was consistent with the children's best interests. There was ample evidence to support the determination that contact with the father would be detrimental to the children. The Appellate Division rejected the father's contention that the Family Court erred in denying his request to adjourn the date scheduled for his testimony at the dispositional hearing. " The father's absence on the scheduled date was unreasonable given that this date had been set and agreed to approximately three months earlier. Furthermore, the court had admonished the father's counsel several months in advance that if the father did not appear on the date scheduled for his testimony, the hearing would proceed to summations.

Matter of Mohammed J., 108 AD3d 542 (2d Dept 2013)

Reversible Error in Depriving Father of His Right to Self-representation

In this custody and visitation proceeding, the father notified the Family Court of his decision to waive his right to counsel and proceed pro se. The Family Court conducted an inquiry into the father's request, but ultimately decided that he could not represent himself, and directed him to retain counsel. Here, the Family Court engaged in a searching inquiry of the father, which revealed that the father knowingly, intelligently, and voluntarily waived his right to counsel, and that it was his desire and personal choice to proceed pro se. The court properly questioned the father with respect to, inter alia, his education, occupational history, and prior experience as a pro se litigant. The father indicated that he had a college education, was attending classes in finance and economics, had been employed in the mortgage-loan industry in various capacities for 20 years, and had been a pro se litigant, with some successes and failures, in both state and federal courts. The Family Court further properly warned the father of the perils of self-representation. The father acknowledged his understanding of those perils, and repeated his desire to proceed pro se. There was no indication that the father ever wavered or was unsure of his decision. Nevertheless, the Family Court refused to permit the father to proceed pro se. The record revealed that the Family Court had a policy against permitting litigants to exercise the right to proceed pro se, as the court explicitly advised the father: "it's not my policy to allow anyone other than

attorneys to proceed pro se." Moreover, the court's denial of the father's request was not justified by the father's inability to accurately describe the hearsay rule. "[M]ere ignorance of the law cannot vitiate an effective waiver of counsel". It was noted that while the Family Court stated that it was appointing "standby" or "advisory" counsel to assist the father, it did not limit the role of the attorney it had appointed to that of "advisory" counsel. Upon learning that the father had made a motion without consulting the "advisory" counsel, the court admonished him for not consulting with the "advisory" counsel and then dismissed the petition "for failure to prosecute because [the petitioner did] not have an attorney." Under these circumstances, the Family Court was not actually appointing "advisory" counsel, but, rather, was appointing counsel to represent the father; in other words, the court was "forcing a lawyer upon [him]". Accordingly, the Appellate Division concluded that the Family Court committed reversible error by depriving the father of his right to self-representation, and the matter was remitted to a different judge.

Matter of Massey v Van Wyen, 108 AD3d 549 (2d Dept 2013)

Sound and Substantial Basis to Modify Custody

Family court modified an order of joint custody and awarded sole custody to the mother and increased the father's parenting time. The Appellate Division affirmed. A sufficient change in circumstances can be established where the relationship between joint custodial parents deteriorates to a point where they cannot work together in a cooperative fashion for the good of their children. Great deference will be accorded Family Court's credibility determinations, and it will not be disturbed unless it lacks a sound and substantial basis in the record. Here, the parties were unable to agree on nearly every aspect of the child's life. A change in circumstances resulted from their antagonism against each other, which superceded their ability to focus on the child's best interests. It was in the child's best interests for the mother to have sole custody.

Matter of Youngs v Olsen, 106 AD3d 1161 (3d Dept 2013)

No Sound and Substantial Basis in Record to Modify Physical Custody

Family Court modified a previous order of custody, continuing joint legal custody, but changing physical custody of the children from the father to the mother. The Appellate Division reversed. Family Court's finding of a change in circumstances lacked a sound and substantial basis in the record. Here, the mother alleged the two children were being physically and verbally abused by their father and the paternal grandmother. The children had arrived at school one day and alleged to the counselor that earlier in the day, the father had grabbed the son by the shoulder and called both children derogatory names. They also alleged the father had a pattern of verbally abusing them, especially the daughter, and when the daughter told him she wanted to live with the mother, the father threatened to kill her pets and told the daughter she would never see her brother again. An agency caseworker testified that the children had repeated the allegations to her later that day. Although FCA §1046(a)(vi) is applicable to custody proceedings upon allegations of abuse, the children's out-of-court statements must be corroborated and while the degree of corroboration is low, it must be reliable. Mere repetition of an accusation is not sufficient. While the reliability threshold may be satisfied by the testimony of an expert, in this case, the children's psychotherapist's testimony acknowledged the mother had participated in the majority of the children's counseling sessions, and the mother had provided details about the father that the children had not mentioned. The psychotherapist also admitted her conclusion that the children were suffering from the father's emotional abuse, was based in part, upon incidents as reported to her by the mother. Finally, although the children's statements could corroborate each other, their out-of-court testimony contradicted their sworn testimony.

Matter of Zukowski v Zukowski, 106 AD3d 1293 (3d Dept 2013)

Unsupervised Visits With Father Not in Children's Best Interets

Family Court modified the father's visitation with the children from unsupervised to supervised. The Appellate Division affirmed. The mother showed there was a significant change in circumstances and that supervised visitation was in the best interests of the children. While the condition of the father's home was known to the mother before the entry of the prior custody order, the evidence reflected that since the entry of the last order, the children had been unwilling or unable to bathe at the father's home and one child's asthma condition had become aggravated at the father's home. The mother testified the father had acknowledged he was unable to provide adequate food for the children. The father admitted he had suffered a cerebral hemorrhage and was unable to work. The father's brain injury also caused him to be confused and suffer memory loss. Family Court's record confirmed the father's testimony was incoherent and confused at many points. Giving due deference to the court's credibility determinations and based on the evidence, it was not in the children's best interests to be left alone in their father's care.

Matter of Patricia P. v Dana Q., 106 AD3d 1386 (3d Dept 2013)

Mother's Unstable, Chaotic Lifestyle Supports Custody to Fathers and Paternal Grandmother

Mother had three children, two by one father and the youngest by another. After the agency advised the mother that she was the subject of a suspected child abuse report, the fathers of the children and the paternal grandmother of the youngest child, all filed for custody. Family Court awarded sole custody of the older two children to their father, and granted joint legal custody of the youngest child to the father and paternal grandmother with primary, physical custody to the grandmother. The mother was afforded visitation. The Appellate Division affirmed. With regard to the older two children, joint custody was not feasible as the parties' relationship and history evidenced an inability to work and communicate with each other. Although the parties had previously shared custody of the children, the children had lived primarily with their father and had resided for most of their lives in the father's home. The father had steady employment, took the children to their medical appointments and they were covered under his health insurance plan. He also made efforts to coordinate visits between the children and their half-brother. On the other hand, the mother did not have a stable home, was unemployed, and her lifestyle was unstable and chaotic. As to the youngest child, while a biological parent has a claim of custody superior to all, such a claim may be supplanted where he or she engages in gross misconduct or other behavior evincing an utter indifference and irresponsibility relative to the parental role. Here, the mother shared different residences with different men, including one who was a former heroin user. Although this factor alone was not sufficient to render her an unfit parent, her various moves caused the child to change schools twice within a short period of time, and the mother's residences were unsafe and unsanitary, including living in quarters littered with feces from approximately 13 dogs and puppies that the mother was then housing. These factors together with her sporadic work history indicated that the mother placed her own interests ahead of her children and demonstrated a lack of parental responsibility. The record also demonstrated the mother had a temper and used corporal punishment as a means of discipline. The child's father traveled frequently for work and it was in the child's best interest to award physical custody to the paternal grandmother.

Matter of Darrow v Darrow, 106 AD3d 1388 (3d Dept 2013)

Mother's Desire to be With Fiancé Not Sufficient Basis for Relocation

Family Court determined the mother had failed to meet her burden of establishing that relocation would substantially enhance the child's economic, emotional or educational well-being, modified the prior consent order of custody and changed the primary care-giver from the mother to the father. The Appellate Division affirmed. The mother made plans to re-locate to Alabama with the parties' child and only informed the father the day before the move. Although the mother contended her fear of homelessness prompted her move, her testimony was not credible since she had been the one to quit her job in New York, and the record reflected her real motive for the move was to be with her fiancé, whom she had met only months before. At the time of the hearing the mother was unemployed, relying on her fiancé and child support she received on behalf of another child, for economic support. The mother was unable to provide evidence to show that the school the child would attend in Alabama could offer more cultural diversity or was superior to the school the child attended in New York. Additionally, the father exercised visitation consistently with the child and the move would be highly detrimental to his relationship with the child, particularly in light of the distance and the father's limited means. Primary custody to the father was in the best interests of the child. The father was gainfully employed and had the financial ability to care for the child. Although the father's girlfriend owned the trailer where he resided, he and his girlfriend had lived together for a number of years and could offer the child stability. The child had a good relationship with the girlfriend's child from a previous relationship. Further, the father was more willing than the mother to foster a relationship between the child and the non-custodial parent.

