NEW YORK CHILDREN'S LAWYER

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Juvenile Justice Reform Must Be a Priority*

Luis A. Gonzalez**

In his State of the State address on Jan. 8, 2014, Gov. Andrew M. Cuomo called for the creation of a commission to study juvenile justice reform. In my view, fundamental reform in this area is long overdue. New York, which has a reputation for being one of the most progressive states in the nation, is presently one of only two states (the other is North Carolina) that treat 16- and 17-year-olds as adults in the criminal justice system. Most states have raised the jurisdictional age for juvenile delinquency: "The vast majority of American children under the age of eighteen who engage in criminal activities are deemed to be delinquent rather than criminal."[1] Under present New York law, children who have reached their 16th birthdays are criminally responsible for their actions; whether arrested for a violent felony or a nonviolent offense such as vandalism or shoplifting, these adolescents are subjected to the same system of prosecution, sentencing, and corrections, and its consequences as adults.[2] Our state's present juvenile justice scheme runs counter to the documented neurological maturation process and its role in adolescent criminality.[3] It also fails to consider, from a rehabilitation standpoint, the problems created for adolescents by placing them in the adult criminal justice system.

The Adolescent Brain

Several U.S. Supreme Court cases have considered the role of neurological maturation in punishing adolescents convicted of crimes.[4] For example, in Roper v. Simmons (543 U.S. 551 [2005]), the court held that the Eighth and Fourteenth Amendments to the U.S. Constitution forbade the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. While Roper involved a capital crime (not at issue in the present juvenile justice reform discussion), three observations made by the Supreme Court, relying on reports of neurological studies, underscore why 16- and 17-year-olds should not be treated as adults within the criminal justice system. The points are as follows:

- "[A]dolescents are overrepresented statistically in virtually every category of reckless behavior" (Roper, 543 U.S. at 569 [internal citation omitted]). Neurologist Lawrence Steinberg, whose research is cited in Roper, explains that middle adolescence is a time when the brain systems implicated in response to rewards are at their height of arousability, but the

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neurological systems vital to self-regulation are still immature.[5] He says: "It's as if the brain's accelerator is pressed to the floor before a good braking system is in place";[6]

• Roper also acknowledges that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" (id. at 569). Steinberg confirms this fact, with neurological evidence of a correlation between age and increased ability to control impulses, plan ahead, and resist peer influence;[7]

• Roper concludes that "the character of an adolescent is not as well formed as an adult. The personality traits of juveniles are more transitory, less fixed" (Roper, 543 U.S. at 570). New York should recognize this fact, and adjust its juvenile justice laws accordingly.

Practical Problems

Gov. Cuomo, in the companion book released with his State of the State address, stated that in 2012, nearly 40,000 16- and 17-year-olds had their cases handled in adult or criminal court, and that they were less likely to receive the services they needed in that environment than they would have in Family Court. The Citizen's Crime Commission of New York City has found that even in criminal cases resolved by Adjournment in Contemplation of Dismissal (ACD), criminal courts are not required to assess a defendant's risks or needs or to make referrals for services.

Moreover, studies indicate that older adolescents, the 16- and 17-year-olds that we now prosecute and sentence in criminal court, are not only more likely to re-offend, but are also more likely to commit violent crimes and serious property crimes than those young people whose cases are adjudicated in Family Court.[8] Thus, public safety is not improved when we prosecute and punish 16- and 17-year-olds as adults. By introducing young people to the criminal justice system, we decrease the probability that they will mature into productive, law-abiding adults. Moreover, the stigma of a criminal record poses a permanent barrier to opportunities for education, housing and employment.

Juvenile Justice Reform

Gov. Cuomo's announcement that he was establishing a "Commission on Youth, Public Safety & Justice" with a mandate to "provide concrete, actionable recommendations [by December 2014] pertaining to youth in New York's criminal and juvenile justice systems and ensure the State's place as a national leader in youth justice" complements initiatives that have been ongoing in the judiciary. In his 2013 "State of the Judiciary Address" Chief Judge Jonathan Lippman discussed "long awaited juvenile justice reform." He devised and discussed a new approach—"Adolescent Diversion Pilot Parts"—which were tested, with what he saw as encouraging results throughout 2012. The pilot programs combined age-appropriate services with interventions and penalties tailored to non-violent 16- and 17-year-old offenders. He also recognized that real reform was only possible with the accompaniment of legislation decriminalizing certain offenses committed by adolescents.

Our youth is our future, and we need to tailor our criminal justice system to recognize the role of maturation in the prosecution and punishment of adolescent offenders. I am in full support of swift enactment of a fiscally sound legislation that will give our 16- and 17-year-olds a better chance at a good productive life.

** Luis A. Gonzalez is Presiding Justice of the Appellate Division, First Department.

ENDNOTES

1. Merril Sobie, "Pity the Child: The Age of Delinquency in New York," 30 Pace L. Rev. 1061, 1065 [2010].

2. "Court Reform For Teenage Offenders," The New York Times, Oct. 11, 2011, http://www.nytimes.com/2011/10/12/opinion/court-reform-for-teenage-offenders.html [accessed Jan. 14, 2014].

3. Lawrence Steinberg, "Should the Science of Adolescent Brain Development Inform Public Policy?," Issues in Science and Technology, Spring 2012, available at http://www.issues.org/28.3/steinberg.html [accessed Jan. 12, 2014] [Steinberg Study].

4. Roper v. Simmons, 543 US 551 (2005); see also Graham v. Florida, 560 U.S. 48 (2010).

5. See Steinberg Study, supra note 3.

6. Id.

7. Id.

8. Jeff Storey, "Lippman Vows Changes to Confront Doubts about Youth Reform Bill," NYLJ, June 26, 2012 (citing New York State Division of Criminal Justice Services, Computerized Criminal History System (as of 5-2012), "Dispositions of Arrests Involving 16- 17-Year-Olds").

Articles of Interest to Attorneys for Children, including legal analysis, news items and personal profiles, are solicited. We also welcome letters to the editor and suggestions for improvement of both this publication and the Attorneys for Children Program. Please address communications to Attorneys for Children Program, M. Dolores Denman Courthouse, 50 East Avenue, Rochester, New York 14604.

NEWS BRIEFS

SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

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

On November 21, 2013, and November 22, 2013, the Appellate Division, Second Judicial Department, the NYC Bar Association's Committee on Immigration and Nationality, the Feerick Center for Social Justice, and the Attorneys for Children Program co-sponsored a two-part series, ***Representing Immigrant Youth in Family Court: Special Immigrant Juvenile Status.*** This presentation was given by Maureen Schad, Esq., Pro Bono Attorney, Chadbourne & Parke; and Anya Mukarji-Connolly, Esq., Brooklyn Defenders Services. This seminar was held at the Office of Attorneys for Children, Brooklyn, New York. This training can be viewed on the Appellate Division Second Department's website. Please contact Gregory Chickel at gchickel@courts.state.ny.us to obtain access to this program and the accompanying handouts.

On December 17, 2013, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored ***the Anatomy of Writing an Appellate Brief - Considerations Before Writing the Statement of Facts and Argument***. The presenters were Ursula Bentele, Esq., Professor of Law, Brooklyn Law School; and Melissa Krakowski, Esq., Assistant Chief Attorney, Appellate Division, 2nd Department. This training can be viewed on the Appellate Division Second Department's website. Please contact Gregory Chickel at gchickel@courts.state.ny.us to obtain access to this program and the accompanying handouts.

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

On January 8, 2014, the Appellate Division, Second Judicial Department, the Westchester County Family Court, and the Committee on Mental Health Court Evaluations co-presented the first of ***a Two-Part Series on Achieving Permanency for Children - Through the Eyes of a Child***: ***the Importance of Visitation and Parent Training and Education Programs***. The Honorable Kathie E. Davidson, Supervising Judge of the Family courts in the Ninth Judicial District served as moderator for this program, and the panelists were as follows: Jackie Boissonnault, LMSW, Director, Children's Advocacy Series, Mental Health Association of Westchester; Phil Goldstein, Director of Program Development, Westchester County Department of Social Services; Wayne Humphrey, Esq., Deputy County Attorney, Westchester County Department of Law; Jennifer Soravilla, LCSW, Clinical Supervisor, Westchester Institute for Human Development (WIHD); and Danielle Weisberg, LCSW, Director, Child Welfare Services & Children's Advocacy Center, WIHD. This seminar was held in White Plains, New York.

Tenth Judicial District (Nassau County)

On March 20, 2014, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, and the Nassau County Bar Association Family Court Liaison Committee co-sponsored Lunch and Learn Series: Mediation Methods in Family Court Practice. The presenters for this program were Harriet M. Steinberg, PC, Attorney & Counselor at Law; and Andrew M. Thaler, Esq., Thaler Law Firm PLLC. This seminar was held at the Nassau County Family Court, Westbury, New York.

The Appellate Division Second Department is certified by the New York State Legal Education Board as an accredited Provider of continuing legal education in the State of New York.

THIRD DEPARTMENT NEWS

Liaison Committees

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts will meet on May 8, 2014 in Lake Placid in conjunction with the Children's Law Update to be held on Friday, May 9, 2014. The committees were developed to provide a means of communication

between panel members and the Office of Attorneys for Children. The Liaison Committees, whose members are nominated by Family Court judges, meet twice annually and representatives are frequently in contact with the Office of Attorneys for Children on an interim basis. If you would like to know the name of your Liaison Committee Representative, it is listed in the Administrative Handbook or you may contact Betsy Ruslander by telephone or e-mail at *oac3d@nycourts.gov*. If you have any issues you would like brought to the attention of the Office of Attorneys for Children, please contact your county's Liaison Representative. Welcome and congratulations to the new Saratoga County Liaison Representative, Gerard V. Amedio, Esq.

Training News

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

He Ain't Heavy, He's My Client: Litigating the Custody Battlefield, this year focusing on custody and visitation will be held on Friday, April 25, 2014 at the Holiday Inn in Colonie;

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

Introduction to Effective Representation of Children, the two-day introductory course for panel applicants and new panel members, will be held on Thursday and Friday, September 18-19, 2014 at the Clarion Hotel (Century House) in Latham. NOTE: This seminar used to be held twice a year in the Third Department, in the months of June and December. As a result of recent trends, we will be presenting this training in collaboration with the Fourth Judicial Department. It will be held only once a year in the Third Department, in September; and once in the Fourth Department, in March, with attorneys from both Departments invited to both programs.

Children's Law Update 2014 will be held on Friday, September 12, 2014 in Johnson City and on Friday, November 7, 2014 in Albany.

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

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

Office of Attorneys for Children CLE is going paperless! Although we have always been able to provide free CLE programs to panel members that included hard copy written material relevant to the presenters' topics, many panel members have pointed out that this is costly and not very *green*. Therefore, beginning with this spring's training, we are excited to announce that all of our CLE programs will be going paperless and all material associated with our seminars will be provided to you electronically by email, *in advance* of the seminar. Following your online registration and our confirmation, we will email you all the materials accompanying the presenters' lectures in advance of the seminar date. This will be extremely helpful to you in your practice as you will be able to save the material on your computer, search for relevant information, and cut and paste portions that you may need for litigation or other purposes. If you insist on receiving printed material, you must email your request by a given date and the material will be available to you at the conference. Absent a specific request, you will receive the materials electronically. We strongly encourage the use of the new paperless system and ask you to join us in this effort to be more cost-effective and environmentally friendly.

Website

The Office of Attorneys for Children web page located at *nycourts.gov/ad3/oac* includes a wide variety of resources, including E-voucher information, online CLE videos and materials, the New York State Bar Association Representation Standards, the latest edition (2-21-14) of the Administrative Handbook, forms, rules, frequently asked questions,

seminar schedules, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. The *News Alert* feature includes recent program and practice developments of note.

FOURTH DEPARTMENT NEWS

Late Spring Seminar Schedule

April 25, 2014

Update

Chautauqua County Family Court
Emergency Services Room
Mayville, NY

May 9, 2014

Update
Holiday Inn Utica
New Hartford, NY

May 30, 2014

Topical: Social Media and Technology

Rochester Airport Marriott
Rochester, NY

Tentative Fall Seminar Schedule

September 12, 2014

Topical
Location TBA
Syracuse, NY

October 17, 2014

Update
Location TBA
Lockport, NY

Fundamentals of Attorney for the Child Advocacy Seminars

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

September 18-19, 2014

Fundamentals of Attorney for the Child Advocacy
Albany, NY

Congratulations to New Judges

8th Judicial District

Hon. Deanne Tripi, Family Court, Erie County
Hon. Mary Carney, Family Court, Erie County
Hon. Mark Montour, Supreme Court, Erie County

7th Judicial District

Hon. James Walsh, Family Court, Monroe County

RECENT BOOKS AND ARTICLES

ADOPTION

Twila L. Perry, *Race, Color, and the Adoption of Biracial Children,* 17 J. Gender Race & Just. 73 (2014)

Alice Richards, *Bombs and Babies: The Intercountry Adoption of Afghanistan's and Iraq's War Orphans,* 25 J. Am. Acad. Matrim. Law. 399 (2013)

Lynn D. Wardle & Travis Robertson, *Adoption: Upside Down and Sideways? Some Causes of and Remedies for Declining Domestic and International Adoptions,* 26 Regent U. L. Rev. 209 (2013-2014)

ATTORNEY FOR THE CHILD

Jonathan W. Gould & David A. Martindale, *Cultural Competency and Child Custody Evaluations: An Initial Step,* 26 J. Am. Acad. Matrim. Law. 1 (2013)

Susan A. Roche, *Maneuvering Immigration Pitfalls in Family Court: What Family Law Attorneys Should Know in Cases with Noncitizen Parties,* 26 J. Am. Acad. Matrim. Law. 79 (2013)

CHILD WELFARE

Jon M. Hogelin, *To Prevent and to Protect: The Reporting of Child Abuse by Educators,* 2013 B.Y.U. Educ. & L. J. 225 (2013)

Emily Weissler, *Head Versus Heart: Applying Empirical Evidence About the Connection Between Child Pornography and Child Molestation to Probable Cause Analyses,* 82 Fordham L. Rev. 1487 (2013)

CHILDREN'S RIGHTS

Sarah J. Baldwin, *Choosing a Home: When Should Children Make Autonomous Choices About Their Home Life?,* 46 Suffolk U. L. Rev. 503 (2013)

Nicole M. Barnard, Astrue v. Capato: *Relegating Posthumously Conceived Children to Second-Class Citizens,* 72 Md. L. Rev. 1039 (2013)

Christopher A. Ferrara, *Customizable "Sexual Orientation Privacy" for Minor Schoolchildren: A Law School Invention in Search of a Constitutional Mandate,* 43 J. L. & Educ. 65 (2014)

Keila E. Molina & Lynne Marie Kohm, *"Are we There Yet?" Immigration Reform for Children Left Behind,* 23 Berkeley La Raza L. J. 77 (2013)

Nicole Mortorano, *Protecting Children's Rights Inside of the Schoolhouse Gates: Ending Corporal Punishment in Schools,* 102 Geo. L. J. 481 (2014)

Elizabeth A. Rossi, *A "Special Track" for Former Child Soldiers: Enacting a "Child Soldier Visa" as an Alternative to Asylum Protection,* 31 Berkeley J. Int'l L. 392 (2013)

CHILD SUPPORT

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Amy E. Halbrook, *Juvenile Pariahs,* 65 Hastings L. J. 1 (2013)

Morgan S. Mcginnis, *Sentenced to Die in Prison: Life Without Parole as an Eighth Amendment Violation for all Juveniles and Especially Those Who Have Not Killed,* 11 Hastings Race & Poverty L. J. 201 (2014)

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Benjamin Good, *A Child's Right to Counsel in Removal Proceedings,* 10 Stan. J. Civ. Rts. & Civ. Liberties 109 (2014)

Laurie S. Kohn, *Engaging Men as Fathers: The Courts,*

the Law, and Father-Absence in Low-Income Families, 35 Cardozo L. Rev. 511 (2013)

Samantha Casey Wong, *Perpetually Turning Our Backs to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings,* 46 Conn. L. Rev. 853 (2013)

CUSTODY AND VISITATION

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David Alan Perkiss, *Boy or Girl: Who Gets to Decide? Gender-Nonconforming Children in Child Custody Cases,* 25 Hastings Women's L. J. 57 (2014)

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

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Myrna S. Raeder, *Preserving Family Ties for Domestic Violence Survivors and Their Children by Invoking a Human Rights Approach to Avoid the Criminalization of Mothers Based on the Acts and Accusations of Their Batterers,* 17 J. Gender Race & Just. 105 (2014)

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Abraham M. Lackman, *The Collapse of Catholic School Enrollment: The Unintended Consequence of the Charter School Movement,* 6 Alb. Gov't L. Rev. 1 (2013)

Elizabeth Lamura, *Our Children, Ourselves: Ensuring the Education of America's At-Risk Youth,* 31 Buff. Pub. Int. L. J. 117 (2012-2013)

Aaron Lawson, *Educational Federalism: A New Case for Reduced Federal Involvement in K-12 Education,* 2013 B.Y.U. Educ. & L. J. 281 (2013)

John E. Rumel, *Back to the Future: The* In Loco Parentis *Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students,* 46 Ind. L. Rev. 711 (2013)

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Thaddeus J. O'Sullivan, *FMLA Amendments to Affect Military Families and Airline Flight Crews,* 57-FEB Advocate (Idaho) 35 (2014)

Maryn Oyoung, *Until Men Bear Children, Women Must not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities,* 44 McGeorge L. Rev. 515 (2013)

Jennifer H. Sperling, *Reframing the Work-Family Conflict Debate by Rejecting the Ideal Parent Norm,* 22 Am. U. J. Gender Soc. Pol'y & L. 47 (2013)

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Lisa Beth Greenfield Pearl, *Using Storytelling to Achieve a Better Sequel to Foster Care Than Delinquency,* 37 N.Y.U. Rev. L. & Soc. Change 553 (2013)

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Carmen M. Cusack, Kent *Make-Up Their Minds: Juveniles, Mental Illness, and the Need for Continued Implementation of Therapeutic Justice Within the Juvenile Justice and Criminal Justice Systems,* 22 Am. U. J. Gender Soc. Pol'y & L. 149 (2013)

Sara E. Fiorillo, *Mitigating After* Miller: *Legislative Considerations and Remedies for the Future of Juvenile Sentencing,* 93 B. U. L. Rev. 2095 (2013)

Alexander L. Nostro, *The Importance of an Expansive Deference to* Miller v. Alabama, 22 Am. U. J. Gender Soc. Pol'y & L. 167 (2013)

Sarah French Russell, *A "Second Look" at Lifetime Incarceration: Narratives of Rehabilitation and Juvenile Offenders,* 31 Quinnipiac L. Rev. 489 (2013)

Symposium, *In Search of Meaningful Systemic Justice for Adolescents in New York,* 35 Cardozo L. Rev. 1021 (2014)

FEDERAL COURTS

One Year Period to File Under Hague Convention Not Subject to Equitable Tolling

The child who is the subject of this proceeding was born in London. Her parents lived with the child in London for three years. The mother then left with the child and moved to a woman's shelter in London for a period of months before ultimately traveling to New York to live with the child at the mother's sister's house. Thereafter, the father filed a petition pursuant to the Hague Convention for the return of the child. The US District Court determined that father made a prima facie case for the child's return, but that mother established that the "now settled" defense applied. Under Article 12 of the Hague Convention when a period of less than one year has elapsed from the date a child was wrongfully removed or retained until the date proceedings are commenced, the judicial or administrative authority shall order the return of the child. When proceedings have been commenced after expiration of the one-year period, the authority shall order the return of the child unless it was demonstrated that the child was now settled in the new environment. The Second Circuit affirmed, holding that the now settled exception was not subject to equitable tolling of the one-year period. The Supreme Court affirmed. There was no general presumption that equitable tolling applied to treaties; the parties to the Hague Convention did not intend that equitable tolling would apply to the one-year period; the Court had applied a presumption of equitable tolling only to statutes of limitations; and the one-year period was not a statute of limitations. Steps taken to promote concealment of the child could prevent the stable attachments that show that a child is "settled" under the Hague Convention. The Concurring Justices addressed the father's contention that the Court's holding would encourage parents to conceal children in the countries to which the children were removed, by observing that Courts retain equitable discretion to order a child's return, even after the child is "settled" within the meaning of the Hague Convention.

Lozano v Alvarez, __ US__ , 2014 WL 838515

Defendant Stopped Without Reasonable Suspicion

Two NYPD officers received dispatches about two 911 calls from an anonymous caller who described a man who was possibly armed. When they drove to the location referenced in the 911 calls, they approached defendant, who fit the description of the suspect in one of the 911 calls. As defendant walked by the police car, one of the officers spoke to him, but defendant kept walking. The officer got out of the police car and put his hand on defendant's elbow and defendant shrugged it off. The other officer also put his hand on defendant's elbow and defendant shrugged it off. The officer then grabbed defendant around the waist in a bear hug and tripped defendant to the ground. After a short struggle, the officers handcuffed defendant and found a firearm in his waistband. Defendant was arrested. Thereafter, defendant moved to suppress on the ground that the officers lacked reasonable suspicion. The District Court concluded that the stop was supported by reasonable suspicion and denied the motion. The Second Circuit reversed, concluding that defendant was stopped without reasonable suspicion. Defendant was seized as soon as the officer grabbed him in a bear hug. Defendant's short struggle and arguably suspicious movement of his hands toward his waist came after the seizure had occurred. The pair of anonymous calls to 911 lacked any indicia of reliability. The District Court determined that the calls were not truly anonymous because the cell phone number was recorded by the 911 system, the individual twice called 911, and based upon the information conveyed in the call, the caller was an eyewitness. However, the identity of the caller was unknown and there was no way for the police or a reviewing court to determine the caller's credibility and reputation for honesty. The fact that the anonymous call contained a detailed physical description and a location did not change the fact that those details merely identified the suspect and did nothing to show that the caller had knowledge of concealed criminal activity. The caller's description of the individual's location was not predictive information -- the caller did not, for example, predict that the individual would begin walking in a certain direction. The fact that the encounter occurred late at night was a relatively weak and generic factor.

United States v Freeman, 735 F3d 92 (2d Cir. 2014)

Parties' Child Must Be Returned to New Zealand

The mother and father lived in New Zealand for nine months before the child's birth and for the first six months of the child's life and they considered New Zealand to be their home. After the parties separated, the father agreed that the mother could go to New York for four or five months with the child. When the mother did not come back to New Zealand or return the child to New Zealand the father commenced a Hague Convention proceeding seeking the return of the child. The District Court granted the petition, concluding that the child was a habitual resident of New Zealand before her mother removed the child to New York by her mother, the father did not consent to the child's indefinite removal to New York, and the child did not acclimate to her residence in New York such that it became her new habitual residence. The Second Circuit affirmed. The fact that the mother did not have a stable residence during the six months the parties were separated in New Zealand did not affect the establishment of their habitual residence in New Zealand. The father did not consent, evidenced by the parties' agreement that the mother would return after five months. The child's one year relationship with a nanny in New York and her enrollment in a play group did not amount to the child's acclimation.

Hollis v O'Driscoll, 739 F3d 108 (2d Cir. 2014)

Jury Could Not Reasonably Find Beyond a Reasonable Doubt That Defendant Possessed Crack Cocaine

Defendant was arrested after the police found a firearm in a car where defendant was present. Defendant was patted down for weapons before being placed in a police car and nothing was found. Defendant was then placed in the back of a police car with his hands handcuffed securely behind his back. The ride to the police station took about one minute. Shortly after defendant got out of the vehicle, with his hands still handcuffed behind his back, an officer lifted the back seat cushion and found a quantity of crack cocaine measuring more than five inches in length and about one inch wide, and of sufficient depth that some quantities of crumbled crack cocaine were visible above the layer of fully powdered crack cocaine. The officers did not observe any traces of crack cocaine on defendant's clothing or hands and no glassine envelope or similar container customarily used for holding crack cocaine was found in the police car and defendant was not observed discarding such a container after leaving the police car. Thereafter, defendant was convicted of being a felon in possession of a firearm (count 1) and possession of a controlled substance (count 2). The Second Circuit reversed with respect to count 2. A jury could not reasonably find beyond a reasonable doubt that defendant, with his hands securely handcuffed behind his back, extracted a substantial quantity of crack cocaine from his person or clothing and wedged it into the space where the quantity was found, without leaving a trace of cocaine on his fingers or clothing. The remote possibility that he could have done so was diminished virtually to zero by the fact that no glassine envelope or other packaging material was found in the police vehicle or on defendant's person.

United States v Freeman, 740 F3d 808 (2d Cir. 2014)

COURT OF APPEALS

Defendant's Plea Vacated Despite Lack of Preservation

Defendant pled guilty to one count of third degree rape. The Appellate Division affirmed, concluding that defendant's sufficiency challenge was unpreserved and the preservation exception in *People v Lopez*, 71 NY2d 662, did not apply. The Court of Appeals reversed and vacated the plea. The factual allocution was not sufficient to support the conviction. Defendant pled guilty to a charge of third degree rape, which required that the complainant clearly expressed a lack of consent. Here, during the plea allocution, defendant indicated that the complainant did not give consent because she took too much medication and had a mental illness, not that she expressed lack of consent. Because an essential element of the crime was negated, the court was required to inquire further to ensure the plea was knowing and voluntary. This unusual scenario fell squarely within the exception in *Lopez*.

