

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

**Case Digest
2023 Decision Lists Plus Select
Court of Appeals, Federal, and Other Cases of Interest**

FOURTH DEPARTMENT CASES

ABUSE AND NEGLECT

Absent a Legal Disqualification, Judge is Generally the Sole Arbitrator of Recusal

Family Court denied the motion of petitioner seeking recusal. The Appellate Division affirmed. Family Court's knowledge of certain instances of negative treatment of respondent mother by workers associated with petitioner stemmed not from an extrajudicial source but from a report from a domestic violence crisis and prevention services organization. Said report was received by Family Court in the course of the proceeding and immediately shared with all parties when Family Court was made aware that the report had not initially been so distributed. Moreover, although some of the comments about petitioner's efforts and handling of the matter would have been better left unsaid, nothing in the record revealed that any bias on the court's part unjustly affected the result to the detriment of petitioner or that the court had a predetermined outcome of the case in mind. While Family Court's intemperate remarks reflected a lack of patience with petitioner that was not appropriate in a delicate and serious matter involving the well-being of children, the Appellate Division perceived no abuse of discretion by Family Court in denying petitioner's recusal motion. Finally, issues related to visitation and certain other matters previously decided by Family Court in the proceeding were not properly before the Appellate Division on the appeal from the intermediate order denying petitioner's recusal motion because an appeal from a nonfinal order or an intermediate order did not bring up for review prior nonfinal orders.

Matter of Indigo S., 213 AD3d 1205 (4th Dept 2023)

Father Abdicated His Parental Responsibilities While the Children Were Living in Foster Care

Family Court found that the father neglected the subject children by failing to exercise a minimum degree of care. The Appellate Division affirmed. The father failed to follow through with petitioner to address his mental health and chemical dependency issues, did not maintain suitable housing for the children, failed to regularly visit with the children, and abdicated his parental responsibilities while the children were in foster care.

Matter of Mirah J. P., 213 AD3d 1219 (4th Dept 2023)

Fact that a Child's Injuries Did Not Require Medical Attention Did Not Preclude a Finding of Neglect

Family Court determined that respondent mother neglected her oldest child by inflicting excessive corporal punishment on her and derivatively neglected her younger child. The Appellate Division affirmed. The mother struck the older child on multiple occasions with an electrical cord and a broomstick handle. Each child's out-of-court statements were sufficiently corroborated, and cross-corroborated, by photographs and witness

observations of the older child's injuries. The fact that the older child's injuries did not require medical attention did not preclude a finding of neglect based on the infliction of excessive corporal punishment. The mother's only defense was that the children were lying.

Matter of Ryanna H., 214 AD3d 1308 (4th Dept 2023)

Mother Was Aggrieved by the Neglect Finding Despite Her Consent to the Disposition and the Fact That the Child Obtained the Age of Majority

Family Court determined that respondent mother neglected the subject child by inflicting excessive corporal punishment on her. The Appellate Division dismissed the appeal insofar as it concerned the disposition and affirmed. The mother's challenge to the finding of neglect was properly before the Appellate Division as the mother was aggrieved by the finding of neglect despite her consent to the disposition and the fact that the child had attained the age of majority. A determination of neglect creates a permanent and significant stigma which is capable of affecting a parent's status in potential future proceedings. Nevertheless, the Appellate Division affirmed the finding of neglect. The mother instigated a confrontation with the child in which she struck the child in the face with an open hand, pushed the child causing her to fall into a bathtub and sustain visible swelling to her leg, and threatened the child with a knife. The child's statements to petitioner's caseworker were corroborated by the caseworker's observations of the child's injuries and by the mother's admissions.

Matter of Vashti M., 214 AD3d 1335 (4th Dept 2023)

Neglect of the Oldest Siblings Was So Proximate in Time to the Derivative Proceeding That It Could Reasonably Be Concluded That the Condition Still Existed

Family Court determined that respondent mother derivatively neglected the subject child. The Appellate Division affirmed. Although the mother showed that she attended some parenting classes and therapy sessions, she failed to meet her burden of demonstrating that the circumstances leading to the prior neglect finding, entered for the subject child's two oldest siblings, could not reasonably be expected to exist then or in the foreseeable future. In addition, Family Court's admission of the case file was not error in that the court admitted the evidence conditionally, subject to the mother's hearsay objection, and there was no indication that the court considered, credited, or relied upon inadmissible hearsay.

Matter of Milo C., 214 AD3d 1350 (4th Dept 2023)

Mother's Actions in Continuing to Allow the Adult Child to Reside in or Visit the Home Placed the Children at Substantial Risk of Harm

Family Court determined that respondent mother neglected the subject children by, inter alia, failing to provide a safe environment for them. The Appellate Division affirmed. One

of the mother's adult children had previously sexually abused one of the subject children over the course of several years. That adult child was also mentally unstable, volatile, and violent, having punched holes in the walls and physically fought with others in the home. The subject children witnessed those events and were, at times, the victims of those events. The police were repeatedly called to the residence and their sibling's mere presence at the house left the subject children uncomfortable and terrified. The mother refused to cooperate with petitioner or comply with a safety plan and the adult child remained a constant presence in the home.

Matter of Cameron J.S., 214 AD3d 1355 (4th Dept 2023)

Petitioner Failed to Show Good Cause to Modify the Placement of the Children

Family Court modified a prior order of fact-finding and disposition and placed the subject children in the custody of petitioner. The Appellate Division dismissed, modified on the law, vacated, and remitted to Family Court. The father did not have standing to contest the order insofar as it related to a child to whom he was not related. Nevertheless, the father's appeal from the order moving his children from relative placement to foster care was not moot because that change in placement might have, in future proceedings, affected his status or parental rights by altering the obligations of petitioner with respect to a future petition to terminate the father's parental rights. With respect to the merits, petitioner failed to show good cause to modify the placement of the children. With respect to the placement of the father's two youngest children with their paternal grandmother, although the grandmother did engage in corporal punishment by hitting the youngest child on her bottom, there was no evidence that the punishment was excessive or part of a pattern. The grandmother testified that she was unable to obtain more spacious housing because she could not obtain a voucher for larger housing without proof that the children were placed in her custody permanently. With respect to the placement of the father's two oldest children with the paternal aunt, even if the uncle did in fact spank one of the children after she intentionally broke a television, there was no indication that the physical contact was not a proportionate disciplinary measure. There was no evidence that the aunt was informed that corporal punishment was not permitted or that she was even aware that the uncle had allegedly engaged in such conduct. In addition, a family support therapist opined that the children had a strong relationship with their aunt and uncle, as well as their cousins, and that it could be very disruptive to separate the older children.

Matter of Shdaya B., 214 AD3d 1420 (4th Dept 2023)

Father Neglected the Child by Failing to Cooperate with the Caseworker in Arranging for the Child's Appropriate Care or Eventual Return Home

Family Court adjudged that the father neglected the subject child by failing to exercise a minimum degree of care. The Appellate Division affirmed. The father refused to allow the child to return home after he learned that she was lying to him and instead informed the child and the caseworker that the child should go to a shelter. Also, the father was not

willing to cooperate with the caseworker in arranging for the child's appropriate care or eventual return home.

Matter of Xandriea M., 214 AD3d 1445 (4th Dept 2023)

Mother Neglected the Child by Choking Him During an Altercation She Initiated

Family Court adjudged that the mother neglected the subject child by inflicting excessive corporal punishment on him. The Appellate Division affirmed. The evidence established that the mother intended to harm the child when she engaged in a physical altercation with him after he failed to take out the trash. It was uncontested that the mother choked the child during the encounter. The mother made various admissions – that she initiated the encounter, that she kicked the child's ass, that she was not going to let the child run over her, and that she was not going to let the child think that she was a little bitch—all of which belied the mother's argument that she acted in self-defense. The child feared the mother as a result of the altercation, had red marks, bruises, and broken blood vessels on his neck, and experienced breathing difficulties after the mother choked him. The conflicting evidence presented by the mother did not require a different result inasmuch as Family Court declined to credit her efforts to minimize or explain her behavior and instead credited the testimony of, inter alia, the child.

Matter of Amarion M., 214 AD3d 1457 (4th Dept 2023)

Mother Knew or Should Have Known of the Circumstances Which Required Action

Family Court adjudged that the mother neglected the subject children. The Appellate Division dismissed the appeal from the order insofar as it concerned the disposition and affirmed. The children were living in deplorable conditions, with dirty dishes, animal feces, garbage, and flies present throughout the home. The children had hygiene issues, including bad body odor, dirty and ripped clothing, and persistent lice, which had had a negative impact on the children's relationships with their peers at school. The conditions continued for several years, and the mother failed to address them, despite having been contacted on numerous occasions by a child protective services caseworker and a school social worker. Furthermore, the mother had left the home several months before the petition was filed to be with her boyfriend, leaving the children in the filthy home with the father. The mother knew or should have known of the circumstances which required action in order to avoid actual or potential impairment of the children and failed to act accordingly. Inasmuch as permanent orders of custody were subsequently entered, the mother's appeal from the order, to the extent that it concerns the disposition, is moot.

Matter of Mollie W., 214 AD3d 1463 (4th Dept 2023)

Prior Determinations of Permanent Neglect, Untreated Mental Illness, and Intellectual Disability Supported Derivative Neglect Determination

Family Court adjudged that the mother derivatively neglected the subject child. The Appellate Division affirmed. Any error in the admission of a report from a licensed psychologist who did not testify at trial was harmless inasmuch as the result would have been the same even if the report had been excluded. A prior order of the court which terminated the mother's parental rights over another child on the ground of permanent neglect was so proximate in time to the derivative neglect proceeding that it could be reasonably concluded that the conditions still existed. Family Court's determination was also properly supported by a finding that the mother's largely untreated mental illness and intellectual disability resulted in an inability to care for the subject child for the foreseeable future.

Matter of Juliet W., 216 AD3d 1424 (4th Dept 2023)

A Causal Connection Existed Between the Mother's Failure to Treat Her Mental Illness and the Potential Harm to the Children

Family Court adjudged that the mother neglected the subject children by failing to exercise a minimum degree of care. The Appellate Division affirmed. The mother called for an ambulance to transport her to a hospital's psychiatric emergency program because she did not feel safe at home. Upon admission the mother was found to be psychotic and unable to care for herself, admitted to regular PCP use, and admitted that she had not taken her psychiatric medication in a month. Moreover, the mother was unable to plan for the children's care on her own.

Matter of Jahkai S., 216 AD3d 1432 (4th Dept 2023)

Mother's Behavior While Under the Influence of an Inhalant Created an Imminent Danger of Emotional or Mental Impairment to the Children

Family Court adjudged that the mother neglected the subject children by failing to exercise a minimum degree of care. The Appellate Division affirmed. On two occasions, the mother became impaired from the use of an inhalant to the point she was unable to care for the subject children. The children were aware of the mother's use of inhalants. The mother was passed out when her children were awake and in need of her care, the children were unable to wake her and were scared. The children's reports were corroborated by the testimony of the father and law enforcement.

Matter of Alexander P., 216 AD3d 1455 (4th Dept 2023)

Appeal from Permanency Order Was Moot Inasmuch as Two Subsequent Permanency Orders Had Been Entered During the Pendency of the Appeal

Family Court continued the placement of the subject children with petitioner. The Appellate Division dismissed. The appeal was moot inasmuch as two subsequent permanency orders were entered during the pendency of the appeal that continued the subject children's placement with petitioner and did not change the permanency goal of reunification with the mother.

Matter of Destiny F., 217 AD3d 1400 (4th Dept 2023)

Family Court Drew the Strongest Possible Negative Inference from the Mother's Failure to Testify

Family Court adjudged that the mother neglected the subject child by, inter alia, exposing him to dangerous and unsanitary conditions. The Appellate Division affirmed. The mother was evicted from a hotel room in which she had been staying with the infant child. The hotel manager observed, among other things, more than 30 dirty diapers in the room, feces on the wall, sharp knives within the reach of a child, and what looked like cocaine residue on the coffee table. The mother did not dispute the conditions of the hotel room; instead, she contended that the child went to visit his grandmother approximately one week before the hotel manager observed the dangerous conditions. However, the only evidence introduced at the hearing that would support this contention arose from hearsay statements in the caseworker's notes. Those notes indicated that the mother refused to provide the grandmother's address to the authorities and that the grandmother, when reached by phone, refused to disclose her address as well. Additionally, the hotel manager testified that she observed the child at the hotel with the mother on several occasions and there were many toys in the room when the mother was evicted, as well as soiled children's clothing and dirty baby bottles, suggesting that the child had recently been in the room. That evidence, together with the negative inference drawn against the mother for failing to testify, supported Family Court's finding. Further, the mother was not denied due process when Family Court proceeded with the fact-finding hearing in her absence. The mother made a belated request for an in-person hearing and refused to attend the hearing virtually from the jail where she was incarcerated. Finally, Family Court did not err in admitting petitioner's case file inasmuch as the contents thereof were admissible as a business record. Even assuming, arguendo, the records contained inadmissible hearsay, any error was harmless.

Matter of Jaylin B., 221 AD3d 1418 (4th Dept 2023)

Cross-Corroborating Accounts of the Children Gave Sufficient Indicia of Reliability; Record Did Not Establish that the Stepmother Failed to Protect the Child

Family Court determined that the father abused the two subject children and that the stepmother neglected one of the subject children. The Appellate Division affirmed with respect to the father and modified and vacated the adjudication with respect to the

stepmother. Petitioner established a prima facie case of sexual abuse in the first degree against the father with respect to both children. The cross-corroborating accounts of the children with respect to the nature and progression of the sexual abuse gave sufficient indicia of reliability to each child's out-of-court statements. The testimony of the father and the stepmother at the hearing also served to corroborate the allegations of abuse made by both girls. With regards to the stepmother, the evidence established that, upon being informed of the father's actions against the younger child, the stepmother acted to separate the child from the father and that no further improprieties took place. Thus, the record did not establish that the stepmother failed to protect the child.

Matter of Zakiyyah T., 221 AD3d 1443 (4th Dept 2023)

Matter of Shaymari R., 221 AD3d 1447 (4th Dept 2023)

Counsel's Comments Were Relevant to Family Court's Determination Whether to Appoint a Guardian Ad Litem

Family Court adjudged that respondent neglected the subject child. The Appellate Division dismissed except it affirmed insofar as respondent claimed that she received ineffective assistance of counsel during the hearing to determine whether to reappoint a guardian ad litem. As respondent failed to appear at the fact-finding hearing and her attorney, although present, did not participate in the hearing, the order was entered upon default. No appeal lies from an order entered on the default of the appealing party. Nevertheless, respondent's appeal brought up for review respondent's claim that she was denied effective assistance of counsel at a hearing to determine whether to reappoint a guardian ad litem. At said hearing, respondent's counsel stated that she was unable to communicate with respondent and that respondent was not cooperating with her. Inasmuch as respondent's counsel's comments were relevant to Family Court's determination whether to appoint a guardian ad litem, respondent failed to demonstrate the absence of a strategic or other legitimate explanation for counsel's alleged shortcomings.

Matter of Josaph M., 221 AD3d 1458 (4th Dept 2023)

Father Neglected the Child by Inflicting Excessive Corporal Punishment

Family Court determined that the father neglected the subject child by inflicting of excessive corporal punishment. The Appellate Division affirmed. The father's contention that he was denied adequate appellate review because parts of the transcript were missing was unpreserved in the absence of a request for a reconstruction hearing. In any event, the record as submitted was sufficient to determine the issues raised on appeal. The nurse practitioner who examined the child two days after the incident observed wounds about the left eye, as well as bruising and swelling. In addition, the child reported having been kicked in the abdomen and beaten with a broom. The child reported pain in the abdomen and head. The child presented as anxious and restless. The nurse practitioner referred the child to the emergency room for further treatment due to the abdominal pain.