Matter of Batchelder v BonHotel, 106 AD3d 1395 (3d Dept 2013)

Cannot Deprive Parent of Custody Without Holding Hearing to Determine if Extraordinary Circumstances Exist

Following neglect allegations that the mother suffered from mental illness and was failing to provide the subject child with appropriate care, the mother consented to her sister having custody of the subject child. Thereafter, the mother filed a modification petition to regain custody of the child. Family Court dismissed the mother's petition upon the basis that she had failed to state a cause of action. The Appellate Division reversed. Initially, Family Court erred in failing to afford the mother's pleading a liberal construction. Constitutional principles protect parental legal rights and the state cannot deprive a parent custody of a child absent surrender, abandonment, persistent neglect, unfitness or other like extraordinary circumstance, and since no such finding had been made, the mother had a fundamental right to petition for custody of her child whom she had voluntarily placed with her sister. Just because a neglect petition had been filed and later withdrawn against the mother, this circumstance did not forever deprive the mother from petitioning for custody. There was no indication that the mother intended to surrender her rights when she consented to her sister having custody, and a judicial finding of extraordinary circumstances had never been made. Therefore, the burden should have been on the sister
the existence of such extraordinary circumstances and not on the mother to demonstrate a change in circumstances.

Matter of McBride v Springsteen-El, 106 AD3 1402 (3d Dept 2013)

Hearing Not Necessary to Rule on Grandmother's Petition for Custody

The grandmother filed for custody of the subject child based on allegations that the father was incarcerated, the mother was frequently intoxicated while caring for the child and allowed her dangerous boyfriend to be in the child's presence. Thereafter, the incarcerated father filed to modify a prior visitation order and sought contact with the subject child. At the initial appearance, the mother consented to the grandmother's petition. Although the father appeared telephonically, his attorney was

present in court. Family Court was advised there was a no-contact order of protection issued by Criminal Court against the father, on behalf of the mother and child, until 2018. Thereafter, without holding a hearing and without either parent present, Family Court determined the grandmother had shown extraordinary circumstances to support her custody petition, and awarded her custody based on the child's best interests. The court also dismissed the father's visitation petition. The father appealed and the Appellate Division affirmed. Family Court had informed both parents at the initial appearance that it intended to give the grandmother custody of the child, and the case adjournment was solely to allow the child's attorney to meet with his client. The court had further informed the parties that neither parent's presence was necessary at the adjourned date since the mother had consented to the grandmother's petition, and there was an order of protection against the father. Since neither the father nor his counsel objected when Family Court dispensed with the father's appearance and since neither requested a hearing, the father was not deprived of his right to due process. While a hearing is generally necessary to determine custody, there was sufficient, un-controverted information available to the court to enable it to rule on the petition. Additionally, the father's visitation petition was facially insufficient and Family Court had no authority to modify a Criminal Court order of protection.

Matter of Mary GG. v Alicia GG., 106 AD3d 1410 (3d Dept 2013)

Substantial Basis in the Record to Determine Existence of Extraordinary Circumstances and in Child's Best Interests to Award Custody to Grandmother

Family Court determined the maternal grandmother had extraordinary circumstances to pursue custody of the child and found it was in the child's best interests to award her custody of the child. The Appellate Division affirmed. A biological parent has a claim of custody of his child superior to all others, in the absence of surrender, abandonment, persistent neglect, unfitness or some other extraordinary circumstance. The relevant factors to consider include the length of time the child has lived with the non-parent, the quality of that relationship and the length of time the biological parent allowed such custody to continue without trying to assume a primary parental role. Here, although the mother had legal custody, the subject child, who was 14-years-old, had lived with the grandmother since he was 4 or 5- years-old. His mother had lived in the same apartment building as the grandmother. The evidence established the grandmother, with some assistance from the mother, met the majority of the child's day-to-day needs and had been primarily responsible for his care for most of his life and offered him the most stability and the child had a strong relationship with his grandmother. The father acknowledged he could have sought custody of the child 5 years earlier but failed to do so until he received notice that the mother had been incarcerated. The child had not resided with the father in over a decade, and although the father maintained contact with the child, it was sporadic and he was unable to remember the names of any of the child's teachers or doctors and had minimal involvement in the child's education or medical treatment. Even when the court awarded temporary custody of the child to the father pending the outcome of the case, the father allowed the child to continue living with the grandmother. The grandmother was supportive of the child's relationship with the father, and the attorney for the child supported the court's decision. Based on these factors, the court had sound and substantial basis in the record to determine the grandmother had established extraordinary circumstances, and there was ample support in the record to find that an award of custody to the grandmother was in the child's best interests.

Matter of Marcus CC. v Erica BB., 107 AD3d 1243 (3d Dept 2013)

Father's Failure to Communicate With Mother Results in Sole Legal Custody to Mother

Parties entered into a stipulated custody order providing for joint legal and physical custody. Before the order was entered the father petitioned to modify, seeking sole custody and the mother cross-petitioned for the same. Family Court determined there had been a substantial change in circumstances and awarded the mother sole legal and primary physical custody. The Appellate Division affirmed. Family Court did not err in considering evidence of events that occurred before the entry of the prior custody order as less weight is afforded stipulated orders. Here, shortly after the parties' stipulation, the father unilaterally terminated all direct communication with the mother. He blocked her phone number from his cell phone so that her calls could not ring through and she was only able to leave mail and text messages. The father only responded to some of her texts. He refused to exchange the child at a location other than the police station and had the paternal grandmother perform all exchanges so that he wouldn't have to see the mother. He violated the prior order by not giving the mother the opportunity to care for the child when he was unavailable, and stated he would continue this behavior. The mother however, attempted to maintain contact with the father and provided him with regular notifications. The proof of a substantial change in circumstances was based on the complete breakdown of communications between the parties, and the parties' inability to cooperate to make parenting decisions. All of this arose subsequent to the stipulation resulting in the prior order, and made joint custody inappropriate. Giving due deference to Family Court's credibility determinations and based on the evidence in the record, it was in the best interests of the child to award sole legal and primary physical custody to the mother.

Matter of Smith v O'Donnell, 107 AD3d 1311 (3d Dept 2013)

Parents Acrimonious Relationship Makes Joint Custody Unworkable

Family Court modified an order of joint legal custody to modified joint legal custody with the mother having final decision-making authority over the child's education and the father having final decision-making authority over the child's health, and continued the prior joint physical custody order. The Appellate Division affirmed the joint physical custody order but modified the legal custody order to sole legal custody to the mother, as the relationship between the parents had severely deteriorated. Although Family Court recognized the parents' level of conflict had escalated, its minor modifications did not sufficiently address the existing level of acrimony between them and the parents' conflict had affected the child detrimentally. It was in the child's best interests to award sole custody to the mother. The father's decision-making ability had been seriously compromised by his animosity against the mother, including his refusal to allow the child to attend one of her dance recitals. While the father brought her to the second dance recital, an altercation occurred between the parents requiring police intervention, and the father called the mother a "f....ing whore" in front of the child. Additionally, the father refused to change the child's current physician, who was not a pediatrician, despite this doctor's recommendation that the child needed a pediatrician. Furthermore, the father repeatedly discussed inappropriate subjects with the child, disparaged the mother in front of the child and refused to participate in co-counseling. While the mother's conduct was not exemplary and she had violated one of the court's orders, the father's failure to place the child's needs before his own made sole custody to him impossible. In a footnote, the
Appellate Division noted its concern over the court's decision to have the father be responsible for the child's health needs in light of his failure to obtain a pediatrician for the child.

Matter of Deyo v Bagnato, 107 AD3d 1317 (3d Dept 2013)

Family Court Did Not Abuse its Discretion by Denying the Father's Motion for Sanctions and Costs

The father filed to modify custody. He served discovery demands upon the mother who failed to respond, and the father moved for sanctions and fees. Family Court denied his motion but reserved his right to move for the same relief during trial. Days before the trial, the mother responded to the demands and the parties settled the case. Thereafter, Family Court denied the father's motion for sanctions. The Appellate Division affirmed. Family Court did not abuse its discretion in denying sanctions and costs. Although the mother's delay in responding to discovery demands caused the trial to be adjourned, the record did not reflect the mother was engaged in any evasive or misleading course of conduct, or that the delay caused any prejudice to the father. In a footnote, the Appellate Division noted allegations were made that the office which employed mother's counsel routinely failed to comply with discovery demands and opined if these allegations were true, the office should address these deficiencies in order to avoid the possibility of future sanctions.