People v Worden, 22 NY3d 982 (2013)

People Failed to Meet Burden of Showing Exigent Circumstances

While police officers were responding to a 911 caller's report of a burglary in a fifth-floor apartment, they observed defendant and a man coming into the lobby of the building from a stairwell. The building superintendent pointed at defendant and her companion and made a face in a manner one of the officers interpreted as a request to stop them, though the building superintendent gave no indication they had a weapon. One of the officers questioned defendant to find out what she was doing and if she was trespassing. Defendant gave contradictory answers and could provide neither names nor apartment numbers associated with her answers. One of the officers approached defendant to arrest her for trespassing and another officer removed from defendant's shoulder a large purse, which appeared to the officer to be heavy. The officer opened the purse and found a loaded handgun. Defendant was arrested. The trial court denied defendant's suppression motion, ruling that the search of defendant's purse was justified for safety reasons. The court determined that the purse was not in the police's exclusive control at the time of the search and that the superintendent's gestures suggested that defendant was connected to the burglary. Defendant was convicted after trial. The Appellate Division affirmed, concluding, among other things, that the surrounding circumstances supported a reasonable belief in the existence of an exigency justifying a search of the purse, even though the officers did not explicitly testify that they were afraid for their safety. The Court of Appeals reversed. The People failed to meet their burden with respect to the exigency requirement. Although an officer need not affirmatively testify regarding concerns of safety to establish exigency, such apprehension must be objectively reasonable. Here, the detention and arrest occurred with at least four, and possibly as many as eight, police officers present. Defendant was cooperative and offered no resistance to the removal of her handbag, the ensuing frisk or when she was handcuffed. The unremarkable fact that the purse was heavy was insufficient, on its own, to support a reasonable belief that it contained a weapon. Further, the superintendent's gestures bore no indicia that defendant was armed. The fact that the police were responding to a radio run for burglary did not translate to exigency, in light of the fact that there was nothing connecting defendant or her companion to the burglary. The dissent would have affirmed based upon the Court's limited review whether there was record support of the determination of the lower courts.

People v Jimenez, __ NY3d __ (2014)

APPELLATE DIVISIONS

ADOPTION

Respondent's Consent Not Required For Adoption of Children

Family Court, upon a fact-finding determination that respondent father's consent was not required for the adoption of the subject children and, in the alternative, that respondent permanently neglected the children, terminated his parental rights and committed custody of the children to petitioner agency for the purpose of adoption. The Appellate Division affirmed. The record supported the court's finding that respondent's consent was not required for the adoption (*see* Domestic Relations Law § 111 [1] [d], [e]). Respondent, who did not live with the children's mother during the relevant time period, admitted that he made no payment towards the support of the children. His small gifts and the occasional meals he gave them were insufficient to constitute support. Respondent also permanently neglected the children. The agency made numerous referrals, but respondent refused them, saying that he had completed services in the past in connection with proceedings to terminate his parental rights to his two other children.

Matter of Jessey Andrews S., 110 AD3d 489 (1st Dept 2013)

Respondent's Consent Not Required For Adoption of Children

Family Court, after a fact-finding hearing, determined that respondent father was a notice father whose consent was not required for the adoption of the subject child. The Appellate Division affirmed. The record supported the court's finding that respondent had not provided a fair and reasonable sum toward the child's support, although he had the means, and that he did not regularly communicate with the child. Respondent's incarceration did not absolve him of these parental obligations and his testimony concerning previous support provided to the child was not consistent.

Matter of Lynik Jomae E., 112 AD3d 513 (1st Dept 2013)

CENTRAL REGISTER

Court Erred in Granting Petitioner's Motion For Summary Judgment

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

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

CHILD ABUSE AND NEGLECT

Neglect Finding And Orders of Protection on Behalf of Children Against Mother's Former Boyfriend Affirmed

Family Court, upon a fact-finding determination that respondent neglected the subject children, issued orders of protection directing respondent to stay away from the children until their eighteenth birthdays. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that the respondent neglected the children by perpetrating acts of domestic violence against the mother in their presence. The children observed respondent and the mother fighting on several occasions, and saw respondent strike the mother in the head and choke her, which caused the children to be upset and frightened. The record also showed that respondent forced one of the children to watch a pornographic movie, and threatened him with a "fake" gun that looked real if the child told his mother about the movie. There also was evidence about other instances of violence and inappropriate conduct toward the children. Respondent was a person legally responsible for the children. He

resided in the household as the mother's boyfriend for a period of nine months, picked the children up from school and cared for them during the day and described himself as a "father figure."

Matter of Jayline R., 109 AD3d 419 (1st Dept 2013)

Extensive History of Domestic Violence Supported Neglect Finding

Family Court found that respondent mother neglected her child. The Appellate Division affirmed. The record showed that there was an extensive history of domestic violence between the mother and father, including an incident where the father broke down a door and hit the mother in front of the child, causing the child to tell the father to "stop." There also was unrefuted evidence that the mother repeatedly exposed the child to the risk of witnessing violence by allowing the father to visit or reside with them, despite an order of protection against him. The child's out-of-court statements were corroborated by the mother's out-of-court statements and a domestic incident report.

Matter of Diamond Tyneshia B., 109 AD3d 740 (1st Dept 2013)

Neglect Finding Based on Child's Exposure to Sexually Explicit Material Affirmed

Family Court determined that respondent mother neglected her child and placed the child in the custody of the Commissioner of Social Services until the completion of the next permanency hearing. The Appellate Division affirmed. The findings of neglect, based upon the child's exposure to sexually explicit material and failure to provide appropriate care and supervision by refusing to take steps to protect the child, were supported by a preponderance of the evidence. The child's statements to investigators that she watched pornographic DVDs with the mother was adequately corroborated by the psychologist's opinion that a child would not exhibit the extreme sexualized behavior at issue, without having either learned, seen, or experienced it.

Matter of Janiyah T., 110 AD3d 416 (1st Dept 2013)

Finding of Neglect Against Mother Vacated

Family Court found that respondent mother neglected her child. The Appellate Division reversed, vacated the finding of neglect, and dismissed the petition. Respondent was unaware that she was pregnant until the moment she gave birth. She then went to the hospital to seek treatment for the newborn and made statements that led to a police investigation. The police determined that there was no evidence warranting police action. While the mother's judgment was impaired immediately after the unexpected birth, she provided a reasonable explanation based on her weight and medical history for not realizing she was pregnant and immediately sought medical treatment for the newborn following delivery. Thus, the facts were insufficient to support a finding that if the child were released to the mother there would be a substantial probability of neglect.

Matter of Destiny M., 110 AD3d 438 (1st Dept 2013)

Father Neglected Children by Using Drugs in Home, Nonparticipation in Treatment Program, and Expelling Mother and Children From Home

Family Court determined that respondent father neglected his children. The Appellate Division affirmed. The record supported the court's credibility determinations made in connection with its findings that the father neglected the children by using drugs in the home, by not participating in any drug rehabilitation program, and by expelling the mother and children from the home on several occasions. The father also admitted to at least one act of domestic violence against the mother. Even if the children were not in the home when respondent chocked the mother, his other admissions concerning other neglectful conduct supported the court's finding.

Matter of Joel S., 110 AD3d 442 (1st Dept 2013)

Court Properly Dismissed Petition Alleging Stepfather Sexually Abused Child

Family Court dismissed the petition alleging stepfather's sexual abuse and mother and stepfather's neglect of the subject child. The Appellate Division affirmed. Petitioner agency failed to demonstrate by a

preponderance of the evidence that respondent sexually abused the child. The child's testimony was inconsistent, vague, and lacking in specific details and, therefore, did not meet the required threshold of reliability and could not provide corroboration for the child's previous out-of-court statements. The record also failed to show that respondents neglected the child. They may not have reacted appropriately to every difficulty that arose involving the child, but the preponderance of the evidence did not show that they failed to exercise the statutory minimum degree of care.

Matter of Alyanna C., 110 AD3d 458 (1st Dept 2013)

Mother Derivatively Neglected Child

Family Court determined that respondent mother derivatively neglected the subject child. The Appellate Division affirmed. The finding was supported by a preponderance of the evidence. Prior neglect findings and a dispositional order placing the mother's two other young children with the mother's aunt were entered less than one year before the filing of the instant petition. Although the mother was no longer in an abusive relationship and had a temporary home with her grandmother, the evidence indicated that the underlying conditions that resulted in the prior neglect findings - lack of an income source, medical care, and stable housing - continued to exist. That the grandmother agreed to house and support the mother and her child "for a while" did not warrant a different conclusion.

Matter of Niya Kaylee S., 110 AD3d 460 (1st Dept 2013)

Mother Neglected Special Needs Son And Derivatively Neglected Daughter

Family Court determined that respondent mother neglected her son and derivatively neglected her daughter. The Appellate Division affirmed. The court's finding of neglect with respect to respondent's special needs son was supported by a preponderance of the evidence. There was no need to conform the petition to the evidence because the petition alleged that the mother failed to exercise a minimum degree of care toward her son, including excessive corporal punishment. The evidence of the single inappropriate actions of the mother at a parent-teacher conference was legally sufficient for the finding of neglect because it showed her judgment was strongly impaired and exposed the child to a risk of substantial harm. The record also supported the finding of derivative neglect inasmuch as the mother's behavior towards her son demonstrated a sufficiently faulty understanding of her parental duties to warrant an inference of an ongoing danger to her daughter.

Matter of Cevon W., 110 AD3d 542 (1st Dept 2013)

Respondent Neglected Children by Engaging in Acts of Domestic Violence

Family Court determined that respondent father neglected his children. The Appellate Division affirmed.
A preponderance of the evidence demonstrated that respondent neglected the children by engaging in acts of domestic violence upon the older child, the child's mother, and his older sister, while in the youngest child's presence, which caused the older child to be so frightened that he had to be rushed to the hospital after he hyperventilated. The older child's out-of-court statements were corroborated by his testimony, his sister's testimony, and medical records. The record also supported the finding of derivative neglect of the youngest child inasmuch as it established that respondent suffered from such a impaired level of parental judgment as to create a substantial risk of harm for any child in his custody.

Matter of Shakil G., 110 AD3d 572 (1st Dept 2013)

Mother Did Not Default: Orders Reversed

Family Court determined that respondent, a person legally responsible for the subject children, abused one child and derivatively abused another child, and directed respondent to comply with the terms and conditions in an order of protection. The Appellate Division reversed and remitted for a new fact-finding hearing. Respondent's failure to appear at the scheduled hearing dates did not constitute a default inasmuch as her counsel was present, stated that she wished to proceed, and affirmed that she had respondent's authorization to do so.

Matter of Trey C., 110 AD3d 575 (1st Dept 2013)

Respondent Abused Child by Bitting And Striking Him

Family Court determined that respondent abused the subject child and directed him to comply with an order of protection to say away from the child until the child's eighteenth birthday and to submit to a mental health evaluation if he sought to petition for any contact with the child. The Appellate Division affirmed. Respondent, who was the child's stepfather, was a person legally responsible for the child, despite the fact that he may have lived with the child for just eight days before the abuse was discovered. Petitioner demonstrated that respondent abused the child by a preponderance of the evidence, including respondent's guilty plea to a felony assault charge arising from the abuse. A police officer testified that respondent admitted that he and the mother had bitten the child on his arms and legs and that they struck the child. A doctor who examined the then two-year-old child after the abuse was discovered testified that the child had several contusions, lacerations, scratches, bite marks, internal injuries and several rib fractures, and that the bruises were probably no more than two weeks old and could not have been self-inflicted. Although the mother admitted that she was responsible for some of the child's injuries, respondent failed to provide a satisfactory explanation regarding how the child received the other injuries or demonstrate that he had not inflicted them. The court properly drew a negative inference against respondent for his failure to testify at the hearing, even if the criminal case against him was still pending.

Matter of Jonathan Kevin M., 110 AD3d 606 (1st Dept 2013)

Respondent Neglected Child by Leaving Child in Care of Unstable Mother

Family Court determined that respondent father neglected the subject child by leaving her in the care of the mother. The Appellate Division affirmed. Petitioner proved, by a preponderance of the evidence, that the father neglected the child by leaving her with her mother, who admitted to him that she was experiencing hallucinations and hearing voices for over a year, and who later threw the seven-week-old child to the pavement, after saying she saw a light in the sky and a chariot with a figure, which were signs that the child was possessed.

Matter of Lakshmi G., 110 AD3d 640 (1st Dept 2013)

Sexual Abuse Finding Supported By a Preponderance of the Evidence

Family Court determined that respondent father sexually abused one of his daughters, derivatively abused another daughter, and derivatively neglected his sons. The Appellate Division affirmed. The court's finding that the father sexually abused one of his daughters was supported by a preponderance of the evidence. The daughter's out-of-court statements to caseworkers that her father raped her on five occasions were corroborated by hospital records. Those records were properly certified and contained the requisite delegation of authority. The daughter also made statements to caseworkers that her father entered the bathroom while she was showering and told her to wash only her private parts. The daughter's statements were adequately corroborated by the statements that her siblings made to the caseworkers. The derivative findings of abuse of the other daughter and neglect of the sons also were supported by a preponderance of the evidence. The evidence of the father's multiple rapes of one of his daughters demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in his care. The derivative findings of abuse and neglect were further supported by evidence that some of the children were in the father's apartment when the rapes occurred. The father's claim was rejected that he was denied effective assistance of counsel. His counsel's failure to object to the admissibility of medical records did not prejudice him, because those records were not necessary to find, by a preponderance of the evidence, that he had abused one of his daughters.

Matter of Nyrie W., 111 AD3d 402 (1st Dept 2013)

Neglect Finding Based Upon Father's Inadequate Supervision and Guardianship Upheld

Family Court found that respondent father neglected his children and released them to the custody of their mother with six months of supervision by petitioner agency. The Appellate Division affirmed the finding of

neglect. The court's finding that the children were neglected based upon the father's inadequate supervision and guardianship was supported by a preponderance of the evidence, including a prior neglect finding and his plea in a criminal case arising from an incident in which the father admitted to threatening the mother with a fire extinguisher. The record showed that the father engaged in a pattern of domestic violence against the mother. The proximity of the children's bedroom to the physical and verbal fighting that occurred in the kitchen of the shelter where the family resided, placed the children in imminent risk of emotional and physical impairment.

Matter of Angie G., 111 AD3d 404 (1st Dept 2013)

Neglect Finding Based on Mother's Marijuana and Alcohol Use Affirmed

Family Court determined that respondent mother neglected the child and placed the child with petitioner until the completion of the next permanency hearing. The Appellate Division affirmed the finding of neglect. The finding of neglect against the mother was supported by a preponderance of the evidence. Although referred for substance abuse and mental health services, the mother failed to attend, citing a lack of substance abuse problem, notwithstanding her admission that she smoked marijuana, but "not all the time," in her daughter's presence, and drank to the point of blacking out on a recent occasion. Further, on that occasion, the mother became so intoxicated that she was psychiatrically hospitalized for an alcoholic induced mental disorder. A single incident in which a parent's judgment was strongly impaired and the child exposed to a risk of substantial harm could sustain a finding of neglect. The mother's contention was rejected that she did not neglect that child when she was using drugs or alcohol, because she provided proper supervision by leaving her daughter with others, including her maternal grandmother. The record indicated that the child was present on some occasions. Moreover, the maternal grandmother had a history of yearly psychiatric hospitalizations resulting from failure to take her medication. The agency also showed, by a preponderance of the evidence, that if the child was released to the mother, there would be a substantial probability of neglect that would place the child at risk, because the then 18-year-old mother testified that she was diagnosed with bipolar disorder at age 12 or 13, and ceased taking any medication to treat it. The record further established that the mother was hospitalized twice for suicide attempts. Because the consequences of the proceedings were temporary, the absence of a diagnosed condition did not preclude a finding of neglect, and expert testimony was not required.

Matter of Liarah H., 111 AD3d 514 (1st Dept 2013)

Record Supported Finding of Neglect and Derivative Neglect

In six related neglect proceedings, Family Court found that respondent mother neglected four of the subject children and derivatively neglected two of the subject children, and placed the children in the custody of the Commissioner of Social Services of the City of New York until the next permanency hearing. The Appellate Division affirmed the order of fact-finding and disposition insofar as it was reviewed. The record supported the finding of excessive corporal punishment. The out-of-court statements of two siblings to the caseworker that they were struck on more than one occasion by the mother and/or father were corroborated, among other things, by the caseworker's personal observation of an injury sustained by one of the children and by the confirmation given by three other siblings, as well as by the children's cross-corroborating statements. Further, the court properly took judicial notice of the prior neglect adjudications against the mother and father based upon the use of excessive corporal punishment. The court's determination that the father lacked credibility when he testified that he never hit the children was entitled to deference. The record likewise supported the determination that two of the subject children were neglected as a result of the mother's failure to exercise a minimum degree of care in supplying them with adequate food, and in providing one child with proper supervision or guardianship. The finding of derivative neglect also was supported by the record.

Matter of Arique D., 111 AD3d 625 (1st Dept 2013)

No Appeal Lies From an Order Entered Upon Consent

Family Court found that respondent father neglected one of the subject children and derivatively neglected another, and released the subject children, upon consent, to the custody of the nonrespondent mother with supervision by the Administration for Children's Services. The Appellate Division affirmed the finding of neglect and derivative neglect and dismissed the appeal from that part of the order of disposition as released the children, upon consent, to the custody of the mother under the supervision of ACS because no appeal lies from an order entered upon consent of the appealing party. Moreover, that portion of the order of disposition had been rendered academic. The court's findings of fact were supported by a preponderance of the credible evidence.

Matter of Eunice D., 111 AD3d 627 (1st Dept 2013)

Respondent Unable to Explain Child's Injuries

Family Court determined that respondent mother abused her daughter and derivatively neglected the child's two siblings. The Appellate Division affirmed. The determination that respondent abused her eight-month-old non-ambulatory daughter was supported by a preponderance of the evidence, including the undisputed evidence that the child sustained two skull fractures and a fracture of the humerus that ordinarily would not have occurred absent acts of omission by respondent and her mother, the child's only caregivers. Respondent failed to provide a reasonable excuse for the child's injuries. Her explanation that the child fell in her crib and hit her head on a toy was not sufficient to explain the acute skull fracture, the humerus fracture, or the older skull fracture. The mother's abuse of her daughter warranted the finding of derivative neglect of the other two children.

Matter of Radames S., 112 AD3d 433 (1st Dept 2013)

Respondent Inflicted Excessive Corporal Punishment on Children

Family Court, upon a fact finding of neglect, released the children to respondent mother with agency supervision. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence, which showed that respondent inflicted excessive corporal punishment on the children by striking the older son in the mouth with her fist, causing a one-half-inch cut to his lip and swelling to his face, and striking her younger son on the left side of his forehead with a wooden candlestick holder, causing a one inch gash-like injury. The children's out-of-court statements were corroborated by the teacher's and caseworker's testimony about their own observations and by photographs depicting the injuries. The fact that the children recanted their initial out-of-court statements did not undermine their credibility - the record showed that the children recanted because they wanted to prevent their mother from having a second finding of neglect against her. Contrary to the AFC's contention, the court did not improperly rely on the prior neglect finding against respondent and, in any event, the two incidents were not separate and isolated occurrences, but instead showed a pattern where respondent became angry and lashed out at the children. The teacher's and caseworker's testimony did not support the AFC's contention that the teacher and caseworker grilled the children until they said respondent hurt them.

Matter of Harrhae Y., 112 AD3d 512 (1st Dept 2013)

Respondent Failed to Exercise Minimal Degree of Care to Ensure Mother Did Not Use Drugs During Pregnancy

Family Court, upon a fact-finding determination of neglect, placed the subject child with the agency until completion of the next permanency hearing. The Appellate Division affirmed. Petitioner proved, by a preponderance of the evidence, that the father neglected the child, in that he knew or should have known of the mother's drug use and failed to exercise a minimum degree of care to ensure that she did not abuse drugs during pregnancy. Shortly before the mother was due to give birth, respondent placed her in the home of a friend who he knew was a drug user and who was visited by others who used alcohol and drugs. Although this residence was a last resort because the couple was homeless, the environment apparently contributed to the mother's relapse during pregnancy. The court correctly reasoned that respondent's intermittent incarceration and resulting separation from the mother

contributed to his failure to ensure that the mother did not use drugs.

Matter of Orlando R., 112 AD3d 525 (1st Dept 2013)

Respondent's Account of Child's Injuries Not Corroborated by Evidence

Family Court, after a fact finding hearing, determined that respondent mother abused her daughter. The Appellate Division affirmed. The child's out-of-court statements that her mother hit and choked her with a belt were corroborated by the medical records and the testimony of an expert in pediatric medicine, who, after evaluating the child and reviewing her medical records, concluded that she had been abused. The child's statements also were corroborated by the caseworker's testimony about marks on the child. Respondent's account of the injuries was not corroborated by the evidence and was not consistent with findings in the child's medical records.

Matter of Francini C., 112 AD3d 532 (1st Dept 2013)

Finding of Derivative Abuse and Neglect Affirmed

Family Court determined that respondent mother derivatively abused and neglected the subject children. The Appellate Division affirmed. The record demonstrated that there had been no change of circumstances since the previous finding that respondent severely and repeatedly abused the subject children's older sibling. Although respondent took anger management and parenting classes while she was incarcerated for abusing the older sibling, the caseworker's unrefuted testimony demonstrated that respondent never acknowledged what she did to the older sibling and that her actions left that child brain damaged, thus supporting the conclusion that respondent had a faulty understanding of the duties of parenthood sufficient to infer an ongoing danger to the subject children. Given the severity and nature of the abuse of the older sibling, the finding of derivative abuse with respect to the subject children was proper, even without direct evidence that respondent actually abused them. That the subject children had not been born at the time respondent inflicted the abuse on the older sibling did not undermine the finding. Respondent's contention that the record contained no evidence that she refused to acknowledge the injuries she inflicted on the older sibling was without merit because respondent was present at the fact-finding hearing and she declined to testify. Thus, the court could infer that respondent never acknowledged the abuse.

Matter of Joseph P., 112 AD3d 553 (1st Dept 2013)

Record Supported Finding of Neglect Based upon Excessive Corporal Punishment

Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect (*see* PL § 35.10; FCA § 1012 [f] [I] [B]). The Family Court's finding of neglect as to one child, based upon the mother's use of excessive corporal punishment, was supported by a preponderance of the evidence (*see* FCA §§ 1012 [f] [I] [B]; 1046 [b] [I]). The evidence demonstrated that the mother struck the then-eight-year-old with a belt numerous times, causing marks on her back and arms. The evidence, which established that the mother inflicted excessive corporal punishment on that child, was sufficient to support the Family Court's determination that the other two children were derivatively neglected. Contrary to the contentions of the mother and the attorney for the children, the Family Court did not improvidently exercise its discretion in denying the mother's motion to dismiss the petitions pursuant to FCA § 1051 (c) on the ground that the aid of the court was not required. Despite the mother's successful completion of parental skills training and anger management counseling, the court properly found that some type of supervision was appropriate, especially since the subject incident was not isolated and the mother had not yet completed individual counseling.

Matter of Matthew M., 109 AD3d 472 (2d Dept 2013)

Father Failed to Provide Reasonable and Adequate Explanation for Child's Injuries

The father argued that the evidence at the fact-finding hearing was insufficient to support the Family Court's finding that he abused his child. The petitioner's medical experts opined that the rib fractures suffered by

the child had been inflicted intentionally, and the record revealed that the child was in the parents' care when he suffered the fractures. Accordingly, the petitioner established a prima facie case of child abuse, and the burden shifted to the father to rebut the evidence of his culpability (*see* FCA § 1046[a][ii]). The father failed to provide a reasonable and adequate explanation for the child's injuries. Moreover, contrary to the father's contention, the Family Court's assessment of the conflicting expert testimony was supported by the record. Orders of fact-finding and disposition affirmed.

Matter of Robert A., 109 AD3d 611 (2d Dept 2013)

Full Fact-finding Hearing on Petition Required

The Family Court improvidently exercised its discretion in granting the mother's application for the return of the subject child during the pendency of a neglect proceeding, notwithstanding that prior findings of neglect against the mother concerning the child's siblings had been reversed. The Family Court should have, upon renewal, denied the mother's application for the return of the subject child, pending a full fact-finding hearing on the petition (*see* FCA § 1028). The order was reversed, the mother’s application for the return of the child was denied, and the matter was remitted for further proceedings, including the expeditious completion of the fact-finding hearing on the petition.

Matter of Alexi R.C., 109 AD3d 819 (2d Dept 2013)

Court Erred in Granting Petitioner's Motion for Summary Judgment

Here, in support of its motion for summary judgment on the issue of neglect, the petitioner included the evidence submitted at a hearing held pursuant to FCA § 1028. At that hearing, the father testified and submitted other evidence on his behalf. Since the evidence submitted by the petitioner revealed questions of fact regarding the issue of neglect, the petitioner failed to establish its prima facie entitlement to judgment as a matter of law. Accordingly, the Family Court erred in granting the petitioner's motion for summary judgment on the issue of neglect. Thus, the matter was remitted to the Family Court for further proceedings on the petitions, including a fact-finding hearing, if warranted.

Matter of Brandie B., 109 AD3d 987 (2d Dept 2013)

Mother Failed to Maintain Contact with Children or Comply with Service Plan Despite Diligent Efforts by Petitioner

The Family Court properly found that the mother permanently neglected the subject children (*see* SSL § 384-b [7] [a]). Contrary to the mother's contention, the petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship by, inter alia, scheduling and providing transportation for visitation, developing a service plan, making referrals for parenting skills and anger management classes, making referrals for mental health evaluations, encouraging the mother to comply with the service plan, and warning the mother of the consequences of noncompliance (*see* SSL § 384-b [7] [f]). The petitioner also established that, despite its diligent efforts, the mother failed, for a period of more than one year, to maintain contact with or plan for the future of the children, that she failed to visit consistently and otherwise failed to comply with the service plan (*see* SSL § 384-b [7] [c]). Moreover, the Family Court properly determined that termination of the mother's parental rights, rather than the entry of a suspended judgment, was in the children's best interests (*see* FCA § 631).

Matter of Precious D.A., 110 AD3d 789 (2d Dept 2013)

Child’s Testimony Regarding Mother’s Knowledge of Sexual Abuse Against Child by Mother’s Boyfriend Was Sufficiently Corroborated

The findings of abuse were supported by a preponderance of the evidence (*see* FCA § 1046 [b] [I]). The evidence showed that, after the mother's boyfriend shot her in January 2008, an order of protection was issued in favor of the mother and the subject children and against the boyfriend, which ordered him to stay away from them. The mother testified that, notwithstanding the order of protection, she allowed the boyfriend back into her home. A worker for the Administration for Children's Services testified that the child, who was eight years old when the incidents occurred, stated to a detective that, in approximately February 2009, while the order of protection was still in effect, the mother's boyfriend

committed various acts of sexual abuse upon her on numerous occasions. The worker also testified that the child stated to the detective that she informed her mother that such abuse was occurring, and her mother did nothing to stop it. The child's statements were corroborated by evidence that the boyfriend pleaded guilty in a criminal proceeding related to the incidents to endangering the welfare of a child (*see* FCA § 1046 [a] [vi]). Under the circumstances of this case, the mother's abuse of the child demonstrated a flawed understanding of a parent's duties and showed impaired parental judgment sufficient to support findings of derivative abuse (*see* FCA § 1046 [a] [I]). However, the Family Court erred in issuing the orders of disposition without first conducting a dispositional hearing (*see* FCA §§ 1045, 1047 [a]; 1052 [a]). The record showed that the Family Court did not allow the mother to testify, failed to adduce any evidence from the father, to whom it released two of the children, and conducted no inquiry into dispositional alternatives before making its determination.

