

**Office of Attorneys for Children
Appellate Division, Fourth Department**

Case Digest

Summer 2013

Covers January through July 2013 Decision Lists

ADOPTION

Biological Father Not Consent Father

Family Court determined that respondent biological father abandoned his children and dispensed with his right to consent to the adoption of the children. The Appellate Division affirmed. Although it was unclear whether the court made a finding pursuant to Domestic Relations Law §111 (1) (d), reversal was not required because the record supported the finding that respondent's consent was not required under the statute. Despite being awarded supervised visitation with the children in 2009, respondent did not exercise such visitation. At the time of the hearing, respondent had not visited the children in over three years and had not sent gifts since 2009. Further, respondent had not made child support payments since 2010, when his tax returns were garnished. Although there was conflicting testimony regarding alleged interference of petitioner mother and petitioner stepfather with respondent's relationship with the children, the court resolved the issue in favor of petitioners and that determination was entitled to great deference. Even assuming respondent demonstrated his right to consent, the record established abandonment because respondent had no contact with the children in the six months preceding the filing of the adoption petition. Because the majority of the testimony at the hearing concerned events that occurred outside the six-month time period preceding the filing of the adoption petition, the court did not prevent respondent from fully establishing the nature of his relationship with the children and the alleged efforts of petitioners to exclude him from the children's lives.

Matter of Angelina K. 105 AD3d 1310 (4th Dept 2013), *lv denied* __NY3d__

CHILD ABUSE AND NEGLECT

Children's Statements Sufficiently Corroborated; Strongest Possible Negative Inference Drawn Against Father for Failure to Testify

Family Court adjudged that respondent father neglected two of his children and derivatively neglected three others. The Appellate Division affirmed. The out-of-court statements of respondent's two children were sufficiently corroborated by their "cross statements," the photographic evidence of their injuries, and the caseworker's testimony. Moreover, the court properly drew the strongest possible negative inference against the father for his failure to testify at the fact-finding hearing. The court's finding of neglect was justified on the record, as was its finding of derivative neglect. The admission of evidence relating to an order of protection that father contended was not in effect was not material to the court's ultimate finding of neglect. Thus, any error in its admission was harmless.

Matter of Brittany W., 103 AD3d 1217 (4th Dept 2013)

Mother's Appeal from Order Temporarily Removing Children Dismissed as Moot

Family Court denied the application of respondent mother pursuant to Family Court Act § 1028 for the return of the subject children who were temporarily removed from her custody. The Appellate Division dismissed the mother's appeal as moot. A final order of disposition was entered while the appeal was pending, which found the children were neglected and placed them in petitioner's custody. The appeal was mooted for the further reason that the order of disposition expired during the pendency of the appeal, and the children were returned to the mother's custody. Contrary to mother's contention, the case did not fall within the exception to the mootness doctrine. Although there may be additional Family Court Act § 1028 hearings with respect to this family, the circumstances addressed in each application were fact-specific; the issue raised did not typically evade review; and the issue raised was not substantial or novel.

Matter of Angel C., 103 AD3d 1246 (4th Dept 2013)

Mother Failed to Rebut Prima Facie Evidence of Educational Neglect

Family Court adjudicated respondent mother's children to be neglected based on her failure to supply them with an adequate education. The Appellate Division affirmed. Petitioner met its burden of establishing educational neglect by a preponderance of the evidence. Proof that a minor child did not attend a public or parochial school in the district where the parent resided made out a prima facie case of educational neglect pursuant to § 3212 (2) (d) of the Education Law. Unrebutted evidence of excessive school absences was sufficient to establish educational neglect. Petitioner submitted the children's school records and the testimony of the caseworker, which established that each child had a significant, unexcused absentee rate that had a detrimental effect on each child's education. The mother failed to present evidence that the children

attended school and received the required instruction in another place, or to establish a reasonable justification for the children's absences. Thus, the mother failed to rebut the prima facie evidence of educational neglect.

Matter of Gabriella G., 104 AD3d 1136 (4th Dept 2013)

Sufficient Evidence of Sexual Abuse of Two Children and Derivative Neglect of Another Child

Family Court determined that respondent father sexually abused two of his children and derivatively neglected another child. The Appellate Division affirmed. The findings of sexual abuse were supported by a preponderance of the evidence. Although the court erred in admitting in evidence the written report of a social worker who performed sexual abuse assessments because it contained prior consistent statements that bolstered her trial testimony, the error was harmless because it did not appear from the record that the court relied on the report in its decision.

Matter of Arianna M., 105 AD3d 1401 (4th Dept 2013)

Neglect Adjudication Against Father Reversed

Family Court adjudged that respondent father neglected his child. The Appellate Division reversed. The only evidence of domestic violence presented by petitioner consisted almost entirely of out-of-court statements made by the mother to a police officer and caseworkers. Those statements were not admissible against the father absent a showing that they came within an exception to the hearsay rule. Petitioner's theories for admissibility of the hearsay statements were not reviewed because they were not advanced at the fact-finding hearing. The nonhearsay evidence was insufficient to establish that the child's physical, mental or emotional condition was impaired or in danger of becoming impaired as a consequence of the father's conduct. Respondent was not denied effective assistance of counsel.