Matter of Ariona P., 221 AD3d 1520 (4th Dept 2023)

Extraordinary Circumstances Existed to Place the Child with the Grandparents Over the Father

Family Court adjudged that the mother neglected the subject child and placed the child with her maternal grandparents. The Appellate Division affirmed. Shortly before the child turned one-year-old, the Department of Social Services filed a neglect petition against the mother. At the time, paternity for the child had not been established. The following day, the father signed and filed an acknowledgement of paternity for the child. The child was removed from the mother's care and placed with the maternal grandparents. Approximately three months later, the father filed a petition for custody. Family Court appropriately found extraordinary circumstances based on the father's abandonment of the child. The father had not visited with the child much, if at all, before the neglect petition was filed and, after, the father visited the child only twice in a one-year period. The father also did not provide financial support for the child or contact the grandparents or the DSS caseworker regarding the child's well-being.

Matter of Lillyana B., 221 AD3d 1522 (4th Dept 2023)

The Appellate Division Afforded Great Weight to Family Court's Drawing of Inferences and Assessments of Credibility

Family Court adjudged that the mother abused the subject child. The Appellate Division affirmed. Petitioner presented the testimony of medical providers who examined the 20-month-old child on July 7, 2019 and found that the child had five circular-shaped burns to her legs that appeared to have been sustained at the same time, likely recently, and were in the early stages of healing. One provider testified that in her experience a child would cry out in pain when receiving those type of burns. The providers also noted that the child had multiple bruises, including bruising to her ear which was highly suspicious for nonaccidental trauma. Petitioner presented testimony that the child had been with the mother the morning of July 5 until approximately 3:00 p.m., and thereafter the child had been in the presence of multiple relatives at a public park until the mother picked up the child around midnight. Several of the child's relatives noticed the burn marks on the child around 6:00 p.m. and the mother herself noticed the burn marks when she picked up the child that night. The other respondents testified that, while at the park, the child never cried out in pain and Family Court made the inference that the child sustained the burn injuries earlier that day when she was in the mother's care. Family Court also relied on the testimony of several members of the mother's family regarding the mother's explosive temper and numerous instances where she struck or screamed at the child. The Appellate Division accorded great weight and deference to Family Court's drawing of inferences and assessments of credibility.

Matter of Johlyanne F., 221 AD3d 1571 (4th Dept 2023)

Father Left the Child Unsupervised at a Shelter for Three Days

Family Court found that the father neglected the subject child. The Appellate Division affirmed. The father left the child unsupervised at a shelter and made no attempt to contact the shelter or the authorities about the well-being of the child or his own whereabouts for three days.

Matter of Barry G., 221 AD3d 1596 (4th Dept 2023)

Mother's Unexplained Failure to Appear Constituted a Default

Family Court determined that the mother neglected the subject children. The Appellate Division dismissed. The mother did not appear at the fact-finding hearing and although her attorney was present at the hearing, the attorney did not participate. Under the circumstances, the mother's unexplained failure to appear constituted a default. Further, a subsequent order terminating the mother's parental rights was entered and the time for the mother to appeal from that order had passed. The subsequent order was final and rendered moot the appeal.

Matter of David P.S., ___ AD3d ___, 2023 NY Slip Op 06608 (4th Dept 2023)

Mother Drove to the Grandmother's House with the Intent of Engaging in a Physical Altercation and Brought the Child with Her

Family Court adjudged that the mother neglected the subject child. The Appellate Division affirmed. The evidence adduced at the fact-finding hearing established that the mother drove to the grandmother's house with the intent of engaging in a physical altercation and brought the child with her. Thus, the child was in the car and witnessed the mother intentionally drive her vehicle into the grandmother after the grandmother stabbed one of the mother's friends during a physical altercation. The child informed a caseworker that she was crying for her grandmother and was scared.

Matter of Shania R., ___ AD3d ___, 2023 NY Slip Op 06631 (4th Dept 2023)

Father Did Not Comply with Medical Instructions About Feeding the Child

Family Court determined that the father neglected the subject child. The Appellate Division affirmed. The child was severely underweight and exhibited signs of malnutrition. Despite their awareness of the child's condition, the father and mother did not comply with medical instructions about feeding the child. The father resided in the same household with the child and the mother, he was aware that the mother was unable to provide the child with adequate nutrition, his assistance was critical to the health of his child, and he was reluctant, and sometimes unwilling, to offer his assistance in ensuring that his child received proper nourishment.

Matter of Ahren B.N., ___ AD3d ___, 2023 NY Slip Op 06646 (4th Dept 2023)

Daughter's Out-Of-Court Statements Were Sufficiently Corroborated by Her Age-Inappropriate Knowledge of Sexual Conduct

Family Court adjudged that the father abused his eldest daughter and derivatively abused his two other children. The Appellate Division affirmed. The daughter's out-of-court statements were sufficiently corroborated by her age-inappropriate knowledge of sexual conduct. Moreover, statements made to the police by the daughter's cousin also provided sufficient cross-corroboration inasmuch as the statements regarding his sexual abuse by the father tended to support the statements of the daughter and viewed together, give sufficient indicia of reliability to each child's out-of-court statements. Additionally, the same cousin stated that he had observed the father abuse the daughter. Family Court did err in admitting into evidence that portion of the police report referring to some of the results of the father's polygraph examination and allowing a detective to testify regarding the same; nonetheless, that error was harmless.

Matter of Lynda M., ___ AD3d ___, 2023 NY Slip Op 06660 (4th Dept 2023)

Based on the Child's Age and Size, the Mother Should Have Known That Dropping the Child with the Result that He Landed on His Head Required Action

Family Court adjudged that the mother neglected the subject child. The Appellate Division affirmed. The mother admitted repeated drug use while pregnant. At the time of the child's birth, both the mother and the child tested positive for multiple drugs. Moreover, following the child's birth, the mother relapsed into drug misuse several times. Additionally, while the child was in the mother's care, at the age of approximately eight weeks, she dropped him and he landed on his head, causing him to sustain a skull fracture and hematoma. The mother did not tell anyone what had happened or take the child to the hospital until the next day when the child was feverish and was suffering seizures. Based on the child's age and size, the mother should have known that dropping the child with the result that he landed on his head required action in order to avoid actual or potential impairment of the child.

Matter of Kameron R., ___ AD3d ___, 2023 NY Slip Op 06678 (4th Dept 2023)

Petitioner Must Prove a Factual Nexus Between the Conviction and the Allegations Made in the Neglect Petition

Family Court placed the subject children with their mother after granting petitioner's motion for summary judgment on the issue of whether respondent had neglected the children. The Appellate Division reversed on the law, denied the motion, and remitted to Family Court. After respondent was convicted upon his guilty plea of one count of endangering the welfare of a child, petitioner moved for summary judgment on the neglect petition. Family Court erred in granting petitioner's motion. The neglect petition alleged that respondent engaged in inappropriate touching on or about July 14, 2021 for one subject child, October 13, 2021 for another subject child, and July 11, 2021 for a non-subject child. The affidavit in support of the motion for summary judgment stated that the

offenses against all three children occurred on or about July 21, 2021. The certificate of conviction did not list the date or dates of the offense or the victim and the minutes of respondent's plea allocution were not contained in the record on appeal. Thus, it was not clear whether the conviction related to the allegations with respect to one of the subject children or the non-subject child for whom respondent was not legally responsible. It was not enough to merely establish the existence of the criminal conviction; petitioner needed to prove a factual nexus between the conviction and the allegations made in the neglect petition.

Matter of Clarissa F., ___ AD3d ___, 2023 NY Slip Op 06680 (4th Dept 2023)

Mother's Speculation that Her Attorney Could Have Found an Expert with a Contrary, Exculpatory Medical Option Was Insufficient to Establish Deficient Representation

Family Court adjudged that the mother abused the subject child and derivatively abused the child's siblings. The Appellate Division affirmed. Two physicians who treated the child testified that the child, who was two months old at the time, sustained a moderately sized subdural hemorrhage and numerous hemorrhages in the retina of the right eye. They both testified that the injuries to the child were nonaccidental and that this was a case of shaken baby syndrome. The mother and the father were the caretakers of the child at the time the injuries occurred, and the presumption of culpability extended to both. The mother's contention that she was denied meaningful representation by her attorney's failure to retain and call a medical witness to rebut the evidence was impermissibly based on speculation that favorable evidence could and should have been offered on her behalf. The mother failed to demonstrate that there were relevant experts who would have been willing to testify in a manner helpful and favorable to her case, and her speculation that her attorney could have found an expert with a contrary, exculpatory medical opinion was insufficient to establish deficient representation.

Matter of Leonard P., ___ AD3d ___, 2023 NY Slip Op 06687 (4th Dept 2023)

Mother Failed to Adequately Respond When the Eldest Child Reported That She Was Being Sexually Abused

Family Court adjudged that the mother abused the subject child and derivatively abused her other four children. The evidence presented included testimony that the mother did not remove the stepfather from the home after her eldest child, who was nine years old at the time, reported that the stepfather was sexually abusing her, but instead, merely instructed the child to pretend to be asleep. That evidence, combined with the adverse inference that Family Court properly drew based upon the mother's failure to testify, provided a sound and substantial basis to support the findings.

Matter of Dorika S., ___ AD3d ___, 2023 NY Slip Op 06690 (4th Dept 2023)

ADOPTION

Mother's Efforts Were So Insubstantial or Infrequent They Did Not Preclude a Finding of Abandonment; Her Consent Was Not Required for Adoption

Family Court determined that the mother's consent was not required for the adoption of the subject children by petitioners. The Appellate Division affirmed. Although the mother filed a petition in 2016 seeking visitation with the children, she made no attempt to contact the children or petitioners for over six months preceding the filing of the amended petitions and second amended petitions. Thus, the mother's efforts were so insubstantial or infrequent that they did not preclude a finding of abandonment. The record did not support the mother's contention that petitioners interfered with any efforts she alleged to have made to contact the children.

Matter of S.M.E., 217 AD3d 1427 (4th Dept 2023)

CHILD SUPPORT

Fugitive Disentitlement Theory Applied Due to the Father's Absence from the Jurisdiction

Family Court committed the father to three months in jail. The Appellate Division dismissed the appeal and granted the father leave to move to reinstate the appeal upon the posting of an undertaking with Family Court. The father moved to Florida without serving his term of imprisonment or purging the contempt finding by paying the amount set for child support arrears. At the time of the appeal, the father was the subject of a bench warrant, but had refused to return. Therefore, the fugitive disentitlement theory applied to the appeal. By the father's absence, he was evading the very order from which he sought appellate relief and had willfully made himself unavailable to obey the mandate of Family Court in the event of an affirmance. Therefore, the Appellate Division dismissed the appeal and granted leave to the father to move to reinstate it on the condition that, within 60 days of the service of a copy of the order with notice of entry, he posted an undertaking in the amount of \$90,000.00 – the amount set by Family Court to purge the term of incarceration.

Matter of Thurston v Bombard, ___ AD3d ___, 2023 NY Slip Op 06661 (4th Dept 2023)

CUSTODY AND ACCESS

Setting Conditions Prerequisite to the Mother's Therapeutic Visitation Was Inappropriate

Family Court gave petitioners sole custody of the subject children and ordered that the mother engage in certain prerequisites prior to having therapeutic visitation with the children. The Appellate Division modified on the law, as modified affirmed, and remitted to Family Court. Family Court awarded sole custody of the older child to the grandmother and sole custody of the younger child to the father of that child. The grandmother established the existence of extraordinary circumstances by providing evidence of a close bond with the child, the existence of a temporary order granting her custody after the mother's mental health began to significantly deteriorate, the mother's failure to adequately address her mental health difficulties, and the fact that the mother's resulting behavior was a danger to the welfare of the older child. The father established a change in circumstances by demonstrating that the mother failed to obtain necessary mental health treatment or divulge any of her mental health problems, and that her behavior – which included making delusional statements to the children regarding the grandmother, forcing the children into hiding, and becoming physical with the grandmother in the children's presence – called the mother's fitness as a parent into question. Although there is a preference for keeping siblings together, in contrast to the mother, the grandmother and the father each demonstrated the ability to provide an appropriate, stable home environment for the child who was the subject of their respective petition. Nevertheless, Family Court erred in requiring the mother to participate in counseling, take her medications as prescribed, and provide proof of a negative hair follicle test prior to having therapeutic visitation with the children. Although Family Court could include such directives as a component of visitation, it did not have the authority to make them a prerequisite to visitation.

Matter of Sharlow v Hughes, 213 AD3d 1200 (4th Dept 2023)

Proceedings Properly Stayed on the Ground of Inconvenient Forum

Family Court stayed proceedings pending the commencement of custody and visitation proceedings in New Jersey. The Appellate Division affirmed. Pursuant to a prior custody order, the mother had sole legal and primary physical custody of the children. The two subject children lived with the mother in Mercer County, New Jersey. The father filed modification and violation petitions in Erie County Family Court. The Mother moved to dismiss those petitions. Family Court properly exercised its discretion in determining that New Jersey was a more appropriate forum after considering such factors as: 1) the length of time the children had resided outside the state; 2) the nature and location of the evidence required to resolve the pending litigation, including testimony from the children; and 3) the familiarity of the court of each state with the facts and issues in the pending litigation. While the order staying the father's petitions was not appealable as of right, the Appellate Division treated the notice of appeal as an application for leave to appeal.

Matter of Feltz v Yanucil, 213 AD3d 1246 (4th Dept 2023)

Modification of Parenting Time Represented a Rebalancing in the Best Interests of the Child

Family Court modified a prior order of custody by increasing the father's parenting time with the subject child. The Appellate Division affirmed. A showing of a pattern of the mother violating the prior order of custody and interfering with the father's visitation was sufficient to establish the requisite change in circumstances. Family Court's modification did not reflect a punishment for the mother's violations of the prior order or a reward for the father's compliance, but rather constituted a rebalancing of parenting time in the best interests of the child.

Matter of Dickes v Johnston, 213 AD3d 1247 (4th Dept 2023)

Family Court Divested Itself of Jurisdiction in a Nonappealable Consent Order

Family Court awarded respondent sole legal and physical custody of the subject children. The Appellate Division dismissed. Subsequent to the entry of the order on appeal, Family Court entered an order, upon the consent of the parties, that, inter alia, ordered that sole custody of the children would remain with the father and further relinquished jurisdiction to Fulton County, Georgia. Even assuming, arguendo, that not all of the provisions of the order on appeal were superseded by the subsequent order, Family Court nonetheless divested itself of jurisdiction in a nonappealable consent order.