Matter of Decker v Davidson, 107 AD3d 1320 (3d Dept 2013)

Failure to Appoint Attorney for Children Not Error

After a trial on a divorce action initiated by the father, Supreme Court, among other things, awarded the parties joint legal custody of the children with primary, physical custody to the mother. The Appellate Division affirmed. The father's contentions that Supreme Court erred in failing to appoint an attorney for the children, or order a forensic evaluation or conduct in camera interviews of the children were not preserved for review since he failed to request any of the foregoing at trial. Additionally, the court believed the parties had settled all custody and visitation issues and it was not until the start of the trial tthe father informed the court he was withdrawing his settlement proposal. Furthermore, when the mother's attorney requested an attorney for the children be appointed, the father's counsel insisted the trial proceed without interruption. Supreme Court also noted it would have appointed an attorney for the children had it known that custody would be an issue. The court's award of primary physical custody to the mother was supported by the record and there was no abuse of discretion. The record established the mother had always been the primary caretaker and she was actively involved in the children's schooling, activities and medical care. She was also willing to foster the children's relationship with their father. On the other hand, the father traveled frequently for his work and often worked late hours. Moreover, the visitation schedule ordered by the court provided him with frequent and regular access to the children.

Musacchio v Musacchio, 107 AD3d 1326 (3d Dept 2013)

Family Court Erred in Determining That Father's Nonappearance Constituted Default

Family Court dismissed the father's petition to modify visitation based on his failure to appear in court. The Appellate Division reversed. The father's petition alleged that since the entry of the prior custody order, he had become disabled resulting in a decrease in his income and imposing restrictions on his ability to travel, which in turn made the specified transportation during visitation with the child, unworkable. At the first appearance, the father failed to appear but his attorney appeared on his behalf. Family Court informed the father's attorney that the father's presence in court was necessary for the next court date. However, at the next court date the father did not appear. While the father's attorney advised the court the father had elected not to appear, he also admitted he had not informed the father that his appearance was necessary. Family Court failed to challenge the accuracy of the attorney's representation to the father and did not make an attempt to reach the father telephonically or by any other means. Based on these factors, the court erred in finding the father's nonappearance constituted a default. Additionally, Family Court erred in determining the father's modification

petition was facially insufficient. The court should have liberally construed the father's allegations. The modification petition was supported by proof that the father had difficulty sitting for long periods and also included proof of the father's receipt of supplemental security income after issuance of the prior custody order. Finally, as the court itself noted, there were serious questions as to whether the father was aware of his disability prior to the issuance of the last order and thus an evidentiary hearing was necessary to determine if there was a basis for granting the relief requested.

Matter of Freedman v Horike, 107 AD3d 1332 (3d Dept 2013)

Mother's Motion to Vacate Supported by Reasonable Excuse

Family Court granted the father's petition to modify custody upon the mother's default and denied the mother's motion to vacate the default order. The Appellate Division reversed. While a motion to vacate is within the sound discretion of the trial court, it is better to have a disposition based on the merits of the case. Here, the mother's motion to vacate was supported by her affidavit which demonstrated a reasonable excuse for her failure to appear in court. The mother alleged her car broke down on the way to the courthouse. The mother's motion papers included a letter from her mechanic supporting this claim and describing the necessary repair work as well as a receipt for auto parts used in the repair. The record failed to support the father's claim that the mother's failure to appear was her usual pattern of conduct. Additionally, the prior custody order arose from a stipulation and there was never a plenary hearing on the custody issue. Furthermore, the child's best interest is the ultimate issue in these matters, not whether the mother should be punished for her actions.

Matter of Brown v Eley, 107 AD3d 1334 (3d Dept 2013)

Family Court Abused its Discretion in Failing to Hold a Lincoln Hearing

Parents and their three children lived in California. The parties' later divorced and the mother moved with the children to New York. The parties stipulated to joint legal custody with primary, physical custody to the mother and parenting time to the father, and the stipulation was incorporated into their divorce decree. Thereafter, the father filed to modify custody, seeking primary physical custody of the youngest child, a 14-year-old daughter. The two older children had moved out of the mother's home. After a hearing, Family Court granted the father's petition. The Appellate Division affirmed but held that Family Court had abused its discretion by failing to hold a Lincoln hearing. There had been a sufficient change in circumstances to modify visitation. The relationship between the mother and the child had significantly deteriorated, resulting in verbal confrontations. The mother sometimes directed profanities and vulgarities at the child. At least on one occasion, the mother had locked the child out of the house and the child spent the evening on the front porch, calling her father and sister in an attempt to find somewhere to pass the night. The record also indicated the mother made no effort to foster a meaningful relationship between the father and the child and at times, had impeded their communication. The mother had threatened the subject child and her older daughter with negative consequences if they testified in support of their father's petition. Despite this circumstance, and despite requests by the child's attorney and the father for a Lincoln hearing, the court directed the child to testify before the parties. The child was put in an awkward position, especially in light of the evidence that the mother had attempted to influence the testimony of her children, and the parents' knowledge of her wishes. The Appellate Division determined that Family Court had abused its discretion by placing the child in such a situation, and emphasized that "a child should not be placed in the position of having.. [her] relationship with either parent further jeopardized by having to publicly relate ... [her] difficulties with them when explaining the reasons for..[her] preference". In this case, the Lincoln hearing would have limited the risk of harm, would have

been far more informative and worthwhile than an examination of the child under oath in open court, and given the child's age, her preference would have been entitled to great weight.

Matter of Casarotti v Casarotti, 107 AD3d 1336 (3d Dept 2013)

Award of Primary Physical Custody to Father Had Sound and Substantial Basis

Family Court awarded primary physical custody of the parties' child to petitioner father and visitation to respondent mother. The Appellate Division affirmed. Family Court properly denied respondent's motion to change venue. Respondent failed to demonstrate good cause for transferring the proceeding to Chautauqua County. She failed to identify a single witness who would be inconvenienced by proceeding in Erie County. Because this proceeding involved an initial determination with respect to custody, petitioner was not required to show changed circumstances. The court properly determined that it was in the child's best interests that the parties have joint custody with primary physical custody with petitioner. The court engaged in a careful weighing of the appropriate factors and its determination had a sound and substantial basis.

Matter of Bonnell v Rodgers, 106 AD3d 1515 (4th Dept 2013)

Custodial Grandmother Properly Directed to Transport Child for Visits With Incarcerated Mother

Family Court directed petitioner paternal grandmother, who was the subject child's primary physical custodian, to transport the child for visits with respondent mother at the correctional facility where the mother was incarcerated. The Appellate Division affirmed. The grandmother failed to establish by a preponderance of evidence that visitation with the mother would be detrimental to the child. Thus, she did not overcome the presumption that visitation with the mother was in the child's best interests.

Matter of Cormier v Clarke, 107 AD3d 1410 (4th Dept 2013)

Petition to Suspend Visitation Properly Denied

Family Court denied petitioner mother's application to suspend visitation. The Appellate Division affirmed. The court properly denied the petition and reinstated visitation between the father and the child. Visitation with the noncustodial parent was presumed to be in the child's best interests and denial of visitation was justified only for a compelling reason. The record supported the court's findings that the mother sought to alienate the child from her father by blaming the father for an incident of alleged sexual abuse perpetrated against the child by a third party, and that the father was not in any way responsible for the occurrence of that alleged crime.

Matter of Nwawka v Yamutuale, 107 AD3d 1456 (4th Dept 2013)

Termination of Visitation with Incarcerated Parent Affirmed

Family Court granted mother's petition to modify a prior order of custody and visitation by terminating visitation with respondent father, who was incarcerated, and denied respondent father's petition for an order of contempt based on the alleged failure of the mother to comply with the prior order. The Appellate Division affirmed. The prior order required the mother to bring the parties' biological child, who was 10 year old at the time of the commencement of the proceeding, to the visit the father at the Auburn Correctional Facility twice a year. The mother established the requisite change in circumstances to warrant a review of the prior order. As the child matured, she developed a strong desire not to visit the father. Additionally, the mother testified that the father used visitation time to attempt to reconcile with the mother, rather than to interact with the child. The mother established by a preponderance of the evidence

that, under all the circumstances, visitation would be harmful to the child's welfare. Visitation need not always include contact visitation at the prison. While the father's incarceration did not, by itself, render visitation inappropriate, that fact, when considered with the evidence that established the father's lack of prior contact with the child, the father's failure to interact with the child during visitation and the child's express desire not to visit with the father, provided a sufficient basis for the court's determination that terminating visitation with the father was in the child's best interests.