Matter of Nicholas C., 105 AD3d 1402 (4th Dept 2013)

CHILD SUPPORT

Father Who Failed to Appear at Hearing Not Denied Right to Rebut Mother's Prima Facie Showing of Willful Violation

Family Court entered an amended order that, among other things, confirmed the Support Magistrate's determination that respondent father had willfully violated an order of child support. The Appellate Division modified the amended order on the law by vacating Special Conditions 17, 18 and 19. The Support Magistrate's amended order determining that there was a willful violation was issued after the father failed to appear for the hearing on the violation petition. The father's contention that he was denied his right to a hearing was not properly before the Appellate Division. The proper procedure for challenging the Support Magistrate's amended order entered upon the father's default was by way of a motion to vacate the amended order pursuant to CPLR 5015 (a). Nonetheless, on the merits, the father was statutorily presumed to have sufficient means to support his child, and evidence of the failure to pay support as ordered constituted prima facie evidence of a willful violation. Once the mother made a prima facie showing of a willful violation, the burden shifted to the father to rebut that showing. Having failed to appear, the father could not now argue that he was denied his right to rebut the mother's prima facie showing. The father's contention that he was denied due process of law was rejected. Inasmuch as Special Conditions 17, 18 and 19 were not reasonably related to the underlying issue of child support arrears, those conditions were vacated.

Matter of Ball v Marshall, 103 AD3d 1270 (4th Dept. 2013)

CPLR 5019 (a) Cannot be Applied to Amend Judgment of Divorce to Change Maintenance and Child Support Arrears

Supreme Court granted plaintiff husband's motion to amend the parties' judgment of divorce to correct an error in the calculation of the child support and maintenance arrears due to defendant wife, and applied CPLR 5019 (a) to amend the judgment by changing the amount of the husband's arrears. The Appellate Division determined that the court erred in granting husband's motion and applying CPLR 5019 (a) to amend the judgment. The court's power to amend orders or judgments under that statute was limited to correcting orders or judgments that contained a mistake, defect, or irregularity not affecting a substantial right of a party, or [that were] inconsistent with the decision upon which [they were] based. The mistakes contemplated for correction pursuant to CPLR 5019 (a) were merely ministerial, not those that involved new exercises of discretion or a further turn of the fact-finding wheel. A court had no power to reduce or increase the amount of a judgment when there was no clerical error. Unlike cases relied upon by the husband, this case did not involve an inconsistency between the judgment and an underlying decision or stipulation of the parties. Rather, the husband sought to correct a mistake of fact, i.e., the court's allegedly erroneous calculation of a credit for maintenance and child support payments made by the husband pursuant to a temporary order, and the court's failure to credit the husband for the wife's equitable

share of medical insurance premiums.

Meenan v Meenan, 103 AD3d 1277 (4th Dept. 2013)

Father Directed to Obtain Life Insurance Policy to Secure Obligation for Child Support and Pro Rata Share of Children's Private School Tuition

Supreme Court entered a judgment of divorce that, among other things, directed defendant father to pay to plaintiff mother the amount of \$30,160 per year in child support and to pay his pro rata share of 80% of the children's private school tuition. The Appellate Division modified and directed defendant to obtain a life insurance policy with plaintiff as the beneficiary in the amount of \$500,000 and to maintain the policy until the youngest child reached the age of majority. Supreme Court did not abuse its discretion when it refused to award child support on the parties' combined income in excess of \$130,000. The court properly considered the factors set forth in Domestic Relations Law § 240 (1-b) (f), including that the divorce did not result in a change in the children's standard of living. Plaintiff's contention that the court erred in its calculation of the parties' pro rata shares was raised for the first time in her reply brief and thus was not properly before the Appellate Division. However, the court erred in failing to direct defendant to obtain a life insurance policy to secure his obligation for child support and his pro rata share of the children's private school tuition.

Scully v Scully, 104 AD3d 1137 (4th Dept. 2013)

Family Court Erred in Revoking Respondent's Suspended Jail Sentence for Willful Violation of Child Support Order

Family Court confirmed an order of the Support Magistrate that found the father to be in willful violation of an earlier order that required the father to pay child support in the amount of \$155 per week. The court sentenced the father to four months in jail. The Appellate Division reversed and remitted the matter. The Support Magistrate issued an order "on consent" setting forth that the father admitted that he willfully violated a child support order and found him in willful violation of the order. The Support Magistrate imposed a sentence of four months in jail, but suspended the sentence on the condition that the father did not miss two consecutive support payments. Based upon the father's alleged failure to pay support as ordered, at a subsequent court appearance, the court dispensed with a hearing and took an oral admission of nonpayment from the father's attorney. Although the court had the discretion to revoke the suspension of the jail sentence, the court erred in doing so when it did not first afford the father an opportunity to be heard and to present witnesses on the issue whether good cause existed to revoke the suspension of the sentence. No specific form of a hearing was required, but at a minimum the hearing must have consisted of an adducement of proof coupled with an opportunity to rebut it.

Matter of Davis v Bond, 104 AD3d 1227 (4th Dept. 2013)

Court's Errors Required Remittal For Recalculations

Supreme Court's judgment in this divorce action dissolved the marriage, awarded the mother maintenance and child support and distributed the marital property. The Appellate Division modified and remitted for a number of recalculations. The court did not err in imputing annual income of \$20,000 to the mother for the purpose of calculating child support and maintenance given her education, qualifications, employment history, past income, and earning potential. The court erred, however, in failing to distribute certain assets to the mother. An investment account, the father's 403-b account, and the father's in-service death benefit were marital property or at least partly marital property, subject to equitable distribution. The court also erred in failing to award the mother any portion of the father's enhanced earnings from his master's degree because the mother made at least a modest contribution towards the degree. It was not possible to ascertain from the record the merit of the mother's contentions regarding the amount of \$250 per week in child support and whether the court deducted maintenance from the father's income before calculating his child support obligation. Finally, the case was remitted for resolution of the mother's contention that the father owed her money pursuant to an order requiring him to pay for groceries during the pendency of this action and the father's contention that he satisfied that obligation.