Matter of Smith v Baldwin, 213 AD3d 1276 (4th Dept 2023)

Failing to Set a Specific and Definitive Schedule for Visitation Between the Father and the Children Was Error

Family Court modified respondent father's visitation. The Appellate Division modified on the law, as modified affirmed, and remitted to Family Court. After an argument that escalated to a physical encounter in which the father punched the mother during a visitation exchange, the mother sought to terminate the father's overnight visitation. Following a hearing, Family Court reduced the father's visitation by conditioning the resumption of unsupervised weekend overnight visitation on the participation of the father and the children in therapeutic counselling, and in the interim, providing one hour of supervised visitation per week at a particular supervised visitation agency. While the incident of domestic violence in the children's presence and the deterioration of the father's relationship with the children constituted a requisite change in circumstances, Family Court erred in failing to set an appropriate supervised visitation schedule by implicitly leaving it to the agency to determine whether the father would receive any such visitation. Further, Family Court erred in making participation in therapeutic counseling a prerequisite to the resumption of unsupervised overnight weekend visitation. Family Court expressly imposed that condition in its bench decision and where there is any discrepancy between an order and a decision, the decision controls. The Appellate Division remitted

to Family Court to fashion a specific and definitive schedule for visitation between the father and the children.

Matter of Bonilla-Wright v Wright, 213 AD3d 1289 (4th Dept 2023)

Order Was Not Appealable as It Expressly Reserved to Respondents the Right to Renew Their Request for a Hearing

Family Court registered a child custody determination entered by a court in the State of Florida and determined that Florida was the home state of the subject child. The Appellate Division dismissed. The order on appeal expressly reserved to respondents the right to renew their request for a hearing pursuant to Domestic Relations Law §77-d challenging petitioners' application to register the order entered in Florida. Consequently, the order was not dispositional inasmuch as it did not dispose of all of the factual and legal issues raised in the action and, as such, was not appealable as a matter of right.

Matter of Bryant v Kepler, 213 AD3d 1291 (4th Dept 2023)

Family Court Failed to Issue Any Factual Findings to Support Its Determination

Family Court awarded the parties joint legal custody with petitioner mother having primary physical custody of the subject child. The Appellate Division reversed on the law and remitted to Family Court. Family Court failed to make any factual findings whatsoever to support its initial custody determination or its award of primary physical custody to the mother, nor did it make any findings with respect to the relevant factors that it considered in making a best interest determination.

Matter of Ianello v Colonomos, 213 AD3d 1301 (4th Dept 2023)

Father Waived Contention That Family Court Should Have Conducted Its Threshold Inquiry from the Date of a Different Order

Family Court granted the mother sole custody and primary physical residency of the subject child. The Appellate Division affirmed. The appeal, which challenged only the custody determination, was not rendered moot by a subsequent order, entered upon the consent of the parties. The mother's subsequent petition sought to modify visitation only and the father consented only to that part of the subsequent order which concerned the modification of his visitation rights. Inasmuch as the father expressly sought to modify the prior order and agreed at the hearing that such prior order was the last order to determine custody, he waived his contention that the court should have conducted its threshold inquiry from the date of a different order.

Matter of Johnson v Forty, 214 AD3d 1347 (4th Dept 2023)

Family Court Had Jurisdiction to Modify Child Custody Determination Made by Florida Court

Family Court modified a custody and visitation determination issued by a court in the State of Florida and granted petitioner father custody of the subject child. The Appellate Division affirmed. Under Domestic Relations Law §76-b, Family Court had jurisdiction to modify a child custody determination made by a court of another state. First, Family Court would have had jurisdiction to make an initial custody determination as New York was the home state of the child on the date of the commencement of the proceeding and the child had been living in New York for more than six months. Second, neither the child nor the child's parents resided in the State of Florida. Although the mother was staying there, she maintained her residence in New York.

Matter of McKissen v Deleon, 214 AD3d 1367 (4th Dept 2023)

Extraordinary Circumstances Existed Where Mother Did Not Make Any Serious Attempts to Regain Custody or Resume a Parental Role for More than 24 Months

Family Court granted sole physical custody of the child to the paternal grandfather and his wife. The Appellate Division affirmed. It was undisputed that the subject child had lived in the grandparents' home since, at the latest, September 2017, when the mother consented to give temporary custody of the child to the paternal grandfather's wife when the mother was homeless. The mother requested that the grandparents return the child to her in late 2017 or early 2018, after Family Court issued a default order granting custody of the child to the grandparents, but the mother did not tell the grandparents where she would be living. The grandparents refused, and the mother did not seek intervention from the court. The mother later requested visitation with the child but did not request to have the child returned permanently or seek intervention from the court until she commenced the modification petition in September 2020. Although the mother had weekly phone calls or video chats with the child, voluntary relinquishment did not require the complete severance of all ties between a parent and child. Further, while the mother met her burden of demonstrating a substantial change in circumstances, Family Court properly determined that it was in the child's best interests to award sole custody to the grandparents. The child had a close bond with the grandparents and, while in their custody, she had regular visits with her father and two of her siblings. In addition, the grandparents had encouraged and facilitated the child's education and extracurricular activities, whereas the mother was unable to state what activities the child was engaged in or which grade the child was in.

Matter of Matthews v Allen, 214 AD3d 1431 (4th Dept 2023)

Appeal Not Proper Procedural Vehicle to Contest Voluntariness

Family Court awarded the maternal grandmother sole custody of the subject child. The Appellate Division dismissed. Appellant father consented to the order. Although the father contended for the first time on appeal that he did not voluntarily consent to the order, the

proper procedural vehicle for the father to pursue that claim was a motion to vacate the order.

Matter of Holiday v Holiday, 214 AD3d 1456 (4th Dept 2023)

AFC was Entitled to Substitute Judgment Because the Mother Engaged in a Pattern of Alienation

Family Court awarded the father sole legal and primary physical custody of the subject children. The Appellate Division modified on the law, as modified affirmed, and remitted to Family Court. Family Court did not err in admitting two exhibits containing screenshots of text messages between the mother and the two subject children. The identities of the senders and the receivers were sufficiently authenticated by the content of the text messages as well as by the maternal grandmother's testimony that she observed one of the children using his phone at the time the text messages were sent. Also, the mother was free to introduce other text messages that would have resolved any purported distortion caused by admitting into evidence only portions of the conversation. Further, although the AFC substituted her judgment for that of the children, she was entitled to do so because the record established that the mother engaged in a pattern of alienating the children from the father. The children's wishes were made known to the court during the Lincoln hearing. There was a sound and substantial basis to support sole custody to the father and the imposition of supervised visits for the mother inasmuch as the mother frequently disparaged the father to the children, exposed the children to domestic violence, unwittingly allowed pornographic images of herself and her partner to be sent to the children's mobile devices, and failed to maintain a stable home environment for a period of several years. However, Family Court should have set a visitation schedule rather than ordering visitation as agreed inasmuch as the record demonstrated that visitation as mutually agreed would be untenable under the circumstances. As a procedural matter, the Appellate Division exercised its discretion to disregard the mother's improper service of the notice of appeal as neither the father nor the AFC were prejudiced as a result of the mistake.

Matter of D.T. v C.T., 215 AD3d 1232 (4th Dept 2023)

Supreme Court Did Not Give Adequate Weight to History of Domestic Violence; Gave Undue Weight to Mother's Decision to Relocate

Supreme Court awarded the parties joint legal custody of the subject children and awarded the father primary physical custody. The Appellate Division modified on the law awarding sole legal and physical custody of the children to the mother with visitation to the father and directing that the children attend school in the mother's school district, as modified affirmed the judgment, and remitted to Supreme Court for determinations regarding visitation and child support. The obvious hostility between the parents made joint custody inappropriate. The parents could not agree on where the children should attend school, the specifics of their medical care, whether the children needed routine in their lives, whether the elder child should be given her allergy medication or enrolled in

counseling, or whether the younger child needed speech therapy or to adhere to a strict diet. According to the report prepared by a licensed psychologist, neither parent appeared able to sufficiently distance themselves from their mutual enmity and embitterment in order to fully act in ways which were reflective of the children's needs. With respect to co-parenting, the psychologist concluded that neither parent had demonstrated the capability to adequately fulfill this expectation. Further Supreme Court failed to give adequate weight to the father's extensive history of domestic violence or his continued minimization of his actions and denial of the nature and extent of his mental illness. By contrast, Supreme Court gave undue weight to the mother's decision to relocate. It also failed to give adequate weight to factors that weighed in favor of granting physical custody to the mother including the AFC's recommendation that the children attend school in the mother's school district. An award of sole custody to the mother was also supported by the psychologist's testimony that he had concerns about the decisions that the father made regarding the children, including the dietary changes and lack of consistency in the children's routines.

K.C. v N.C, 215 AD3d 1238 (4th Dept 2023)

Provision of the Order That the Mother Allegedly Violated Was Ambiguous and Did Not Express an Unequivocal Mandate

Family Court determined that the mother did not violate the prior order and continued sole custody of the subject child with the mother. The Appellate Division affirmed. The provision of the prior order that the mother allegedly violated was ambiguous and did not express an unequivocal mandate. Inasmuch as the mother did not violate the prior order, Family Court properly determined that the dispute between the parties with respect to the ambiguous provision of the prior order did not demonstrate a sufficient change in circumstances to modify the prior order. Furthermore, although the record reflected that there was significant acrimony between the parties, there did not appear to have been a change in that respect after the prior custody order was entered.

Matter of Brookover v Harris, 217 AD3d 1411 (4th Dept 2023)

Parties' Informal Arrangement Was a Factor to Be Considered in Initial Custody Determination

Supreme Court, inter alia, awarded the parties shared physical residency of the subject child. The Appellate Division modified on the facts and the law, as modified affirmed the judgment and remitted the matter to Supreme Court. Contrary to plaintiff's contention on his appeal, the proceeding involved an initial determination with respect to custody and, although the parties' informal arrangement was a factor to be considered, defendant was not required to prove a substantial change in circumstances in order to warrant a modification thereof. The Appellate Division affirmed Supreme Court's custody determination and modified the judgment on other grounds.

Wagner v Wagner, 217 AD3d 1509 (4th Dept 2023)

Contact with Adoptive Grandfather, a Convicted Sex Offender, Created an Unnecessary Risk to the Children's Health and Well-Being

Family Court, *inter alia*, granted petitioner mother sole legal and primary physical custody of the subject children, ordered both parents to ensure that adoptive grandfather had no contact with the children, and ordered that adoptive grandfather stay away from the subject children. The Appellate Division affirmed. Adoptive grandfather adopted the father when the father was an adult. The evidence in the record established that adoptive grandfather was a convicted sex offender, adoptive grandfather and the father concealed that fact from the mother when adoptive grandfather had contact with the children, contact with adoptive grandfather continued against the mother's wishes, and the disclosure of adoptive grandfather's criminal history caused substantial disruption in the relationship between the mother and the father. Consequently, allowing adoptive grandfather to have contact with the children created an unnecessary risk to their health and well-being, and thus it was in the children's best interest to have no contact with adoptive grandfather. There was a sound and substantial basis in the record for Family Court's determination that visitation with the adoptive grandfather was not in the children's best interests. Further, Family Court did not exceed its authority in granting the order of protection against adoptive grandfather. Adoptive grandfather was on notice that the mother opposed his contact with the children, and the court had the authority to issue an order of protection. There was a sound and substantial basis in the record for Family Court's determination that the order of protection should continue until the youngest child's eighteenth birthday.

Matter of Ceravolo v Lefebvre, 217 AD3d 1523 (4th Dept 2023)

Supreme Court Failed to Consider the Impact of the Children's Relocation to North Carolina on the Quantity and Quality of Future Contact with the Father in Georgia

Supreme Court denied the mother's relocation petition. The Appellate Division reversed on the law and remitted to Supreme Court. The parties previously had joint custody of the subject children with primary residency to the father in Onondaga County and visitation with the mother in North Carolina. When the father relocated to Georgia with the children in 2018, the mother moved back to Onondaga County in order to pursue an enforcement petition with respect to the prior custody order. The parties thereafter stipulated to a new order giving the mother primary physical residency in Onondaga County. The mother subsequently filed a relocation petition seeking to permission to move to North Carolina with the children, and the father cross-petitioned to modify the prior order to grant him primary residency in Georgia. The parties stipulated that the scope of the hearing would be what plans were in place supporting the children's move to either North Carolina or Georgia. Nonetheless, the evidence at the hearing was limited to the mother's request to relocate to North Carolina, which Supreme Court subsequently denied without resolving the fathers' cross-petition. Even assuming, *arguendo*, that it was appropriate to apply the Tropea standard, Supreme Court failed to consider and give appropriate weight to all of the factors that may have been relevant to the determination. Supreme Court failed to consider the impact of the children's relocation to North Carolina on the quantity and

quality of their future contact with the father in Georgia, the potential emotional benefit to the children of being substantially closer to the father, and the potential for greater suitable visitation arrangements between the father and the children. Further, the record was devoid of any basis, other than the father's desire to have the children reside with him in Georgia, for the father's opposition to the mother's request. In addition, Supreme Court gave weight to the children's purported preference to remain in Onondaga County and the Appellate Division cautioned that there is a significant difference between allowing children to express their wishes and allowing those wishes to chart the course of litigation.

Matter of Mason v Mason, 218 AD3d 1226 (4th Dept 2023)

Change in Circumstances Where Father Unilaterally Arranged the Child's Medical Appointments During the Mother's Visitation and Refused to Communicate with Her About the Child

Family Court amended a prior order of custody and visitation. The Appellate Division affirmed. Respondent father appealed from an order that awarded the mother increased visitation. The mother established a change in circumstances where the father had unilaterally arranged for the child's medical appointments to take place during the mother's scheduled visitation, which, in turn, required an adjustment to the visitation schedule, and the father refused to communicate with the mother about the child. Increased visitation was supported by a sound and substantial basis in the record.

Matter of Luce v Buehlman, 218 AD3d 1243 (4th Dept 2023)

No Basis to Disturb Family Court's Determination Inasmuch as It Was Supported by a Sound and Substantial Basis in the Record, Including the Lincoln Hearing

Family Court dismissed the mother's violation petitions and granted in part her modification petition. The Appellate Division affirmed. Family Court did not err in dismissing the violation petitions inasmuch as the mother failed to establish that the father's conduct defeated, impaired, impeded, or prejudiced any right or remedy to which she was entitled. Further, Family Court's determination regarding contact between the father's wife and the subject child was supported by a sound and substantial basis in the record, including the Lincoln hearing.

Matter of Kelley v Crammond, 218 AD3d 1260 (4th Dept 2023)

Grandparents Established the Existence of "Other Like Extraordinary Circumstances" Which Afforded Them Standing

Family Court modified a prior order and awarded the mother custody of the subject child. The Appellate Division, in a three to two split, reversed on the law and remitted to Family Court. A prior order of custody awarded joint custody of the subject child to the mother, the child's father, and the child's paternal grandparents with primary placement of the child with the grandparents. Although Family Court properly determined that the mother

established a change in circumstances since the entry of the prior order, it erred in determining that the grandparents failed to establish extraordinary circumstances and thus lacked standing to contest the mother's custody petition. An extended disruption of custody as defined in DRL §72 (2) (a) is merely a specific example of extraordinary circumstances; the statute was not intended to overrule existing case law. Accordingly, the grounds for nonparent standing set forth in *Matter of Bennett v Jeffreys* apply to grandparents who cannot establish extraordinary circumstances arising from an extended disruption of custody. Here, the grandparents established the existence of other like extraordinary circumstances so as to afford them standing, to wit: The child, who was eight years old at the time of the hearing, had lived with the grandparents for his entire life in the only home he had ever known. The child expressed a strong desire to continue to reside with his grandparents; said desire continued through the appeal. The mother and father had both suffered from severe substance abuse problems for years and were unable to care for the child on their own. The mother failed to contact the child for a period of eighteen months before resuming visitation. The child's half-sister also resided with the grandparents and the child had developed a sibling relationship with her. The grandparents had taken care of the child for most of his life and provided him with stability. Additionally, the AFC advised that the child had developed a strong emotional bond with the grandparents. Under the circumstances, even if the prolonged separation alone was entitled to little significance, the combination of that factor along with the others present sufficiently established the existence of extraordinary circumstances. The Appellate Division remitted to Family Court for a new hearing to determine the best interest of the child at which new facts could be considered.

