

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

Case Digest

Winter 2013

Covers September through December 2013 Decision Lists

CENTRAL REGISTER

Court Erred in Granting Petitioner's Motion For Summary Judgment

After an administrative expungement hearing, respondent OCFS denied the request of petitioner, that a report maintained in the NYS Central Register of Child Abuse and Maltreatment, indicating petitioner for maltreatment, be amended to unfounded. The Appellate Division affirmed. The report was based upon petitioner's, an employee of OCFS, physical altercation with a 16-year-old resident at a secure residential facility. Based upon the record, the determination was supported by substantial evidence. Petitioner was not denied effective assistance of counsel at the fair hearing.

Matter of Milton v Joyce, 109 AD3d 1138 (4th Dept 2013)

CHILD ABUSE AND NEGLECT

Finding of Neglect Supported by Preponderance of Credible Evidence

Family Court adjudged that respondent mother neglected her children. The Appellate Division affirmed. Although the court erred in admitting police records into evidence because the certification attached to the records did not comply with Family Court Act § 1046 (a) (iv), the finding of neglect was supported by a preponderance of the credible evidence. The evidence presented at trial established that police officers had been called to the mother's residence on numerous occasions for disturbances and repeated acts of domestic violence and that the eight and nine-year-old children were present for many of the instances. On the most recent occasion, the police observed a "huge puddle" of blood and mother's boyfriend with a cloth covering his bloody arm. The mother was not injured, the police recovered a hunting knife with fresh blood on it, the mother and boyfriend appeared intoxicated, and the children were in a bedroom watching television. Although the children told a social worker that they slept through the incident, they were traumatized by the blood and being forced to clean up the blood the next day. The evidence established that the children were neglected, and the mother, who was the instigator of the physical altercation with the boyfriend, was responsible for the neglect.

Matter of Kadya J., 109 AD3d 1158 (4th Dept 2013)

Respondent Properly Excluded From Courtroom During Stepdaughters' Testimony

Family Court determined that respondent sexually abused his stepchildren. The Appellate Division affirmed. The findings of abuse were supported by a preponderance of the evidence. The court did not abuse its discretion in excluding respondent from the courtroom during his stepdaughters' testimony. The court properly balanced the respective interests of the parties and, based upon the hearing testimony, reasonably concluded that the stepdaughters would suffer emotional trauma if they were compelled to testify in open court. Further, the court properly based its decision to exclude respondent from the courtroom on the social worker's affidavit that respondent's abuse of the children compromised their ability to give clear and accurate testimony in respondent's presence.

Matter of Alesha P., 110 AD3d 1461 (4th Dept 2013)

Respondent Not Prejudiced by Absence From Court When Petitioner's Motion For Summary Judgment Granted

Family Court determined that respondent father abused and derivatively abused the subject children. The Appellate Division affirmed. Although not preserved for review, respondent's contention was without merit that the court violated his right to due process by conducting proceedings in his absence. While due process of law applied

in article 10 proceedings and included the right of a parent to be present at every stage of the proceeding, that right was not absolute. At the time of the article 10 proceeding, respondent was incarcerated on criminal charges stemming from his conviction of sexually abusing one of his daughters, which was the same conduct that formed the basis of the article 10 proceeding. Respondent was not prejudiced by his absence from the court appearance during which the court granted petitioner's motion for summary judgment. It was well settled that evidence that a parent had been convicted of having raped or sexually abused a child was sufficient to support a finding of abuse of that child within the meaning of the Family Court Act. Here, there was nothing respondent could have stated at the appearance that would have warranted the denial of the motion for summary judgment.

Matter of Skyla H., 111 AD3d 1285 (4th Dept 2013)

Determination of Neglect Supported by Sound and Substantial Basis in Record

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. The court's decision had a sound and substantial basis in the record. The undisputed evidence at the hearing established that the mother's husband repeatedly misused alcohol to the point of intoxication, and that the harm to the children was causally related to the mother's failure to acknowledge, confront and adequately address her husband's alcohol abuse and associated aggressive behavior. The mother's contention that the court erred in requesting an oral report from the Attorney for the Children was not preserved for review and, in any event, any alleged error was harmless.