Matter of Monique M., 110 AD3d 814 (2d Dept 2013)

Respondent, on Cross-examination of Child, Not Permitted to Present Evidence of Bank Checks Allegedly Received by Child

The determination by the Family Court that the respondent sexually abused the child, J.C., was supported by a preponderance of the evidence (*see* FCA § 1046 [b]). In light of the conflicting testimony presented at the fact-finding hearing, the factual findings of the Family Court turned largely on its assessment of the witnesses' credibility, which was entitled to great weight. The Appellate Division could find no basis in the record to disturb the Family Court's assessment of the witnesses' credibility. In addition, the nature of the sexual abuse, its duration, and the circumstances of its commission, demonstrated a fundamental defect in the respondent's understanding of the duties of parenthood, and his lack of self-control created a substantial risk of harm to any child in his care. Accordingly, the Family Court's determination that the respondent derivatively abused the other children in the home was supported by a preponderance of the evidence. Contrary to the respondent's contention, he was not entitled on cross-examination of the child, J.C., to present evidence of bank checks allegedly received by J.C. It is impermissible for a party cross-examining a witness to introduce extrinsic documentary evidence to contradict a witness' answers concerning collateral matters solely for purpose of impeaching that witness' credibility. Here, the evidence which respondent sought to admit was properly excluded as too remote and speculative. As to the respondent's contention that the Family Court erred in excluding him from the courtroom during the testimony of the child, J.C., the Family Court reasonably concluded that J.C. would suffer emotional trauma if compelled to testify in front of the respondent and, after properly weighing the respective rights and interests of the parties, thereafter providently exercised its discretion in permitting her to testify via a two-way closed-circuit television set-up.

Matter of Michael U., 110 AD3d 821 (2d Dept 2013)

Mother Presented Sufficient Evidence to Rebut Petitioner's Case

The petitioner appealed from an order of fact-finding and disposition of the Family Court, which, after a hearing, found that the mother did not abuse the child S. and did not derivatively abuse S.'s siblings. Contrary to the petitioner's contention, the mother presented sufficient evidence to rebut the petitioner's case, through the testimony of her expert witness, indicating that S. sustained a brain injury at a time when the petitioner had not established that she was in the exclusive care of the mother, and opining that S.'s death could have resulted from accidental asphyxiation. Thus, the petitioner failed to establish, by a preponderance of the evidence, that the mother abused S. and derivatively abused S.'s siblings.

Matter of David T.-C., 110 AD3d 1084 (2d Dept 2013)

Evidence Established a Prima Facie Case of Neglect

Contrary to the mother's contention, the Family Court's finding of neglect was supported by a preponderance of the evidence (*see* FCA §§ 1012 [f] [i] [B]; 1046 [a] [iii]; [b] [i]). While only one positive drug test result was referenced in the testimony at the fact-finding hearing, other evidence was adduced of the mother's repeated misuse of drugs without regular participation in a rehabilitative program. This evidence established a

prima facie case of neglect and, therefore, neither actual impairment of the children's physical, mental, or emotional conditions, nor specific risk of impairment, needed to be established.

Matter of Darrell W., 110 AD3d 1088 (2d Dept 2013)

Children's Out-of-court Statements Were Corroborated

The out-of-court statements of two subject children, who were siblings, to the caseworker that they were struck on more than one occasion by the mother and/or the father were corroborated (*see* FCA § 1046 [a] [vi]), inter alia, by the caseworker's personal observation of an injury sustained by one of the subject children and by confirmation given by their other siblings, as well as by their own cross-corroborating statements. Further, the Family Court properly took judicial notice of the prior neglect adjudications against the mother and the father based on the use of excessive corporal punishment (*see* FCA § 1046 [a] [i]). Moreover, the Family Court's determination that the father lacked credibility when he testified that he never hit the children was entitled to deference. In addition to the finding of excessive corporal punishment, the record likewise supported the finding that the subject children were neglected as a result of the mother's failure to exercise a minimum degree of care in supplying them with adequate food (*see* FCA § 1012 [f] [i] [A]), and in providing one of the subject children with proper supervision or guardianship (*see* FCA §1012 [f] [i] [B]). The record also supported the finding that two of the three other siblings were derivatively neglected.

Matter of Arique D., 111 AD3d 625 (2d Dept 2013)

Different County Attorney Referee Was Required to Make a New Determination Regarding the Permanency Goal for Child

In a December 19, 2012, decision and order on the mother's appeals from certain determinations made by a court attorney referee following a May 4, 2012, permanency hearing, the Appellate Division reversed the orders appealed from, granted the mother's motion to vacate the determinations on the ground that she was denied her rights to counsel and due process, and remitted the matter to the Family Court for a new hearing before a different court attorney referee and a new determination regarding the permanency goal for the child, K.N.C. Before the decision and order was released, however, the same court attorney referee issued an order dated November 15, 2012, approving the permanency goal of adoption for the child, K.N.C., and thereafter, the mother appealed. Since the November 15, 2012, order was decided by the same court attorney referee who issued the orders that were reversed on the prior appeal, and who was removed from the case by the December 19, 2012, decision and order based on her denial of the mother's rights to counsel and due process, the November 15, 2012 order was reversed and the matter was remitted to the Family Court, for further proceedings pursuant to the Appellate Division's prior determination.

Matter of Dashawn N., 111 AD3d 640 (2d Dept 2013)

Record Supported Finding of Neglect Based on Excessive Corporal Punishment

The Family Court's finding that the mother neglected her child based on excessive corporal punishment, was supported by a preponderance of the evidence (*see* FCA § 1012 [f] [i] [B]). The evidence presented at the fact-finding hearing included the testimony of a caseworker who interviewed the child and observed welts and scars consistent with being hit by a cord or a belt, and the mother's testimony in which she admitted hitting the child with a belt, but claimed to do so for the purpose of disciplining him. In addition, the child's statements to the caseworker that the mother regularly hit him with a cord or belt were corroborated by the evidence. Contrary to the mother's contentions, photographs of the child's bruises taken by an agency caseworker, and certified hospital records of the child's medical examination following this incident, were properly admitted in evidence (*see* FCA § 1046 [a] [iv]).

Matter of Jahani K., 111 AD3d 832 (2d Dept 2013)

Scrivener's Error in Identifying Nonexistant Section of the Penal Law in Fact-finding Order Had No Effect on Finding of Abuse

The Family Court's finding that the respondent abused his daughter by sexually abusing and forcibly touching her was supported by a preponderance of the evidence

(*see* FCA §§ 1012[e][iii]; 1046[b] [I]; PL §§ 130.00[3]; 130.52, 130.55, 130.60). In light of the conflicting testimony presented at the fact-finding hearing, the factual findings of the Family Court turned largely on its assessment of witnesses' credibility. The Appellate Division could find no basis in the record to disturb this assessment. Moreover, since the petitioner established by a preponderance of the evidence that the respondent committed the offenses of sexual abuse and forcible touching against the child as defined in PL §§ 130.52, 130.55, and 130.60, the Family Court's scrivener's error in also identifying a nonexistent section of the Penal Law in the order of fact-finding had no effect on the finding of abuse (*see* FCA § 1012 [e][iii]).

Matter of Joshua P., 111 AD3d 836 (2d Dept 2013)

Mother Admitted to Using Cocaine on More than One Occasion

By submitting proof of the mother's repeated use of cocaine, the petitioner established a prima facie case of neglect pursuant to the presumption contained in Family Court Act § 1046 (a) (iii). In this regard, the presumption operates to eliminate a requirement of specific parental conduct vis-à-vis the child and neither actual impairment of the child's physical, mental, or emotional condition nor specific risk of impairment need be established. The mother did not rebut this presumption, instead admitting to using cocaine on more than one occasion while she was the children's custodial parent. Accordingly, the Family Court properly found that the mother neglected the subject children.

Matter of Angela M., 111 AD3d 940 (2d Dept 2013)

Family Court Properly Credited Mother's Testimony Regarding Alcohol-related Incident Involving Father

The children's mother testified at the fact-finding hearing that during the children's visitation with the father on a certain date, she observed that his speech was slurred, his eyes were bloodshot, he was unsteady on his feet, and he smelled of alcohol. Evidence was also adduced that the father had multiple alcohol-related arrests and had misused alcohol in the children's presence. Contrary to the father's contention, the Family Court properly credited the mother's testimony regarding the alcohol-related incident involving the father, and properly found that the petitioner established by a preponderance of the evidence that he had neglected the subject children by his misuse of alcohol which impaired, or was in danger of impairing, the children's physical, mental, or emotional condition. Accordingly, the Family Court properly found that the father neglected the subject children and directed, inter alia, that the father attend a parenting skills program and undergo a substance abuse evaluation.

Matter of Denis F., Jr., 112 AD3d 626 (2d Dept 2013)

Father Failed to Plan for Child's Future by, Inter Alia, Failing to Attend and Complete Drug Treatment Programs and Complete a Mental Health Evaluation

The Family Court properly found that the father permanently neglected the subject child. The petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [7]). These efforts included facilitating visitation, providing the father with referrals for drug treatment programs and mental health evaluations and counseling, and repeatedly advising the father of the need to attend and complete such programs and submit to random drug screenings. Despite these efforts, the father failed to plan for the child's future by, inter alia, failing to cooperate with drug screenings, failing to complete a mental health evaluation and, following a court-ordered hair follicle drug test, testing positive for cocaine. Moreover, based on the evidence adduced at the dispositional hearing, the Family Court properly determined that it was in the best interests of the child to terminate the father's parental rights.

Matter of Corey S., 112 AD3d 641 (2d Dept 2013)

Challenged Determination Which Denied Petitioner's Request to Expunge Sealed, Unfounded Reports Was Not Arbitrary or Capricious

In a proceeding pursuant to CPLR article 78 to review a determination of the respondent New York State Office of Children and Family Services, which denied the petitioner's request to expunge sealed, unfounded

reports maintained by the New York State Central Register of Child Abuse and Maltreatment, the petitioner appealed from a judgment of the Supreme Court which denied the petition and, in effect, dismissed the proceeding. The Appellate Division agreed with the petitioner's contention, which was conceded to by the respondent, that the Supreme Court erred in denying the petition based on a failure to exhaust administrative remedies, since the petitioner was not entitled to a hearing with regard to his request to have the subject unfounded reports expunged (*see* SSL § 422 [5] [c]). Nonetheless, the Appellate Division affirmed the judgment denying the petition and, in effect, dismissing the proceeding, because the petitioner, although afforded a full opportunity to do so, failed to present clear and convincing written evidence to the respondent affirmatively refuting the allegations in the reports (*see* SSL § 422 [5] [c]). Accordingly, the challenged determination was not arbitrary and capricious. Judgment affirmed.

Matter of Williamson v New York State Off. of Children & Family Servs., 112 AD3d 730 (2d Dept 2013)

Parents' Application to Parole Subject Child to Their Custody Should Have Been Denied; Order Reversed

The petitioner appealed from an order of the Family Court, which, after a hearing pursuant to FCA § 1027, granted the parents' application to parole the subject child to their custody under the petitioner's supervision, pending determination of the petition. Shortly thereafter, by decision and order on motion of the Appellate Division, enforcement of the order was stayed pending hearing and determination of the appeal. Upon a review of the record, the Appellate Division concluded that in light of, inter alia, the subject child's age and the documented history of the parents' drug use, the child's life or health would have ben at imminent risk if he were released to the custody and care of his parents during the pendency of the proceeding (*see* FCA § 1027 [a], [b], [d]). Moreover, the evidence adduced at the hearing demonstrated that, during the pendency of the proceeding, the imminent risk to the child's life or health could not be mitigated by reasonable efforts short of removal. Accordingly, the order was reversed and the matter was remitted to the Family Court for further proceedings.

Matter of Arthur G., 112 AD3d 925 (2d Dept 2013)

Sound and Substantial Basis in the Record to Support Neglect Determination

Family Court removed two children from their pre-adoptive parents (also the biological uncle and aunt of the children), determined that respondents had neglected one of the children, their then 9-year-old nephew, and placed both children in the custody of DSS. The Appellate Division affirmed. A hearing on the removal of both children was not necessary since DSS's motion to remove the children was made pursuant to the original permanent neglect order, under SSL §384-b, and FCA article 6, part 1, which allowed the court to modify or extend an order of placement if the relative with whom the child was placed failed to institute an adoption proceeding within 6 months after entry of such placement order. In this case, both children had been placed with respondents two-and-a-half years earlier and respondents had not initiated adoption proceedings. There was sound and substantial basis in the record to support the court's finding that respondents had neglected the nephew by using inappropriate methods to discipline him, and their lack of insight into his special needs and disorders. The nephew, who was diagnosed with post-traumatic stress disorder and pervasive development disorder, was described by the psychotherapist and his teacher as being "emotionally fragile". The respondents punished this child by, among other things, restraining him for extended periods, spanking him, forcing him into cold showers and binding his hands and mouth with duct tape. The psychotherapist testified that such disciplinary methods would have adverse effects on a child with such disorders and exacerbate the trauma that was already there. Although the uncle testified he used cool not cold water when he showered the nephew and the showers were meant to calm the child down after his tantrums, the Appellate Division deferred to Family Court's credibility determinations. Furthermore, testimony revealed that respondents failed to fully understand or acknowledge the child's special needs. They turned down an offer from the child's teacher to enroll the child in necessary services because they felt he did not need it. It was in the child's best interests to remain in the continued custody of DSS. Since the niece had not been adjudicated as being neglected and her adoption had been finalized, the matters concerning

her aspect of the case were moot.

Matter of Victoria XX., 110 AD3d 1168 (3d Dept 2013)

Court Improperly Delegated Its Authority

Family Court found that respondent father had neglected the subject child. The Appellate Division determined there was a sound and substantial basis in the record for the finding of neglect. The agency established that respondent hit the child's face, causing her lip to bleed and swell, and he regularly abused marihuana and was under the influence of marihuana during periods of visitation with the child. However, Family Court erred in issuing an order prohibiting visitation between respondent and the child except as therapeutically recommended by a therapist. By requiring a therapist's recommendation as a prerequisite for any visitation between respondent and the child, the court improperly delegated its authority to make a determination as to whether visitation was in the child's best interests.

Matter of Alisia M., 110 AD3d 1186 (3d Dept 2013)

Family Court Has Non-Delegable Duty to Determine Respondents' Access to Child and Whether it is in the Child's Best Interests

Family Court found respondent parents had neglected the subject child. After a dispositional hearing, and pursuant to a custody petition filed by the aunt, the court awarded respondents and the aunt joint legal custody with primary, physical custody to the aunt and visitation to respondents. The Appellate Division affirmed the neglect and custody orders but determined the court had improperly delegated its responsibility to the aunt to decide frequency of visits between the parents and the child. Respondent father had a prior neglect finding based on his mental health and alcohol/drug abuse issues. Despite the prior adjudication, he continued to abuse alcohol to such a level that it impaired his ability to make appropriate parental judgments and provide proper care for the subject child. The father acknowledged he used alcohol at least twice when the child was in his custody and his testimony as to how often this occurred was contradictory. He admitted using marihuana during the relevant time period as well, and he continued to suffer from a bipolar disorder. A mental health counselor testified that although the father attended all counseling sessions he was only doing so because he was court ordered to do so. The counselor testified the father had made little or no progress and had gained no insight into how his alcohol use impacted his life or his family's life. It was in the child's best interests to be placed with the aunt. Pursuant to FCA §1055-b, the statutory standard for such placement is based on the child's best interests. The child and aunt had developed a close bond, the child's financial needs would be improved if she lived with the aunt, she would be able to continue in her school and continue her previously established bonds with extended family and friends. However, the aunt should not have been given sole discretion in determining frequency of visits between respondents and child. The record showed the parents' and the aunt had a strained relationship and there was lack of communication between the parties. The court had a non-delegable duty to determine respondents' access to the child and whether such access was in the child's best interests.

Matter of Nicolette I., 110 AD3d 1250 (3d Dept 2013)

Neglect Determination Reversed

Supreme Court found that respondent mother had neglected the subject children. The Appellate Division reversed. The neglect finding against respondent was premised upon her allowing the subject children to have unsupervised visitation with their father, a registered sex offender. Previously, Supreme Court had found the father to have neglected the children based upon his sex offender status and his failure to complete treatment. The Appellate Division had reversed that decision stating that the father's sex offender status was insufficient to support a finding that he had neglected the subject children, since the other factors relied upon by Supreme Court in making such a determination, had lacked a sound and substantial basis in the record. Therefore, the Appellate Division concluded it would be illogical to affirm a neglect adjudication against respondent mother.

Matter of Hannah U., 110 AD3d 1258 (3d Dept 2013)

Court Properly Determined There Was No Abuse

Family Court properly determined there was insufficient evidence to find that the mother's boyfriend had abused her children by sexually abusing her then four-year-old child. Petitioner's evidence was based upon the testimony of four people who stated the child had disclosed that respondent had touched her underneath her clothing while sitting on a couch next to her. Although a child's out-of-court statement of abuse may be corroborated by any evidence tending to support its reliability, and a relatively low degree of corroborative evidence is sufficient, there is still a threshold of reliability that the evidence must meet. Consistency of the child's repetition of the allegations of abuse is not sufficient corroboration without expert testimony to validate the subject child's account of abuse. While the police investigator testified he conducted a "truth versus lie" inquiry of the subject child and concluded she understood the consequences of lying, he did not explain his methodology for reaching this conclusion. And although several witnesses described the child's upset demeanor, without expert opinion connecting this with the alleged abuse, such demeanor might have been due to her parents' neglect, the parents' separation, or her witnessing domestic violence between her parents. Family Court adequately set forth its grounds for its decision. The court was not required to set forth evidentiary facts, only ultimate facts upon which the rights and liabilities of the parties depend. The court summarized all relevant testimony and discussed the applicable law regarding proof of abuse and the need for corroboration.

Matter of Dezarae T., 110 AD3d 1396 (3d Dept 2013)

Insufficient Evidence to Find Neglect

Family Court found the agency had failed to prove that respondent had neglected the children due to, among other things, an act of domestic violence by respondent against the children's mother allegedly in the presence of one of the children. The Appellate Division affirmed. To establish neglect, petitioner had to prove by a preponderance of the evidence that the children's physical, mental or emotional condition was harmed or was in imminent danger of being harmed. Here, the only proof offered was the testimony of a caseworker who had no personal knowledge of the event and consisted entirely of what he had been told by the mother.

Matter of Lydia DD., 110 AD3d 1399 (3d Dept 2013)

No Right of Appeal From Consent Order

Family Court found respondent father had neglected the subject child based upon, among other things, an incident where the father, after consuming alcohol in excess, punched the back window of the mother's automobile while the child was in the car, causing glass to shatter onto the child. Respondent was criminally convicted for this incident and sentenced to prison. The neglect proceeding was filed after his criminal conviction and respondent appeared telephonically. He was represented by counsel and he engaged in colloquy with the court and his attorney. Based upon respondent's statements, the court determined he had consented to the neglect finding. The Appellate Division affirmed. Respondent had no right to appeal from a consent order, and because he failed to move to vacate or withdraw the consent order in Family Court, the matter was not properly before the Appellate Division.

Matter of Dante W., 110 AD3d 1400 (3d Dept 2013)

Respondent Father Knew or Should Have Known of Mother's Substance Abuse Issues

Family Court found that respondent father and mother had neglected their second child. The Appellate Division affirmed. Respondent and the mother had already been found to have neglected their first child due to the mother's drug abuse. Thereafter, the mother again tested positive for opiates and amphetamines when the subject child was born. Pursuant to FCA §1012(f)(I), a child may be adjudicated to be neglected when a parent knows or should have known of circumstances which required action in order to avoid actual or potential impairment of the child, and failed to act accordingly. Here, respondent was aware of the mother's positive drug test after the birth of their first child, yet he continued to live with her during her pregnancy with the subject child. He was the mother's sole source of support and he was driving with the mother and a known drug dealer when they were

arrested for possession of controlled substances. Respondent's claim that he was unaware of the mother's drug problem was not credible. Respondent was also in violation of a previous court order requiring him to complete a

substance abuse treatment program. Based on the above, the court's determination had a sound and substantial basis in the record.

Matter of Stevie R., 111 AD3d 1078 (3d Dept 2013)

Appeal Rendered Moot

Respondent's older child was adjudicated to be neglected based on injuries inflicted upon the child by respondent, and for this, respondent was convicted of assault in the second degree. When respondent's younger child was born, she agreed to temporarily place the child in foster care. Thereafter, the agency commenced a derivative neglect proceeding against her on behalf of the younger child, and respondent moved to have the child returned to her. Family Court issued an order directing the child's return to the mother. The agency appealed and obtained a stay from the Appellate Division. During the pendency of the appeal, the agency successfully moved for summary judgment on its derivative neglect petition and was granted custody of the child, thereby rendering the appeal moot.

Matter of Johnathan YY., 111 AD3d 1204 (3d Dept 2013)

Bruises Likely Caused by Non-accidental Means

Family Court found that respondent mother and her boyfriend neglected the child. The Appellate Division affirmed. Petitioner agency established by a preponderance of the evidence that the child sustained injuries that would not ordinarily be sustained except due to acts or omissions by respondent or her boyfriend. The proof included pictures and testimony from the emergency room physician who examined the child, detailing bruises to the then 3-year-old's hands, feet, legs, ears, eye, forehead, back and a cut lip. The physician testified the injuries were more likely caused by abuse than accidental based on the number, size, location and different stages of healing. The mother's explanations were not consistent. She testified that she and her mother bruised easily and that the injuries were caused accidentally. The mother's expert physician testified that the bruises could be caused by accidental means, but some were likely not accidental. The court noted that the mother did not provide her expert with the child's medical records, which as a parent, she could have easily obtained, and the expert agreed his opinion was only based on counsel's overview of the facts. Furthermore, the Appellate Division agreed Family Court was correct to grant the non-respondent father a protective order in response to a notice of deposition and subpoena duces tecum that was served upon him by the mother. While leave of court was not required here, disclosure from a nonparty would have been available only if the mother had established the existence of special circumstances, namely that the information sought was necessary material and not discoverable from other sources. Here, the father testified he had provided the mother with all the documentation he had. Additionally, the protective order was issued without prejudice. Therefore, the mother could have sought disclosure again from the father after receiving the subpoenaed information from the agency if she learned there was more information that only the father had, which was necessary to help her prepare for trial. Family Court did not err in denying the mother's request for the child to be produced for a medical examination. While proof of a medical condition that causes bruising could be important to respondent's defense, the mother failed to obtain the child's medical information before making such an application. The evidence showed the mother never took the child to be tested for this condition. Moreover, the conditions listed which could cause bruising all appeared to be conditions affecting the blood or internal organs and would presumably involve at least the drawing of blood, causing the child to be subjected to potential pain as a result of the exam.

Matter of Ameillia RR., 112 AD3d 1083 (3d Dept 2013)

Finding of Neglect Supported by Preponderance of Credible Evidence

Family Court adjudged that respondent mother neglected her children. The Appellate Division affirmed. Although the court erred in admitting police records into evidence because the certification attached to the records did not comply with Family Court Act §

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

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

Respondent Properly Excluded From Courtroom During Stepdaughters' Testimony

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

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

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

Family Court determined that respondent father abused and derivatively abused the subject children. The Appellate Division affirmed. Although not preserved for review, respondent's contention was without merit that the court violated his right to due process by conducting proceedings in his absence. While due process of law applied in Family Court Act article 10 proceedings and included the right of a parent to be present at every stage of the proceeding, that right was not absolute. At the time of the article 10 proceeding, respondent was incarcerated on criminal charges stemming from his conviction of sexually abusing one of his daughters, which was the same conduct that formed the basis of the article 10 proceeding. Respondent was not prejudiced by his absence from the court appearance during which the court granted petitioner's motion for summary judgment. It was well settled that evidence that a parent was convicted of having raped or sexually abused a child was sufficient to support a finding of abuse of that child within the meaning of the Family Court Act. Here, there was nothing respondent could have stated at the appearance that would have warranted the denial of the motion for summary judgment.

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

Determination of Neglect Supported by Sound and Substantial Basis in Record

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

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

Court Erred in Granting Motion to Dismiss with Respect to Mother

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

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

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

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

Matter of Lebraun H., 111 AD3d 1439 (4th Dept 2013)

Finding of Neglect Supported by Preponderance of Evidence

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

Matter of Amodea D., 112 AD3d 1367 (4th Dept 2013)

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

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

Matter of Gada B., 112 AD3d 1368 (4th Dept 2013)

CHILD SUPPORT

Mother's Interference With Visitation Warranted Suspension of Child Support

Family Court denied the father's motion to suspend his child support obligation and to enforce payment by the plaintiff mother of fines for missed parenting time. The Appellate Division modified by granting the motion to the extent of suspending the father's child support payments until regular visitation with the child resumed. The mother's deliberate frustration of, and active interference with the father's visitation rights, warranted the suspension of child support payments. On a prior appeal, the Appellate Division affirmed the court's finding that the mother alienated the child from the father. Here, the court found that the alienation continued unabated and the mother persisted in denigrating the father as a parent and a person and that she refused to accept responsibility for the escalating damage to her daughter. The father's contention regarding the daughter's constructive emancipation was raised for the first time on appeal and, in any event, at the time of the father's motion, the daughter was not of an employable age.

Rodman v Friedman, 112 AD3d 537 (1st Dept 2013)

Father Improperly Filed Written Objections

In an order, the Support Magistrate determined that the father was in willful violation of a prior support order. On the same date, the Family Court confirmed the determination of willfulness and thereupon issued an order of commitment which committed the father to the custody of a correctional facility for a period of 14 days. The father failed to pursue his sole remedy, which was to appeal from the order of commitment, entered upon confirmation of the Support Magistrate's determination (*see* FCA § 1112). Since the father improperly filed written objections to the nonfinal order of the Support Magistrate, the Family Court correctly denied the father's objections on procedural grounds. Accordingly, the Family Court's order was affirmed.