Lauzonis v Lauzonis, 105 AD3d 1351 (4th Dept. 2013)

Father Not Denied Effective Assistance of Counsel

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

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

Willful Violation of Prior Order of Child Support Affirmed

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

front page, the “warning” that a hearing was being requested, the purpose of which was to punish respondent for contempt of court. The “warning” further advised respondent that the sanction of imprisonment could be imposed.

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

Court Erred in Determining Child Was Emancipated

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

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

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

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

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

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

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

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

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

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

Leonard v Leonard, ____ AD3d ____ (4th Dept. 2013)

CUSTODY AND VISITATION

Court Erred in Failing to Advise Party of Her Right to Assigned Counsel

Family Court granted mother's petition to modify an order on consent that had awarded grandmother, mother, and father joint legal custody of the subject child and primary physical custody to grandmother. The mother's petition sought visitation with the child in the mother's home. The Appellate Division reversed. The court committed reversible error when it failed to advise the grandmother of her right to assigned counsel. Contrary to the contention of the AFC, the Appellate Division, Fourth Department had not squarely addressed the issue whether respondents in visitation proceedings are entitled to assigned counsel under the Family Court Act. In doing so in this case, the Court concluded that respondent was entitled to assigned counsel. Although the word "visitation" did not appear in Family Court Act § 262, a proceeding to modify a prior order of visitation was a proceeding under the Family Court Act article 6, part 3 and therefore, was within the purview of the assigned counsel statute.

Matter of Wright v Walker, 103 AD3d 1087 (4th Dept 2013)

Award of Sole Custody to Mother Had Sound and Substantial Basis

Supreme Court awarded sole custody and primary physical residence of the parties' child to plaintiff mother. The Appellate Division affirmed. The Referee's findings that the father's application for equal time with or sole custody of the child was economically motivated and that the mother was more fit because the father was preoccupied with child support, placed his needs above the child's needs, and was not as stable as the mother were supported by a sound and substantial basis in the record. The Referee did not abuse his discretion in ordering the father to pay 40 % of the child's private school tuition.

Belec v Belec, 103 AD3d 1089 (4th Dept 2013)

Mother Established Changed Circumstances

Family Court modified a prior joint custody order entered upon the parties' consent by awarding primary physical custody of the parties' children to petitioner mother and granting her all decision-making authority with respect to the children's health, education and welfare. The Appellate Division affirmed. Even assuming, for purposes of argument, that a showing of changed circumstances had to made notwithstanding language in the prior order that such showing need not be made, the mother established changed circumstances. The record established that the father interfered with the children's telephone conversations with the mother. Also, the parties' relationship had become so strained and acrimonious that communication between them was impossible.

Matter of Murphy v Wells, 103 AD3d 1092 (4th Dept 2013), *lv denied* 21 NY3d 854

Father Who Did Not Seek Modification Not Aggrieved by Order

Family Court directed the parties to participate in and cooperate in therapeutic supervised visitation for petitioner mother. The Appellate Division dismissed respondent father's appeal. In her petition, mother had sought enforcement of a 2009 visitation order, and the court determined that father was not in willful violation of the order and continued supervised visitation. On appeal, father and AFC contended that the court erred in continuing supervised visitation. Because the father never requested a modification of the 2009 order he was not aggrieved by the court's disposition.

Matter of Mosher v Mosher, 103 AD3d 1095 (4th Dept 2013)

Order Reversed: Relocation in Child's Best Interests

Family Court denied mother's petition to relocate with the parties' child to the New York City area. The Appellate Division reversed. The court's determination lacked a sound and substantial basis. The mother established that the relocation would benefit the child economically and emotionally because the relocation would increase the mother's earning potential and would enable her to spend more time with the child. The mother agreed to maintain a visitation schedule that would foster the child's relationship with the father, to transport the child to and from Syracuse, and to pay transportation costs. The AFC was not ineffective. The AFC actively participated in the hearing and there is no requirement that she submit a position in her written closing argument. Also, there was no indication that the AFC would have succeeded in obtaining a *Lincoln* hearing even if she had requested one because the child was five at the time of the hearing.

Matter of Venus v Brennan, 103 AD3d 1115 (4th Dept 2013)

When Substitution of Judgment Warranted, AFC Not Obligated to State the Basis of Position

Family Court awarded respondent father sole custody of the parties' child. The Appellate Division affirmed. The mother contended that the AFC improperly advocated a position that was contrary to the child's express wishes because the AFC failed to state the basis for advocating that contrary position. Because she did not move to remove the AFC, the issue was not preserved for appeal. In any event, the mother's contention lacked merit. There were only two circumstances in which an AFC would be authorized to substitute his or her own judgment for that of the child: where the AFC was convinced either that the child lacked the capacity for knowing, voluntary and considered judgment, or that following the child's wishes was likely to result in a substantial risk of imminent, serious harm to the child. Where the AFC was convinced that one of those two circumstances was implicated, the obligation of the AFC was to inform the court of the child's wishes, if the child requested that the AFC do so. The AFC did so in this case. Moreover, the record supported a finding that the child lacked the capacity for knowing, voluntary and considered judgment.

