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PRESERVING AND PROTECTING THE TRIAL RECORD*

By Ben Rubinowitz and Evan Torgan**

There can be no doubt that the goal of every trial attorney who sets foot in a courtroom is the same – to win the case. For all practical purposes, however, not all cases can be won and when there is a winner, there inevitably must also be a loser. For those lawyers who brag that they have never lost a case, the reality is that either they have not tried very many, or they have successfully pawned off and assigned the "dogs" to the younger, less experienced attorneys in their office. Irrespective of whether the case starts out as a good or a bad one, quite often the success or failure of the trial attorney is determined by how faithfully the trial lawyer adheres to the practice of protecting and/or preserving the trial record. Thus, even the best of cases can be lost simply because the lawyer failed to protect the trial record.

To say that protecting the record is an important aspect of trial practice is a gross understatement. Indeed, it is essential. Protection of the trial record serves a crucial function at both the trial and the appellate levels. At the trial level, proper protection will ensure that the record is sufficiently developed to create a logical and compelling argument for summation, to guarantee that in the event of a request for a readback by the jurors during deliberation, that sufficient proof has been adduced to answer any concerns the jurors might have and to withstand a trial or post-trial motion to dismiss and/or to set aside the verdict. Upon review, at the appellate level, the trial record must be sufficiently protected to preserve any legitimate basis for appeal. Put another way, the failure to preserve the trial record for appeal will likely result in waiver of the issue sought to be reviewed.

The Crucial Answer

For a variety of reasons, trial testimony tends to proceed at a very fast pace. Court congestion, judicial economy and keeping the interest and focus of the jurors are often the reasons the presiding judges push to have the testimony move even faster. Haste makes waste. The trial lawyer is, therefore, cautioned to not get caught up in the speed of the trial to the detriment of having the trial record not truly reflect what actually took place. A trial lawyer's keen ability to watch the witness, listen to his answers and craft probing follow-up questions are for naught if the written record does not accurately reflect what was seen but not heard. The following is an example of a question and answer sequence where the attorney failed to "hear" what the witness was trying to convey and consequently failed to protect the record:

Q: Tell us exactly what the man did with the gun?

A: He pointed it that way. And then he slowly turned this way and then pointed in the other direction.

Q: What happened next?

CONTENTS

Needless to say, in this example the trial lawyer undoubtedly observed the witness but failed to preserve the record. That failure has made meaningless any chance for clarification during a read-back and, worse, has left the appellate court without a clue as to what actually happened. That failure could have been cured in one of two ways. First, by asking the court to let the record reflect the manner and direction in which the witness pointed: “Your honor, may the record reflect the witness pointed forward, directly in front of him, then to his left and then to his right.”

As an alternative, the trial lawyer could have had the witness himself describe in clear terms the movements he just made:

Q: Tell us in words what you mean when you say “he pointed that way”?

Words must constantly be used to describe what is happening in the courtroom. References to “that exhibit” or “the document” offer little value in informing a reviewing court as to what actually took place. The better approach is to always ask the court to let the record reflect “The witness is referring to plaintiff's exhibit 22" or “the contract of June 12, 2010.” Clarity, not expediency, wins cases. What is obvious to people in the courtroom is hardly obvious to those reviewing the trial transcript.

In much the same way as in the above example, the trial lawyer must be acutely aware if the witness merely nods his head in response to an answer instead of offering a verbal response. For instance, in the morning session, a court reporter might interrupt the proceedings and indicate that the witness has failed to offer an audible response. The same realization and declaration by the court reporter, however, might not repeat itself in the afternoon session when the court reporter (along with the judge and the attorneys), are tired. Imagine the scenario in which one of the most sensitive and crucial questions was asked in the late afternoon and the final record reflects the following:

Q: Doctor, were you aware at that time that the patient's oxygen saturation levels fell below 80?

A: Witness nods.

Here, the lesson is obvious. The record reflects nothing. A “nod” does not equal a “yes” or a “no.” Do not rely on the court reporter to clarify the nod. Either describe the nod for the court stenographer to report: “Let the record reflect that the witness nodded in agreement;” or remind/ instruct the witness that the court reporter cannot transcribe a nod and that therefore, he needs to verbalize his answer in a “yes” or “no.”

Along the same lines, the trial lawyer must always be on the lookout for ambiguous or equivocal terms used in an answer. Consider the following examples:

Q: How would you describe the traffic conditions immediately before the accident?

A: Traffic was good.

Q: Tell us what you observed?

In this example, the answer “good” is of little value. The attorney should have followed up with the question:

Q: Tell us what you mean by “good”?

Even answers which are seemingly responsive must constantly be clarified for content:

Q: How would you describe the man's height?

A: He was “tall.”

Once again, the answer “tall” is not specific enough. The appropriate follow-up question should be asked:

Q: What do you mean when you say “tall”?

While many trial lawyers like to use demonstrative exhibits such as enlargements of photographs, maps or diagrams to enhance their case, the manner in which these exhibits are marked is crucial to the proponent of such evidence. Take the scenario in which a photograph of an intersection is offered in an accident case where a pedestrian was struck by a car. Too often trial lawyers fail to insure that the photograph is appropriately marked to reflect the descriptive testimony referencing what is depicted in the photograph. Questions like these

are sadly more the norm than the rare occasion:

Q: Put a mark on the photo where you were standing when you observed the accident. Your Honor, let the record reflect the witness put an “X” in that spot.

Q: Now put a mark where you first observed (the pedestrian)?

Let the record reflect the witness put an “X1" in that spot.

Q: Now put a mark where the impact took place? Let the record reflect the witness put an “X2" on that spot.

Here, not only did the attorney fail to protect the record and avoid confusion, but he missed an ideal opportunity to do what a good trial attorney should do -- be persuasive. The better way to mark such an exhibit is to think through the manner in which the exhibit should be marked before the witness ever takes the stand. Careful planning in this regard will serve three purposes: First, if marked properly, the exhibit will serve to allow the attorney to forcefully argue his point during summation. Second, if appropriately marked, that exhibit will “talk” to the jury in the event the jurors are permitted to view that exhibit during deliberation. Third, proper marking will serve to educate any appellate court as to testimony they never saw or heard.

To achieve this goal the following approach is suggested. Bearing in mind that although you, as the trial lawyer, and the witness, are familiar with the enlarged photograph, the jurors have never seen it before. Therefore, prior to allowing the witness to put whatever marking he or she wants on the exhibit, carefully guide the witness to ensure that the witness has not made a mistake, and then put a descriptive marking on the appropriately identified exhibit

Q: Using Exhibit 24 in evidence show us where South Street is by pointing it out on the exhibit.

(Once you have assured yourself that the witness has pointed to the right spot, then have the witness put an informative marking on the exhibit. Rather than having the witness write “SS: for South Street, the following is better):

Q: Write the words “South Street” right on Exhibit 24.

Q: Point out where you were standing at the time you witnessed the accident.

Q: Now write your initials right on the exhibit in that location.

Q: Show us where the impact took place by first pointing to it on the exhibit.

Q: Now put a large “X” on the exhibit where the impact took place.

By properly marking the exhibit, the exhibit will continue to “testify” whenever it is shown to the jury or appellate court.

In the event your adversary chooses to use the same exhibit during cross-examination, make sure to have a transparent overlay or different colored marker to avoid any potential confusion. Make sure to let the record reflect what color is being used by your adversary if the same exhibit is being marked during cross examination.

In the event a black board or chalkboard is used, make sure to request permission from the court to take a photograph of the board and offer the photo in evidence to properly preserve the record. Likewise, if movable model cars or other such objects are used as proof during a witness' testimony, make sure to let the record reflect exactly what was done during the demonstration to properly preserve the record. If a large pad on an easel is used to illustrate a particular point, be sure to offer that page in evidence at the time the witness is on the stand.

Get a Ruling

One of the most difficult problems facing a trial attorney is where the court has failed to state on the record what it is doing. An incomplete record is created when the court does not adequately reflect the basis for its ruling or where the court fails to rule on a motion, an objection, or a request to charge. Without such a ruling it is hard to argue that there was an error committed at the trial court level.

Objections

In the same manner, an incomplete record is created where the attorney fails to object in a timely manner. While formal exceptions are no longer necessary and a simple, but specific, objection will suffice, to properly preserve the record, the objection must be timely and counsel should state a proper ground. Objections must be specific and an objection made on one ground will not preserve an objection on a different ground. The rationale behind these requirements is to insure that your adversary and/or the court, are afforded sufficient opportunity to cure any alleged error or defect. Finally, the failure to make such a specific and timely objection often amounts to a waiver that may preclude the appellant from challenging the error. Although the appellate courts may review and determine an unpreserved error, it is generally limited to situations where the claimed error is considered to be fundamental; notably, very few errors will be deemed fundamental. The better practice, therefore, is to preserve and protect.

Conclusion

The importance of protecting and/or preserving the trial record cannot be overly stressed. Protection of the record and preservation of any claimed errors must always be an integral component of every trial lawyer's trial strategy. Not only does a properly protected trial record assist the trial attorney in achieving his or her ultimate goal of obtaining a favorable result for his or her client, but in the untoward event that the trial is lost, preservation of any alleged errors and a fully protected record is the key to obtaining appellate review and possible reversal of any unfavorable judgment.

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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, Suite 304, Rochester, New York 14604.

Address changes should be directed to the Department's Attorneys for Children Program office in which you reside.

NEWS BRIEFS

John E. Carter, Jr. (Jack), Director of the Attorneys for Children Program of the Appellate Division, Third Department, has retired from that position after 20 years of dedicated service. Jack is a tireless advocate for the highest quality of legal representation of children and was the 2004 recipient of the New York State Bar Association's Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare. He remains a member of that organization's Committee on Children and the Law, which he previously chaired. We wish Jack all the best in the future and we thank him for his many significant accomplishments. Betsy R. Ruslander, formerly the Program's Assistant Director, has succeeded Jack as Director.

FIRST DEPARTMENT NEWS

Use of the electronic check in system is increasing. Attorneys are responsible for using the system to check in on all of their cases. The more the system is used, the better it will serve all family court participants.

Things Are Getting Better

The growing use of time for certain appearances is having a positive impact on case coverage and the productivity of court appearances. Scheduling continues to be a challenge, but everyone's cooperation has gone a long way to improve things. Physical plant improvements and changes in courtroom assignments in both Manhattan and the Bronx have also served to facilitate the ability of attorneys to appear on their cases. There are additional improvements planned.

Continuing Legal Education

A series of three CLE programs focusing on domestic violence were held in both the Bronx and Manhattan. In June, there was a well attended and dynamic program held in the Bronx. Under the leadership of Judge Gayle P. Roberts, and the Bronx Committee on Disproportionate Minority Representation in Child Welfare, judges, attorneys, administrators and court personnel listened and discussed issues arising from the disproportionate representation of minority litigants. Much data was presented and there was discussion regarding the importance of reflection. A follow-up meeting is in the planning.

Coming Up in New York Family Court

November 19: ***Working with Children in Foster Care Impacted by Parental Incarceration***

Additional upcoming programs will be announced via email.

SECOND DEPARTMENT NEWS

<u>Continuing Legal Education</u>

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

On September 14, 2010, the Appellate Division, Second Judicial Department, the Attorneys for Children Advisory Committee, and the Kings County Women in the Courts Committee, co-sponsored ***A Program Addressing the Dynamics of Domestic Violence in the Asian Community***. The presenters were M. Currey Cook, Esq., Co-Director, Bronx Office, Children's Law Center, and Kyoko Shakagori, Counselor Advocate, New York Asian Women's Center. This lunchtime training was held at the Queens County Family Court on September 14, 2010, and was also held at the Office of Attorneys for Children on September 21, 2010.

On October 5, 2010, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored ***The Annual Fall Seminar***. Gary Solomon, Esq., Legal Aid Society, New York City, Juvenile Rights Practice, presented ***A Caselaw and Legislative Update***. Patricia E. Doyle, Esq, Court Attorney Referee, Nassau County Family Court, and Richard Mayer, M.D., Psychiatrist, Private Practice, presented ***The Legal and Psychological Aspects of Equitable Estoppel***.

On October 27, 2010, the Appellate Division, Second Judicial Department, the Attorneys for Children Advisory Committee, and the Kings County Women in the Courts Committee, co-sponsored ***Domestic Violence and***

Technology: Power and Control in the Age of My Space, Twitter, Facebook, and GPS. The presenter was Edward Thomas Farley, Esq., Initiative Coordinator, Urban Justice Center. This lunchtime training was held at the Kings County Family Court.

Tenth Judicial District (Nassau County)

On September 16, 2010, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored ***An Overview of the Nassau County Family Treatment Court.*** A welcome and overview was presented by the Hon. Conrad Singer, Nassau County Family Court, and the Hon. Robin M. Kent, Nassau County Family Court. The remaining speakers included Warren Graham, LMSW, ACSW, CASAC, Project Director, Family Treatment and Juvenile Treatment Court, Geralyn Calvelli, BA, Resource Coordinator, Family Treatment and Juvenile Treatment Court, Valeri Raine, Esq., Director of Drug Court Projects, Center for Court Innovation, and Dennis A. Reilly, Esq., Deputy Director, Drug Court Programs, Center for Court Innovation.

On October 21, 2010, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored ***The Annual Fall Seminar***. Gary Solomon, Esq., Legal Aid Society, New York City, Juvenile Rights Practice, presented ***A Caselaw and Legislative Update***. Joy D. Osofsky, Ph.D., Barbara Lemann Professor of Child Welfare, Department of Pediatrics and Psychiatry, Louisiana State University Health Services Center, presented ***Trauma of Separation for Young Children***.

Tenth Judicial District (Suffolk County)

On November 1, 2010, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored ***The Annual Fall Seminar***. Margaret A. Burt, Esq., Attorney at Law, presented ***New Child Welfare Legislation***.

Ninth Judicial District (Westchester County)

On October 1, 2010, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored ***The Annual Fall Seminar***. Margaret A. Burt, Attorney at Law, presented ***New Child Welfare Legislation***; the Hon. Joan Cooney (retired) presented ***Best Practices Commentary***; the Hon. Philip C. Segal (retired) presented ***Evidentiary Issues Involving Business Records***; Susan L. Pollet, Esq., Coordinator of New York State Parent Education and Awareness Program, presented ***Parent Education***; the Hon. Patricia E. Doyle, Esq., Court Attorney Referee, Nassau County Family Court, presented ***Issues of Equitable Estoppel***; and William Kaplan, M.D., Psychiatrist, Private Practice, presented ***Psychological Aspects of Equitable Estoppel***.

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.

Interested attorneys may obtain copies of the materials from the above seminars by contacting the Office of Attorneys for Children.

THIRD DEPARTMENT NEWS

2010 Revisions to the *Administrative Handbook*

The latest version of the Administrative Handbook of the Office of Attorneys for Children is available on the program's website, www.nycourts.gov/ad3/oac. The Administrative Handbook contains important information about the agency's operations, including updated lists of the Advisory Committee and Liaison Committee for each Judicial District, as well as office contact information.

Mileage Rate Change

Attorneys should note that the mileage reimbursement rate was changed to $.50 per mile, effective January 1, 2010.

Website

The Office of Attorneys for Children continues to update its web page located at www.nycourts.gov/ad3/oac. Attorneys have access to a wide variety of resources, including online CLE, the New York State Bar Association Representation Standards, the 2010 edition 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 Publication Order Form allows Third Department panel attorneys to email the Office with any requests for written materials handed out in conjunction with CLE programs.

Training News

The following continuing legal education programs are scheduled for Spring 2011. Registration information will go out by e-mail to all Third Department panel attorneys six to eight weeks prior to the training dates.

Effective Representation of Children: Part II will be held at the Clarion Hotel (Century House) in Latham on Friday, April 8, 2011.

Custody Topical Conference will be held at the Holiday Inn on Wolf Road in Colonie on Friday, April 15, 2011.

Children's Law Update '10-11 will be held at the Crowne Plaza Resort on Friday, May 6, 2011.

Introduction to Effective Representation of Children, introductory training of new attorneys for children, will be held on Friday and Saturday, June 3-4, 2011 at the Clarion Hotel (Century House) in Latham.

When available, program dates and agendas will be posted on the Office website, www.nycourts.gov/ad3/oac/cle, along with previously taped training programs that are available for online viewing. For any additional information regarding these programs, or general questions concerning the continuing legal education of attorneys for children, please contact Betsy Ruslander, Director of the Office of Attorneys for Children in the Third Department, at (518) 471-4826, or by e-mail at oac3d@nycourts.gov.

Liaison Committee Meetings

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts met this fall to discuss matters relevant to the representation of children in their counties. 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 will meet again in the spring of 2011. Additionally, 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.

FOURTH DEPARTMENT NEWS

"No-Shows" at Seminars

Once again we are experiencing a 20-25 % "no-show" rate at seminars. The seminars are free to AFCs, but are paid for with taxpayer dollars. When you do not notify us that you will not attend a seminar for which you are registered money is wasted. For a full-day seminar this can amount to as much as $50 per person. Therefore, if you do not attend a seminar for which you are registered and you do not cancel at least five business days before the seminar, we will request further information from you before you may attend any other AFC seminar.

Internet Voucher System Reminders

Warning: Several Judges have brought to our attention that AFCs have been charging for court appearances for which they were not present. Remember you certify on the voucher that the charges are true and correct. Just because an appearance is listed on the drop down menu does not mean that the attorney was present in court. **Be sure you actually appeared before selecting an appearance from the drop down list.** We will be checking all court appearances and will return for an explanation any vouchers where court appearances are charged but the attorney was not present.

Resort Seminar 2011

The Third and Fourth Department Attorneys for Children Programs are planning a "resort" seminar at the Otesaga Resort Hotel in Cooperstown on October 21-22, 2011. 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 Otesaga Resort Hotel, located on Otsego Lake, and the beauty and recreational possibilities of Cooperstown (home of the Baseball Hall of Fame), we urge you to check them out, starting with the hotel website at www.otesaga.com. Daily rates at the Otesaga are based on the **Full American Plan** (FAP) which **includes the accommodation, and breakfast, lunch, and dinner daily in the Main Dining Room** (beginning with dinner on the evening of arrival and concluding with lunch on the day of departure). The cost of a single room accommodation will be $290 per day for single occupancy and $365 per day for double occupancy. An upgrade to a two-room suite, if available, is an additional $135 per day. Daily FAP rates for children sharing a room with parents run from no charge for children four years old and under, to $75 per child aged 12 to 18. All rates are subject to taxes and a daily service charge. In 2010 the service charge is $18.50 per person, per day ($10 per child four years old and under) and covers the bellmen for check-in and check-out, dining room personnel, and guest room attendants. Attorneys for children and their guests who choose not to stay at the hotel may join us for lunch and dinner at a cost of $18 and $55 respectively. Food and beverage charges not included in the meal plan will have an automatic 20% service charge added. All charges are subject to tax. The Attorneys for Children Programs anticipate a reception (cash bar) on Friday evening with complementary hors d'oeuvres. On Saturday we will provide a full day of free CLE. We are considering a private group lunch and dinner on Saturday, and hope that those who attend the seminar will attend those events, regardless whether they stay at the hotel.

Spring Seminars/Seminar Times

Because we must balance speakers' and judges' schedules and accommodate attorney travel time, the time the seminar begins may vary from 9:00 a.m. When you receive the seminar agendas, please CHECK THE TIME the seminar begins.

Fundamentals of Attorney for the Child Advocacy Seminars

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

March 25, 2011

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

M. Dolores Denman Courthouse, Appellate Division, Fourth Department, 50 East Avenue, Rochester, New York

March 26, 2011

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

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, unless a waiver is granted.

The Program will provide lodging for prospective attorneys for children who attend both days and whose office is more than 80 miles from downtown Rochester. In order to accommodate the commute time of attorneys from counties distant from Monroe County, the seminar on March 25 will not begin until 9:45 A.M. A light breakfast and box lunch will be provided to all each day. A dinner stipend will be provided to prospective attorneys for children who stay overnight.

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 18, 2011

Update for Attorneys for Children
(full day)
Marriott Rochester Airport
Rochester, NY

March 31, 2011

Update for Attorneys for Children
(full day)
Sheraton Syracuse University Hotel & Conference Center

Syracuse, NY

May 12, 2011

Update for Attorneys for Children
SUNY at Buffalo, Center for Tomorrow
Buffalo, NY

Your Training Expiration Date

If you need to attend a training seminar before April 1, 2011 to remain eligible for panel designation, you should receive a letter to that effect in January 2011. Please remember, however, that it is your responsibility to ensure that your training is up-to-date. If your training requirement date expires on April 1, 2010, you may attend the May 2011 Buffalo seminar to comply: you will receive an automatic extension by registering for the Buffalo seminar. If you receive an extension and do not attend the Buffalo seminar you will be taken off the panel.

RECENT BOOKS AND ARTICLES

ADOPTION

Jennifer Butch, *Finding Family: Why New Jersey Should Allow Adult Adoptees Access to Their Original Birth Certificates,* 34 Seton Hall Legis. J. 251 (2010)

Symposium, *Wells Conference on Adoption Law,* 38 Cap. U. L. Rev. 271 (2009)

ATTORNEY FOR THE CHILD

Judy L. Estren & Kristin Winokur, *Community-Based Solutions for Delinquent Youth: A Guide for Advocates,* 29 Child L. Prac. 49 (2010)

Chris Gottlieb, *Reflections on Judging Mothering,* 39 U. Balt. L. Rev. 371 (2010)

Jessica R. Kendall, *Ex Parte Communications Between Children and Judges in Dependency Proceedings,* 29 Child L. Prac. 97 (2010)

Zuzana Murarova & Elizabeth Thornton, *Federal Funding for Child Welfare: What You Should Know,* 29 Child L. Prac. 33 (2010)

Representing Juvenile Status Offenders, American Bar Association Center on Children and the Law (2010)

Elliot D. Samuelson, *Inherent Dangers to Consider in Representation of a Client in a Contested Matrimonial Case,* 42 Fam. L. Rev. 1 (2010)

Elizabeth Thornton, *Tools for Evaluating Parent Attorney Performance,* 29 Child L. Prac. 81 (2010)

CHILD SUPPORT

Karen Syma Czapanskiy, *Chalimony: Seeking Equity Between Parents of Children With Disabilities and Chronic Illness,* 34 N. Y. U. Rev. L. & Soc. Change 253 (2010)

Monica Hof Wallace, *A Federal Referendum: Extending Child Support for Higher Education,* 58 U. Kan. L. Rev. 665 (2010)

CHILD WELFARE

Advocating for Nonresident Fathers in Child Welfare Court Cases, American Bar Association Center on Children and the Law (2009)

Lucinda Cornett, *Remembering the Endangered "Child:" Limiting the Definition of "Safe Haven" and Looking Beyond the Safe Haven Law Framework,* 98 Ky. L. J. 833 (2010)

Diane K. Donnelly, *Nebraska's Youth Need Help - But was a Safe Haven Law the Best Way,* 64 U. Miami L. Rev. 771 (2010)

Martha Drane, *Street Children as Unaccompanied Minors With Specialized Needs: Deserving Recognition as a Particular Social Group,* 44 New Eng. L. Rev. 909 (2010)

Amos N. Guiora, *Protecting the Unprotected: Religious Extremism and Child Endangerment,* 12 J. L. & Fam. Stud. 391 (2010)

Edward J. Imwinkelried, *Shaken Baby Syndrome: A Genuine Battle of the Scientific (And Non-Scientific) Experts,* 46 Crim. L. Bull. 156 (2010)

Amy F. Kimpel, *Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws,* 34 N. Y. U. Rev. L & Soc. Change 299 (2010)

Yali Lincroft & Bill Bettencourt, *The Impact of ASFA on Immigrant Children in the Child Welfare System,* 29 Child L. Prac. 17 (2010)

Lisete M. Melo, *When Children Suffer: The Failure of U.S. Immigration Law to Provide Practical Protection for Persecuted Children,* 40 Golden Gate U. L. Rev. 263 (2010)

Mary Prescott, *Invasion of the Body Snatchers: Civil Commitment After Adam Walsh,* 71 U. Pitt. L. Rev. 839 (2010)

Stephanie Sciarani, *Morbid Childhood Obesity: The Pressing Need to Expand Statutory Definitions of Child Neglect,* 32 T. Jefferson L. Rev. 313 (2010)

Andrew Smith & Kristin Ware, *Helping Pregnant and Parenting Teens Find Housing,* 29 Child L. Prac. 65 (2010)

CHILDREN'S RIGHTS

Emily Buss, *What the Law Should (and Should not) Learn From Child Development Research,* 38 Hofstra L. Rev. 13 (2009)

Jon M. Van Dyke, *The Privacy Rights of Public School Students,* 32 U. Haw. L. Rev. 305 (2010)

CONSTITUTIONAL LAW

Emily Catalano, *Healing or Homicide?: When Parents Refuse Medical Treatment for Their Children on Religious Grounds,* Buff. J. Gender, L. & Soc. Pol'y., 2009-2010 at 157

Josh Darris & Josh Rosenberg, *Government as Patron or Regulator in the Student Speech Cases,* 83 St. John's L. Rev. 1047 (2009)

Steve Disharoon, Safford Unified School District No. 1 v. Redding: *A Missed Opportunity to Restore Fourth Amendment Rights to School Children,* 44 U.S.F. L. Rev. 659 (2010)

Richard Hartsock, *Sext Ed: Students' Fourth Amendment Right in a Technological Age,* 37 N. Ky. L. Rev. 191 (2010)

Stephanie Klupinski, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age,* 71 Ohio St. L. J. 611 (2010)

Richard M. Re`, *Can Congress Overturn* Kennedy v. Louisiana*?,* 33 Harv. J. L. & Pub. Pol'y 1031 (2010)

Matthew I. Schiffhauer, *Uncertainty at the "Outer Boundaries" of the First Amendment: Extending the Arm of Schoolhouse Authority Beyond the Schoolhouse Gate Into Cyberspace,* 24 St. John's J. Legal Comment. 731 (2010)

Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment,* 85 Ind. L. J. 1113 (2010)

Robert H. Wood, *The First Amendment Implications of Sexting at Public Schools: A Quandary for Administrators who Intercept Visual Love Notes,* 18 J.L. & Pol'y 701 (2010)

COURTS

Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights,* 71 Ohio St. L. J. 127 (2010)

Healthy Beginnings, Healthy Futures A Judge's Guide, American Bar Association Center on Children and the Law (2009)

Martin R. Gardner, *"Decision Rules" and Kids: Clarifying the Vagueness Problems with Status Offense Statues and School Disciplinary Rules,* 89 Neb. L. Rev. 1 (2010)

Judge Christopher J. Mehling & Matthew W. Swafford, *A Biological Father's Rights Extinguished,* 37 N. Ky. L. Rev. 343 (2010)

Marissa Wiley, *Redefining the Legal Family: Protecting the Rights of Coparents and the Best Interests of Their Children,* 38 Hofstra L. Rev. 319 (2009)

CUSTODY AND VISITATION

C. Duncan, *The Legal Fiction of De Facto Parenthood,* 36 J. Legis. 263 (2010)

Sarah E. Kay, *Redefining Parenthood: Removing Nostalgia From Third-Party Child Custody and Visitation Decisions in Florida,* 39 Stetson L. Rev. 317 (2010)

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FEDERAL COURTS

Father's *Ne Exeat* Right Granted by Chilean Court Is "Right of Custody" Under Hague Convention

The parties were married in England, moved to Hawaii where they had a child, and then moved to Chile. When the parties separated the Chilean courts granted respondent wife daily care and control of the child and petitioner father visitation rights. The father also had an *ne exeat* right to consent before mother could take the child out of the country. When mother brought the child to Texas without father's permission, father filed suit in Federal District Court seeking the son's return under the Hague Convention (Convention). The District Court denied relief and the Court of Appeals affirmed. The Supreme Court reversed. Father's *ne exeat* right before mother could remove the child from Chile was a "right of custody" under the Convention. The Chilean court granted the father regular visitation rights that automatically gave him a joint right to decide his child's country and the Convention defines "right of custody" to include the right to determine the child's place of residence.

Abbott v Abbott, ___US___, 130 S Ct 1983 (2010)

Juvenile's Sentence to Life Without Parole Cruel and Unusual Punishment

Petitioner was 16 years old when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced him to probation and withheld an adjudication of guilt. Subsequently, the trial court found that petitioner violated the terms of his probation by committing other crimes, adjudicated him guilty of the earlier crimes, revoked probation, and sentenced him to life in prison for the burglary conviction. Because Florida does not have a parole system, the sentence was life in prison without parol. Petitioner challenged the sentence under the Cruel and Unusual Punishment Clause but the federal District Court denied the habeas petition and the Court of Appeals affirmed. In reversing, the Supreme Court majority held that sentencing a juvenile offender to life without parole for a non-homicide crime violates the Eighth Amendment's Cruel and Unusual Punishment Clause. The majority notes that there is a national consensus against such sentences; juveniles have lessened culpability and thus are less deserving of the most severe punishments; that life in prison without parole is the second most severe penalty permitted by law, and is especially harsh for a juvenile, who will serve more years and a greater percentage of his life than an adult offender. In rejecting a case-by-case approach and adopting a categorical rule, the majority notes that the former approach does not "take account of special difficulties encountered by counsel in juvenile representation, given juvenile's impulsiveness, difficulty thinking in terms of long-term benefits, and reluctance to trust adults. The United States is the only nation that imposes life without parole sentences on juvenile non-homicide offenders, and the overwhelming weight of international opinion is relevant to the cruel and unusual punishment issue."

Graham v Florida, ___US___, 130 S Ct 2011 (2010)

Petitioner Denied Effective Assistance of Counsel

At defendant's third trial, defense counsel moved for a mistrial after the prosecutor elicited testimony from a detective that defense counsel, who had been present at the lineup at which petitioner was identified, had not objected to the lineup. Before moving for a mistrial, counsel was denied permission to testify in rebuttal and explain why he may not have objected. The motion for a mistrial was denied. Petitioner brought a habeas proceeding, alleging ineffective assistance of appellate counsel, which the federal District Court granted and ordered a new trial. The District Court concluded that petitioner was denied effective assistance of appellate counsel in state court because counsel failed to argue that the trial court erred in denying a mistrial. Respondent Superintendent of Attica Correctional Facility appealed. The Second Circuit remanded to the District Court to elicit evidence from appellate counsel why she did not raise the mistrial claim and for the District Court to set forth its reasons for granting a new trial rather than a new appeal. After holding an evidentiary hearing at which appellate counsel testified, the District Court issued an order clarifying its grant of the writ and its grant of a new trial. The Second Circuit affirmed. Appellate counsel's failure to raise the mistrial claim was not a sound strategic decision, but rather a mistake based on the erroneous perception that

the claim, which trial counsel explicitly objected to, had not been preserved. The mistake rose to the level of constitutional ineffectiveness, and the New York Court of Appeals decision to the contrary on the affirmance of the Appellate Division's denial of petitioner's writ of error *coram nobis,* was an unreasonable application of clearly established Supreme Court precedent. The clear implication of the detective's testimony was that trial counsel conceded that the lineup, which was the sole basis for petitioner's identification as the perpetrator, was fair. While appellate counsel challenged the denial of trial counsel's request to testify while continuing to act as an advocate, that request ran directly contrary to the advocate-witness rule, and, contrary to appellate counsel's contention, there is no exception for cases in which an advocate has exclusive knowledge of material facts. Appellate counsel was not wrong to argue for petitioner's right to present a defense, but was wrong to argue that it had to be vindicated by defense counsel serving as an advocate-witness, rather than argue that it should have been vindicated through the declaration of a mistrial. Because the District Court found the mistrial claim unassailably meritorious and given the long delay petitioner had endured, that court properly concluded that remanding for a new trial, without pausing for a new appeal, was appropriate.