Matter of James DD., 111 AD3d 1337 (4th Dept 2013)

Court Erred in Granting Motion to Dismiss with Respect to Mother

Family Court dismissed the neglect petition against respondents. The Appellate Division modified by denying that part of the motion with respect to respondent mother and reinstating that part of the petition and remitted the matter for further proceedings. With respect to the allegation of neglect against the mother, her 16-year-old son testified that she drank beer nearly every day and that she often drank beer all day and evening. A caseworker testified that the mother's younger son told the caseworker that the mother started drinking before the younger son went to school and was still drinking when he went to bed. Thus, petitioner established a prima facie case that the children were neglected by the mother pursuant to Family Court Act Section 1046 (a) (iii).

Matter of Tyler J., 111 AD3d 1361 (4th Dept 2013)

Petition Dismissed Where Neglect Finding Based Upon Child's Possible Reaction to Future Harm

Family Court determined that the subject child was neglected by respondent, the child's

paternal grandmother, and granted the custody modification petition of petitioner, the child's maternal grandmother. The Appellate Division modified by dismissing the neglect petition. The court's finding of neglect hinged on the testimony of DSS's expert psychologist that respondent's dismissive response to the child's allegations that she was sexually abused by her eight-year-old cousin put the child at risk of harm because such response would cause the child to be reluctant to report future allegations of abusive contact. The evidence did not establish that the child was in fact sexually abused. Thus, the court erred in finding that respondent was chargeable with neglect for failing to protect the child from actual harm. Moreover, the finding of neglect could not be based upon the child's possible reaction to future harm. With respect to the court's directives concerning custody and visitation, although the award of sole custody to petitioner had a sound and substantial basis in the record, the court's determination that respondent's visitation should be supervised did not. Accordingly, the order was further modified by vacating the supervised visitation provision and the matter was remitted to fashion an appropriate schedule of unsupervised visitation for respondent.

Matter of Lebraun H., __ AD3d __ (4th Dept 2013)

Finding of Neglect Supported by Preponderance of Evidence

Family Court determined that respondent father neglected the subject children. The Appellate Division affirmed. The court's finding of neglect was supported by a preponderance of the evidence. Testimony presented at the fact-finding hearing established that one child witnessed, and the other was in proximity to, a physical altercation between the parties, where the father kicked the mother in the face and placed his hands around her neck to prevent her from breathing. The child who witnessed the altercation told a caseworker for petitioner later that day that she was "very sad and scared" upon seeing the mother's bloodied face after the altercation. Both children indicated to the caseworker that they were afraid of the father. The children's proximity to the altercation, together with the evidence of a pattern of ongoing domestic violence in the home, placed the children in imminent risk of emotional harm.

Matter of Amodea D., __ AD3d __ (4th Dept 2013)

Finding that Child in Imminent Danger of Impairment Supported by Sound and Substantial Basis in Record

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. The mother surrendered her parental rights to the child during a subsequent Family Court appearance, but the appeal was not mooted because the finding of neglect constituted a permanent and significant stigma that might indirectly affect the mother's status in future proceedings. Based upon the evidence presented by petitioner, combined with the adverse inference that the court properly drew based upon the mother's failure to testify, there was a sound and substantial basis to support the court's finding that the child was in imminent danger of impairment as a result of the mother's failure to exercise a minimum degree of care.

Matter of Gada B., __ AD3d __ (4th Dept 2013)

CHILD SUPPORT

Father Required to Pay Child Support - Child Not Emancipated

Supreme Court, among other things, ordered defendant father to pay child support to plaintiff mother. The Appellate Division modified by reducing defendant's net child support obligation. Where, as here, there was no provision for an adjustment of child support upon the termination of maintenance, it was not error to fail to deduct the amount defendant paid in maintenance from his gross income before calculating the parties' child support obligations. However, although not raised on appeal, the court made a mathematical error. Consequently, the amount defendant was required to pay in child support per month was reduced from \$540.85 to \$504.85.