Flanagan v Flanagan, 109 AD3d 470 (2d Dept 2013)

Capped Amount of Combined Parental Income Improperly Excluded Consideration of Mother's Net Annual Income

In an action for a divorce and ancillary relief, the mother appealed from a portion of the amended judgment of the Supreme Court which reduced father's child support obligation. The Appellate Division found that the Supreme Court providently exercised it discretion in applying the statutory child support percentage of 29% to the amount of the combined parental income it considered in excess of $80,000.00, but improvidently exercised its discretion in capping the amount of combined parental income at $255,000.00, an amount which was only marginally higher than the plaintiff's net annual income of $248,721.00. The capped amount, in effect, improperly excluded consideration of the mother's net annual income of $487,693, contrary to the cost-sharing scheme directed by the CSSA (*see* DRL § 240[1–b][f][1][3]).

Beroza v. Hendler, 109 AD3d 498 (2d Dept 2013)

Plaintiff's 2007 Reported Income Was an Accurate Reflection of His Current Earning Capacity

The Appellate Division rejected the Plaintiff's contention that the Supreme Court erred in concluding that the income that he reported earning in his 2007 tax returns, rather than the income he reported in his 2009 tax returns, was an accurate reflection of his current earning capacity for the purpose of calculating his child support obligation. Here, in light of the Plaintiff's earning power and substantial assets, the Supreme Court did not improvidently exercise its discretion in imputing his 2007 reported income to him for the purpose of determining his child support obligation. Contrary to the Plaintiff's further contention, the court did not improvidently exercise its discretion by not also imputing to the defendant her 2007 income. The defendant made financial disclosure to the court, and appeared to be earning income consistent with her education and opportunities.

Patete v Rodriguez, 109 AD3d 595 (2d Dept 2013)

Parents Obligated to Equally Share College and Camp Expenses

The parties were former husband and wife who entered

into a comprehensive stipulation of settlement, which was thereafter incorporated but not merged into a judgment of divorce. Upon reviewing the record, the Appellate Division found that the Supreme Court properly denied the defendant's motion which was to direct the Plaintiff to pay 100% of their eldest child's college expenses above the stipulated "SUNY Cap." The defendant had stated that he was "pleased" with his eldest child's college selection, which was also his alma mater. The parties' stipulation of settlement contemplated that the parties would contribute to their children's college expenses equally and, under these circumstances, the defendant could not avoid his contractual obligation on the ground that the Plaintiff did not adequately discuss their eldest child's college selection with him. As to the defendant's motion to direct the Plaintiff to pay 50% of the parties' children's camp expenses as set forth in the parties' stipulation of settlement, the Supreme Court properly granted the defendant's motion, and properly denied the Plaintiff's cross-motion to direct the defendant to pay 100% of the parties camp expenses. The record established that the Plaintiff acquiesced in the defendant's choice of summer camp for their children by failing to provide an alternative option and by permitting the children to attend that camp during the years that the defendant had decisional control. Moreover, the Plaintiff was not entitled to include certain purported camp-related expenses in the defendant's share of camp expenses because she failed to demonstrate that those purported expenses were for the children's camp activities as set forth in the parties' stipulation of settlement.

Matter of Gretz v Gretz, 109 AD3d 788 (2d Dept 2013)

Plaintiff Directed to Pay 100% of Costs of a Court-appointed Forensic and an Attorney for the Child

In light of the parties' combined parental income, which was greatly in excess of the $136,000 statutory cap (*see* DRL § 240 [1-b]), the Supreme Court providently exercised its discretion in directing the Plaintiff to pay interim child support in the amount of $4,250 per month. Moreover, under the circumstances of this case, the court providently exercised its discretion in directing the Plaintiff to pay 100% of the costs of a court-appointed forensic evaluator and an attorney for the parties' child.

Abramson v Gavares, 109 AD3d 849 (2d Dept 2013)

Father Failed to Demonstrate That Mother Prevented Reasonable Access to Child

Generally, parents have a statutory duty to continually support their children until they reach 21 years of age (*see* FCA§ 413 [1] [a]). " 'However, where the noncustodial parent establishes that his or her right of reasonable access to the child has been unjustifiably frustrated by the custodial parent, child support payments may be suspended' ". Here, contrary to the plaintiff's contention, the Supreme Court properly denied, without a hearing, that branch of his motion which was to suspend his obligation to pay child support. The plaintiff alleged continuing conduct on the part of the defendant which, if proven, would not have risen "to the level of 'deliberate frustration' or 'active interference' with the noncustodial parent's visitation rights".

Jones v Jones, 109 AD3d 877 (2d Dept 2013)

Record Supported Performing Calculation of Child Support Pursuant to CSSA

Here, the Supreme Court improvidently exercised its discretion in fixing the amount of pendente lite child support to be paid by the defendant. The court was presented with sufficient evidence concerning the parties' respective incomes and assets, yet it did not provide any reason why it declined to perform the calculations or consider the factors enumerated in the Child Support Standards Act, and it ultimately failed to provide any explanation as to how it determined the amount of the award (*see* DRL § 240 [1-b]). Accordingly, the matter was remitted to the Supreme Court for a recalculation of the plaintiff's pendente lite child support award.

Davydova v Sasonov, 109 AD3d 955 (2d Dept 2013)

Father Denied Credit for Overpayment Made Toward Child Care Expenses

The Family Court's award of child support arrears to the mother in the sum of $4,042.44 was improper, as it, in effect, denied the father a credit for an overpayment he made toward child care expenses, retroactive to the

date of his petition seeking to terminate his obligation to contribute toward such expenses. The Support Magistrate properly offset the child support arrears by the father's overpayment of child care expenses. Accordingly, the Family Court should have denied the mother's objection to so much of Support Magistrate's order as applied the father's overpayment of child care expenses as an offset to reduce his child support arrears. The mother's petition for an upward modification of child support was properly denied under the circumstances presented. Moreover, as the mother did not actually incur child care expenses for the child, who was 17 years old at the time of the hearing, the father's obligation to pay child care expenses was properly terminated (*see* FCA § 413 [1] [c] [4]).

Matter of Zengling Shi v Shenglin Lu, 110 AD3d 729 (2d Dept 2013)

Father Failed to Establish a Decrease in His Income

Here, the father failed to meet his burden of establishing a substantial change in circumstances due to loss of employment. The father failed to submit the compulsory financial form in support of his petition, although he was given proper notice of this obligation (*see* FCA § 424-a [a]). Where a party fails to submit financial information, the Family Court may, in its discretion, draw inferences favorable to the opposing party or deny the petition on the ground of insufficient evidence. Moreover, the father failed to satisfy his burden of demonstrating that he was making diligent attempts to secure employment commensurate with his qualifications and experience (*see* FCA § 451 [2] [b] [ii]). Although the father belatedly filed the requisite financial disclosure affidavit and supporting documents with his objections to the Support Magistrate's order, the evidence submitted was insufficient to meet his burden of establishing a decrease in his income of 15% or more since the previous support order was entered (*see* FCA §§ 413, 451 [2] [a], [b] [ii]). Accordingly, the Family Court properly denied so much of the father's objection to the Support Magistrate's determination as dismissed the instant petition. However, under the circumstances of this case, the Support Magistrate erred in dismissing the father's petition "with prejudice" to the filing of any subsequent petition for modification of child support. The Family Court has continuing jurisdiction to modify a prior order of child support upon a proper showing of statutorily enumerated circumstances (*see* FCA § 451 [2] [a], [b] [i], [ii]).

Matter of Edwards v Edwards, 111 AD3d 630 (2d Dept 2013)

Mother Failed to Produce Sufficient Evidence That She Actively Sought Re-employment

The Family Court properly granted the father's petition alleging that the mother was in willful violation of her child support obligation. The mother's undisputed failure to pay child support as ordered constituted prima facie evidence of a willful violation of the order of support. The burden then shifted to the mother to offer competent, credible evidence of her inability to pay. The mother failed to meet that burden. She admitted that she voluntarily left her position as a bookkeeper and failed to produce sufficient evidence that she had since actively sought re-employment. In addition, the mother failed to provide proof of any medical or psychological condition that would prevent her from working. Accordingly, the Family Court properly determined that the mother willfully failed to pay child support.

Matter of Vasquez v Powell, 111 AD3d 754 (2d Dept 2013)

Court Erred in Denying Father's Petition for Downward Modification

Here, the father testified that he was unable to pay child support because he lost his prior job in October 2010. More specifically, he stated that he had been working at a restaurant in the dual capacity of manager and head waiter. Following his loss of that employment, he sought and obtained a position as a manager at a restaurant at a lesser salary, but could not find a position working in the dual capacity of manager and head waiter. Under these circumstances, the father demonstrated that his loss of employment and obtainment of new employment at a lesser salary constituted a substantial and unanticipated change in circumstances, and that he made a good faith effort to obtain new employment which was commensurate with his qualifications and experience. Thus, the Support

Magistrate's determination that the father failed to satisfy his burden of establishing an inability to pay his monthly child support obligation of $2,500, which had been set in the parties' judgment of divorce, was not supported by the evidence. Accordingly, the father's objections to the Support Magistrate's order denying his petition for a downward modification of his child support obligation should have been granted. The order was reversed, and the matter was remitted for a hearing and a determination thereafter of the amount of the father's reduced child support obligation.

Matter of Dimaio v Dimaio, 111 AD3d 933 (2d Dept 2013)

Hearing Warranted to Determine Whether Father's Income Fell below Poverty Income Guidelines

The father appealed from an order of the Family Court, which denied his objection to an order of the same court, which denied his motion to reduce child support arrears to $500 for the period of June 2, 2011, through July 16, 2012. Upon reviewing the record, the Appellate Division found that the father's averments as to his level of income for the period of June 2, 2011, through July 16, 2012, was supported by documentation of disability payments received by him during that specified time. Thus, a hearing was warranted to determine whether the father's income for that period fell below, or was equal to, the income level provided in the poverty income guidelines. Should the father prove that his income was at or below that level for "any period of time", child support arrears for that period of time must be capped at $500 (*see* FCA § 413 [1] [g]).

Matter of Briggs v McKinney-Mays, 112 AD3d 622 (2d Dept 2013)

Father's Failure to Pay Support Obligation Was Not Willful; Order of Commitment Reversed

Although the father has completed his sentence, the appeal from the order of commitment which adjudged him to be in willful violation of his support obligation set forth in the parties' judgment of divorce was deemed not academic in light of the enduring consequences that might flow from the finding that he willfully violated his support obligation. Once the mother established, prima facie, that the father owed approximately $147,000 in child support and maintenance, the burden shifted to the father to come forward with competent, credible evidence that his failure to pay his support obligation was not willful. The father's uncontroverted testimony demonstrated that he had been unemployed for at least two years, had repeatedly searched for employment, had no savings or appreciable assets, and relied upon his family and friends for support. "In the absence of proof of an ability to pay, an order of commitment for willful violation of a support order may not stand". Based upon the evidence in the record, the father met his burden of establishing his inability to meet his support obligations set forth in the parties' judgment of divorce. Accordingly, the Family Court erred when it adjudicated the father in willful violation of his support obligations set forth in the parties' judgment of divorce. Order reversed.

Matter of Lecei v Lecei, 112 AD3d 629 (2d Dept 2013)

Family Court Properly Determined That the Subject Child Was Not Emancipated

Contrary to the father's contention, the Family Court properly determined that the subject child was not emancipated. A parent is obligated to support his or her minor child until the age of 21 (*see* FCA § 413), unless the child becomes emancipated, which occurs once the child becomes economically independent through employment and is self-supporting. Here, the evidence at the hearing established that the child generally did not work full time and that she lived with her mother, who paid her expenses. Under these circumstances, the child was not economically independent of her parents at the time of the hearing. Order affirmed.

Matter of Schermerhorn v Vermillion, 112 AD3d 643 (2d Dept 2013)

Mother Established That She Did Not Willfully Violate Child Support Order

The mother appealed from an order of the Family Court, dated February 21, 2013, which, upon findings of fact of the same court, made after a hearing, found that she willfully violated a prior order of support, confirmed the finding of willfulness, and directed that she be incarcerated for a period of six months unless

she paid the sum of $60,000. The record sufficiently demonstrated that the mother was on public assistance, that she had been recently evicted from the apartment where she was living, and that she was unable to pay the amounts required by the child support order which had been entered, on her default, approximately six years earlier. Under these circumstances, the mother met her burden of establishing that she did not willfully violate the child support order. Accordingly, the Family Court should have denied the father's petition to adjudicate the mother in willful violation of the prior child support order. Accordingly, the order was reversed and the petition was denied.

Matter of Granberg v Granberg, 112 AD3d 714 (2d Dept 2013)

Family Court Lacked Jurisdiction to Consider the Merits of Father's Objections

In her petition, the mother sought to modify a prior child support order so as to require the father to pay the private school tuition of the parties' child. Following a hearing at which both parties were present, the Support Magistrate, in an order dated July 31, 2012, directed the father to pay 64% of the child's private school tuition and expenses, commencing with the 2012–2013 school year. The father filed objections to the order. The affidavit of service indicates that the objections were mailed to the mother at a specified address. The mother did not file a rebuttal to the father's objections. In an order dated November 15, 2012, the Family Court granted the father's objections, vacated the Support Magistrate's order, and dismissed the petition. The mother then moved to vacate the order dated November 15, 2012, and, thereupon, to dismiss the father's objections as untimely. The mother averred in an affidavit that she never received the father's objections, and only became aware of them when the Family Court served her with the order dated November 15, 2012. The mother asserted that the address to which the father mailed his objections was not her address, and she had resided at a different address on the same street for the past five years. Her petition and driver license, as well as the stipulation of settlement entered in the parties' divorce action, all stated an address different from the one to which the father had mailed the objections. In an unsworn affidavit in opposition, the father acknowledged that "Petitioner did not receive Objections to Support Order due to server mailing to wrong address in error." Here, given the mother's evidence that she did not live at the address to which the father had mailed the objections, coupled with the father's conceded failure to mail the objections to the correct address, and where no rebuttal to the objections was filed by the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order and, thus, failed to exhaust the Family Court procedure for review of his objections. Consequently, the Family Court lacked jurisdiction to consider the merits of the objections, and the father waived his right to appellate review. Order affirmed.

Hamilton v Hamilton, 112 AD3d 715 (2d Dept 2013)

Father Failed to Show That His Child Had Actively Abandoned Him

Here, the father failed to satisfy his burden of showing that the subject child had actively abandoned him, such that the child had forfeited any entitlement to support. The record demonstrated that it was the father who caused the breakdown in communication with the child, through his misconduct toward the mother and the child, and that the child had justifiably refused to continue the relationship. Accordingly, the Family Court properly denied the father's petition to terminate his child support obligation on the ground of constructive emancipation. Order affirmed.

Barlow v Barlow, 112 AD3d 817 (2d Dept 2013)

Family Court Was Within its Discretion in Not Deviating from Statutory Formula with Respect to Combined Parental Income over $136,000

The father appealed from an order of the Family Court, which, upon a finding of paternity in an order of filiation of the same court, and after review of his objections to a prior order of support of the same court, made after a hearing, directed him to pay child support in the sum of $1,074 semimonthly and retroactive child support in the sum of $195 semimonthly. While the support magistrate listed the statutory factors she considered in making her determination, she did not expressly relate those factors to the record. However, the support magistrate's decision as a whole reflects

that she thoroughly and carefully considered the parties' circumstances and that her determination to apply the statutory percentage to the combined parental income over $136,000 was not an improvident exercise of discretion. Contrary to the father's contention, the support magistrate providently exercised her discretion in not deviating from the statutory formula (*see* DRL § 240[1–b]) with respect to the combined parental income over $136,000, despite the fact that the father supported four children in addition to the subject child. Regardless of whether combined parental income is more or less than the statutory cap, "the court may, in its discretion, disregard the statutory formula where it would result in a child support obligation which is unjust and inappropriate". Here, however, the father failed to demonstrate what resources were available to support his four other children, and, thus, failed to demonstrate that the resources available to support such children were less than the resources available to support the subject child. Order affirmed.

Matter of De Souza v. Nianduillet, 112 AD3d 823 (2d Dept 2013)

Calculation of Father's Child Support Obligation under the Basic Support Formula Was Unjust and Inappropriate

The father argued that when the Support Magistrate reduced his child support obligation, he should have made a corresponding reduction in the amount of the father's child support arrears which accrued before he filed his petition. This contention was without merit. A court has no discretion to reduce or cancel arrears of child support which accrue before an application for downward modification of the child support obligation. A downward modification can only apply prospectively. However, the Support Magistrate improvidently exercised his discretion in granting the father's petition only to the extent of reducing his obligation to the sum of $1,074 per month. If the basic child support amount computed pursuant to FCA § 413 (1) (c) is unjust and inappropriate, child support is to be determined pursuant to FCA § 413 (1) (g), based upon "such amount of child support as the court finds just and appropriate." Furthermore, additional expenses for child care, which must be awarded when child support is determined pursuant to FCA § 413 (1) (c), need not be awarded if child support is determined pursuant to FCA § 413 (1) (g). Here, the father demonstrated that his wife's income was lower than the mother's income, so there were fewer resources available to support the children of his marriage than there were to support the subject child (*see* FCA § 413 [1] [f] [8]). Moreover, given the level of education completed by the father's wife, and the fact that she was the caretaker of four children, including a baby, her ability to contribute to her family's earnings was severely circumscribed. Under these circumstances, it was unjust and inappropriate for the child support award to be calculated pursuant to FCA § 413 (1) (c). Accordingly, the matter was remitted for a new determination of child support pursuant to FCA § 413 (1) (g).

Matter of Gardner v. Maddine, 112 AD3d 926 (2d Dept 2013)

Mother Failed to Establish Substantial Change in Circumstances

The mother appealed from an order of the Family Court, dated January 7, 2013, which denied her objections to an order of the same court, dated November 5, 2012, which, after a hearing, denied her petition for a downward modification of her child support obligation. Here, the mother failed to establish that a substantial change in circumstances had occurred since the entry of the prior child support order warranting a downward modification of her support obligation. She testified that she was disabled as a result of spinal stenosis and that she was unable to work due to her disability. However, she failed to present credible evidence that her symptoms or condition at the time of the petition and hearing prevented her from working. Contrary to the mother's contention, the evidence that she was receiving Social Security disability benefits did not, by itself, preclude the Family Court from finding that the mother failed to establish that she was incapable of working. Order affirmed.

Matter of Gavin V Worner, 112 AD3d 928 (2d Dept 2013)

Family Court Required to Consider Mother's Objections to the Child Support Order

The mother appealed from an order of the Family Court, dated February 27, 2012, which denied, as untimely, her objections to an order of the same court dated December 5, 2011, which, after a hearing, granted the father's petition to terminate his child support obligation and directed her to pay child support to the father in the sum of $178 per week. Here, the record revealed that, on January 19, 2012, the mother timely filed objections to the child support order dated December 5, 2011, which was mailed to the parties on December 15, 2011, and served a copy of those objections upon the father, but failed to file proof of service of the objections at the time of the filing, as required by FCA § 439 (e). However, the mother, who was proceeding pro se, received a letter from the court dated January 19, 2012, the same day she filed her objections, informing her that she had failed to submit proof of service of her objections, and stating that she had two weeks within which to correct the defect and submit the appropriate documentation. The mother then filed proof of service with the court six days later. Moreover, the affidavit of service filed by the mother indicated that the father was served with a copy of her objections within the statutory 35-day period (*see* FCA § 439 [e]), and the father filed a rebuttal to the mother's objections. Under the particular circumstances of this case, the Family Court should not have denied the mother's objections on the ground that they were untimely. Accordingly, the order was reversed and the matter was remitted to the Family Court for a determination of the mother's objections on the merits.

Matter of Worner v Gavin, 112 AD3d 956 (2d Dept 2013)

Family Court Had Jurisdiction to Hear Applications to Modify or Enforce Support Brought by DSS on behalf of Non-Public Assistance Recipient Father

Family Court determined it had no jurisdiction to hear a child support violation petition filed by DSS on behalf of the father, which sought money judgment against the mother in the amount of her income tax refund. The Appellate Division reversed. While Family Court is a court of limited jurisdiction, it is empowered to determine applications to modify or enforce judgments and orders of support. DSS is authorized to commence violation proceedings on behalf of those who receive child support pursuant to court order, and is also responsible for collecting those funds from the child support obligor, to ensure they are properly accounted for. The "on behalf of" language was added to FCA § 453 to clarify that DSS could prosecute as well as originate proceedings on behalf of non-public assistance individuals in receipt of child support. Therefore, DSS acted within its statutory authority in commencing such a proceeding and Family Court had subject matter jurisdiction to consider it. Additionally, even though the children were over 21 when the enforcement petition was filed and the mother no longer owed current support, she still owed arrears and Family Court retained continuing jurisdiction to enforce the support order until it was completely satisfied.

Matter of Chemung County Support Collection Unit v Greenfield, 109 AD3d 4 (3d Dept 2013)

Parental Alienation Cannot be Used as Defense for Failure to Comply with Support Obligations

Family Court determined the mother did not engage in parental alienation and therefore the father was not entitled to use that as a defense in failing to pay his share of the child's college expenses, and calculated the parties' respective obligations for such expenses. The Appellate Division agreed there was no parental alienation to support the father's claim, but modified the father's college expense obligation. Here, the parties had entered into a divorce decree which incorporated a stipulation setting forth the terms of the father's child support obligation including the parties' obligations to contribute to the children's college expenses. The father did not establish his defense of alienation as the evidence showed the children's alienation from their father was as a result of a lack of effort by all to make the relationship function. The father was absent from the children's lives for two years, and upon his return the children did not want to initiate visits with him or return his phone calls and messages. Family Court's calculation of the parties' respective obligations for the college expenses was based on the mother's current part-time income of $15,000, and the father's income from a 2002 order, which listed his annual earnings as $68,112. However, the Appellate Division stated that

in determining child support or related expenses, a court could impute income to a parent based on, among other things, the party's earning capacity. The Court determined that based on the evidence in the record, the mother's full-time salary would be $25,000, and there was testimony by the father that his income was around $110,000. Given this fact, the father's obligation would be 81.5% of college expenses and the mother's 18.5%.

Matter of Curley v Clausen, 110 AD3d 1156 (3d Dept 2013)

Family Court Did Not Abuse It's Discretion by Failing to Impute Income

Support Magistrate found that the mother's child support obligation would reduce her income below the self-support reserve and accordingly lowered her basic child support payment, and further reduced it based upon the expenses associated with the mother's visitation with the child. Family Court amended the order with regard to visitation expenses but otherwise affirmed the Support Magistrate's findings. The Appellate Division affirmed. The father's claim that income should be imputed to the mother since the mother's paramour paid for her expenses was dismissed. While the mother admitted that her paramour had previously paid for her rental expenses, she stated that she had been responsible for all her expenses since this instant proceeding was commenced. According due deference to the trial court's credibility determinations, there was no abuse of discretion in denying the father's request to impute income.

Matter of Tompkins v Tompkins, 110 AD3d 1172 (3d Dept 2013)

Family Court's Erred in Deviating From Father's Presumptive Support Obligation

The parents shared equal physical custody of two children but for child support purposes, since the mother earned substantially less than the father, she was deemed the custodial parent. When the older son moved in with the father, the father moved to modify child support. Family Court deviated from the support standards without specifying the relevant factors for doing so and issued an order of support, which the Appellate Division reversed and remitted, finding the support amount to be erroneously calculated. The support matter was once again heard by the Support Magistrate, who correctly calculated the support amount based upon the parties combined income. Since the mother was deemed the custodial parent of the younger child, and the father had custody of the older child, the Support Magistrate subtracted the amount the mother owed the father from the support amount the father owed the mother. Thereafter, he determined that pursuant to FCA §413[1][f][10], the "catch all" provision, the amount of support the father owed under the CSSA, was unjust or inappropriate because the younger child spent half the time with him, and further reduced the father's support obligation. While the Appellate Division agreed with the Support Magistrate's method of calculating the father's support obligation, it determined that he had no authority to reduce the father's obligation under FCA §413[1][f][10], stating that such matters as creating an offset formula for shared custody arrangements, are better left to the Legislature. Additionally, the Appellate Division found that Family Court abused its discretion in dismissing the mother's objections as untimely. Even if the mother's objections were received one day later than the extended deadline, since the court was closed on the day the objections were due because of severe weather conditions, and given the fact that the mother was unable to obtain an affidavit of service or the services of a notary due to the court closure, her objections should have been accepted and addressed on the merits.

Matter of Ryan v Ryan, 110 AD3d 1176 (3d Dept 2013)

Respondent Father Had No Right of Appeal from Family Court's Denial of His Objections

Family Court denied the father's objections to the Support Magistrate's default order, which found that the father had wilfully violated a previous support order. The father had failed to appear at the support violation hearing and was advised by Family Court to move to vacate the Support Magistrate's order. The father failed to do so and instead appealed the decision. The Appellate Division noted the father would only be entitled to a direct appeal after moving to vacate the Support Magistrate's order, and if denied, filing objections with Family Court. As the father had not done so before filing his appeal, the merits of the

Support Magistrate's order were not properly before the Court.

Matter of Reaves v Jones, 110 AD3d 1276 (3d Dept 2013)

Support Magistrate Incorrectly Applied FCA §451[2][a]

Family Court vacated the Support Magistrate's order, which pursuant to FCA § 451[2][a], downwardly modified, for a limited period of time, respondent father's support obligation based on his recent incarceration. The Appellate Division affirmed. FCA §451 [2][a], which provides that incarceration does not necessarily bar a finding of a substantial change in circumstances, did not apply to respondent's petition since the amendment went into effect prospectively as of October 13, 2010 and respondent was seeking modification of a May 2010 order. Moreover, the court's determination that respondent failed to demonstrate a substantial change in circumstances to warrant downward modification was supported by the record.