Ramchair v Conway, 601 F3d 66 (2d Cir 2010)

Defendant Received Effective Assistance of Counsel

At trial, petitioner's substituted defense counsel mistakenly thought that there were no funds to enable an investigator to go to Florida to find and interview a list of 13 alibi witnesses that petitioner contended would have testified that he was in Florida at the time of the shooting of which he was accused. Following affirmance of petitioner's conviction of second degree murder, he filed in Federal District Court for habeas relief on the ground of ineffective assistance of counsel, alleging that trial counsel failed to properly investigate his alibi defense. The District Court denied the petition. The Second Circuit affirmed. The Second Circuit determined that petitioner received effective assistance of counsel under the United States Constitution because he failed to show that the state court either identified the federal standard for ineffective assistance of counsel but applied that standard in an objectively unreasonable way, or that the state court applied a standard that contradicted the federal standard. At petitioner's 440.10 hearing, the state court found meaningful representation in view of the fact that trial counsel put on the two best alibi witnesses and the fact that the other alibi witnesses were questionable. The majority notes that when properly applied, New York's standard governing ineffectiveness assistance of counsel claims, which examines prejudice in the context of determining whether the defendant received meaningful representation, does not violate the federal *Strickland* prejudice standard. The Court cannot conceive of a case in which an error is so egregious that it most likely affected the outcome of the trial, but did not cripple the fundamental fairness of the proceeding. In this case, the state court did not unreasonably apply *Strickland*. The dissent would have conditionally granted the writ, characterizing trial counsel's mistake a "colossal failure."

Rosario v Ercole, 601 F3rd 118 (2d Cir 2010)

Defendant Failed to State a Claim For Violation of His Right to Intimate Association

In 2005, mother and plaintiff father entered into a parenting agreement that, among other things, provided that the children would be in West Patent Elementary School for their elementary education. In 2008, mother enrolled the children in another school in the same school district. Shortly thereafter, father brought this action in federal District Court against defendants' School District and the Superintendent of the School District, alleging violations of his First and Fourteenth Amendment right to intimate association and for violations of his First Amendment right to free speech and to petition the government for the redress of grievances. Defendants moved to dismiss the complaint. The District Court granted the motion. Plaintiff failed to adduce sufficient facts to support his allegations of violation of his right to intimate association and therefore failed to state a claim. The facts alleged were conclusory or otherwise inadequate. Moreover, the limited disruption in the parent-child relationship plaintiff alleged did not approach the kind of "shocking, arbitrary, and egregious" interference the Second Circuit has associated with a constitutional claim. Plaintiff abandoned his claim for violation of his right to free speech and to petition the government for the redress of grievances.

Garten v Hochman, 2010 WL 2465479 (SDNY 2010)

Petitioner Not Deprived of Effective Assistance of Counsel Because His Attorney Sought to Withdraw Based Upon "Ethical Dilemma"

Petitioner was convicted in state court of murder in the second degree. Before trial, petitioner moved to suppress his written and video-taped confessions to the murder. Before the suppression hearing, defense counsel moved to withdraw, stating that he had an ethical dilemma and he could go no further than that. The DA objected and the court asked for further information, but defense counsel responded that there was nothing more he could say. The court inferred that defense counsel's ethical dilemma concerned petitioner's right to testify; denied the application to withdraw; and directed counsel to advise the court of the nature of the ethical problem should the occasion arise. After the DA presented his case at the suppression hearing, defense counsel advised the court, outside the presence of petitioner, that he had advised petitioner that he should not testify and that in view of defense counsel's ethical problem he was going to direct petitioner's attention to the date, time and location of the statement "and let hin run with the ball." The court determined that the written and videotaped were admissible. Petitioner's contention on appeal that he was deprived of the effective assistance of counsel was rejected and his conviction affirmed by the Appellate Division and the Court of Appeals. The District Court denied petitioner's petition for a writ of habeas corpus. Petitioner's contention that his right to effective assistance of counsel was violated because the trial court was also the fact-finder at the suppression hearing was rejected. The ethical obligations of an attorney did not cease because the trial court was the fact-finder. Defense counsel was precluded by Supreme Court law and the Code of Professional Responsibility from sitting by passively or silently if he believed that his client was going to commit the crime of perjury. Here, defense counsel acted in accordance with his ethical obligations, while revealing as little information as possible in order to protect his client's interests. Thus, the state court's determination that petitioner was not deprived of effective assistance of counsel or a fair hearing was reasonable. The determination that petitioner did not have a right to be present at the colloquy between defense counsel and the court regarding presenting his testimony in narrative form was not unreasonable or contrary to clearly established federal law.

Andrades v Ercole, 2010 WL 3021252 (SDNY 2010)

Determination That Identification Not Unduly Suggestive Not Contrary to or an Unreasonable Application of Clearly Established Federal Law

In this habeas corpus proceeding, District Court concluded that the New York State trial court improperly admitted testimony based upon two pretrial identifications of petitioner by a witness to a robbery and murder in violation of petitioner's due process rights. The Second Circuit reversed. Petitioner failed to exhaust his state remedies with respect to one of the challenged identifications. With respect to the other identification, the witness, who came to the police station at the request of the police to identify the perpetrators, spontaneously identified defendant immediately upon entering the police station. Although the witness may have anticipated that the police would have a suspect in custody after he was asked to make an identification, he was given no reason to expect to see any suspects in the first room he entered. The fact that defendant was handcuffed was of limited significance because people in handcuffs are not unexpected or unusual sights in a police station. Although defendant was significantly shorter than the two men next to him, that would not have linked defendant to any crime. Further, the identification was reliable. A streetlight illuminated the crime scene and the witness had a clear view of the criminals' faces, the witness demonstrated a high degree of certainty of the identification, and there was only an hour or two between the crime and the confrontation. The witness's lack of focus on respondent's face because the witness was frightened did not require a different result, given the witness's confident identification in the initial, unprompted station-house confrontation. Thus, the determination of the State court that the identification was not unduly suggestive was not contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court.

Richardson v Superintendent of Mid-Orange Corr. Fac., ___F2d___ (2d Cir 2010)

COURT OF APPEALS

School District Required to Provide Aide to Child With Disabilities Attending Private School

The Appellate Division affirmed Supreme Court's denial of petitioner Bay Shore Union Free School District's (School District) petition for a judgment vacating, annulling and setting aside the determination of a State Review Officer for the State Education Department (SRO). The SRO had dismissed the School District's appeal from the decision of an Impartial Hearing Officer (IHO) that the individual aide recommended for respondents parents' son by the School District's Committee on Special Education be provided at the private school the son attended. The Court of Appeals affirmed. Respondent child, a student at a private school within the School District, was diagnosed with attention deficit hyperactivity disorder. The School District's Committee on Special Education established an Individual Education Program recommending that respondent receive 40 minutes a day in a resource room and an individual classroom aide for three hours during his academic classes. Both sides agreed that the aide was needed but the School District contended that the aide should be provided at a public school. Respondent child was entitled to have the aide at his private school. Education Law §3602-c, known as the dual enrollment statute, required the provision of special education programs on an "equitable basis" to students who attend private schools. While the dual enrollment statute did not require that a school district provide services at a private school, the relevant inquiry was what the educational needs of the particular student required. Here, the SRO and IHO agreed that the aide must be provided at the private school to be effective. If the School District's position were upheld it would be necessary for respondent to withdraw from the school selected by his parents in order to receive the required services. Moreover, under the broad statutory language of the Education Law, a teacher's aide falls within the statutory definition of "services."

Board of Educ. of Bay Shore Union Free School Dist. v Thomas K., 14 NY3d 289 (2010)

Warrantless Search of Home Justified by Exigent Circumstances

Defendant pled guilty to attempted second degree robbery. After a pretrial hearing to determine whether the police unlawfully arrested defendant and seized evidence in his home, whether defendant's lineup was unduly suggestive, and whether statements from defendant taken by the police violated his *Miranda* rights, Supreme Court denied defendant's suppression motion in its entirety. The Appellate Division affirmed. The Court of Appeals affirmed. A restaurant employee identified defendant as the gunman in an armed robbery at the restaurant the day before from a photo array that a detective compiled with defendant's photo and the photos of five men who looked similar to defendant. Three days later the police went to defendant's address where they heard voices coming from the apartment. The police officers knocked on the door and identified themselves but no one answered. One of the officers used the building's intercom system to call defendant's apartment and a person the police believed to be male answered. While three officers remained at defendant's door, two officers went to the apartment immediately below defendant's to access the fire escape outside his apartment. From the fire escape an officer looked through a window into defendant's apartment and saw a man lying on the floor. Guns drawn, the officers knocked on the window and said, "Police Department. Open the door." A short time later they saw a different person run towards the door. When a young woman answered the door she was crying and hyperventilating. The officers tried to calm her down but she was unresponsive. According to one of the officer's testimony the young woman's appearance and inability to speak led him to believe she was facing a life-threatening situation and he entered the apartment to investigate. He saw defendant in the hallway and arrested him. The police transported defendant to the police station and advised him of his *Miranda* rights. Defendant waived his rights and gave a statement admitting his involvement in the robbery. He was placed in a line-up and identified by three of four witnesses. Although it would have been the better practice for the police officers to get an arrest warrant and they had ample time to so, there is support in the

record that exigent circumstances existed that precluded Court of Appeals review. The dissent would have reversed on the exigent circumstances issue because the police had several days to get an arrest warrant and failed to do so.

People v McBride, 14 NY3d 440 (2010)

Father Had Sufficient Means to Contribute to Child's Education Expenses Within Meaning of Parties' Agreement

The Appellate Division reversed, on the law, a judgment of Supreme Court entered upon a non-jury trial, awarding plaintiff wife damages in the sum of $46,373.31 and dismissed plaintiff's complaint, which sought college expenses of the parties' child pursuant to the terms of a settlement agreement. The parties' settlement agreement provided that any "expense of the children's education that will not be covered by the proceeds of [a certain trust] will be equally shared between the husband and the wife," and that "[b]oth parties will contribute to their children's educations at an accredited institution of higher learning in accordance with their means and abilities." The Appellate Division determined that plaintiff failed to produce any evidence regarding the proceeds or balance of the trust available to cover the children's educational expenses and no evidence was adduced about the means and abilities of the parties, and therefore plaintiff failed to establish a contractual entitlement to recovery of the college expenses. The Court of Appeals reversed. In this nonjury trial, the parties charted their own course, effectively removing from the case the question whether the trust funds were exhausted, thus eliminating plaintiff's burden on that issue. There was evidence adduced regarding the means and abilities of the parties to contribute to the children's college expenses. As a matter of law defendant father had sufficient means to contribute to his son's college education expenses within the meaning of the parties' agreement.

Washington v Washington, 14 NY3d 777 (2010)

Canine Sniff of Vehicle Constitutes a Search Requiring Suspicion That Criminal Activity is Afoot

This digest concerns two cases. In *People v Devone*, police officers pulled over a vehicle after observing its driver talking on a cell phone. The driver was unable to produce his driver's license or registration and he told the officers the car was registered to his cousin and he didn't know his cousin's name. When the officer asked for the cousin's whereabouts, the driver pointed at defendant who was seated in the passenger's seat. When the officers ran the license number they discovered that the car was registered to a female. Because of the suspicious inconsistencies of the driver's answers the officers' police dog conducted a canine sniff of the exterior of the car. The dog "alerted and the officers ultimately found crack cocaine in the vehicle's interior. Defendant moved to suppress the drugs as the product of an illegal search. County Court held that the canine sniff was a search and the police lacked reasonable suspicion to conduct the search. The Appellate Division reversed, holding that the police needed only founded suspicion to conduct the search. In *People v Abdur-Rashid*, a police officer stopped defendant's vehicle because it was missing a front license plate. The officer initially thought the car was uninsured but he received verification that the insurance was in effect. After writing a ticket for the missing plate and an expired inspection sticker, the officer allowed defendant to leave. About 45 minutes later, another officer stopped defendant because of the missing plate and because debris was protruding from the front of the vehicle. Defendant showed the officer the tickets from the prior stop and told him about the insurance mix-up. The officer was unsure whether defendant showed him all the tickets from the first stop and ordered defendant to get out of the vehicle. While the officer was attempting to contact the officer who had written the tickets, defendant appeared nervous, was looking at the police dog and asked if he could go. The officer approached the passenger in the car, who gave him an implausible story about why he was riding in the vehicle and how the debris got on the vehicle. The officer ordered the passenger out of the vehicle and retrieved the police dog. The dog "alerted" to the driver's side door and attempted to climb in the window. The officer found two bags of cocaine in a duffel bag in the vehicle. After a suppression hearing County Court concluded that the search was lawful and

the Appellate Division affirmed. The Court of Appeals affirmed both cases. The searches of the vehicles were lawful because the level of suspicion required is suspicion that criminal activity was afoot and in both cases such founded suspicion was established. The dissent would have reversed on the ground that the reasonable suspicion standard should be met before law enforcement conducts a canine sniff of a vehicle.

People v Devone, 15 NY3d 106 (2010)

APPELLATE DIVISIONS

ADOPTION

Respondent Not Consent Father

After a hearing, Family Court found that respondent was not a consent father under DRL § 111 (1) (d). The Appellate Division affirmed. The finding that respondent did not meet the parental responsibility criteria was supported by clear and convincing evidence. Respondent was incarcerated for the majority of his son's life, he failed to provide any financial support, and he did not maintain regular contact or visit with his son. The monies provided by the paternal grandmother as purported support for the child on respondent's behalf did not substitute for the legal support obligations owed by respondent, nor were the contacts and communications by the paternal grandmother with the child imputed to respondent. Although respondent asserted that he was thwarted in his effort to maintain contact with his son because he perceived the maternal grandmother to be a difficult person, such contention ignored his statement that, while incarcerated, he chose not to maintain contact with his son because it caused him stress. Further, there was no evidence that respondent reached out to the agency for assistance in maintaining contact with his son.

Matter of Mathew Niko M., 71 AD3d 440 (1st Dept 2010)

Respondent Not Consent Father

Family Court found that respondent was not a consent father under DRL § 111 (1) (d). The Appellate Division affirmed. The finding that respondent did not meet the parental responsibility criteria was supported by clear and convincing evidence, including that respondent failed to provide financial support for the children and that he did not maintain regular contact or visit them. His 18-month incarceration while the children were in foster care did not excuse him of his obligations and there was no evidence that he attempted to reach out to the agency for assistance in maintaining contact with the children. A preponderance of the evidence supported the determination that it was in the best interests of the children to free them for adoption by their foster father, with whom they had lived for most of their lives and had developed a close relationship. Placement with their paternal aunt would not have been in the children's best interests.

Matter of Lambrid Shepherd D., 73 AD3d 496 (1st Dept 2010)

Motion to Vacate Order Properly Denied

Family Court denied respondent's motion to vacate an order committing the custody and guardianship of the subject child to petitioner agency for the purpose of adoption following findings that respondent was not a consent father and that he failed to appear at any stage of the proceeding, despite being personally served with the summons and petition. The Appellate Division affirmed. Respondent's contention that his interest and concern with the child's welfare was confirmed by his unexplained, unsubstantiated participation in the termination proceeding that involved the child's older sister was insufficient to show a meritorious defense. The finding that adoption was in the child's best interests was supported by the testimony of the agency's caseworker that the child had lived since birth with her older sisters in the kinship foster home of respondent's mother, with whom the child had bonded and who wished to adopt the children.

Matter of Asia Sonia J., 74 AD3d 437 (1st Dept 2010)

Father's Consent to Adoption Not Required

Family Court determined that respondent father's consent was not required for his child's adoption. The Appellate Division affirmed. Even if the court committed prejudicial error in preventing respondent from offering an explanation for his admitted failure to ever pay child support and assuming in respondent's favor that the court's denials of his requests for visitation prevented him visiting the child at least monthly, respondent could have communicated regularly with the agency but failed to do so. Respondent's testimony, at best, showed only half-hearted attempts, largely by his mother, to reach the agency by phone, and that fell short of the regular efforts at communication contemplated by the statute.

Matter of Gekia Hafeesah Amore M., 74 AD3d 633 (1st Dept 2010)

Respondent Not Consent Father

Family Court concluded that respondent was not a consent father under DRL § 111 (1) (d). The Appellate Division affirmed. Because respondent did not maintain substantial or repeated contact with the child and failed to provide support for him in foster care, his consent to the child's adoption was not required. Respondent was incarcerated for about half of his son's first eight years and did not maintain regular contact with him for much of that period. Although contact increased substantially after respondent's release from prison, those intermittent periods of contact did not amount to regular contact under DRL § 111. Respondent was not excused from paying financial support because the agency did not instruct him to do so. The unexcused failure to provide support for most of his son's life was fatal to respondent's contention that his consent was required. Further, respondent was not a consent father because the agency directed him to engage in parenting classes and other services as a prerequisite to custody. Even if the agency had petitioned to terminate parental rights on the ground of permanent neglect, it would not have precluded it from withdrawing that claim and proceeding on the theory that respondent was a notice father.

Matter of Marc Jaleel G., 74 AD3d 689 (1st Dept 2010)

Abuse of Discretion to Deny Respondent's Request for Adjournment

Family Court dispensed with respondent's consent to the adoption of the subject child. The Appellate Division reversed and remitted. On October 14, 2008, respondent was served with the petition seeking to allow petitioners to adopt the child. On December 1, 2008, respondent's attorney appeared for the first court appearance. The court informed respondent that a hearing on the merits of the petition would take place that day. Respondent's attorney requested an adjournment until January 12, 2009, on the ground that he was unaware that the hearing was scheduled to take place that day, but the court denied the request and went forward with the hearing. There was no evidence that the father had notice that the hearing was scheduled to occur on December 1, 2008. Moreover, the record established that the proceedings were not protracted, that this was the father's first request for an adjournment, and that the court had adjourned proceedings concerning the child's biological mother to the precise adjournment date sought by respondent.

Matter of Nicole J., 71 AD3d 1581 (4th Dept 2010)

CHILD ABUSE AND NEGLECT

Motion to Vacate Order Entered on Default Properly Denied

Family Court denied respondent mother's motion to vacate a dispositional order that found that she derivatively neglected the child following an inquest upon her default in appearing at the fact-finding and dispositional hearings. The Appellate Division affirmed. Respondent failed to give a reasonable excuse for the default and a meritorious defense to the neglect cause of action. Even if the photocopy of the adjourn slip annexed to the motion were authentic and caused confusion, it was at odds with the selected and confirmed court dates and the mother should have clarified any resulting confusion, especially considering she used the same excuse for an earlier failure to appear. Further, the mother's unsubstantiated and conclusory assertion of partial compliance with other aspects of the dispositional order entered in neglect proceedings regarding her two older children and her bald claim that compliance with other aspects of the dispositional order were no longer necessary at the time of the subject child's birth, were insufficient to establish a meritorious defense.

Matter of Shavenon N., 71 AD3d 401 (1st Dept 2010)

Suspended Judgment Satisfied

Family Court denied petitioner agency's application to revoke a suspended judgment, deemed the suspended judgment satisfied, and referred the case back to the Referee for a permanency hearing and further consideration of the disposition. The Appellate Division affirmed. Respondent substantially complied with all the terms and conditions of the suspended judgment, including attending individual and couple's

counseling, submitting to random drug testing and remaining free of illicit substances, cooperating with announced and unannounced visits, and cooperating with all reasonable referrals for services. The record supported the court's finding that respondent addressed and ameliorated the problems that endangered the child and led to his removal from the home.

Matter of Vincent P., 71 AD3d 497 (1st Dept 2010)

No Basis to Disturb Court's Credibility Determinations

Family Court adjudged the child to be neglected by respondent father and released her to the custody of her mother, with supervision. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence, including testimony that respondent engaged in acts of domestic violence against the child's mother in the presence of the child and no expert or medical testimony was required to prove impairment or risk to the child under such circumstances. Further, the court's credibility determinations were supported by the record. Respondent's contention that he was deprived the right to counsel was unpreserved and, in any event, without merit.

Matter of Niyah E., 71 AD3d 532 (1st Dept 2010)

Dismissal of Derivative Neglect Petition Reversed

Family Court dismissed derivative neglect petitions against respondent father with respect to his three youngest daughters. The Appellate Division reversed. The court erred in concluding that a 2004 fact- finding that respondent had over the course of four years sexually abused his older daughter could not be used as a basis for finding derivative neglect warranting the removal of his three younger daughters from his care. The 2004 finding was based on respondent's admission that he touched his daughter's genitals, evidencing a profoundly impaired level of parental judgment. The court's emphasis on the fact that the 2004 fact-finding was five years ago was of no consequence particularly where the abuse took place continually over a four-year period and there was no evidence that respondent's proclivity for sexually abusing children had changed.

Matter of Nyjaiah M., 72 AD3d 567 (1st Dept 2010)

Finding of Neglect Reversed

Family Court determined that respondent father neglected his children and placed the children with their paternal grandfather. The Appellate Division reversed and dismissed the petition. The court improperly concluded that the father neglected his children based upon his past mental illness and substance abuse. Even if those allegations were true, the evidence did not contain a causal connection between the basis for the petition and the circumstances that allegedly impaired the children or placed them in imminent danger of becoming impaired.

Matter of Jarrod G. Jr., 73 AD3d 503 (1st Dept 2010)

Dismissal of Charge of Severe Abuse Reversed

Family Court dismissed charge of severe abuse against father where five-month-old child sustained, on separate occasions, a fractured clavicle and four to seven broken ribs and parents failed to provide an adequate explanation. The First Department reinstated the charge of severe abuse, and remanded the matter for a determination whether the agency exercised diligent efforts or whether such efforts should be excused. Family Court erred in concluding that *People v Suarez* (6 N.Y.3d 202), where it was noted that conduct evincing a depraved indifference to human life generally cannot occur in a one-on-one situation, precluded the court from making a finding of severe abuse. The definition of severe abuse in Social Services Law § 384-b (8) (a) encompasses conduct which is either intentional or reckless. In any event, *Suarez* recognized that in cases involving abused children, conduct evincing depraved indifference to human life may be present in a one-on-one situation. The father's conduct was sufficient to demonstrate depraved indifference.

Matter of Dashawn W., 73 AD3d 574 (1st Dept 2010)

Prior Finding of Abuse of Children Sufficient to Sustain Finding of Abuse of Subject Child

Family Court granted the agency's motion for summary judgment, finding that the parents had derivatively

neglected their child. The Appellate Division affirmed. The court properly relied on findings made a few months earlier that the parents neglected and abused their other children, including the fact that their five-month-old son sustained four broken ribs and a fractured clavicle, which the parents could not adequately explain, and the father's admitted beating of their five-year-old son. The agency established that this conduct was sufficiently proximate in time that it could reasonably be concluded that the condition currently existed.

Matter of Takia B., 73 AD3d 575 (1st Dept 2010)

Leaving Sleeping Child Alone on Train Constituted Neglect

Family Court determined that respondent mother neglected her child and placed the child with the Commissioner of Social Services pending the next permanency hearing. The Appellate Division affirmed. The finding that respondent neglected the child was supported by a preponderance of the evidence, which showed that on their way home from school, respondent exited the subway train and left the child, who was asleep, alone on the train. When the child found her way back to school, the mother could not be reached and the grandmother picked the child up from school. Further, the child's statement, which was corroborated by her statement to the caseworker, that respondent had left her alone on the train twice before supported the court's finding that respondent exposed the child to an imminent risk of harm. The dissent would have reversed because an 11 ½ year old traveling on the subway on her own would have supported a finding that future harm was merely possible, not that it was imminent.

Matter of Sasha B., 73 AD3d 587 (1st Dept 2010)

Agency Failed to Establish Neglect

After a fact-finding hearing, Family Court determined that respondent mother neglected her daughter. The Appellate Division reversed. The evidence merely established that the apartment where mother and daughter resided was cluttered with bags and boxes belonging to the recently deceased owner of the apartment and that the kitchen was dirty. While the condition of the apartment was not ideal, it did not place the child's physical, mental or emotional state in imminent danger of impairment. The child had adequate sleeping arrangements and a doctor and juvenile officer characterized the child as clean, well taken care of, verbal, very smart and well-fed. The child's school principal stated that the child was attending school and passing her classes, although she sometimes had body odor and dirty clothes. Certain of the court's findings were not supported by the record. There was no basis for a neglect finding based upon the mother leaving the 11-year-old child alone for approximately two hours.

Matter of Clydeane C., 74 AD3d 486 (1st Dept 2010)

Record Did Not Support Finding of Neglect

Family Court determined that respondent parents neglected their children, released the children to the custody of mother with 12 months supervision by ACS, on conditions that the mother and children receive family counseling for domestic violence; that the father receive anger management therapy, enroll in a batterer's program and be referred for psychiatric evaluation and for family counseling; and entered a final order of protection against the father for 12 months with respect to the children, allowing only supervised visitation. The Appellate Division reversed, vacated the findings of neglect, and dismissed the petition. The record did not support the findings of neglect because a preponderance of the evidence did not establish that the children's physical, mental or emotional condition had been impaired or was in danger of becoming impaired, or that an actual or threatened harm to the children was a consequence of the failure of the parents to exercise a minimal degree of care in providing the children with proper supervision or guardianship. The hearing testimony pertained to a single act of domestic violence that occurred outside the presence of the children. The court improperly based its characterization of a "repeated atmosphere of domestic violence" upon hearsay statements by the parents in police domestic incidence reports that did not fall within an exception to the hearsay rule. The police reports were inadmissible because the information contained in the reports came from witnesses not engaged in police business in the course in which the memorandum was made. The

finding of neglect could not be based upon excessive corporal punishment on one of the children and derivative neglect of the other children. The father acknowledged that he "popped" or "tapped" the child, but there was no evidence that the force he used was excessive or that it went beyond his common-law right to use reasonable force.

Matter of Christy C., 74 AD3d 561(1st Dept 2010)

Return of Children Pursuant to Family Court Act § 1028 Reversed

Family Court granted respondent mother's application pursuant to Family Court Act § 1028 for return of her children, who had been temporarily removed from her care. The Appellate Division reversed. Evidence of the repeated sexual abuse of mother's children while in her care; the mother's allowing a 25- year-old man to sleep in the same bedroom with the children despite her knowledge that the man had previously statutorily raped and twice impregnated her 14-year-old daughter; the mother's failure to report the statutory rape or the man's sexual abuse of her 12-year-old daughter; and the mother having a sexual relationship with the man after the statutory rape of her daughter, demonstrated that mother had such poor judgment and flawed understanding of her role as caretaker over a period of years that the children were at risk of imminent harm.

Matter of Martha A., 75 AD3d 476 (1st Dept 2010)

Evidence that Father, a Designated Sex Offender, Resided in Home Was Not Sufficient to Establish Neglect Absent Showing of Actual Danger to Subject Children

The petitioner filed neglect petitions pursuant to Family Court Act Article 10 against the father and the mother alleging that the father was an "untreated" level three sex offender who, after his release, had returned to the family home wherein the subject children resided, and that the mother, by allowing the father to return to the home, failed to protect the subject children. Following a fact-finding hearing, the Family Court found that the parents had neglected the subject children. The Appellate Division found that the petitioner failed to establish by a preponderance of the evidence that the father's presence in the home had impaired the subject children's physical, mental, or emotional well-being, or placed them in imminent danger of such impairment. Accordingly, the Family Court erred in finding that the parents had neglected the subject children.

Matter of Afton C., 71 AD3d 887 (2d Dept 2010)

Plan to Change Permanency Goal to Adoption Was in Child's Best Interests

Contrary to the mother's contention, the petitioner met its burden of establishing, by a preponderance of the evidence, that a plan to change the permanency goal to adoption was in the subject child's best interests. The record supported the Family Court's finding that the mother endangered the welfare of the subject child when she willfully violated a prior court order by refusing to abide by an order of protection against the child's father. In light of this finding, as well as the testimony at the permanency hearing and the fact that the three-year-old child had been in kinship foster care for approximately 2 1/2 years, the Family Court's decision to change the permanency goal to placement for adoption had a sound and substantial basis in the record.

Matter of Michael D., 71 AD3d 1017 (2d Dept 2010)

Record Did Not Support Finding of Neglect by Use of Excessive Corporal Punishment

The evidence presented at the fact-finding hearing established that the father pulled on his daughter's shirt when his daughter failed to follow his instructions, causing her to fall down onto the floor. The evidence also established that he then spanked her on the buttocks and hit her on her arm with an open hand. Although the evidence established that her wrist was injured as a result of the fall, there was no evidence that he intended to injure her, or engaged in a pattern of using excessive force to discipline her. Although a single incident may suffice to support a finding of neglect, under the circumstances, the Family Court's finding that the father neglected his daughter by using excessive corporal punishment was not supported by a preponderance of the evidence.

Matter of Alexander J.S., 72 AD3d 829 (2d Dept 2010)

Father Allowed Child to Ride in Car Driven by Intoxicated Mother

The Family Court's finding that the father neglected his eight-year-old daughter was supported by a preponderance of the evidence (see FCA § 1012 [f] [i] [B]; § 1046 [b] [i]). The nonhearsay evidence presented at the fact-finding hearing was sufficient to establish that the father allowed the child to ride in a car being driven by her mother when he knew or should have known that the mother was intoxicated. Since the evidence of neglect as to this child demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for other children in the father's care, the Family Court properly found that the other child was derivatively neglected.

Matter of Tylasia B., 72 AD3d 1074 (2d Dept 2010)

Child's Testimony Was Not Corroborated

The appellant's contention that the Family Court erred in dismissing the petition alleging abuse and neglect was without merit. The Family Court found the child's testimony to be incredible. The child's testimony as to the events was inconsistent, vague, and lacking in specific details. Her timeline of events was contradicted by the documentary evidence. The child's testimony was not corroborated by any other sources, including medical evidence, expert testimony, or the testimony of any other witnesses. Order affirmed.

Matter of Taylor T., 73 AD3d 1075 (2d Dept 2010)

Evidence Was Sufficient to Prove Appellant Committed Sex Offense

Contrary to the contention of the appellant, who was a "person legally responsible for the child's care" (see Family Ct Act § 1042), the evidence adduced at the fact-finding hearing, including the sworn testimony of the subject child, was sufficient to prove, by the requisite preponderance of the evidence, that he committed a sex offense as defined by Penal Law § 130.65 (3) against that child. Although the 10-year-old complainant could not testify with certainty at the fact-finding hearing as to the date of the sexual abuse, which allegedly took place more than three years earlier, her testimony that the offense did indeed take place was unshaken on cross-examination, and the reliability of her testimony was amplified by her additional testimony detailing the lighting conditions at the time of the incident, that she was seated and clothed as the abuse took place while the appellant was standing, and that she told someone at school about the incident the day after it happened. Moreover, the Family Court properly considered the report filed by the school guidance counselor with the Statewide Central Register of Child Abuse and Maltreatment.

Matter of Lauryn H., 73 AD3d 1175 (2d Dept 2010)

Mother's Use of Physical Force Was Justified

The mother's use of physical force was justified to stop her daughter from escalating an altercation by grabbing a knife, the use of which could have constituted deadly physical force (see Penal Law § 35.10 [1], [4]). Accordingly, the neglect finding against the mother was vacated.