Zufall v Zufall, 109 AD3d 1135 (4th Dept 2013)

Defendant Willfully Failed to Pay Child Support And Plaintiff Properly Awarded Attorney's Fees

Supreme Court, among other things, found defendant father in contempt of court on the ground that he willfully failed to pay child support and awarded attorney's fees to plaintiff mother. The Appellate Division modified other parts of the order, but affirmed the finding of contempt and award of attorney's fees. Defendant's admission that he failed to pay child support pursuant to the judgment of divorce constituted prima facie evidence of a willful violation and thus the burden shifted to him to show some competent, credible evidence to justify his failure to make the required payments. Respondent did not meet his burden. His failure to make payments was not excused by an Idaho statute requiring that payments be made to an Idaho agency because the judgment of divorce was issued in New York and, under the Uniform Interstate Family Support Act, the law of the issuing state governs. Because the court properly determined that defendant willfully failed to pay his child support, it properly awarded plaintiff attorneys' fees she incurred in enforcing those obligations.

Johnson v Johnson, 109 AD3d 1164 (4th Dept 2013)

Mother Established Change in Circumstances - Order Reversed

Family Court denied mother's amended petition seeking an upward modification of child support. The Appellate Division reversed and remitted for further proceedings. The parties' separation agreement provided that the parties were opting out of the requirements of the CSSA based upon several factors, including that the children would spend a significant portion of their time with respondent father pursuant to the visitation schedule in the separation agreement. The evidence at trial supported the mother's allegations in her petition that there was a breakdown in the father's relationship with the children such that there was only sporadic visitation with the father and there was a concomitant increase in the mother's child-rearing expenses. Thus, there was an unanticipated change in circumstances that created a need for modification of the child

support obligation.

Matter of Gallagher v Gallagher, 109 AD3d 1176 (4th Dept 2013)

No Evidence that Father Made Reasonable Efforts to Obtain Employment

Family Court denied respondent father's objections to the order of the Support Magistrate, which denied respondent's motion to vacate the underlying support order entered upon his default and to cap his unpaid child support arrears. The court also confirmed the Magistrate's determination that respondent willfully failed to obey the support order and committed him to a term of incarceration of three months. The Appellate Division affirmed. Although default orders involving child support are disfavored, here the father's excuse for the default, that he and the child's mother agreed that neither of them would pay child support and he therefore thought the court proceedings were scheduled in error, was not reasonable. Respondent also failed to establish a meritorious defense. Family Court Act § 413 (1) (h) did not apply because the underlying support order was entered upon default, not pursuant to a stipulation or agreement of the parties. The order was not invalid because it imputed income to respondent without providing calculations. Where a party defaults, the court shall order child support based upon the needs of the child or standard of living of the child, whichever is greater. Respondent's contention that the court erred in confirming the Magistrate's finding that he willfully violated the support order lacked merit. Respondent failed to submit some competent, credible evidence to establish that he made reasonable efforts to obtain gainful employment.

Matter of Roshia v Thiel, 109 AD3d 1490 (4th Dept 2013)

Support Magistrate Properly Conformed Petition to Proof

Family Court granted the mother's petition seeking an upward modification of child support. The Appellate Division affirmed. Pursuant to an agreement of the parties that was incorporated, but not merged, in their judgment of divorce, in the event that either party's income increased or decreased by 25% through no fault of their own, either could petition the court for a de novo review of their respective child support obligations and school cost contributions. In her petition, the mother alleged that her income had decreased by 25%. After a hearing, the Support Magistrate determined that the father had more than a 25% increase in income, and thereafter calculated the father's child support obligation in accordance with the Child Support Standards Act. The father did not dispute that his income increased more than 25%. Rather, the father contended that the Support Magistrate should have dismissed the petition after finding that the mother failed to demonstrate that she had a 25% decrease in income. The Support Magistrate properly conformed the petition to the proof and rejected the father's contention that he was prejudiced. Additionally, the father's contention was unavailing that it made no sense for the Support Magistrate to keep the father's private school tuition obligation intact while quadrupling his basic support obligation. The Support Magistrate ordered the mother to pay her pro rata share of the private school tuition

and, while the father dismissed the mother's contribution as negligible, that was a function of the vast disparity in income between the parties.