Matter of Baltes v Smith, 111 AD3d 1072 (3d Dept 2013)

Family Court's Failure to Consider Respondent's Testimony Before Support Magistrate Was Harmless Error

Family Court determined that DSS had presented a prima facie case that respondent father was in wilful violation of his support obligation, entered a judgment in favor of the mother in the amount of $6,362.75, and ordered that respondent be incarcerated for a period of 90 days unless he purged his contempt by paying $5,000, which respondent failed to do. The Appellate Division affirmed. Although the 90-day jail sentence had been completed by the time the appeal was heard, respondent's appeal was not moot since his challenge was to the wilfulness finding. The record showed that Family Court held an evidentiary hearing, advised respondent that testimony would be taken, and also noted that it would take judicial notice of prior proceedings. DSS presented sufficient evidence to establish respondent's wilfulness. Respondent chose not to testify and instead relied solely on his counsel's opening and closing statements. While respondent argued that it was not clear whether Family Court took into consideration his earlier testimony before the Support Magistrate, he also did not dispute that DSS had met its burden by showing he had wilfully violated the support order and was in arrears. Respondent also failed to present competent and credible testimony of his inability to pay. Therefore, any error based on Family Court failure's to consider respondent's earlier testimony was harmless.

Matter of Washington County Department of Social Services v Costello, 111 AD3d 1104 (3d Dept 2013)

Non-Custodial Father Failed to Establish Mother Unjustifiably Interfered With His Visitation

Petitioner father sought a downward modification of his support obligation or termination of his support obligation claiming that he had been deprived of visitation with his son. After a hearing, Family Court dismissed his petition. The Appellate Division affirmed. While a parent is obligated to support a child until age 21, a non-custodial parent's support obligation may be suspended where the parent establishes that "the custodial parent unjustifiably frustrated the non-custodial parent's right of reasonable access" to the child. Contrary to petitioner's claim, the court found it was the petitioner who had failed to exercise visitation with the son. The son, who was nearly 18, was diagnosed with various mental health issues and his found his relationship with his father very stressful. The son's therapist advised the mother not to force the son's visit with the father. While a child's right to support payments may be forfeited when the child is of employable age and actively abandons the non-custodial parent, refusing contact, the child's refusal to have contact must be "totally unjustified". Here, testimony showed the father exercised visitation until his work commitments and a new relationship resulted in a decrease of visitation. Thereafter, the father-son relationship became strained and the father had become both emotionally and verbally abusive to the son. The father admitted the son had never been in his current home and he had not taken the son on vacation since the parties' divorce although the father had vacationed with his girlfriend and her children. Based on the testimony and Family Court's credibility determinations, there was no reason to disturb the

court's conclusion that it was the father who had made the decision to abandon the child emotionally and it was the father who was walking away from the child, not the other way around.

Matter of McCloskey v McCloskey, 111 AD3d 1120 (3d Dept 2013)

DRL §240(1-b)(b)(5)(viii)(C) is Inapplicable

Parties divorced and stipulated to custody and support issues. Thereafter, the father argued that his child support obligation should be recalculated since the parties had failed to address the impact of the maintenance award on child support. The Appellate Division determined while this issue had not been preserved for review, even if it were to be addressed, the statute relied on by the father, DRL §240 (1-b)(b)(5)(viii)(C), is inapplicable as that provision deals with the adjustment of child support once maintenance terminates, and in this case, the maintenance would outlast child support and therefore the statutory reduction would not be required.

Alecca v Alecca, 111 AD3d 1127 (3d Dept 2013)

Support Magistrate's Award of Child Support Was Unjust and Inappropriate

The Support Magistrate issued an award of award of child support to DSS in the amount of $25 per month, on behalf of the subject child who was a public assistance recipient. The order was issued against respondent mother, retroactive to the date the child became eligible for public assistance, and capped the arrears at $500. Family Court denied respondent's objections. The Appellate Division reversed, determining the award of child support was unjust and inappropriate pursuant to FCA § 413[1][b][5][vii][E],[F]. Respondent, who was developmentally disabled and a recipient of SSI and public benefits, received $961 per month. She earned some money from employment at a sheltered workshop. The Support Magistrate's determination that respondent's weekly income totaled $15-20 per week gross was erroneous and not supported by the record. Respondent's financial disclosure affidavit was the only evidence presented regarding her income, and it listed her bi-weekly income as $25.00. After subtracting her SSI and public assistance benefits, the child support award represented about one-half of respondent's earning. The Appellate Division exercised its authority and set respondent's support obligations at $0.

Matter of Broome County Department of Social Services v Meaghan XX., 111 AD3d 1174 (3d Dept 2013)

DSS Cannot Bring Proceeding to Recoup Child Support Payments in Family Court

DSS sought to recoup child support from the respondent non-custodial father after both children had ceased receiving public assistance. The Support Magistrate dismissed the agency's petition on the ground that it had been filed after the public assistance had ended, and Family Court affirmed the Support Magistrate's decision. On appeal, the Appellate Division determined that although the language in FCA § 449 (2) is unclear, when the statute was enacted in 1992, its intention was to extend the retroactive period for which support could be recovered when public assistance was involved. Thus a proceeding to recoup public assistance could commence after the assistance has stopped. However, the Appellate Division affirmed the dismissal,without prejudice, in order for DSS to re-file in the appropriate court. Family Court was not the appropriate forum to initiate such a proceeding since this was an action to recoup public assistance based on an implied contract and more significantly, the beneficiary of the proceeding was not children but the public fisc**.**

Matter of Chemung County Department of Social Services v Crane, 112 AD3d 90 (3d Dept 2013)

Court's Failure to Appoint Counsel Results in Reversal

Respondent was found to be in wilful violation of his child support obligation constituting contempt of court. Family Court issued a suspended sentence in order to give him time to purge the contempt. When respondent failed to purge, DSS moved to vacate the suspended sentence and have the court impose a penalty. The respondent, who was incarcerated for another criminal matter, appeared by telephone, waived his right to counsel and admitted he had not paid the

arrears or the newly-accrued support payments. Family Court found respondent had not purged his contempt, and imposed a150 day jail sentence, to be completed after his release from the unrelated criminal matter. The Appellate Division reversed. Since respondent was facing a contempt allegation that could potentially lead to his incarceration for violation of a prior order, his waiver of counsel should have been explicit and intentional, and the court should have been assured that it was made knowingly, intelligently and voluntarily. Here, although respondent asked if he could continue without counsel, after making the admissions and the sentence had been imposed, he asked the court to send him forms so he could apply for assigned counsel. The court advised him it was too late. Family Court failed to conduct a searching inquiry to determine whether respondent understood the court process and was aware of the dangers of proceeding without counsel. Based on the record, the matter was remitted for a new hearing.

Matter of Madison County Support Collection Unit v Feketa, 112 AD3d 1091 (3d Dept 2013)

Since Decrease in Father's Income was Due to Father's Voluntary Departure From Job, Family Court's Properly Dismissed His Downward Modification Petition

Family Court dismissed respondent father's downward modification of child support petition and granted the mother's support violation petition, finding respondent in wilful violation. The Appellate Division affirmed. A child support obligation is based on a parent's ability to support and not a parent's current financial circumstances. Here, respondent voluntarily terminated his job with Morgan Stanley Smith, where he was earning approximately $200,000 per year, to begin employment with Wells Fargo, knowing he would be earning considerably less. The evidence showed the father was neither forced out nor required to leave. Since the decrease in his income was due to his voluntary departure, the court's decision to dismiss was appropriate. Additionally, Family Court found that a lump-sum payment made to the father from his new employer would satisfy his child support obligation. Even if the funds were a loan as respondent claimed, the court had discretion to consider the funds as a resource available to the father in meeting his support obligation.

Matter of Carnahan v Parillo, 112 AD3d 1096 (3d Dept 2013)

Family Court Erred in Upwardly Modifying Child Support

Family Court upwardly modified respondent father's support obligation based on a 15% change in respondent's income, determined he was in violation of his support obligation and issued a monetary penalty against him. The Appellate Division reversed. While FCA §451 (2)(b)(ii) allows a court to modify an order without requiring a party to demonstrate a change in circumstances but only a showing that a party's income has changed by 15% or more since the prior order had been entered, that only applied to support orders issued on or after October 13, 2010, that were incorporated but not merged into divorce decrees. Here, the support order was issued in 2008, and thus the mother had to make a showing of a change in circumstances, which she failed to do. While the terms of the parties support order directed respondent father to provide the mother with specified financial information, and while the court properly determined respondent failed to do so, the remedy imposed by the court was erroneous. To sustain a civil contempt finding against the father, the mother needed to show that respondent's actions or failure to act defeated, impaired, impeded or prejudiced her rights. Family Court's finding she was prejudiced because she could have petitioned earlier if she had known respondent's income had increased, and the imposition of $1887 fine which represented an increase of child support by 15%**,** was erroneous since that standard was not applicable here. However, the Appellate Division found that since the mother testified she did not receive respondent's tax information prior to the hearing, she may have been prejudiced or her rights may have been impaired in that she was unable to properly prepare for the hearing. And although she was not able to show actual loss, a fine could still be imposed in the amount of $250.

Matter of Zibell v Zibell, 112 AD3d 1101 (3d Dept 2013)

Child's Receipt of Social Security Survivor's Benefits Does Not Constitute a Change in Circumstances

Family Court incorrectly determined that the son's receipt of social security survivor's benefits from his biological father constituted a change in circumstances sufficient to downwardly modify respondent's child support obligation. A child's resources may only be considered in determining child support if the amount of basic support is unjust or inappropriate. Respondent's financial situation was not affected by the child's benefits, and a reduction in support based on these benefits would provide respondent with a windfall and allow him to provide less for the child, to the child's detriment. Additionally, despite respondent's assertions that his earnings have been below the poverty line for more than three years, he had no debt, had $14,000 in the bank and was current on his child support payments.

Matter of McDonald v McDonald, 112 AD3d 1105 (3d Dept 2013)

Faher Required to Pay Child Support - Child Not Emancipated

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

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

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

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

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

Mother Established Change in Circumstances - Order Reversed

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

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

No Evidence that Father Made Reasonable Efforts to Obtain Employment

Family Court denied respondent father's objections to

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

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

Support Magistrate Properly Conformed Petition to Proof

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

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

Court Erred in Dismissing Petition for Lack of Personal Jurisdiction

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

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

Appeal From Nonfinal Intermediate Order in CPLR Article 78 Proceeding Dismissed

In a CPLR article 78 proceeding, Supreme Court remitted the proceeding to Family Court for a hearing before the Support Magistrate on the merits of petitioner's objection to his ex-wife's request for a cost of living adjustment to the amount of his child support obligation. The Appellate Division dismissed petitioner's appeal. An appeal from a nonfinal intermediate order in a CPLR article 78 proceeding did not lie as of right. The appeal was dismissed on the

further ground that petitioner was not aggrieved by the order inasmuch as Supreme Court merely remitted the matter to Family Court for a hearing. Finally, the issue whether the court properly remitted the matter to Family Court was not encompassed by the notice of appeal.

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

CUSTODY AND VISITATION

Court Properly Concluded New York More Appropriate Forum

Family Court denied respondent mother's motion to dismiss this proceeding on forum non conveniens grounds. The Appellate Division affirmed. The court providently exercised its discretion and weighed all relevant factors in concluding that New York, and not Florida, was the more appropriate forum for custody proceedings. The court properly considered that the mother moved to Florida with the child less than one month before the filing of the custody petition, and that evidence relating to the mother's allegations that the father had engaged in domestic violence against her and sexually abused the child was located in New York, where the alleged incidents took place. Additionally, the father agreed to pay the child's travel expenses for the proceedings and any related evaluations, and the court would allow the mother to appear at proceeding telephonically from Florida with little expense to her.

Matter of Brett M.D. v Elizabeth A.D., 110 AD3d 424 (1st Dept 2013)

Child's Preference to Live with Mother Not Dispositive

Family Court denied petitioner mother's application to relocate with the parties' child to Texas, and granted respondent father's petition for modification of custody, awarding custody of the child to the father with visitation to the mother. The Appellate Division affirmed. The court's decision had a sound and substantial basis in the record. The child's preference to live with the mother, although a factor to be considered, was not dispositive. The record showed that the mother and her parents have engaged in a long-standing pattern of exclusionary behavior and hostility towards the father, making it unlikely that the father-child relationship would be preserved if the mother was allowed to move to Texas. Although the evidence showed that the mother's life would be enhanced economically, emotionally and educationally by moving, the educational benefit to the child, if any, would be minimal. The court properly rejected the forensic opinion because his report contained many deficiencies. The expert failed to consider, among other things, that the mother left the jurisdiction temporarily with the child in violation of a court order and permanently moved to Texas without informing the court, the father, or the social worker.

Matter of Hildebrandt v St. Elmo Lee, 110 AD3d 491 (1st Dept 2013)

Petitioner's Epileptic Seizures Did Not Render her Unfit to be Custodial Parent

Family Court determined that it was in the child's best interests to grant sole custody to petitioner mother. The Appellate Division affirmed. Petitioner's epileptic seizures, standing alone, did not render her unfit as custodial parent. Petitioner consistently received medical care for her condition and was reasonably compliant with her medication, and her physician did not suggest that she could not adequately care for the child. The court also correctly found that petitioner made adequate arrangements for the child in the event petitioner had a seizure.

Matter of Desiree L. v Lewis N., 110 AD3d 510 (1st Dept 2013)

Insufficient Change in Circumstances to Warrant Modification of Custody Order

Family Court denied the mother's petition to modify a custody order with respect to the parties' youngest child. The Appellate Division affirmed. Respondent father obtained counseling and tutoring for the child to improve his behavior and academic performance and he worked with the child on his homework. In contrast, petitioner mother failed to demonstrate that the child's problems in school would be ameliorated if custody were transferred to her. The child's preference was not

determinative.

Matter of Liza R. v Lin F., 110 AD3d 513 (1st Dept 2013)

Joint Legal Custody in Child's Best Interests

Family Court awarded joint legal custody of the child to the parties, with primary legal custody to petitioner mother and liberal visitation to respondent father. The Appellate Division affirmed. A sound and substantial basis supported the determination that joint legal custody was in the child's best interests. The court considered the appropriate factors and determined that the parties had conducted themselves with civility towards each other, reached compromises regarding visitation, and generally set aside personal feelings for the child's sake. The record did not support the mother's contention that the court's award of overnight visitation to the father was not in the child's best interests.

Matter of Victoria H. v Tetsuhito A., 110 AD3d 636 (1st Dept 2013)

Denial of Mother's Petition to Relocate Reversed

Family Court denied respondent mother's petition to relocate to Mississippi with the parties' child. The Appellate Division reversed and remanded the matter for further proceedings. The court's determination denying the mother's petition lacked a sound and substantial basis in the record. The mother established by more than a preponderance of the evidence that relocation was in the best interests of the child, because it would enhance the child's life both economically and emotionally, notwithstanding the Attorney for the Child's position to the contrary. Since losing her job several years previously, the mother had been unable to support herself and the child beyond the subsistence level. The court's supposition that the mother had other undocumented jobs or income was unsupported by the record and contradicted by her receipt of various public assistance benefits such as Medicaid and food stamps. While the mother was not destitute, proof of economic necessity did not require a parent to wait until he or she had used up every last dollar of savings before taking steps to ensure that the child's future economic needs would be met. Moreover, the proposed move would give the mother and child an extensive network of family support, including grandparents with whom the child already had established strong emotional bonds. The record did not provide any assurance that the father would provide sufficient support to ensure the child's lifestyle at a level above subsistence. Although the frequency of visits with the father, with whom the child had a positive relationship, would be disrupted, nothing in the record established actual interference in that relationship by the mother. The mother testified that the father could come to the other state as often as he liked, and assured the court that he would be provided with transportation and accommodations. Additionally, a forensic psychologist testified that he did not believe that the mother sought to relocate to interfere with the child's relationship with the father, and observed that the mother seemed to appreciate that the child had a positive relationship with the father. While the impact of the move on the quantity and quality of the child's future contact with the father was a central concern, it was not "the" central concern. On remand, the court was directed to make provision for liberal visitation and an allocation of travel costs.

Matter of Kevin McK. v Elizabeth A E., 111AD3d 124 (1st Dept 2013)

Family Court Lacked Subject Matter Jurisdiction

Family Court properly determined it lacked subject matter jurisdiction to hear the custody matter. The initial custody determination was made by the Court of Florence, Italy and since then numerous proceedings had been held in that court. At the time the instant petition was filed, a proceeding was ongoing in Italy and a decision concerning custody was expected soon. Additionally, Italy advised Family Court that Italy would not decline jurisdiction.

Matter of Maura B. v Giovanni P., 111 AD3d 443 (1st Dept 2013)

Family Court Erred in Failing to Exercise Jurisdiction

Family Court properly found that New York was the child's home state based on the literal construction of the statute since the mother resided in New York, and

the petition was filed in New York two days after the child's birth. However, the court erred, pursuant to the UCCJEA, in declining to exercise jurisdiction. The court failed to consider all of the relevant factors in reaching its determination that New York was an inconvenient forum. The putative father's paternity petition filed earlier in California, did not initiate a custody proceeding because the child was not yet born. The mother did not engage in "unjustifiable conduct" to gain jurisdiction in New York. While such conduct is not defined by the statute, it applies to situations where a child has been removed contrary to a current custody order. Therefore, the court's determination that the mother had appropriated "the child while in utero" was error. Rather the mother's actions were nothing more than a decision to relocate during her pregnancy. Additionally, the court erred in stating that the mother needed to arrange her relocation with the putative father, with whom she had only a brief romantic relationship, before coming to New York. Putative fathers have neither the right nor the ability to restrict a pregnant woman from her constitutionally-protected liberty rights.

Matter of Sara Ashton McK. v Samuel Bode M., 111 AD3d 474 (1st Dept 2013)

Florida Did Not Have Jurisdiction Since Both Parties and Child Resided in New York and Substantial Evidence Available Here

Family Court properly determined that it had subject matter jurisdiction pursuant to DRL §76(1) (b). Florida could not have had jurisdiction because, although it was the home state of the child when the proceeding commenced, neither of the parties nor the child resided there anymore. Thus, Florida no longer had jurisdiction under the UCCJEA provisions found in DRL§ 76(1) (a). Additionally, the mother and child had a family network in New York and substantial evidence was available in this state regarding the child's care.

Matter of Liza P. v Kevin P., 111 AD3d 517 (1st Dept 2013)

Move to Florida Did Not Change Child's Home State

Family Court properly determined that New York was the child's home state. The mother and child had lived in New York since the child's birth, New York issued the initial custody order, and New York continued to be the home state when the instant modification petition was filed. New York had exclusive jurisdiction because no determination was made that either party or the child lacked a significant connection to this State or that substantial evidence was not available in this State concerning the child's care. The mother and child did not move to Florida until after the modification petition was filed in New York. Finally, the court properly exercised its discretion to retain jurisdiction because the mother failed to show that public or private interests supported her argument to have the matter heard in another state, especially since an alternative forum was unavailable to petitioner grandmother.

Matter of Rankin v Rankin, 111 AD3d 535 (1st Dept 2013)

Child's Best Interests for Mother to Have Primary, Residential Custody

Family Court had a sound and substantial basis in the record to award joint legal custody with primary, residential custody to the mother. The mother was the primary caregiver of the child for all but two years of her life. Although both parties provided loving, nurturing homes, the child was doing well in the mother's home and succeeding academically. While the mother's boyfriend did inflict inappropriate corporal punishment upon the child when she was younger, there was no evidence this problem continued. Furthermore, the father was afforded extensive parenting time with the child in accordance with the child's wishes. Additionally, the mother was directed to obtain the father's permission or the court's approval prior to any relocation with the child.

Matter of David H. v Khalima H., 111 AD3d 544 (1st Dept 2013)

Fact that Mother Did Not Neglect, Abuse or Abandon Child Did Not Preclude Issuance of Order of Special Findings for Purpose of SIJS Application

Family Court granted the child's petition for the appointment of her stepfather as her coguardian, and denied the child's motion for the issuance of an order that would have, among other things, made special findings enabling the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (SIJS) pursuant to 8 USC Section 1101 (a) (27) (J). The court held that the child was not eligible for such an order because she failed to show that reunification with one or both of her parents was not viable and that it was not in her best interests to return to her country of origin, El Salvador. The Appellate Division reversed, granted the child's motion and declared that the child was dependent on the Family Court; found that she was unmarried and under 21 years of age; that reunification with one or both of her parents was not viable because of parental abandonment; and that it was not in the best interests for the child to return to her previous country of nationality and last habitual residence. The child was born in El Salvador in January 1993. Her father abandoned her before she was born, and thereafter did not provide support for her or communicate with her. The child's mother left El Salvador for the United States when the child was approximately one year old. In approximately 2007, at the age of 14, the child came to the United States, where she has lived primarily with her mother, stepfather and three half-siblings. In 2013, the child filed a petition seeking the appointment of her stepfather as her coguardian with her mother. The record, which included detailed affidavits from the child and her mother, fully supported the conclusion that because her father abandoned her, reunification with her father was not a viable option. The fact that the child's mother was not shown to have neglected, abused or abandoned her did not preclude the issuance of the order of special findings for the purpose of the SIJS application, in light of the terms of the applicable statue, which provided that a child may qualify for SIJS where he or she has been neglected, abused or abandoned by "1 or both" parents. Additionally, the record reflected that it was not in the child's best interests to return to El Salvador.

Matter of Karen C., 111 AD3d 622 (1st Dept 2013)

Court Properly Denied Incarcerated Father's Petition For Visitation

Family Court denied the father's petition for annual visitation with his children. The Appellate Division affirmed. Respondent father was incarcerated at a prison in Washington State. The court properly concluded that visitation was not in the children's best interests, primarily because of the parties' inability to identify or agree upon an appropriate person who was willing to accompany the four and five-year-old children. The father's testimony did not establish that the paternal grandmother was a suitable guardian, as she had lived with the children only briefly when they were very young and she had not spent time with them recently. By allowing written correspondence and requiring photos of the children to be sent to the father, the court acknowledged that it was in the best interests of the children to maintain contact with the father and was apparently open to allowing visitation if the parties were able to agree upon a suitable person to accompany the children.

Matter of Omari M. v Amanda M., 112 AD3d 492 (1st Dept 2013)

Error to Summarily Decline Signing Order to Show Cause on Jurisdictional Grounds

The Family Court erred in declining to sign an order to show cause which accompanied the father's petition to modify visitation. Since the initial visitation determination in this matter was made as part of a stipulation of settlement entered into during the parties' divorce proceedings before the Supreme Court, it was error for the Family Court to summarily decline to sign the order to show cause on jurisdictional grounds. Instead, the Family Court should have signed the order to show cause and then directed the parties to submit evidence on the issue of whether the Family Court retained exclusive, continuing jurisdiction over the visitation issues. If, upon remittal, the Family Court determined, upon a complete examination of the evidence submitted, that it retained exclusive and continuing jurisdiction over the visitation issues, it could exercise that jurisdiction, or it could decline to do so if it determined, upon consideration of the relevant statutory factors, that New York was an inconvenient forum (*see* DRL § 76-a [1]).

Matter of Ramirez v Gunder, 108 AD3d 563 (2d Dept 2013)

Setting Aside Stipulation of Settlement Not Warranted

Setting aside the stipulation of settlement which awarded the mother and father joint custody of their child was not warranted. Here, the Family Court conducted a proper allocution of the mother, determining that she understood the terms of the stipulation, that she had sufficient time to consult with her attorney, and that she consented to the terms of the stipulation, and thus properly determined that she voluntarily and knowingly accepted the terms of the stipulation. The mother's contentions in support of her motion that she felt forced into settling and misled by her attorney, and that she did not fully understand what she was agreeing to were insufficient to establish a claim of mistake or duress so as to warrant setting aside the stipulation of settlement.

Strang v. Rathbone, 108 AD3d 565 (2d Dept 2013)

New York Was an Inconvenient Forum Notwithstanding Family Court's Jurisdiction

The Family Court erred in determining that it lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (*see* Domestic Relations Law art 5-A) to determine the father's visitation petition. Here, although the mother and the subject children had been living in Georgia since moving there in February or March 2011, they had resided in New York for at least six consecutive months prior to that move. Thus, the Family Court had jurisdiction over the father's visitation proceeding, commenced on February 17, 2011, because New York was the subject children's "home state" either on the date of commencement of the proceeding or within six months prior thereto (*see* DRL § 75-a [7]). The court, however, may decline to exercise that jurisdiction it if it finds, upon consideration of certain enumerated factors, that New York is an inconvenient forum and that a court of another state is a more appropriate forum (*see* DRL § 76–f(1). While the Family Court did not consider the enumerated factors set forth in DRL § 76–f(1), the record was sufficient to permit the Appellate Division to consider and evaluate those factors. Based upon the record before it, the Appellate Division agreed with the attorney for the children that, contrary to the father's contention, New York was an inconvenient forum. The record demonstrated that, since February or March 2011, the children had resided in the relatively distant state of Georgia, where the children had been enrolled in school and had connected with the mother's extended family. Most significantly, the evidence regarding their care, well-being, and personal relationships was more readily available in Georgia.

Matter of Balde v Barry, 108 AD3d 622 (2d Dept 2013)

DRL § 72 (2) Was Inapplicable as Grandmother Only Had Temporary Custody of Child

The Family Court improperly granted the child's motion, in which the maternal grandmother joined, to dismiss the father's custody petition in reliance upon DRL § 72. This statute authorizes a grandparent to make an application for custody of his or her grandchild upon demonstrating the existence of "extraordinary circumstances" (*see* DRL § 72 [2] [a]). Since the grandmother only had temporary custody of the child and never filed a petition for custody, DRL § 72 (2) was inapplicable in this custody matter. Moreover, to the extent that the Family Court dismissed the petition as also barred by res judicata, this was improper in the absence of a permanent custody determination in the permanency proceedings.

Matter of Finlay v Plummer, 108 AD3d 671 (2d Dept 2013)

The Family Court Was Not Required to Engage in a Change-of-Circumstances Analysis as There Was No Prior Custody Order in Effect

The father appealed from an order of the Family Court, as amended by an order of the same court, which, after a hearing, granted the mother's petitions for sole legal and physical custody of the subject children and established a visitation schedule for the father. Here, the Family Court's determination that the subject children's best interests would be served by awarding sole legal and physical custody to the mother has a sound and substantial basis in the record. Contrary to

the father's arguments, as the parties' former custody arrangement was an informal one, and as there was no prior custody order in effect at the time this proceeding was commenced, the Family Court was not required to engage in a change-of-circumstances analysis.