Matter of Crystal S., 74 AD3d 823 (2d Dept 2010)

Parents Plead Guilty to Manslaughter; Reasonable Efforts to Return Other Child Excused

The petitioner, with the support of the attorney for the children, moved for summary judgment against the parents on the issues of abuse and severe abuse, establishing that the father pleaded guilty to manslaughter in the first degree, and the mother pleaded guilty to manslaughter in the second degree for their commission of the same abusive acts alleged in the petition. In their plea allocutions, both parents admitted that the victim was the subject child. Based upon these submissions, an award of summary judgment was proper on the issue of whether the father and mother abused the subject child and derivatively abused their other child. As to the allegations of severe abuse, the criminal convictions of the father and the mother satisfied Social Services Law § 384-b (8) (a) (i) and (iii). Moreover, the uncontroverted evidence of their criminal acts, which caused the death of the subject child, a 20-month-old child in their care, clearly and convincingly established that reasonable efforts to return their other child to the home should have been excused as being detrimental to the best interests of that child. Accordingly, an award of summary judgment

was proper on the issues of whether the father derivatively severely abused the other child, and whether the mother severely abused the subject child and derivatively severely abused the other child. Order affirmed.

Matter of Yamillette G., 74 AD3d 1066 (2d Dept 2010)

Mother Opposed to Child's Immunization Not Entitled to Religious Exemption

Contrary to the mother's contention, the Family Court's determination that she neglected the subject child was supported by a preponderance of the evidence. The evidence adduced at the hearing established that the mother maintained the child's home in a deplorable and unsanitary condition. Moreover, the Family Court properly granted the motion of the Administration for Children's Services to direct that the child be immunized in accordance with Public Health Law § 2164. The mother opposed the motion on the ground that she was entitled to the religious exemption from the Public Health Law's immunization requirements provided by Public Health Law § 2164 (9). However, she failed to prove by a preponderance of the evidence that her opposition to immunization stemmed from genuinely-held religious beliefs.

Matter of Isaac J., 75 AD3d 506 (2d Dept 2010)

Derivative Neglect Finding Upheld but Order of Protection Not in Child's Best Interests

Based on a prior ruling that a father had allowed the sexual abuse of his older children, Family Court found derivative neglect of his six-month-old child. Even though the father was not found to have actively abused the older children, he allowed known sexual offenders to be alone with his children and the circumstances showed that the father was unable to understand his fundamental duties as a parent. The Appellate Division affirmed the derivative neglect but overruled an order of protection that would have barred the father from contact with the child until she turned 18. The Appellate Division held that Family Court did not err in allowing the permanency hearing to proceed in the father's absence because the father's attorney was present and did not request adjournment and because of the "strict statutory timetable" within which permanency hearings must be completed.

Matter of Paige WW., 71 AD3d 1200 (3d Dept 2010)

Family Court Lacked Jurisdiction to Vacate Sentencing Order *Sua Sponte*

Family Court entered a temporary order of protection against a mother who was alleged to have neglected her son. The next month, she was found to have violated the order of protection and was sentenced to six months in jail with the sentence suspended subject to a number of conditions. After leaving her inpatient treatment and failing to notify her caseworker of her change of address, the mother was found to have violated the conditions and Family Court imposed the six-month sentence. The mother appealed, surrendered her parental rights to the child and Appellate Division granted the mother's motion for a stay of her sentence and released her, pending the outcome of her appeal. Family Court then vacated its own sentencing order - on its own motion - and ordered an evidentiary hearing on the suspended sentence violation. DSS appealed, stating that Family Court lacked the authority and the jurisdiction to lift the suspension of the six-month jail sentence, and Appellate Division stayed Family Court from proceeding with the hearing. The Appellate Division ruled that Family Court had the authority to lift the suspension of the jail sentence, but lacked the jurisdiction to vacate, *sua sponte*, its order sentencing the mother to jail. Appellate Division ruled that the trial courts are allowed to correct ministerial errors of its prior orders and may entertain motions. However, it cannot vacate a prior order which has been appealed. "If it were able to do so, the issuing court would, in effect, be insulating its subsequent order from appellate review as of right."

Matter of Zachary EE., 71 AD3d 1239 (3d Dept 2010)

Respondent Violated Order of Protection and Family Court Can Modify Permanency Goal to TPR

This case involved three appeals. On the first one, Family Court's finding of abuse and neglect against the father was affirmed based upon a holding of sufficient corroboration of the child's allegations. The 8-year-old child was called as a witness and gave unsworn testimony *in camera*. At the dispositional hearing,

Family Court, on its own motion, called the non-respondent mother as a witness and questioned her in detail. In fact, the mother's behavior was the main focus of the dispo. Family Court properly found that respondent father had abused the child and derivatively neglected the sibling. However, the Appellate Division held that Family Court misused the notice provisions of FCA § 1035 (d) by making factual findings of failure to protect against the non-respondent mother and removing the children from her care notwithstanding the lack of any petition against her. The disposition as to the mother was reversed and remitted for a 1034 investigation. On the second appeal the respondent father contested Family Court's dispositional order precluding visitation. At a permanency hearing, the father did not object to the no visitation order provided he was not required to engage in any sex abuse programs or services. Family Court continued the placement of the children, continued the no visitation order and modified the permanency plan to provide for, among other things, the filing of a TPR. The Appellate Division affirmed holding that the Department demonstrated reasonable efforts in the face of respondent's refusal to acknowledge any responsibility for the abuse. Family Court has the authority to modify a permanency goal and the record supported this change. On the third appeal, it was held that the father wilfully violated an order of protection requiring him to stay at least 1000 feet from the children.

Matter of Telsa Z., 71 AD3d 1246 (3d Dept 2010), 74 AD3d 1434 (3d Dept 2010), 75 AD3d 776 (3d Dept 2010)

DSS Attorney Failed to Sign Permanency Hearing Report

Family Court adjudicated children to be neglected and placed them with DSS. Subsequent permanency hearings continued placement and the parents appealed, arguing that Family Court should have rejected the permanency hearing report because it was not signed by DSS counsel. The Appellate Division held that the permanency hearing report must be signed by the attorney for the social services agency, but that the unsigned report should not be stricken if the attorney signed the report soon after learning of the omission, or if there was a good reason that the attorney failed to correct the omission. The appeal was mooted due to a subsequent permanency hearing.

Matter of Heaven C., 71 AD3d 1301 (3d Dept 2010)

Father Was Risk to Children by Refusing to Undergo Sex Offender Evaluation

Appellate Division upheld Family Court's neglect ruling against father. Father was previously convicted of photographing girls undressing in the locker room of the high school where he worked. County Court sentenced him to a four-month imprisonment and five years of probation. DSS commenced neglect proceedings against the father after he violated probation by continuing to live in the family home and refused to undergo a forensic sex offender evaluation. The Appellate Division affirmed Family Court's ruling that the father's refusal to receive treatment represented an imminent risk to the "physical, mental and emotional" health of the children.

Matter of Richard S., 72 AD3d 1133 (3d Dept 2010)

Family Court's NRE Finding was Not Warranted

After children were found to be neglected, DSS filed violation petitions against the parents and submitted a permanency hearing report proposing a permanency planning goal of reunification. Family Court found that parents had willfully violated the prior court orders and directed DSS to file a TPR against them, made a no reasonable efforts finding, and approved an amended permanency goal of adoption. The parents appealed and Appellate Division held that their failure to participate in mandated services since the children entered foster care provided a sound and substantial basis to modify the proposed planning goal, to direct DSS to file petitions, and the TPR. However, Appellate Division ruled that the no reasonable efforts finding was not warranted.

Matter of Lindsey BB., 72 AD3d 1162 (3d Dept 2010)

Father's Admission to Neglect Stands

DSS commenced this neglect proceeding against father of three children alleging that, in front of the children, he pointed a loaded handgun at the children's mother and threatened to kill her and the children. Thereafter,

the father pled guilty in another court to a criminal charge involving possession of a weapon during the alleged domestic violence incident. Based upon his admission to the neglect, specifically that he violated a no-contact order of protection, Family Court adjudicated the children to be neglected. The father appealed, stating that his admission of neglect was "not knowing, intelligent, and voluntary" and was only done so that his son would not be forced to testify at trial. The Appellate Division held that father's admission was knowing, intelligent and voluntary, that he was represented by counsel throughout the neglect proceeding and he was fully informed of the consequences of such an admission.

Matter of Cora J., 72 AD3d 1170 (3d Dept 2010)

Father Appeals Abuse Finding

Five-year old child made detailed accusations of sexual abuse against father, causing DSS to commence Art. 10 proceedings. Following a fact-finding hearing at which the child testified, *in camera*, Family Court found a preponderance of evidence and adjudicated the child to be abused and neglected. The father appealed, contending that he received ineffective assistance of counsel and that the child's statements were insufficiently corroborated and should not have been credited. Appellate Division held that the father received adequate counsel and that the evidence supported the allegations of sexual abuse.

Matter of Destiny UU., 72 AD3d 1407 (3d Dept 2010)

Children Found to be Neglected by Grandparents

Family Court found that grandparents had neglected their grandchildren who were living with them. The grandfather was convicted of raping one of his daughters, who was then 14-years-old, and forced his son to have sex with his daughter. After being released to probation, he was resentenced to prison for assaulting the grandmother. The grandparents parental rights to all of their children were thereafter terminated. After it was discovered that the children were living with the grandparents, DSS commenced neglect proceedings against them as well as the mother for placing the children in imminent danger and failure to exercise minimum degree of care in providing supervision. On the grandparent's appeal, the Appellate Division held that the evidence was sufficient to support the neglect determination.

Matter of Anthony Y., 72 AD3d 1419 (3d Dept 2010)

Family Court Erred in Dismissing Neglect Petition Against Sex Offender

Respondent father was a convicted level three sex offender who had not completed sex offender treatment. In this neglect proceeding, Family Court dismissed the petition on the parties stipulation, finding that respondent fulfilled all of his obligations as a registered sex offender and abided by an agreement with petitioner that he not have any unsupervised contact with his son. The Department appealed and the Appellate Division found that Family Court erred by dismissing the petition, holding that a preponderance of the evidence established that respondent has not acted as a reasonably prudent parent to prevent an imminent danger of impairment or substantial risk of harm to his child. Considering all of the circumstances here, including numerous instances of sexual abuse of young children, both female and male, related to respondent and unrelated, along with respondent's inability or unwillingness to engage in and successfully complete sexual offender treatment, respondent neglected his son and the petition should have been granted. The matter was remitted for a dispositional hearing.

Matter of Christopher C., 73 AD3d 1349 (3d Dept 2010)

Family Court Properly Found Neglect

Conceding he was a person responsible for the care of the subject children, the respondent was properly found to have neglected them. "Here, given the caseworker's testimony regarding the children's terrorized response to the incident of domestic violence instigated by respondent against the mother, a sound and substantial basis supports Family Court's conclusion that respondent's actions endangered the well-being of the children and, thus, constituted neglect."

Matter of Shiree G., 74 AD3d 1416 (3d Dept 2010)

Abuse Finding Upheld but Derivative Abuse Dismissed

This was an Art. 10 proceeding which resulted in an abuse finding against the father for injuries he inflicted on his 1-year-old daughter. There was also a derivative finding relative to the mother's other daughter from a prior relationship. The abuse as to the subject child was upheld. However, the derivative finding was dismissed on appeal for lack of proof that respondent was a person legally responsible for that child's care. Family Court inferred that the other child lived with respondent but there was no proof in the record where she lived or with whom.

Matter of Brooke OO., 74 AD3d 1429 (3d Dept 2010)

Respondent Mother Wilfully Violated Dispositional Order Necessitating Placement of the Child With Petitioner; and Continued Placement Was in Child's Best Interests

This case involved two appeals. On the first, respondent-mother was under an order of supervision based upon her admission to neglect of her son. Upon learning that the mother had married a level two sex offender who was prohibited any contact with minors, Family Court modified its orders requiring respondent to keep the new stepfather from coming within 1,000 feet of the child. This violation proceeding was commenced upon allegations that respondent allowed the stepfather to be present in the home with the child. During the fact-finding hearing, the caseworker testified that when she went to respondent's home, respondent denied that the child was in the home but he was discovered hiding, fully clothed, in the shower. Respondent called the child by a different name and pretended that he was a friend's nephew and directed the child not to cooperate. In addition, another person, who was present in respondent's home at the time, testified that he signed a statement that respondent prepared in which he falsely swore that the child found in her home was not respondent's son. During the hearing, the mother admitted that the allegations were true. Family Court found a willful violation, ordered respondent to serve three days in jail and issued several modified orders of protection and disposition, placing the child in petitioner's custody with supervised visitation. On appeal, respondent characterized the child's placement as an extreme overreaction and against the child's best interests. "As Family Court noted, the evidence at the dispositional hearing established that respondent knowingly allowed the child to be in the
presence of the stepfather despite orders to the contrary, was fundamentally unwilling to protect the child from the stepfather, and engaged in an elaborate scheme to deceive the authorities, which included encouraging the child to lie about his identity and attempted solicitation of perjury. Under these circumstances, Family Court properly determined that temporary placement with petitioner was in the child's best interests." The second appeal was from a 6-month extension of placement. Although the mother had made meaningful efforts towards reunification, she tested positive on a drug test and continued to live with the stepfather. Additionally, she did not always act appropriately with her son during visitation. As such, the extension of placement was in the child's best interests.

Matter of Brandon DD., 74 AD3d 1435 (3d Dep. 2010), 75 AD3d 815 (3d Dept 2010)

Abuse Petition Properly Dismissed

Mother had primary custody of the parties' young daughter and father had visitation. The mother repeatedly filed modification petitions alleging that the father was sexually abusing the daughter resulting in supervised, suspended and ultimately no unsupervised visitation to the father. Yet another petition was filed alleging that the child made disclosures of sexual contact by the father. Family Court dismissed the petition finding that the mother's animosity toward respondent and her “strong investment” in proving that he had sexually abused the child, rendered her observations, memory and testimony incredible. The court acknowledged the father's motivation to lie but there was nothing in his testimony to detract from his credibility. The record supported the conclusion that the reliability of the child's disclosures was affected by adult influence or coaching. And, finally, the child's out-of-court statements were insufficiently corroborated. There was no physical evidence of abuse, objective validator's assessment or other strong corroboration. "In a careful analysis of the therapists' testimony, Family Court noted that because their goals were therapeutic rather than forensic, neither expert

followed interviewing protocols designed to avoid tainting or influencing the child's testimony." Family Court's dismissal was affirmed.

Matter of Kayla J., 74 AD3d 1665 (3d Dept 2010)

Regular Beatings and Leaving the Children Alone Constituted Neglect

The subject children told school officials that they were regularly beaten by their mother and her live-in boyfriend and that they were often left home alone. Following an investigation, abuse and neglect proceedings were commenced alleging excessive corporal punishment and failure to provide adequate supervision. The children were temporarily removed and after a fact-finding hearing, Family Court made a finding of neglect, continued placement and issued an order of protection against respondent. On appeal Family Court's findings were upheld. Witness testimony substantiated both the claim that the children were left alone and that they were regularly beaten. Several witnesses testified that they observed bruises on the children which they say were caused by being hit with a belt. The children had told school officials that they were told not to talk about what happened in their home and that they were afraid to do so for fear of being punished. In light of the testimony, Family Court properly found that the children were in imminent danger of impairment due to respondent's failure to exercise a minimum degree of care. Even a single incident of excessive corporal punishment can support a finding of neglect and actual physical injury or impairment of the child is not required. Finally, while the mother and then boyfriend denied hitting the children and had various explanations for the bruises, Family Court gave no weight to the testimony of either witness.

Matter of Bianca QQ., 75 AD3d 679 (3d Dept 2010)

Neglect Petition Brought by Attorney for the Child Dismissed

The attorney for the child received permission from Family Court to file a neglect petition in which it was alleged that the mother had inflicted corporal punishment on the child, exposed her to domestic violence, routinely abused drugs and alcohol in the child's presence, neglected the child's hygiene and failed to provide her with proper supervision, clothing and appropriate medical care. Family Court held a 1027 hearing and found that removal was not required. The parties agreed to use the evidence from the 1027, together with educational records, to decide the neglect. Family Court found that the evidence presented was insufficient to support a finding of neglect and dismissed the petition. That decision was upheld on appeal. The corporal punishment allegation was resolved by the mother's testimony that it was an accident and CPS had investigated and found it to be an isolated incident. While even an isolated incident can be neglect, there was no proof here of any persistent pattern of conduct by the mother. Regarding the allegation of exposure to domestic violence, the mother admitted to a hostile relationship with the father and her current boyfriend but that none of it had occurred in front of the child nor was there any evidence presented that the child's physical, mental or emotional state had ever been threatened or impaired as a result. On the issue of the drug use, no credible evidence was presented at the hearing. Regarding the child's education, the mother had taken a more active role in meeting the child's educational needs and she was doing much better during the recent school year. As for the child's hygiene and her medical care, the child had contracted ringworm and head lice, and needed eyeglasses, but the mother did not ignore those issues. The mother testified that the child bathes every day and is appropriately dressed for the weather. While the father took issue with this testimony, there was nothing in the record to support the claim that the child was harmed or that her welfare was compromised by the manner in which the mother addressed these needs.

Matter of Jalesa P., 75 AD3d 730 (3d Dept 2010)

Hitting and Throwing Child As a Result of Toilet Training Accident Constituted Neglect

As a result of separate incidents of hitting and throwing his young stepson, respondent was found to have neglected that child and derivatively neglected his two younger daughters. Family Court's decision was affirmed. The mother witnessed the one incident and testified that despite her efforts to restrain him, the respondent screamed at the stepson and struck him in the face after a toilet training accident. Furthermore,

she testified that the stepson was afraid of respondent and would cower or hide when respondent was present. Respondent, himself, admitted that the stepson sometimes flinched when he approached. With regard to the other incident, the stepson stated that he was walking in front of respondent, who became irritated at his the slow pace, picked him up and threw him down a hallway. After that incident, several individuals testified to and a photograph showed the injuries to the stepson's face and neck. Contrary to respondent's contentions, this testimonial and photographic evidence corroborated the stepson's out-of-court statements. Moreover, it provided a sound and substantial basis to support Family Court's finding of neglect - that the stepson's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of respondent's failure to exercise a minimum degree of care in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof. Respondent repeatedly acted in a manner that not only could have, but did, injure the stepson, and his actions left the stepson in a state of fear. Finally, because respondent's actions evinced such an impaired level of parental judgment as to create a substantial risk of harm for any child in his care, Family Court properly determined that he had derivatively neglected his two daughters.

Matter of Dylan TT., 75 AD3d 783 (3d Dept 2010)

Family Court Abused ItsDiscretion in Imposing Restriction Absent Evidence of Alcoholism

Respondent is the father of two children whom he was found to have neglected due to his substance abuse. The children were placed and respondent was under an order of protection which required him to undergo drug testing and prohibited him from purchasing, possessing or consuming alcoholic beverages. Subsequently, respondent was found to be in willful violation of the court's orders due to his failure to submit to certain drug tests and his use of various drugs. As a result, he was sentenced to 90 days in jail. Family Court held a permanency hearing to determine if the placement of the children should be extended. At the conclusion of the hearing, the court issued orders extending the children's placement until the next permanency hearing, as well as orders of protection. One condition of the orders, imposed by the court *sua sponte*, was that respondent be fitted with a SCRAM device and that a SCRAM monitoring system be installed in his home. Respondent appealed that provision and the Appellate Division modified by deleting that requirement. Here, the children were initially removed from respondent's care due to his substance abuse. His subsequent violation of the court's orders was based upon his failure to submit to certain drug tests and his admitted use of drugs. There is nothing in the record establishing that respondent abused alcohol or was diagnosed as an alcoholic; nor was there anything in the record to explain why Family Court imposed such an onerous restriction.

Matter of Todd NN., 75 AD3d 813 (3d Dept 2010)

Prior Neglect Adjudication Too Remote to Sustain Derivative Neglect

Respondent mother appealed from an order adjudicating her child to be a neglected child based on a finding of derivative neglect. The Appellate Division reversed and dismissed the petition. The Appellate Division noted that although respondent's contention that the court erred in failing to conduct a hearing within three court days of her application pursuant to FCA § 1028 was moot, Family Court had erred because no good cause was demonstrated for the delay. The Appellate Division determined that the derivative neglect finding also was error. The mother consented to a prior adjudication of neglect with respect to her two other children based on the condition of her home and her failure to obtain medical treatment for the children. Five years later the child at issue was born and petitioner commenced this proceeding with respect to that child. Under the circumstances, the prior adjudication of neglect was too remote in time to sustain the court's finding of derivative neglect. In addition, the evidence presented at the hearing failed to establish that the conditions that led to the prior neglect adjudication currently existed and could reasonably be expected to exist in the foreseeable future. The witnesses presented by petitioner had either no contact or very limited contact with the mother in the 2 ½ years before the birth of the child at issue and thus they were unable to provide testimony with respect to the current living situation of the mother. Indeed, the mother presented several witnesses who testified that, when

this proceeding commenced, the mother's home was clean, she had attended all prenatal appointments for the child, and she was equipped with the skills necessary to be a good parent.

Matter of Dana T., 71 AD3d 1376 (4th Dept 2010)

Neglect Based on Domestic Violence Affirmed

Family Court adjudged that respondent parents neglected the subject children, two of whom were the father's biological children and two of whom were the mother's biological children. The Appellate Division affirmed. Respondent father failed to preserve his contention that the court erred in relying on evidence of the father's use of alcohol that postdated the filing of the neglect petition. In any event, the court's finding was based also on evidence that the father engaged in acts of domestic violence against the mother and at least one of the children. The children's out-of-court statements describing the domestic violence were sufficiently corroborated by independent proof, including the testimony of the school nurse and petitioner's caseworker. Respondents also contended that the court erred in removing the children from the home without conducting a full dispositional hearing. The appeals from the order insofar as they concerned disposition were moot because superseding permanency and custody orders with respect to all the children had been entered.

Matter of Dustin B., 71 AD3d 1426 (4th Dept 2010)

Derivative Abuse Based on Causing Death of Sibling Affirmed

Family Court ordered a suspended judgment, finding that respondent father derivatively abused three of his children based upon his admission that he committed serious abuse in causing the death of their sister. The Appellate Division affirmed. The evidence was legally sufficient to support the finding of derivative abuse: proof of abuse or neglect of one child is admissible evidence on the issue of abuse or neglect concerning any of respondent's other children. Further, if the conduct that formed the basis for the finding of abuse regarding one child was so proximate in time to the derivative proceeding that it reasonably can be concluded that the condition still exists, a finding of abuse should be made as to the surviving children. Respondent failed to preserve his contention that the court erred in failing to conduct a separate dispositional hearing, and that contention and respondent's remaining contentions, were without merit.

Matter of Keyarei M., 71 AD3d 1510, *lv denied* 14 NY3d 712 (2010)

Family Court Properly Exercised Inherent Authority to Vacate Prior Order

Family Court granted agency's petition and vacated an order that had dismissed a petition alleging abuse and neglect. The Appellate Division affirmed. Subsequent to the dismissal, respondent mother entered an *Alford* plea with respect to the sexual abuse of one of her children. Although the judgment of conviction upon her guilty plea did not constitute newly discovered evidence within the meaning of CPLR 5015, the court properly exercised its inherent authority to vacate a prior order in the interest of justice. Here, even absent any specific admissions by the mother during her plea colloquy, her conviction of sexual abuse constituted conclusive proof of the abuse allegations in the petition with respect to that child. The conviction of sexual abuse therefore directly contradicted the testimony of the mother that she did not sexually abuse the child. Thus, the court properly exercised its discretion in vacating a prior order based on fraud. Further, the trial court had the inherent power to set aside its decision in a non-jury case on its own initiative and in doing so, may ignore the 15-day limitation set forth in CPLR 4405. The mother's remaining contentions were without merit.

Matter of Aaron H., 72 AD3d 1602 (4th Dept 2010)

Respondents Neglected Children

Family Court adjudicated respondent parents' child and the older child of respondent mother to be neglected by respondents. The Appellate Division affirmed. Respondent father's contention that he was not the person legally responsible for the care of the mother's older child was rejected. Petitioner agency established that the father and the mother were living together as a family during the relevant time, and thus father acted as the functional equivalent of a parent with respect to the

mother's older child, rendering him responsible for that child's care. The father's contention that the evidence did not support the court's determination that he neglected respondents' child was without merit. A finding of neglect was warranted here because father was an individual legally responsible for the care of a child who allowed that child to be cared for by individuals known to be unsuitable caregivers. The mother and respondents' child tested positive for cocaine at the time of the child's birth and the mother's explanation to the father with respect to those test results was not credible. In addition, the father was present during an incident prior to the date on which he allowed the mother to care for the child overnight where another individual attempted to deliver marihuana to the mother's residence. The father failed to preserve for review his contention that he was punished for exercising his right to a fact-finding hearing rather than accepting an adjournment in contemplation of dismissal.

Matter of Donell S., 72 AD3d 1611 (4th Dept 2010)

Mother Unable to Meet Her Own Needs or Needs of Any Child in Her Care

Following the termination of parental rights of respondent mother with respect to her older child on the ground of mental illness, Family Court granted petitioner agency's motion for summary judgment and adjudged that respondent's younger child was a neglected child. The Appellate Division affirmed. Respondent was diagnosed as having bipolar disorder, attention deficit disorder, posttraumatic stress disorder, reactive attachment disorder and psychotic disorder. Respondent suffered from a thyroid condition, lead poisoning, possibly autism, and she was dependent on marihuana. Petitioner established that respondent did not follow medical advice, did not take prescribed medication and did not complete various mental health, substance abuse and anger management treatment programs. Further, in the opinion of the court appointed psychologist, respondent was unable to care for her own needs and was unable to meet the needs of any child placed in her care. Respondent's contention that the record contained triable issues of fact was rejected. Respondent's condition was longstanding and developmental in nature and there was no evidence in the record that her condition had changed. Further, the statement by respondent to a social worker during the initial investigation of the neglect petition concerning the younger child that respondent was seeing a mental health provider was unsubstantiated.

Matter of Majerae T., 74 AD3d 1784 (4th Dept 2010)

Parents Failed to Exercise Minimum Degree of Care

Family Court adjudged that respondent parents neglected their four children. The Appellate Division affirmed. Petitioner agency established by a preponderance of the evidence that the physical, mental or emotional condition of the children had been impaired as a consequence of the parents' failure to exercise a minimum degree of care. Respondent mother repeatedly subjected the children to unnecessary and demeaning physical examinations and gave them herbal remedies that she knew to be toxic. With respect to respondent father, he knew or reasonably should have known that the mother was harming the children.

Matter of Elizabeth W., 74 AD3d 1787 (4th Dept 2010)

Petitioner Established Prima Facie Case of Child Abuse and Neglect

Family Court adjudged that respondent parents abused and neglected their two-week-old child and derivatively neglected their 18-month-old child. The Appellate Division affirmed. Gaps in the transcript of the fact-finding hearing resulting from audibility problems were insignificant and did not preclude meaningful appellate review. Further, the evidence was legally sufficient to support the court's findings. Petitioner presented the testimony of a physician that established that the younger child sustained a fracture of the left humerus and a laceration of the liver and that none of the explanations offered by respondents were consistent with the nature and severity of those injuries. Petitioner also established by a preponderance of the evidence that the older child was derivatively abused and neglected because the abuse and neglect of the younger child was so closely connected with the care of the older child as to indicate that he was equally at risk.

Matter of Devre S., 74 AD3d 1848 (4th Dept 2010)

Respondent Failed to Provide Adequate Supervision

Family Court's order adjudged respondent mother's children to be neglected. The Appellate Division affirmed. The court was entitled to draw the strongest inference against mother based on her failure to testify at the fact-finding hearing. Further, petitioner met its burden of establishing by a preponderance of the evidence that the children were neglected. The court properly found that the two children, ages one and three, were in imminent risk of harm when the mother left them unattended in a vehicle for at least 15 minutes.

Matter of Serenity P., 74 AD3d 1855 (4th Dept 2010)

CHILD SUPPORT

Mother's Alleged Public Assistance Fraud Could Not Be Challenged in Family Court

The Commissioner of Social Services, as assignee of the child's mother, brought a child support proceeding against the respondent father. Family Court denied, in part, father's objections to a December 2006 support order directing him to pay child support and an August 2008 order, which denied father's objections to (a) a November 2007 order denying his motion for summary judgment to dismiss the proceeding on the ground of judicial estoppel and (b) a January 2008 order directing him to pay child support without deviation from CSSA guidelines. The Appellate Division affirmed. The doctrine of judicial estoppel did not bar the proceeding brought by the Commissioner. Although the Commissioner, after commencing this proceeding, did inconsistently refer mother's case to the District Attorney for possible welfare fraud prosecution, the DA's decision not to prosecute was not a prior judgment or a decision in the Commissioner's favor, vindicating the position that mother had committed welfare fraud. Father's objection to the quashing of his subpoena for the Commissioner's public assistance records was properly denied because father failed to demonstrate his entitlement to confidential records. Finally, father was not automatically entitled to deviation from CSSA guidelines because the parties shared custody equally. The dissent would have remitted on the ground that the father was deprived of his due process right to present evidence concerning the mother's financial means and because the amount of child support should have been adjusted to relect the fact that the parties had a split custody arrangement.

Matter of Commissioner of Social Servs. v Paul C., 73 AD3d 469 (1st Dept 2010)

No Basis to Disturb Imputation of Income to Respondent

Family Court denied respondent father's objections to the Support Magistrate's order of support. The Appellate Division affirmed. There was no basis to disturb the finding that the gross income of the subchapter S corporation of which respondent was the sole proprietor did not include $88,528 of expenses described in the corporation's tax return as "reimbursed expenses" and claimed by respondent as an expense that reduced his income. Other than pointing to the corporation's tax return, respondent offered no evidence that the reimbursed expenses were included in the corporation's gross income or paid by the corporation. Further, there was no basis to disturb the imputation of income to respondent, where his own testimony revealed that the corporation paid many of his personal expenses and that he deducted those expenses on the corporation's tax return.

Matter of Christine W. v Adrian B., 74 AD3d 551 (1st Dept 2010)

Court Erred in Sua Sponte Vacating Child Support Provisions in Separation Agreement

The Supreme Court erred in sua sponte vacating the child support provisions of the parties' separation agreement. The proper vehicle for challenging the propriety of child support provisions contained in a separation agreement or stipulation of settlement incorporated, but not merged, into a divorce judgment is by either commencing a separate plenary "action in which such relief is sought in a cause of action" or by motion within the context of an enforcement proceeding. Here, the defendant neither interposed a cross motion, nor commenced a separate plenary action, seeking to vacate or set aside the purportedly unenforceable child support provisions. Thus, the Supreme Court erred in sua sponte vacating the child support provisions in the separation agreement and

denying the plaintiff's contempt motion.

Barany v Barany, 71 AD3d 613 (2d Dept 2010)

Actual Earnings Greatly Exceeded Amount of Income Reported on Tax Returns

For purposes of its child support award, the Supreme Court properly imputed an annual income to the plaintiff based, inter alia, on undisputed evidence that his businesses paid for virtually all of his personal expenses, so that his actual earnings greatly exceeded the amount of income which he reported on his tax returns.

Beroza v Hendler, 71 AD3d 615 (2d Dept 2010)

Violation of Child Support Order Was Not Willful

Contrary to the Family Court's determination, the father sustained his burden of demonstrating his financial inability to make the payments required by the child support order dated April 18, 2008. The father presented uncontroverted evidence that, upon losing his position as a security guard in 2004, he was able to obtain only sporadic employment with low wages, and had no savings or other assets. Under these circumstances, the finding that his violation of the child support order was willful was not supported by the record.