Matter of Mason v Mason, 103 AD3d 1207 (4th Dept 2013)

Primary Physical Placement Transferred to Father After Mother Violated Court Orders

Family Court transferred primary physical placement of the parties' child to petitioner father. The Appellate Division affirmed. Pursuant to a consent order entered in August 2011, the mother was awarded primary physical placement of the child. The father was awarded liberal visitation that included, in odd-numbered years, "Christmas/Winter Break***or*** at least two weeks at Christmas time." The mother, who had relocated to Virginia, was responsible for all transportation to and from visitation with the father in New York. It was undisputed that the mother did not transport the child for Christmas 2011 visitation. The father established by clear and convincing evidence that a lawful court order clearly expressing an unequivocal mandate was in effect, that the mother had actual knowledge of its terms, and that the violation***defeated, impaired, impeded, or prejudiced the rights of the father. The fact that the court did not specifically address any other factors related to the child's best interests before transferring primary physical placement of the child did not warrant reversal. The record was sufficient for the Appellate Division to make a best interests determination. The mother's repeated violations of court orders and her interference with the father's visitation rendered her unfit to act as a custodial parent.

Matter of Howell v Lovell, 103 AD3d 1229 (4th Dept 2013)

Order Appealable; Refusal to Grant Downward Modification of Child Support and Award of Attorney's Fees Affirmed

Supreme Court modified defendant's visitation schedule, among other things. The Appellate Division modified by vacating the first ordering paragraph. The mother sought, among other things, a modification of the parties' access arrangement set forth in their settlement agreement, which was incorporated into their judgment of divorce, an upward modification of defendant father's child support obligation, and attorney's fees. The mother's contention that certain issues raised by the father with respect to the modification of the access schedule were not reviewable on appeal because they were the subject of a consent order was rejected. Although an order incorporated into the final order stated at the end that it was a "stipulation," it stated at the beginning that it was an order entered after the court heard testimony and***considered***evidence in the matter, in the best interests of the children. Additionally, another order incorporated into the final order that amended access provisions stated that the modification was proposed by the attorney for the child. No agreement or stipulation was placed on the record during the action, and the court issued a written decision, which supported the notion that the determination was made on the merits. The court erred in modifying certain access provisions where the mother failed to establish a subsequent change in circumstances. Although raised for the first time on appeal and thus not properly under review, nonetheless, the court did not err in using the father's 2010 tax return to calculate his child support obligation nor did it abuse its discretion in not granting a

downward departure from the Child Support Standards Act. The record did not indicate that the parties provided the court with more recent financial documents. The recalculation provisions of the settlement agreement were triggered by the father's failure to continue to provide health insurance for the children. Further, the court did not abuse its discretion in awarding attorney's fees to plaintiff. The court properly reviewed the financial circumstances of both parties together with all the other circumstances of the case, including the relative merits of the parties' positions. The father's failure to provide the children with health insurance for over a year in part necessitated the action and further justified the court's award.

Griffin v Griffin, 104 AD3d 1270 (4th Dept 2013)

Res Judicata Did Not Bar Consideration of Mother's Prior Changes in Residence

Family Court modified a prior custody order and awarded petitioner father primary physical custody of the parties' teenage child. The Appellate Division affirmed. Respondent mother contended that the court erred in considering her pre-2007 changes in residence in determining that there had been a change in circumstances because those changes were considered in a prior custody hearing after which the petition was dismissed. The mother's pre-2007 changes in residence were not barred by res judicata. The court properly considered the mother's pre-2007 changes in residence as background information in determining the significance of her post-2007 changes in residence.

Matter of Nelson v Morales, 104 AD3d 1299 (4th Dept 2013)

Jurisdiction Properly Retained; Mother's Violation of Divorce Judgment Among Factors Considered in Granting Sole Custody to Father

Family Court modified the parties' joint custody arrangement and granted petitioner father sole custody of the parties' youngest child. The Appellate Division affirmed. Notwithstanding the fact that respondent mother had primary physical residence of the parties' children in California for approximately five years, the court had exclusive, continuing jurisdiction to determine custody pursuant to Domestic Relations Law § 76-a. It was undisputed that the initial custody determination was rendered in New York. Ample evidence existed of a significant connection by the child with New York. The father's extensive parenting time took place in New York, the child's extended family lived in New York, and her medical and dental providers were located there. The mother's argument that New York was an inconvenient forum was rejected. There was substantial evidence in this state from which the custody determination was made, the New York courts were more familiar with the parties and the child, and the court permitted the mother to appear electronically for all proceedings except the fact-finding hearing. The court properly determined that the father established the requisite change in circumstances to warrant inquiry into whether the best interests of the child were served by a custody modification. Moreover, the record supported the court's determination that it was in the child's best interests to award sole custody to the father.

Among the factors considered were the express wishes of the 13-year-old child to live with her father. Her wishes were entitled to substantial weight. Further, the weight of the evidence supported the court's finding that the mother willfully violated that part of the parties' divorce judgment that pertained to travel expenses for visitation. The court had discretion to consider that violation as part of its best interests analysis.