Matter of Land-Wheatley v Land-Wheatley, 108 AD3d 674 (2d Dept 2013)

Family Court Improvidently Exercised its Discretion in Denying Mother's Request for a One-Week Adjournment

The mother filed a petition to modify a prior order of the Family Court to award her sole legal and physical custody of the parties' child and to require that visitation with the father be supervised. After the third day of a hearing on the petition, during cross-examination of the mother, the mother requested that she be allowed to substitute her court-appointed counsel with counsel that she privately retained. The privately retained counsel sought a one-week adjournment of the hearing to obtain the transcript of the prior testimony and to prepare for the continuation of the hearing. The Family Court denied the request for an adjournment and advised the mother that she could choose to continue with one or both counsel, who were present in the courtroom, or proceed without counsel that afternoon, or have the court make a decision based on the incomplete record. The mother chose the latter option. Based upon the evidence adduced by the mother until the point of the adjournment request, the Family Court denied the mother's petition and dismissed the proceeding with prejudice. Here, the Family Court improvidently exercised its discretion in denying the mother's request for a one-week adjournment. Under the circumstances of this case, the Family Court should have exercised its discretion to grant the one-week adjournment request rather than requiring the mother to choose between proceeding with the hearing that afternoon with the court-appointed attorney, whom the mother expressed she no longer wanted to represent her and who made an application to be relieved as counsel, or the privately retained attorney or both of them, or submitting the matter for a decision even though the record was incomplete. Accordingly, the Appellate Division reversed the order, reinstated the petition, and remitted the matter to the Family Court for a new hearing before a different court attorney referee and a new determination of the petition.

Matter of Feliciano v King, 108 AD3d 703 (2d Dept 2013)

Visitation Schedule Did Not Provide for Sufficient Parenting Time to the Mother During the Holidays

The Family Court's determination awarding sole legal and physical custody of the children to the mother had a sound and substantial basis in the record. The evidence at the hearing established that the children had a strong, positive, and healthy relationship with both parents. Moreover, each parent was able to provide a sufficiently stable environment, and adequately provide for the children's emotional and intellectual development. However, the Family Court, having the benefit of observing and listening to the witnesses firsthand, credited the mother's allegations of domestic violence by the father, and found that his denials thereof lacked veracity. Many of these acts of domestic violence occurred before the children were born and they were present during only one of these incidents, when they were infants. Nonetheless, the Family Court properly found that the domestic violence perpetrated by the father demonstrated that the mother was better suited to provide the children with moral and intellectual guidance. The provision of the visitation schedule which, in addition to yearly summer visitation, awarded the father visits in Kentucky during school breaks for “every Thanksgiving, Christmas, winter, mid-winter, spring, and Easter,” effectively depriving the mother “of any significant quality time” with the children, and is therefore “excessive”. While that provision took into account the children's need to spend time with the father and his family, it did not take into account the importance of their relationship with the mother and her extended family, in that it deprived the children of contact “during times usually reserved for family gatherings and recreation”. The Appellate Division noted that the court-appointed forensic evaluator recommended that the parties share parenting time during major holidays such as Thanksgiving, Christmas, and Easter. There was no contrary evidence that awarding all parenting time during these holidays to the father furthered the children's best interests. The opinions of experts are entitled to some weight, and, under the circumstances presented here, the Family Court should have awarded equal parenting time to the

parties for these school breaks. Accordingly, the matter was remitted to the Family Court to set forth a new visitation schedule regarding "Thanksgiving, Christmas, winter, mid-winter, spring, and Easter" that would apportion those school breaks equally between the parties.

Matter of Felty v Felty, 108 AD3d 703 (2d Dept 2013)

Family Court Did Not Err in Disallowing, on Hearsay Grounds, the Father's Testimony Regarding Certain Statements Made by the Child

The parties were divorced in Florida in 2008 and a parenting plan with regard to the parties' child, who was born in 2004, was issued by a Florida court in 2009, while the parties both resided in Florida. In November 2010, the Florida court granted the father's petition to relocate to New York with the child, and a time-sharing schedule was incorporated into the order. The mother thereafter moved to California. In March 2012, the mother filed a petition in the Family Court, Westchester County, seeking, inter alia, modification of the parenting plan and order issued by the Florida court. The Family Court granted the mother's petition, and awarded the mother sole legal and residential custody of the child. The father appealed. Here, the Family Court's determination that there had been a change of circumstances sufficient to warrant a change of custody, based on evidence that the father interfered with the relationship between the mother and child by, inter alia, failing to comply with the visitation and communication provisions of the prior court orders, was supported by a sound and substantial basis in the record. The Appellate Division also found that the Family Court providently exercised its discretion in denying the father's application for a forensic evaluation. Moreover, the Family Court did not err in disallowing, on hearsay grounds, the father's testimony regarding certain statements made by the child (*see* FCA § 1046 [a] [vi]), and properly denied the father's application to compel the testimony of the attorney for the child.

Matter of Gonnard v Guido, 108 AD3d 709 (2d Dept 2013)

Relocation to North Carolina Was Not in the Best Interests of the Children

There was a sound and substantial basis in the record for Family Court's denial of the father's petition to relocate to North Carolina with the parties' two children, of whom he had primary physical custody. Although moving with the father, a pediatrician employed by United States military, would have ensured that the children could continue their education at a school run by the Department of Defense, remaining in New York with their mother would allow them to maintain relationships which they had formed with friends, doctors, therapists, and the church community. The mother had been intimately involved in the children's lives since birth, and was their exclusive caregiver during the father's three overseas deployments. It was noted that the position of the attorney for the children, that the relocation was not in their best interests, was entitled to some weight.

Hertz v Hertz, 108 AD3d 712 (2d Dept 2013)

Court Gave Appropriate Weight to the Evidence, Which Showed That the Mother Had a History of Mental Illness, Coupled with Cognitive Limitations

Here, the Family Court correctly found that the mother failed to prove that the father had engaged in domestic violence. The court also gave appropriate weight to the evidence, which showed that the mother had a history of mental illness, coupled with cognitive limitations, and had been hospitalized on at least three occasions, during which time the mother had been unable to care for the parties' children. Moreover, the mother had never lived alone, and had a history of becoming overwhelmed by the responsibility of caring for the children. Further, while the mother was making progress in managing her illness, there was no testimony to show that the mother could manage the stress of raising the children alone without again needing hospitalization. Although the father had a history of abusing alcohol, the evidence showed that he had stopped drinking, had completed an alcohol recovery program, and was engaged in activities to manage his stress and prevent a relapse. Further, the supervised visitation between the father and the children had been without incident. Under these circumstances, the Family Court's determination

granting the father's petition for sole custody of the children with supervised visitation to the mother and denying the mother's petition for sole custody of the children was supported by a sound and substantial basis in the record.

Matter of Howard E.I. v Sandra I., 108 AD3d 715 (2d Dept 2013)

Family Court Erred in Deciding the Issue of Guardianship Without the Aid of Forensic Evaluations

The record revealed that Shanika M. and Stephanie G. were in a domestic partnership. In March 2003, the parties traveled to Grenada, where Stephanie's family lived. While there, they met one-month-old J., the subject child, who is the daughter of Stephanie's sister, Allison G. With Allison's consent, the parties agreed to bring J. to the United States with the intention of formally adopting J. One month later, Stephanie brought J. to New York, and J. lived with the parties until she was two years old, when the parties separated. The adoption was never formalized, although J. continued to live with Stephanie. Thereafter, Stephanie and Shanika then entered into a voluntary visitation arrangement that they adhered to for several years and which was modified by the parties at various times. Following an altercation in August 2008, Stephanie refused to allow Shanika to have any further contact with J. In December 2008, Shanika filed a custody petition. During the pendency of the custody matter, Shanika and Stephanie each filed a petition to be appointed as J.'s legal guardian. The Family Court conducted a hearing on the petitions. Despite a request by the attorney for the child that forensic evaluations be performed, no such evaluations were conducted. After the hearing, the Family Court denied Shanika's custody and guardianship petitions and granted Stephanie's guardianship petition, appointing Stephanie as J.'s sole guardian. Upon reviewing the record, the Appellate Division found that the Family Court erred in deciding the issue of guardianship without the aid of forensic evaluations of Stephanie, Shanika, and J. It was noted that although forensic evaluations are not always necessary, such evaluations may be appropriate where there exist sharp factual disputes that affect the final determination. Under the circumstances of this case, the record was inadequate to determine the best interests of the child, particularly as there had been no expert assessment of the psychological impact of separating J. from Shanika. In addition, given Stephanie's allegations of alcohol abuse by Shanika, and Shanika's allegations of alienation by Stephanie and Stephanie's current partner, forensic evaluations of Stephanie, Shanika, and J. were proper to aid in the resolution of these factual issues. Accordingly, the matter was remited to the Family Court for complete forensic evaluations of Shanika, Stephanie, and J., for a reopened hearing on the issue of guardianship, and thereafter for a new determination of the guardianship petitions. Pending the new determination, it was directed that child remain with Stephanie G. and that the Family Court establish a visitation schedule for Shanika M.

Matter of Shanika M. v. Stephanie G., 108 AD3d 717 (2d Dept 2013)

Change of Circumstances Warranted Modification of Existing Custody Arrangement

The father appealed from an order of the Family Court, Westchester County, dated October 5, 2012, which, after a hearing, denied his petition to modify a prior custody order of the Family Court, Suffolk County, dated September 8, 2008, to award him sole residential custody of the subject child. By decision and order on motion dated October 19, 2012, the Appellate Division stayed enforcement of the order dated October 5, 2012, pending the hearing and determination of the appeal. Here, the Family Court's determination that the evidence did not demonstrate a sufficient change in circumstances was not supported by a sound and substantial basis in the record. In October 2011, after the commencement of a Family Court Act article 10 child protective proceeding against the mother in Suffolk County, the father was awarded temporary sole residential custody of the subject child with liberal visitation to the mother. The child protective proceeding was dismissed after the initial report of the Suffolk County Department of Social Services, which concluded that child abuse or neglect was "indicated," was amended, after an expungement hearing, to conclude that the allegations of abuse or neglect were "unfounded" (*see* SSL § 422 [8]). The father then filed a petition in the Family Court, Westchester County. The evidence presented at the hearing on the father's

petition established that, while living with the father in Westchester County, the child, who has special needs, had thrived both at home and in school. Under these circumstances, the Appellate Division found that it would have been disruptive to remove the child from the father's house and his established routine. Moreover, the father was ensuring that the child maintained a strong and continuing relationship with the mother. The continuation of a liberal visitation schedule would provide the mother with a meaningful opportunity to maintain a close relationship with the child. It was noted that the attorney for the child supported the award of sole residential custody of the child to the father. Accordingly, the order was reversed, the father's petition was granted, and the matter was remitted to the Family Court, Westchester County, for further proceedings to establish an appropriate visitation schedule for the mother.

Matter of Ellis v. Burke, 108 AD3d 764 (2d Dept 2013)

Record Supported Determination That Relocation Would Be in the Best Interests of the Children

Contrary to the father's contention, the record contained a sound and substantial basis for the Family Court's determination that the mother's relocation to Florida would be in the best interests of the parties' children. The Family Court found credible the mother's testimony at trial that, if she were permitted to relocate with the children to Florida, the children's quality of life would be significantly improved on a day-to-day basis because the cost of living would be less than it is in New York, where she was struggling financially, and the mother would have several close family members in the vicinity of her new home to offer her support. Significantly, it was undisputed that the mother was the children's primary caregiver, and that the father was minimally involved in the children's lives. In the previous year, the father had missed several visits, and had seen the children approximately 10 times for a total of 30 hours. He did not attend any of the children's extracurricular activities, communicate with their teachers, or schedule or attend their medical appointments, and he rarely initiated phone contact. Moreover, the position of the attorney for the children was in favor of the relocation. Order affirmed.

Davis v Ogden, 109 AD3d 539 (2d Dept 2013)

Court Properly Declined to Mandate Visitation with the Father

Here, having given due consideration to the wishes, age, and maturity of the child, it was a provident exercise of the court's discretion to decline to mandate visitation with the father where the child, who was 15 years old at the time of the Supreme Court's determination, had an extremely strained relationship with the father. Thus, the Supreme Court properly denied that branch of the father's motion which was to enforce certain visitation provisions of a prior order of the same court.

Cervera v Bressler, 109 AD3d 780 (2d Dept 2013)

Mother's Argument Barred by the Law of the Case Doctrine

The mother appealed from an order of the Family Court, which, after a hearing, denied her petition which was for additional unsupervised visitation, and prohibited her from telling the child that any man other than the father is the child's biological father. As a general rule, the law of the case doctrine precludes the Appellate Division from reexamining an issue which had been raised and decided against a party on a prior appeal where that party had a full and fair opportunity to address the issue. A review of the mother's contention regarding the prohibition against telling the child that any man other than the father is the child's biological father was barred by the doctrine of law of the case, as the Appellate Division had already decided this exact issue on a prior appeal, and there had been no showing of subsequent evidence or change of law. Further, contrary to the mother's contention, there was a sound and substantial basis in the record for the Family Court's denial of her request for certain additional visitation. Moreover, the mother was awarded liberal unsupervised visitation that afforded her a meaningful opportunity to maintain a close relationship with the child.

Fulmer v. Buxenbaum, 109 AD3d 822 (2d Dept 2013)

Record Did Not Support Award of Sole Custody to Maternal Grandparents

The Family Court's determination awarding sole

custody of the child, and joint custody of the child's sibling with the sibling's father, Victor, to the maternal grandparents was not supported by a sound and substantial basis in the record. The mother's testimony indicated that, at the time of the hearing, she had abstained from drug use for more than 2 1/2 years. The mother's testimony also indicated that there had been no recent incidents of domestic violence between her and Victor. Indeed, the Family Court noted in its order that the mother and Victor were "clean and sober," three years having passed between their last instances of drug use and the date of the order, and that "there have been no reports of aggression." The Family Court placed undue emphasis on the forensic evaluation, which was completed almost two years prior to the court's determination. Additionally, while the Family Court did acknowledge the nature of the child's wishes, the court failed to adequately consider those preferences. Further, the attorney for the children supported the mother's position on appeal, at least insofar as advocating for the mother to have joint custody of both children. The order was reversed, the maternal grandparents' petition was denied, and the mother was granted sole custody of the child, and joint custody of the child's sibling with the sibling's father.

Matter of Noonan v Noonan, 109 AD3d 827

Supreme Court Retained Exclusive, Continuing Jurisdiction over Maternal Grandparents' Visitation with Child

The father's conclusory assertion that the more liberal visitation awarded to the maternal grandparents was not in the child's best interests was without merit. The father never disputed that visitation with the maternal grandparents was in the child's best interests under the circumstances of this case, as, along with the paternal grandparents, they were the child's primary caregivers for the first four years of her life, and remained the child's sole connection to her deceased mother. Furthermore, the modified schedule was specifically tailored to accommodate the demands of the child's residence with the father and his new family in Israel, without subjecting the child to excessive travel or disturbing her daily life. As to the stipulation entered into by the father and the maternal grandparents, the father expressly agreed that New York courts were to exercise exclusive, continuing jurisdiction over the maternal grandparents' visitation with the child, despite the fact that the Supreme Court had full knowledge that he lived in Israel and would continue to reside in Israel. The no radius clause that was included in the stipulation also reflected that, at the time when the father agreed to the terms of the stipulation, he anticipated that he would not always reside in New York, and that he might move away from New York at some time in the future. Further, during the more than three years in which the paternal grandparents and the maternal grandparents acted as the child's primary caregivers, the father remained in Israel without objecting to the jurisdiction of the courts of this State on the ground that they were "inconvenient." Accordingly, the Supreme Court properly concluded that it retained exclusive, continuing jurisdiction over the stipulation, as modified to reflect the child's new residence in Israel.

People ex rel. Libin v. Berkovitch, 109 AD3d 846 (2d Dept 2013)

Award of Custody of the Children to the Father Was Supported by the Record

Contrary to the mother's contention, the Family Court's determination to award custody of the parties' five children to the father had a sound and substantial basis in the record. Hearing testimony and in camera interviews conducted with the four older children established that the mother, who had been diagnosed with schizoaffective disorder of the bipolar type, experienced delusions and disorganized speech that directly affected her abilities to parent and, thus, constituted an adequate ground on which to find a change of circumstances. Furthermore, the Family Court properly determined that any therapeutic treatment was likely to be ineffective due to the mother's lack of insight about her illness, as evidenced by credible testimony at the hearing and the prior finding of neglect made on the mother's consent. The Family Court's determination was further supported by the recommendation of the court-appointed forensic psychologist, and by the position taken by the attorneys for the children.

Matter of Angelina L.C., 110 AD3d 793 (2d Dept 2013)

Family Court Erred in Granting Father's Petition for Custody Granted Without a Hearing

The mother appealed from an order of the Family Court, which, without a hearing, granted the father's petition for custody of the subject children. The order appealed from incorrectly stated that a hearing had been held on the father's petition for custody. In fact, the father's petition for custody was granted without a hearing. In addition, the Family Court did not conduct an examination of the parties or inquire into whether an award of custody of the subject children to the father was in the children's best interests. It also prohibited the mother from offering evidence in opposition to the petition. Thus, the Family Court failed to make a careful analysis of the applicable factors to be considered in determining which custody arrangement would further the children's best interests. The order was reversed and the matter was remitted for a hearing on the father's petition before a different Judge, and a new determination thereafter.

Matter of Archibald M. v Georgette S., 110 AD3d 811 (2d Dept 2013)

Family Court Not Required to Make Finding That Extraordinary Circumstances Existed

Shortly after the subject child was born, a proceeding was commenced against his mother alleging that she neglected him. The neglect proceeding against the mother was dismissed when she consented to the entry of an order giving custody of the child to the child's maternal aunt. Thereafter, a neglect proceeding was commenced against the child's maternal aunt, and the child was placed into foster care. The neglect proceeding against the maternal aunt advanced to a fact-finding hearing where, following the presentation of evidence by the Administration for Children's Services and, upon the maternal aunt's failure to appear, the Family Court found that she had neglected the subject child. The mother, who had filed a petition for custody of the child, sought leave to intervene in the dispositional phase of the neglect proceeding, arguing that the Family Court was obligated to conduct a hearing on whether extraordinary circumstances existed before making a disposition in the neglect proceeding. The Family Court, in effect, granted the mother's application for leave to intervene, thereafter determined that the best interests of the child warranted placing him with the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing, and referred the mother's petition for custody to a referee. In order for a nonparent to be awarded permanent custody of a child over a parent's objection, he or she must first prove that extraordinary circumstances exist such that the parent has relinquished his or her superior right to custody. Here however, the child's maternal aunt had permanent custody of him when this neglect proceeding was commenced against her. The mother's petition to regain permanent custody of the child from the maternal aunt was pending, and had been referred for a hearing. Contrary to the mother's contention, in the context of the neglect proceeding, in which permanent custody was not at issue, the Family Court was not required to make a finding that extraordinary circumstances existed before determining, in effect, that the best interests of the child warranted that he be temporarily placed in the care of the Commissioner of Social Services (*see* FCA § 1052 [a] [iii]).

Matter of Eric W., 110 AD3d 1000 (2d Dept 2013)

Record Supported Family Court's Determination That There Was a Sufficient Change in Circumstances; Transfer of Sole Custody to Father in Child's Best Interests

Here, the Family Court's determinations that there had been a sufficient change in circumstances since it issued the custody and visitation order in 2008, and that a transfer of sole custody to the father would be in the child's best interests, had a sound and substantial basis in the record. In particular, the record supported the Family Court's conclusion that the mother "failed to demonstrate that she has the ability to nurture the child's relationship with [his father]." Indeed, the mother's relocation to Nassau County without notifying the father, and her travels with the child to Florida in contravention of a court order that specifically prohibited her from removing the child from New York State, was evidence that the mother was dismissive of the child's relationship with his father. On the other hand, there was evidence adduced which demonstrated the father's willingness to foster the relationship between the child and his mother.

Matter of Cornejo v Salas, 110 AD3d 1068 (2d Dept 2013)

Father Properly Directed to Make Children Available for Supervised Visitation

The father is the custodial parent of the parties' two children. In a corrected order dated October 17, 2011 (hereinafter the October 2011 order), the Supreme Court awarded the mother supervised visitation with the children on Friday evenings and on alternate weekends, with visitation to begin immediately. The October 2011 order also directed, inter alia, that the mother be evaluated by an independent psychiatrist, and thereafter participate in any therapy and treatment recommended by the independent psychiatrist. Contrary to the father's contention, the therapy and treatment requirements of the October 2011 order were components of that order, and not conditions precedent to the mother's right to supervised visitation with the children. Indeed, "a court may not order that a parent undergo counseling or treatment as a condition of [supervised] visitation, . . . but may only direct a party to submit to counseling or treatment as a component of visitation". Accordingly, the Supreme Court properly granted that branch of the mother's motion which was to direct the father to comply with the terms of the October 2011 order by making the children available for supervised visitation. It was noted that the mother remains under a continuing obligation to comply with the therapy and treatment requirements of the October 2011 order for as long as that order remains in effect.

Palmeri v Palmeri, 110 AD3d 859 (2d Dept 2013)

Court Erred in Determining That Same Sex Non-Biological Parent Lacked Standing to Seek Custody or Visitation with Child

In May 2009, the petitioner and the respondent traveled to Connecticut to be married, and then returned to live in their home in New York. Subsequently, they decided to have a child, the respondent was artificially inseminated, and, in September 2010, the respondent gave birth to a child. The petitioner is listed as the second mother on the child's birth certificate, and the child's last name is the hyphenated last names of the petitioner and the respondent. In 2012, the parties separated, and the respondent and the child lived apart from the petitioner for several months. However, the petitioner continued to see the child a few times per week, which included overnight visits. The parties briefly lived with each other again at the end of 2012, but their attempt to reconcile failed, and the respondent again moved with the child to another residence. The petitioner commenced an action for a divorce and ancillary relief, and sought, by order to show cause, custody of the child, or in the alternative, visitation. The respondent cross-moved, inter alia, for sole custody of the child. In the order appealed from, the Supreme Court, determining that the petitioner lacked standing to seek custody or visitation because she was not the child's biological or adoptive parent, without a hearing, denied the petitioner's motion and granted that branch of the respondent's cross motion which was for sole custody. Although, at the time of the child's birth, New York had not yet enacted the Marriage Equality Act (*see* L. 2011, ch. 95), affording comity to the parties' Connecticut marriage, the Supreme Court should have recognized the petitioner as the child's parent under New York law (*see* DRL § 73[1]). Thus, the Supreme Court erred in determining that the petitioner lacked standing to seek custody or visitation with regard to the subject child. Accordingly, the matter was remitted to the Supreme Court for a hearing and, thereafter, a new determination of the motion and cross motion.

Counihan v Bishop, 111 AD3d 594 (2d Dept 2013)

Relocation with Mother to South Africa Was Not in the Child's Best Interests

The father appealed from an order of the Family Court, which, after a hearing, granted the mother's motion seeking permission to relocate with the parties' child to South Africa. Upon reviewing the record, the Appellate Division found that the Family Court's determination that the proposed relocation was in the child's best interests was not supported by a sound and substantial basis in the record. Although the Family Court was properly concerned about the father's history of domestic violence, the record was devoid of evidence that he has ever harmed the child or directed his anger toward her, and many of the incidents described by the mother involved the father's suicidal ideation and infliction of harm upon himself. Significantly, the court-appointed psychologist found that the father was currently emotionally and mentally

stable, and at low risk of neglectful or abusive behavior toward the child. Moreover, the record showed that the mother sought permission to relocate primarily because she felt lonely and isolated in the United States, and not to escape domestic violence. The record also established that the father consistently exercised his right to visit the child twice a week, and that he desired to spend more time with her. Further, there was no economic necessity for the proposed relocation because the mother has been steadily employed as a payroll analyst for more than six years. Although the mother testified that the proposed relocation would offer her economic benefit because she could live rent-free in her parents' home and her mother could assist her with child care, those benefits did not outweigh the drastic reduction in the quantity and quality of the child's contacts with the father which would ensue if the child relocated to a country so distant from the United States that, according to the parties, required a 24-hour-long flight to reach. It was noted that the attorney for the child supported the relocation and that her position was entitled to some weight, but was not dispositive. Order reversed.

Matter of Francis-Miller v Miller, 111 AD3d 632 (2d Dept 2013)

Modification of Provision Which Caused Acrimony Between the Parents Upheld

Here, the Family Court's determination that there had been a sufficient change in circumstances to warrant modification of the prior order of custody dated September 23, 2009, to the extent of vacating so much of that order as directed the parents to "offer the children to the other" for visitation in the event that they were "unavailable for when they have the children in their care," was supported by a sound and substantial basis in the record. The evidence in the record demonstrated that the provision caused acrimony between the parents and, thus, was not in the best interests of the children. Order affirmed.

Matter of Salmela v Goodwin, 111 AD3d 642 (2d Dept 2013)

Relocation with Mother to Florida Not in the Children's Best Interests; Joint Custody of the Parties' Children Appropriate

The Family Court did not err in determining that the mother failed to establish, by a preponderance of the evidence, that a proposed relocation to Florida would serve the subject children's best interests. The court considered and gave appropriate weight to all of the relevant factors, including, but not limited to, each parent's reasons for seeking or opposing the move, the quality of the relationships between the children and each parent, the impact of the move on the quantity and quality of the children's future contact with the father, the degree to which the mother's and children's lives might be enhanced economically, emotionally, and educationally by the move, and the feasability of preserving the relationship between the father and children through suitable visitation arrangements. The impact of a move on the relationship between the children and the noncustodial parent is a central concern. The mother failed to establish that the proposed move would not have a negative impact on the children's relationship with the father. Furthermore, the Family Court did not err in awarding the parties joint custody. Joint custody is appropriate where the parties involved are relatively stable, amicable parents who can behave in a mature, civilized fashion. Here, although the parties had disagreements, they behaved in a relatively civilized fashion toward each other, and there was no evidence that they were so hostile or antagonistic toward each other that they would have been unable to put aside their differences for the good of the children.

Matter of Carter v Carter, 111 AD3d 715 (2d Dept 2013)

Award of Sole Custody to Father Not in Child's Best Interests

Here, the father failed to establish that a change in custody was in the best interests of the parties' son in light of, inter alia, the evidence as to the child's emotional distress during a period of time when he lived with the father, the evidence that the child was in need of certain professional treatment, and the father's failure to consistently obtain such treatment for the child. Accordingly, the Family Court should have

denied that branch of the father's petition which was to modify the existing child custody arrangement so as to award him sole custody of the parties' son. Order reversed.