Matter of Barton v Barton, 111 AD3d 1348 (4th Dept 2013)

Court Erred in Dismissing Petition For Lack of Personal Jurisdiction

Family Court denied the objections of petitioner to the order of the Support Magistrate. The Appellate Division reversed, reinstated the petition and remitted for further proceedings. Family Court erred in determining that it lacked personal jurisdiction over respondent because the affidavit of service did not include the last name of the person of suitable age and discretion who was served with process. Moreover, the court's sua sponte dismissal of the petition for lack of personal jurisdiction was error.

Matter of Monroe County Dept. of Human Servs.-CSEU v Derrell M., 111 AD3d 1394 (4th Dept 2013)

Appeal From Nonfinal Intermediate Order in CPLR Article 78 Proceeding Dismissed

In a CPLR article 78 proceeding, Supreme Court remitted the proceeding to Family Court for a hearing before the Support Magistrate on the merits of petitioner's objection to his ex-wife's request for a cost of living adjustment to the amount of his child support obligation. The Appellate Division dismissed petitioner's appeal. An appeal from a nonfinal intermediate order in a CPLR article 78 proceeding did not lie as of right. The appeal was dismissed on the further ground that petitioner was not aggrieved by the order inasmuch as Supreme Court merely remitted the matter to Family Court for a hearing. Finally, the issue whether the court properly remitted the matter to Family Court was not encompassed by the notice of appeal.

Matter of Green v Monroe County Child Support Enforcement Unit, 111 AD3d 1446 (4th Dept 2013)

CUSTODY AND VISITATION

Mother Properly Granted Sole Custody of Parties' Three Children

Family Court awarded petitioner mother sole custody of the parties' three children with visitation to respondent father on alternate weekends. The Appellate Division affirmed. The award of sole custody to the mother had a sound and substantial basis in the record. The father's contention that the AFC failed to advocate for the children's interests was unpreserved and without merit. The court did not abuse its discretion in allowing testimony concerning events that predated the prior custody order. In determining the best interests of the children, the court was vested with broad discretion with respect to the scope of proof. The delay between the conclusion of the hearing and the court's decision, by itself, did not require reversal.

Matter of Brown v Wolfgram, 109 AD3d 1144 (4th Dept 2013)

Splitting Placement of Children Affirmed

Family Court awarded the parties joint custody, awarded primary physical custody of two children to respondent father and primary physical custody of one child to petitioner mother. The Appellate Division affirmed. The mother's contention that the court abused its discretion in splitting custody of the children was rejected. The court's determination, which was entitled to great deference, was supported by extensive factual findings and warranted the conclusion that the needs of the children were best met by the court's disposition.

Matter of Button v Allen, 109 AD3d 1158 (4th Dept 2013)

Mother Had No Rights Over Child Adopted by Father and Father's Wife

Family Court dismissed the petition of mother to modify her visitation rights set forth in a prior order. The Appellate Division affirmed. The court did not err in dismissing the petition without a hearing. While this proceeding was pending, an order was entered in Surrogate's Court granting respondent father's and his wife's petition seeking adoption of the child by respondent's wife. Upon entry of that order, the mother's parental rights ceased and she lacked standing to prosecute a visitation petition regarding the subject child. Although it appeared from the record that respondent and his wife failed to provide required notice of the adoption proceeding to the mother, the court lacked the authority to vacate or ignore the adoption order. Rather, the mother must seek relief from the adoption order in the court that rendered that order.