Matter of Mercado v Frye, 104 AD3d 1340 (4th Dept 2013), *lv denied* __NY3d__

Sole Custody to Father Properly Denied

Family Court denied father's petition for sole custody of his son. The Appellate Division affirmed. Although the father's contention that the court erred in characterizing him as a "notice," rather than "consent" father, was not properly before the Appellate Division, it noted that, in any event, the father failed to establish that he had a substantial relationship with the child such that his consent to an adoption of the child would be required. The father's contention that respondent failed to use its best efforts to promote the father's relationship with the child pursuant to Article 10 of the Family Court Act was not properly before the Appellate Division because those sections of the Family Court Act were applicable only when a child was initially removed from a parent's custody. The court properly denied the father's custody petition.

Matter of Bowie v Erie County Children's Servs., 105 AD3d 1312 (4th Dept 2013)

Father Established Changed Circumstances

Family Court modified the parties' judgment of divorce, which incorporated the terms of their oral stipulation providing joint legal custody of the children, primary physical custody to the mother and unsupervised visitation to the father, by directing that the mother maintain primary physical custody of the parties' 15-year-old daughter and that the father have primary physical custody of the parties' 13-year old-daughter. The Appellate Division affirmed. The father met his burden of establishing a change in circumstances. The mother's testimony at the hearing established that her relationship with her 13-year-old daughter was strained due to the mother's inability to communicate with the daughter. It was in the 13-year-old daughter's best interests to reside with the father because of the stress caused by the mother's interactions with her, but it was in the older child's best interests to reside with the mother because that child had learned to cope with her mother's personality. Although the separation of siblings was unfortunate, the children attended the same school and pursuant to the visitation schedule, the children would spend time together at each party's house during the week and every weekend.

Matter of O'Connell v O'Connell, 105 AD3d 1367 (4th Dept 2013)

Order Reversed: Petition For Visitation With Father in Prison Reinstated

Family Court dismissed father's petition seeking visitation with the parties' then nine-

year-old child. The Appellate Division reversed and reinstated the petition. The petitioner was an inmate at a New York State prison serving a 15-year sentence. He never had sought custody or visitation with the child. During the pendency of this proceeding, the mother agreed to transport the child to prison to visit the father. Thereafter, the mother and AFC informed the court that after the visit the child did not wish to have further contact with the father. The AFC also stated that the child's school counselor told him that contact between the father and child was not "preferable." The record was insufficient to determine whether visitation with the father would be detrimental to the child's welfare. Further, neither the mother nor the AFC presented any evidence rebutting the presumption that it was in the child's best interest to have visitation with the noncustodial parent and the fact that the parent was incarcerated did not, by itself, render visitation inappropriate. Moreover, no sworn testimony or other evidence was presented and the court did not conduct an in camera interview with the child.

Matter of Brown v Divelbliss, 105 AD3d 1369 (4th Dept 2013)

Court Erred in Summarily Dismissing Petition Based on Incarcerated Father's Failure to Appear

Family Court dismissed the father's petition alleging that respondent violated a prior order because he failed to appear by video or telephone for proceedings held on an adjourned date. The Appellate Division reversed and reinstated the petition. Although the court was entitled to dismiss the petition with prejudice for failure to prosecute based upon exceptional circumstances or an unreasonable neglect to prosecute, here neither ground was established. The record did not establish the basis for petitioner's failure to appear by telephone or video but, rather, the court stated on the record that staff had attempted to call the correctional facility and "didn't get through."

Matter of Thomas v Smith, 105 AD3d 1398 (4th Dept 2013)

Grant of Sole Custody to Father Affirmed

Family Court granted petitioner father sole custody of the parties' child. The Appellate Division affirmed. The court's determination that sole custody to the father was in the child's best interests was supported by a sound and substantial basis in the record. There was evidence that the mother sought to interfere with the relationship between the father and child by pressuring the child into making groundless allegations of sexual abuse against the father and by repeating those groundless accusations. The court did not err in relying heavily on the investigative report and opinion testimony of a licensed clinical psychologist. The psychologist met with the parties individually, visited their homes when the child was present, administered psychological tests to the parties and the child, and consulted with caseworkers. Although the opinion of a court-ordered psychologist was only one factor to be considered in a custody proceeding, there was additional evidence in the record supporting the court's determination. The mother's contention that the court erred in failing to hold a *Lincoln* hearing was not preserved for

review. In any event, given the child's young age, there was no abuse of discretion in the court's failure to conduct a *Lincoln* hearing.

Matter of Olufsen v Plummer, 105 AD3d 1418 (4th Dept 2013)

Validity of Service of Summons With Notice by Email to Defendant in Iran Affirmed

Supreme Court granted plaintiff father a divorce and sole custody of the parties' child. The Appellate Division affirmed. On appeal, defendant mother, who lived in Iran, contended that the court erred in ordering service of the summons with notice by email. Plaintiff made a sufficient showing that service upon defendant pursuant to CPLR 3018 (1), (2), or (4) was impracticable. Plaintiff submitted evidence that defendant left the US with the parties' child and declared her intention to remain in Iran with her family. Iran and the US do not have diplomatic relations and Iran is not a signatory to the Hague Convention on Service Abroad. Once the impracticability standard was satisfied due process required that the method of service be reasonably calculated, under all the circumstances, to apprise defendant of the action. Here, the court initially ordered service by (1) personal service upon defendant's parents, (2) mail service upon defendant at her parent's address in Iran; and (3) service upon defendant by plaintiff's attorneys in accordance with Iranian law. When plaintiff was unable to effect personal service upon defendant's parents, the court relieved him of that obligation and allowed service via email at each email address that plaintiff knew defendant had. Although service of process by email is not directly authorized by the CPLR of the Hague Convention, it is not prohibited by state or federal law or the Hague Convention. Here, service by email was sufficient to satisfy due process. For several months before the application for alternative service, the parties had been communicating by email at the two email addresses used for service. Although defendant claimed she did not receive the emails, she acknowledged receipt of a subsequent email from plaintiff's attorney sent to the same email addresses.