Matter of Westchester County Commr. of Social Servs. v Perez, 71 AD3d 906 (2d Dept 2010)

Vacating Prior Support Order Violated CSSA Requirement That Mother Pay Minimal Child Support

In vacating a prior support order, thereby relieving the mother of any obligation to pay child support, the Support Magistrate violated the requirement of the Child Support Standards Act that she be required to pay child support of at least $25 per month (*see* Family Ct Act § 413 [1] [d] [g]). In addition, the Support Magistrate improperly vacated the mother's child support arrears as the Family Court could not reduce or vacate the arrears which accrued prior to the date of the mother's petition.

Matter of Moore v Abban, 72 AD3d 970 (2d Dept 2010)

Father Failed to Present Evidence That His Illness Prevented Him From Working

The father failed to establish a substantial change in circumstances warranting a downward modification of his support obligation. He testified that he was diagnosed with cancer in December 2007, and that he was unable to work after that time due to his illness and treatment. However, he sought reduction of his obligation commencing only in May 2008, when he filed his petition. He testified that he completed chemotherapy one month after he filed his petition, and he further testified that his cancer was in remission. Further, the record supported the Support Magistrate's determination that the father failed to present credible evidence at the hearing that his symptoms or condition at the time of the petition and hearing prevented him from working. Contrary to the father's contention, the evidence that he was receiving Social Security disability benefits did not, by itself, preclude the Family Court from finding that he was capable of working.

Matter of Karagiannis v Karagiannis, 73 AD3d 1064 (2d Dept 2010)

Father Could Not Avoid His Obligation to Pay for Daughter's College Expenses

Where the parties' stipulation contemplated that both contribute to their children's college expenses equally, the father could not avoid his contractual obligation solely based on the ground that the mother did not discuss the matter with him, as required by the stipulation. Since the father took no action to object to his daughter's choice of school or to apply to be relieved of his obligation regarding her higher tuition, he "tacitly agreed" to her college choice by his conduct.

Matter of Parker v Parker, 74 AD3d 1076 (2d Dept 2010)

Father Was Aware of His Right to Be Represented by Counsel

In a proceeding commenced by the father for a downward modification of his child support obligation,

the Support Magistrate was not required to conduct an inquiry as to whether the father understood and knowingly accepted the perils of self-representation prior to conducting the hearing. In any event, the record demonstrated that the father was aware that he had a right to be represented by counsel, inasmuch as he had been represented by counsel for approximately six months during the proceeding.

Matter of Savarese v Galgano, 74 AD3d 1083 (2d Dept 2010)

Resources Available to Support Children of Marriage Were Less than Resources Available to Support Subject Child

The Family Court could only take the needs of the father's other two children into account if the resources available to support them were less than the resources available to support the child who was the subject of the proceeding. Since the father's wife's income was less than the income of the mother, the resources available to support the children of his marriage were less than the resources available to support the subject child. Therefore, a new hearing and determination was required with respect to whether the child support obligation imposed was unjust or inappropriate in light of the father's obligation to support the children of his marriage.

Matter of Hudgins v. Blair, 74 AD3d 1199 (2d Dept 2010)

Support Magistrate Failed to Articulate Basis for Applying Statutory Percentage

While the Family Court properly granted the father's objection to that portion of the Support Magistrate's order which directed him to pay child support in the sum of $340 per week, to the extent of remitting the matter to the Support Magistrate because it failed to sufficiently articulate the reasons for applying the statutory percentage to the combined parental income in excess of $80,000 annually, the Family Court incorrectly directed the Support Magistrate to make additional findings only "if warranted." Accordingly, the order was modified clarifying the Support Magistrate's duty to articulate the basis for the application of the statutory percentage to the combined parental income over $80,000.

Matter of Smith v Evans, 75 AD3d 603 (2d Dept 2010)

Respondent Properly Ordered to Pay Arrears

Mother obtained a child support award upon proof that her 20-year-old son was living with her until he joined the military. Following a hearing, the father was directed to pay arrears to account for that period. Family Court's denial of his objections was affirmed on appeal. In addition to the requisite proof that the son was living with the mother and not emancipated, the father did not substantiate his claim that his share of the basic child support obligation was unjust or inappropriate.

Matter of DiOrio v Rossman, 73 AD3d 1352 (3d Dept 2010)

Sufficient Change in Circumstances and Hardship Warranted Modification of Father's Child Support

The parties stipulated to child support based upon the father's imputed income even though he was then basically unemployed. Two years later, after the father's attempts to obtain steady employment failed, he sought a downward modification of child support. The Support Magistrate dismissed the petition for the father's failure to show a sufficient change in circumstances but Family Court reversed and reduced his child support. The mother appealed, arguing that since the father was unemployed when he stipulated to the amount of child support, his continued unemployment does not constitute an unanticipated change in circumstances. The Appellate Division disagreed and affirmed holding that the child support amount was based upon agreed-upon imputed income and the father's expectation that he would soon secure employment. He was only able to meet his support obligations, however, by exhausting the $35,000 distributive award that he had received upon the divorce. Accordingly, the father established a sufficient change in circumstances and hardship warranting a modification of child support.

Matter of Silver v Reiss, 74 AD3d 1441 (3d Dept 2010)

Father to Pay His Share of the Children's Sports and Extracurricular Activities

The mother filed a violation petition alleging that the father had not paid his share of the costs for the children's sports and extracurricular activities as set forth in their separation agreement and divorce. Following support hearings and objections by the father, Family Court determined the father's support arrears and, in a separate order, awarded the mother counsel fees. On appeal, the father argued that he should not have to pay for activities which he had not consented to and which the mother had not requested. However, the separation agreement did require either party's express consent to the children's activities as a precondition to the obligation to pay his or her share. As they were obligated to share the costs of "mutually acceptable extracurricular activities," the record supported the conclusion that the father had known of and accepted the children's extracurricular activities given the extensive time he spent with the children and his failure to present any contrary evidence at the hearing. Additionally, the record supported the mother's claim that she did not submit regular billings to the father because he had made it clear that he would not pay them even had she done so and, in fact, he had not paid certain of the children's medical bills despite her requests. Moreover, the father's challenge to the amount of the expenses was not preserved for review due to his failure to specifically object to the Support Magistrate's findings in that regard; nor was the father given credit for the amount he allegedly overpaid his basic child support obligation. The separation agreement provided that, after one year and annually thereafter, child support of $1,000 per month was to increase by 5% and include 15% of the portion of his income in excess of $80,000. The father failed to establish that he had paid more than that amount.

Matter of Costopoulos v Ferguson, 74 AD3d 1457 (3d Dept 2010)

Violation Finding Reversed Due to Ineffective Assistance of Counsel

When the father sought a downward modification of support based upon alleged injuries from a car accident that rendered him unable to work, the mother sought enforcement. The Support Magistrate found the father in willful violation and assessed arrears. Following a hearing, Family Court ordered that the father reimburse the mother pursuant to Judiciary Law § 773 for costs she had incurred in pursuing the violation, including her expenses, lost wages and travel expenses to attend the hearing. The father contended that he did not receive the effective assistance of counsel and the Appellate Division agreed. It was undisputed that the father received injuries in a car accident, and his sole defense to the willful violation proceeding was that he was unable to work because of the injuries. Nonetheless, his counsel, despite repeated attempts, failed to obtain his extensive medical records. As such, there was no proof presented regarding the father's medical condition. Family Court found the lack of such proof fatal to the father's defense. Under these circumstances, the court found merit to the father's ineffective assistance of counsel.

Matter of Templeton v Templeton, 74 AD3d 1513 (3d Dept 2010)

Jail Term and Money Judgment for Violation Affirmed

Father was under court order to pay child support and when he failed to do so, the mother filed a violation petition. The father appeared and admitted, in response to which Family Court imposed a six-month suspended sentence contingent upon him remaining current in his child support. He almost immediately fell behind, prompting a second violation petition. When various attempts to locate and serve him failed, Family Court authorized DSS to effect service at the address of his sister, where he previously indicated he could be reached. Service was completed within one month of notice from respondent that he could be reached there—and a warrant for his arrest was issued. The record was silent as to what transpired in the six years between the warrant and the hearing. At the conclusion of that hearing, at which the father testified, Family Court found him to be in willful violation of the prior order of support, entered a money judgment and ordered two consecutive six-month terms in jail—one for each violation. On appeal it was held that even though respondent was not served with a copy of the order or with any summonses issued by Family Court, DSS exercised due diligence in attempting to locate him for service of process and the service method

ultimately employed was entirely proper. Respondent was present in court with counsel and had a full opportunity to be heard at the hearings on both violations.

Matter of Amy V. v Carlos V., 74 AD3d 1643 (3d Dept 2010)

Referee's Refusal to Impute Income Not Abuse of Discretion

Supreme Court, among other things, directed plaintiff father to pay $103.85 per week in child support. The Appellate Division affirmed, rejecting defendant mother's contention that the Referee should have imputed additional income to the father in calculating his child support obligation. The record established that the father's prior employment ended when his employer terminated the part of the business in which he was employed. In addition, the father did not significantly decrease his income by starting his own business rather than accepting similar employment from another employer. Finally, the mother's contention that the father should have been required to maintain life insurance for the benefit of the children was not preserved for review.

Hurley v Hurley, 71 AD3d 1470 (4th Dept 2010)

Order Directing Defendant Father to Pay Weekly Child Support Affirmed

Supreme Court directed defendant father to pay weekly child support in the sum of $100.00 to plaintiff mother. The Appellate Division affirmed. Contrary to the father's contention, the court properly determined that the parties had a shared custody arrangement and that the father was the noncustodial parent. The father failed to establish that he had physical custody of the child for a majority of the time. Contrary to the mother's contention on her cross-appeal, the court properly calculated the amount of child support and the parties' respective shares. The court was not required to determine the mother's income based on her federal tax return for the previous year because she was receiving a higher salary at the time of the hearing. The court properly set forth its reasons for determining that it was unjust and inappropriate to require the father to pay child support pursuant to the statutory percentage and thus that it was necessary to deviate from that percentage. Finally, the court did not abuse its discretion in permitting the father to claim the child as a tax exemption.

Eberhardt-Davis v Davis, 71 AD3d 1487 (4th Dept 2010)

Order Determining Child Support Obligations Affirmed

Supreme Court determined the child support obligations of the parties, including their respective shares of education expenses. The Appellate Division affirmed. Plaintiff father's appeal was treated as valid despite the fact that he appealed from the order rather than the judgment of divorce. The court did not abuse its discretion in setting a cap of $160,000 for the combined parental income and it properly set forth the factors it considered in deviating from the $80,000 statutory cap. Further, the court did not err in directing father to pay his pro rata share of the children's private school tuition because the appropriate special circumstances existed, including the educational background of the parents, the children's academic ability, and the parents' financial ability to provide the necessary funds.

Matter of Francis v Francis, 72 AD3d 1594 (4th Dept 2010)

Court Properly Dismissed Petition For Child Support

Family Court dismissed mother's petition for an award of child support and granted respondent father's objections. The Appellate Division dismissed the father's cross- appeal because he was not an "aggrieved party" and otherwise affirmed. The court properly dismissed the petition because petitioner failed to establish that the parties' agreement was unfair or that there was a requisite change in circumstances. The fact that the order contained language or reasoning that respondent deemed adverse to his interests did not provide him with a basis for standing to take an appeal.

Matter of Cooper v Cooper, 74 AD3d 1868 (4th Dept 2010)

Respondent Willfully Violated Order of Child Support

Family Court found that respondent father willfully violated an order of child support and sentenced him to 30 days in jail. The Appellate Division affirmed. The father's contentions in this case were the same as those raised in *Matter of Paige v Paige* (50 AD3d 1542) and the order here was affirmed for the reasons set forth in that case. The Appellate Division noted that contrary to the further contentions of the father, the court properly refused to issue a suspended commitment order and the father received meaningful representation.

Matter of Burris v Loving, 899 NYS2d 687 (4th Dept 2010)

Order Committing Respondent to Jail for Six Months Reversed

Family Court committed respondent mother to Cattaraugus County Jail for a term of six months for violation of a prior child support order. The Appellate Division reversed. The court erred in finding the mother in willful violation of the prior support order. Although petitioner agency established that the mother failed to pay support, the mother presented competent, credible evidence of her inability to make the required payments. The court further erred in continuing the prior order of support and denying the mother's petition seeking a downward modification. The mother was unable to maintain steady employment and her income level was well below the poverty line and thus her support obligation should have been reduced to $25 a month. The mother's contention that the court erred in failing to cap her unpaid support was raised for the first time on appeal and was not preserved for review.

Matter of Cattaraugus County Dept. of Social Servs. v Stark, 75 AD3d 1098 (4th Dept 2010)

COURTS

Family Court Had Jurisdiction Over Family Offense Proceedings

Since the petitioner resided in a shelter located in Queens County when she commenced two related family offense proceedings, the Family Court, Queens County, had jurisdiction even though the acts allegedly occurred in Bronx County.

Matter of Barta v Barta, 71 AD3d 764 (2d Dept 2010)

CRIMES

Photographic Array Was Not Unduly Suggestive

The hearing court properly denied that branch of the defendant's omnibus motion which was to suppress identification testimony. Contrary to the defendant's contention, the various persons depicted in the photographic array used in the pretrial identification procedure were sufficiently similar in appearance to the defendant and there was little likelihood the defendant would be singled out for identification based on particular characteristics.

People v Curtis, 71 AD3d 1044 (2d Dept 2010)

Defendant Improperly Relied Upon Trial Testimony to Challenge Court's Denial of Suppression Motion

The defendant improperly relied, in part, upon trial testimony to challenge the hearing court's determination which denied suppression of the showup identification evidence. The Appellate Division noted that trial testimony may not be considered in evaluating a suppression ruling on appeal. In any event, the defendant's contention was without merit. The showup took place within an hour of the commission of the crime, where the "getaway car" was found, five miles from the scene of the crime, and in the context of a continuous, ongoing investigation.

People v Hudson, 71 AD3d 1046 (2d Dept 2010)

Although Detention Was Justified, Subsequent Frisk Was Not

Contrary to the determination of the County Court, the police officer, who had received a radio report of a burglary, possessed the requisite reasonable suspicion to stop and detain the defendant for a showup identification. However, although the detention was justified, the subsequent frisk, which occurred before the showup was conducted, was not. At the hearing, the police officer failed to articulate any fact or

circumstance which would support a reasonable suspicion that the defendant was armed. Accordingly, the small flashlight recovered from the defendant's pocket was properly suppressed.

People v Mais, 71 AD3d 1163 (2d Dept 2010)

Police Officer Was Justified in Directing Defendant to Raise His Hands

The defendant's motion to suppress physical evidence and statements he made to law enforcement officials was denied. The initial encounter between the defendant and the police was lawful in its inception. The information already possessed by the arresting officer provided him with an objective, credible reason to approach the defendant and ask him why he was in the building and whether he lived there. After the defendant told the arresting officer that his girlfriend lived in the building, and the defendant knocked on the door of an apartment but failed to receive a response, the arresting officer was justified in requesting the defendant to produce identification. Since the arresting officer recalled that he had previously seen a poster on the wall of the Housing Unit containing the defendant's name and photograph, indicating that he was known to carry a gun, he was justified in directing the defendant to raise his hands, as he had reasonable suspicion that the defendant had committed or was committing a felony or misdemeanor. Once the defendant's t-shirt rose, allegedly revealing a portion of what appeared to be the handle of a gun, and the defendant fled, the arresting officer had probable cause to arrest the defendant.

People v Hill, 72 AD3d 702 (2d Dept 2010)

Defendant Was Lawfully Stopped and Detained Before Being Identified

The defendant's motion to suppress identification testimony was denied. Since the description of the defendant, though limited, was broadcast to police units near the scene, the stop by the backup police unit that occurred at approximately 4:00 a.m., at a distance of no more than four houses away from the crime scene, and within two minutes of the call by the witness to the 911 operator, was, under the totality of the circumstances, justified. The prosecution presented sufficient evidence to establish that the defendant was lawfully stopped and detained before being identified by the complainant.

People v James, 72 AD3d 844 (2d Dept 2010)

Normal Police Procedures Would Have Led to Recovery of Gun

Following a hearing, the Supreme Court properly concluded that the People established a "very high degree of probability" that normal police procedures would have led to recovery of the gun from the defendant's bedroom independently of a prior, illegally-obtained statement.

People v Trotter, 74 AD3d 1107 (2d Dept 2010)

CUSTODY AND VISITATION

Court Improperly Delegated Its Authority to Mental Health Professional

Supreme Court found that respondent father should have unsupervised visitation with his child after a transition period managed by an "intervention therapist." The Appellate Division modified. Despite the attorney for the child's position to the contrary, the decision that the child should transition from supervised to unsupervised visitation had ample support on the record, including the opinion of the court-appointed forensic psychologist and the testimony of impartial witnesses that the child seemed comfortable and relaxed while visiting the father. However, the court improperly delegated to a mental health professional the court's authority to determine issues involving the best interests of the child, i.e., when unsupervised visitation should commence. The parties can make another application to the court regarding unsupervised visitation at which time the court may render a decision on that issue. During the transition period from supervised to unsupervised visitation, and subject to further order of the court, it was in the best interests of the child that the father should have decision-making authority regarding the child's mental health Finally, there was never any suggestion by the father himself or his attorney that the mother was a flight risk or had any intention of removing the child to Canada and therefore the directive ordering the mother

to surrender the child's passport was deleted from the order.

Linda R. v Ari Z., 71 AD3d 465 (1st Dept 2010)

Custody Arrangement in Child's Best Interests

Supreme Court awarded primary residential custody of the parties' child, as well as final decision-making authority on health related issues, extracurricular activities, and education through eighth grade to defendant mother and granted plaintiff father final decision-making authority on religion and education after eighth grade and issued a comprehensive access schedule. The Appellate Division affirmed. In reaching its determination, the court properly considered the appropriate factors, including the mother's traditional role as the child's primary care-giver, the strengths and weaknesses of both parent's and the child's need for nurturing, guidance and meaningful involvement of both parents. Further, the court gave proper consideration to the fact that both parents, at times, placed their own needs above the child's best interests. It was noted that despite the father's contention, the German court to which he applied for return of the child did not declare the mother a kidnapper or child abductor. Rather, the record showed that the Hague Convention proceedings were dismissed without any such finding. In order to allay the father's fears, the court properly directed that neither party can remove the child from this country without the express written consent of the other parent or an order of court. Disobeying the court's ban would permit the other party to petition for the return of the child under terms of the Hague Convention on Civil Aspects of International Child Abduction.

White v White, 71 AD3d 473 (1st Dept 2010)

Petition for Custody Properly Dismissed

Family Court dismissed petitioner's application for custody of the subject child. The Appellate Division affirmed. The court properly considered the child's best interests in denying the application of petitioner, who was not related to the child, for custody. The record showed that petitioner did not file a petition for adoption, whereas the foster mother, who had provided a loving and stable environment for the child for the majority of his life, wished to adopt him. The Appellate Division noted that the attorney for the child advanced cogent arguments in support of an affirmance. Petitioner's contention that the court erroneously relied on Social Services Law § 383 in its determination was unpreserved.

Matter of Ernestine L. v New York City Admin. for Children's Servs., 71 AD3d 510 (1st Dept 2010)

Petition for Visitation Properly Dismissed

Supreme Court dismissed father's petition for visitation. The Appellate Division affirmed. Given petitioner's repeated abductions of the parties' children, violations of court orders of visitation and protection, and long history of domestic violence against the children's mother, the court properly determined that visitation was not in the children's best interests. Further, petitioner's record demonstrated his contempt for the authority of the court, his disregard for the safety and well-being of the children, and his failure to appreciate the psychological impact of his repeated abductions of the children.

Matter of James W. v Theresa D., 71 AD3d 556 (1st Dept 2010)

Action Dismissed as Moot

Family Court denied respondent father's motion to vacate default orders of protections and custody and visitation. The Appellate Division dismissed the action as moot. The father's subsequent filing of a new custody petition and his consent to satisfaction of that petition by entry of a final order of visitation rendered the appeal moot. Likewise, the expiration of the order of protection rendered the father's appeal to vacate that order moot. Were the court to reach the merits, it would have found that the father failed to demonstrate a reasonable excuse for his default and a meritorious defense to the mother's claims.

Matter of Sandra G. v Victor P., 71 AD3d 588 (1st Dept 2010)

Brother's Petition Seeking Visitation With Sisters Properly Denied

Family Court denied the petition of brother seeking visitation with his younger sisters. Domestic Relations Law § 71 provides that the decision whether to grant sibling visitation is to be made under the "best interests of the child" standard. Here, there were no allegations or evidence that respondents adoptive parents of the sisters, were not fit parents, and the parents strongly objected to visits between petitioner and his sisters. There was evidence that petitioner's behavior was troubling and respondents' expert testified that the prospect of visits with the brother caused the sisters great anxiety and was not in their best interests. Additionally, there was no familial bond between brother and sisters and respondents were the only real family the sisters had ever known.

Matter of Keenan R. v Julie L., 72 AD3d 542 (1st Dept 2010)

Grandparent's Petition for Custody Denied

Following a hearing, Family Court dismissed grandparent's petition for custody. The Appellate Division affirmed. A grandparent has no preemptive statutory or constitutional right to custody superior to persons selected by the agency as adoptive parents. A grandparent's petition for custody may be dismissed where the children have been in the foster home for many years, the home is appropriate, the children have bonded with the foster parent and wish to remain in the home. The children here had lived with the nonkinship foster mother for 8 of their 11 years and were happy and thriving in that home.

Matter of Geneva B., 73 AD3d 406 (1st Dept 2010)

Respondent's Decision to Represent Herself Was Knowing, Intelligent and Voluntary

Family Court, after a trial, awarded custody of the parties' child to petitioner father. The Appellate Division affirmed. This matter was not effectively decided at a hearing that should not have been conducted. Petitioner was awarded custody of the child after a hearing and subsequently respondent mother's default on the original date was vacated and a full trial was conducted six months later. While the court could not have been oblivious to petitioner's legal and physical custody of the child during the period before the full hearing, the court's final decision after the full hearing was largely based upon properly considered *Escbach* (56 NY2d 167) factors. There was no indication in the record that the court's final decision significantly relied on petitioner's testimony at the original hearing or the circumstances of respondent's default. The court did not deprive respondent of her right to counsel by allowing her to represent herself because the court repeatedly apprised her of her right to assigned counsel and the consequences of proceeding pro se. The court did not err by not appointing an attorney for children because such appointment was unnecessary to the resolution of the custody issue where the court had an extremely detailed forensic report as well as home studies.

Matter of Lionel E. v Shaquana R.B., 73 AD3d 434 (1st Dept 2010)

Mother Unwilling to Facilitate Close Relationship Between Father and Child

Family Court awarded custody of the parties' child to petitioner father. The Appellate Division affirmed. The award was properly made based upon a record that supported findings that respondent mother was either unwilling or unable to facilitate a close relationship between the father and child. The father, who had temporary custody of the child since December 2005, when the child was 3 ½ years old, had been appropriately addressing the child's needs. The court properly admitted the mother's medical records because she waived whatever privilege against disclosure that she may have had. The court also properly admitted text and voice mail messages sent by the mother to the father because mother admitted to sending many of them and father otherwise authenticated the voice mail recordings.

Matter of Edward F. v Karima G., 73 AD3d 453 (1st Dept 2010)

Order of Protection on Behalf of Child Properly Granted

Family Court, among other things, awarded petitioner

mother sole physical and legal custody of the parties' child and issued a five-year order of protection forbidding respondent father from exercising any corporal punishment against the child. The Appellate Division affirmed. There was no basis for striking the forensic psychologist's testimony. Although the forensic psychologist's report was not in the record, the attorney for the child submitted the report to the Appellate Division. Respondent never contended that he lacked an opportunity to read the report and therefore he could not complain that his appeal had been impaired by the Family Court Clerk's failure to produce the report. In view of respondent's testimony that he believed in physically disciplining the child and had once used a belt to do so, the court properly issued a five-year order of protection directing him to refrain from such acts. An order of protection under FCA § 656 need not be justified by aggravating circumstances in order to exceed a year in duration, and, because the order was issued only on behalf of the child, petitioner was not required to allege an assault, nor was the court required to issue a summons or a warrant. The Court also upheld the denial of respondent father's motions to dismiss the custody petitions for failure to comply with the procedural time limitations in 22 NYCRR § 205.14 and CPLR 2219 (a), noting, among other things, that neither of those authorities provides a remedy or penalty for failing to comply with time requirements. Contrary to respondent's contention, the court's authorization to pay his portion of the forensic evaluation at government expense was not tantamount to a finding that he was indigent – that relief was not granted because of poverty, but because of the court's desire for a thorough and balanced forensic evaluation.

Matter of Anderson v Harris, 73 AD3d 456 (1st Dept 2010)

Court Improperly Conditioned Visitation on Children's Wishes

Supreme Court awarded respondent mother sole legal and physical custody of the parties' three teenaged children. The court set an access schedule allowing the father to call the children three times a week and to have supervised visitation with them once a month for three hours. The order provided that if the children refused to visit the father they would not be forced to do so and that the mother was not required to make them visit the father. The Appellate Division reversed and remitted on the ground that a court may not delegate its authority to determine visitation to either a child or a parent. The Appellate Division noted that on remittal, in light of the children's ages and the mother's claim that the children were reluctant to visit the father, the court should consider, after consultation with counsel, appointing an attorney for children and holding a *Lincoln* hearing.

William-Torand v Torand, 73 AD3d 605 (1st Dept 2010)

Relocation of Custodial Parent in Child's Best Interests

Family Court granted petitioner mother leave to relocate to Florida with her child and granted the paternal grandmother supervised visitation with the child. The Appellate Division affirmed. As a result of the relocation the mother and child were able to obtain a suitable apartment rather than living in a series of homeless shelters in New York. They were able to benefit from supportive relationships with family members that lived nearby in Florida and the child seemed happy in her new environment. Although the relocation would limit the visitation between father and child, the court found that he was a "visiting father" who had never lived with the child for any extended period. Moreover, given the father's history of domestic violence, the mother's stated fear of father appeared to be well founded. The determination that the paternal grandmother have supervised visitation had a sound basis in the record.

Matter of Melissa Marie G. v John Christopher W., 73 AD3d 658 (1st Dept 2010)

Intermediate Orders in Habeas Corpus Proceeding Not Appealable

Family Court, among other things, granted father's petition for a writ of habeas corpus directing mother to produce the parties' child in New York for custody and visitation proceedings. Mother and father were still married, mother had gone to her parents in Texas with father's permission and did not return upon father's request. The Appellate Division dismissed the appeals. The orders appealed from were intermediate orders in a

habeas corpus proceeding and thus were not appealable. The threshold issue whether the court has subject matter jurisdiction could be resolved by allowing the mother to testify by electronic means. There was no need to disrupt child's schooling until the threshold issue of jurisdiction was resolved.

Carter v Wesson, 74 AD3d 407 (1st Dept 2010)

Grandmother Properly Awarded Sole Custody of Child and Permission to Relocate

Family Court granted grandmother's petition for modification of a 2005 order giving her physical custody of the child in a joint custody arrangement with respondent parents, denied respondent mother's cross petition for sole custody, and awarded sole custody to grandmother with permission to relocate with the child to Florida. The Appellate Division affirmed. The 2005 custody arrangement was granted on consent and mother failed to show a sufficient change in circumstances to support her cross petition. Extraordinary circumstances were established by evidence of the parents' persistent neglect and the prolonged separation between the parents and child, who had lived with petitioner for over three years. Based upon the totality of the evidence, including evidence of the parent's past performance and the need to maintain stability for the child, there was no basis to disturb the court's award of custody to the grandmother with permission for the child to remain with her in Florida.

Matter of Iris R. v Jose R., 74 AD3d 457 (1st Dept 2010)

Petitioner Should Have Been Allowed to Take Notes During Review of Forensic Report

Family Court denied petitioner's application that he be provided with a copy of a forensic report to prepare for a custody trial. The Appellate Division modified. The court did not improvidently exercise its discretion in denying the pro se petitioner's request for a copy of the forensic report because he was allowed to review it in court. However, petitioner should have been allowed to take notes during the in court review because he was proceeding pro se and opposing counsel had unfettered access to it. The better practice in most cases would be to give counsel and pro se litigants the same access to the forensic reports under the same conditions.

Matter of Isidro A.-M. v Mirta A., 74 AD3d 673 (1st Dept 2010)

Children Would Benefit From Custody to Father

Family Court granted a final order of custody to petitioner father with visitation to respondent mother. The Appellate Division affirmed. There was no basis for disturbing the court's finding that while both parents were fit to act as custodian on most counts, the children would benefit from returning to father. The record supported the findings that father demonstrated an ability to recognize the children's needs, while mother failed to consider the impact of refusing to return the children to their father in 2005, lacked an adequate parenting plan, and had an inconsistent work schedule that exacerbated the children's emotional and academic problems. The court properly considered the benefits of keeping the siblings together and the lack of any stated preference of the children.

Matter of Thomas S. v Letisha S., 74 AD3d 695 (1st Dept 2010)

Order Granting Sole Custody to Father Reversed

The Family Court's determination to grant the father's petition for sole custody of the child lacked a sound and substantial basis in the record and, thus, could not be upheld. The Family Court gave insufficient weight to the fact that the mother had been the child's primary care provider since the child's birth, having provided for both the child's emotional and intellectual development. There was no evidence that the father sought to have any relationship with the child prior to June 2008. Furthermore, the father, who had history of drug abuse, repeatedly avoided drug testing during the pendency of the custody matter. Order reversed.

Matter of Marrero v Centeno, 71 AD3d 771 (2d Dept 2010)

Relocation to North Carolina Not in Child's Best Interests

The record lacked a sound and substantial basis for the

court's determination that relocation was in the child's best interests. The mother's proposed employment situation in North Carolina was tenuous at best, the father's visitation with the child would have been dramatically reduced by the relocation, and the mother failed to demonstrate by a preponderance of the evidence that the proposed move would have enhanced the child's life economically, emotionally, and educationally.

Rubio v Rubio, 71 AD3d 862 (2d Dept 2010)

Hearing Testimony Established Change in Circumstances

The hearing testimony established that since the issuance of the consent order of custody, the father had been convicted, inter alia, of attempted murder in the second degree of the subject child and an order of protection had been issued by Westchester County Court in favor of the mother and the child and against the father until 2039. Accordingly, the Family Court's determination that there had been a change in circumstances since the issuance of the consent order of custody and that it was in the child's best interests to modify that order so as to award the mother sole custody was supported by a sound and substantial basis in the record.

Matter of Gilleo v Williams, 71 AD3d 1023 (2d Dept 2010)

Change of Custody Not Warranted

The Family Court's determination that a change of custody was warranted because the mother seemingly placed her own interests before those of her children and did not provide the same stability in the home as the father could provide lacked a sound and substantial basis in the record. While neither parent was unfit, and either would have provided the child with a comfortable and loving home, the children had resided in the mother's home since 2003, when the father left the marital home and relocated out-of-state. While living with their mother, the children thrived both at home and in school. It was noted that this custody arrangement was supported by the position taken by the attorney for the children. Order reversed.