Matter of Benzin v Kutny 109 AD3d 1175 (4th Dept 2013)

Modification of Prior Order Awarding Father Physical Custody of Child Upheld

Family Court granted father's petition seeking to modify a prior order and awarded him

primary physical custody of the parties' child and prohibited all contact between the mother's live-in fiancé, a level one sex offender, and the child. The Appellate Division affirmed. The contention of the mother that testimony about her fiancé's statement to his counselor were privileged was without merit because the fiancé authorized his counselor to disclose privileged communications. The court properly allowed the fiancé's counselor to testify about the underlying facts of the fiancé's sexual abuse conviction. The testimony was not inadmissible hearsay because it was not offered for the truth of the matter asserted therein and was relevant to the mother's state of mind. The court's determination to award primary physical custody to the father was in the best interests of the child and had a sound and substantial basis in the record. The record supported the court's determination that the father was better able to provide for the child's emotional and intellectual needs. Additionally, the court properly weighed against the mother that she resided with a sex offender and allowed him to have unsupervised contact with the child.

Matter of Weekley v Weekley, 109 AD3d 1177 (4th Dept 2013)

Mother Failed to Establish Post-Surrender Visitation Agreement Was Enforceable

The mother petitioned to enforce an agreement providing post-surrender visitation with the child. Family Court dismissed the petition on the ground that further visitation between the mother and the child was not in the child's best interests. The Appellate Division affirmed. The mother failed to establish that the agreement was enforceable. The mother's contention was rejected that the agreement was enforceable pursuant to Social Services Law Sections 383-c and 384. The Social Services Law unequivocally provided that subsequent to the adoption of the child, enforcement of any post-surrender contact agreement shall be in accordance with Domestic Relations Law Section 112-b. The Domestic Relations Law, in turn, provided in relevant part that such agreement "shall not be legally enforceable after any adoption approved by a court pursuant to this article unless the court entered an order pursuant to this section incorporating those terms and conditions into a court-ordered adoption agreement." The mother failed to establish that the terms of the agreement were incorporated into the court-ordered adoption agreement. In any event, the court shall not enforce an order incorporating a post-surrender contact agreement, unless it found that the enforcement was in the child's best interests

Matter of Kaylee O., 111 AD3d 1273 (4th Dept 2013)

Supervised Access Proper Where Mother Violated Prior Order by Absconding With the Child

Family Court modified an existing custody and visitation order by requiring that respondent mother's access to the subject child be supervised. The Appellate Division modified and remitted for further proceedings. In 2009, the court modified a prior custody order by awarding sole custody of the subject child to petitioner father and granting liberal access to the mother. In making the 2009 order, the court determined

that there was a change in circumstances inasmuch as the mother repeatedly frustrated the father's access and the mother failed to follow court orders. The instant order limited the mother's access to supervised visitation based largely upon the court's finding that the mother, without notifying the father and in violation of the 2009 order, absconded with the child, leaving the country for a period of 39 days. The mother's violation of the 2009 order and her pattern of continued violation of court orders constituted a sufficient change in circumstances. The court's determination that unsupervised visitation would be detrimental to the child had a sound and substantial basis in the record. The mother put the child at risk of emotional and intellectual harm by absconding with her, causing her to miss over a month of school, and failing to appreciate the importance of the child's relationship with the father. However, the court erred in failing to set a supervised visitation schedule. Therefore, the matter was remitted to determine the access schedule and whether sibling visitation should occur.

Matter of Green v Bontzolakes, 111 AD3d 1282 (4th Dept 2013)

Visitation Petition Properly Dismissed With Prejudice

Family Court dismissed with prejudice the father's petition seeking visitation with his daughter. The Appellate Division affirmed. Under the unique circumstances of the case, the court erred in taking judicial notice of the alleged fact that his daughter was a severely abused child under Social Services Law Section 384-b (8) (a) (iii) (A). However, the court properly dismissed the petition with prejudice. Inasmuch as there was an existing order of protection prohibiting petitioner from having contact with his daughter until June 22, 2018, the court was without authority to award petitioner visitation.

Matter of Shaw v Seals-Owens, 111 AD3d 1284 (4th Dept 2013)

Evidence Former Live-in Boyfriend Abused Child Constituted Change in Circumstances

Family Court modified the parties' existing custody arrangement by transferring primary physical placement of the children from respondent mother to petitioner father. The Appellate Division affirmed. The father met the burden of establishing a change in circumstances sufficient to warrant an inquiry into whether the best interests of the children called for a change in circumstances by submitting evidence, among other things, that the mother's former live-in boyfriend abused one of the children. The court's determination with respect to the best interests of the children was based upon a totality of the circumstances and had a sound and substantial basis in the record.