Matter of Tuttle v Worthington, 219 AD3d 1142 (4th Dept 2023)

Family Court Erred in Granting Respondents' Motion and Terminating the Hearing Before Petitioners Had Completed the Presentation of Their Case

Supreme Court granted respondents' motion for summary judgment. The Appellate Division reversed on the law, denied the motion, reinstated the petitions, and remitted to Supreme Court. Petitioners commenced the proceeding seeking visitation with their grandchildren. After the hearing began, Supreme Court, sua sponte, terminated it before petitioners had completed the presentation of their case and informed the parties that it would entertain written submissions. Respondents then moved to dismiss the petitions which Supreme Court granted. Supreme Court erred in granting respondents' motion. Under the circumstances of this case, absent a full evidentiary hearing Supreme Court lacked sufficient evidence to enable it to undertake a comprehensive independent review of the children's best interests.

Demarco v Severance, 219 AD3d 1150 (4th Dept 2023)

The Age and Maturity of the Child Rendered Her Input Particularly Meaningful

Family Court granted sole custody and primary residency of the subject child to the mother with supervised visitation to the father. The Appellate Division affirmed. Certain

behavior by the father had resulted in both fear and anxiety in the child requiring medical treatment and therapy. The AFC noted the child's refusal to visit the father based on the father's behavior and requested on behalf of the child that visitation be supervised. The child's age and maturity rendered her input particularly meaningful. The father's contention that the AFC should have substituted judgment was unpreserved in the absence of a motion to remove the AFC and, in any event, lacked merit.

Matter of Frederick v Snyder, 219 AD3d 1708 (4th Dept 2023)

Mother's Unsubstantiated Testimony That She Completed a Parenting Class and a Mental Health Evaluation Did Not Constitute a Change in Circumstances

Family Court denied and dismissed the mother's modification petitions. The Appellate Division affirmed. The mother failed to demonstrate a change in circumstances sufficient to modify a prior order of custody and grant her visitation with the subject child. The prior order of custody was entered in 2017 upon the mother's default and at a time when a petition to terminate the mother's parental rights on the ground of abandonment was pending. In the years since the prior order was entered, the mother had essentially no contact with the child and had made no effort to have such contact. The mother's unsubstantiated testimony was insufficient to demonstrate that she completed a parenting class and a mental health evaluation and, regardless, under the facts of the case, those factors would not have constituted a sufficient change in circumstances.

Matter of Keyes v Halton, 219 AD3d 1709 (4th Dept 2023)

Mother Had Been Adequately Warned of the Consequences of Failing to Appear Visually at the Virtual Hearing and Was Afforded Ample Time to Find Access to a Device That Would Permit Her to Participate Via Videoconference

Family Court awarded petitioner sole custody of the subject child upon the mother's default. The Appellate Division dismissed except, it affirmed insofar as the mother challenged the denial of her attorney's request for an adjournment. During a pretrial conference weeks before the hearing, Family Court advised the mother that she needed to appear virtually to avoid the prospect of default. The mother confirmed her understanding that she was required to appear via videoconference. She was offered the opportunity to appear visually via a computer from a kiosk in the courthouse with her attorney physically present. On the date of the hearing, the mother called in by telephone. The court afforded the mother an opportunity to confer with her attorney, and, upon returning to the videoconference, the mother's attorney requested an adjournment. The court denied the request and the mother's attorney declined to participate in the inquest. The Appellate Division concluded that Family Court properly determined that the mother's failure to appear in the manner required constituted a default. The mother's attorney failed to demonstrate that the need for the adjournment was not based on a lack of due diligence on the part of the mother or her attorney.

Matter of Reardon v Krause, 219 AD3d 1710 (4th Dept 2023)

Mother Failed to Articulate – Let Alone Substantiate – Any Legitimate Objection to Visitation Between the Children and the Grandmother

Family Court granted the maternal grandmother's petition for visitation with respect to the subject children. The Appellate Division affirmed. The grandmother established that conditions existed in which equity would see fit to intervene. It was undisputed that the grandmother had a long-standing, extensive, and loving relationship with the children. Prior to the deterioration of her relationship with the mother, the children visited the grandmother overnight on a monthly basis and saw her several times a month. The mother did not testify or adduce any evidence at the factfinding hearing and therefore failed to articulate—let alone substantiate—any legitimate objection to visitation between the children and the grandmother.

Matter of Nichols v Nichols, 221 AD3d 1542 (4th Dept 2023)

A Prior Finding of Extraordinary Circumstances Cannot be Revisited in a Subsequent Proceeding Seeking to Modify Custody

Family Court found the father in contempt of court and modified a prior order of custody by awarding paternal aunt sole legal and physical custody of the child. The Appellate Division affirmed. The father absconded with the child to another state and had repeatedly interfered with the aunt's ability to see the child who she raised for the majority of the child's life. The father did not contest the jurisdictional validity of the prior order or dispute that he violated it. However misguided and erroneous the father believed Family Court's order to have been he was not free to disregard it and decide for himself the manner in which to proceed. With regards to the custody determination, Family Court determined in a prior order that paternal aunt had established the existence of extraordinary circumstances. That finding could not be revisited in subsequent proceedings seeking to modify custody. In determining whether a custody modification was in the child's best interests, Family Court properly considered, among other factors, the father's contempt of court, his disregard for the child's relationship with a person the child considered to be her mother, and the child's wishes.

Matter of Pritty-Pitcher v Hargis, 221 AD3d 1548 (4th Dept 2023)

Court Attorney Referee Properly Considered the Tropea Factors

The Court Attorney Referee granted the mother sole legal and physical custody of the subject children with leave to relocate to Tennessee. The Appellate Division affirmed. The father waived his challenge to the authority of the Court Attorney Referee to hear and determine the petition before him. The Referee properly considered the factors set forth in *Matter of Tropea v Tropea*. The mother testified at the hearing that she had been the primary caregiver of the children and that her health had been steadily declining. She further established that the maternal grandmother, who moved to Tennessee in 2021, had provided her with extensive financial assistance, as well as assistance in caring for herself and the children, and that the maternal grandmother would continue to do so if the

mother were to relocate closer to her. Further, the record established that the father had no accustomed close involvement in the children's everyday lives.

Matter of Martin v Martin, 221 AD3d 1557 (4th Dept 2023)

Mother Raised Sufficient Allegations to Establish of a Change in Circumstances and Survive the AFC's Motion to Dismiss

Family Court granted the motion of the AFC to dismiss the amended modification petition of the mother. The Appellate Division modified on the law, reinstated the petition, vacated the fourth ordered paragraph, and as modified affirmed. Contrary to Family Court's determination, the mother's amended petition contained sufficient allegations of a change in circumstances, namely, that since the entry of the existing consent order, the mother and the father had been unable to successfully co-parent with respect to, among other things, the children's education and after-school care. The mother failed to preserve her contention that Family Court was biased against her inasmuch as she failed to make a motion for the court to recuse itself. In any event, review of the record did not indicate the existence of any bias that would warrant remittal before a different judge.

Matter of Melish v Rinne, 221 AD3d 1560 (4th Dept 2023)

Additional Parenting Time with the Mother Was Not in the Best Interest of the Child

Family Court awarded the father sole custody of the child. The Appellate Division affirmed. While the mother and the father could sometimes effectively communicate with each other, the majority of their interactions were acrimonious. In addition, the mother neglected the child, interfered with the father's relationship with the child, and engaged in domestic violence with the father of her two younger children in the child's presence. Therefore, it was not in the best interests of the child to award additional parenting time with the mother.

Matter of Castle v Barnes, 221 AD3d 1562 (4th Dept 2023)

Family Court Denied Imprisoned Father's Petition for Visitation

Family Court denied the father's petition for visitation. The Appellate Division affirmed. The father had been imprisoned after pleading guilty to kidnapping in the second degree as a result of his role in the kidnapping of the child's mother.

Matter of Geer v Collazo, 221 AD3d 1571 (4th Dept 2023)

Family Court Did Not Make an Express Determination as to Whether the Father Established a Change in Circumstances

Family Court denied the father's request for expanded visitation and ordered supervised visitation for him. The Appellate Division dismissed the appeal from the order insofar as

it directed that the father's visitation be supervised and remitted to Family Court. Prior to the hearing, the father advised Family Court that he was no longer seeking to have his visitation be unsupervised. However, the record did not establish that the father agreed to forgo his request for expanded visitation and Family Court did not make an express determination as to whether the father established a change in circumstances sufficient to warrant an inquiry into the child's best interests.

Matter of Collichio v Bishop, ___ AD3d ___, 2023 NY Slip Op 06618 (4th Dept 2023)

FAMILY OFFENSE

Two-Year No-Contact Order of Protection Was Appropriate

Family Court directed respondent father to have no contact with petitioner mother and the subject children for a period of two years. The Appellate Division modified on the law and as modified affirmed. Family Court erred in entering the order of protection on default as the father was represented by counsel. However, Family Court did not abuse its discretion in conducting the hearing in the father's absence inasmuch as he appeared by counsel and had notice of the hearing. With respect to the merits, Family Court failed to specify which family offenses the father committed. Nevertheless, the record was sufficient for the Appellate Division to establish that the father committed the family offenses of criminal obstruction of breathing or blood circulation and stalking in the fourth degree warranting the issuance of an order of protection against him. In addition, although visitation with a noncustodial parent was presumed to be in the children's best interests, the mother rebutted the presumption inasmuch as she demonstrated that the children's health and safety were compromised while in the father's care.

Matter of Bailey v Bailey, 213 AD3d 1298 (4th Dept 2023)

Absent Unusual Circumstances, an AFC Cannot Overrule the Decision-Making Authority of a Parent in an Article 8 Matter

Family Court granted the motion of respondent to dismiss the family offense petition. The Appellate Division dismissed. Petitioner filed a family offense petition on behalf of her son against respondent. Respondent moved to dismiss the petition on the ground that it was facially insufficient. The AFC appealed from the order granting the dismissal. Under the circumstances of this case, the AFC lacked standing to bring an appeal on behalf of the subject child. Generally speaking, the legislature has demonstrated its preference for natural guardians, such as petitioner, to represent their minor children in a proceeding. Given that preference, an AFC cannot, in most Family Court Article 8 proceedings, unilaterally take an appeal where a parent or guardian who is an aggrieved party has not done so. Petitioner did not appeal even though it was her petition that was dismissed. There was no evidence that petitioner had an interest adverse to that of the subject child that would warrant termination of her role as guardian in the proceeding, thereby permitting the AFC to bring an appeal on the child's behalf. Absent unusual circumstance, an AFC cannot overrule the decision-making authority of a parent, the party the legislature prefers to act as the child's guardian and take an appeal where the parent has not done so.

Matter of Joey L.F. v Jerid A.F., 218 AD3d 1297 (4th Dept 2023)

Family Court Precluded Petitioner from Filing Any Request for Relief in Family Court Without Permission of the Court or Without an Attorney

Family Court dismissed two petitions and precluded petitioner from filing any request for relief in Family Court without permission of that court or without an attorney. The Appellate Division affirmed. Petitioner commenced two family offense proceedings alleging that respondent committed numerous family offenses. Neither petition set forth specific factual allegations that, if proven, would establish that respondent committed a qualifying family offense.

Matter of Pynn v Pynn, ___ AD3d ___, 2023 NY Slip Op 06606 (4th Dept 2023)

JUVENILE DELIQUENCY

Family Court Violated Respondent's Constitutional and Statutory Right to Be Present at the Fact-Finding Hearing

Family Court, inter alia, adjudicated respondent to be a juvenile delinquent. The Appellate Division dismissed, reversed on the law, and remitted to Family Court. Respondent and his father both appealed. Even assuming, arguendo, that the father had standing to appeal, the father only challenged respondent's placement. Therefore, the father's appeal was moot inasmuch as respondent's placement had expired. Respondent's contentions that he was denied his right to a speedy hearing and that Family Court erred in considering hearsay evidence were unpreserved. However, Family Court violated respondent's constitutional and statutory right to be present at the fact-finding hearing. Family Court did not advise respondent that he had a right to be present at the fact-finding hearing and that the consequences of his failure to appear would be that the fact-finding hearing would proceed in his absence. Therefore, there was no voluntary, knowing, and intelligent waiver of respondent's right to be present at the hearing.

Matter of Timar P., 217 AD3d 1591 (4th Dept 2023)

PATERNITY

Mother Was Not an Aggrieved Party as She Did Not Seek Any Relief Herself and No One Sought Any Relief Against Her

Family Court dismissed the amended petition. The Appellate Division dismissed. Petitioner, who purportedly had sexual intercourse with the mother during her marriage to respondent father, filed a petition seeking to establish the paternity of the subject child. Family Court concluded that it was not in the best interests of the child to order genetic testing and dismissed the petition. The mother appealed. The Appellate Division dismissed the mother's appeal inasmuch as she was not an aggrieved party. The mother did not seek any relief herself and no one sought any relief against her. Indeed, the mother did not formally join in the amended petition, nor did she file a petition of her own seeking to establish the paternity of the child. Moreover, the mother's rights remained unchanged and that fact that she might have been disappointed by the order did not equate to aggrievement.

Matter of Brandon P. v Jennifer M.C., ___ AD3d ___, 2023 NY Slip Op 06677 (4th Dept 2023)

TERMINATION OF PARENTAL RIGHTS

Mother Failed to Comply with Terms of the Suspended Judgment

Family Court terminated the mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The mother violated the terms of her suspended judgment by failing to verify her income, failing to sign necessary consent forms for the child, and missing several scheduled visits. In addition, any progress that the mother made towards overcoming the specific problems which led to the removal of the child was not sufficient to warrant any further prolongation of the child's unsettled familial status.

Matter of Jerimiah H., 213 AD3d 1298 (4th Dept 2023)

Mother Did Not Successfully Address or Gain Insight into the Problems that Led to the Removal of the Child

Family Court terminated the mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Although the mother, inter alia, obtained stable housing, regularly attended visitation, and complied with substance abuse evaluations, the mother did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return. Despite participation in certain recommended programs and services, the mother continued struggling to put into practice the parenting skills she had learned, manifesting in her failure to act appropriately during visits. The mother still only had supervised visits after a fairly extensive time span. The mother's testimony that she did not need mental health treatment any longer, because she had completed one program, demonstrated a lack of insight into one of the issues that led to the child's removal. In addition, Family Court did not abuse its discretion in refusing to issue a suspended judgment – at the time of the dispositional hearing, the child had been in foster care for five years – effectively since birth.

Matter of Tyasia T.S., 214 AD3d 1342 (4th Dept 2023)

Parent Who Has Been Prohibited from Direct Contact with Child Continues to Have an Obligation to Maintain Contact with the Child's Legal Custodian

Family Court terminated the father's parental rights on the ground of abandonment. The Appellate Division affirmed. Despite having been prohibited from direct contact with the subject child in the child's best interests, the father continued to have an obligation to maintain contact with the legal custodian of the child. Petitioner had legal custody of the child and there was no evidence that the father made any effort to maintain contact with petitioner.