Matter of Russell v Russell, 72 AD3d 973 (2d Dept 2010)

Child Was Alienated But Record Did Not Support Change of Custody to Father

The record supported a finding that the divorced parties' son was alienated from the father, the noncustodial parent, with, among other factors, both the mother and father having contributed to the deterioration of that relationship. Although the father made serious and good faith attempts at reconciliation over the past several years, the son—who was then 17 1/2 years of age, and was scheduled to graduate high school in June 2010, to attend a program in Israel which was to commence in August 2010, and thereafter to begin college—had strongly voiced, to both the Family Court and his appointed attorney, his objections to being forced to visit with his father. Despite repeated attempts by the Family Court over several years to ameliorate the alienation, and some therapeutic intervention, the son remained alienated. Under these circumstances, it was an improvident exercise of discretion, unsupported by a sound and substantial basis in the record, to change custody to the father and force the son to interact with the father, sever his contact with his mother and siblings for a three-month period, and compel him to undergo intensive therapeutic counseling. Order reversed.

Matter of Schick v Schick, 72 AD3d 1100 (2d Dept 2010)

Family Court Resolved Conflicting Testimony in Favor of Father

The best interests of the child were served by awarding custody to the father. Although the mother accused the father of being the aggressor in certain altercations they had, he denied those allegations, and the Family Court resolved the conflicting testimony in favor of the father. The Appellate Division could find no basis to disturb the Family Court's credibility determination. Moreover, the mother admitted to certain allegations of her own violent behavior against the father. Evidence of the mother's acts of domestic violence demonstrated that she possessed a character which was ill-suited to the difficult task of providing her young child with moral and intellectual guidance.

Matter of Julie v Wills, 73 AD3d 777 (2d Dept 2010)

Award of Residential Custody to Father in Children's Best Interests

Contrary to the mother's contention, there was sound support in the record for the determination that an award of residential custody to the father was in the children's best interests. The father testified as to the arrangements he had made for the children's care since the mother left the household. Further, the evidence indicated that the children continued to live in the same house near their friends and to attend the only school they ever had attended, in which they were doing well.

Matter of McDonough v. McDonough, 73 AD3d 1067 (2d Dept 2010)

Maternal Aunt Demonstrated Extraordinary Circumstances

The Family Court properly determined that the petitioner, a maternal aunt who has had physical custody of the subject children for an extended period of time since their mother's death, sustained her burden of demonstrating extraordinary circumstances in this case. Moreover, the Family Court's determination that an award of custody to the petitioner was in the best interests of the subject children was supported by a sound and substantial basis in the record.

Matter of Drake v Carroll, 73 AD3d 1172 (2d Dept 2010)

Relocation to North Carolina Not in Child's Best Interests

The father had visitation with the child on alternate weekends and twice a month mid-week for three hours, which he never missed. The mother sought permission to relocate with the parties' child to North Carolina to live with the maternal grandmother, who would care for the child while the mother attended college to obtain a degree in special education. These reasons did not justify the uprooting of the child from the only area he had ever known, where he was thriving academically and socially, and where a relocation would have qualitatively affected his relationship with his father.

Matter of Messler v. Simovic, 73 AD3d 1180 (2d Dept 2010)

Visitation Schedule With Father Who Resided in Florida Found to Be Excessive

While the Appellate Division agreed with the Family Court that the father should be afforded frequent and meaningful visitation with the child, the Court disagreed with the amount of visitation time awarded in Florida until the child started school at the age of five. The visitation schedule should have allowed for a period of weekend visitation and some holiday visits in New York until the child adapted to visiting with his father. After this period, the visitation schedule could eventually progress to the child and father having some holiday and summer vacation visits in Florida.

Matter of Aguirre v. Romano, 73 AD3d 912 (2d Dept 2010)

Family Court Improperly Delegated Authority to Determine Future Issues Involving Visitation to a Therapist

The Family Court's order provided that the father's access to the child was to remain suspended until the child's treating therapist recommended that the father's access be reinstated. The Appellate Division found that the Family Court improperly delegated the authority to determine future issues involving visitation to a therapist. It was noted that suspending the father's visitation with the subject child in no way precluded the father from seeking a modification as to his visitation rights at some later date should the totality of the circumstances indicate that to do so would be in the best interests of the child.

Matter of Balgley v Cohen, 73 AD3d 1038 (2d Dept 2010)

Therapeutic Supervised Visitation Not in Child's Best Interests

The Family Court's determination that therapeutic supervised visitation would have been psychologically detrimental to, and not in the best interests of, the subject child had a sound and substantial basis in the record. To the extent that the Family Court relied upon

the *in camera* interview of the then-12-year-old child, it was entitled to place great weight on the wishes of the child, who was mature enough to express his wishes. Further, the Family Court did not improvidently exercise its discretion in declining to proceed with psychological evaluations of the parties before suspending visitation. The Family Court had the benefit of the reports of the director of the relevant supervised visitation program at the YMCA and the child's therapist, a letter from the father's therapist, the in camera interview of the child wherein the Family Court was able to assess firsthand the child's feelings towards the father and the prospect of having to engage in therapeutic supervised visitation with him, and the position advocated by the attorney for the child.

Matter of Mera v Rodriguez, 73 AD3d 1069 (2d Dept 2010)

Grandmother's Petition for Visitation Improperly Dismissed

The Family Court improperly dismissed the grandmother's petition for visitation with the subject child without first conducting a full inquiry into the matter to determine whether such visitation was in the child's best interests. The record revealed that the Family Court terminated the hearing held on the petition without conducting an in camera interview with the child and without permitting the grandmother to complete her presentation. Additionally, the Family Court failed to admit into evidence a forensic evaluation report prepared by a clinical psychologist at the Family Court's direction and did not give the parties an opportunity to examine the forensic expert. Finally, in determining that visitation with the grandmother was not in the child's best interests, the Family Court failed to consider whether any alternatives to unsupervised visitation, such as supervised visitation and/or limited telephone contact, would be in the child's best interests.

Matter of Robinson v Lewis, 73 AD3d 1183 (2d Dept 2010)

Relocation to State of Washington Permitted

Contrary to the contention of the attorney for the children, the mother established by a preponderance of the evidence that relocation to the State of Washington was in the best interests of the parties' three children. 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 she were permitted to relocate, she would receive financial assistance, including assistance in finding employment and housing, from extended family members in the State of Washington, one of whom had offered her an apartment rent free.

Matter of Harrsch v Jesser, 74 AD3d 811 (2d Dept 2010)

Visitation With Grandfather Terminated

The Supreme Court, after a hearing, denied the grandfather's motion seeking unsupervised visitation and, in effect, modified the prior stipulation and terminated all visitation between the grandfather and the child. Contrary to the grandfather's contentions, the record demonstrated that there was, in fact, a change of circumstances justifying a modification of the stipulation. The Supreme Court noted that the grandfather had an "unsatiable and obsessive desire to inform the subject child of her family's tragic past," that during the first therapeutic meeting, the grandfather, inter alia, engaged in "ill suited conversation with his grandchild," during which he sought to explain the circumstances surrounding the death of his daughter, who was the mother of the child. Moreover, there was evidence in the record that, after the meeting, the child was distressed and suffered adverse health. Under the circumstances, the Supreme Court's order, which was consistent with the position of the attorney for the child, had a sound and substantial basis in the record. Accordingly, the Supreme Court providently exercised its discretion in determining that visitation with the grandfather was not in the best interests of the child.

Murphy v Diem, 74 AD3d 814 (2d Dept 2010)

Change of Custody Required Hearing

While custody may properly be fixed without a hearing where sufficient facts are shown by uncontroverted affidavits, here, the record revealed that there were disputed issues. Further, the alleged misconduct of the mother did not dispense with the need for a hearing

with respect to the change in circumstances and the best interests of the children. Therefore, it was error for the Supreme Court to change custody of the children, even temporarily, without first holding a hearing.

Matter of Odeh v Assad, 74 AD3d 1345 (2d Dept 2010)

Hearing Required on Father's Application for Unsupervised Visitation

Upon reviewing the record, the Appellate Division found that the Family Court did not possess adequate relevant information to deny the father's petition which sought unsupervised overnight visitation with the parties' children at his home. The matter was remitted to the Family Court, for a hearing and an in camera interview with the children, and thereafter a new determination. Moreover, the Family Court was directed to issue an immediate interim visitation order providing the father with one unsupervised visitation on at least one weekend day of every month.

Matter of Riemma v Cascone, 74 AD3d 1082 (2d Dept 2010)

Record Supported Award of Supervised Visitation to Mother

The Family Court's decision to award the mother monthly supervised visits with the subject child had a sound and substantial basis in the record. The record established that the mother had a history of mental health problems that impaired her ability to parent her children. However, the record also established that the mother's condition had significantly improved over the last decade through her voluntary compliance with mental health treatment. Although the mother admitted to physically abusing her now-adult son on at least one occasion in 1991 when he was three years old, the record evinced that the mother was remorseful and had taken responsibility for these actions. The Family Court's determination was also consistent with the opinion of the court-appointed forensic psychologist, the opinion of the court-appointed social worker who supervised visitation between the mother and the subject child, and the position of the attorney for the child.

Matter of Ciccone v Ciccone, 74 AD3d 1337 (2d Dept 2010)

Child's Godmother Established Extraordinary Circumstances

The petitioner, the subject child's godmother, established extraordinary circumstances by demonstrating that the mother surrendered the child to her when the child was approximately three months old, and that, after taking the child into her home, the petitioner provided for all of the child's financial, educational, emotional, and medical needs, with no contribution from the mother. Further, the record showed that the petitioner provided the child with a stable, nurturing, and supportive home environment, and that the child was thriving in her care. Thus, the Family Court correctly determined that it was in the child's best interests for custody of the child to be awarded to the petitioner, with whom the child had bonded psychologically.

Matter of Jumper v Hemphill, 75 AD3d 507 (2d Dept 2010)

Child's Biological Father Lacked Standing to Seek Custody or Visitation

The child's biological father lacked standing to seek custody or visitation. It was in the child's best interests to be adopted by the adoptive parents, with whom she had been living since birth, and who had provided a stable and loving home in which she thrived. The validity of the biological mother's extrajudicial surrender had been determined by the Court of Appeals, and could not be relitigated. The biological father failed to demonstrate a willingness to assume full custody of the child during the crucial six-month period preceding the child's placement with the adoptive parents, and was entitled only to notice of the adoption proceeding and an opportunity to present evidence relevant to the best interests of the child. Upon the adoption of the child, following the determination that the biological father's consent to the child's adoption was not required, his parental rights ceased, and he lacked standing to prosecute a custody and visitation proceeding regarding the child.

Matter of Seasia D., 75 AD3d 548 (2d Dept 2010)

Mother's Actions Were Inconsistent With Child's Best Interests

Contrary to the mother's contention, a sound and substantial basis existed in the record to support the Family Court's determination that a sufficient change of circumstances had occurred such that a change in custody was required to protect the best interests of the child. The evidence established, among other things, that the mother interfered with the father's visitation rights and attempted to strike the paternal grandmother during an exchange of the child. Such acts were so inconsistent with the child's best interests that they per se raised a strong probability that the mother was unfit to act as a custodial parent. Additionally, the Appellate Division noted that the Family Court's determination was supported by the recommendation of the court-appointed forensic evaluator, which was entitled to some weight.

Matter of Jones v Leppert, 75 AD3d 552 (2d Dept 2010)

Child Interviewed by Physician Without Knowledge or Consent of the Attorney for the Child

In a custody proceeding, the Family Court did not err in striking the testimony of an expert retained by the father, and in precluding further testimony by this expert. The father's attorney violated the Rules of Professional Conduct (22 NYCRR 1200.0) Rule 4.2 by allowing a physician, whom the attorney retained or caused the father to retain, to interview and examine the subject child regarding the pending dispute and to prepare a report without the knowledge or consent of the attorney for the child.

Matter of Awan v Awan, 75 AD3d 597 (2d Dept 2010)

Family Court Erred in Not Granting Agreed-Upon Hearing With Father

Father was granted visitation rights with his twin daughters. However, he was unable to exercise his right due to the daughters' aversion to the father's illness, which was unspecified. Since the daughters refused therapeutic visitation with the father, an agreement was reached by which the father consented to forgo his visitation rights until after the daughters had completed four weekly therapy sessions, at which time the parties would reconvene and, if the attorney for the child believed that the children were ready, therapeutic visitation would be permitted. If, after those four sessions, the children were still not ready for visitation, the Family Court told the father that he could file a petition and a hearing would be held, after which the court would decide the extent of the father's visitation. However, the written order did not mention the in-court agreement and stated only that the father's visitation was suspended until further order of the court. Seven months later, the father commenced a proceeding seeking some contact with his daughters and the mother moved to dismiss the petition. Family Court dismissed the petition without a hearing and the father appealed. Appellate Division ruled that Family Court erred in dismissing the father's petition because the father was promised at a prior court appearance that if he agreed to suspend his visitation, he would be informed of his daughters' progress in therapy and that the court would conduct a hearing on the issue upon his subsequent application.

Matter of Reardon v Reardon, 71 AD3d 1244 (3d Dept 2010)

Custody Given Back to Aunt After Incarcerated Parents Released

Family Court awarded the temporary custody of a child with incarcerated parents to the child's maternal aunt. Upon the mother's release from jail, the aunt sought custody based upon the father's continued incarceration and alleged extraordinary circumstances that rendered the mother unsuitable as a "custodial resource" for her daughter. Following a trial, Family Court held that the aunt failed to establish extraordinary circumstances existed and awarded joint legal custody of the child to the parents, with the mother receiving primary custody and supervised parenting time for the father. The father, who was released from prison during the proceedings, appealed the portion of the ruling that stated that his parenting time be supervised. After the father filed his notice of appeal, the Family Court presided over a hearing concerned with the parent's various petitions. At the hearing, all parties consented to granting, once again, custody to the maternal aunt per the original order. Since that order did not direct that the father's parenting time be supervised, the

father's appellate counsel sought to be relieved of his assignment on the ground that the appeal was moot and should be dismissed. The Appellate Division agreed and dismissed.

Matter of Bathrick v Bathrick, 71 AD3d 1293 (3d Dept 2010)

Joint Custody of Children Not Feasible Due to Father's Hostility Towards Mother

Due to their tumultuous relationship, Family Court found that joint custody was not feasible between mother and father and was not in the best interests of their children. Father's hostility towards mother was primary reason for their inability to cooperate and Family Court granted sole custody to the mother. Appellate Division affirmed on appeal by the father, stating that mother took responsibility for her mistakes to a far greater degree than the father. Furthermore, the mother had been the children's primary caregiver since their birth, was aware of their medical and educational needs, and was more able to foster meaningful contact between the children and the dad. Also, the Appellate Division held that evidence was sufficient to establish that the father committed harassment in the second degree by "bodychecking" the mother during an argument. The Appellate Division also ruled that the father was not denied effective representation stemming from his attorney's rejection of a favorable settlement offer. The father was present when Family Court advised the father's attorney that he was pursuing a risky strategy and was present when the more favorable settlement was offered.

Matter of Melissa K. v Brian K., 72 AD3d 1129 (3d Dept 2010)

Mother Granted Sole Custody Due to Father's Attitude

Although child had a good relationship with both parents, Family Court granted sole custody to the mother who was the child's primary caregiver and willing to put child's interests above her own and encourage a continued relationship between the child and the father. Furthermore, a court-appointed psychologist opined that joint custody would be inappropriate and that the mother would be a more suitable guardian, a viewpoint shared by the child's attorney. On an appeal by the father, the Appellate Division affirmed holding that the father acted exceedingly bitter towards the mother and engaged in behavior that called into question his ability to make appropriate decisions for the child and promote the child's relationship with the mother.

Matter of Dana A. v Martin B., 72 AD3d 1136 (3d Dept 2010)

Grandparent Visitation Not in Child's Best Interests

This was an application pursuant to Family Court Act article 10-A, to approve the permanency plan for respondent's child and pursuant to article 6 for grandparent visitation. As a result of a domestic violence incident, the child was removed, and following a neglect finding against both parents, was placed in foster care. The grandparents were thrice denied guardianship and kinship foster care. Subsequently, the father murdered the mother and DSS filed a TPR against the father. The Department sought and obtained approval of a permanency plan for adoption and the paternal grandparents filed for and were denied visitation. Based upon Family Court's subsequent termination of the father's parental rights, his appeal was deemed moot. The Appellate Division affirmed Family Court's denial of visitation to the grandparents. as not being in child's best interests. The 2-year-old child had spent almost all of his life in custody of DSS and the grandparents had no meaningful relationship with him. They knew that the father was using drugs, but did nothing to intervene; and they did not appreciate seriousness of domestic violence that resulted in the child's removal.

Matter of Brendan N., 72 AD3d 1138 (3d Dept 2010)

Grandparents Lacked Standing to Seek Visitation

Family Court dismissed maternal grandparents' petition for visitation based on the fact that the children's mother was still alive. On appeal, the matter was reversed and remitted based upon Family Court's failure to determine whether there were equitable circumstances which would allow petitioners standing. On the remittal, Family Court properly found that the grandparents lacked standing to seek visitation.

Petitioners testified that they had frequent and substantial contact with the children several years ago but had only seen the younger two children twice in the last several months. Additionally, petitioners conceded that their relationship with the mother had deteriorated to the point where they had no communication with the her, even for the sake of the children; nor were they willing to facilitate visitation by transporting the children. Even if petitioners had established standing, Family Court properly determined that visitation was not in the children's best interests. Petitioners used foul language and disparaged the mother in the presence of the children.

Matter of Couse v Couse, 72 AD3d 1231 (3d Dept 2010)

Custody Ruling Reversed Due to Lack of Notice to Incarcerated Father

The incarcerated father was found to have neglected his child and was prohibited by an order of protection from having any contact with the child. Family Court previously awarded custody to the mother with the condition that she not remove the child from the court's jurisdiction without prior court approval, and also awarded visitation the child's maternal grandmother. Subsequently, the mother commenced a proceeding seeking to relocate with the child, continue the weekend visitation with the grandmother and prohibit the father from exercising any visitation. The father was not present at the initial appearance on the petition. Noting that he was in prison and had no court-ordered visitation, Family Court concluded that issues regarding visitation with the father were academic and otherwise granted the petition. The father appealed and the Appellate Division reversed stating that it was error to grant the proceeding due to there not being any proof that the father was notified of the proceeding.

Matter of Fuller v Barreto, 72 AD3d 1293 (3d Dept 2010)

Best Interests Warranted Award of Custody to Maternal Aunt and Uncle

Mother, who was mildly mentally retarded, suffered a series of small strokes shortly after her child's birth, during which time the child was cared for by family members. Thereafter, the mother and child had a number of various living arrangements. During the time that the mother was residing with her sister, the sister filed for custody, and a court-ordered investigation was commenced by DSS. Following an incident where mother was observed to be intoxicated, the child was removed from mother's care and placed in the temporary custody of the maternal aunt and uncle. DSS then commenced a neglect proceeding against the mother and the mother consented to a finding with continued custody to the aunt and uncle. After a permanency hearing, Family Court concluded that it was in the best interests of the child to award custody to the aunt and uncle, subject to weekly visitation with the mother. The mother appealed and the Appellate Division affirmed holding that extraordinary circumstances existed which warranted the award of custody to the aunt and uncle. The mother was unfit to provide full-time care for her child, who had been diagnosed with developmental delays and behavioral disorders, due to her cognitive limitations, mental illness, and flawed parental judgment.

Matter of Melody J. v Clinton County Dept of Social Servs., 72 AD3d 1359 (3d Dept 2010)

Custody Awarded to Mother With Permission to Relocate With Children Out of State

Family Court awarded custody of children to mother and granted her permission to move with the children to her parent's home in New Jersey. Family Court also issued a temporary order of protection against the father after a violent altercation at the child's school. Father appealed and the Appellate Division affirmed. The mother had been the primary caretaker for the children and the most attentive to their health needs. In contrast to the father, who lacked stable employment and had a history of mental and physical abuse towards the mother, the mother maintained steady employment and was able to transfer to one of her employer's stores in New Jersey. She also put her children's needs ahead of her own and was able to foster the relationship between the father and the children.

Matter of Torkildsen v Torkildsen, 72 AD3d 1405 (3d Dept 2010)

Mother Permitted to Relocate to New Jersey With Child

Parents moved from New Jersey to New York shortly after the birth of their child. After their relationship deteriorated and the mother moved back to New Jersey with child, Family Court entered a temporary custody order under which the parties alternated physical custody of the child every two weeks. Mother petitioned for modification and was awarded custody with liberal visitation for the father. The father appealed and the Appellate Division affirmed holding that the child's most meaningful family contacts were in New Jersey, where most of both parents' extended families resided. Family Court minimized the detrimental effect of distance on the father's relationship with the child by awarding him liberal visitation, including extended visits during summer and school vacations as well as time when the father visited relatives and friends in New Jersey. The court also found it in the best interests of the child to be in the custody of the mother. Although both parents were loving, the mother's full-time employment in the pre-kindergarten facility where she intended to enroll the child would permit her to spend time with the child during working hours. The mother also used her time with the child to engage in more interactive social and educational activities, such as reading aloud, than did the father.

Matter of Schneider v Lascher, 72 AD3d 1417 (3d Dept 2010)

Incarcerated Father Entitled to Hearing on Modification of Visitation

Child's father was incarcerated. A consent order was issued granting sole custody to the mother, with pictures, updates and phone calls to the father. About a year later, the father sought monthly visits with the child and an order precluding the mother from relocating with the child to Arizona; he also alleged a violation against the mother for traveling out of state with the child without his permission. Family Court dismissed both the violation and the modification petitions without a hearing, finding that the father had failed to show a change of circumstances. The Appellate Division reversed and remitted holding that on such a sparse record, they could not say that there was no showing of change in circumstances. "If transportation obstacles were the primary reason that in-person visits at the prison were unsuccessful in the past, their removal may constitute changed circumstances justifying modification." Also, mother's counsel confirmed that it was her intent to relocate to Arizona. As such, it was the mother's burden to show that relocation was in the child's best interests. Since there was no proof on the record to make this determination, the matter must be remitted for an evidentiary hearing.

Matter of Chambers v Renaud, 72 AD3d 1433 (3d Dept 2010)

Hearing Should Have Been Adjourned Due to Newly-Assigned Counsel

Parents resided together in North Carolina until the mother relocated with the child to New York. On consent the parties stipulated to joint legal custody and alternating parenting time in six-week blocks. Last year, when the parents could not agree as to which state the child would attend school, they each filed for modification with the mother seeking primary physical custody and the father seeking both sole legal and physical custody. On the first day of a two-day fact-finding hearing, the father appeared without counsel. At the father's request, the hearing went forward, with the father proceeding *pro se.* On the second day of the hearing, counsel was assigned to the father. After briefly meeting with his client for the first time, counsel requested an adjournment, which was denied. Family Court subsequently granted the mother's petition and the father appealed. The Appellate Division was unpersuaded that Family Court erred in permitting the father to proceed *pro se* during the first day of the fact-finding hearing. However, they did find merit with the father's contention that Family Court should have granted the newly-assigned counsel's request for an adjournment in order to give the counsel an opportunity to prepare.

Matter of McKenney v Westervelt, 72 AD3d 1435 (3d Dept 2010)

No Change of Circumstances to Warrant Modification of Joint Custody

By stipulation, parents shared joint custody of their daughter with primary physical custody to the mother and a shared parenting plan. Multiple petitions were filed related to the parent's inability to agree on the single issue of what preschool the child should attend. Family Court awarded sole custody to the father with decreased parenting time to the mother. The Appellate Division reversed holding that since both parties were fit and loving parents, there was no basis to disturb the joint custodial arrangement. However, since they resided in separate school districts, child's entry into kindergarten necessitated modification of physical custody arrangement. The Appellate Division awarded primary physical custody to the father with increased parenting time to the mother.

Matter of Ehrenreich v Lynk, 74 AD3d 1387 (3d Dept 2010)

Sound and Substantial Basis in Record to Change Custody

This family had an extensive history in Family Court, including numerous proceedings under Family Court Act articles 6, 7, 8 and 10. In this proceeding, the mother sought sole custody of the parties' child and termination of the father's visitation rights. She also commenced a family offense proceeding seeking an order of protection. Following a hearing, Family Court properly dismissed the family offense petition and awarded sole custody to the father with visitation to the mother. On the Art. 8 petition, the mother testified that she and the child were scared of the father but this fear appeared to be based on rumors or events that she admitted were not recent. Most of her testimony was inadmissible hearsay, which cannot be used to establish a family offense. On the custody matter, there was confusion by the parties and even the court as to the prior controlling order because custody had been subsequently awarded either permanently or temporarily in proceedings pursuant to Family Court Act articles 7 or 10. The child had lived with each of the parties at different times. There was proof of several changes in circumstances since the prior order necessitating a change in custody in the child's best interests. The record showed that the mother could not control the child, she and her paramour used drugs in the residence and smoked marihuana with the child, and she was facing charges of endangering the welfare of a child and forcible touching. While the father had been evicted from his residence, he was never homeless and found a new residence soon thereafter, he and his wife both had jobs and he did not use drugs. Family Court found the mother less than credible and while not determinative, the 16-year-old child testified that he wanted to live with his father where he felt less stress.

Matter of Belinda YY. v Lee ZZ., 74 AD3d 1394 (3d Dept 2010)

Family Court Properly Ordered Custody to Father and Dismissed Mother's Family Offense Petition

Following the mother's hospitalizations for mental health issues, the father sought custody and in response, the mother filed a family offense petition and a petition for custody claiming, among other things, that she had been sexually and verbally abused by the father. After a hearing, Family Court found that as a result of mental illness and unstable mental condition, the mother was unable to properly function as a parent and concluded that the father should have legal and physical custody of their child with supervised visitation to the mother. The Appellate Division affirmed holding that this determination was based on a number of factors, including conclusions arrived at by court-appointed psychologist who performed evaluations on the parents and a second evaluation done at the request of DSS. The mother also argued that Family Court improperly delegated to the supervising agency the authority to determine the frequency and duration of her supervised visits with the child. Read with another provision of the order that allowed her to seek unsupervised or increased visitation once her mental condition had stabilized through treatment from a psychiatrist, the order was appropriate.

Matter of Mackenzie v Patrice V., 74 AD3d 1406 (3d Dept 2010)

Custody to Grandparents in Child's Best Interests

Following the mother's arrest for attacking the father with a knife, among other problems, the mother called

upon her parents to come to Tennessee and retrieve her children. At that point, she signed a notarized statement granting the grandparents physical custody until she was able to provide and care for them, permission to obtain medical care and permission to enroll them in school in New York, where they lived. It was undisputed that, at that time, the grandparents expected the mother to eventually join the children in New York. Instead, she stayed in Tennessee, living with a man on criminal probation with a history of substance abuse. When the grandparents sought legal custody in New York, the mother opposed the petition and cross-petitioned for sole custody. The father, who moved nearby the grandparents' home, ultimately consented to physical custody with the grandparents on the condition that no finding of extraordinary circumstances was entered against him and that he be granted visitation with the children. Following a fact-finding hearing and a *Lincoln* hearing, Family Court found extraordinary circumstances and awarded custody to the grandparents with visitation to the father. The Appellate Division affirmed holding that "[g]iven the instances of neglect, domestic violence, emotional instability and financial insecurity leading up to her decision to transfer physical custody of the children to the grandparents, and the lack of evidence, despite her completion of anger management classes, that the mother has matured to a point of placing her children's interests above her own...," Family Court's finding of extraordinary circumstances had a sound and substantial basis in the record.

Matter of Moseley v White, 74 AD3d 1424 (3d Dept 2010)

Change in Circumstances Warranted Change of Physical Custody to Father

By stipulated order, the parents shared joint legal and physical custody of their two children. After various disputes, the father sought sole physical custody alleging that the mother violated court directives by failing to facilitate his telephone contact and participate in counseling and that she created an unstable environment for the children due to ongoing altercations with neighbors involving numerous unfounded complaints by her to the police. Following fact-finding and *Lincoln* hearings, Family Court found a change in circumstances warranting a modification of physical custody but kept joint legal custody. The Appellate Division affirmed holding that such a change was in the child's best interests. The mother admitted that she did not facilitate the phone contact between the children and the father. Although she tried to explain it, the court did not find her testimony consistent or credible.

Matter of Arieda v Arieda-Walek, 74 AD3d 1432 (3d Dept 2010)

Change in Circumstances Warranted Award of Sole Custody to Father and Reduction in Mother's Parenting Time; Request for "Recommendation" of Child's Attorney Was Harmless Error

Following the parents' divorce, the mother had primary physical custody of the parties' daughter. However, after losing her job and then her apartment, the parties stipulated to an order of joint legal custody with the father having primary physical custody and final decision-making authority. The mother had specified parenting time, holidays, vacation and such other time as the parents mutually agreed. It was undisputed that the parents' ability to communicate and cooperate with regard to the child deteriorated to the point where a fight occurred between the parents, at least partially in the presence of the child, resulting in the mother's arrest for harassment, to which she pled guilty. An order of protection was issued in favor of the father and his fiancé. Following this incident, the mother sought defined parenting time or, in the alternative, primary physical custody; and the father cross-petitioned for sole custody. After a hearing, Family Court dismissed the mother's petition and granted the father's cross-petition. In addition to awarding sole custody to the father, Family Court reduced the mother's parenting time and, except for Christmas Eve in alternating years, eliminated the mother's right to have the child overnight. The Appellate Division affirmed holding that the mother offered no evidence of significant deficiencies in father's home or parenting of child while the record reflected numerous problems on mother's part which called into question her ability to promote best interests of child. While both parents had loving relationships with child, sole custody to the father with the parenting time awarded to the mother was in the child's best interests. Family Court's request that the child's attorney provide a “recommendation” was

harmless error. The attorney's submission was in the nature of a closing argument, as were the submissions of the parents' attorneys, and was not *ex parte*. Any mention of factual allegations outside the record were not relied upon by the court.

Matter of Henderson v MacCarrick, 74 AD3d 1437 (3d Dept 2010)

Mother's Intention to Join Military Did Not Warrant Modification of Custody

The children resided with the mother since the parties separated and a mutually agreed upon visitation schedule was maintained. The father sought sole custody based on the mother's stated intention to join the military, the children's tardiness to school and concerns over the children's dental care. Initially, Family Court appropriately dealt with the mother's intention of joining the military reserves by awarding the father temporary custody of the children during the time that the mother was expected to be away at boot camp. With respect to the children's attendance at school, the mother had taken steps to address the problem and the children were doing fine. Furthermore, contrary to the father's allegations, there was no evidence that the mother's work schedule or financial difficulties had placed the children in jeopardy. Likewise, there was no evidence that the mother had failed to obtain appropriate dental care and educational services for the children. Family Court properly dismissed the father's petition.

Matter of Bush v Bush, 74 AD3d 1448 (3d Dept 2010)

Joint Custody With Primary Physical Custody to Father and Visitation to Mother was Proper

Parents appropriately shared joint custody. Family Court found that the father provided a more stable environment for physical custody. He is married and his wife is actively involved with the children, including dealing with medical and educational issues. To the contrary, the mother's boyfriend testified that they have broken up three or four times over what he characterized as stupid disagreements. While the children have somewhat less time with the mother, the visitation awarded to her was frequent and the parties were free to agree to additional visitation, as they lived only a mile apart.