Matter of Kelsey v Kelsey, 111 AD3d 1338 (4th Dept 2013)

Court Did Not Place Undue Emphasis Upon Evidence of Father's Extramarital Relationship

Family Court modified a prior custody order by, among other things, awarding petitioner mother sole custody and primary physical residency of the parties' children. The Appellate Division affirmed. The father's contention was rejected that the court placed undue emphasis upon evidence of his private immoral conduct. The record established that the court did not consider the moral implications of the father's extramarital relationship. Instead, the court carefully considered the evidence only in evaluating the father's history of impulsiveness and his inability to put the needs of the children before his own. Indeed, the court properly determined that evidence of the father's infidelity or sexual indiscretions was not relevant except in those contexts.

Matter of Lawson v Lawson, 111 AD3d 1393 (4th Dept 2013)

Modification of Prior Order Awarding Father Physical Custody of Child Affirmed

Family Court transferred primary physical placement of the subject child from respondent mother to petitioner father. The Appellate Division affirmed. The court properly determined that the child's downward slide in school performance and the child's referral for mental health treatment for behaviors exhibited in school and at home constituted a change in circumstances sufficient to warrant an inquiry into the child's best interests. Further, there was a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award primary physical placement to the father. The child performed poorly at school for four years while living with the mother. The child's teacher and school counselor testified that the child reported that he stayed up late watching television, which was attributed as a cause of the child's fatigue. Indeed, the teacher testified that the child sometimes fell asleep in class or was required to go to the school nurse's office to nap. The mother was unemployed and relied on others for transportation. In contrast, the father was employed and able to provide a more stable home for the child.

Matter of Brewer v Soles, 111 AD3d 1403 (4th Dept 2013)

Father's Cross Petition Granted Where Domestic Violence in Mother's Household

Family Court awarded petitioner mother sole legal and physical custody of the parties' child. The Appellate Division vacated the order, granted respondent father's cross petition, in part, by awarding him primary physical custody of the child, and remitted the matter to Family Court to fashion a visitation schedule for the mother. The incidents of domestic violence in the mother's household constituted a sufficient change in circumstances to warrant modification of the prior custody order. Furthermore, modification was warranted because the parties' prior parenting time arrangement would no longer be practical upon the child's attainment of school age. It was in the child's best interests to award primary physical custody of the child to the father. Although the mother had been the primary residential parent since the child's birth, the violent and abusive behavior of the child's uncle in the mother's home created a dangerous environment for the child.

Matter of Pecore v Blodgett, 111 AD3d 1405 (4th Dept 2013)

By Requiring Posting of Undertaking, Court Properly Imposed Meaningful Sanction to Ensure Visitation Occurred

Family Court denied the mother's petition for a modification of custody. The Appellate Division affirmed. Although the mother met her burden of proving a change in circumstances because the parties' relationship had deteriorated and the child had missed numerous visitations with the mother, the record supported the conclusion that a change in custody would not be in the best interests of the child. By requiring the father to post an undertaking in a specific amount, the court properly imposed a meaningful sanction based on the father's failure to comply with orders concerning her visitation rights, to ensure that visitation occurred.

Matter of Smith-Gilsey v Grisanti, 111 AD3d 1424 (4th Dept 2013)

Reduction of Mother's Visitation in Best Interests of Children

Petitioner mother sought to modify visitation with respect to her four biological children. Respondent, petitioner's sister, had custody of the children, and she in turn sought to reduce petitioner's visitation. Following a hearing and an in camera interview with the children, Family Court granted the relief sought by respondent and reduced petitioner's visitation to three visits per year. The Appellate Division dismissed the appeal insofar as it concerned the oldest child, who had attained 18 years of age, and otherwise affirmed. The court's determination that the best interests of the children were served by a change in visitation had ample support in the record. Respondent, who supervised petitioner's visitation with the children, testified that petitioner did not regularly avail herself of the opportunity to visit the children despite an order allowing her monthly visitation. Respondent further testified that, when petitioner did visit with the children, the visitation was a negative experience for the children. The court gave proper weight to the children's wishes, which, although not controlling, must be considered, particularly where, as here, the children were of sufficient age to articulate their needs and preferences to the court.