Matter of Rulinsky v West, 107 AD3d 1507 (4th Dept 2013)

Dismissal of Petition to Modify Custody Reversed

Family Court dismissed that part of mother's petition that sought a modification of custody. The Appellate Division reversed, granted the petition in part by awarding primary physical custody of the child to the mother and visitation to respondent father, and remitted the matter to Family Court for further proceedings. The mother met her burden of establishing a change in circumstances. Each party remarried since the original custody trial and had two additional children who were younger than the subject child, and the father had two-step children who were older than the subject child. The evidence established that the child felt isolated at the father's home and indicated a strong desire to live with the mother. The evidence further established that the child's anxiety with respect to living with the father progressed to the point where he expressed to others his thoughts of harming the father and his family. It was in the child's best interests to award the mother primary physical custody. The mother was better able to provide for the child's emotional needs. Given the child's anxiety, this factor was accorded greater weight.

Matter of Cole v Nofri, 107 AD3d 1510 (4th Dept 2013)

Award of Sole Legal and Physical Custody to Father Affirmed

Supreme Court awarded petitioner father sole legal and physical custody of the parties' children. The Appellate Division affirmed. Respondent mother's contention was rejected that the court placed too much emphasis on the wishes of the children and that the award of custody to the father was not in the children's best interests. Although the wishes of the children were but one factor to be considered when determining the relative fitness of the parties and the custody arrangement that served the best interests of the children, the court properly weighed and considered all of the relevant factors, some of which favored the father while others favored the mother. Due deference was given to the court's superior ability to evaluate the character and credibility of the witnesses, and there was no basis to disturb its award of custody to the father.

Matter of Radley v Radley, 107 AD3d 1578 (4th Dept 2013)

Dismissal of Petition to Terminate Child's Half-brother's "Access" to Child Proper

Family Court denied the objection of petitioner father and confirmed the report of the referee which recommended dismissal of the petition following a hearing. The Appellate Division affirmed. Petitioner, who had sole custody of his 12-year-old daughter, sought to terminate the weekend "access" to the child that respondent, the child's half-brother, was granted pursuant to a stipulated order. Petitioner alleged that respondent was a drug dealer and exposed the child to domestic violence. Respondent failed to answer the petition. The court's determination that it was in the best interests of the child to continue having scheduled visitation with respondent had a sound and substantial basis in the record. It was undisputed that the child and respondent had a close relationship which the child wished to continue. Although not controlling, the express wishes of the child were entitled to great weight because her age and maturity rendered her input

particularly meaningful.

Matter of Perry v Render, 107 AD3d 1615 (4th Dept 2013)

Reversal of Dismissal of Violation Petition

Family Court granted respondent father's motion to dismiss the amended violation petition. The Appellate Division reversed on the law, the motion to dismiss the amended petition was denied, the petition was reinstated and the matter was remitted to Family Court for a hearing on the amended petition. The court erred in dismissing petitioner's amended petition without a hearing inasmuch as the amended petition alleged sufficient factual and legal grounds to establish a violation of a prior order. Moreover, respondent's submissions in support of his motion to dismiss did not address all of the allegations in the mother's amended petition.

Matter of Schultz v Schultz, 107 AD3d 1616 (4th Dept 2013)

Reversal of Order that Designated Mother Primary Residential Custodian

Family Court entered an order that designated respondent mother the primary residential custodian of the parties' children. The Appellate Division reversed and remitted the matter to Family Court. The expert's report relied upon by the court was of limited utility inasmuch as it highlighted challenges faced by the father and downplayed similar challenges faced by the mother. In any event, the Court was advised that facts and circumstances had changed during the pendency of the appeal. The record was no longer sufficient for determining the mother's fitness and right to primary physical custody of the children. In deciding the issue in the mother's favor, Family Court relied on evidence that the mother was self-supporting and living in her own apartment. The Court was advised that the mother had since lost her job and was living with her own mother.

Matter of Kennedy v Kennedy, 107 AD3d 1625 (4th Dept 2013)

Denial of Visitation with Incarcerated Parent Affirmed

Family Court denied the father's petitions for visitation at the correctional facility where he was incarcerated, but allowed petitioner to communicate in writing with two of his children. The Appellate Division affirmed. Respondents in the consolidated appeals, the mother and maternal grandmother of one of petitioner's children and the mother of another of petitioner's children, rebutted the presumption in favor of visitation by establishing, by a preponderance of the evidence, that visitation would be harmful to the children. Petitioner had never met the children. He was essentially a stranger to them. Additionally, the counselor of one of the children testified in detail as to how visitation would be detrimental to her welfare and the other child's mother testified that the child was afraid of seeing petitioner and had been in therapy since he learned of the proceedings.

Matter of Brown v Terwilliger, 108 AD3d 1047 (4th Dept 2013)

Orders Awarding Visitation to Father and Paternal Grandparents Modified

Respondent mother appealed from two Family Court orders. The first order granted petitioner father increased visitation, among other things. The Appellate Division modified. The father established a change in circumstances warranting a modification of the access provisions in the parties' separation agreement. The record established that the mother interfered with the father's telephone communications with the children. It was in the children's best interests to increase the father's visitation. However, the court abused its discretion with respect to certain aspects of the revised visitation schedule. The award of parenting time for the father each and every weekday morning before school was not in the children's best interests because it created instability and was

likely to increase tension between the parents. Additional provisions of the same ordering paragraph were ambiguous, confusing and unnecessary and were modified so that each parent was responsible for making childcare arrangements during his or her respective parenting time. The court further abused its discretion in awarding the father both Memorial Day and Labor Day weekends each year. The order was further modified so that the mother had parenting time on Labor Day weekend each year. The second appeal pertained to the paternal grandparents' visitation order. To avoid conflict with the parents' order of custody and visitation, the order was modified so that the grandparents' monthly Sunday visitation occur during the father's parenting time in odd-numbered months and during the mother's parenting time in even-numbered months. The order was further modified by vacating that part of the first ordering paragraph that directed that the grandparents have one summer weekend of visitation during the mother's parenting time.

Matter of Dubiel v Schaefer, 108 AD3d 1093 (4th Dept 2013)

Supervised Visitation Order Reversed

Family Court directed that respondent father's visitation with the parties' children be supervised. The Appellate Division reversed on the law and remitted the matter to Family Court. Family Court erred in relieving respondent's assigned counsel after the modification petition, which sought full legal custody of the three children at issue, was amended to seek only a modification of respondent's visitation. While the appeal was pending, the Appellate Division held that respondents in visitation proceedings were entitled to assigned counsel.

Matter of Brown v Patterson, 108 AD3d 1131 (4th Dept 2013)

Adjudication of Neglect Constituted Change in Circumstances

In a proceeding pursuant to, among other things, Family Court Act article 6, Family Court determined that petitioner mother should have sole custody of the subject child. The Appellate Division affirmed. In the first appeal, the father appealed from the order that granted mother sole custody on the modification petition and, in the second appeal, he appealed from the dispositional order on the neglect petition. With respect to the second appeal, the court properly concluded that DSS established by a preponderance of the evidence that the child was a neglected child. The evidence established that the child's emotional condition was impaired as a result of the father's "bizarre and paranoid behavior," which resulted in the child being frightened and depressed. The child's out-of-court statements were adequately corroborated by the father's statements to the DSS caseworker and the child's testimony. Regarding the first appeal, the adjudication of neglect constituted a change in circumstances that warranted a determination whether a modification of the custody arrangement set forth in the parties' joint custody order was in the best interests of the child. The court properly determined that it was in the child's best interests for the mother to have sole custody.

Matter of Christy S. v Phonesavanh S., 108 AD3d 1207 (4th Dept 2013)

Denial of Modification Petition Error; Appellate Division Granted Petition

Family Court denied the father's petition for modification of a prior custody order, among other things. The Appellate Division modified by granting the petition and remitted the matter to Family Court to establish a visitation schedule with the mother. The Court addressed the cross appeal first and rejected the mother's contention that Family Court erred in finding her in civil contempt of the court's 2001 order. It was undisputed that the order prohibited her from moving out-of-state with the parties' child without the permission of either the father or the court, and that the mother moved to Maine in August 2011 without such

permission. With respect to the father's appeal, the court's determination that it was in the best interests of the child to remain in the custody of the mother lacked a sound and substantial basis in the record. The court abused its discretion in failing to draw the strongest inference that the opposing evidence permitted against the mother based upon her failure to appear for the hearing. Although the court properly determined that the father failed to take steps to enforce his right to visit with the child, the court failed to credit the testimony of the mother's family that the mother interfered with the father's ability to visit the child; that the mother disparaged the father in the presence of the child; that, despite the court's order granting telephone access to the child, the access lasted only two weeks; that the mother was verbally abusive to the child; that the child was afraid of the mother; among other things. Further, the evidence established that the father had a home, a job and paid child support. Although the court properly determined that the child barely knew the father, the court erred in failing to give any weight to the 14-year-old child's preference to live with the father rather than the mother.