Matter of Johnpeer v Williams, 74 AD3d 1584 (3d Dept 2010)

Grandmother and Incarcerated Father Allowed Supervised Visitation

When the father was incarcerated, his relationship with the mother ended and she obtained sole custody of the parties' two young children. Although she originally brought the children to visit the father in prison, when she stopped those visits and all contact with the father or the paternal grandmother, they each sought visitation. Family Court granted the grandmother visitation once a month and gave the father supervised visitation at the prison three times a year. The record supported this determination as the father had lived with and cared for the children for much of their lives prior to his incarceration. Additionally, the children had a history of visiting him while he was incarcerated. Even though the father had not had contact with children for more than two years, his attempt to contact the mother were unsuccessful because she had a confidential address. Family Court did not err in granting visitation to the grandmother. Until the father was incarcerated, she had almost daily contact with her grandchildren and she accompanied the mother and children to the early jail and prison visits. She had attempted to contact the mother numerous times to arrange to see the children but was rebuffed. Any concerns about the grandmother being alone with the children were addressed by requiring one of her adult daughters to supervise the visitation.

Matter of Baker v Blanchard, 74 AD3d 1427 (3d Dept 2010)

Family Court Improperly Acted on Its Own in Ordering Supervised Visitation

In the latest of a succession of appeals, this case involved a petition to extend the father's supervised visitation with his son and stepdaughters. However, at the hearing, the mother and the attorney for the teenaged son advocated for unsupervised visitation as to the son. Mother's witnesses unequivocally supported unsupervised visitation and described in detail the positive interaction between father and son as well as

the father's successful completion of pertinent programs. In fact, at the close of the case, the mother admitted it was a mistake to include the son in the petition and asked that the petition be dismissed as to him. Nonetheless, Family Court produced and admitted into evidence its own exhibit, a Canadian study on the effectiveness of sex offender treatment. The finding that witnesses were unreliable and lacked credibility, one of whom it had characterized in an earlier matter involving these parties as "credible and highly reliable" was unsupported by the record. The Appellate Division found that Family Court acted arbitrarily and without a sound and substantial basis in the record to support the determination and the petition as to the son was dismissed.

Matter of Blaize F., 74 AD3d 1454 (3d Dept 2010)

Extreme Animosity Renders Joint Custody Improper

Within weeks of the birth of the parties' daughter, the couple began experiencing marital difficulties stemming from the father's growing concern about the mother's mental health. When the child was just five weeks old, the mother took the child and moved to another county. Within days each party filed for divorce and custody. The father also filed for an order prohibiting the mother from removing the child from the county. Family Court issued an interim order restricting the mother from leaving the state with the child and set a prompt return date. The mother was initially granted temporary custody with supervised visitation to the father but throughout the course of the litigation, the father obtained increased visitation to the point where, when the child was 21 months old, the parties had stipulated to a temporary custody and visitation schedule which provided generous unsupervised and overnight visitation to the father. The parties agreed to proceed to trial on the issues of custody and visitation only. Following a 29-day trial, Supreme Court issued a 46-page decision awarding sole custody to the father with liberal visitation to the mother on a set schedule to continue at least until the child began pre-kindergarten. The mother appealed and the Appellate Division affirmed holding that the father could provide the more stable home life and appropriate living environment. In fact, his fitness was not called into question. The mother, however, presented no evidence concerning her home environment, the stability that she provided to the child or her daily routine or interactions with the child. Although she testified that she believed it important for the child to have a good relationship with the father and affirmed that she would cooperate in any way to facilitate that relationship, she prevented the father from having contact with the child for five weeks after she moved, misrepresented that she was exclusively breast feeding the child in order to limit the father's visitation time and opposed many of the father's requests for increased visitation. Additionally, the mother never fully acknowledged her long history of anxiety and depression and had not sought treatment for it. Finally, although the mother argued that Supreme Court improperly failed to appoint an attorney for the child, *sua sponte*, her argument was not considered by the Appellate Division because of her objection to the father's pre-trial request for the same. In any event, such an appointment is discretionary, especially with such a young child.

Moor v Moor, 75 AD3d 675 (3d Dept 2010)

Record Supported Denial of Joint Custody But Not Severe Limitations on Father's Visitation

These parties were married for over 14 years and had 3 children. The mother filed a family offense petition against the father and sought sole custody. Following a hearing, Family Court granted sole custody to the mother with one hour of supervised visitation each week to the father, dismissed her family offense petition and issued an order of protection against the father in favor of the mother and the children. The record supported Family Court's finding that recent events seriously compromised the parties' ability to communicate and effectively make joint decisions. Specifically, as a result of a road rage incident, the father's pistol permit was suspended and he was charged with criminal contempt when he failed to turn over his weapons. He wrote a letter expressing his outrage at the situation, claiming a violation of his constitutional rights and suggesting a conspiracy against him by county officials. The day before his hearing on the contempt, he was arrested when he allegedly displayed suspicious behavior outside the courthouse and, upon receiving permission from the mother to search their vehicle and home, the police

found a dagger in the vehicle and loaded, unlocked guns that the father had left in their home, as well as swords and nun-chucks. It was then that the mother filed for sole custody. She testified that she was afraid of the father; and that he had stated his intention of moving the family out of state because he was frustrated with New York State's interference with his right to retain weapons and that the father demeaned her on a regular basis and once kicked his son, leaving a mark. Based upon this, Family Court had a sound and substantial basis for declining to grant joint custody. However, on the issue of visitation, the record did not support the severe restrictions. Both parties testified that the father had a good relationship with his children and the mother admitted that she had not noticed any negative impact on the children stemming from the father's recent, erratic behavior. In the absence of a forensic evaluation or any insight into the children's views, the court was not able to determine whether such limitations on the father's access to his children was warranted. Accordingly, the matter was remitted to Family Court for, at least, a *Lincoln* hearing to provide insight into the relationship between the children and their father.

Matter of Tamara FF. v John FF., 75 AD3d 688 (3d Dept 2010)

Maternal Grandmother Granted Custody of Child

Mother and child moved in and out of the maternal grandmother's house several times prompting the grandmother to seek custody of the child after hearing that the mother's boyfriend hit her in the face while she was holding the child. The mother consented to an award of temporary custody with scheduled visitation. Following a fact-finding hearing, Family Court adjudicated the child to be neglected by the mother by allowing the boyfriend to inflict harm on the child and an order of protection was entered on behalf of the child against the boyfriend. The grandmother then sought permanent custody of the child and Family Court granted her petition on the basis that the child had lived with the grandmother for most of her life and they shared a close relationship. On the mother's appeal the Appellate Division held that the record supported Family Court's determination that extraordinary circumstances existed to overcome the mother's superior rights to custody and the child's best interests were served by permanently placing her in custody of the grandmother.

Matter of Lori MM. v Amanda NN., 75 AD3d 774 (3d Dept 2010)

Mother Granted Sole Custody Due to Father's Refusal to Coparent

After their divorce, the parents stipulated to joint custody of their son. The judgment did not address schooling or state which parent had primary physical custody. When the child reached school age, the father filed a petition for primary physical custody so the child could attend school in the district where he lived. The mother filed a petition for sole custody and Family Court granted the mother's petition. The father appealed and the Appellate Division affirmed holding that sole custody to the mother was in the child's best interests. The testimony described a lack of communication between the parties. In the past, the father had refused to speak to the mother for approximately one year and refused to speak to the mother during doctor visits where both parties were present. In addition, the father had refused to consent to a medical procedure recommended by the child's doctor. The court concluded that the mother was more likely to foster a relationship between the child and the other parent and attempt to provide the father with information regarding the child.

Matter of Claflin v Giamporcaro, 75 AD3d 778 (3d Dept 2010)

Insufficient Change in Circumstances to Warrant Modification of Custody

Mother and father are the unmarried parents of two children. Family Court entered an order of joint legal custody with primary physical custody awarded to the mother. Father commenced modification and violation petitions alleging that the mother allowed her husband to be present during the parties' exchanges. The mother then commenced a proceeding alleging that the father was sexually abusing their daughter. Family Court granted the father's violation petition, dismissed the mother's petition and partially granted the father's modification petition. On the father's appeal it was held that changes in circumstances were insufficient to

warrant modification. Both the father's attorney and the attorney for the children acknowledged at trial that the circumstances had not changed since the prior order. The Appellate Division agreed with Family Court that the mother was no less fit to have custody of the children than she was at the time of the previous order and that the father's employment provided little flexibility for more time with the children.

Matter of Robert SS. v Ashley TT., 75 AD3d 780 (3d Dept 2010)

Mother Doesn't Follow Instructions of Court-Appointed Therapist

Parents shared joint legal custody of their daughter, with the mother having primary physical custody and the father having weekly visitation. When the daughter refused to visit with the father after an incident in which the daughter was accused of having had sexual contact with the father's six-year-old stepdaughter, Family Court modified the parties' custody order by staying its visitation provisions and directing the father and the daughter to engage in therapeutic visitation under the supervision of a licensed clinical social worker. The modified order also required the daughter to continue in individual therapy with another therapist regarding the alleged sexual contact and it directed both parents to follow the therapists recommendations regarding visitation and to cooperate in the daughter's separate counseling. Subsequently, the father commenced a violation proceeding on the ground that the mother had willfully violated the modified order. During the resulting hearings, Family Court denied the mother's request for a *Lincoln* hearing and ultimately found that she had willfully violated the modified visitation order. Based upon that finding, the father moved for an order directing the mother to pay counsel fees and expenses. Family Court reduced the amount requested by the father and partially granted his motion. The mother appealed from both orders, and the Appellate Division affirmed holding that there was sufficient evidence to establish that the mother willfully violated the modified child custody and visitation order by not following the instructions of the therapist. The therapist testified that the mother was not committed to healing the relationship between the daughter and the father and the mother improperly cancelled therapy appointments.

Matter of Jones v Jones, 75 AD3d 786 (3d Dept 2010)

Mother's Neglect of Son's Education Warrants Modification of Custody

A divorced mother and father were awarded joint legal custody of their two children with physical custody to the mother and visitation to the father. The father filed three petitions - one seeking a modification of the prior custody order and requesting primary custody of the son; another seeking enforcement of the visitation order; and the third alleging that the mother had disobeyed a court order prohibiting the parties from removing either child from the state without each other's permission. After a *Lincoln* hearing, Family Court dismissed the petition concerning the violation but found that the mother had interfered with the father's visitation and, finding that it was in the son's best interest, awarded sole legal custody of the son to the father with visitation to the mother. The mother appealed and the Appellate Division affirmed. Family Court found that the son had missed an excessive amount of school and that the mother's explanations were not credible. The mother also testified that she had stopped monitoring her son's school work and DSS had filed educational neglect petition against her.

Matter of Paul T. v Ann-Marie T., 75 AD3d 788 (3d Dept 2010)

Evidence of Domestic Violence Insufficient to Warrant Modification of Custody

Pursuant to an order of Family Court, the unmarried parents of a son shared joint legal custody with the mother having sole residential custody and the father having visitation rights. The father filed a petition seeking temporary custody of the child based on allegations that the child had witnessed the mother's boyfriend physically abuse the mother. After taking testimony from the father and speaking with the child in the courtroom, Family Court issued a bench decision granting the father temporary emergency custody. The mother then filed a petition to amend that decision. After a *Lincoln* hearing, Family Court issued a written decision granting the father's amended petition, finding that there had been repeated instances of domestic violence inflicted on the mother by her boyfriend, and awarded legal and residential custody to the father with

visitation rights to the mother. The mother appealed and the Appellate Division reversed due to an insufficient amount of evidence that the mother was the victim of repeated domestic violence at the hands of her boyfriend or that the child had witnessed it. While the mother acknowledged that the boyfriend did strike her, she took appropriate action by terminating the relationship. Also, Family Court could not rely on the statements made by the 5-year-old child at the *Lincoln* hearing since they were not corroborated.

Matter of Scott QQ. v Stephanie RR., 75 AD3d 798 (3d Dept 2010)

Civil Contempt Finding Upheld

These parents were involved in an ongoing and acrimonious custody and visitation dispute since their separation. Family Court had granted a temporary order of joint custody, with the mother having primary physical custody and the father having certain parenting time as supervised by the mother. Petitions were thereafter filed by both parties - the father alleging that the mother failed to comply with visitation as ordered and the mother alleging that she was physically unable to remove the children from the car as they did not want to see their father. Family Court directed that the parties undergo a psychological evaluation, during which the mother accused the father of being a pedophile. The psychologist stated that his evaluation showed that the accounts by the children of their alleged abuse was verbatim to the report of the mother and that the children displayed "classical evidence of having been alienated from their father" as a result of the influence of the mother. Thereafter, the mother filed a petition seeking the elimination of the father's supervised therapeutic visitation until the children could be further evaluated and treated for sexual trauma. After a seven day trial at which numerous expert witnesses testified, Family Court dismissed the mother's petition, finding that she failed to establish the requisite change in circumstances; and granted the father's violation petition. The mother appealed and the Appellate Division affirmed holding that there was no reason to disturb the Family Court's determination due to there being insufficient evidence of sexual abuse to prosecute the father criminally, and the allegations were deemed unfounded by DSS.

Matter of Joseph YY. v Terri YY., 75 AD3d 863 (3d Dept 2010)

Attorney for the Child Prevented From Effectively Representing Client

Parents entered into an agreement in conjunction with a divorce action in Supreme Court that granted joint custody of their daughter, with the mother having primary physical custody and the father having certain visitation rights. Thereafter, the father filed an emergency petition seeking a modification of the custody order alleging that the child had been sexually abused by the then-17-year-old boyfriend of the mother's older daughter. At the initial court appearance, Family Court engaged both *pro se* parties in a brief discussion regarding the matter but testimony was not taken nor was a hearing scheduled. The attorney for the child also advised the court that he had just returned from vacation and had not had a chance to speak to the child. Family Court concluded that the child's well-being was not being jeopardized and advised the parties that it would issue an order directing that the child not be in the presence of her sister's boyfriend without one of the parties being present, but otherwise continue the Supreme Court's order. The father appealed and the Appellate Division held that a full evidentiary hearing was warranted to determine the best interests of the child. Likewise, the Family Court's erred because its order was issued before the attorney for the child could interview his client, thus prohibiting the attorney from taking an active role in and effectively representing the interests of his client.

Matter of Christopher B. v Patricia B., 75 AD3d 871 (3d Dept 2010)

Consent Order Does Not Obviate Need to Show Extraordinary Circumstances

Mother had sole custody and father had alternate weekend visitation with his two children. The mother had left the children with her parents, in order to temporarily relocate as a result of financial difficulties and an ongoing contentious relationship with the father. On the grandparents' petition and with the mother's consent - through counsel in her absence - and the father's failure to appear, Family Court ordered that the mother and the grandparents share joint custody, with

physical custody to the grandparents and visitation to the mother and the father as agreed upon by the parties. The parents then, separately, commenced modification proceedings seeking sole custody of the children. At the conclusion of a hearing, the court dismissed the parents' applications, finding an insufficient change in circumstances to warrant modification and both parents appealed. The Appellate Division reversed holding that Family Court failed to decide the issue of extraordinary circumstances but rather, erroneously assumed that the earlier consent order had somehow established extraordinary circumstances. It had not - the mother had only agreed to allow the grandparents to take the children temporarily while she stabilized her life after some financial difficulties.

Matter of Ramos v Ramos, 75 AD3d 1008 (3d Dept 2010)

Father Properly Granted Sole Custody and Permission to Relocate to Arizona

Respondent mother appealed from an order granting the father's petition for sole custody of the parties' child and for permission to relocate with the child to Arizona. She also appealed from an order settling the record in the first appeal. The Appellate Division affirmed both orders. Addressing the second appeal first, the Court held that the JHO did not err in settling the record to include a transcript from a family offense proceeding commenced against the mother by the child's paternal grandfather, who was also a respondent in the first appeal. The JHO was entitled to consider the actions of the mother in the family offense proceeding in making the custody determination, and all the parties to the first appeal repeatedly referred to the event described in the transcript. The Appellate Division also affirmed the custody order, rejecting the mother's contention that the father failed to plead or to establish a change in circumstances sufficient to warrant modification. The amended petition alleged that mother's deteriorating mental health constituted a change in circumstances warranting modification, thus alleging that the mother was unfit or perhaps less fit to continue as the proper custodian. Further, the JHO properly determined that the mother presently was less fit than the father and less able to provide for the child's stability and well-being. Additionally, the contention that mother did not have notice of the allegations in the amended petition or an opportunity to be heard was belied by the record. Although the mother contended that the amended petition was filed without proper proof of service, she waived that contention by appearing in the proceeding without raising the defense of lack of personal jurisdiction. The mother failed to preserve her contention that she was deprived of a fair hearing based on various alleged errors committed by the JHO, and the JHO did not err in granting permission for the child to relocate with the father. Although the JHO failed to include an analysis of the factors she considered, the record on appeal was sufficient to enable the Appellate Division to analyze the relevant factors and thus determine the propriety of the decision.

Matter of Dove v Rose, 71 AD3d 1411 (4th Dept 2010), *lv denied* 15 NY3d 742

Court Properly Granted Sole Custody of Child to Maternal Grandmother

Family Court granted the maternal grandmother's petition seeking to modify a prior order of custody. The Appellate Division affirmed. Respondent paternal grandmother failed to demonstrate that she was prejudiced by the alleged defect in verification of the petition. Further, the petition was not barred by the doctrine of equitable estoppel. The court properly determined that petitioner established a change of circumstances warranting modification of the prior order and that it was in the best interests of the child to award the maternal grandmother sole custody.

Matter of Perez v Perez, 71 AD3d 1496 (4th Dept 2010)**,** *lv denied* 14 NY3d 714 (2010)

Order Granting Sole Legal Custody Affirmed

Family Court awarded sole custody of the parties' children to petitioner mother. The Appellate Division affirmed. The order was supported by a sound and substantial basis in the record. The record established the offensive behavior of respondent father toward the mother in the presence of the children, his sporadic and often nonexistent exercise of visitation with the children, and his refusal to accept the medical diagnosis of the older child or cooperate with the treatment of that child. In addition, the parties' acrimonious relationship and inability to communicate with each

other rendered the existing joint custody arrangement inappropriate.

Matter of Ingersoll v Platt, 72 AD3d 1560 (4th Dept 2010)

Order Granting Father Sole Custody in Children's Best Interests

Family Court granted father's petition seeking sole custody of the parties' two younger children. The Appellate Division affirmed. The court's award of sole custody to the father was entitled to great deference. Among the factors considered were the quality of the home environment and the parental guidance the custodial parent provided for the children, the ability of each parent to provide for the children's emotional and intellectual development, the financial status and ability of each parent to provide for the children, the relative fitness of the respective parents, and the length of time the present custody arrangement had been in effect. The record established that the court's determination had a sound and substantial basis in the record.

Matter of Goossen v Goossen, 72 AD3d 1591 (4th Dept 2010)

Court Erred in Granting Petition on Default

Family Court granted mother's petition for sole custody of the parties' child. The Appellate Division reversed. The court erred in entering the order upon the father's default because the father was represented by counsel and counsel appeared in court. Further, the court erred in granting the petition without conducting an evidentiary hearing because the record did not contain sufficient evidence to support the award of sole legal custody.

Matter of Balls v Doliver, 72 AD3d 1618 (4th Dept 2010)

Modification Petition Properly Denied

Family Court denied respondent mother's petition seeking to modify a prior custody order. The Appellate Division affirmed. While not properly before the court, the Judicial Hearing Officer (JHO) did not err in applying the relocation standard set forth in *Matter of Tropea v Tropea.* The JHO properly considered the relevant factors, and properly determined that the mother failed to establish that the lives of the mother and child would be enhanced economically, emotionally and educationally by the move. Although the mother cited her desire to promote a relationship between the child and his half sibling, she offered no evidence that relocation was necessary to accomplish that goal. Because the court's order was stayed during the pendency of the appeal, the parties have continued to have alternative periods of physical custody of the child. The mother was thus directed to return the child to the father at the expense of the mother within five days after service of the order.

Matter of Murphy v Peace, 72 AD3d 1626 (4th Dept 2010)

Custody Order Had Sound and Substantial Basis in the Record

Family Court continued the award of physical and legal custody of the parties' two children to petitioner mother and reduced respondent father's visitation with the children to one weekend every three months, and prohibited the father from discussing religion with the children. The Appellate Division affirmed. The ability of the father over that of the mother to provide for certain material needs of the children was only one factor to consider in determining best interests. Here, the record established that father frequently disparaged the mother in the children's presence, consistently used his religion in an attempt to alienate the mother from the children, and disregarded court orders concerning the mother's right to choose the religious upbringing of the children. Further, the court's determination that effectively denied the father visitation was supported by compelling reasons and substantial evidence, including that the father harmed the children by disobeying court orders and using religion to alienate them from the mother. The court did not abuse its discretion in prohibiting the father from discussing religion with the children because such discussion caused the children harm. Finally, any error in the admission of a report containing recommendations that were based on inadmissable hearsay was harmless because the record contained ample evidence to support the court's determination.

Matter of Matthews v Matthews, 72 AD3d 1631 (4th Dept 2010)

Petitioner Failed to Demonstrate Change in Circumstances

Family Court dismissed mother's petition seeking modification of a prior custody order. The Appellate Division affirmed. A hearing is not automatically required whenever a parent seeks modification of a prior order. Because petitioner failed to demonstrate a sufficient change in circumstances there was no basis for modification. Petitioner failed to preserve her contention for review that the court abused its discretion in dismissing the petition without conducting a *Lincoln* hearing because she failed to request such hearing.

Matter of Knuth v Westfall, 72 AD3d 1642 (4th Dept 2010)

Court Erred in Modifying Prior Order Without a Hearing

Family Court granted grandmother's petition and modified an order of visitation. The Appellate Division reversed. The court erred in failing to conduct a hearing before granting the petition. Based upon the record, there was not sufficient information to render an informed determination that was consistent with the children's best interests. With respect to the order in respondent mother's second appeal, the mother did not raise any issues concerning that order in her brief on appeal and those issues were deemed abandoned.

Matter of Rousseau v Kraft, 72 AD3d 1643 (4th Dept 2010)

Order of Custody Modified: Primary Custody Awarded to Defendant

Supreme Court awarded primary physical custody of the parties' children to plaintiff father. The Appellate Division modified. The award of primary physical custody to plaintiff was not in the children's best interest and lacked a sound and substantial basis in the record. The record established that defendant mother was the children's primary caretaker throughout the marriage. In addition to maintaining a full time job, defendant prepared the meals, bathed the children, made day care arrangements, administered the children's medications, read to the children and put them to bed. By contrast, plaintiff's involvement with the children largely consisted of attending a few medical appointments and school conferences. Plaintiff spent a significant amount of time pursuing his own recreational activities, leaving the children in defendant's care. The court erred in focusing on irrelevant matters, including the defendant's alleged marital infidelity. The court also improperly based its determination on defendant's relocation to Ithaca, which was 65 miles from the marital residence. The record reflected that defendant moved to Ithaca to obtain a new job only after plaintiff sent a letter to defendant's supervisor criticizing defendant's work and alleging job-related misconduct. Defendant was awarded primary physical custody and the matter was remitted to the court to set an appropriate visitation schedule.

Sitts v Sitts, 74 AD3d 1722 (4th Dept 2010)

Support Magistrate Lacked Subject Matter Jurisdiction

Petitioner commenced this proceeding pursuant to article 4 of the Family Court Act seeking an order directing respondent mother to pay one-half the travel expenses related to two of the parties' children, who were 17 years, 11 months old and 20 years 11 months old. Family Court denied the objections of respondent to the order of the Support Magistrate, which had denied the mother's motion seeking, among other things, to dismiss the petition and refer the case to Family Court upon finding that the Support Magistrate lacked jurisdiction The Appellate Division vacated the provision in the order that referred the matter to the Support Magistrate and remitted. The Support Magistrate did not have subject matter jurisdiction over the petition because travel expenses related to visitation were properly considered custody and visitation issues pursuant to Family Court Act article 6. Further, the father was not entitled to reimbursement for travel expenses related to visitation incurred after the children reached the age of 18. The petition did not specify which of the travel expenses sought were attributable to visitation that occurred before the older child reached the age of maturity and therefore the matter was

remitted for further proceedings.

Matter of Stroud v Vahl, 74 AD3d 1726 (4th Dept 2010)

Petition Requesting Permission to Relocate Reinstated

Family Court granted respondent father's petition at the close of petitioner mother's proof to dismiss the petition seeking permission for the parties' three children to relocate with the mother from Utica to New York City. The Appellate Division reversed, reinstated the petition, and remitted. The mother established a prima facie case that relocation was in the children's best interests. The 20-year-old mother was the primary caretaker of the children, and her parents, who were moving to New York City, provided extensive assistance to the mother and would continue to do so if she were to relocate. Further, the mother had several family members in the New York City area who were available to assist her with housing and child care. Although the father exercised alternate weekend visitation, the mother established that he did not work to support the children, that he sold marihuana, and that based upon an incident of domestic violence, the court issued an order of protection in favor of the mother.

Matter of Ramirez v Velazquez, 74 AD3d 1756 (4th Dept 2010)

No Willful Violation: Order Reversed

Family Court found that respondent mother willfully violated an order of visitation. The Appellate Division reversed. The order indicated that the mother breached her duty to foster the relationship of the parties' two children with the father when she allowed one of the children to decide for herself whether to accompany the father for Christmas visitation. The record did not support the court's determination. The evidence in the record established that the mother prepared the child's backpack for Christmas visitation, placed it by the front door and unequivocally told the child in question that she would be going with the father for visitation. The mere fact that the mother made equivocal statements to a babysitter outside the presence of the child was insufficient to establish that the mother willfully interfered with the father's relationship with the child and thus willfully violated the order of visitation.

Matter of Koss v Michaud, 74 AD3d 1763 (4th Dept 2010)

No Change in Circumstances: Order Reversed

Family Court granted the petition of father and transferred primary physical residence of the parties' child from respondent mother to father. The Appellate Division reversed. The father failed to establish the requisite change in circumstances to warrant modification of the existing custody order. The father alleged in his petition that the mother had emotionally and physically abandoned the parties' child, the mother's relationship with the child had deteriorated, and that the child wanted to live with the father. Evidence presented at the hearing, however, focused on the mother's work schedule and changes in the mother's residence. There was no showing at the hearing that the mother's work schedule had changed substantially. In addition, it was undisputed that the mother was forced to change residence after ending her relationship with her live-in boyfriend, and the child remained in the same school district and maintained her customary summer camp schedule. The attorney for the child's contention that the mother was unfit because she allowed the child to travel to Pennsylvania without the mother was rejected. There was no showing that the individuals caring for the child put the child at risk in any fashion while she was in their care. Although the child wished to reside with her father, it was well settled that the established custodial arrangement should not be changed solely to accommodate the child's desires.

Matter of Porter v Nesbitt, 74 AD3d 1786 (4th Dept 2010)

Award of Sole Custody Affirmed

Family Court awarded petitioner mother sole custody of the parties' twin daughters and visitation to respondent father. The Appellate Division affirmed. Contrary to the father's contention, the court retained jurisdiction over the proceeding. Although the children resided in Virginia with their father, they visited the mother in New York several weeks each year. In addition, the children visited regularly with other relatives in New

York and shortly before the mother commenced this proceeding, the father filed a petition in the same court in New York seeking to modify child support. New York was not an inconvenient forum. There was evidence at the hearing that the children were subject to mistreatment by the father in Virginia and there was substantial evidence in this state from which to make a custody determination. Moreover, psychological evaluations conducted in Virginia were admitted in evidence, the attorney for the children traveled to Virginia to meet with the father and other individuals with knowledge of the children, and the court was able to conduct a *Lincoln* hearing with the children in New York. It was further noted that the court gave the father permission to conduct depositions of witnesses from Virginia, but the father did not avail himself of that opportunity. The court did not err in the admission of hearsay statements of the children, because it was well settled that there was an exception to the hearsay rule in custody cases involving allegations of abuse and neglect, where, as here, their statements were corroborated. Finally, there was ample support in the record that the court's determination of sole custody to the mother was in the children's best interests.

Matter of Sutton v Sutton, 74 AD3d 1838 (4th Dept 2010)

No Change in Circumstances

Family Court dismissed the petition of mother, which sought to modify a prior custody order entered upon consent of the parties. The Appellate Division affirmed. The mother failed to demonstrate a change in circumstances sufficient to warrant a change in the established custody arrangement. Further, the record did not establish whether a conflict of interest existed with respect to the attorney for the children's representation of all five children in question.

Matter of Horn v Horn, 74 AD3d 1848 (4th Dept 2010)

Mother Not Deprived of Fair Hearing

Family Court awarded petitioner father custody of the parties' child. The Appellate Division affirmed. The court did not abuse its discretion in the denial of respondent mother's request to testify by telephone. Respondent's contention that she was deprived of the right to a fair hearing was raised for the first time on appeal. In any event, that contention was without merit. Respondent in fact appeared by counsel, and although she had notice of the hearing, she chose not to attend. Further, the record did not support respondent's contention that the court erred in awarding custody of the child to the father based solely upon her default. The record established that the court properly placed great emphasis on respondent's failure to value and support the child's relationship with the father as shown by evidence in the record of her active interference with the father's scheduled parenting time on more than one occasion, her failure to comply with prior orders relative to returning to the region, and her failure to offer evidence of compelling circumstances requiring her relocation of the child to Oregon, Georgia and then back to Oregon.

Matter of Stiles v Edwards, 74 AD3d 1869 (4th Dept 2010)

Matter Remitted to Determine if Extended Summer Visitation in Child's Best Interests

Family Court ordered that petitioner father was entitled to a certain period of extended visitation with the parties' child during summer vacation should he take a vacation. The Appellate Division reversed. The court erred in failing to conduct an evidentiary hearing. Although no hearing would have been required if it was clear from the record that the court possessed sufficient information to determine best interests, that was not the case here. Because there was no indication in the record that there was any prior hearing involving the child, and the only evidence before the court with respect to the current visitation schedule was based upon brief allegations of the parties' attorneys and the attorney for the child during one court appearance, the matter was remitted to determine if extended summer visitation was in the child's best interests.

Matter of McDade v Spink, 74 AD3d 1904 (4th Dept 2010)

Attorney for the Child Vigorously Represented the Interests of the Children

Family Court denied the attorney for the children's petition seeking to suspend respondent father's

supervised visitation with the parties' children and directed him to pay the attorney's fees and costs of the father based upon the "frivolity" of the petition. In another order, the court found mother in willful violation of a prior order of custody and visitation. The Appellate Division modified. The court abused its discretion in imposing sanctions on the attorney for children because the court failed to afford him an opportunity to be heard. Moreover, the attorney for children zealously represented the interests of the children. However, the court properly denied the petition seeking to suspend the father's supervised visitation. The denial of visitation was a drastic remedy only to be employed when visitation would be harmful to the children's welfare and that was not the case here. Further, the record was sufficient for the Appellate Division to find that mother willfully violated the prior custody and visitation order. The evidence presented at the hearing established that the mother disparaged and belittled the father in the presence of the children. In addition, the mother failed to participate in individual therapy and to apprise the father of the children as required by the prior order.

Matter of Chapman v Tucker, 74 AD3d 1905 (4th Dept 2010)

Court Not Required to Allow Petitioner to Testify by Electronic Means

Family Court dismissed mother's petition to modify a custody order. The Appellate Division modified. The court was not required to allow petitioner to testify at the custody hearing by electronic means as a reasonable accommodation under the Americans with Disabilities Act because she failed to demonstrate that she had a covered disability under that act. However, the court erred in making any future filings by the mother contingent on her submission of medical proof establishing her ability to travel to New York.