Matter of Maria R., 214 AD3d 1411 (4th Dept 2023)

Father Evinced an Intent to Forego His Parental Rights

Family Court terminated the father's parental rights on the ground of abandonment. The Appellate Division affirmed. The father had almost no contact with the subject child during the six-month period preceding the filing of the petition and thus evinced an intent to forego his parental rights. Although the father was present on the video during one video call between the child's mother and the child and he attended one planning meeting, those were minimal, sporadic, and insubstantial contacts. Furthermore, petitioner did not prevent or discourage the father from having contact with the child. Although petitioner required that the father establish paternity before allowing him to visit the child, the father did not take the necessary actions to do so.

Matter of Dennym K.J., 215 AD3d 1254 (4th Dept 2023)

Mother Failed to Ask Family Court to Qualify Her Mental Health Counselor as an Expert

Family Court terminated the mother's parental rights on the ground of mental illness. The Appellate Division affirmed. Petitioner presented the testimony of an expert psychologist who opined that the mother suffered from mental illness and as a result the child would be in danger of being neglected if she returned to the mother's care at the present time or in the foreseeable future. The contention that Family Court erred in failing to qualify the mother's mental health counselor as an expert was unpreserved inasmuch as the mother never asked the court to do so.

Matter of Evalynn R.B., 217 AD3d 1430 (4th Dept 2023)

Petitioner Exercised Diligent Efforts to Encourage and Strengthen the Mother's Relationship with the Children While She Was Incarcerated

Family Court terminated respondents' parental rights on the ground of permanent neglect. The Appellate Division affirmed. While an agency's obligation to exercise diligent efforts is not obviated by a parent's incarceration, incarceration creates some impediments, both to the agency and the parent. Petitioner established that it fulfilled its duty, but that the mother failed to plan for the future of the children or to progress meaningfully to overcome the predicaments that initially endangered the children and led to their removal. Mother was not denied effective assistance of counsel when her attorney failed to object to allegedly inadmissible business records and allegedly prejudicial court exhibits. The attorney successfully objected to the admission of numerous records and refused to stipulate to other records. The record viewed in its totality reveals that the mother received meaningful representation. In addition, Family Court did not abuse its discretion in failing to issue a suspended judgment. The children had been in foster care for over three years and had bonded with their respective foster parents who intended to adopt them.

Matter of Aubree R., 217 AD3d 1565 (4th Dept 2023)

In the Absence of Fraud, Duress or Coercion in the Execution or Inducement of a Surrender, No Action or Proceeding May Be Maintained by the Surrendering Parent to Revoke or Annul Such Surrender

Family Court denied respondent's motions to vacate prior conditional judicial surrender orders. The Appellate Division affirmed. In the absence of fraud, duress or coercion in the execution or inducement of a surrender, no action or proceeding may be maintained by the surrendering parent to revoke or annul such surrender. In his motions, the father alleged that certain relatives were threatened by a foster parent that they would not see the subject children again if they testified on the father's behalf. However, the father was not aware of those alleged threats at the time he executed the surrenders. The father's further allegation that petitioner's caseworker told the father that he faced having his parental rights terminated at the conclusion of the hearing was also not a valid basis for vacatur. Informing a parent of an accurate, albeit unpleasant, event is not coercion. Moreover, the father indicated during the colloquy with respect to the surrenders that no one was forcing him or threatening him to sign the surrenders. The remedy with respect to the father's primary allegation, that petitioner failed to meet a material condition of the surrenders with respect to visitation, was to file for enforcement.

Matter of Liam M.A., 221 AD3d 1441 (4th Dept 2023)

No Abuse of Discretion in Family Court's Refusal to Adjourn the Hearing; Mother Failed to Preserve Disqualification Objection

Family Court terminated the mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The mother had failed to appear on a prior date, appeared late on the day of the hearing, and when she ultimately appeared for the hearing spoke to her counsel only briefly before leaving the courthouse. Under the circumstances, there was no abuse of discretion in Family Court's refusal to adjourn the hearing. The mother failed to preserve her contention that Family Court erred in disqualifying her initial assigned counsel upon finding a conflict of interest. Although the mother's initial assigned counsel filed her own motion to be reinstated, the record did not reflect that the mother joined in that motion, that she made her own motion seeking to reinstate her initial assigned counsel, or that she otherwise had raised the issue later raised on appeal.

Matter of Aniyah J., 221 AD3d 1472 (4th Dept 2023)

Services that Petitioner Arranged for the Mother Were Tailored to Address the Problems that Gave Rise to the Removal of the Children; Petitioner Was Not Required to Guarantee that the Mother Succeeded in Overcoming Her Predicament

Family Court terminated the mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The Appellate Division rejected the contention that petitioner failed to establish diligent efforts because it did not offer financial assistance to the mother. The mother received services to work on maintaining her home and other life skills. She received parenting counseling and a referral for counseling to address her

mental health needs. The services that petitioner arranged for the mother were tailored to address the problems that gave rise to the removal of the children. Despite the services that were offered and provided to her, the mother failed to plan for the future of the children or to progress meaningfully to overcome the issues that led to their removal. Petitioner was not required to guarantee that the mother succeeded in overcoming her predicament. The mother failed to preserve the contention that Family Court erred in accepting opinion testimony from the testifying mental health counselor. In any event, any error in the admission was harmless.

Matter of Aric D.B., 221 AD3d 1502 (4th Dept 2023)

Personality Disorders, Such as Antisocial Personality Disorder, Are Mental Conditions and May Provide a Basis to Support Terminating Parental Rights

Family Court terminated the father's parental rights on the ground of mental illness. The Appellate Division affirmed. Petitioner presented the testimony of a licensed psychologist, several caseworkers assigned to respondent, mental health staff who interacted with respondent, and two former foster parents of the child, along with the psychologist's written report and respondent's records from mental health and substance abuse providers. The psychologist was qualified as an expert in the field of psychology, including the administration of psychiatric assessments, without objection. The fact that Family Court later noted that the psychologist was not qualified as a psychiatrist or mental health expert was irrelevant because Social Services Law § 384-b (6) (c) expressly provides that a determination to terminate parental rights may be based upon the testimony of either a psychiatrist or a psychologist. Likewise, the fact that the psychologist diagnosed respondent with anti-social personality disorder, and not a mental illness, was irrelevant inasmuch as personality disorders are mental conditions as that term is used in the definition of mental illness in Social Services Law §384-b (6) (a) and may provide a sound and substantial basis to support a determination terminating parental rights. Respondent's objections to Family Court's reliance on his medical records and that Family Court erred in failing to order an independent psychiatric or psychological examination of him were unpreserved.

Matter of Steven M., 221 AD3d 1518 (4th Dept 2023)

No Suspended Judgment When Parental Rights Were Terminated Based on Mental Illness

Family Court terminated the mother's parental rights on the ground of mental illness. The Appellate Division affirmed. The mother failed to preserve her objection that Family Court erred in relying on the testimony of the forensic psychologist because his opinion was conclusory and lacked necessary information. In addition, and contrary to the mother's contention, there is no statutory provision providing for a suspended judgment when parental rights are terminated based on mental illness.

Matter of Lil' Brian J.Z., 221 AD3d 1580 (4th Dept 2023)

Petitioner Scheduled Regular Visitation During Which Petitioner Provided Therapists to Give Medically Necessary Services to the Child and, at the Same Time, Educate the Mother as to the Child's Needs

Family Court terminated the mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner exercised diligent efforts to encourage and strengthen the mother's relationship with the child. Petitioner provided appropriate referrals to the mother for mental health counseling and parenting classes. In addition, petitioner scheduled regular visitation between the mother and the child during which petitioner provided several different therapists to give medically necessary services to the child and, at the same time, educate the mother as to the child's needs. Contrary to the contention of the mother, there is no evidence that the mother had a realistic plan to provide an adequate and stable home for the child. Therefore, a suspended judgment was not warranted.

Matter of Zander W., ___ AD3d ___, 2023 NY Slip Op 06637 (4th Dept 2023)

Mother's Speculation that Her Attorney Could Have Found an Expert with a Contrary Medical Opinion Was Insufficient to Establish Deficient Representation

Family Court terminated the mother's parental rights on the ground of mental illness. The Appellate Division affirmed. The testimony of petitioner's expert psychologist established that the mother suffered from a delusional disorder and that the child would be in danger of being neglected if he was returned to her care. The mother's speculation that her attorney could have found an expert with a contrary medical opinion was insufficient to establish deficient representation. The mother failed to demonstrate that there were relevant experts who would have been willing to testify in a manner helpful and favorable to her case.

Matter of Landin F., ___ AD3d ___, 2023 NY Slip Op 06647 (4th Dept 2023)

Father Failed to Comply with Various Terms and Conditions of His Suspended Judgment

Family Court revoked a suspended judgment and terminated the father's parental rights. The Appellate Division affirmed. The father violated the suspended judgment by, among other things, missing the vast majority of scheduled visits with the child, failing to attend appointments for substance abuse treatment and being unsuccessfully discharged from the treatment program, failing to obtain a mental health evaluation despite a history of mental illness, attending only two out of twenty-seven classes for domestic violence prevention, failing to complete a parent training program, failing to maintain stable housing, and failing to provide evidence of a stable income. The father was homeless at times during the period of suspended judgment and was incarcerated twice. In fact, the father was in jail at the time of the hearing.

Matter of Amelia D., ___ AD3d ___, 2023 NY Slip Op 06695 (4th Dept 2023)

Family Court Did Not Rely Solely on Respondents' Admissions of Severe Abuse but Also Relied on Respondents' Criminal Convictions

Family Court terminated respondents' parental rights on the ground of severe abuse. The Appellate Division affirmed. Respondents both contended that Family Court erred in terminating their parental rights because the orders of fact-finding issued in the underlying Article 10 proceeding were insufficient to establish severe abuse. However, as respondents did not move to vacate said orders or withdraw their admissions of severe abuse, their contentions were not preserved. In any event, Family Court did not rely solely on respondents' admissions; it also relied on respondents' criminal convictions arising from their conduct towards the children, which established that they severely abused and derivatively severely abused the children.

Matter of Latoria B., ___ AD3d ___, 2023 NY Slip Op 06697 (4th Dept 2023)

YOUTH PART CASES OF INTEREST

It Is Contrary to the Spirit of Raise the Age to Criminally Punish a Minor for the Circumstances into Which They Have Been Born

Youth Part removed the pending matters to Erie County Family Court. The AO was arrested along with two co-defendants - his mother and her boyfriend - in their home, and all three were charged with criminal possession of a controlled substance in the third and fourth degree and criminally using drug paraphernalia in the second degree. The controlled substances were in a common hallway closet accessible to all three co-defendants. The AO had another matter currently pending in Youth Part in which he was charged with assault in the second degree. The Court found no extraordinary circumstances preventing removal to Family Court as it is contrary to the spirit of the Raise the Age law to criminally punish a minor for the circumstances that they have been born into. The AO was clearly not situated as the leader of the criminal activities in question and was not coercing others into engaging in said activities. The AO was not alleged to have displayed any weapons as a part of the criminal activities in question and the criminal activities did not include the AO committing any acts of violence on anyone.

People v J.L., 78 Misc. 3d 1231(A) (Youth Part, Erie Co. 2023)

Extraordinary Circumstances Existed Where a Youth Showed Disregard for a Court's Leniency After Multiple Cases Were Removed to Family Court and Family Court's Rehabilitative Services Were Unlikely to Be of Further Benefit

Family Court granted the district attorney's motion to prevent removal of the pending matter to Family Court. The AO approached a woman entering a grocery store, grabbed her by the shoulders, spun her around, and forcefully took her purse. The AO then got into the passenger side of a stolen vehicle, which sped away. The AO had five prior matters transferred from Youth Part to Family Court before the current charges were filed. Defendant had the benefit of Family Court services for at least ten (10) months, and some of those services were likely intended to address the AO's proclivity to commit crimes involving stolen vehicles. Extraordinary circumstances existed such as to grant the district attorney's motion to prevent removal where the AO showed disregard for the Court's leniency after multiple cases were removed to Family Court, and Family Court rehabilitative services were unlikely to be of further benefit.

People v D.J., 78 Misc. 3d 1232(A) (Youth Part, Erie Co. 2023)

OTHER CASES OF INTEREST FROM THE FOURTH JUDICIAL DISTRICT

The Questioning Procedure at the Code of Conduct Hearing Substantially Departed from That Set Forth in the Title IX Policy

Respondent university determined that petitioner had violated respondent's student code of conduct and imposed disciplinary sanctions. The Appellate Division annulled the determination, granted the petition, and directed respondent to expunge all reference to the matter from petitioner's school record. Pursuant to CPLR §7804 (g), petitioner, a former student at respondent, sought to annul a determination finding him responsible for a violation of the prohibition against sexual violence in respondent's student code of conduct. Following an administrative hearing and administrative appeal, respondent expelled petitioner and placed a notation on his transcript. The Appellate Division found that respondent departed from its own published rules and guidelines by adjudicating the alleged misconduct under the code of conduct rather than its Title IX grievance policy when seeking to impose a disciplinary sanction. Respondent's Title IX policy was established pursuant to 34 CFR 106.44 (b) (1). The questioning procedure provided at the code of conduct hearing substantially departed from the Title IX policy in that it inhibited petitioner's advisor's right to conduct live cross-examination of the other party and witnesses in real time.

Matter of Doe 1 v State University of New York at Buffalo, 219 AD3d 1663 (4th Dept 2023)

The Best Interests of the Child Were Substantially Promoted by Enabling the Child to have the Surname of Both of His Parents

Petitioner mother sought to change the surname of her six-year-old son from R. to P.-R., thus enabling the child to have the surname of both of his parents. Family Court found that the father's objections were not reasonable and considering the best interests of the child found that they would be substantially promoted by the proposed name change. Family Court granted the mother's application. The sharing of a surname by a child with the parent he or she lives with is a legitimate point of concern because it minimizes embarrassment, harassment, and confusion in school and social contracts. The mother was merely seeking to add her last name and not to eliminate the father's name. Therefore, the fact that the father supported the child did not preclude the proposed name change. To the extent the father's objection was based on traditional values—giving a child the father's name—the objection was not reasonable. Neither parent had a superior right to determine the surname of the child and Family Court does not accord preference to paternal surnames in the context of determining best interests. Both parents waived their right to request the appointment of an attorney for the child.

Matter of Megan P., 81 Misc. 3d 1202(A) (Fam. Ct., Monroe Co. 2023)

DHS' Reasonable Efforts to Support a Return to Parent Goal Would Now Require All Communications Be Conveyed in Mother's Primary Language

DHS sought and Family Court granted removal of the subject child from respondent mother finding there was imminent risk of harm. The mother consented to the child's removal. At the permanency hearing, the mother did not consent to a finding of reasonable efforts. After several days of trial, Family Court found that DHS failed to exercise reasonable efforts in effectuating the child's permanency goal of return to parent. The mother was a refugee from the Democratic Republic of Congo as a teenager. Her first language was Swahili. However, DHS did not consistently give the mother information in Swahili affording her the tools needed to access services. The mother was never connected with an in-person Swahili interpreter to help navigate such services. The mother was also unreasonably denied minimal visits with her child due to: 1) two caseworkers failing to communicate with each other; 2) DHS' failure to send timely bus tickets to Rochester; 3) caseworker's failure to instruct the mother how to use Zoom to visit virtually; 4) DHS' failure to provide a cellphone to the mother; and 4) caseworker's failure to attempt to call the mother after 5:00 p.m. on the mother's family's only cell phone. Family Court required that all of DHS' communications with the mother, whether written or verbal, be conveyed in Swahili from the date of Family Court's order.