Matter of Lara v Sullivan, 108 AD3d 1238 (4th Dept 2013)

FAMILY OFFENSE

Petitioner Failed to Demonstrate Respondent Committed a Family Offense

After a fact-finding hearing, Family Court dismissed petitioner's family offense petition and decided that respondent did not commit the acts that constituted harassment in the second degree. The Appellate Division affirmed, finding there was no basis to disturb the court's credibility determinations. Petitioner failed to demonstrate, by a fair preponderance of the evidence, that respondent intended to harass, annoy or alarm petitioner, or that respondent repeatedly committed acts that served no legitimate purpose**.**

Matter of Gloria C. v Josephine I., 106 AD3d 630 (1st Dept 2013)

JUVENILE DELINQUENCY

Legally Sufficient Evidence

Family Court adjudged respondent to be a juvenile delinquent based on the finding that she committed an act which, if committed by an adult, would constitute the crimes of assault in the second degree and criminal possession of a weapon in the fourth degree and placed her on probation for 12 months. The Appellate Division affirmed and determined the finding was based on legally sufficient evidence. The evidence established that respondent threw an unopened can of soda at the victim's face from five feet away and then punched the victim twice even as a school official was intervening. The evidence supported the inference that respondent intended to cause physical injury and there was ample evidence that respondent did cause physical injury. The soda can qualified as a dangerous instrument because, under the circumstances of its use, it was capable of causing serious physical injury.

Matter of Joy T., 106 AD3d 456 (1st Dept 2013)

Probation was Not the Least Restrictive Alternative

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed an act which, if committed by an adult, would constitute the crime of attempted assault in the third degree and placed him on probation for 12 months. The Appellate Division reversed. The underlying incident showed that the 14-year-old respondent punched another 14-year-old in the face causing him to sustain a contusion. However, respondent came from a stable home, this was his first contact with the juvenile justice system and he accepted full responsibility for his actions and showed sincere remorse. Placing respondent on probation was not the least restrictive alternative consistent with respondent's needs and the community's needs for protection since an ACOD

would have been sufficient in this case. However, since the term of probation had expired by the time of the appeal, the matter was dismissed.

Matter of Tyttus D., 107 AD3d 404 (1st Dept 2013)

Proper Exercise of Discretion in Ordering Secure Placement for Respondent

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed acts which, if committed by an adult, would constitute the crimes of rape in the first and third degrees, sexual abuse in the first degree, sexual misconduct and forcible touching, and placed him in the Agency's custody for a period of 3 years, with the first 12 months in a secure facility. The Appellate Division affirmed. Family Court properly exercised its discretion in ordering secure placement pursuant to FCA § 335.5. This disposition was warranted based on, among other things, the seriousness of the offense and respondent's history of recidivism and violence. Furthermore, while awaiting disposition of this case, respondent who had turned 16-years-old, was convicted in Supreme Court of another sex offense. While the therapists who evaluated respondent did not support restrictive placement for him, they nevertheless recommended that he be placed in a highly structured environment outside the community with various services including sex offender treatment. Additionally, Family Court properly denied respondent's belated request for an adjournment to call the therapists to testify as their testimony would have been cumulative since their reports were admitted into evidence.

Matter of Malik H., 107 AD3d 447 (1st Dept 2013)

Court Erred in Ordering Testimony to Proceed in Respondent's Absence

Family Court adjudicated respondent a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of robbery in the third degree, grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed her with the Office of Child and Family Services for a period of up to 18 months. The Appellate Division reversed and remanded the matter for a new fact-finding hearing. The court erred in ordering testimony to proceed in respondent's absence. Although the court briefly inquired into respondent's whereabouts and learned that defense counsel did not know where she was, the court did not make a determination that respondent's absence was deliberate, or state any grounds for reaching such a conclusion. Accordingly, there was a violation of respondent's right to be present. The Appellate Division noted that respondent arrived in court approximately one hour late, and had a reasonable excuse for her lateness.

Matter of Joelin V., 107 AD3d 511 (1st Dept 2013)

Probation Proper Exercise of Court's Discretion

Family Court adjudicated respondent a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed her on probation for a period of 12 months. The Appellate Division affirmed. The court properly exercised its discretion in adjudicating respondent a juvenile delinquent and placing her on probation. The court adopted the least restrictive dispositional alternative consistent with respondent's needs and those of the community. Although this was respondent's first interaction with the juvenile justice system, she neither expressed remorse nor demonstrated any insight into the wrongfulness of her conduct. During this assault, respondent encouraged her accomplice to hit the victim. As the victim tried to stand up, respondent, while wearing hard-toed boots, kicked the fallen victim twice in the head. Respondent's poor school attendance and other behavioral issues were additional reasons to impose a period of probationary supervision rather than an adjournment in contemplation of dismissal.

Matter of Shariah T., 107 AD3d 605 (1st Dept 2013)

Suppression Motion Properly Denied

Family Court adjudicated respondent a juvenile delinquent upon his admission that he committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 12 months. The Appellate Division affirmed. Family Court credited the police officer's testimony, which was corroborated by the account given by respondent's own witness. The court's ability to observe the witnesses afforded much weight to its findings. Given respondent's rigid posture, the location of the bulge, his remarks and the attendant circumstances, the officer had reasonable suspicion to detain and frisk him, and thus the respondent's suppression motion was properly denied.

Matter of Daquan B., 108 AD3d 402 (1st Dept 2013)

Petition Was Facially Insufficient

Here, the respondent admitted to committing acts which constituted the crime of possession of weapons by persons under 16, in that he possessed a "dangerous knife" (*see* PL§ 265.05). However, as the respondent correctly argued, the petition was facially insufficient to support that charge because it did not contain allegations which, if true, would have established that the knife he possessed was a "dangerous knife" (*see* Penal Law § 265.05). The supporting deposition merely described the unmodified, utilitarian knife which the respondent possessed, and contained no allegations as to the "circumstances of its possession," so as to "permit a finding that on the occasion of its possession it was essentially a weapon rather than a utensil". Accordingly, the order of disposition was reversed and the petition was dismissed.

Matter of Antwaine T., 105 AD3d 859 (2d Dept 2013)

No Violation of Defendant's Right to Speedy Fact-finding

Under the circumstances of this case, the Family Court erred in dismissing the juvenile delinquency petition filed against the defendant. There was no violation of the defendant's right to a speedy fact-finding hearing. The Presentment Agency only sought an adjournment until later in the day of June 12, 2012, which was still on "day 60" for purposes of his right to a speedy fact-finding hearing (*see* FCA § 340.1 [2]). Any delay in the commencement of the hearing was de minimis, and would have been obviated by merely recalling the case later that day, after the complainant had an opportunity to arrive in court.

Matter of David P., 106 AD3d 745 (2d Dept 2013)

Placement Least Restrictive Alternative

Here, the Family Court providently exercised its discretion in placing the defendant in the custody of the New York State Office of Children and Family Services for a period of 18 months for placement with a residential treatment facility. The record established that the disposition was the least restrictive alternative consistent with the best interests of the defendant and the needs of the community (*see* FCA § 352.2 [2] [a]), particularly in light of, inter alia, his previous juvenile delinquency adjudication, the violation of the conditions of his probation, his record of truancy, the findings in the mental health services report, and the recommendation in the probation report.

Matter of Paul T., 107 AD3d 726 (2d Dept 2013)

ACD Warranted

Here, the Family Court improvidently exercised its discretion when it denied the defendant's request for an order adjourning the proceeding in contemplation of dismissal (ACD) pursuant to FCA § 315.3 (1). This proceeding constituted the defendant's first contact with the court system, he took responsibility for his actions, and the record

demonstrated that he had learned from his mistakes. There was no indication that the defendant's father failed to provide adequate supervision and, in fact, the record demonstrated his active and positive role in the defendant's home and school life. Under the circumstances, including the defendant's commendable academic and school attendance record, his association with a positive peer group, and the minimal risk that he posed to the community, an ACD was warranted (*see* FCA § 315.3 [1]).