Matter of Barnes v McKown, 74 AD3d 1914 (4th Dept 2010)

Nonparent Established Extraordinary Circumstances

In appeal no. 1, father (Tucker) filed a petition for custody of his then 14-year-old child who had lived for twelve years with her recently deceased mother and her mother's boyfriend, respondent Martin. In appeal number no. 2, Martin filed a petition against Tucker, seeking custody of the child. Family Court dismissed Tucker's petition and granted custody of the child to Martin. The Appellate Division affirmed. Martin met his burden of establishing extraordinary circumstances. There was support in the record that Martin fulfilled a "father" role for the child, that the most familiar and comfortable setting for the child was with Martin, and that Martin was part of the only family unit the child had ever known. That family unit included half-siblings with whom the child had a close relationship, and grandparents, aunts, uncles, and cousins living in the area where she resided with Martin and her mother. Martin and the mother provided for the needs of the child since the child was two and the father had only limited involvement. Separating the child from the only family unit she had known would undoubtably exacerbate the already significant emotional injury suffered by the child as a result of her mother's death. Moreover, the father was separated from his spouse and was earning a living managing parking lots while he pursued a bachelor's degree. He was relying heavily on student loans and was unsure where he would live when he finished school. It was in the child's best interests that custody be granted to Martin. The child, who was now 16 years of age, had established ties to schools, friends, and family in Oneida County and knew no one but the father at the out-of-state location where the father resided. Martin also was more financially stable than the father and was better equipped to provide for the child's health and prospective post-secondary educational needs. The dissent would have granted sole custody to the father because extraordinary circumstances could not be established absent the biological parent's "unfitness, abandonment, persistent neglect or other gross misconduct or grievous cause" and there was no evidence of those factors here.

Matter of Tucker v Martin, 75 AD3d 1087 (4th Dept 2010)

Family Court Lacked Jurisdiction Over Mother's Petition

Petitioner mother commenced a proceeding seeking, among other things, to modify a 2009 custody order that was entered in Indiana. Family Court dismissed the

petition. The Appellate Division affirmed. There was no indication in the record that the Indiana court determined that it no longer had exclusive, continuing jurisdiction under Domestic Relations Law § 76-a or that New York State would be a more convenient forum under Domestic Relations Law § 76-f. Indeed, the Indiana court's order was entered less than one week before the mother commenced this proceeding and the order noted that the issue of child support was "deferred." Further, the father continued to live in Indiana and therefore neither Family Court nor the Indiana court could determine that the children and their parents did not reside in Indiana.

Matter of Saunders v Hamilton, 75 AD3d 1172 (4th Dept 2010)

FAMILY OFFENSE

Warrant Not Justified by Aggravating Circumstances

After fact-finding and dispositional hearings Family Court determined that the evidence was insufficient to sustain a finding of aggravating circumstances under Family Court Act § 827 (a) (vii) and, in another order, denied petitioner mother's motion to allow a social worker to testify at the fact-finding hearing about out-of-court statements made by the parties' child or alternatively to allow the child to testify in camera. The Appellate Division affirmed. To the extent that respondent father's acts exposed family members to physical injury, those acts were not sufficiently contemporaneous with the dispositional hearing to support the statutory element of "immediate and ongoing danger." While the court erred in refusing to permit the child to testify in camera at the dispositional hearing, remitting for such testimony was not warranted because the testimony, even if credited, would not involve events sufficiently contemporaneous to support a finding of aggravating circumstances.

Matter of Norma B. v Sven H., 74 AD3d 464 (1st Dept 2010)

Court Found That Father Committed Family Offense Based on Father's Conviction of Criminal Contempt in the Second Degree

Supreme Court properly granted the mother's motion for summary judgment finding that the father committed a family offense based on the father's conviction of criminal contempt in the second degree, which arose out of the same conduct as alleged in the petition. Contrary to the father's contentions, the Supreme Court did not subject him to double jeopardy when it entertained the mother's family offense petition, even though he had already been convicted of criminal contempt and sentenced for the same offense as alleged in the petition. The petitioner proved by a preponderance of the evidence that the father committed acts constituting the family offense of harassment, warranting the issuance of an order of protection which, inter alia, prohibited him from contact with the parties' children for a period of five years.

Matter of Gowrie v Squires, 71 AD3d 1023 (2d Dept 2010)

Testimony Did Not Support Petitioner's Allegation

The Family Court's findings were not supported by the record. In addition to respondent's testimony, in which he denied committing any of the acts constituting the offenses alleged in the petition, the record contained the testimony of an apparently disinterested witness who indicated he was present at the time and place of the alleged incident that formed the basis of the Family Court's fact-finding, and that the incident never occurred. It was noted that the petitioner's current husband, who allegedly was standing next to the petitioner during that incident, and who was, according to the petitioner, the primary target of respondent's aggressive conduct, did not testify at the hearing and that, under the circumstances, his unexplained absence was significant. Order reversed.

Matter of Foxworth v DeJesus, 74 AD3d 1064 (2d Dept 2010)

JUVENILE DELINQUENCY

JD Adjudication Affirmed

Family Court adjudged respondent to be a juvenile delinquent upon a fact-finding determination that he committed acts, which, if committed by an adult, would

constitute the crimes of attempted assault in the first and second degree, assault in the second degree and criminal possession of a weapon and placed him with OCFS for 18 months. The Appellate Division affirmed. There was no basis for disturbing the court's credibility determinations. Although respondent's personal role consisted of hitting the victim with his fist, the police officer, who saw the entire incident, clearly established respondent's accessorial liability for the acts of another participant who struck the victim with a bat. Further, respondent received effective assistance of counsel. Respondent's placement for a period of 18 months was the least restrictive given the seriousness of the crime as well as his lack of remorse and pattern of behavioral problems.

Matter of La-Me M., 71 AD3d 459 (1st Dept 2010)

Court's Finding Not Against the Weight of The Evidence

Family Court adjudicated respondent to be a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of sexual abuse in the second degree and attempted sexual misconduct and placed him with OCFS for a period of 12 months. The Appellate Division affirmed. The fact that the court dismissed counts of the petition alleging that respondent engaged in other forms of unlawful sexual conduct during this incident did not warrant a different conclusion. Further, given the age of the victim and the sexual nature of the charges, it was understandable that the presentment agency needed to use some leading questions to draw out all the facts, and this did not cast doubt on the reliability of the victim's testimony.

Matter of Christopher T., 71 AD3d 464 (1st Dept 2010)

JD Adjudication Reversed

Family Court adjudged respondent to be a juvenile delinquent, upon a fact-finding determination that he committed an act, which, if committed by an adult, would constitute the crime of obstructing governmental administration in the second degree and placed him on probation for 12 months. The Appellate Division reversed and dismissed the petition. The police came upon respondent and other persons who were pushing and shoving each other and appeared to be either fighting or "goofing around." Respondent and the others failed to comply with a directive to break it up and go away. When the police placed the group, including respondent, against a wall, they responded with obscene language but not acts of physical resistance. Although the police were performing an official function within the meaning of Penal Law §195.05, the "interference" under that statute must be in part physical in nature. Respondent's failure to comply with the order to disperse, without more, lacked the requisite intentional physical component.

Matter of Kendell R., 71 AD3d 553 (1st Dept 2010)

Probation Least Restrictive Alternative

Family Court adjudicated respondent a juvenile delinquent upon his admission that he committed an act which, if committed by an adult, would constitute the crime of unlawful possession of a weapon by a person under 16 and placed him on probation for 12 months. The Appellate Division affirmed. The record established that probation was the least restrictive alternative consistent with respondent's needs and the needs of the community given the serious nature of the incident, in which respondent caused injury with a BB gun and respondent's egregious school disciplinary, attendance record and lack of parental involvement.

Matter of Joel J., 71 AD3d 601 (1st Dept 2010)

Probation Least Restrictive Alternative Given Respondent's Use of Box Cutter

Family Court adjudicated respondent a juvenile delinquent upon her admission that she committed an act which, if committed by an adult, would constitute the crime of menacing in the second degree and placed her on probation for 12 months. The Appellate Division affirmed. The record established that probation was the least restrictive alternative consistent with respondent's needs and the needs of the community given the serious nature of the incident, in which respondent brought a box cutter to school and used it to injure a classmate and her history of violent behavior.

Matter of Olivia B., 72 AD3d 589 (1st Dept 2010)

Respondent Accessory to Second Degree Assault

Family Court adjudicated respondent a juvenile delinquent upon a fact-finding determination that she committed acts which, if committed by an adult, would constitute the crimes of assault in the second and third degrees, attempted assault in the second and third degrees, menacing in the second and third degrees, criminal possession of a weapon in the fourth degree, reckless endangerment in the second degree, and endangering the welfare of a child, and placed her on probation for 12 months. The Appellate Division affirmed. The evidence was legally sufficient with respect to the attempted assault in the third degree, menacing in the third degree, and endangering the welfare of a child based upon evidence that during respondent's and other youths' attack of a family outside a movie theater, respondent threatened a complainant's daughter who was holding her two-year-old son, told the woman to "put the kid in the car" so they could fight, swung at the second complainant and pulled his hair when he stepped between the two women, that respondent's fist grazed the second complainant's forehead and then respondent chest bumped the first complainant. The evidence was legally sufficient with respect to the assault in the second and third degrees, menacing in the second degree, criminal possession of a weapon in the fourth degree and reckless endangerment in the second degree. Respondent was present, shouting threats and throwing punches, while her companion attacked one complainant with a knife. Respondent's participation in the attack continued long past the moment her companion began using the knife. Respondent's participation in chasing, surrounding, threatening and attacking the family justified the conclusion that she and her companion were working together and that she shared her companion's intent to use the knife in the attack. There was sufficient evidence to support the other findings based upon accessorial liability. Dismissal of several of the offenses as lesser-included offences was not warranted because they applied to different victims or different primary actors. The dissent would have vacated those the findings based upon accessorial liability.

Matter of Tatiana N., 73 AD3d 186 (1st Dept 2010)

Probation Least Restrictive Alternative

Family Court adjudged respondent to be a juvenile delinquent, upon a fact-finding determination that he committed an act, which if committed by an adult, would constitute the crime of assault in the third degree and placed him on probation for 12 months. The record established that probation was the least restrictive alternative consistent with respondent's needs and the needs of the community given the violent nature of the offense, which involved an unprovoked attack on another boy who had given respondent a dirty look months before. The evidence supported the conclusion that respondent would benefit from counseling on anger management issues and that he was in need of supervision for a longer period than six months, which was the maximum period available under an ACD.

Matter of Florin R., 73 AD3d 533 (1st Dept 2010)

Parent Waived Right to Be Present at Hearing

Family Court adjudicated respondent to be a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute the crime of possession of a stolen vehicle in violation of Vehicle and Traffic Law § 426 and placed him with OCFS for a period of 18 months. The Appellate Division affirmed. Respondent's contention that the court erred in taking his admission outside his mother's presence because the statutory mandate to include a parent in the allocution provides that it "shall not be waived" (Family Ct Act § 321.3 [1]) and the court failed to affirmatively establish that "reasonable and substantial efforts" had been made to notify her of the proceeding (Family Ct Act § 341.2 [3]), was without merit. The court's allocution must extend to a parent if present and here it was undisputed that respondent's mother was not present. The court fully complied with the statute by conducting the allocution with respondent, his guardian ad litem and his attorney present. The record reflects that the reason respondent's mother was not present at the allocution was that she felt intimidated by her son, did not want him in her household, and would prefer that he remain in custody. Indeed, this was the reason a guardian ad litem was appointed at respondent's attorney's request. Moreover, there was nothing in the statute indicating that a parent cannot waive the right to be present at a

hearing and here the appointment of a guardian ad litem was as clear an indication of waiver that could be expected.

Matter of Deiby C., 73 AD3d 602 (1st Dept 2010)

Respondent Entitled to Vacatur of His Admission

Family Court adjudicated respondent to be a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute the crime of grand larceny in the fourth degree and placed him with OCFS for 18 months. The Appellate Division reversed and remitted for a new fact-finding hearing. The court failed to comply with the allocution requirements of Family Court Act § 321.3 (1). The court did not advise respondent of his right to testify, call witnesses on his own behalf and confront witnesses against him, or of the presentment's agency's obligation to prove his guilt beyond a reasonable doubt. Because the statutory requirement was nonwaivable, preservation was not required.

Matter of Aaron B., 74 AD3d 534 (1st Dept 2010)

Court's Findings Based Upon Legally Sufficient Evidence

Family Court adjudicated respondent a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of obstructing governmental administration in the second degree and resisting arrest and placed him on probation for 12 months. The Appellate Division affirmed. The court's finding was based upon legally sufficient evidence. There was no reason to disturb the court's determinations regarding credibility. There was sufficient physical interference with an official police function to constitute obstructing governmental interference. When the officer's observed respondent punch another individual in the face for no apparent reason and tried to investigate the matter, respondent fled, ignoring the officer's directive to stop, and respondent struggled when they caught him. Because respondent's arrest for obstructing governmental administration was authorized, his struggle to avoid being handcuffed constituted resisting arrest.

Matter of Miguel R., 74 AD3d 548 (1st Dept 2010)

Court Drew Reasonable Inference About Respondent's Knowledge of Stolen Merchandise

Family Court adjudicated respondent a juvenile delinquent upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree and imposed a conditional discharge for a period of 12 months. The Appellate Division affirmed. The court reasonably drew the inference that respondent knew he had stolen merchandise in his backpack and properly found respondent's explanation for the presence of the stolen merchandise to be implausible. Respondent testified that he had been carrying only a notebook and a folder in his backpack when he entered the store. The court properly rejected respondent's claim that he did not notice the extra weight or bulk of two pairs of adult jeans, which he stated were placed in the bag by another person. It was also within the court's province to reject respondent's testimony that he loaned his backpack to a friend who was trying on jeans and that he went to another floor to meet a friend and that he made no plan to retrieve the backpack. The court's dismissal of the petit larceny charge was of no moment. A person may be guilty of stealing and criminally possessing the same property and the court's decision to make a finding regarding one offense and to dismiss the other did not entitle respondent to the windfall of yet another dismissal. The dissent would have reversed on the ground that defendant's testimony that the backpack had been in the possession of another youth who had tried on jeans while respondent was in the store, that the jeans were not respondent's size, and that respondent cooperated when asked to open his backpack, did not establish beyond a reasonable doubt that respondent knowingly possessed the stolen property.

Matter of Albert F., 74 AD3d 568 (1st Dept 2010)

Clerical Discrepancy on Orders Not Controlling

Family Court adjudicated respondent to be a juvenile delinquent, upon a finding that he committed acts which, if committed by an adult, would constitute the crimes of menacing in the second degree, harassment in

the first degree and menacing in the third degree and placed him with OCFS for a period of 12 months. The Appellate Division modified by changing the incident dates on the court's order. The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. Respondent's contention that certain counts should be dismissed because of a lack of proof that the events in question occurred on the date set forth on the last pages of the fact-finding and dispositional orders was without merit. Although those pages appeared to limit the incident date to July 24, 2008, the first page of each order stated that the findings of menacing and harassment in the second degrees were based on continuing events occurring from May 2008 through August 14, 2008. This was a clerical discrepancy and there was no reason to find the dates recited on the last page controlling when the dates on the first page conformed to the petition, the evidence and the court's oral decision.

Matter of Louie M., 74 AD3d 610 (1st Dept 2010)

Adjudication Supported by Circumstantial Evidence

Family Court adjudicated respondent to be a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, obstructing governmental administration in the second degree and menacing in the third degree and placed him with OCFS for a period of 18 months. The Appellate Division affirmed. The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. Although neither the victim nor his companion saw the face of the person who stole the victim's watch, respondent's identity was established by circumstantial evidence. The robber, like respondent, was a young back male wearing a white hooded sweatshirt. The robber was one of a group of four males and when the police saw respondent shortly after the robbery, he was in a group of four or five males. When the police asked to speak with respondent, respondent ran away. Finally, when the police apprehended respondent after chasing him several blocks, he was wearing a watch of the same color, brand, and model as the victim's stolen watch. While no single factor was sufficient by itself, when taken together, they warranted the conclusion that respondent was the robber.

Matter of William B., 74 AD3d 618 (1st Dept 2010)

Evidence Established "Lewd Manner" Element of Public Lewdness Charge

Family Court adjudged respondent to be a juvenile delinquent, upon a fact-finding determination that he committed an act, which if committed by an adult, would constitute the crime of public lewdness and placed him on probation for a period of nine months. The Appellate Division affirmed. Respondent did not merely expose his private parts, but did so in the offensive manner at which the statute was aimed. Respondent exposed himself to a teacher's assistant and then did so again, this time calling her name and behaving in a manner to ensure that she directed her attention to his exposed private parts.

Matter of Tyrone G., 74 AD3d 671 (1st Dept 2010)

Court Properly Allowed Eight-Year-Old Victim to Testify

Family Court adjudged respondent to be a juvenile delinquent, upon a fact-finding determination that he committed an act, which if committed by an adult, would constitute the crime of criminal sexual act in the first degree and placed him on probation for a period of eighteen months. The Appellate Division affirmed. The court properly allowed the eight-year-old victim to give sworn testimony because his voir dire responses established that he sufficiently understood the difference between truth and falsity, the nature of a promise to tell the truth, and the wrongfulness of lying. The record did not support respondent's contention that the voir dire consisted primarily of leading questions.

Matter of Prince A., 74 AD3d 685 (1st Dept 2010)

JD Adjudication Against Weight of Evidence

Family Court adjudged respondent to be a juvenile delinquent, upon a fact-finding determination that she committed an act, which if committed by an adult, would constitute the crime of possession of pistol ammunition in violation of Administrative Code of the

City of New York § 10-131 (i) (3), and placed her with OCFS for 12 months. The Appellate Division reversed. Respondent's mother called 911 to report that respondent's stepfather found a gun in respondent's bedroom. After police officers recovered the .25 caliber semiautomatic pistol, they picked up respondent from school and transported her to a police precinct for questioning. After her mother arrived and she was read her *Miranda* rights and her mother and she acknowledged they understood those right respondent was questioned. Respondent said the gun was hers and the officer said he didn't believe her. Thereafter, respondent was arrested and had one hand handcuffed to a metal bar in the interviewing room because the precinct did not have cells for juveniles. After her arrest was processed, respondent's mother was brought back into the room and the officer read respondent her *Miranda* rights again. She then admitted the gun belonged to her boyfriend. She said that she put the gun under her bed because her boyfriend asked her to hold it because there were cops downstairs and he didn't want to get caught with it. She stated that she did not know if it was loaded. Thereafter, respondent committed her statement to writing. She was not promised leniency. The court properly denied respondent's motion to suppress her written statement. The court's determination that respondent possessed ammunition, however, was against the weight of the evidence. Her statement that she didn't know whether the gun was loaded was sufficient to prove respondent possessed a gun, but it did not prove she knowingly possessed ammunition. The court's decision erroneously was based solely on the hypothetical possibility that respondent may have known there was ammunition in the gun.

Matter of Amber B., 76 AD3d 475 (1st Dept 2010)

Element of Intent to Obtain Sexual Gratification Inferred

Contrary to respondent's contention, the element of intent to obtain sexual gratification could be inferred from the totality of the circumstances. The touching of the complainant's breasts while she was being restrained by another was clearly sexual and could not be characterized as "horseplay."

Matter of Jonathan F., 72 AD3d 963 (2d Dept 2010)

Evidence Established That Appellant Made Terroristic Threat

Contrary to respondent's contention, the petition, including the supporting depositions, contained nonhearsay allegations which established, if true, every element of making a terroristic threat, as defined by Penal Law § 490.20, and respondent's commission thereof (see FCA § 311.2 [3]). Viewing the evidence in the light most favorable to the presentment agency, the Appellate Division found that it was legally sufficient to establish that respondent committed acts, which, if committed by an adult, would have constituted the crime of making a terroristic threat.

Matter of Horan A., 74 AD3d 1192 (2d Dept 2010)

Respondent Properly Adjudged Juvenile Delinquent

Following a jury trial in County Court, respondent was found guilty of rape in the second degree and criminal sexual act in the second degree. Because he was not criminally responsible for those crimes by reason of infancy, County Court ordered the verdict deemed vacated and replaced by a juvenile delinquency fact determination, and the action was removed to Family Court for disposition. Family Court adjudicated respondent a juvenile delinquent based upon the finding that he committed acts that would constitute the crimes he was found guilty of in County Court. The Appellate Division affirmed. The evidence was legally sufficient to establish that the victim lacked mental capacity to consent to sexual relations and respondent failed to establish that he was unaware of the victim's mental disability. Further, there was sufficient evidence to corroborate the victim's testimony, because the testimony of respondent established that he attempted to engage the victim in sexual intercourse or oral sexual conduct at the time and place of the alleged incident. The verdict was not against the weight of evidence: resolution of issues of credibility, as well as the weight to be accorded the evidence presented, are primarily questions to be determined by the finder of fact. The court did not abuse its discretion in placing respondent in the custody of OCFS for 18 months. The court was not required to try the lowest form of intervention before ordering placement. Although respondent had some success with electronic monitoring, he also had a record of infractions while in detention and failed to

take responsibility for his actions.

Matter of Christopher T., 71 AD3d 1384 (4th Dept 2010), *lv denied* 15 NY3d 707

Family Court Lacked Authority To Order Respondent To Leave Country

Respondent pled guilty to one count of criminal possession of marihuana in the fourth degree. At the dispositional hearing, Family Court admitted diagnostic reports recommending probation supervision and the testimony of respondent's mother who had flown to Erie County from Puerto Rico for the hearing. The court adjudicated respondent a juvenile delinquent and, over the objections of petitioner and respondent, granted a conditional discharge for a 12 month period with the condition that respondent leave Erie County in the custody of his mother and remain in Puerto Rico for the 12 month period. Six months later respondent was arrested in Erie County and the court found that he violated the conditional discharge. The court "vacated" the prior order of conditional discharge and adhered to its original condition, ordering Erie county to transport respondent to Puerto Rico. The Appellate Division reversed. Upon the court's revocation of the order of conditional discharge, the proceedings were returned to the dispositional phase of the application to restore the matter to the calendar. Thus, the court erred in again ordering respondent to be transferred to Puerto Rico. Moreover, the court had no authority to order respondent to leave the county or the country where the incident occurred.

Matter of Eduardo R., 72 AD3d 1488 (4th Dept 2010)

Respondent Properly Adjudicated Juvenile Delinquent

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that he committed acts which, if committed by an adult, constituted the crime of attempted robbery in the second degree. The Appellate Division affirmed. Respondent waived his contention that the presentment agency's failure to provide him with the transcript of the testimony of the complaining witness from the co-respondent's hearing constituted a *Rosario* violation. The transcript was not prepared because the hearing in question had occurred the day before, and respondent declined the court's offer for an adjournment to allow the transcript to be produced. Further, respondent's contention that the evidence was legally insufficient was without merit. The evidence at the hearing established that respondent shoved the victim and was aided by at least one companion in the immediate vicinity.

Matter of Javier R., 72 AD3d 1553 (4th Dept 2010)

Adjournment in Contemplation of Dismissal Improper Disposition

Family Court adjourned respondent's proceeding in contemplation of dismissal. The Appellate Division reversed and remitted. The court had previously made a finding that respondent was a juvenile delinquent and thus lacked the authority to adjourn the proceeding in contemplation of dismissal.

Matter of Eduardo R., 72 AD3d 1570 (4th Dept 2010)

ORDER OF PROTECTION

Father Violated Order of Protection

The Appellate Division had previously affirmed a Family Court determination that the father had abused and neglected his daughters, based upon evidence that he repeatedly sexually abused the older daughter; and Family Court's dispositional order which precluded the father from having visitation with the daughters and the issuance of a final order of protection against the father. More recently, the Appellate Division had affirmed an order of Family Court which continued placement of the children with DSS, continued the no visitation order, and modified the permanency plan to allow the filing of a TPR against the father. The Department then filed two violation petitions. After a hearing, Family Court concluded that the father had willfully violated the order as alleged in each petition and imposed a sanction of six months in jail. The father appealed and the Appellate Division affirmed holding that Family Court properly concluded that DSS met its burden of proving, by clear and convincing evidence, that the father had willfully violated the order. The father admitted driving twice by the children's home and to having contact with the children, a violation of the order.

Matter of Telsa Z., 75 AD3d 776 (3d Dept 2010)

PATERNITY

Dismissal of Petition on Ground of Equitable Estoppel Affirmed

On the ground of equitable estoppel, Family Court granted the motion of respondent Wayne N. and dismissed the petition of petitioner Fidel A. seeking a declaration of paternity of the subject child. The Appellate Division affirmed. Despite the results of the DNA tests, which established that petitioner was the subject child's biological father, the court properly found that it was not in the best interests of the child for petitioner to assert his paternity. Evidence showed that it would be detrimental to the child's interests to disrupt her close relationship with respondent Wayne N., whom she knows as her father and whose actions established a close parental relationship.

Matter of Fidel A. v Sharon N., 71 AD3d 437 (1st Dept 2010)

Order Granting Genetic Marker Test Premature

Supreme Court granted plaintiff former husband's motion to the extent of ordering that genetic marker testing be performed on defendant former wife and her child. The Appellate Division reversed. The parties were granted an uncontested divorce on the ground of constructive abandonment based upon plaintiff's sworn statement that defendant refused to have sexual relations with him for one year prior to the commencement of the divorce action. Just over a year after the judgment of divorce was entered, plaintiff brought a motion seeking to establish paternity of defendant's child, alleging he was unaware that she was pregnant when he commenced the divorce action and that she had given birth some time during their separation. Defendant opposed what she characterized as plaintiff's attempt to undermine the divorce judgment and establish paternity. Defendant stated that she was remarried and had established a happy home for her child and her second husband. The order was premature, based upon an inadequate record, and without representation of the child's interests. An order directing genetic testing should not be entered prior to a hearing on the child's best interests and the child should be represented by an attorney at the hearing.

Andrew T. v Yana T., 74 AD3d 687 (1st Dept 2010)

Putative Father Was Equitably Estopped From Challenging Paternity

In a paternity proceeding, the hearing testimony demonstrated that the putative father and the child, who was 15 years old at the time this proceeding commenced, had established a parent-child relationship and that the child had developed relationships with members of his family. From these facts, the Family Court should have found that there was sufficient evidence of harm to the child since the child changed his position by forming a bond with the putative father and the putative father's family. Consequently, the Family Court should have determined that the mother met her prima facie burden of demonstrating that the putative father was equitably estopped from challenging paternity, denied the putative father's motion to dismiss, and continued the hearing to afford him an opportunity to present evidence that it would be in the child's best interests to order genetic marker testing.

Matter of Smythe v Worley, 72 AD3d 977 (2d Dept 2010)

PERSON IN NEED OF SUPERVISION

PINS Adjudication Reversed

Family Court adjudicated respondent to be a person in need of supervision and placed him on probation for 12 months. The Appellate Division reversed and dismissed the petition. The court erred in failing to dismiss the petition because the petition failed to specify what diversion services were offered prior to the filing of the petition as required by Family Court Act § 735. The petition also failed to demonstrate that petitioner made documented diligent attempts to avoid the necessity of filing a petition. The failure to comply with such substantive statutory requirements constituted a non-waivable jurisdictional defect requiring dismissal.

Matter of James L., 74 AD3d 1775 (4th Dept 2010)

TERMINATION OF PARENTAL RIGHTS

Motion to Vacate Default Properly Denied

Family Court denied respondent parents' motions to vacate a dispositional order entered upon their default. The Appellate Division affirmed. The court properly denied respondents' motions to vacate because they failed to demonstrate a reasonable excuse for the default. The parents' purported reliance on an adjourn slip for September 19, 2008 was unreasonable, given that the slip clearly related to a separate neglect proceeding involving the couple's younger child, and that the parents appeared in court on March 28, 2008 and July 21, 2008, at which time the September 9 date was selected and confirmed. Even if the photocopy of the adjourn slip annexed to the motion were authentic and caused confusion, it was at odds with the selected and confirmed court dates and the parents should have clarified any resulting confusion, especially where the same excuse had been used in connection with an earlier failure to appear. Further, the claim for abandonment was established by proof that the parents had no contact with and failed to visit the children in the six month period preceding the filing of the petition. The mother's claim that the caseworker did not respect her and was rude to her lacked the requisite specificity and corroboration to support a claim that she was prevented or discouraged by the agency from contacting her children. The mother's claim that the agency made an inappropriate referral was unpersuasive because the agency was not required to prove diligent efforts in an abandonment proceeding. The father's claim that he failed to visit more frequently because visits were not scheduled and that only supervised visits were allowed, failed to set forth a meritorious defense.

Matter of Bibianamiet L. - M., 71 AD3d 402 (1st Dept 2010)

Termination in Children's Best Interests

Upon a fact-finding of permanent neglect against respondent mother and abandonment against respondent father, Family Court terminated respondents' parental rights to the subject children for the purpose of adoption. The Appellate Division affirmed. Although the mother attended all the programs recommended by the agency, she failed to correct the conditions that led to the placement of the children in foster care – she remained in an abusive relationship with the father of two of the subject children and attempted to hide that relationship from the agency. She failed to gain insight into either the needs of the children or her own limitations - evidence indicated that the mother suffered from a deteriorating mental condition, failed to properly assess her daughter's serious mental problems and remained passive during visits with the children. The father admitted that although he was aware of his children's placement with the agency and their residence with the grandmother, he made no attempt to contact the children or the agency after the expiration of the order of protection. Further, the order of protection itself did not relieve him of his obligation to maintain contact. Termination was in best interests of children to facilitate their adoption by their foster mother, the children's maternal grandmother, with whom they have resided for six years and with whom they wish to stay.

Matter of Raquel N., 71 AD3d 418 (1st Dept 2010)

Termination on Ground of Abandonment Affirmed

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of abandonment for the purpose of adoption. The Appellate Division affirmed. Respondent admitted that she failed to contact, visit, call or provide support for the child. She also admitted that the child's father, with whom the child had resided since May 2002, did not discourage contact. Although respondent had experience with court proceedings, she took no steps to enforce her parental rights or obtain visitation until after the adoption petition was filed.

Matter of Ezri, 71 AD3d 472 (1st Dept 2010), *lv denied* 14 NY3d 712 (2010)

Despite Progress, Termination in Children's Best Interests

Following respondent mother's admission to permanent neglect, Family Court terminated her parental rights with respect to the subject children for the purpose of adoption. The Appellate Division affirmed. Respondent's laudable progress did not outweigh the

need of the children to have a permanent and stable home. Given respondent's history of drug abuse and prior relapses, and her at best uncertain prospects of obtaining permanent housing and steady income, the court's concern that respondent was still a "work in progress" was well-founded. Further, the children have bonded with their foster parents who have been providing a stable, secure and loving home environment for the children since early 2004, when one child was two years old and the other children two months old. Under the circumstances, a suspended judgment was not in the children's best interests.

Matter of Samantha Stephanie R., 71 AD3d 484 (1st Dept 2010)

Respondent Permanently Neglected Children by Maintaining Only Sporadic Contact

Family Court terminated respondent mother's parental rights to her children on the ground of permanent neglect and committed their custody and guardianship to ACS for the purpose of adoption. The Appellate Division affirmed. Petitioner established that it exerted diligent efforts to encourage the parent-children relationship by preparing a service plan for respondent that included drug treatment, teen parent parenting skills and anger management programs, and referred her to an agency that could assist her with reapplying for public assistance. Respondent did not attend the parenting skills program or complete her drug treatment. Moreover, petitioner established by clear and convincing evidence that respondent permanently neglected her children by maintaining only sporadic contact with them throughout her unsettled history as a parent and failed to address her drug problem. It was in the best interests of the children to terminate parental rights to free them for adoption by their foster mother and her husband, both of whom were giving the children excellent care and with whom they were thriving. A suspended judgment was not in the children's best interests.