Matter of Cortez v Cortez, 111 AD3d 717 (2d Dept 2013)

Ample Evidence in the Record of Mother's Deliberate Interference with the Father's Relationship with the Child

Here, contrary to the mother's contention, the Family Court properly determined that the best interests of the parties' child would be served by awarding the father sole custody. The determination was supported by the record, including the testimony of the parties, which established, among other things, that the mother allowed the child to view her ex-husband, rather than the father, as the child's father and to call him "daddy" or "dad"; that the mother and her ex-husband deliberately interfered with the father's relationship with the child by putting the ex-husband's name on the child's amended birth certificate, despite their knowledge of genetic testing establishing that the father was the child's biological parent and despite the father having obtained an order of filiation; that, despite his knowledge of the genetic testing, the ex-husband, with the mother's acquiescence, attempted to adopt the child; that the mother acquiesced in her ex-husband's attempt to have their judgment of divorce vacated and then reinstated at a date after the child's birth so as to create a legal presumption that he was the child's father; that the mother and ex-husband opposed the father's petitions for custody or visitation and his petition to establish paternity; that the mother persistently denigrated the father in the child's presence; and that the mother made repeated uncorroborated and unfounded allegations of domestic violence and abuse of the child against the father, which interrupted his visitation with the child for extended periods. All of these actions were to the detriment of the child's best interests. Although the mother attempted to excuse her behavior based upon her allegations of domestic violence by the father and abuse of the child, the Family Court concluded that her allegations were not supported by credible evidence, and thus it properly discounted that explanation. Moreover, the mother's testimony established her continued unwillingness to place the child's need for a relationship with the father above her own interest in avoiding the father and thwarting his attempts to form a relationship with the child. These acts constituted conduct so inconsistent with the best interests of the child as to have per se raised a strong probability that the mother was unfit to act as a custodial parent. Accordingly, the Family Court's determination awarding the father sole custody of the child was supported by the record.

Matter of Khan-Soleil v Rashad, 111 AD3d 728 (2d Dept 2013)

Record Did Not Support Denial of Mother's Petition for Relocation

The Family Court's determination that the best interests of the child would have been served by remaining in the father's physical custody lacked a sound and substantial basis in the record. The Family Court failed to give sufficient weight to the mother's testimony, which it credited, that she only intended for the father to have custody of the child temporarily while she underwent a hysterectomy and moved from Washington to Colorado with her new husband. The record showed that the mother, who stayed at home to care for her children, had been the primary caregiver throughout the child's life, while the father had limited involvement with the child until the mother transferred custody to him. Furthermore, while living with her mother, the child thrived both at home and at school. The child, who had been a part of a military family for the majority of her life, relocated along with her family many times both during and after her parent's marriage. There was no evidence that these frequent relocations had been detrimental the child's intellectual or emotional development. The Family Court also erred in finding that the mother replaced the "father figure" in the child's life. The record contained no evidence that supported a finding of parental alienation against the mother. The Family Court also failed to give sufficient weight to the fact that the child's relationship with her half-siblings, who resided with the mother, would continue to be disrupted if she remained in the father's care, as the record demonstrated that the child and her half-siblings had a close and healthy relationship. Furthermore, both the court appointed evaluator and the attorney for the child recommended returning the child to the mother's care, and the child communicated that

preference. Accordingly, the Family Court's determination lacked a sound and substantial basis in the record, and the Family Court should have granted the mother's petition.

Matter of Shannon J. v Aaron P., 111 AD3d 829 (2d Dept 2013)

Maternal Grandmother Demonstrated Extraordinary Circumstances

Contrary to the mother's contention, the Family Court properly determined that the maternal grandmother sustained her burden of demonstrating the existence of extraordinary circumstances. The evidence before the Family Court, which included testimony regarding the unstable and unsafe living situation the mother created for the subject child through her drug use and her physically and verbally abusive behavior toward the child, demonstrated the existence of extraordinary circumstances. Moreover, the Family Court's determination that an award of custody to the maternal grandmother was in the best interests of the child was supported by a sound and substantial basis in the record. In a separate appeal, the Appellate Division found that the Family Court's determination to award liberal visitation to the mother, and to require that such visitation must be supervised, had a sound basis in the record.

Matter of Diana B. v Lorry B., 111 AD3d 927, 928 (2d Dept 2013)

Family Court Not Obligated to Adopt Recommendation of Court-appointed Forensic Evaluator

The Family Court properly denied the mother's petition which was for an order directing the parties and their children to enroll in a program to treat parental alienation which was recommended by the court-appointed forensic evaluator. The recommendations of court-appointed experts are but one factor to be considered and are entitled to some weight. Such opinions, however, are not determinative and must not be permitted to usurp the judgment of the trial judge. Consequently, in this case the court was not obligated to adopt the recommendation of the court-appointed forensic evaluator. The court adequately explained its reasons for disregarding that recommendation and instead directing the mother and the subject children to enroll and engage in family counseling. Further, the court's determination had a sound and substantial basis in the record.

Matter of Pitt v Reid, 111 AD3d 946 (2d Dept 2013)

New York Had Exclusive, Continuing Jurisdiction to Determine Custody

The Family Court correctly determined that New York had exclusive, continuing jurisdiction to determine custody pursuant to DRL § 76-a. It was undisputed that the initial child custody determination was rendered in New York, and there was " 'ample evidence of a significant connection by the child with this state for Family Court to retain jurisdiction' (*see* DRL § 76-a [1] [a]). The father's extensive parenting time took place in New York, the child had relationships with a half-sibling and extended family in New York, and the father had furthered the child's education and attended to her medical care in New York. Accordingly, the court correctly concluded that the child had a substantial connection to New York, that there was adequate evidence in this state regarding her then present and future well-being, and that jurisdiction in the courts of this state was proper (*see* DRL § 76-a [1]).

Matter of Seminara v Seminara, 111 AD3d 949 (2d Dept 2013)

Supreme Court Acted Within its Discretion in Denying Mistrial Motion

Upon reviewing the record, the Appellate Division found that the Supreme Court did not improvidently exercise its discretion in denying the plaintiff's motion for a mistrial which was based upon her contention that the court erred in appointing a forensic evaluator who was not a member of the panel of mental health professionals promulgated by the court rules (*see* 22 NYCRR 623.1, 680.1). A court may appoint a mental health professional from that panel to evaluate adults and children in a case involving, among other things, custody and visitation, or may, upon a finding of good cause set forth in the order of appointment, appoint a mental health professional who is not a member of the panel (*see* 22 NYCRR 623.5[a]; 680.5[a]). Under the

circumstances of this case, which involved protracted proceedings that affected the welfare of the children, and a lengthy delay in making the motion for a mistrial, the court did not improvidently exercise its discretion in declining to declare a mistrial.

Lieberman v Lieberman, 112 AD3d 583 (2d Dept 2013)

No Sound and Substantial Basis in the Record for Reducing Overnight Visitation

The Family Court granted that branch of the mother's petition which was to modify the visitation order so as to reduce the father's alternating weekend visitation with the child from Friday 6:00 p.m. until Sunday 6:00 p.m., to Friday 6:00 p.m. until Saturday 8:00 p.m. when the child has school the following Monday. In addition, the Family Court granted that branch of the mother's petition which was to modify the visitation order so as to permit her to travel with the child outside of the United States on vacation. The father appealed. The mother sought to modify the visitation order so as to reduce overnight visitation because the child was returning home too tired on Sundays, which was interfering with her ability to complete her homework and wake up rested for school on Mondays. The Appellate Division found that the mother's contention did not constitute a sound and substantial basis in the record for reducing the father's visitation time with the child, where viable alternatives aside from reducing the child's time with the father were available for the child to complete her homework. It was noted that the child's wishes, while worthy of considerable weight, were not determinative. Her wishes were not in accordance with her best interests, which were to afford her sufficient time to complete her homework over the weekend while also fostering a meaningful relationship between her and the father, who was already limited to seeing the child every other weekend. Accordingly, the order was modified to restore overnight visitation with the father. As to that branch of the mother's petition which sought to travel with the child to outside the United States, the Family Court providently exercised its discretion in permitting the mother to travel with the child outside of the United States on vacation, and specifically, to El Salvador. The mother established that it was in the best interests of the child to travel to El Salvador, the mother's country of origin and where two of the child's half-siblings lived. The father failed to provide any evidence that the child would be in danger in El Salvador.

Matter of Orellana v Orellana, 112 AD3d 720 (2d Dept 2013)

Maternal Grandmother Established Extraordinary Circumstances

The father appealed from an order of the Family Court which granted the petition of the maternal grandmother for her appointment as the permanent guardian of the person of the subject child, and, in effect, denied his petition which was for custody of the subject child. The Appellate Division found that the Family Court's determination that it was in the best interests of the child to place him in the permanent guardianship of the maternal grandmother had a sound and substantial basis in the record. The maternal grandmother satisfied her burden of establishing extraordinary circumstances on the basis of the evidence as to the father's history of substance abuse and failure to comply with mental health treatment, the father's criminal history and history of domestic violence, the father's inability to support the child, and the grandmother's demonstrated ability to care for the child's extraordinary special needs, as well as the strong emotional bond that the child has developed with the grandmother.

Matter of Roberta W. v Carlton McK., 112 AD3d 729 (2d Dept 2013)

Granting Father's Petition for Residential Custody of Children Was in the Best Interests of the Children

In an order dated May 2, 2012, entered after a fact-finding hearing on both of the father's petitions, the family offense petition was dismissed, the petition seeking a change of custody was denied, and residential custody was returned to the mother. Thereafter, the father filed another family offense petition, dated May 25, 2012, against the mother on behalf of the children, which was dismissed without a hearing in an order dated May 30, 2012. The father appealed from the dismissal of two family offense petitions, and the denial of his petition for residential custody of the children, and the children appealed from so much of the resettled order as returned residential custody to the mother. The

father's motion to stay the resettled order was granted by the Appellate Division. The Appellate Division found that the father's October 13, 2010, family offense petition against the mother on behalf of the children was properly dismissed, since, to the extent that it alleged facts which could support a finding that the mother committed a family offense, the evidence adduced at the fact-finding hearing did not establish the commission of such offense by a fair preponderance of the evidence. The father's May 25, 2012, family offense petition also was properly dismissed, without a hearing, since, to the extent that it alleged new facts, it did not allege conduct which would constitute a family offense committed by the mother against the children. Contrary to the finding of the Family Court, the father demonstrated that there was a change in circumstances since the March 24, 2005, order awarding the mother residential custody, which was entered on consent of the parties. The evidence clearly demonstrated that the parties' relationship had deteriorated to the point that they did not speak to each other, one of the children had moved in with the father even before the father was awarded temporary custody, and the father was concerned that the mother had become involved in a relationship that would have a negative impact on the children. Moreover, the Appellate Division found that the determination to award the mother residential custody of the children lacked a sound and substantial basis in the record. In evaluating the totality of the circumstances to determine the best interests of the children, the Appellate Division concluded that the father's petition for residential custody of the children should have been granted.

Bustamante v. Largue, 112 AD3d 819 (2d Dept 2013)

Visitation Schedule Deprived Mother of Any Significant Quality Time with Children

Here, the parties demonstrated that a change of circumstances had occurred and that modification of the existing visitation arrangement was in the children's best interests. The existing visitation arrangement did not specify the exact time and date that weekly and summer vacation visitations were to begin, which led to disagreement between the parties, thereby warranting modification of that arrangement. However, the Family Court improvidently exercised its discretion in providing that the father have visitation every weekend, beginning Saturday at noon and ending Sunday at 8:00 p.m. The schedule established by the Family Court effectively deprived the mother of any significant quality time with the children during each weekend. Moreover, the Family Court improvidently exercised its discretion in failing to specify the period of the mother's visitation with the children during their summer vacation. Under the circumstances presented, a more appropriate schedule, which was consistent with the parental rights and responsibilities of both parties, and the best interests of the children, should have provided that the noncustodial father would have visitation every other weekend, beginning Saturday at noon and ending Sunday at 8:00 p.m., and one overnight visit per week, and that the parties should have had equal visitation time during the children's summer vacation. Accordingly, the matter was remitted to the Family Court to set forth a new visitation schedule. Contrary to the mother's contention, the attorney for the children took an active role in the proceeding and accorded the children effective assistance of counsel.

Matter of Rivera v Fowler, 112 AD3d 835 (2d Dept 2013)

Family Court Not Required to Conduct in Camera Interview of the Child Before Denying Petition for Modification

Contrary to the petitioner's contentions, the Family Court providently exercised its discretion by denying her petition to modify the prior order so as to change the school district in which the subject child was registered, as the petitioner failed to show a change in circumstances warranting the modification of the prior order. Further, it was not an improvident exercise of discretion to deny the petition without conducting an in camera interview of the subject child.

Matter of Arroyo v Agosta, 112 AD3d 920 (2d Dept 2013)

Parties' Acrimonious Relationship Renders Joint Custody Inappropriate

Family Court issued an order of joint legal custody of the children to the parties with primary, physical custody to the mother. Thereafter, the father repeatedly

filed petitions to enforce and modify, seeking primary, physical custody of the children. Family Court denied the father's custody modification petitions and awarded sole custody of the children to the mother, with minor visitation adjustments to the father's schedule. The Appellate Division affirmed. There was no error in the court's determination that the father failed to establish a change in circumstances. Within days after the initial custody order was issued, the father filed a violation petition against the mother and over the next several months, filed five more violation petitions and the instant modification petition against her. Upon consideration of all the circumstances, including the parties' acrimonious relationship, their inability to effectively communicate and cooperate with each other, Family Court properly concluded joint custody was inappropriate and amended the prior order.

Matter of Green v Green, 109 AD3d 1027 (3d Dept 2013)

Sound and Substantial Basis in the Record to Deny Father Overnight Visitation

With the parties' consent, Family Court awarded sole custody of the children to the mother, suspended the father's visitation and the father left the county for several years. Upon his return, the parties' consented to a temporary order of supervised visitation to the father. Thereafter, the father filed several violation petitions and a modification petition and the mother also filed a violation petition. After a hearing, Family Court modified the father's visitation from unsupervised to supervised. The Appellate Division affirmed determining there was a sound and substantial basis in the record to support the court's decision. The father's return to the county constituted a change in circumstances. Although the father requested overnight visits with the children, the father's current housing situation did not provide an adequate sleeping arrangement for the children. Additionally, the father had been absent from the children's lives for several years.

Matter of Rohan AA. v Lonna CC., 109 AD3d 1051 (3d Dept 2013)

Father's Refusal to Return Child to Mother Supports Wilful Violation Determination

Family Court determined the father had wilfully violated an order of custody but failed to impose any sanctions against him. The father appealed and the Appellate Division affirmed. The appeal was not moot as such a finding could have "enduring consequences". Despite the fact that Family Court found neither party very credible, the parties did agree the custody order provided the mother with sole legal custody and the father with parenting time upon the parties' agreement. The father's failure to return the child after a lengthy period of parenting time, despite the mother's attempt to retrieve the child, provided clear and convincing proof to support the court's finding.

Matter of Guild v Clifford, 109 AD3d 1053 (3d Dept 2013)

No Showing of Extraordinary Circumstances

Family Court dismissed petitioner grandmother's custody petition determining she had failed to establish extraordinary circumstances. The Appellate Division affirmed. Petitioner's argument that the mother persistently neglected the child was unpersuasive. While relinquishing care and control of a child for a continuous period of 24 months will support an extraordinary circumstances finding, such was not the case here. Although the child had visits with the grandmother that lasted multiple weeks, and at one occasion three months, this could not be construed to be a prolonged period of separation or a complete abdication of the mother's parental rights. While the mother was not a model of stability, there was no evidence that her frequent moves and questionable relationships rose to the level of extraordinary circumstances.

Matter of Mildred PP., 110 AD3d 1160 (3d Dept 2013)

Sound and Substantial Basis in the Record to Support Modification From Joint to Sole Custody

Family Court granted the father's petition and modified the custody order from joint to sole and transferred physical custody of the child from the mother to the father. The Appellate Division affirmed. There was a

sound and substantial basis in the record to support a change in circumstances making joint custody unworkable. The record showed the mother's current boyfriend admitted to using corporal punishment on the subject child, had a violent temper and a domestic violence history. The mother had started to limit the father's involvement in the child's life for no apparent reason and initiated heated arguments with the father in the presence of the child. She agreed she could not communicate with the father except through written exchanges via a notebook. It was in the child's best interest to award physical custody to the father. The mother was unwilling to foster a relationship between the child and the father, the father's home environment was more stable and he was more likely to foster a relationship between the child and his mother.

Matter of Festa v Dempsey, 110 AD3d 1162 (3d Dept 2013)

Court's Award of Shared Physical Custody Lacks a Sound and Substantial Basis in the Record

Family Court issued a default order of joint legal custody with primary physical custody to the father, without prejudice to the mother's rights. Thereafter, the mother filed to modify custody and sought primary physical custody of the children. After a hearing, Family Court determined the mother had demonstrated a change in circumstances and ordered shared physical custody of the children to the parents. The Appellate Division reversed, finding the decision lacked a sound and substantial basis in the record. Neither party sought shared custody and both parties alleged the other had committed acts of domestic violence. The evidence also showed the parties communicated poorly and had different parenting styles. Furthermore, although not a determinative factor, the court failed to take into consideration the wishes of the children, and as they both were in their teens, their preferences would have been entitled to great weight. Additionally, the court failed to discuss how alternating the children's custody arrangement would work better in light of the son's alleged preference to live with the mother and the father's failure to understand the daughter's dietary and medical needs.

Matter of Stout v Gee, 110 AD3d 1163 (3d Dept 2013)

Based on the Totality of Circumstances, it was in Child's Best Interests to Live with Father

Parents of one child consented to an award of joint legal custody issued by California, with primary physical custody to the father and reasonable parenting time to the mother. The order also allowed the father to temporarily relocate with the child to Michigan. Thereafter, the child came to visit the mother, who lived in New York, and stayed with her for a year during which time the mother filed a family offense petition against the father based on his conduct during telephone calls and obtained a temporary order of protection. The father appeared for the family offense hearing, which was later dismissed, and without notifying the mother, returned to Michigan with the child. The mother then filed to modify custody, seeking physical custody of the child. Family Court determined it had subject matter jurisdiction and after a hearing, dismissed the mother's petition. The Appellate Division affirmed. New York had subject matter jurisdiction as California no longer had exclusive continuing jurisdiction. Additionally, New York was the home state of the child pursuant to DRL § 76-b since the child had lived in New York for six consecutive months immediately before the commencement of the custody proceeding. While the mother was able to establish there had been a change in circumstances based on the child's lengthy stay with her in New York and the father's failure to take any steps to enforce his custodial rights, based on the totality of circumstances, it was not in the child's best interests to modify custody. Although both parents maintained a loving relationship with the child, the father was able to provide the child greater stability. The mother had moved twice during the one-year period the child was living with her and one such move occurred just before the end of the child's school year, which resulted in a disruption of the child's schooling. Additionally, the father was more willing than the mother, to foster a relationship between the child and the other parent. The child did well in school and was involved in sports when living with the father. The father was able to devote a lot of time to the child and the child had a good relationship with his paternal grandmother as well as his father's girlfriend and her family. Furthermore, the child expressed a desire to live with his father.

Matter of Clouse v Clouse, 110 AD3d 1181 (3d Dept 2013)

Mother's Poor Parental Judgment in Concealing Her Father's Level III Sexual Offender Status Supported Court's Decision to Grant Father Primary Physical Custody

Family Court determined that an award of joint legal custody to the parents with primary, physical custody to the father was in the children's best interests. The court also directed that all visitation between the children and their maternal grandfather be supervised. The Appellate Division affirmed. The father was gainfully employed while the mother was unemployed and on public assistance. The father had served in the military, obtained an Associate's Degree and was working towards a Bachelor's
Degree. He had a suitable home and an extended support system of family members. The mother however, did not have stable housing, moved multiple times since relocating to New York, and lacked any support system in New York apart from her father who was a risk level III sex offender convicted of committing multiple sexual acts against girls ages 11-17, some of whom were childhood friends of the mother. Despite the grandfather's history, the mother had relied on him to provide day-care services for the children, unsupervised. Additionally, she and the grandfather had concealed his sex offender status from the children's father because they felt it was not a concern of his. The mother's exercise of poor parental judgment in allowing her father to care for her children, without any supervision, was a relevant and important factor in the best interest determination.

Matter of McLaughlin v Phillips, 110 AD3d 1184 (3d Dept 2013)

Court's Imposition of $1000 Fine Against Mother was an Improvident Exercise of Discretion

The parents' judgment of divorce awarded them joint legal custody of the child with primary physical custody to the mother and parenting time to the father. Thereafter, both parents filed to modify. After a hearing, Family Court dismissed the mother's petition finding she had failed to establish a change in circumstances, but found that in regard to the father's petition, the mother had wilfully violated the terms of the prior custody order with regard to the father's parenting time and right of first refusal, and ordered, among other things, make up parenting time for the father and fined the mother $1000 for her egregious conduct. The Appellate Division found that since the mother's modification petition was premised on the child's wish to have less contact with her father, and Family Court failed to hold a Lincoln hearing without any explanation as to why it failed to do so, it was uncertain whether the child's wishes were taken into consideration by the court and as the child was 12-years-old, her wishes "at minimum" should have been entitled to consideration. Therefore, this matter was remitted to Family Court. Additionally, while there was no error in Family Court's finding the mother had wilfully violated the visitation provision of the divorce judgment, the imposition of the fine was an improvident exercise of discretion since the father clearly stated he was seeking monetary damages only if he did not receive make up parenting time, which he did receive. Finally, the mother's argument that the court was biased against her was found to be without merit.

Matter of Yeager v Yeager, 110 AD3d 1207 (3d Dept 2013)

Grandmother Met Burden of Establishing Extraordinary Circumstances and Awarded Custody of Children

Family Court determined petitioner grandmother had established extraordinary circumstances and awarded her sole custody of the parties' minor children. The Appellate Division affirmed. Here, the record showed the mother was an unfit parent. She had a history of instability, moved frequently, continued to abuse alcohol and drugs and suffered from untreated mental illness. While living with the father, she had married an inmate who was a drug abuser. She stated the inmate was the father of her second child. The mother physically and verbally abused the children, exposed them to cigarette and marihuana smoke despite the son's asthma and the daughter's respiratory issues, locked them in their rooms without attention and drugged them with cold medicine. The mother denied she had substance abuse issues and placed her own needs above those of her children. The father, who was serving a sentence for 13 ½ years for armed robbery, supported the grandmother's petition.

Matter of Ettari v Peart, 110 AD3d 1256 (3d Dept 2013)

Relocation in Child's Best Interests

Family Court properly determined the father could relocate with the child to Maryland. The father had been the primary caretaker of the now 15-year-old child since he was 5-years-old. The subject child had a close relationship with the father's wife and their 3-month-old son. Although the father earned $115,000 in 2011, he was not working in his desired field and his average salary was $75,000 since his pay was based solely on commissions. His position in Maryland only had a base salary of $40,000. However, he would also receive, among other things, a tax-free housing allowance for approximately $28,000 per year, a subsistence allowance of $2,880 per year and deferment of student loans with a possibility of cancellation of the total amount, retirement benefits and health benefits for his whole family (which his current job did not have). These benefits would make the father's economic position in Maryland equal to his current job. While the mother argued the move would hinder her relationship with the child as well as the child's relationship with his half siblings, she had rarely asked for more time with the child and never petitioned to have more time with the child. The father's wife understood the importance of fostering a relationship between the mother and child and indicated that in addition to any ordered visits, they would often travel near the mother's home to visit family and they would encourage phone calls and video chats. The mother's involvement in the child's life was limited and she only had a basic understanding of the child's medical and dietary needs. Additionally, the school the child would attend in Maryland would provide an opportunity for extracurricular activities which the child enjoyed, while the child's current school was considering doing away with the activities the child enjoyed due to budget constraints.

Matter of Cole v Reynolds, 110 AD3d 1273 (3d Dept 2013)

It was Not in Child's Best Interests to Have Visitation With Her Father

Family Court determined that visitation with the father was not in the child's best interests and directed the mother to provide the father with regular updates regarding the child. The Appellate Division affirmed. Here, the father abruptly left the state in 2003 without any explanation and without providing the mother with any means of contact. Thereafter, the mother sought and obtained a default order of sole custody of the child. The father returned 8 years later and petitioned for visitation with the child. Prior to the father's departure from New York, an order of protection had been issued against him on behalf of the mother based on threats he made that he would harm the mother and the child. He had been granted supervised visits with the child, but he left the state soon thereafter without any word to the mother or child. During his absence, the father never sent the child any letters, cards, pictures or gifts. The child had bonded with her stepfather, who had been in her life since she was two-years-old. The child did not wish to see her father and was in therapy due to anxiety she felt over the instant court proceedings. Additionally, given the child's anxiety and the court's awareness of the child's wishes, Family Court did not abuse its discretion by failing to hold a Lincoln hearing.

Matter of VanBuren v Assenza, 110 AD3d 1284 (3d Dept 2013)

Relocation Not in Child's Best Interests

Family Court permitted the mother to relocate with the then 18-month-old child on a temporary basis to New Jersey, which was four hours from where the father lived in Ithaca. After a fact-finding hearing, the court dismissed the mother's application to relocate and granted sole custody to the father. The mother, who was a lawyer, alleged she was only able to find employment in her field in New Jersey, where she was offered and accepted a position as a law clerk for a New Jersey judge. However, the court found she made no genuine effort to find a job in the Ithaca area. The father presented evidence that a parallel move by him would not be feasible because of his employment as an assistant professor of mechanical and aerospace engineering at Cornell, and the scarcity of faculty positions in his field. While the mother was the primary caretaker before the parties' separation, the father had been regularly involved in the child's life

before the separation, and showed an ability to appropriately care for and nurture the child during his post-separation parenting time. Family Court was appropriately concerned about the mother's ability to provide a safe and clean home for the child and her utter lack of respect for the father. The mother was not entirely willing to include the father in decisions regarding the child, and argued that the court unfairly characterized her as being "unduly combative and aggressive" toward the father. The court concluded the father was the parent more willing to foster a relationship with the other parent. The Appellate Division affirmed but remitted the visitation exchange matter to Family Court since travel to the current exchange point was difficult for the child as the drive was long and exhausting, and the parents were unable to reach an agreement.