Safadjou v Mohammadi, 105 AD3d 1423 (4th Dept 2013)

Visitation Properly Suspended But Conditions on Resumption of Visits Improper

Family Court suspended respondent mother's visitation with her three children who were in the custody of petitioner, the children's maternal grandfather. The Appellate Division modified. The court's determination to suspend visitation with the children had a sound and substantial basis in the record. In determining that visitation with the mother would be detrimental to the youngest child, the court properly considered the deleterious effects of such visitation on the two older children. The court erred, however, in directing the mother to engage in mental health counseling as a condition of visitation and in delegating its authority to the children's counselor to determine when resumption of visitation was appropriate.

Matter of Roskwitalski v Fleming, 105 AD3d 1432 (4th Dept 2013)

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

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

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

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

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

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

Petition to Suspend Visitation Properly Denied

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

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

Termination of Visitation with Incarcerated Parent Affirmed

Family Court granted mother's petition to modify a prior order of custody and visitation by terminating visitation with respondent father, who was incarcerated, and denied respondent father's petition for an order of contempt based on the alleged failure of the mother to comply with the prior order. The Appellate Division affirmed. The prior order

required the mother to bring the parties' biological child, who was 10 year old at the time of the commencement of the proceeding, to the visit the father at the Auburn Correctional Facility twice a year. The mother established the requisite change in circumstances to warrant a review of the prior order. As the child matured, she developed a strong desire not to visit the father. Additionally, the mother testified that the father used visitation time to attempt to reconcile with the mother, rather than to interact with the child. The mother established by a preponderance of the evidence that, under all the circumstances, visitation would be harmful to the child's welfare. Visitation need not always include contact visitation at the prison. While the father's incarceration did not, by itself, render visitation inappropriate, that fact, when considered with the evidence that established the father's lack of prior contact with the child, the father's failure to interact with the child during visitation and the child's express desire not to visit with the father, provided a sufficient basis for the court's determination that terminating visitation with the father was in the child's best interests.

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

Dismissal of Petition to Modify Custody Reversed

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

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

Award of Sole Legal and Physical Custody to Father Affirmed

Supreme Court awarded petitioner father sole legal and physical custody of the parties' children. The Appellate Division affirmed. Respondent mother's contention was rejected that the court placed too much emphasis on the wishes of the children and that the award of custody to the father was not in the children's best interests. Although the wishes of the children were but one factor to be considered when determining the relative fitness of the parties and the custody arrangement that served the best interests of the children, the court properly weighed and considered all of the relevant factors, some of which favored the father while others favored the mother. Due deference was

given to the court's superior ability to evaluate the character and credibility of the witnesses, and there was no basis to disturb its award of custody to the father.

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

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

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

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

Reversal of Dismissal of Violation Petition

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

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

Reversal of Order that Designated Mother Primary Residential Custodian

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

Court was advised that the mother had since lost her job and was living with her own mother.

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

Supervised Visitation Order Reversed

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

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

Orders Awarding Visitation to Father and Paternal Grandparents Modified

Respondent mother appealed from two Family Court orders. The first order granted petitioner father increased visitation, among other things. The Appellate Division modified. The father established a change in circumstances warranting a modification of the access provisions in the parties' separation agreement. The record established that the mother interfered with the father's telephone communications with the children. It was in the children's best interests to increase the father's visitation. However, the court abused its discretion with respect to certain aspects of the revised visitation schedule. The award of parenting time for the father each and every weekday morning before school was not in the children's best interests because it created instability and was likely to increase tension between the parents. Additional provisions of the same ordering paragraph were ambiguous, confusing and unnecessary and were modified so that each parent was responsible for making childcare arrangements during his or her respective parenting time. The court further abused its discretion in awarding the father both Memorial Day and Labor Day weekends each year. The order was further modified so that the mother had parenting time on Labor Day weekend each year. The second appeal pertained to the paternal grandparents' visitation order. To avoid conflict with the parents' order of custody and visitation, the order was modified so that the grandparents' monthly Sunday visitation occur during the father's parenting time in odd-numbered months and during the mother's parenting time in even-numbered months. The order was further modified by vacating that part of the first ordering paragraph that directed that the grandparents have one summer weekend of visitation during the mother's parenting time.

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

Denial of Visitation with Incarcerated Parent Affirmed

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

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

Adjudication of Neglect Constituted Change in Circumstances

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

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

Denial of Modification Petition Error; Appellate Division Granted Petition

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

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

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

FAMILY OFFENSE

Dismissal of Petition Reversed

Family Court dismissed the mother's petition without prejudice. The Appellate Division reversed, reinstated the petition and remitted the matter for further proceedings. There was no basis for the dismissal of the petition due to "remote" allegations inasmuch as some of the respondent paternal grandmother's offending conduct set forth in the petition occurred only 12 days before the petition was filed. There was likewise no basis for the dismissal of the petition as a "delay tactic" on the eve of trial because the court could have proceeded with the hearing scheduled for custody and visitation and considered the family offense petition at a later date. Respondent's challenge to the appealability of an order dismissing a petition "without prejudice" lacked merit.