Matter of Jonathan M., 107 AD3d 805 (2d Dept 2013)

Record Supported Determination That Defendant Violated Condition of Probation

After a hearing, the Family Court properly determined that the Presentment Agency established, by a fair preponderance of the evidence (*see* FCA § 350.3) that the defendant violated the condition of his probation that he have no new arrests by being arrested on December 21, 2011, and, thereupon, properly vacated the prior order of disposition. The Presentment Agency elicited testimony from the police detective who arrested the defendant which established that the detective had probable cause to arrest the defendant. The Family Court found the detective to be credible and there no basis in the record to set aside the Family Court's credibility determination. There was no merit to the defendant's contention that the Presentment Agency failed to meet its burden of establishing the subject violation of probation because the violation of probation petition alleged that the defendant was arrested on December 8, 2011, rather than on December 21, 2011. Further, the Family Court providently exercised its discretion in placing the defendant in the custody of the New York State Office of Children and Family Services. The disposition was the least restrictive alternative consistent with the best interests of the defendant and the needs of the community in light of, inter alia, the seriousness of the offense and the defendant's previous violation of the terms and conditions of probation.

Matter of Leighton F., 108 AD3d 669 (2d Dept 2013)

Defendant Not Entitled to ACD

Here, the Family Court providently exercised its discretion in adjudicating the defendant a juvenile delinquent and placing her on probation for a period of 12 months (*see* FCA § 352.2), rather than directing an adjournment in contemplation of dismissal (*see* FCA § 315.3). The defendant was not entitled to an adjournment in contemplation of dismissal (ACD) merely because this was her first encounter with the law, or in light of the other mitigating circumstances that she cited. The record established that the imposition of probation was the least restrictive alternative consistent with the defendant's best interests and the need for protection of the community (*see* FCA § 352.2 [2] [a]), particularly in light of, inter alia, the nature of the incident that led to the defendant's adjudication as a juvenile delinquent and the recommendations made in the probation report.

Matter of Racheal M., 108 AD3d 770 (2d Dept 2013)

Placement With DSS was the Least Restrictive Available Alternative

Family Court adjudged respondent to be a juvenile delinquent based on the finding that she had committed an act which, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree and placed her in the custody of the agency for a period of one year. The Appellate Division affirmed. The court did not abuse its discretion in ordering respondent's placement with the agency rather than the less restrictive alternative of placing her on probation. Based on the totality of circumstances, the record revealed respondent had a significant history of substance abuse, running away from home, and un-excused absences from school. Moreover, despite the mother's positive efforts to supervise respondent in the weeks prior to the dispositional hearing, the record showed that respondent's parents had a

history of failing to provide the supervision and assistance that she needed. Therefore, placement with the agency was consistent with respondent's best interests and protection of the community.

Matter of Tianna W., 108 AD3d 948 (3d Dept 2013)

Determination that Petition Not Jurisdictionally Defective Affirmed

Family Court adjudged respondent to be a juvenile delinquent based upon his admission that he committed acts that if committed by an adult would constitute the crime of criminal mischief in the fourth degree and placed him on probation for a period of twelve months. The Appellate Division affirmed. Respondent's contention was rejected that the petition was jurisdictionally defective because the allegations of the factual part of the petition consisted solely of hearsay, in violation of Family Court Act Section 311.2 (3). The petition stated that the information contained therein was derived from statements and admissions of respondent and/or statements and depositions of witnesses filed with the court. Those statements included confessions from respondent and his accomplices, as well as depositions of various other witnesses. There was no support in the record for respondent's assertion that the statements in question were not actually filed with the petition. Respondent's assertion was refuted by the clerk of the court, who submitted an affidavit in support of petitioner's motion to strike that portion of respondent's reply brief in which he made the assertion.

Matter of Casey C.T., 107 AD3d 1579 (4th Dept 2013)

ORDER OF PROTECTION

Petitions Properly Dismissed

Family Court dismissed petitions for orders of protection against respondents. The Appellate Division affirmed. Petitioner failed to establish by a preponderance of the evidence that respondents, her mother and uncle, committed acts that constituted harassment in the second degree, menacing in the third degree, or disorderly conduct. The evidence indicated that the parties had a single altercation at the entranceway to their apartment when petitioner returned in the late evening with an unknown man. During the incident, petitioner's uncle picked up a knife in the kitchen and told petitioner she could not come in with the man, while petitioner's mother blocked the door. The incident ended with the arrest of petitioner. Petitioner's testimony, which was not credited by the court, was in any event insufficient to establish any of the alleged offenses.

Matter of Cindy O. v Edna C., 108 AD3d 410 (1st Dept 2013)

Willful Violation of Order of Protection Affirmed

Family Court found that respondent father willfully violated an order of protection and committed him to a jail term of six months. The commitment was stayed for a period of six months on the condition that respondent not violate the order of protection. The Appellate Division dismissed the appeal from the order insofar as it concerned commitment to jail and otherwise affirmed. Petitioner mother established by clear and convincing evidence that respondent willfully violated the terms of the order of protection. Respondent's challenge to the commitment was moot because that part of the order expired by its own terms.

Matter of Ferrusi v James, 108 AD3d 1083 (4th Dept 2013)

TERMINATION OF PARENTAL RIGHTS

Agency Excused From Making Diligent Efforts to Reunite Family

Family Court granted the Agency's application to be excused from making diligent efforts to reunite the family and upon a finding of permanent

neglect, terminated the mother's parental rights. The Appellate Division affirmed. The Agency demonstrated, by clear and convincing evidence, that diligent efforts to encourage the parent-child relationship would be detrimental to the child in light of the mother's role in the death of the subject child's infant brother, and termination of the mother's rights was in the child's best interests. The finding of permanent neglect was supported by clear and convincing evidence that the mother failed to plan for the subject child's future, failed to take responsibility for causing her son's death, and failed to take responsibility for maltreating the subject child. The fact that the mother was incarcerated did not relieve her of the responsibility to plan for the child's future.

Matter of Diana Angela Bedolla F., 106 AD3d 421 (1st Dept 2013)

Revocation of Suspended Judgment Due to Domestic Violence

Family Court revoked a suspended judgment entered on a finding of permanent neglect and terminated respondent father's parental rights. The Appellate Division affirmed. The father failed to show he had stopped the cycle of domestic violence with the children's mother, which was one of the reasons the children were placed in foster care, and his actions demonstrated that he was unable to take responsibility as the children's primary caretaker. A preponderance of the evidence supported the court's finding that it was in the children's best interests to terminate the father's parental rights. The children had been in the same foster home for most of their lives, the foster parents had provided for the special needs of the children and wished to adopt them. Furthermore, the father failed to show that exceptional circumstances existed requiring the court to extend the suspended judgment, or that a fourth attempt to reunite the family was in the children's best interests.

Matter of Anthony Wayne S., 106 AD3d 463 (1st Dept 2013)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent mother's parental rights to the subject child upon the finding of permanent neglect. The Appellate Division affirmed. The Agency met its burden of showing, by a preponderance of the evidence, that it was in the child's best interest to terminate the mother's rights and free the child for adoption. The child was doing well in the home of her foster mother, her father's ex-wife, who wished to adopt her. At the time of the dispositional hearing, the mother had still not completed drug treatment, parenting skills, or any aspect of her service plan. There was no evidence that the mother was making progress that could result in a suspended judgment.

Matter of Mercedez Alicia Dynasty F., 106 AD3d 519 (1st Dept 2013)

Motion to Vacate Order Terminating Parental Rights Denied

Family Court denied respondents' motions to vacate an order of disposition which, upon the respondents' default and upon findings of permanent neglect, terminated their parental rights to their children. The Appellate Division affirmed. Respondents failed to demonstrate a reasonable excuse for their absence from the proceeding and a meritorious defense to the petition. The respondents were responsible for knowing the time of their hearing, and their assertions that their attorneys would have presented evidence sufficient to counter the allegations of permanent neglect was insufficient to establish a meritorious defense.