Matter of Hayden N., 81 Misc. 3d 1207(A) (Fam. Ct., Monroe Co. 2023)

COURT OF APPEALS

The Issue of Standing Did Not Impact the Subject Matter Jurisdiction of the Appellate Division

Family Court signed writs of habeas corpus and proceeded by inquest on the mother's applications seeking sole custody of the children and their immediate return. Upon inquest, Family Court denied the mother's applications. The Appellate Division dismissed on motion the mother's ensuing appeal for lack of subject matter jurisdiction. In a 4-3 decision, the Court of Appeals concluded that the Appellate Division erred. By dismissing the appeal upon motion, with an undeveloped record, without full briefing, and without providing all parties the opportunity to appear, the Appellate Division rendered impossible meaningful appellate review of the weighty issues raised. To the extent that the Appellate Division's order on the motion to dismiss could be read to be a determination that the mother lacked standing to seek habeas corpus relief without an order of custody in place, the issue of standing did not impact the subject matter jurisdiction of the Appellate Division. Regardless of whether the Appellate Division had the power to reach the merits, it did not lack the competence to entertain the appeal. The Court of Appeals remitted to the Appellate Division for an expeditious determination on the merits of the standing question and, if warranted, disposition of any other issues that the parties might raise.

The dissent would have reversed and remitted to the Family Court to reinstate the mother's petition and adjudicate the issue of custody without further delay. The mother had waited over two years for a determination which was now further delayed by the majority's non-merits remittal to the Appellate Division. Dismissing the proceeding just because there was no prior custody order in place was contrary to the broad powers of Family Court to resolve custody matters and resulted in additional work for an overburdened and under-resourced court. The Court of Appeals should not add to the challenges faced by parents, many of whom, like the mother here, initiate actions pro se and turn to the courts for help in reuniting with their children. No parent—or child—should go through this.

Matter of Celinette H.H. v Michelle R., ___ N.E.3d ___, 40 NY3d 1047 (2023)

Defendant Must Be Made Aware of Possible First-Time, In-Court Identification as Early as Is Practicable

A jury convicted defendant of all charges and the Appellate Division affirmed the judgment. The Court of Appeals affirmed. When the people call a witness who may make a first-time, in-court identification, they must ensure that a defendant is aware of that possibility as early as practicable so that defendant has a meaningful opportunity to request alternative identification procedures. If a defendant explicitly requests such procedures, a trial court may exercise its discretion to fashion any measures necessary to reduce the risk of misidentification. When determining whether to admit the identification, the trial court must balance the probative value of the identification against the dangers of misidentification and other prejudice to a defendant. The trial court's

obligation is dependent upon a timely request made by a defendant, as that defendant may not wish to seek protective measures that would bolster or draw further attention to the identification. In exercising its discretion, the trial court must consider the danger of misidentification, and whether there are independent assurances of the identification's reliability that outweigh this risk. Such considerations may include: a witness's familiarity with a defendant; the quality of a witness's opportunity to observe a defendant before the incident in question; a witness's ability to provide accurate descriptive details regarding a defendant; the time between the crime and the testimony; whether there is other, reliable trial evidence corroborating the identification; and the suggestiveness of the in-court identification procedure itself. When a defendant is not given advance notice of the identification, the trial court may also consider whether there was any reason for the failure to provide notice and the extent to which it has prejudiced the defendant. Here, defendant was aware from pre-trial discovery that the witness might make a first-time, in-court identification, but sought only preclusion of the identification. Because the witness's testimony and pretrial statements established the reliability of the identification, and the lack of formal notice did not significantly prejudice defendant, the trial court did not abuse its discretion in denying defendant's preclusion request.

People v Perdue, ___ N.E.3d ___, 2023 NY Slip OP 06404 (2023)

SUPREME COURT OF THE UNITED STATES

ICWA is Consistent with Congress’s Article I Authority and Survives Anti-Commandeering Challenges

The en banc Fifth Circuit affirmed in part and reversed in part the findings of the District Court which granted petitioners’ motion for summary judgment on their constitutional claims. The Supreme Court of the United States declined to disturb the Fifth Circuit’s conclusion that ICWA was consistent with Congress’s Article I authority, rejected petitioners’ anticommandeering challenges, and did not reach the merits of petitioners’ two additional claims – an equal protection challenge to ICWA’s placement preferences and a nondelegation challenge to the provision allowing tribes to alter placement preferences – because no party before the Court had standing to raise them.

The case arose from three separate child custody proceedings governed by the Indian Child Welfare Act (“ICWA” and/or “the Act”), a federal statute that aims to keep Indian children connected to Indian families. ICWA governs state court adoption and foster care proceedings involving Indian children. Among other things, the Act requires placement of an Indian child according to the Act’s hierarchical preferences unless the state court finds good cause to depart from them. Under those preferences, Indian families, or institutions from any tribe (not just the tribe to which the child has a tie), outrank unrelated non-Indians or non-Indian institutions. Further, the child’s tribe may pass a resolution altering the prioritization order. The preferences of Indian children or their parents generally cannot trump those set by statute or tribal resolution.

In involuntary proceedings, the Act mandates that an Indian child’s parent or custodian and tribe be given notice of any custody proceeding, as well as the right to intervene. It also requires a party seeking to terminate parental rights or to remove an Indian child from an unsafe environment to satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent breakup of the Indian family. A court cannot order relief unless the party demonstrates, by a heightened burden of proof and expert testimony, that the child is likely to suffer serious emotional or physical damage if the parent or Indian custodian retains custody. Even for voluntary proceedings, a biological parent who gives up an Indian child cannot necessarily choose the child’s foster or adoptive parents. The child’s tribe has a right to intervene at any point in a proceeding to place a child in foster care or terminate parental rights, as well as a right to collaterally attack a state court’s custody decree. The tribe thus can sometimes enforce ICWA’s placement preferences against the wishes of one or both biological parents, even after the child is living with a new family. Finally, the states must keep certain records related to child placements and transmit to the Secretary of the Interior all final adoption decrees and other specified information.

The Supreme Court rejected all of petitioners’ challenges to the Act, some on the merits and others for lack of standing.

Haaland v Brackeen, 599 US 255 (2023)

JUDICIAL ETHICS OPINION

A Judge Who Has Information Indicating a Substantial Likelihood That a Lawyer Has Committed a Substantial Violation of the Rules of Professional Conduct Must Take Appropriate Action

The inquiring Family Court judge was presiding in a case where the subject children's AFC was insisting on filing adoption papers on behalf of proposed adoptive parents who were the children's current foster parents. The judge believed this presented a conflict of interest for the attorney because the children were too young to waive in writing any actual or potential conflicts of interest in the matter. The judge wished to advise the attorney, in writing, that the proposed representation was impermissible. The letter would also clarify the judge's prior oral warning about the conflict, which the attorney apparently misinterpreted to mean that the attorney could represent the parents in an adoption proceeding, as long as a different attorney represented the children in that proceeding. The judge asked whether it was sufficient to send the letter the judge proposed, or whether the judge must also report the attorney to the grievance committee.

The Advisory Committee on Judicial Ethics noted that a judge who has information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Rules of Professional Conduct must take appropriate action. If the two-prong test is met and the misconduct is so serious that it calls into question the attorney's honesty, trustworthiness, or fitness as a lawyer, the judge must report the conduct to the appropriate disciplinary authority.

Here, the two-prong test was clearly met. However, the facts set forth in the inquiry did not clearly reach the level of egregiousness that required reporting the attorney. Accordingly, the judge had full discretion regarding what action was appropriate under the circumstances, and thus the proposed letter was sufficient.

Advisory Comm on Jud Ethics Op 23-20 (2023)

CASES OF INTEREST FROM THE FIRST JUDICIAL DEPARTMENT

A Child Does Not Have Full-Party Status and Cannot Veto a Settlement

Family Court granted the father's custody modification petition on consent over the objection of the attorney for the older child. The Appellate Division, First Department affirmed. Although the AFC had authority to pursue an appeal on behalf of the child, the child did not have full-party status and therefore could not veto a settlement reached by the parents and force a trial after the AFC had a full and fair opportunity to be heard. Family Court had sufficient information to assess the child's best interests and the Appellate Division found no basis to conclude that the child's preferences were not given due consideration or that the order was not in her best interests.

Matter of Kylie P., 213 AD3d 463 (1st Dept 2023)

Family Court Properly Exercised Emergency Jurisdiction Under the UCCJEA Where the Petition Alleged That the Father Neglected the Child

In a Family Court Act Article 10 proceeding, Family Court denied the mother's motion to convert emergency jurisdiction under the UCCJEA to permanent jurisdiction and subsequently dismissed the underlying neglect petition. The Appellate Division, First Department reversed on the law and facts, reinstated the petition, and remanded for further proceedings. Family Court properly exercised emergency jurisdiction under the UCCJEA where the petition alleged that the father neglected the child by committing acts of domestic violence against the mother, including in the child's presence, when they resided together in Texas, and that the mother had fled Texas with the child. However, Family Court erred when, without first holding a hearing, it denied the mother's motion to convert temporary emergency jurisdiction to permanent jurisdiction or to continue temporary emergency jurisdiction, and relinquished jurisdiction based on the existence of a custody proceeding filed by the father in Texas. There was no basis establishing that the Texas court had "home state" jurisdiction. The child had not resided in Texas for the six months immediately preceding the commencement of the Texas custody proceeding, and there was no factual basis for finding that any of the alternative jurisdictional bases applied to Texas. Also, Family Court had been informed that the Texas Department of Family and Protective Services would not investigate whether the father was a danger to the child because the mother and child resided in New York. Family Court communicated with the Texas court, but it did not appear that a record was made of that communication, as required under the statute. Although Family Court provided the parties the opportunity to raise jurisdictional arguments before it dismissed the neglect petition, they were undoubtedly hampered in doing so by the absence of a record.

Matter of Nathaniel H., 213 AD3d 525 (1st Dept 2023)

Child's Out-Of-Court Statements Were Sufficiently Corroborated by the Parent's Testimony

Family Court determined that respondent father neglected the subject children. The Appellate Division, First Department vacated certain findings, and otherwise affirmed. The out-of-court statements of one of the children regarding a domestic incident involving the father and the mother in the children's presence were sufficiently corroborated by the parents' testimony, which described the altercation in a manner similar to the child's description but for their denial of any physical component to the fight. Family Court was entitled to reject the parents' claims, that nothing physical occurred between them, as not credible.

Matter of Kaylee S., 214 AD3d 423 (1st Dept 2023)

Family Court Should Have Granted Petitioner Guardianship to Enable Child to Petition for Special Immigrant Status

Family Court denied petitioner and the subject child's motion for an order of special findings which would have enabled the child to petition for Special Immigrant Juvenile Status. The Appellate Division, First Department reversed and granted the motion nunc pro tunc. The evidence showed that the child was unmarried, under the age of 21, and dependent on a juvenile court at the time in question. Reunification with the child's parents was not viable; the child's parents were not contributing to his financial support or maintaining contact with him since he came to the United States. It was not in the child's best interests to return to Albania – in addition to the child's testimony regarding parental abandonment, the child testified that he had been the target of several assaults because of his family's political affiliation, and his parents were unable to protect him. The child presented evidence that he was doing well in petitioner's care.

Matter of Eriseldo C., 217 AD3d 512 (1st Dept 2023)

Not In Child's Best Interests for His Father to Have Independent Access to His Records

Family Court granted the mother sole physical and legal custody of the child with therapeutic supervised visits to the father and granted the father independent access to the child's records. The Appellate Division, First Department modified on the facts and otherwise affirmed. Family Court providently exercised its discretion in suspending the forensic evaluation because it had ample evidence upon which to reach a decision after a full fact-finding hearing. Family Court conducted a trial spanning fourteen dates with both parties testifying and being subjected to cross examination. The father also called two additional witnesses. Furthermore, Family Court conducted an in-camera interview with the child and admitted into evidence the child's medical records, mental health records, and reports regarding court-ordered supervised visits. There were no sharp factual disputes where a forensic report could be instrumental in determining the child's best interests. However, it was not in the child's best interests for his father to have

independent access to his records. The father had only a limited and sporadic relationship with the child who adamantly opposed the father's access to the records. In addition, a limitation on the father's access to the child's records would not deprive him of meaningful access to the child as he was awarded supervised therapeutic visits.

Matter of Robert S. v Norma C., 220 AD3d 498 (1st Dept 2023)

CASES OF INTEREST FROM THE SECOND JUDICIAL DEPARTMENT

Father's Noncompliance with Supreme Court's Directives Prevented the Matter from Proceeding to a Best Interests Hearing

Supreme Court dismissed the father's petition. The Appellate Division, Second Department affirmed. The father filed a petition for sole legal and physical custody of the children. During court conferences, Supreme Court directed the father to enroll in alcohol dependency treatment. The father failed to comply with the directive. Supreme Court dismissed the father's petition without prejudice, stating that the father could refile when he was ready to cooperate with Supreme Court's directives. Under the circumstances of this case, the father's noncompliance with the court's directives prevented the matter from proceeding to a best interests hearing.

Matter of Dysko v Dysko, 213 AD3d 848 (2d Dept 2023)

Family Court Dismissed Petitioner's Paternity Petition; Petitioner Acquiesced to the Development of a Parent-Child Bond Between the Subject Child and Another Man

Family Court dismissed the mother's paternity petition on equitable estoppel grounds. The Appellate Division, Second Department affirmed. Family Court dismissed the petition after determining that, inter alia, petitioner had acquiesced to the development of a parent-child bond between the subject child and another man, not respondent. In 2018, petitioner commenced the proceeding to establish paternity as to the subject child, who was born in 2011. The mother was never married, but, around the time of the child's birth, she began a relationship with a man with whom she subsequently had two additional children. Although the mother had told respondent he was the biological father prior to the child's birth, respondent had been an inconsistent and unreliable presence in the child's life and had not visited the child since she was approximately six years old. Meanwhile, the father of the child's half-siblings had assumed a parental role toward the child since the time of her birth; he provided her with emotional and financial support and exercised regular visitation with the child after she was removed from the mother's care by ACS. The child considered him to be her "daddy" despite knowing that he was not her biological father.

Matter of Jemelle S. v Latina P., 213 AD3d 856 (2d Dept 2023)

In-Camera Interview Was Necessary to Create a Sufficient Record to Determine the Child's Best Interests

Family Court denied the mother in-person parental access in Trinidad and Tobago. The Appellate Division, Second Department reversed and remitted to Family Court for further proceedings. The subject child was born in 2013. When the child was one year and three months old, the mother was arrested, detained, and subsequently deported to Trinidad and Tobago. Family Court granted those branches of the mother's petition which were for

phone and video parental access and, in effect, denied that branch of the petition which was for in-person parental access in Trinidad and Tobago. Family Court improvidently exercised its discretion in failing to conduct an in-camera interview of the child, particularly given the mother's testimony that the child's fear of visiting her in person was due to outside influence. The child was of such an age and maturity that his preferences were necessary to create a sufficient record to determine his best interests.