Wiley v Greer, 103 AD3d 1218 (4th Dept 2013)

Respondent Committed Family Offense of Disorderly Conduct; Audio Recording of Incident Properly Admitted in Evidence

Family Court issued an order of protection in connection with its determination that respondent husband committed acts that constituted the family offense of disorderly conduct against petitioner wife. The Appellate Division affirmed. Petitioner met her burden of establishing by a preponderance of the evidence that respondent committed the family offense of disorderly conduct. Although respondent's conduct did not take place in public, section 812 (1) specifically stated that disorderly conduct included disorderly conduct not in a public place. In addition, disorderly conduct may be committed when a person recklessly created a risk of annoyance or alarm through violent or threatening behavior. Thus, the respondent's contention that the statute required more than a risk was rejected. The Acting Family Court Judge did not abuse her discretion in refusing to recuse herself where respondent's claim of bias was not supported by the record. There was no evidence that any alleged bias had resulted in an opinion on the merits of the case on some basis other than what the Judge learned from her participation in the case. The court did not err in admitting in evidence an audio recording of the incident made by the parties' son. The eavesdropping statutes were implicated only when the recording was made by a person not present thereat. The parties' son, who made the recording from his bedroom, was present for the purposes of the statutes.

Matter of McLaughlin v McLaughlin, 104 AD3d 1315 (4th Dept 2013)

JUVENILE DELINQUENCY

Restitution Award Reduced Where Theft of Item Not Alleged in Petition

Family Court ordered respondent to pay restitution in the amount of \$740. The Appellate Division modified by reducing the amount of restitution to \$730. With one minor exception, the court's restitution award was supported by a preponderance of the material and relevant evidence. The evidence was sufficient to support the court's determination of the fair and reasonable cost to replace the property or repair the damage caused by respondent. However, the theft of a \$10 bottle of vodka was not alleged in the petition and, as such, was not properly part of the restitution award.

Matter of Joshua R.S., 103 AD3d 1228 (4th Dept 2013)

Finding Supported by Sufficient Evidence on Issues of Identification and Serious Physical Injury

Family Court adjudicated respondent to be a juvenile delinquent upon his admission that he committed an act that if committed by an adult would constitute the crime of criminal sale of a controlled substance in the fifth degree. The Appellate Division affirmed. The court's finding that respondent committed an act that if committed by an adult would constitute the crime of gang assault in the second degree, as an accomplice, was supported by legally sufficient evidence on the issues of identification and serious physical injury. The victim testified that he was attacked initially by an individual other than respondent, and other people joined in the attack. With respect to the issue of identification, an eyewitness testified that respondent was one of the individuals who encircled the victim and engaged in the attack on him. With respect to the issue of serious physical injury, the victim testified that his vision was impaired as a result of the attack, and the court admitted in evidence the victim's certified hospital record, which indicated that the victim sustained a collapsed lung and fractures of the ribs and left orbital.

Matter of Justin G., 104 AD3d 1329 (4th Dept 2013)

Jurisdictionally Defective Petition Dismissed on Appeal

Family Court adjudicated respondent to be a juvenile delinquent based upon his admission that he committed an act that if committed by an adult would constitute the crime of criminal sale of a controlled substance in the fifth degree. The Appellate Division reversed and dismissed the petition. A juvenile delinquency petition is legally sufficient on its face when "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged" (FCA § 311.2 [3]). A conclusory statement that a substance seized from a defendant was a particular type of controlled substance did not meet the reasonable cause requirement. Rather, petitioner was required to provide factual allegations that established a reliable basis for inferring the presence of a controlled substance. Here,

the petition alleged that respondent knowingly and unlawfully sold a controlled substance, i.e., Adderall and the conclusory statements of respondent's classmate and an officer that the substance was Adderall. Those statements were not supported by evidentiary facts showing the basis for the conclusion that the substance was actually Adderall.

Matter of Brandon A., 105 AD3d 1365 (4th Dept 2013)

Determination that Petition Not Jurisdictionally Defective Affirmed

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

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

ORDER OF PROTECTION

Petition For Modification of Stay-Away Order of Protection Reinstated

Petitioner father sought modification or vacatur of a stay-away order of protection against him. Family Court dismissed the petition. The Appellate Division reversed and reinstated the petition. Upon the father's default, the court terminated the father's parental rights with respect to two of his children and issued the order of protection that is the subject of this appeal. The order of protection required the father to stay away from the children until the youngest reached the age of 18. Ten years later he filed the instant petition claiming "changed circumstances." The court dismissed the petition on the ground that the father lacked standing because the presumption of regularity applied to the termination proceeding, including the order of protection, and the father failed to meet his burden of establishing that he was not served with notice of the petition seeking the order of protection or the order itself. Here, the father had standing because he did not seek access to his children, but rather he sought to modify or vacate the order of protection and the order terminating his parental rights was separate and distinct from the order of protection. The court improperly dismissed the petition because DSS had the burden to show that it properly served the father so as to obtain jurisdiction over him with respect to the order of protection and DSS failed to submit a process server's affidavit of service and the record was otherwise devoid of evidence that the father was served with the petition giving rise to the order of protection or the order of protection itself.