Matter of Sean Michael N., 106 AD3d 561 (1st Dept 2013)

Termination of Parental Rights on Ground of Permanent Neglect Affirmed

Family Court terminated respondent mother's parental rights upon a fact-finding determination that she permanently neglected the child. The

Appellate Division affirmed. The finding that respondent permanently neglected the child was established by clear and convincing evidence. Despite diligent efforts made by the agency to strengthen and encourage the parental relationship, respondent failed during the statutorily relevant time period to plan for the future of the child. In particular, the record showed that petitioner met regularly with respondent to prepare a service plan and review her progress, arranged visitation between the respondent and the child, and encouraged respondent to complete her drug treatment program. These efforts notwithstanding, respondent failed to complete her service plan. A preponderance of the evidence supported the determination that it was in the best interests of the child to terminate respondent's parental rights, rather than issue a suspended judgment. The child had lived most of her life with her foster parent, who wanted to adopt her and her older siblings. That respondent made efforts to remain drug free did not warrant a different finding.
Matter of Danielle Nevaeha S.E., 107 AD3d 527 (1st Dept 2013)

Sufficient Evidence of Permanent Neglect

Family Court determined that respondent father permanently neglected the subject children. The Appellate Division affirmed. The agency demonstrated by clear and convincing evidence that it repeatedly tried to contact respondent in writing and by telephone and made referrals in order to assist him in completing the service plan, but he failed to respond, failed to consistently visit the children, and did not complete a drug treatment program or other programs to which he was referred. The court was permitted to draw a negative inference from respondent's failure to testify.

Matter of Alford Isaiah B., 107 AD3d 562 (1st Dept 2013)

Sufficient Evidence of Permanent Neglect Notwithstanding Respondent's Completion of Anger Management Program and Parenting Skills Class

Family Court determined that respondent mother permanently neglected the subject children. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that petitioner agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, scheduling visitation with the children, providing respondent with referrals for services, and assisting her with her immigration status. Respondent failed, during the statutorily relevant period, to meaningfully avail herself of the services deemed essential to prepare her to assume custodial parenting responsibilities by failing to complete mental health services and obtain suitable housing for the children. Although respondent completed an anger management program and a parenting skills class, the testimony demonstrated that she failed to gain insight into her inability to control her anger. Thus, respondent failed to adequately plan for the children's future.

Matter of Dina Loraine P., 107 AD3d 634 (1st Dept 2013)

Diligent Efforts Made By Agency

Family Court determined that respondent father permanently neglected the subject child. The Appellate Division affirmed. The finding of permanent neglect against the father was supported by clear and convincing evidence. The record established that petitioner agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, attempting to contact the father for the purpose of formulating a service plan, directing and encouraging weekend and other visitation between the father and the child, and referring the father for drug testing, psychological evaluation and family therapy. Despite these diligent efforts, the father failed, during the statutorily relevant period, to plan for the child's future or maintain substantial and continuous contact with the child. Indeed, the father failed to visit with the child on a regular,

consistent basis, respond to the agency's attempts to contact him, or comply with the agency's requirements for him to be granted custody of the child, who had never lived with him.

Matter of Jaelyn V.L.G., 108 AD3d 422 (1st Dept 2013)

Suspended Judgment Not Warranted

Here, the record supported the Family Court's determination that the best interests of the subject child were served by terminating the mother's parental rights and freeing the child for adoption by her foster mother (*see* FCA § 631). A suspended judgment was not warranted in this instance, despite the mother's recent progress and efforts to plan for the child's future, because the child had bonded with her foster mother, who had competently and consistently provided for her specialized needs since she was three months old, and it is not in the child's best interests to prolong the uncertainty of foster care.

Matter of Alicia M.L., 105 AD3d 848 (2d Dept 2013)

Reasonable Efforts by ACS to Reunite Mother and Child Not Required

The Appellate Division, upon reviewing the record, found that the Family Court properly relieved the Administration for Children's Services (ACS) of its obligation to make reasonable efforts to reunite the mother with the child. Here, contrary to the mother's contention, ACS established that the mother's parental rights with respect to a sibling of the subject child had been terminated "involuntarily" (*see* FCA§ 1039–b[b][6]). In support of its motion, ACS submitted the judgments terminating the mother's parental rights with respect to the child's two elder siblings. In opposition to ACS's motion, the mother failed to prove that "reasonable efforts" should nonetheless still be required under the exception pursuant to FCA § 1039–b(b), which provides that such reasonable efforts would have been in the best interests of the child, were not contrary to the health and safety of the child, and would likely have resulted in the reunification of the parent and the child in the then foreseeable future. The Appellate Division rejected the mother's contention that the statute places the burden on the social services official to establish the inapplicability of the exception, rather than on the parent to establish its applicability.

In re Skyler C., 106 AD3d 816 (2d Dept 2013)

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

The Family Court properly found that the mother permanently neglected the subject child. Contrary to the mother's contention, the petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [7]). These efforts included repeated referrals of the mother to drug treatment programs and individual counseling, the monitoring of her progress in these programs, and repeated warnings to the mother that if she failed to attend and complete a drug treatment program, she could permanently lose custody of the subject child. Despite these efforts, the mother failed to plan for the child's future). Accordingly, the petitioner met its burden of proving, by clear and convincing evidence, that the mother permanently neglected the subject child. Furthermore, under the circumstances of this case, the Family Court properly determined that it was in the best interests of the subject child to terminate the mother's parental rights.

Matter of Angel H., 107 AD3d 891 (2d Dept 2013)

Mother's Abandonment of Children Established by Clear and Convincing Evidence; Diligent Efforts Not Required

The petitioner established by clear and convincing evidence that the mother abandoned the subject children by failing to visit or communicate with them or the petitioning agency during the six-

month period immediately prior to the date on which the petitions were filed (*see* SSL § 384-b [4] [b]; 5 [a];). The mother's contention that her parental rights were improperly terminated because the petitioner failed to demonstrate that it engaged in diligent efforts to encourage her relationship with the children and to provide services to effect the same was without merit. In the context of a proceeding to terminate parental rights on the ground of abandonment, a showing of diligent efforts by an authorized agency to encourage the parent to visit and communicate with the child or agency is not required (*see* SSL § 384-b [5] [b]).

Matter of Angela Simone S., 107 AD3d 901 (2d Dept 2013)

Father's Incarceration Did Not Excuse Him from Planning for Child's Future

The father appealed from a fact-finding order of the Family Court, which, after a hearing, found that he permanently neglected the subject child, and an order of disposition of the same court, which, after a hearing, terminated his parental rights and committed the guardianship and custody of the child to the petitioner for the purpose of adoption. Here, the Family Court properly found that the father permanently neglected the subject child. 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 father failed for a period of one year following the child's placement with the agency to plan for the child's future, as he failed to develop a realistic and feasible plan SSL § 384-b [7][c]). Further, the father's incarceration did not excuse him from the planning requirement of the statute. Accordingly, the appeal from the fact-finding order was dismissed, as the fact-finding order was superseded by the order of disposition, and the order of disposition was affirmed.

Matter of Egypt A.A.G., 108 AD3d 533 (2d Dept 2013)

Family Court Properly Revoked Suspended Judgment

The Family Court may revoke a suspended judgment after a hearing if it finds, by a preponderance of the evidence, that the parent failed to comply with one or more of its conditions. Here, the agency established by a preponderance of the evidence that the father failed to comply with the terms and conditions of the suspended judgment requiring him, inter alia, to regularly attend and participate in substance abuse treatment and to visit consistently with the children. Accordingly, the Family Court properly revoked the suspended judgment, terminated the father's parental rights, and transferred guardianship and custody of the subject children to the petitioner for the purpose of adoption.

Matter of Kimble G., II, 108 AD3d 534 (2d Dept 2013)

Mother Only Partially Complied with Service Plan

The petitioner agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the subject children by meeting with the mother to review her service plan, discussing the importance of compliance, providing referrals for drug testing and housing, and scheduling visitation between the mother and the subject children. The mother's partial compliance with the service plan was insufficient to preclude a finding of permanent neglect. Furthermore, the Family Court correctly determined that it would be in the children's best interests to terminate the mother's parental rights and free the children for adoption.

Matter of Tamara F.J., 108 AD3d 543 (2d Dept 2013)

Child Had Bonded with Foster Mother Who Had Cared for Him Most of His Life

The Family Court's determination that it was in the child's best interests to terminate the mother's parental rights and free the child for adoption by his foster mother, who also cared for and intended to adopt the child's sibling, was supported by a preponderance of the evidence. Contrary to the mother's contention, a suspended judgment was not warranted, despite the mother's recent progress and efforts to avail herself of the services offered to her, because the child had bonded with the foster mother who had consistently provided for his specialized needs and cared for him for most of his life.

Matter of Jordan E.G.L., 108 AD3d 546 (2d Dept 2013)

Father Continued to Engage in Dangerous Activity in Child's Presence Following Her Removal from His Custody

Contrary to the father's contention, the evidence presented at the fact-finding hearing established, by the requisite clear and convincing standard of proof, that he permanently neglected the subject child by continuing to engage in dangerous criminal activity in her presence in the years following her removal from his custody, by failing to maintain consistent contact with the child, and by failing to plan for her future. Notwithstanding the diligent efforts of the agency to help reunite the family (*see* FCA § 384-b [7] [a]), the father was incarcerated and ultimately permanently deported from the United States as a result of his criminal convictions. By his actions, the father failed to plan for the child's return to his custody. Further, the Family Court properly determined that the best interests of the subject child were served by terminating the father's parental rights and freeing the child for adoption by the foster parent (*see* FCA § 631).