Matter of Badal v Wilkinson, 213 AD3d 926 (2d Dept 2023)

A Nonparent Relative Has No Precedence for Custody Over the Adoptive Parents Selected by an Authorized Agency

Family Court dismissed the nonparent relative's petition for custody and transferred custody and guardianship of the subject child to an adoption agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division, Second Department affirmed. The appellant, an extended family member of the subject child, previously served as the child's foster parent until the child was removed from her home twice. After a combined fact-finding hearing on the custody petition and dispositional hearing on the permanent neglect petition, Family Court transferred custody and guardianship of the child to the agencies for the purpose of adoption and dismissed the custody petition. The standard applied was the best interests of the child. A foster parent who has cared for the child continuously for a period of 12 months or more has preference for adoption while members of the child's family are given no special preference with regards to custody. The appellant did not establish that it was in the best interest of the child for custody to be awarded to her. The child lived with the appellant for approximately one year, during which time the child was removed from her care twice. The child had a strong and loving bond with the foster mother who was able to provide the child with a permanent, stable home. Family Court recognized that it would be detrimental for the child to remove her from the only home she had known for years, in which she had lived since she was approximately thirteen (13) months old.

Matter of Rosamae M. v Regina Cheyenne G., 216 AD3d 1161 (2d Dept 2023)

No Express Requirement to Submit Certified Copies of Birth Certificates in a Guardianship Proceeding

Family Court dismissed, without a hearing, a petition to appoint the mother as guardian of the subject child, denied the mother's motion to dispense with service on the father, and denied the mother's motion for the issuance of an order, inter alia, making specific findings so as to enable the subject child to petition for special immigrant juvenile status. The Appellate Division, Second Department reversed, granted the mother's guardianship petition, granted her motions, and declared, inter alia, that the subject child was dependent on a juvenile court, was unmarried and under the age of 21, and that reunification with his father was not in the child's best interests. Although an application to United States Citizenship and Immigration Services for special immigrant juvenile status must be supported by documentary evidence of the applicant's age, in the form of

a valid birth certificate, official government-issued identification, or other document that in USCIS' discretion establishes the applicant's age, in Family Court Act guardianship proceedings Family Court is only required to ascertain the juvenile's age; there is no statutory requirement that a petitioner submit any particular evidence to establish the same.

Matter of Joel A.A.R., 216 AD3d 1167 (2d Dept 2023)

A Single Act of Domestic Violence, Either in the Presence of the Child or Within the Hearing of a Child, May Be Sufficient for a Neglect Finding

Family Court found that the father neglected the subject children, placed the younger child under the supervision of the department, and dismissed the petition as to the older child on the ground that the aid of the court was not required. The Appellate Division, Second Department dismissed parts of the appeal and affirmed the order of disposition insofar as reviewed. The father punched the mother in the face several times, causing bruising, the fifteen-year-old child attempted to intervene, and the three-year-old child was in the living room of the apartment during the incident and was crying. Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding.

Matter of Davasha T., 218 AD3d 475 (2d Dept 2023)

Family Court Granted Guardianship of a Twenty-Year-Old Child to Petitioner to Help the Child Gain Citizenship

Family Court granted guardianship of a twenty-year-old subject child to petitioner. The subject child, born in 2002 in Grenada, met petitioner through the Boys and Girls Club. The petition alleged that respondent mother and the stepfather neglected the child and kicked her out of her home, and that respondent father abandoned and neglected the child. Family Court, acknowledging that a person is able to become a lawful and permanent resident of the United States without first obtaining a visa if the person is granted Special Immigrant Juvenile Status, granted the petition, noting, inter alia, that a non-parent can be appointed as guardian if there are "extraordinary circumstances" present; that the extraordinary circumstances requirement applied even though the child was 20-years-of-age; that the mother abandoned the child when she had shelter management remove the child from the apartment, did not visit or communicate with the child for the following two years, declined to provide the child with her new address and did not provide the child with her new telephone number; that much uncertainty lay ahead for the child, including her citizenship status and finding housing after she aged out of the youth shelter she currently resided in; and that appointing petitioner as her guardian would officially recognize the assistance he had provided to the child to date and help her gain citizenship, without which she risked having to return to Grenada, where she had not lived since she was thirteen.

Matter of R.D.R., 78 Misc. 3d 1221(A) (Fam. Ct., Kings Co. 2023)

Petition Alleging a Coercive and Controlling Relationship Can Be Sufficient to State a Cause of Action for Neglect

The Administration for Children's Services ("ACS") alleged that respondent neglected the subject children by perpetrating acts of domestic violence against their non-respondent mother in their presence. Specifically, ACS alleged that respondent did not allow the mother to leave the home, accused her of sleeping with everybody, did not allow her to see her friends or family, took her financial benefits, threw away all her belongings, and confiscated all the children's vital documents, spoke to the mother in a demeaning manner which their two-year-old repeated, threatened to take the children away from the mother, and, in one incident, pulled on the mother's arm. Family Court denied respondent's motion to dismiss the petitions for failure to set forth a cause of action.

Domestic violence is not limited to acts of overt physical aggression but rather can exist through the interpersonal relationship dynamics of two adults. Coercion and control can exist together, creating a condition of unfreedom also known as entrapment. Coercive control is a particularly harmful form of domestic violence. Research has shown that children are not only witnesses to domestic violence but actual victims who experience the same dynamics in the home. Children adapt their behaviors in the home to manage and mitigate further abuse. There are many ways in which children are affected by emotional abuse in the home, including learning the wrong lessons about relationships, which puts them at risk of perpetuating an intergenerational cycle. Moreover, the relationship between the abused parent and the child is negatively impacted by that parent's inability, over time, to consistently respond to the child's needs. In a home marked by coercive control, a child also is isolated from family, friends, and community support structures. Research has shown that the deleterious effects of coercive control in a home contribute to children's emotional and behavioral struggles as much as, or even more than, experiencing physical violence perpetrated in the home.

Using derogatory language that the children repeated, using the children as tools to further control their mother, using isolating tactics that left children feeling alone and unsupported, and unreasonably creating a tense home environment was not the way a reasonable and prudent parent would care for a child.

Finally, Family Court also noted the 32-year age difference between respondent and the mother. At minimum, the relationship between the parties existed when the mother was a teenager with an infant from a prior relationship. The specter of a much-older man taking up a relationship with a vulnerable 18-year-old with a baby implied a significant power dynamic from the outset.

Matter of Aisha R., 79 Misc. 3d 1106 (Fam. Ct., Kings Co. 2023)

Conduct That is Detrimental to the Welfare (Physical or Emotional) of a Child Should Be a Factor in Determining the Appropriateness of an Award of *Pendente Lite* Exclusive Use and Occupancy

Supreme Court granted the mother's application for *pendente lite* exclusive use and occupancy of the premises where she and the child resided. The court noted, inter alia, that the child alleged through the AFC that: 1) he recently placed a lock on his bedroom door to keep the father out of his room; 2) before the lock was placed on the door, the father would come home late in the evenings - sometimes as late as midnight and 1:00 a.m. during weekday school nights - and come into the child's room and rub his body with oil as part of an anointing religious ceremony; 3) the child was exhausted at school and sports the next day and wanted this to stop immediately; and 4) the father did not respect the child's wishes and continued coming into his room. An award of exclusive occupancy is appropriate where it is necessary to protect the safety of persons. Inasmuch as the subject child resided in the residence, said child was a person under the purview of the court and within the meaning of the protection of persons. Similarly, the word safety could not be narrowly construed; the child's emotional state, security, and well-being were just as important as his physical safety. Despite all of the child's entreaties seeking cessation, the father nonetheless persisted in his efforts to anoint the child by entering his room at all hours of the night to perform an act which, critically, could have been performed during the waking hours of the day. While the father posited that he was seeking to ensure that the child had the mental, spiritual, and physical capacity to be an upright citizen in society, his conduct only served as a detriment to those goals. While the father's conduct may have been well-intentioned in his mind, the father's unbridled ignorance of his child's emotional well-being coupled with his unapologetic attempts to justify his conduct led the Supreme Court to find no other alternative but to exclude the father from the residence.

T.H. v G.M., 81 Misc. 3d 1205(A) (Sup. Ct., Nassau Co. 2023)

Father's Refusal to Produce the Child for Visits and to Meet with the AFC Constituted Civil Contempt

Family Court found the father in contempt where the mother established by clear and convincing evidence that the father violated orders requiring that he: 1) arrange for the production of the child for supervised visitation with the mother; 2) telephone the forensic expert; and 3) produce the child at the AFC's office. The forensic evaluation was stalled solely because of the father's failure to contact the expert and it would have been unproductive to schedule trial when the AFC had been unable to speak to the child. Given that the father was awarded temporary custody and had obstructed the mother's right to visitation, the delay of the custody trial prejudiced the mother's rights and remedies.

Matter of B.F. v S.R., 81 Misc. 3d 1207(A) (Fam. Ct., Kings Co. 2023)

Family Court Concluded That There Was a Conflict of Interest and Disqualified the AFC

Family Court concluded that the Children’s Law Center, hereinafter “CLC,” had a conflict of interest and was therefore disqualified from representing their remaining client, Joseph, in any proceeding. In August of 2021, CLC was assigned to represent two children, Joseph and Dominic, in a custody proceeding filed by the father against the mother. Thereafter the family became involved in highly contentious litigation, including competing custody petitions, custody petitions filed by maternal grandmother, and family offense petitions filed by the father against the mother, the mother against the father, and the stepmother against Joseph. In March 2023, CLC’s request to be relieved from representing Dominic was granted and he was given other counsel.

In April 2023, before Joseph’s release from a psychiatric hospitalization, ACS filed a child protective proceeding on behalf of Joseph against the father, and Joseph was placed with the maternal grandmother. ACS initially sought to have Joseph removed because of the father’s statement that he did not want Joseph home because of fear for his son Dominic, his daughter Brianna, and the stepmother. The father subsequently agreed to care for Joseph, but CLC opposed a return, which led to a FCA §1028 hearing. CLC requested that Joseph remain with the grandmother. ACS supported releasing Joseph to his father. During the course of the §1028 hearing, the CLC attorney stated that she planned to call Joseph as a witness, and then counsel for the father stated that she planned to call Dominic as a witness.

At the same time Joseph was with the maternal grandmother based on CLC advocacy, Dominic stated that he was afraid of his maternal grandmother. CLC previously represented both children when they opposed any contact with the maternal grandmother. Thus, claims by CLC that they had no confidential information from the child Dominic, or had disclosed all of said information during oral arguments, were unpersuasive.

Family Court rejected CLC’s contentions that there was no conflict, and that any conflict could be resolved by their not cross-examining Dominic, or by having another attorney assigned for Joseph for the sole purpose of cross-examining Dominic.

In addition, Family Court found find the question of conflict was not being raised as an offensive tactic. Counsel for the father requested that the §1028 hearing not continue until the issue was resolved, even though the delay prejudiced the father. Moreover, the Court’s obligation to ensure the integrity of the proceedings eliminated the Court’s need to determine who had standing to assert that CLC had a conflict of interest.

Matter of Joseph, Fam. Ct., Kings County, May 1, 2023, Gruebel, Hon. I.

CASES OF INTEREST FROM THE THIRD JUDICIAL DEPARTMENT

Family Court Interfered with Petitioner's Statutory Obligations by Ordering that No One Was to Discuss Certain Matters with the Child Except for the AFC

Family Court denied petitioner's motion to modify a prior order which, inter alia, prohibited anyone from discussing matters of adoption or surrender with the subject child, except for the AFC. The Appellate Division, Third Department reversed, modified, and vacated. Upon request, Family Court suspended proceedings to allow the AFC an opportunity to speak with the subject child about the judicial surrender and a potential subsequent adoption. Over petitioner's objection, Family Court also issued a written order that no one except for the AFC was to discuss matters of adoption or surrender with the subject child. The Appellate Division invoked the mootness exception to address the question of whether Family Court may, upon request by an AFC, prohibit a child protective agency from discussing issues of surrender and adoption with a child in its custody. The question involved the intersection between an AFC's representation of their child-client and a child protective agency's duty to that same child. The Appellate Division reasoned as follows: Under Family Court Act §1089 [c] and 18 NYCRR 441.21 [c] [1] and 428.6, child protective agencies and their caseworkers have an obligation to discuss matters of permanency with the child. Also, AFC play a critical and undeniably integral role in Family Court proceedings and ensuring child welfare. Children who are the subject of proceedings to terminate their parents' parental rights have a constitutional as well as statutory right to legal representation of their interests in these proceedings. During the judicial surrender appearance, the AFC requested that Family Court issue an order that until the AFC spoke to the child, no one was to speak to the child about surrender and adoption. However, Family Court's order was not a temporal arrangement allowing the AFC an opportunity to broach the issue with the child, which may have been appropriate. Instead, the order was an outright ban on anyone, including petitioner's caseworkers, having a discussion with the child regarding issues that were central to the child's permanency. Although, the child had a right to meaningful representation and to learn about legal issues from the AFC, such could not be made into a roadblock preventing petitioner from fulfilling its mandates and planning for the child's permanency and well-being.

Matter of Michael H., 214 AD3d 84 (3d Dept 2023)

Mother Was at All Times Actively Acknowledging the Difficulties Posed by Her Circumstances and Seeking Aid

Family Court adjudicated the three subject children to be neglected. The Appellate Division, Third Department reversed and dismissed the petition. The mother of the three subject children fled an abusive relationship following a particularly severe beating which occurred in the presence of the oldest child. Subsequently, she came to New York with the children, where she lived in a shelter for victims of domestic violence. There she experienced difficulties in supervising her three highly active children, then all under the age of four. The mother reached out to petitioner for help, however, other than a brief period of respite care and the purchase of a bus ticket to Georgia for legal proceedings

there, she did not receive meaningful assistance. Instead, after the mother accepted petitioner's offer of respite and rather than opening a preventative services case for her, petitioner, without explanation for its timing, commenced the neglect proceeding against her. Family Court expressly noted the mother's acknowledgements of her desperation and inability to control the oldest child's behavior and aptly attributed the oldest child's emotional condition to the severe domestic violence he had witnessed his father perpetrate against his mother. As the oldest child's emotional difficulties were, at least to some great extent, properly attributed to the trauma he experienced, rather than any failing of the mother, his condition did not support the neglect finding. Moreover, at no point did petitioner proffer evidence that either of the younger siblings had been injured by the oldest child, nor was there any evidence that such physical harm was imminent. Likewise, while the mother did leave the children unattended for brief periods, considering the surrounding circumstances, the evidence did not constitute a failure to exercise a minimum degree of parental care. Nor did the Appellate Division fault the mother for her inability to control all three young children while attending to their various needs. Most critical to the Appellate Division's review and determination was the fact that the mother was, at all times, actively acknowledging the difficulties posed by her circumstances and seeking aid. The testimony fully revealed that any parent would have struggled to meet the needs of these three young children. For these reasons, the Appellate Division reversed. The Appellate Division further noted its exasperation with the delay in bringing this appeal which illustrated that justice delayed is justice denied.

Matter of Alachi I., 215 AD3d 1014 (3d Dept 2023)

Mother's Contention That the AFC Improperly Substituted Judgment for the Child Was Unpreserved in the Absence of a Motion to Remove the AFC

Family Court ordered genetic marker testing for the purpose of establishing petitioner's paternity. The Appellate Division affirmed. The mother failed to satisfy her prima facie burden of establishing that a parent-child relationship existed between her husband and the child. Although the mother testified at the hearing that her husband interacted with the child on a daily basis and provided emotional and financial support to the child, she did so only in a conclusory manner. Her husband's testimony was also lacking in specific details sufficient to show a significant relationship between him and the child. To the extent that the mother contended that the AFC at the hearing improperly substituted judgment for the child, such contention was unpreserved in the absence of a motion to remove the AFC.