Matter of Juan A, 72 AD3d 542 (1st Dept 2010)

Respondent Father Failed to Plan For Children's Future

Family Court terminated respondent mother's parental rights with respect to her children on the ground of permanent neglect and terminated respondent father's parental rights with respect to his child and committed the children's custody and guardianship to ACS for the purpose of adoption. The Appellate Division affirmed. Petitioner established that it made diligent efforts to encourage and strengthen the parental relationship by working with the mother to develop a service plan, maintaining frequent contact with her, scheduling visits between mother and children, referring her for individual therapy, and taking steps to assist her in obtaining suitable housing. The mother failed to plan for the future of her children by failing to obtain required treatment and appropriate housing and the father also failed to plan by not obtaining appropriate housing. The father's contention that the court erred in not entering a suspended judgment with respect to his child was not preserved and, in any event, a suspended judgment was not in the child's best interests.

Matter of Jazmin Marva B., 72 AD3d 569 (1st Dept 2010)

Mother Failed to Show Excuse For Default

Family Court denied respondent mother's motion to vacate orders that, upon her default, terminated her parental rights to her children on the ground of permanent neglect and committed custody and guardianship of the children to petitioner ACS for the purpose of adoption. Respondent's affidavit explaining that she was ill and her documentation that she saw her doctors once in September and once in October 2008 was insufficient to show a reasonable excuse for the default because there was no showing that she was ill on the day of the hearing. Additionally, respondent failed to establish a reasonable excuse for the delay because she failed to apprise counsel of her nonappearance prior to the hearings and failed to explain that failure in her motion to vacate the default. The dissent would have reversed and granted her motion to vacate the default.

Matter of Amirah Nicole A., 73 AD3d 428 (1st Dept 2010), *lv dismissed* 15 NY3d 766

TPR by Reason of Mental Illness Affirmed

Family Court, upon a finding of mental illness,

terminated respondent mother's parental rights to her child. The Appellate Division affirmed. The unrebutted expert psychiatric testimony and medical and agency records established by clear and convincing evidence that respondent suffered from paranoid schizophrenia rendering her unable to properly and adequately care for her special-needs child presently and for the foreseeable future. In cases of termination of parental rights by reason of mental illness, the agency was not required to show that it made diligent efforts.

Matter of Roberto A., 73 AD3d 501 (1st Dept 2010), *lv denied* 15 NY3d 703

TPR Affirmed – Mother Failed to Plan

Family Court, upon a finding of permanent neglect, terminated respondent mother's parental rights to her children and committed their custody and guardianship to petitioner ACS for the purpose of adoption. The Appellate Division affirmed. The agency was excused from making diligent efforts in light of the termination of parental rights to mother's other children. In any event, the record established that the agency did exercise diligent efforts and that the findings of permanent neglect were supported by clear and convincing evidence. The mother failed to plan for the children's future by failing to secure employment and appropriate housing and failed to gain insight into the conditions that led to the children's placement. It was in the best interests of the children to terminate parental rights to free them for adoption by their foster parents with whom the children had lived most of their lives.

Matter of Shawntashia Michelle B., 73 AD3d 615 (1st Dept 2010)

Father Permanently Neglected His Child

Family Court terminated respondent father's parental rights to his child upon a fact-finding determination that he permanently neglected the child and committed her custody and guardianship to NYC Commissioner of Social Services and the agency for the purpose of adoption. The Appellate Division affirmed. Petitioner established that it made diligent efforts to reunite father with child, making referrals for drug treatment and other services and arranging visitation. Despite these efforts, respondent failed to remain drug-free and continued to live with the child's mother who remained a drug user. Respondent admitted relapsing four or five times during the relevant period and that he never completed a drug treatment program. The child's best interests warranted termination of respondent's parental rights to enable the child to be adopted by her foster mother, with whom she had lived with and thrived in a loving relationship since infancy. A suspended judgment was not warranted given respondent's failure to remain drug-free and to separate from the mother.

Matter of Angelica G., 74 AD3d 470 (1st Dept 2010)

Respondent Permanently Neglected Children by Maintaining Only Sporadic Contact

Family Court terminated respondent mother's parental rights to her child on the ground of permanent neglect and committed her custody and guardianship to the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. Petitioner established that it made diligent efforts to encourage the parent-children relationship by making referrals for drug and mental health treatment, arranging visitation with the child, advising respondent of the child's progress, and making available staff and counseling for developing a plan for appropriate services. Notwithstanding respondent's mental disorder, she was responsible for cooperating with and completing mandated drug and mental health treatment and she failed to do so. Further, respondent continued her use of marijuana and repeatedly failed to take her psychiatric medication.

Matter of Lanise Moena R., 74 AD3d 490 (1st Dept 2010)

Findings of Permanent Neglect Supported by Clear and Convincing Evidence

Family Court terminated respondent mother's parental rights to her children and respondent father's parental rights to his child upon findings of permanent neglect and committed the children's custody and guardianship to ACS and the agency for the purpose of adoption. The Appellate Division affirmed. Petitioner established that it made diligent efforts to encourage and strengthen the parental relationship including providing father with referrals for drug rehabilitation and parenting skills and

scheduling regular visitation. Despite these efforts, father failed to remain drug-free and did not complete a drug treatment program. He also missed approximately one-quarter of his scheduled visitation with his child. The finding that the mother permanently neglected her children was also supported by clear and convincing evidence. Although the agency referred her to drug rehabilitation, anger management and parenting skills programs, she failed to complete any of them. Mother did not visit the children on a sustained and regular basis. The children's best interests warranted termination of respondents' parental rights to enable the child to be adopted by her foster mother, with whom they had developed a loving relationship. The foster mother had tended to the children's special needs and wanted to adopt them. A suspended judgment was not warranted.

Matter of Carol Anne Marie L., 74 AD3d 643 (1st Dept 2010)

Mother Not Prevented From Visiting Child

Contrary to the mother's contention, the Family Court did not err in considering her time at a drug-treatment facility in determining whether she permanently neglected the child. Except for the first 30 days at the drug-treatment facility, the mother was not prevented from visiting with the child or planning for his future. Thus, she was not "institutionalized" or "hospitalized" within the meaning of Social Services Law § 384-b (7) (d) (ii).

Matter of Christopher V., 72 AD3d 980 (2d Dept 2010)

Family Court Properly Considered Diligent Efforts

The father was convicted of manslaughter in the first degree for killing the child's mother, and is serving an 18-year term of imprisonment. At the conclusion of the combined hearings to adjudicate the child severely abused and to terminate the father's parental rights, the petitioner made an oral motion pursuant to Family Court Act § 1039-b (a) to dispense with the requirement that it make reasonable efforts to reunite the child with the father, and the Family Court granted the motion. The father appealed arguing that the Family Court erred in granting the motion because it was not made in writing, and the requisite period of notice was not given. The Appellate Division disagreed. In making its determination of severe abuse under both Social Services Law § 384-b and Family Court Act § 1039-b (a), the Family Court was required to consider the appropriateness of diligent reunification efforts, and the extent to which such efforts would be detrimental to the child. Since the Family Court had already considered the issue of diligent efforts in connection with its determination that the child had been severely abused, the petitioner's motion was merely "superfluous." Order affirmed.

Matter of Peter B., 73 AD3d 764 (2d Dept 2010)

Forensic Testimony Regarding Mother's Mental Retardation Uncontroverted

The Family Court properly found that the petitioner first established, by clear and convincing evidence, that the mother was at that time and for the foreseeable future unable, by reason of mental retardation, to provide proper and adequate care for the subject child. The uncontroverted testimony of the Mental Health Services psychologist revealed that the mother had subaverage intellectual functioning that originated in her childhood, impaired adaptive functions, and impaired parental capacity, and that because of her mental retardation, the subject child would be in danger of becoming neglected if he were returned to her care. Although the attorney for the child raised new facts and allegations, which the Appellate Division might have properly considered, they did not warrant remittal for a dispositional hearing as to whether termination of the mother's parental rights is in the best interests of the subject child.

Matter of Diante B., 75 AD3d 599 (2d Dept 2010)

Parental Rights Terminated Due to Parents' Mental Illness

Appellate Division affirmed a Family Court ruling that parental rights be terminated. Father had pled guilty to sexual abuse of a minor. Due to this abuse and the mother's refusal to acknowledge the father's behavior, the children were removed from the home. After mental health evaluations, a licensed psychologist interviewed the mother and father and opined that their mental illness, intellectual deficiencies, and the father's

pedophilia diagnosis made them unfit to be serve as parents. In view of any contradictory expert evidence, the Appellate Division sustained the Family Courts's determination to terminate respondents' parental rights on the basis that their mental illness rendered them unable to care for their children now and for the foreseeable future.

Matter of Darren HH., 72 AD3d 1147 (3d Dept 2010)

Father Denied Right to Counsel

Family Court found child abused by virtue of her father being found guilty of assaulting her. Thereafter, DSS moved to have the child adjudicated a severely abused child. While the motion was pending, the father's assigned counsel wrote a letter to Family Court stating that the father had failed to advise her in writing if he wished to oppose the motion, and requested that she be relieved from representing the father. The unopposed motion was granted. At the beginning of a subsequent dispositional hearing, the father asserted that he was unaware that his attorney had been relieved from representing him and that summary judgment had been granted. Family Court appointed another attorney, and that attorney requested that the court vacate its summary judgment decision since the father had not been afforded an ample opportunity to respond to the motion. The motion to vacate was denied, a dispositional hearing conducted, and the father's parental rights terminated. The father appealed and the Appellate Division reversed, holding that the father had a right to an attorney when facing a proceeding seeking to terminate his parental rights.

Matter of Alicia EE., 72 AD3d 1155 (3d Dept 2010)

Mother's Parental Rights Terminated Due to Mental Illness

A neglect petition was filed against a mother with two young children, both of whom had special needs. Family Court found the children to be neglected and the children continued to be in the mother's custody with preventative services provided to her. An order of protection was also entered providing that the mother comply with certain conditions, such as cooperating with the services and ensuring that the children's father, a registered sex offender, not be allowed within 1,000 feet of the children. Subsequently, the children were removed from her custody and placed in foster care after it was found that she was allowing the children to be in their father's presence. DSS filed a mental illness TPR. Family Court ordered the mother to submit to a mental health evaluation by a licensed clinical psychologist. Following a hearing, the court determined that the mother's mental illness rendered her unable to provide adequate care for the children and terminated her parental rights. The Appellate Division held that the mother's mental illness endangered the children's welfare and precluded her from caring for them for the immediate future.

Matter of Karen GG., 72 AD3d 1156 (3d Dept 2010)

Abusive Relationships and Drug Abuse Grounds for Permanent Neglect TPR

Child was removed from his mother when he was two months old and placed with his maternal great aunt after reports that the child had been repeatedly exposed to violent physical altercations between the mother and her boyfriends that often required the intervention of police. In the neglect proceeding, the mother consented to a finding of neglect and a dispositional order that continued the child in the aunt's care. In order to regain custody of her son, the dispositional order required the mother to meet regularly with her caseworker, maintain a safe and stable household and work towards full employment. DSS subsequently sought a TPR alleging that the mother failed to comply with many of these conditions. Family Court determined that the child's best interests required that the mother's parental rights be terminated and the mother appealed. The Appellate Division affirmed holding that the mother failed to plan for her child's future and that TPR was in the child's best interests. The Appellate Division decided their ruling on a number of issues, including that the mother continued to pursue relationships with men who physically abused her as well as her refusal to finish mandated substance abuse programs and drug testing.

Matter of Keegan JJ., 72 AD3d 1159 (3d Dept 2010)

Abandonment TPR Upheld Even Absent Respondent

Mother's three children were removed from her care,

custody was given to DSS and a neglect petition was filed. Mother stipulated to a finding of neglect of her children, was placed under DSS supervision, and consented to comply with certain terms and conditions, including substance abuse treatment. Later that year, after the mother admitted to violating the terms of her supervision and failed to appear for a dispositional hearing, Family Court issued a warrant for her arrest. After her arrest, she was served with an abandonment TPR petition, which she stipulated to with a one-year suspended judgment, subject to earlier terms. Two years later, DSS moved to revoke the suspended judgment, alleging the mother abused cocaine and failed to maintain stable housing. After the mother failed to appear for the hearing without excuse, Family Court revoked suspended judgment and terminated the parent's parental rights. The mother appealed, and the Appellate Division affirmed holding that Family Court acted within its discretion in allowing the dispositional hearing to continue without the mother present because she failed to demonstrate the required "good cause" for an adjournment. In addition, Family Court is permitted to terminate parental rights as long as noncompliance has been demonstrated by a preponderance of the evidence. In this case, during the two years the children have been in care, the mother made little effort to reunite with them and had further violated the terms and conditions of her suspended judgment.

Matter of Elias QQ., 72 AD3d 1165 (3d Dept 2010)

Father's Parental Rights Terminated Due to Abandonment

With mother's consent, her child was placed in a foster home shortly after birth. The father's parental rights were terminated based upon the grounds of abandonment. The Appellate Division rejected the Attorney's for Child contention that the appeal was rendered moot by virtue of the child's subsequent adoption by her foster parents. A determination of neglect creates "a permanent and significant stigma which is capable of affecting a parent's status in potential future proceedings." Despite being aware of the child's existence and visiting her immediately after her birth, the father did not interact with either the child or the petitioner during the relevant six-month period. The father asserted that petitioner made an insufficient effort to involve him in the child's life. However, diligent efforts are not required in an abandonment TPR. In any event, the record reflects that petitioner diligently sought out the father and made multiple efforts to contact him at his correct address without success. The Appellate Division affirmed.

Matter of Mahogany Z., 72 AD3d 1171 (3d Dept 2010)

Incarcerated Father's Plan for Child Deemed Not Feasible

Down's syndrome child was adjudicated permanently neglected and the incarcerated father's parental rights were terminated. The Appellate Division agreed with the Family Court that the DSS met its burden of establishing the lack of a realistic plan by the father for the child. The father had supplied a DSS caseworker with the names of relatives and friends as possible resources to care for the child. However, the caseworker's investigation revealed that these individuals were unsuitable for a variety of reasons. No suitable caregiver was identified by the father for this special needs child, and leaving the child in foster care for four to six years while the father served his prison term was not consistent with the goal of avoiding prolonged foster care.

Matter of Lawrence KK., 72 AD3d 1233 (3d Dept 2010)

Mother's Parental Rights Terminated Due to Permanent Neglect

When it was discovered that the mother was living with a convicted sex offender, she voluntarily placed her daughter with DSS who placed her with a foster family. After a fact-finding hearing, Family Court learned that the mother had observed the boyfriend sexually abuse the child without taking action and found the child to have been neglected by the mother. Following dispositional and permanency hearings, Family Court ordered that mother's parental rights be terminated. Mother appealed, contending that the DSS failed to make diligent efforts to strengthen and encourage the parental relationship. The Appellate Division disagreed and held that DSS had provided the mother with a caseworker, who provided access to mental health and literacy volunteers, and arranged for parenting classes, which constituted diligent efforts. The caseworker had

continually observed deplorable conditions during home visits and the Appellate Division found that the mother continuously failed to protect the child from sexual abuse.

Matter of Mary MM., 72 AD3d 1427 (3d Dept 2010)

Abandonment TPR Upheld

Clear and convincing evidence established that, during the six-month period prior to the filing of the TPR petition, respondent father evinced an intent to forego his parental rights and obligations as manifested by his failure to visit with the children and communicate with the children or agency, although able to do so and not prevented or discouraged from doing so by the agency. A parent's ability to visit and communicate with his or her children is presumed and once a failure to do so is established, the burden shifts to the parent to show that he maintained sufficient contacts with the children. Sporadic or insubstantial contact is insufficient and will support a finding of abandonment. In this case, the father made only two attempts during the statutory period to visit with his children. Although he testified that his limited contact with the children was the caseworker's fault, Family Court found such testimony not credible.

Matter of Michaela PP., 72 AD3d 1430 (3d Dept 2010)

Reversible Error to Determine Failure to Plan Before Diligent Efforts

Children were in foster care due to respondents' neglect. Violation petitions were filed alleging that they failed to comply with conditions in the dispositional order. While those petitions were pending, a permanent neglect TPR was filed. After a hearing on the violation petitions, Family Court found clear and convincing evidence of violations and, significantly, also held that each respondent failed to address the shortcomings that led to the removal of the children and thereby failed to plan for the children's future. Based on those findings, DSS moved for partial summary judgment in the TPR. The motions were opposed on numerous grounds, including that the violation petitions had not alleged a failure to plan and that a judicial determination regarding diligent efforts by petitioner had not yet been made. Family Court nevertheless granted the motions, holding that diligent efforts was the only remaining issue. Family Court found such diligent efforts following a hearing and ultimately terminated respondents' parental rights. Respondents appealed and the Appellate Division found merit to respondents' argument that partial summary judgment was improperly granted. "The two elements that an agency seeking to establish permanent neglect must prove are: 'first, that it made diligent efforts to strengthen the parent-child relationship and, second, that despite those diligent efforts, the parent has failed to maintain contact with the child or participate in plans for the child's future for one year after the agency has been charged with the child's care.' The second element of the permanent neglect analysis (i.e., lack of contact or failure to plan) cannot be decided as a matter of law before the first element (i.e., diligent efforts) has been addressed." Because the procedure was defective, the error cannot be deemed harmless. All matters remitted for a new hearing before another judge.

Matter of Jasmine F., 74 AD3d 1396 (3d Dept 2010)

Father's Surrender Was Proper

Family Court adjudicated all three of respondents' children to be permanently neglected. Rather than terminating their parental rights, Family Court suspended judgment and approved a permanency plan of reunification. Subsequently, Family Court signed an order to show cause to terminate the suspended judgment and while that was pending, the parents surrendered one of the children. The father appealed from the order approving his judicial surrender. The Appellate Division upheld the surrender finding that there was no defect in the application. The petition was verified by a person acquainted with the facts and circumstances of the matter and contained all of the required information. The fact that it was not called an affidavit did not prejudice the father and was, at most, a technical defect. Further, there was no flaw in the order to show cause. Service was proper and the father received timely notice. Finally, the surrender was proper. "Family Court read the required warnings and the provisions of the surrender to the father prior to its execution. At the time the father executed the judicial surrender, he was represented by counsel and he indicated to the court that he understood the finality of

the surrender, that he had adequate opportunities to consult with counsel and others and that he understood the available alternatives."

Matter of Christina RR., 74 AD3d 1408 (3d Dept 2010)

Mother's Drug Addiction Grounds for Permanent Neglect

Respondent's drug addiction, before during and after her child's birth, resulted in a finding of neglect and ultimately a permanent neglect TPR. While she did not contest the finding of diligent efforts, on appeal she argued that the permanent neglect was not proved and/or that it was not in her child's best interests to terminate her parental rights but rather a suspended judgment was the more appropriate disposition. The Appellate Division did not agree and affirmed Family Court's findings holding that respondent's chaotic lifestyle and drug addiction prevented her from addressing the conditions that led to the child's removal and that she failed to effectively plan for the child's future. As such, the finding of permanent neglect was supported by clear and convincing evidence. Further, because of respondent's refusal to acknowledge the negative impact of her drug addiction on the child, and the close bond that the child has formed with the foster parents, termination of parental rights as opposed to suspended judgment was the proper disposition.

Matter of Sierra C., 74 AD3d 1445 (3d Dept 2010)

Mother's Parental Rights Terminated Based on Permanent Neglect

Respondent mother admitted to permanently neglecting her two children in that she had been incarcerated three times while the children were in care. Family Court issued a six-month suspended judgment. Prior to its expiration, the Department moved to extend the suspended judgment and, later, to revoke it and terminate the mother's parental rights, alleging that the mother had violated certain conditions of the judgment. After a trial, Family Court found that the mother had failed to comply, granted the Department's motion to revoke the suspended judgment and terminated the mother's parental rights. The mother appealed and the Appellate Division affirmed. The suspended judgment required that the mother maintain a safe and stable home, meet regularly with service providers, attend all of the children's medical appointments, attend all visitation with the children, attend to the children's medical needs during visitation and notify petitioner immediately upon any change of address. During the final weeks of the original six-month period of suspension, the mother had problems affording her apartment, even though her sole source of income was public assistance. As a result, she shortened a double overnight visit with the children because she believed that she would have to move and cancelled the following two overnight visits to shop, unpack and gather money for rent. She also failed to attend a mental health appointment for her autistic son, was late to three mandatory meetings, failed to attend one meeting and, during an overnight visit, failed to give the children their prescribed medications. She permitted the father of her youngest child to move back in with her despite his history of domestic violence. It was in the children's best interests to terminate her parental rights. They had been in foster care for most of their young lives and were placed in preadoptive homes.

Matter of Clifton ZZ., 75 AD3d 683 (3d Dept 2010)

Father's Parental Rights Terminated Due to Lack of Contact and History of Violence

DSS commenced an abandonment TPR. Following fact-finding and a dispositional hearing, Family Court found that the father had abandoned the child and terminated his parental rights. The father appealed and the Appellate Division affirmed. The testimony of a caseworker established that the father did not contact the Department or communicate with the child over a significant period of time; also, she sent a letter to the father outlining his responsibilities while the child was in foster care, including his responsibility to maintain contact with his son and plan for the child's future but received no response from the father. Finally, the termination of parental rights would be in the child's best interests due to the father's history of violent and assaultive behavior, which resulted in multiple periods of incarceration. The father had also admitted that he failed to complete domestic violence counseling and dropped out of a substance abuse treatment program.

Matter of Jackie B., 75 AD3d 692 (3d Dept 2010)

Court Upheld Abandonment TPR but Dismissed Permanent Neglect

After a neglect petition was filed against her, a mother consented to temporary placement of her child in foster care. Subsequently, the mother was arrested after police observed her in a car with her child, who was naked, screaming, and not in a car seat. The police also observed in that car a man with his pants unzipped and cocaine. Based on the mother's admission, Family Court adjudicated the child to be neglected and extended placement. Placement was subsequently extended through several permanency hearings during which time the child's father executed a surrender instrument. Based upon the mother's failure to visit or communicate with the child, DSS filed TPR on grounds of abandonment and permanent neglect. After a fact-finding hearing, Family Court dismissed the permanent neglect petition but granted the petition premised on abandonment. The Appellate Division affirmed. Through testimony of the mother's caseworkers, the DSS established by clear and convincing evidence that the mother did not visit or communicate with the child during the six months immediately preceding the filing of the petitions and that TPR was in the child's best interests.

Matter of Kaitlyn E., 75 AD3d 695 (3d Dept 2010)

Termination on Ground of Mental Illness Affirmed

Family Court terminated respondent mother's parental rights with respect to one of her children on the ground of mental illness. The Appellate Division affirmed. The failure of the court-appointed psychologist to provide a precise, clinically accepted diagnosis did not render his testimony legally insufficient. Further, a separate dispositional hearing was not required following the determination that the mother was unable to care for the child because of mental illness. Finally, respondent failed to demonstrate that she was afforded less than meaningful representation by counsel.

Matter of Demariah A., 71 AD3d 1469 (4th Dept 2010), *lv denied* 15 NY3d 70

Compliance With Terms of Suspended Judgment Alone Not Sufficient

Family Court properly revoked a suspended judgment and terminated respondent's parental rights. Compliance with the terms of a suspended judgment does not necessarily lead to dismissal of the petition. The evidence at the hearing established that it was in the child's best interests to terminate the mother's parental rights. At the time of the order, the child was three years old, had been living with the same foster parents since birth, and they wished to adopt her. There was no evidence that the mother was currently in a position to have even unsupervised visitation with the child. The caseworker testified that the mother had not demonstrated consistency in parenting the child, nor had she shown that she had learned anything from her parenting classes. The visitation supervisor testified that the mother made poor progress in setting boundaries for the child, and that she often gave in to the child's demands and would respond inappropriately when she became frustrated with the child. Further, the mother was arrested for shoplifting a few months after petitioner filed the petition, had been unemployed for at least the past three years, and had not been seeking employment. Moreover, the mother resided in a facility for individuals recovering from drug or alcohol addition, and that facility did not allow for full-time custody. None of the mother's service providers recommended that the child be returned to her and her own therapist testified that before having unsupervised visits with the child, the mother needed to demonstrate that she was competent to do so. Thus, although the mother established that she had made substantial progress in some areas, she failed to establish that she was able to take full responsibility for the care of the child. Further, the court properly denied the mother's request for post-termination visitation. Since the birth of the child, the mother had only supervised visitation. While there was testimony that the child had formed a bond with her mother, there was also testimony that the three-year-old child had a strong bond with her foster parents. In addition, the foster parents testified that the child would act out and have more temper tantrums after extended visitation with the mother.

Matter of Malashia B., 71 AD3d 1493 (4th Dept 2010), *lv denied* 15 NY3d 707

Motion to Vacate Default Properly Denied

Family Court properly denied the motion of respondent father to vacate an order entered upon his default in appearing at the fact-finding and dispositional hearing in the proceeding seeking termination of his parental rights with respect to four of his children. Respondent failed to meet his burden of providing a reasonable excuse for his failure to appear and a meritorious defense to the petition.

Matter of Alexis C.R., 71 AD3d 1511 (4th Dept 2010), *lv dismissed* 14 NY3d 922

Suspended Judgment Properly Revoked

Family Court granted the petition to revoke a suspended judgment and terminated respondent mother's parental rights with respect to the subject children. The Appellate Division affirmed. The mother violated the terms and conditions of the suspended judgment. The record established that she attended only one third of the scheduled visitation sessions with her children, she failed to attend appointments for the children, and she failed to obtain suitable housing. The mother's contention that the petitioner failed to use diligent efforts was without merit. Further, the court did not err in admitting hearsay testimony in evidence. Because a hearing on the issue of the revocation of a suspended judgment is part of the dispositional phase of a permanent neglect proceeding, hearsay testimony is admissible if material and relevant.

Matter of Janasia H., 71 AD3d 1524 (4th Dept 2010), *lv denied* 15 NY3d 701

Parental Rights Properly Terminated on Grounds of Permanent Neglect

Family Court terminated respondent mother's parental rights with respect to one of her children on the ground of permanent neglect. The Appellate Division affirmed. The mother's contention that the court was biased against her as evidenced by the court's statements was without merit. The statements made were relevant to the issue whether the mother had failed to plan for the future of the child, although physically and financially able to do so. Further, the court did not abuse its discretion in refusing to enter a suspended judgment because the mother's progress was not sufficient to warrant any further prolongation of the child's unsettled familial status. The child was 4 ½ years old and had been placed in foster care on three separate occasions because of the mother's substance abuse. Although the record established that the mother made progress in treatment and maintained her sobriety for intermittent periods, the record also established that she relapsed each time the child was returned to her.

Matter of Roystar T., 72 AD3d 1569 (4th Dept 2010)

Respondent's Parental Rights Properly Terminated

Following a dispositional hearing, Family Court terminated respondent father's parental rights. The Appellate Division affirmed. While the Appellate Division agreed with respondent that the court erred in precluding him from cross-examining witnesses at the dispositional hearing concerning the stability of the foster home environment, the error was harmless because the evidence provided proper support for the court's disposition. Respondent's contention that the court should have issued a suspended judgment was rejected. The children had been living with the foster parents for four years, the foster parents wished to adopt the children, and the children, who were teenagers at the time of the dispositional hearing, wished to be adopted by the foster parents. Further, respondent's progress was not sufficient to warrant any further prolongation of the children's unsettled familial status.

Matter of Kyle K., 72 AD3d 1592 (4th Dept 2010)

Respondent Unable to Provide Proper and Adequate Care for His Child by Reason of Mental Illness

Family Court terminated respondent father'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 father was presently and for the foreseeable future unable to provide proper and adequate care for his child by reason of mental illness. Despite father's contention, the foundation for the psychologist's testimony was sufficient. The failure of the psychologist to provide a precise, clinically accepted diagnosis did not render his

testimony legally insufficient to satisfy the statutory mandate.

Matter of Demariah A., 72 AD3d 1592 (4th Dept 2010)*, lv denied* 15 NY3d 701

Post-Termination Visitation Not in Child's Best Interests

After a finding of permanent neglect, Family Court terminated respondent mother's parental rights with respect to her daughter. The Appellate Division affirmed. The mother failed to preserve for review her contention that the court should have entered a suspended judgment. In any event, that contention was without merit. Any progress made by the mother was not sufficient to warrant a further prolongation of the child's unsettled familial status. Furthermore, the mother failed to ask the court to consider any post-termination contact with the child and failed to establish that such contact would be in the child's best interests.

Matter of Andrea E., 72 AD3d 1617 (4th Dept 2010), *lv denied* 15 NY3d 703

Suspended Judgment Properly Revoked

Family Court revoked a suspended judgment and terminated respondent mother's parental rights with respect to her daughter and son. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that the mother violated several conditions of the suspended judgment. Further, respondent failed to establish that it would be in the best interests of the children to have post-termination visitation with her. Because of the mother's actions, the children had visited with the mother only twice in the eight month period prior to the hearing.

Matter of Sean H., 74 AD3d 1837 (4th Dept 2010)

Suspended Judgment Not in Best Interests of Child

Family Court terminated respondent mother's parental rights with respect to her child. The Appellate Division affirmed. The record supported the court's decision that a suspended judgment was not in the child's best interests. Further, respondent failed to demonstrate that post-termination contact would be in the child's best interests.

Matter of Micah H., 74 AD3d 1838 (4th Dept 2010)

Termination on Grounds of Permanent Neglect Affirmed

The Appellate Division affirmed Family Court's order terminating respondent mother's parental rights with respect to her son on the ground of permanent neglect. The child was placed in foster care ten days after his birth as a result of positive toxicology reports which indicated that a variety of substances were in his system at birth. The record supported the conclusion that despite progress made by the mother in the ten months preceding the dispositional determination, that progress was not sufficient to warrant further prolongation of the child's unsettled familial status. Further, the mother was not denied effective assistance of counsel. The record established that the mother's attorney effectively cross-examined petitioner's witnesses, called several witnesses, effectively demonstrated that the inability of the mother to care for her son was related to prescribed pain medication, that she had made progress in completing the requirements of petitioner's plan for services, and that she visited her son consistently in the several months preceding the dispositional determination.

Matter of Elijah D., 74 AD3d 1846 (4th Dept 2010)

Parental Rights Properly Terminated on the Ground of Abandonment

Family Court terminated respondent mother's parental right with respect to her daughter on the ground of abandonment. The Appellate Division affirmed. The fact that mother visited her daughter once and had one telephone conversation with her in the six months preceding the filing of the petition did not preclude a finding of abandonment. Minimal, sporadic or insubstantial contacts were not sufficient to defeat an otherwise viable claim of abandonment.

Matter of Maddison B., 74 AD3d 1856 (4th Dept 2010)

Father Violated Suspended Judgment

Family Court terminated the parental rights of respondent father. The Appellate Division affirmed. The court properly rejected respondent's request either to continue the period of suspended judgment or to extend the period pursuant to Family Court Act § 633 (f). Although the suspended judgment had not expired at the time petitioner alleged that the father violated its terms and conditions, petitioner established the father's noncompliance by a preponderance of the evidence. At the violation hearing, the record established that the father attended only 5 out of 34 possible visits with the children, and at the time of the dispositional hearing the record established that father had attended only 9 out of 65 possible visits, had not completed a mental health evaluation, was denied public assistance, and could not verify that he was employed. The record also supported the court's finding that the children had a strong attachment to their foster parents who wish to adopt them.

Matter of Terrance M., 75 AD3d 1147 (4th Dept 2010)

N O T E S