Matter of Golda v Radtke, ___ AD3d ___ (4th Dept 2013)

Reversal Not Required Where Father Was Unrepresented When Court Granted Temporary Order

Family Court granted petitioner mother sole custody and primary physical residency of the subject children. The Appellate Division affirmed. Respondent father's contention was rejected that the court erred in transferring temporary custody of the younger child to the mother while the father was not represented by counsel. The father was unrepresented due to his own inaction. The record established that, during two prior court appearances, the court advised the father of his right to counsel and gave him a referral for assigned counsel. At the third appearance, when the father again appeared

without counsel, the court granted the temporary order upon the motion by the Attorney for the Children. Assuming, arguendo, that the court erred in deciding the motion, reversal was not required because the order on appeal was issued following a subsequent evidentiary hearing at which the father was represented by counsel.

Matter of Stearns v Crawford, __ AD3d __ (4th Dept 2013)

Children Could Not Force Mother to Litigate Abandoned Petition

Family Court dismissed the petition for modification of a custody order. The Attorney for the Children appealed from a decision dismissing various petitions filed by the parents of two children. Although no appeal lies from a decision, the notice of appeal was treated as valid and the appeals were deemed as taken from the seven orders in the respective appeals that were entered upon the single decision. The children were not aggrieved by the orders in six of the appeals because the orders dismissed petitions filed by one parent alleging that the other parent had violated an order of custody or which sought a personal order of protection against the other parent. Thus, those appeals were dismissed. The mother did not take an appeal from the order in the remaining appeal, which dismissed the mother's petition seeking modification of a custody order. The children, while dissatisfied with the order, could not force the mother to litigate a petition that she had since abandoned. "[C]hildren in custody cases should [not] be given full-party status such that their consent is necessary to effectuate a settlement...There is a significant difference between allowing children to express their wishes" to the court and allowing their wishes to chart the course of litigation [citation omitted]. Thus, this appeal was affirmed.

Matter of Kessler v Fancher, __ AD3d __ (4th Dept 2013)

FAMILY OFFENSE

Respondent Committed Family Offenses

Family Court granted a protective order to petitioner upon a finding that respondent committed the family offenses of assault in the third degree, harassment in the second degree, and disorderly conduct. The Appellate Division affirmed. The court's findings were supported by a preponderance of the evidence. The testimony presented established that respondent kicked petitioner in the face, resulting in bruises, swelling and a cut lip requiring stitches, and that while on top of petitioner he put his hands around her neck to prevent her from breathing. The court's determination that respondent was not acting in self-defense was supported by the record and could not be disturbed.

Matter of Dietzman v Dietzman, __ AD3d __ (4th Dept 2013)

JUVENILE DELINQUENCY

Evidence Legally Sufficient to Establish Respondent Intended to Cause Physical Injury

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that he committed acts that, if committed by an adult, would constitute the crime of assault in the third degree. The Appellate Division affirmed. Although a different result would not have been unreasonable because respondent testified to a version of the incident different than that presented by petitioner, there was no basis to disturb the court's resolution of witnesses' credibility.

Matter of Isaac J., 109 AD3d 1176 (4th Dept 2013)

PATERNITY

Paternity Petition Properly Dismissed

Family Court dismissed the paternity petition. The Appellate Division affirmed. Contrary to the contentions of the AFC and petitioner, the court was not required to apply the doctrine of equitable estoppel to bar the mother from denying that petitioner was the father of the subject child. A nonbiological, nonadoptive third-party does not have standing to seek visitation when a biological parent who is fit opposes it, and equitable estoppel does not apply even where the nonparent had enjoyed a close relationship with the child and exercised some control over the child with the parent's consent.

Matter of White v Wilcox, 109 AD3d 1145 (4th Dept 2013)