Matter of Anna B., 105 AD3d 1399 (4th Dept 2013)

Willful Violation of Order of Protection Affirmed

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

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

TERMINATION OF PARENTAL RIGHTS

Father Not Denied Effective Assistance of Counsel

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The court rejected father's contention that his attorney's failure to seek a stay of the court's proceeding based upon the pendency of the father's appeal from the judgment convicting him of murdering the mother constituted ineffective assistance. An order terminating parental rights on the ground that a parent was convicted of murdering the other parent may be affirmed notwithstanding an appeal of the conviction. Further, during the dispositional phase of the proceeding, the father's attorney stated that the father did not oppose the TPR. Therefore, the allegation that counsel's failure to seek a stay was an error - rather than a strategic decision made by counsel - was speculative.

Matter of Dalton A. B., 103 AD3d 1181 (4th Dept 2013), *lv denied* __NY3d__

Respondent's Parental Rights Properly Terminated on Ground 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 then and for the foreseeable future unable, by reason of mental illness***, to provide proper and adequate care for the child. The unequivocal testimony of petitioner's expert witness, a psychologist, and other witnesses established that the father was so disturbed in his behavior, feeling, thinking and judgment that, if his son was returned to his custody, his son would be in danger of becoming a neglected child. Moreover, although the father participated in several treatment programs, he was unable to overcome his significant limitations.

Matter of Christopher B., 104 AD3d 1188 (4th Dept. 2013)

TPR Affirmed; Derivative Neglect Properly Determined

Family Court terminated respondent mother's parental rights and ordered that the child be freed for adoption. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and child. Furthermore, the court properly determined that the child was a neglected child based upon the derivative evidence that three of the mother's other children were determined to be neglected children, including the evidence that the mother failed to address the mental health issues that led to those neglect determinations and the placement of those children in a foster home. The court properly denied the mother's request for a suspended judgment. A suspended judgment is a brief grace period designed to prepare the parent to be reunited with the child. The court's assessment that the mother was not likely to change her behavior was entitled to great deference.

Matter of Lillianna G., 104 AD3d 1224 (4th Dept. 2013)

Despite Mother's Partial Participation in Services, TPR Affirmed Where Mother Had No Realistic Plan to Care for Child and Was Unlikely to Change Behavior

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. The court did not abuse its discretion in determining that a suspended judgment was not in the child's best interests. Although the mother participated in some of the services offered by petitioner, she failed to address successfully the problems that led to the removal of the child and continued to prevent his safe return. The mother also did not have a viable plan for the child while she was incarcerated. Therefore, the record supported the court's refusal to grant a suspended judgment inasmuch as the mother had no realistic feasible plan to care for the child and she was not likely to change her behavior. The Appellate Division rejected the mother's contention that she was denied effective assistance of counsel, inter alia, on the grounds that her attorney allegedly failed to call the child's maternal grandmother as a witness during the dispositional hearing. The mother did not meet her burden of demonstrating that the alleged failure resulted in actual prejudice. There was no support in the record for the mother's contention that the child's maternal grandmother was willing or able to care for the child while the mother was incarcerated.

Matter of Dahmani M., 104 AD3d 1245 (4th Dept 2013)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights with respect to his child on the ground of permanent neglect. The court considered the appropriate factors, including the special circumstances of an incarcerated parent, in determining that the child was neglected. The father failed to demonstrate any commitment to the responsibilities of parenthood and demonstrated a fundamental defect in his understanding of proper parenting responsibilities. Petitioner was not required to guarantee that respondent succeed in overcoming his predicaments but, rather, he must have assumed a measure of initiative and responsibility.

Matter of Aiden J. W., 105 AD3d 1334 (4th Dept 2013)

Court Did Not Abuse Its Discretion in Denying Adjournment

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

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

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

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of demonstrating by clear and convincing evidence that the mother was then and for the foreseeable future unable, by reason of mental illness ... to provide proper and adequate care for the child. Respondent was pregnant with the subject child when her vehicle was struck by a pickup truck. She sustained a traumatic brain injury, which caused diminished cognitive abilities. Petitioner submitted unrefuted expert testimony that, as a result of respondent's injuries, she suffered from a mental condition that rendered her unable to care for the child because respondent was functioning at the level of an eight-year-old. Petitioner's expert also testified that respondent's mental condition would not improve.

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

Suspended Judgment Not Appropriate

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

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

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

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

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

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

Family Court terminated respondent mother's parental rights to her three children having determined that the mother was then and for the foreseeable future unable, by reason of her mental retardation, to provide proper and adequate care for the children. The Appellate Division affirmed. Petitioner met its burden of proof at the fact-finding hearing.

A psychologist who conducted a court-ordered evaluation of the mother testified that the mother functioned at a very low level and that her IQ score of 63 placed her in the first percentile. The psychologist further testified that the mother's low IQ had remained unchanged over time, and he explained that it is highly unusual for an IQ score to change dramatically absent some type of trauma. Furthermore, the mother lacked a basic intellectual understanding of the needs of a child and was unable to recognize and identify the fundamental tasks of parenting. Despite the services made available to her, the mother demonstrated very little improvement in functioning effectively as a parent. The mother failed to present any contradictory evidence with respect to her intellectual capacity.

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

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

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

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