Matter of Darrell R.R. and Donaisha S.S., 216 AD3d 1234 (3d Dept 2023)

The Child's Gender Identity – and Their Chosen Name and Preferred Pronouns – Were A Point of Major Contention Between the Parties

Family Court granted the mother sole legal custody and primary physical custody of the subject child. The father was granted parenting time as the parties might mutually agree, with the mother retaining discretion over whether such parenting time required

supervision. Family Court also ordered the father to complete anger management and mental health counseling. The Appellate Division, Third Department modified on the law, reversed as related to the father's parenting time, specified that the father would have independent access to the child's records, and remitted to Family Court. Despite the father's contention, Family Court did not take an improper stance regarding his religious views. Rather, Family Court appropriately focused its inquiry on the best interests of the child. Family Court considered, *inter alia*, that the child's gender identity – and their chosen name and preferred pronouns – were a point of major contention between the parties. The father explained that addressing the child by their chosen name or preferred pronouns was contrary to his Catholic faith. Although the father initially agreed to engage in family counseling, it was short-lived. During the third session, the father took issue with the counselor addressing the child with the child's preferred pronouns, which led to an argument between the father and the child. The father then stormed out of the family session. The counselor continued to treat the child and revealed that the child often reported distress at the father's refusal to respect the child's chosen name and pronouns. The counselor further testified regarding suicide rates among transgender and gender nonbinary people being halved if the individual feels that their pronouns are respected in their daily lives. The Appellate Division noted that the child was hospitalized on two separate occasions in 2021 after reporting that they wanted to commit suicide. A plethora of emails between the parties revealed an acrimonious relationship with the father often hyper-focused on perceived slights rather than trying to coparent for the child's well-being. The mother's efforts to communicate were hindered, and at times thwarted, by the father's combative nature and his constant demands for obedience by the child. Under the circumstances, joint legal custody was untenable. However, Family Court erred when it did not make provision for the father to have independent access to the child's records. Deferring to Family Court's findings regarding the child's fear of the father's aggressive nature, the mother's attempts to nurture a positive relationship between the father and the child, and the mother's superior ability to provide for the child's mental health and overall well-being, Family Court's decision to grant the mother primary physical custody was supported by the record. However, in making the father's parenting time contingent on the mother's agreement, Family Court improperly delegated its authority to the mother. The Appellate Division remitted to Family Court to determine whether parenting time with the father was appropriate and if so, to consider the type of parenting time warranted by the record.

Laura E. v John D., 216 AD3d 1274 (3d Dept 2023)

Though Respondent Was a Person Legally Responsible, Neglect Could Not Be Predicated Solely on His Incarceration

Family Court adjudged that respondent neglected the subject child. The Appellate Division, Third Department reversed and dismissed the petition. Respondent and the mother were involved in a short-term relationship that ended in May 2019. The child was born in October 2019 and tested positive for drugs. Petitioner immediately commenced the neglect proceeding against respondent and the mother. Although this case presented a close call, there was a sound and substantial basis to find that respondent was a person

legally responsible for the child's care. Respondent credibly testified that he knew he was possibly the father and that he assisted the mother during her pregnancy by driving her to some of her prenatal appointments, to pick up medications, and to run other errands. Respondent also admitted that he planned to care for the child upon the child's birth and would later seek paternity testing. Such conduct was consistent with a person behaving as a functional equivalent of a parent. However, the determination of whether respondent neglected the child was complicated by the fact that no DNA analysis was performed to establish paternity until over a year after the child's birth. During petitioner's first meeting with respondent, respondent reported that he wanted a paternity test and offered his mother as a custodial resource for the child. Thereafter, despite respondent being incarcerated, no one met with him to inform him of his mother's unavailability or to ask about other familial resources. Petitioner had an affirmative obligation to conduct an immediate investigation into familial resources and failed to do so, choosing instead to bring a neglect petition against respondent. Petitioner's proof failed to establish how respondent's plan to have his mother care for the child fell below the minimum degree of care or how it impaired the child or placed the child in imminent danger of becoming impaired. Petitioner's proof seemed to be predicated solely on respondent's incarceration, which, alone, cannot form a basis for a neglect finding.

Matter of Elijah A.A., 216 AD3d 1372 (3d Dept 2023)

Challenge to Family Court's Disposition in a Termination of Parental Rights Proceeding Rendered Moot by a Subsequent Adoption

Family Court terminated respondent's parental rights on the ground of permanent neglect. The Appellate Division, Third Department dismissed the appeal as moot. Respondent waived her right to a fact-finding hearing and admitted to several allegations. Based on those admissions, Family Court found respondent to have permanently neglected the child. Following a dispositional hearing at which the grandmother's petition for custody was also considered, Family Court granted petitioner's application to terminate the mother's parental rights and transferred custody to petitioner. During the pendency of the appeal, the child was adopted, notably by the foster family whose care she had been in since her initial removal over 10 years ago. Although the adoption did not render moot a challenge to the finding of permanent neglect, respondent did not take issue with that underlying finding. Instead, respondent only challenged Family Court's choice of dispositions and it is well established that a challenge to Family Court's disposition in a termination proceeding is rendered moot by a subsequent adoption.

Matter of Amari F., 217 AD3d 1063 (3d Dept 2023)

Family Court Abused Its Discretion in Denying the AFC's Request for a Lincoln Hearing

Family Court granted respondent's motion to dismiss petitioner's modification petition. The Appellate Division, Third Department reversed and remitted to Family Court for further proceedings. The mother filed a modification petition seeking primary residency of

the subject child. During a fact-finding hearing, at the close of the mother's proof, the father moved to dismiss the petition. The mother and the AFC opposed the motion and the AFC requested that Family Court conduct a Lincoln hearing. Family Court declined to conduct such a hearing, stating that it presumed the child's position was that he preferred to reside with the mother in Florida, and granted the father's motion to dismiss on the ground that the mother failed to establish a change in circumstances. While the determination of whether to conduct a Lincoln hearing lies within the Family Court's discretion, it is indeed the preferred method for ascertaining a child's wishes. At the time of hearing, the child was six days shy of being 16 years old and the mother's primary argument in support of her petition was that the child preferred to reside with her. The wishes of this soon-to-be 16-year-old child, although not determinative, should have been considered, including any insight he may have provided as to the status of his relationship with each parent. It was improper for Family Court to simply presume the child preferred to reside with his mother, as the fundamental purpose of a Lincoln hearing is to ascertain a child's preferences and concerns.

Matter of Samantha W.W. v Malek X.X., 217 AD3d 1081 (3d Dept 2023)

Although FCA §1055-a(b) Provides for the Enforcement of Postadoption Contact Agreements, It Does Not Provide a Mechanism for the Revocation of Said Agreements

Family Court granted a motion by the AFC to dismiss the petition. The Appellate Division, Third Department affirmed. In 2019, petitioner surrendered her rights to the subject children and executed a judicial consent to their adoption. In conjunction with the surrender, Family Court approved a postadoption contact agreement. In June 2020, petitioner filed a petition for enforcement of the contact agreement. Based on petitioner's failure to appear for some of the hearing dates, Family Court dismissed the petition with prejudice. In March of 2021, petitioner filed a second petition. The allegations in the second petition were identical to those that gave rise to the first petition, but the relief sought was different in that petitioner sought to revoke the contact agreement and the judicial surrender. Family Court granted the motion by the attorney for the children to dismiss the second petition finding that it was barred by res judicata and that it failed to state a cause of action. While subsequent proceedings rendered the appeal moot as to the older child and as to the issue of res judicata, the Appellate Division affirmed Family Court's determination that petitioner failed to state a cause of action. Although Family Court §1055-a(b) provides for the enforcement of postadoption contact agreements, it does not provide a mechanism for the revocation of said agreements. Moreover, per DRL §112-b (3), failure to abide by the terms of a contact agreement shall not be grounds for revocation of a written consent to an adoption after that consent has been approved by the court.

Matter of Samuel S., 218 AD3d 844 (3d Dept 2023)

Counsel Should Have Been Given an Opportunity to Present Arguments Concerning Petitioner's Application for a Voluntary Discontinuance

Family Court granted petitioner's motion to withdraw the neglect petition. The Appellate Division, Third Department remitted to Family Court. On December 6, 2021, petitioner transmitted a letter by email to Family Court and counsel requesting to withdraw its neglect petition without prejudice and cancel the fact-finding hearing scheduled for December 14, 2021. That same day, Family Court issued an order granting petitioner's request and dismissing the petition. The AFC appealed. Family Court was not required to make findings pursuant to FCA §1051(c), as the court's dismissal was not the result of a failure of proof following a hearing. Rather, petitioner's email amounted to an application for voluntary discontinuance. However, Family Court erred in granting petitioner's application without allowing time for objections to be raised. Ordinarily, a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted. However, other parties should be given an opportunity to present any such special circumstances or any other arguments concerning the application, such as the effect upon a subject child's welfare, whether prejudice should attach to the discontinuance, or whether another party should be permitted, in the court's discretion, to commence a neglect proceeding.

Matter of Lauren X., 218 AD3d 858 (3d Dept 2023)

Petitioners had Standing to Challenge Host Family Homes Program; Implementation of the Program Would Place Children Outside Their Home Without the Right to Legal Representation

Supreme Court dismissed petitioner's CPLR Article 78 proceeding for lack of standing. The Appellate Division, Third Department reversed. In December 2021, respondent promulgated regulations creating the Host Family Homes program, which provided for the temporary care of children by pre-vetted volunteers outside the voluntary placement process in the Social Services Law. These regulations authorized certain agencies to be host family home agencies that would recruit and train volunteer host families, conduct background checks, approve host families, and match the host family with a family in need. The placement of a child with a host family did not involve a relinquishment of legal custody; instead, the parents would execute a designation of person in parental relation that could be revoked at any time. The children were not entitled to assigned counsel, although they could communicate with an attorney. Petitioners commenced an CPLR Article 78 proceeding, seeking to annul the Host Family Homes program in its entirety. Respondents moved to dismiss the petition for lack of standing. Supreme Court granted respondent's motion, determining that petitioners had failed to establish that they had suffered actual injury from the program and that petitioners were essentially seeking to challenge the program on behalf of speculative potential clients. The Third Department reversed, noting, inter alia, that implementation of the program would, in essence, place children outside their home without the right to legal representation to which they would be entitled by Social Services Law § 358-a and which petitioners had a contractual obligation to provide; that this harm was reasonably certain to occur; that where the

parties were subject to the relatively short statute of limitations set forth in CPLR 217, the precise particulars of the asserted injury might not have been ascertainable within the time restraint of the statute of limitations; and that the injury fell squarely within the zone of interests sought to be protected by the Social Services Law, which, under the voluntary placement regime, provides for judicial oversight of the process by Family Court, and entitles a child to legal representation. Accordingly, petitioners sufficiently alleged that they had standing to challenge the program as improperly bypassing the statutory voluntary placement process.

Matter of Lawyers for Children v New York State Off. of Children and Family Servs., 218 AD3D 913 (3d Dept 2023)

Family Court Erred in Disclosing Information That the Child Shared During the Lincoln Hearing

Family Court modified a prior order of custody. The Appellate Division, Third Department affirmed. Although it was not an independent basis for reversal, Family Court erred in disclosing information that the child had shared during the Lincoln Hearing. The Appellate Division reminded Family Court of the paramount importance that information shared during a Lincoln hearing remain confidential to protect children from having to openly choose between parents or openly divulge intimate details of their respective parent/child relationships. Family Court should limit itself to stating whether it has held a Lincoln hearing and, if not, its reasons for declining to hold one. Although courts should consider the information shared by a child in a Lincoln hearing to corroborate other evidence adduced at a fact-finding hearing or to ascertain a child's thoughts and feelings regarding the crafting of a custodial arrangement, such considerations must remain silent to ensure that a child's right to confidentiality is protected.

Matter of John M. v Tashina N., 218 AD3d 935 (3d Dept 2023)

Mother's Use of Medical Marihuana Did Not Preclude a Switch to Unsupervised Visitation

Family Court granted the mother's application to modify a prior order of custody and visitation. The Appellate Division, Third Department affirmed. Following a hearing, Family Court granted the mother certain unsupervised parenting time for two weekends a month. The change from supervised to unsupervised visitation was appropriate. The mother had been successful in her recovery from abuse of opioids and alcohol for over two years. Although the mother had been regularly using medical marihuana, she testified that such use was prescribed by a healthcare provider to treat and manage her various mental health conditions and that this treatment had been successful. Although, the mother did not have a driver's license as a result of pending criminal charges from 2018 for felony driving while intoxicated, she testified that she was working to resolve the matter and lived in an area that was within close proximity to emergency services. Although not dispositive, the AFC supported the visitation arrangement as modified by Family Court.

Matter of Maranda WW. v Michael XX., 219 AD3d 1590 (3d Dept 2023)

Supreme Court Abused Its Discretion By Ordering the Child's Return to Italy Without Making Further Inquiry as to the Hague Convention Exceptions Asserted

Supreme Court ordered that the child be returned to Italy and remain there pending further order of the Italian court. The Appellate Division, Third Department reversed on the law and remitted to Supreme Court. Although the mother established that the father wrongfully retained the child in New York, Supreme Court erred in ordering the child's return to Italy without making further inquiry as to the Hague Convention exceptions asserted. There is no law requiring that discovery be allowed or that an evidentiary hearing be conducted as a matter of right in cases arising under the Convention. However, courts routinely hold hearings in circumstances such as these and it is also common to conduct an in-camera interview, direct and/or consider the results of expert evaluations, and/or appoint and hear from an attorney for the child. As for the grave risk exception, the father's affidavit reflected that the child made prompt, detailed disclosures of extended sexual abuse experienced in Italy and that the child reported that abuse to the mother who did nothing to intervene or prevent it and instead allegedly forced the child to continue sleeping in the same bed as the offending minor. As a result, the child had developed a fear of returning to the mother's custody in Italy. There were Italian criminal proceedings against the mother and her boyfriend for their alleged failure to prevent or facilitate the abuse. The father also raised a genuine issue of fact as to the child's objection and degree of maturity. Notable was the transcript of a telephone call between the child and the mother, in which the child, then nearly ten and a half years old, articulately opposed the mother's efforts to secure his return citing the mother's alleged lies as to why he was in New York.

Matter of Luisa JJ. v Joseph II., 219 AD3d 1628 (3d Dept 2023)

The Focus of an Extraordinary Circumstances Finding Is the Parent, Not the Nonparent, Therefore It Was Immaterial that the Niece Was Not Involved in Earlier Proceedings

Family Court dismissed the mother's applications to modify prior orders of custody and visitation and granted custody to the mother's niece. The Appellate Division, Third Department affirmed. In previous proceedings, Family Court granted sole legal and primary physical custody of two of the subject children to the maternal aunt. After the aunt's death, the mother's niece filed for custody of the two children. The mother contented that Family Court should not have relied on the prior judicial determinations of extraordinary circumstances because the niece was not a party in the prior proceedings. However, the Appellate Division found that, as the focus of an extraordinary circumstances finding is on the parent, not the nonparent, the mother's preferred status as the birth parent had already been lost by the previous extraordinary circumstances determinations. Therefore, it was immaterial that the niece was not involved in the earlier proceedings. The Appellate Division went on to affirm Family Court's decision using the change in circumstances and best interests of the children standards.

Matter of Evelyn E.E. v Jody C.C., ___ AD3d ___, 2023 NY Slip Op 06782 (3d Dept 2023)