Matter of Larice N. Mc., 108 AD3d 675 (2d Dept 2013)

Mother, Who Was Incarcerated, Failed to Plan for Child's Future Despite Diligent Efforts

Contrary to the mother's contention, the evidence presented at the fact-finding hearing established that the presentment agency made diligent efforts to assist her in planning for the future of her child (*see* SSL § 384-b). These efforts included meetings with the mother, who was incarcerated, advising her of the child's progress, and encouraging her to participate in planning for the child. Despite these efforts, the mother failed to provide a realistic alternative to foster care for the child and made no plans for his future.

Matter of Tramel T.V., 108 AD3d 726 (2d Dept 2013)

Family Court Lacks Authority to Direct Continuing Contact Between Parent and Child after Termination of Parental Rights

The Family Court properly found that the mother permanently neglected the subject child, terminated the mother's parental rights, and transferred custody and guardianship of the child for the purpose of adoption. The petitioner agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship. Despite these efforts, the mother failed to plan for the child's future. Further, the Family Court properly determined that it was in the child's best interests to terminate the mother's parental rights and free the child for adoption by the foster mother. Contrary to the mother's contention, a suspended judgment was not appropriate in this case. To the extent that the mother argued that the Family Court erred in denying her request for visitation with the child after her parental rights had been terminated, her contention without merit, since the Family Court lacks the authority to direct continuing contact between parent and child once parental rights have been terminated pursuant to SSL § 384-b.

Matter of Jamel D.G., 108 AD3d 766 (2d Dept 2013)

Preponderance of Evidence Established Noncompliance With Terms of Suspended

Judgment

Family Court properly revoked a suspended judgment and terminated the mother's parental rights. Since the mother admitted to permanent neglect and did not appeal from this determination, there was no need to determine whether the agency exercised diligent efforts to strengthen the parental relationship. The purpose of a suspended judgment is to provide a parent, previously found to have permanently neglected her children, with a brief grace period within which to become a fit parent with whom the children can be safely reunited. During such grace period, the parent must comply with the terms of the judgment and, if a preponderance of the evidence establishes noncompliance, the court may revoke the judgment and terminate that party's parental rights. In this case, the mother's suspended judgment had been extended twice and her rights were revoked upon a finding that she had failed to take her prescribed medications and had tested positive for drugs during the relevant period of time the suspended judgment was in effect. It was in the best interests of the children to terminate the mother's parental rights. The children had been in foster care for nearly four years and despite numerous opportunities, the mother had failed to overcome her substance abuse issues.

Matter of Abigail EE., 106 AD3d 1205 (3d Dept 2013)

Sound and Substantial Basis in the Record

Family Court revoked suspended judgments issued against respondents and terminated their parental rights. The Appellate Division affirmed. There was sound and substantial basis in the record to support Family Court's decision. The respondents repeatedly violated various terms of the suspended judgments. The father was given four different opportunities to complete domestic violence counseling and yet failed to do so. He failed to establish a separate household within the time specified in the suspended judgment and both parties violated the suspended judgment by resuming residing together without approval. The mother failed to complete mental health counseling and when she was given two opportunities for the children to reside with her on a short-term basis, she was unable to properly care for them and she cut both visits short by returning the children to foster care. Termination was in the children's best interests since the children had been in foster care from a very young age, respondents repeatedly failed to respond to efforts to assist them with their problems, and instead of improving, the respondents' situations had become worse.

Matter of Cole WW., 106 AD3d 1408 (3d Dept 2013)

Court Did Not Abuse Its Discretion in Denying Adjournment

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. The court did not err in denying respondent's request for an adjournment to present psychological evidence. The court had already adjourned the proceeding for three months to allow respondent to call her own expert, and she failed to do so. Further, respondent did not demonstrate that the testimony of her expert would have been material and favorable to her.

Matter of K'Quamere R., 106 AD3d 1444 (4th Dept. 2013)

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

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of demonstrating by clear and convincing evidence that the mother was then and for the foreseeable future unable, by reason of mental illness ... to provide proper and adequate care for the child. Respondent was pregnant with the subject child when her vehicle was struck by a pickup truck. She sustained a traumatic brain

injury, which caused diminished cognitive abilities. Petitioner submitted unrefuted expert testimony that, as a result of respondent's injuries, she suffered from a mental condition that rendered her unable to care for the child because respondent was functioning at the level of an eight-year-old. Petitioner's expert also testified that respondent's mental condition would not improve.

Matter of Destiny V., 106 AD3d 1495 (4th Dept. 2013)

Suspended Judgment Not Appropriate

Family Court terminated respondent father's parental rights with respect to his child. The Appellate Division affirmed. The father stipulated to the finding of permanent neglect, but contended that a suspended judgment would have been in the child's best interests. The evidence supported the court's determination that termination of the father's rights was in the best interests of the child and that the father's negligible progress in addressing his chronic substance abuse was not sufficient to warrant further prolongation of the child's unsettled familial status.

Matter of Alexander M., 106 AD3d 1524 (4th Dept 2013)

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

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of proving by clear and convincing evidence that the mother was then and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child. The psychologist appointed by the court testified that the mother had schizophrenia, paranoid type. He characterized her prognosis as bleak based upon her lack of insight into her illness or her need for treatment, and her refusal to take prescribed medication. The psychologist further concluded that if the child was returned to the mother he would be at imminent risk of harm.

Matter of Roman E A., 107 AD3d 1455 (4th Dept 2013)

No Good Cause For Substitute Counsel

Family Court terminated respondent father's parental rights with respect to the subject child. The Appellate Division affirmed. The court did not err in denying respondent's request for new assigned counsel. The right to assigned counsel under the Family Court Act is not absolute. Here, respondent failed to establish that good cause existed necessitating dismissal of his assigned counsel.

Matter of Destiny V., 107 AD3d 1468 (4th Dept. 2013)

Termination of Respondent's Parental Rights on Ground of Mental Retardation Proper

Family Court terminated respondent mother's parental rights to her three children having determined that the mother was then and for the foreseeable future unable, by reason of her mental retardation, to provide proper and adequate care for the children. The Appellate Division affirmed. Petitioner met its burden of proof at the fact-finding hearing. A psychologist who conducted a court-ordered evaluation of the mother testified that the mother functioned at a very low level and that her IQ score of 63 placed her in the first percentile. The psychologist further testified that the mother's low IQ had remained unchanged over time, and he explained that it is highly unusual for an IQ score to change dramatically absent some type of trauma. Furthermore, the mother lacked a basic intellectual understanding of the needs of a child and was unable to recognize and identify the fundamental tasks of parenting. Despite the services made available to her, the mother demonstrated very little improvement in functioning effectively as a parent. The mother failed to present any contradictory evidence with respect to her intellectual capacity.

Matter of Joseph A.T.P., 107 AD3d 1534 (4th Dept 2013)

Parental Rights Properly Terminated on Ground of Permanent Neglect; Dissent Would Have Reversed Because Petitioner Misdiagnosed Mother and Child, Among Other Things

Family Court terminated respondent mother's parental rights to the subject child on the ground of permanent neglect. The Appellate Division affirmed. The court properly determined that petitioner made diligent efforts to reunited the mother with the child. Among other things, petitioner arranged for a psychological assessment of the mother, arranged for therapy sessions for the mother and various services for the child, and provided the mother with parenting, budgeting, and nutrition education training. Petitioner also provided the mother with supervised and unsupervised visits with the child. Most significantly, petitioner arranged for a child psychologist to meet with the mother on several occasions in her home to provide parenting training. The court properly determined that the mother failed to plan for the future of the child. While the mother participated in the services offered by petitioner and had visitation with the child, the evidence established that she was unable to provide an adequate, stable home for the child and parental care for the child. The dissent would have reversed reasoning that petitioner failed to prove by clear and convincing evidence that it made the requisite diligent efforts to strengthen the mother's relationship with the child given that it was undisputed that petitioner misdiagnosed both the mother and the child. Further, assuming, arguendo, that petitioner met its burden of proof with respect to diligent efforts, it failed to prove by clear and convincing evidence that the mother failed to plan for the child's future.

Matter of Cayden L.R., 108 AD3d 1154 (4th Dept 2013)

NOTES