Matter of Michelle V. v Brandon V., 110 AD3d 1319 (3d Dept 2013)

Mother's Acrimonious Relationship with Grandmother is Not Sufficient Cause to Deny Grandmother Visitation With Grandchild

Maternal grandmother petitioned to have visitation with her two grandchildren. Family Court granted the grandmother's visitation petition with regard to one grandchild but not the other. The Appellate Division affirmed and found the court's decision to have a sound and substantial basis in the record. When a child's parents are living, a grandparent who seeks visitation must establish, pursuant to DRL § 72[1], that conditions exist which equity would see fit to intervene. Family Court properly concluded the grandmother had standing with regard to one of the grandchildren. She had enjoyed a regular and loving and relationship with this grandchild and frequent and extended visitation from his birth until he was 3 ½ -years old. However, following a disagreement with the mother just after the second child's birth, the mother cut off all contact between the children and the grandmother. The mother avoided or refused all contact with the grandmother. Thereafter the grandmother had difficulty locating the mother as she moved several times with the children without providing family members with her new address or telephone number. During this period, the grandmother unsuccessfully sought help from various family members and requested they speak to the mother on her behalf. It was in the child's best interests to have visitation with the grandmother. The evidence showed the child had a healthy and nurturing relationship with the grandmother. While the mother had estranged herself from the grandmother, an acrimonious relationship between the mother and grandmother alone was insufficient cause to deny visitation.

Matter of Rubel v Wilson, 111 AD3d 1065 (3d Dept 2013)

Sound and Substantial Basis in the Record

After living with the mother and the child in several states across the country, the father left them in Kansas and moved to New York. Thereafter, the father discovered the child, who had by then moved to Oklahoma with the mother, had been twice removed from the mother's care by Oklahoma Department of Social Services. The father then took physical custody of the child and was awarded temporary custody. Both parents filed for custody in New York and after a hearing, Family Court awarded custody to the father. The Appellate Division affirmed, determining there was a sound and substantial basis in the record for the court's decision. When making initial custody determinations, the primary focus is the best interests of the child. Although the child had resided with the mother for most of his life, she had been unable to provide with him with stable home. By the time he was removed from the mother's care, the child had moved a dozen times within at least six states. The child had been removed from the mother due to her relationship with a violent individual. Although she promised to keep the child away from this person, she had failed to do so and once again the child had been removed from her care. The mother acknowledged she left the child alone overnight with the mother's 13-year-old daughter, to go away with the violent individual. The child, who was 7-years-old when the father obtained temporary custody, was not toilet trained, was educationally delayed and suffered from serious and substantial untreated dental problems. Additionally, the mother had mental health issues and medical problems. For a period of time, the mother had also failed to inform the father of the child's whereabouts. By contrast, the father was able to provide a stable home for the child. He was married, had stable employment and was

addressing the child's dental, developmental and educational needs. There was no abuse of discretion in the court's decision not to hold a Lincoln hearing due to the child's age and development delays, and given the representation provided by the attorney for the child.

Matter of Adams v Morris, 111 AD3d 1069 (3d Dept 2013)

Wishes of 15-Year-Old Child Insufficient Basis to Modify

Family Court denied the father's request to re-open the custody hearing and dismissed his custody modification petition. The Appellate Division affirmed. The father's modification petition was based in large part on the wishes of his 15-year-old child, and while the wishes of an older child were worthy of serious consideration, that alone without other factors supporting the change of a long standing and otherwise successful custodial arrangement, as the court found this to be, was not a sufficient reason to modify, especially since the current arrangement allowed the child access to two fit and loving parents.

Matter of Repsher v Finney, 111 AD3d 1074 (3d Dept 2013)

Family Court Erred in Summarily Dismissing Father's Violation Petition

Incarcerated father filed modification and violation of visitation petitions. Following a court appearance, Family Court modified the father's visitation times to accommodate the father and summarily dismissed his violation petition. On appeal, the Appellate Division found that while the father's release from the correctional facility rendered his appeal of the modification order moot, the appeal from the dismissal of his violation petition remained. Upon review, the Appellate Division determined Family Court erred in summarily dismissing the father's violation petition since factual issues had been posed. The father's allegations, if established, supported a finding that his rights had been impaired by the mother's wilful failure to comply with the court order, and thus the matter was remitted for this purpose.

Matter of Hartley v Post, 111 AD3d 1093 (3d Dept 2013)

Mother's Alienating Course of Conduct Supports Physical Custody to Father

Family Court modified a joint legal custody order by changing physical custody of the child from the mother to the father. The Appellate Division affirmed. The record was replete with evidence that the mother engaged in a course of conduct intended to alienate the 14-year-old child from her father. Among other things, the mother claimed the child had been sexually abused by the father and then later acknowledged to a State Police Investigator that she had threatened the father she would do everything she could to ensure he did not have a relationship with the child, and this might be the motivation for her abuse allegations. The mother failed to inform the father she had enrolled the child in counseling, she later terminated counseling and started the child on medication without consulting or informing the father. She failed to take the child to Girl Scouts, as the parties had previously agreed to do, routinely picked up the child early from Girl Scouts, and she took the child away crying from Thanksgiving festivities just before the feast had begun. The mother made further reports to CPS against the father, which were later deemed unfounded and also tried to create problems for the father with his employer. Giving due deference to the court's credibility determinations, the Appellate Division found the record as a whole supported modification and a change of physical custody.

Matter of Graham v Morrow, 111 AD3d 1178 (3d Dept 2013)

No Showing of Real Need for Modification

Family Court dismissed parents modification petitions. The Appellate Division affirmed. The father, who had sole legal custody, sought to have the mother's visits, which were currently unsupervised, supervised. The mother sought physical custody of the child. While there was some evidence that the father was interfering with the mother's access to the subject child, there was also proof that the child was doing well in school, was involved in extracurricular activities and had a stable home life with the father
and his wife. Therefore, there was no showing that a real need for modification was necessary in order to

ensure the child's best interests.

Matter of Beane v Curtis, 112 AD3d 1005 (3d Dept 2013)

Family Court Did Not Improvidently Award Custody to Father

Here, the parents lived together before the child's birth. After the child was born but before the mother left the hospital with the child, the agency received a hot line report reflecting concerns about domestic violence and the mother's ability to care for the child. The mother consented to have the child discharged from the hospital into the father's care. Thereafter both parents filed for custody. Family Court concluded the father was the more fit parent and awarded sole custody to him. The Appellate Division affirmed, finding the court did not improvidently award custody to the father based on the evidence before the court. The record showed the mother's other three children had been removed from her care, two due to neglect and one placed voluntarily with a grandparent. The mother, who was borderline intelligent, had an extensive mental health history with hospitalizations and suicide attempts. Additionally, she had a history of mutual domestic violence with the father as well as substance abuse. The father had been found to have neglected his children, by his ex-wife, and had orders of protection issued against him, now expired, on her behalf. The mother accused the father of domestic violence, poly-substance abuse and neglect. However, the father had a stable home and had been employed as a skilled laborer until a work injury resulted in his being let go. Additionally, the father's 19-year-old daughter by his ex-wife was a frequent visitor to his home and helped him take care of the child. The fact that the father had been incarcerated and the child removed from his care since the instant appeal had been filed did not make the appeal moot given the fact that if the mother had been successful on the appeal, it would have directly affected her rights.

Matter of Perry v Surplus, 112 AD3d 1077 (3d Dept 2013)

Father's Incarceration Presented Logistical Restrictions on Parties' Ability to Communicate Thus Sole Custody to Mother Was in Child's Best Interests

Family Court modified a joint legal custody order to sole legal and physical custody to the mother, and gave the father access to the child's medical/educational records and provided him with specific visits with the child based on his incarceration. The Appellate Division affirmed. As father had been released from prison since the court order had been issued, the appeal was moot only as to the visitation issue. Family Court's order modifying custody had a sound and substantial basis in the record. The father's incarceration had constituted a change in circumstances that reflected a real need for modification. Additionally, his incarceration presented logistical restrictions on the parties' ability to effectively and efficiently communicate. Therefore, the court's award of sole legal and physical custody to the mother was in the child's best interests.

Matter of Breitenstein v Stone, 112 AD3d 1157 (3d Dept 2013)

Visitation With Father Would Be Harmful to the Child

Incarcerated father filed to modify visitation and sought access to the child. Family Court found that communication between the incarcerated father and the child was not in the child’s best interests, and directed the mother to provide annual photographs of the child to the father. The Appellate Division affirmed. While generally visitation with a noncustodial parent is presumed to be in the child’s best interests, the court has discretion to deny such visitation where there are compelling reasons and substantial proof that visitation would be harmful to the child. Here, the father had been convicted of manslaughter in the death of the mother’s older daughter and was adjudicated to have derivatively neglected the subject child. He had not had any contact with either the mother or child for over two years, and had made no attempt at contact even after the order of protection barring contact between him and the child had expired. No members of respondent’s family attempted to maintain a relationship with the child and the record established the child had no knowledge of the father or his circumstances. The mother testified she believed contact with respondent would be traumatic for the

child and the child viewed the mother's new husband as her father. Additionally, respondent owed over $4,000 in child support arrears and had commenced a proceeding to discontinue his support obligation.

Matter of Joshua SS. v Amy RR., 112 AD3d 1159 (3d Dept 2013)

Family Court Failed to Make the Necessary Findings to Support its Dismissal of Mother's Visitation Modification Petition

Due to the mother's erratic behavior, Family Court transferred custody of the two children to the father and provided the mother supervised visits on a weekly basis and additional visitation at such other times as the parties could agree. Thereafter, the mother moved to modify the order and after a hearing, Family Court dismissed her petition. The Appellate Division affirmed the custody determination but remitted the visitation portion of the order. The mother failed to show there had been a change in circumstances reflecting a genuine need for modification of custody. While the mother had apparently completed a substance abuse program, there was no evidence to support her claim. Additionally, there was no medical testimony or evidence that the mother had received treatment or counseling to address her mental health issues. However, with regard to visitation, Family Court's record was limited and failed to make the necessary findings to support its dismissal of the mother's petition. The court failed to address the necessity or justification for continuing the current visitation arrangement, or make any finding that the once-weekly highly restrictive supervised visits continued to be in the children's best interests or that unsupervised visits would be inimical to the children. While the visitation order allowed the mother additional visitation as the parties could agree, the father had permitted the mother only two unsupervised visits in one year, and while the father expressed some concerns about visitation, he did not oppose unsupervised visits to the mother. He also admitted the children were not negatively affected by the visits with their mother. Furthermore, although requested by the mother, the court failed to hold a Lincoln hearing with the 7 and 14-year-old children. The mother and children had a right to meaningful visitation, and in providing such visitation, the frequency, regularity and quality of the visits needed to be considered. The court also failed to consider, among other things, factors such as the children's ages and their needs and wishes, the mother's progress with treatment, and availability of additional supervisors. Finally, the court erred in delegating its authority to determine visitation to the father especially given the significant competing rights of the non-parent's right to visitation and the children's right to be protected from a potentially harmful parent.

Matter of Fish v Fish, 112 AD3d 1161 (3d Dept 2013)

Sole Custody to Father in Children's Best Interests

Supreme Court awarded the father sole legal custody of his two children with parenting time to the mother. The Appellate Division affirmed the custodial determination but expanded the mother's parenting time. Joint legal custody was not feasible given the parties' mutual animosity and inability to communicate. The parents had engaged in disputes over every aspect of the children's lives. There was sound and substantial basis in the record to award the father sole custody. The mother minimized his role in the children's lives by telling them, among other things, that they would be moving to California to find " a new daddy" who would not be "broken" and could be trusted and she referred to the father in degrading and obscene terms in front of the children. However, upon review of the record, the mother should have been entitled to more parenting time. Although the Appellate Division did not incorporate the detailed rights and responsibilities of the parents into the order, as suggested by the attorney for the children, the Court did stress that both parties would be well advised to honor the visitation schedule and be civil and courteous in all dealings with each other.

Matter of Bowman v Engelhart, 112 AD3d 1187 (3d Dept 2013)

Mother Properly Granted Sole Custody of Parties' Three Children

Family Court awarded petitioner mother sole custody of the parties' three children with visitation to respondent father on alternate weekends. The Appellate Division affirmed. The award of sole custody to the mother had a

sound and substantial basis in the record. The father's contention that the AFC failed to advocate for the children's interests was unpreserved and without merit. The court did not abuse its discretion in allowing testimony concerning events that predated the prior custody order. In determining the best interests of the children, the court was vested with broad discretion with respect to the scope of proof. The delay between the conclusion of the hearing and the court's decision, by itself, did not require reversal.

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

Splitting Placement of Children Affirmed

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

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

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

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

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

Modification of Prior Order Awarding Father Physical Custody of Child Upheld

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

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

Mother Failed to Establish that Post-Surrender Visitation Agreement Was Enforceable

The mother petitioned to enforce an agreement providing post-surrender visitation with the child. Family Court dismissed the petition on the ground that further visitation between the mother and the child was not in the child's best interests. The Appellate Division affirmed. The mother failed to establish that the agreement was enforceable. The mother's contention was rejected that the agreement was enforceable pursuant to Social Services Law Sections 383-c and 384. The Social Services Law unequivocally provided

that subsequent to the adoption of the child, enforcement of any post-surrender contact agreement shall be in accordance with Domestic Relations Law Section 112-b. The Domestic Relations Law in turn provided in relevant part that such agreement "shall not be legally enforceable after any adoption approved by a court pursuant to this article unless the court entered an order pursuant to this section incorporating those terms and conditions into a court-ordered adoption agreement." The mother failed to establish that the terms of the agreement were incorporated into the court-ordered adoption agreement. In any event, the court shall not enforce an order incorporating a post-surrender contact agreement unless it found that the enforcement was in the child's best interests

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

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

Family Court modified an existing custody and visitation order by requiring that respondent mother's access to the subject child be supervised. The Appellate Division modified and remitted for further proceedings. In 2009, the court modified a prior custody order by awarding sole custody of the subject child to petitioner father and granting liberal access to the mother. In making the 2009 order, the court determined that there was a change in circumstances inasmuch as the mother repeatedly frustrated the father's access and the mother failed to follow court orders. The instant order limited the mother's access to supervised visitation based largely upon the court's finding that the mother, without notifying the father and in violation of the 2009 order, absconded with the child, leaving the country for a period of 39 days. The mother's violation of the 2009 order and her pattern of continued violation of court orders constituted a sufficient change in circumstances. The court's determination that unsupervised visitation would be detrimental to the child had a sound and substantial basis in the record. The mother put the child at risk of emotional and intellectual harm by absconding with her, causing her to miss over a month of school, and failing to appreciate the importance of the child's relationship with the father. However, the court erred in failing to set a supervised visitation schedule. Therefore, the matter was remitted to determine the access schedule and whether sibling visitation shall occur.

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

Visitation Petition Properly Dismissed with Prejudice

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

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

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

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

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

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

Family Court modified a prior custody order by, among

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

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

Father's Cross Petition Granted Where Domestic Violence in Mother's Household Constituted Sufficient Change in Circumstances

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

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

Modification of Prior Order Awarding Father Physical Custody of Child Affirmed

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

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

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

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

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

Children Could Not Force Mother to Litigate Abandoned Petition

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

Matter of Kessler v Fancher, 112 AD3d 1323 (4th Dept 2013)

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

Family Court granted petitioner mother sole custody and primary physical residency of the subject children. The Appellate Division affirmed. Respondent father's contention was rejected that the court erred in transferring temporary custody of the younger child to the mother while the father was not represented by counsel. The father was unrepresented due to his own inaction. The record established that, during two prior court appearances, the court advised the father of his right to counsel and gave him a referral for assigned counsel. At the third appearance, when the father again appeared without counsel, the court granted the temporary order upon the motion by the Attorney for the Children. Assuming, arguendo, that the court erred in deciding the motion, reversal was not required because the order on appeal was issued following a subsequent evidentiary hearing at which the father was represented by counsel.

Matter of Stearns v Crawford, 112 AD3d 1325 (4th Dept 2013)

Reduction of Mother's Visitation in Best Interests of Children

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

Matter of Golda v Radtke, 112 AD3d 1378 (4th Dept 2013)

FAMILY OFFENSE

Respondent Committed Family Offenses

Family Court determined that respondent husband committed the family offenses of attempted assault in the second degree; attempted assault in the third degree; menacing in the third degree; disorderly conduct;

harassment in the second degree; and aggravated harassment in the second degree. The Appellate Division affirmed. Family Court had personal and subject matter jurisdiction over respondent. Respondent submitted to the jurisdiction of the court by appearing in the family offense proceeding commenced by petitioner, who was then residing in a New York State shelter. The court's subject matter jurisdiction is not limited by geography and the court therefore could receive evidence and make fact-findings about incidents that occurred in Pennsylvania before petitioner moved to New York with her daughters. The court's determination that respondent committed the family offences was supported by a fair preponderance of the evidence.

Matter of Opportune N. v Clarence N., 110 AD3d 430 (1st Dept 2013)

Wife Failed to Establish Family Offense of Disorderly Conduct

In order to establish that the husband committed the family offense of disorderly conduct, the wife was required to prove that the husband's conduct was committed with the intent to cause, or recklessly posed a risk of causing, public inconvenience, annoyance, or alarm. The wife did not sustain that burden. She did not adduce any testimony regarding the layout of the marital home, or the proximity of neighbors or other members of the public. Nor did she testify that the husband was screaming or otherwise being so loud that others might reasonably be expected to hear him. Further, while the husband testified that his two daughters were upstairs watching television at the time of the incident, assuming arguendo that they could constitute "the public," there was no evidence that the husband intended to cause them inconvenience, annoyance, or alarm, and the evidence was insufficient to demonstrate that he recklessly created a risk thereof. In that respect, there was no evidence regarding how close the daughters were to the confrontation or whether the husband's conduct would have been noticeable to someone not in the immediate vicinity. Accordingly, the wife failed to establish the family offense of disorderly conduct. Therefore, the Appellate Division reversed the order of protection issued in her favor, which was based solely on the finding that the husband had committed the family offense of disorderly conduct.

Matter of Cassie v Cassie, 109 AD3d 337 (2d Dept 2013)

Issuance of Order of Protection Warranted

Contrary to the respondent's contention, the petitioner established, by a fair preponderance of the evidence (*see* FCA § 832), that the respondent, who, inter alia, made verbal threats to the petitioner in the hallway of the Family Court building and physically blocked the petitioner's car from exiting the parking lot of the Family Court, engaged in threatening behavior that recklessly created a risk of causing public inconvenience, annoyance, or alarm (*see* PL § 240.20). Accordingly, a fair preponderance of the credible evidence supported the Family Court's determination that the respondent committed acts which constituted the family offense of disorderly conduct, warranting the issuance of an order of protection.

Matter of Banks v Opoku, 109 AD3d 470 (2d Dept 2013)

Petitioner Established by Preponderance of the Evidence That Respondent Harassed Her

Family Court found respondent father had committed a family offense, issued a two-year order of protection on behalf of petitioner mother, and ordered supervised visits with the child to respondent father. The Appellate Division affirmed. Petitioner mother established by preponderance of the evidence that respondent committed the family offense of harassment in the first degree by intentionally and repeatedly harassing her. While incarcerated, respondent repeatedly threatened both her well-being and to take the child from her. When petitioner told him she had met another man, who was now her husband, respondent replied "you must have a f....ing death wish....it's death do us part....you don't just get to leave." Additionally, when petitioner spoke to respondent about changing the child's last name, respondent replied "if you try to take that f....ing kid from me I will make sure he....never knows your name... I will make him disappear like that (fingers snapping); all it takes is one phone call." These and another threatening statement carried "ominous

implications" for petitioner and the child's safety and provided ample support to find respondent had committed the family offense. Supervised visits were in the child's best interests based on respondent's limited contact with the child due to his incarceration, his lack of parenting experience, as well as his failure to complete a sex offender treatment program. Additionally, therapeutic visits were appropriate given the nightmares and behavioral difficulties the child suffered after visiting with respondent.

Matter of Shana SS. v Jeremy TT., 111 AD3d 1090 (3d Dept 2013)

Respondent Committed Family Offenses

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

Matter of Dietzman v Dietzman, 112 AD3d 1370 (4th Dept 2013)

JUVENILE DELINQUENCY

Respondent's JD Finding And Dispositional Order Reversed

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted two counts each of the crimes of sexual abuse in the second and third degrees and forcible touching, and placed him on probation for 12 months. The Appellate Division reversed, dismissed the first, third and fifth counts of the petition, vacated the delinquency finding and disposition, and remitted to the court with a direction to order an ACD nunc pro tunc. At the time of the underlying occurrence, the complainant was 13 years old and respondent was 12 years old. While at the school they attended, respondent asked the complainant to be his girlfriend and she ignored him. Thereafter, respondent grabbed the complainant in a public hallway, dragged her down the hallway and touched and squeezed her breasts and the right side of her buttocks. He also tried to kiss her and ignored her when she told him "I need to go to class. I don't like you. No." He told her that if she hugged him he would let her go and she did so to get him away from her. Although the court's finding that respondent committed a delinquent act was based upon legally sufficient evidence and was not against the weight of the evidence, there was insufficient support that respondent needed supervision, treatment or confinement. This was respondent's first and only contact with the juvenile justice system; when the hearing took place his academic performance and school attendance had improved; he had stopped contact with "negative peers;" and he had no history of illegal dug or alcohol use. Further, he had a stable home and had been compliant with all court orders and proceedings. A psychologist with
a psychiatric center testified that respondent's mother and respondent indicated that they would make certain respondent attended all scheduled treatment appointments with the psychologist's recommended program. The dissent would have affirmed the placement of probation for 12 months because of the seriousness of the offense, respondent's failure to accept responsibility for his behavior, and the need to supervise respondent during the course of treatment recommended by the psychologist.

Matter of Narvanda S., 109 AD3d 710 (1st Dept 2013)

Juvenile Delinquency Adjudication Based on Legally Sufficient Evidence And Not Against Weight of Evidence

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed act that, if committed by an adult, would constitute the crime of assault in the third degree, and imposed a conditional discharge for a period of 12 months. The Appellate Division affirmed. Family Court's finding was based upon legally sufficient evidence and was not against the weight of the evidence. The victim's testimony established that respondent participated in the attack by

hitting and physically restraining the victim while other attackers repeatedly punched and kicked him, causing the victim to sustain a broken nose and other injuries. Given the serious and violent nature of the underlying assault, as well as respondent's poor performance and attendance at school, the court properly concluded that respondent needed a full year of supervision.

Matter of Kwante H., 109 AD3d 744 (1st Dept 2013)

Juvenile Delinquency Adjudication Based on Legally Sufficient Evidence And Not Against Weight of Evidence

Family Court adjudicated respondent to be a juvenile delinquent based upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree, menacing in the second degree and criminal possession of a weapon in the fourth degree, and placed him on probation for a period of 12 months. The Appellate Division affirmed. Family Court's finding was based upon legally sufficient evidence and was not against the weight of the evidence. There was no basis to disturb the court's determinations concerning credibility and identification, including its evaluation of any inconsistencies in testimony. The court properly exercised its discretion in denying respondent's request for and ACD. The 12- month- period of supervision was warranted by the seriousness of the attack on the victim, as well as respondent's poor academic performance, truancy, and school disciplinary record.

Matter of Jamie S., 110 AD3d 448 (1st Dept 2013)

Placement With OCFS For 33 Months Warranted

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of robbery in the first degree, and placed him with OCFS for 33 months, 12 months to be served in a secure facility and 12 months to be served in a residential facility, with no credit for time served. The Appellate Division affirmed. Because respondent committed a designated felony act, the guidelines for restrictive placement applied, as opposed to the least restrictive available alternative standard. The disposition was warranted by, among other things, respondent's predatory behavior and his history of recidivism and violence. Although a psychiatrist and probation officer who evaluated respondent recommended against restrictive placement, they nevertheless recommended that respondent be placed in a structured environment outside the community, and the court properly concluded that this would best be provided by restrictive placement.

Matter of Joseph B., 110 AD3d 501 (1st Dept 2013)

Placement With OCFS Least Restrictive Dispositional Alternative

Family Court adjudicated respondent to be a juvenile delinquent based upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted robbery in the first degree, attempted robbery in the second degree, menacing in the second degree, criminal possession of a weapon in the fourth degree and possession of an imitation firearm, and placed him with OCFS for 18 months. The Appellate Division affirmed. Family Court's finding was based upon legally sufficient evidence and was not against the weight of the evidence. There was no basis for disturbing the court's credibility determinations. The placement was the least restrictive dispositional alternative given that respondent was already on probation for a prior delinquency adjudication and his pattern of misconduct at school and at home.

Matter of Malik B., 110 AD3d 520 (1st Dept 2013)

Respondent's Right to be Present Not Violated When Respondent Chose to be Elsewhere and Fact-finding Hearing Continued in His Absence

Family Court adjudicated respondent to be a juvenile delinquent based upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the third degree, grand larceny in the fourth degree and assault in the third degree, and placed him on enhanced supervised probation for a period of 15 months. The Appellate Division affirmed. While the better practice would have been to adjourn the matter for one day, especially where the Presentment Agency joined in the request for an adjournment, based on the record, the court did not

violate respondent's right to be present when it ordered a portion of the fact-finding hearing to continue in respondent's absence. The record established that although respondent was aware of the time and date for his continued fact-finding hearing, he chose to be elsewhere. Accordingly, this constituted a deliberate absence, resulting in the forfeiture of the right to be present. Respondent did not appear in court until the next day, and offered no explanation for his absence. Respondent's counsel's strategic decisions regarding nonparticipation during respondent's absence were objectively reasonable, and did not cause respondent any prejudice. Respondent's claims of ineffective assistance of counsel were rejected. Although not preserved for review, respondent's challenge was rejected on the merits to the sufficiency of the evidence supporting the physical injury element of third degree assault. The victim sustained swelling to his eye that lasted for three to four days. In addition, his jaw, which he iced twice a day for four days, was swollen for a week and caused him difficulty in eating and talking. Therefore, the record contained ample evidence of physical injury.

Matter of Will V., 111 AD3d 425 (1st Dept 2013)

Probation Least Restrictive Dispositional Alternative

Respondent was adjudicated to be a juvenile delinquent based upon a fact-finding determination that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed her on probation for 12 months. The Appellate Division affirmed. The court properly exercised its discretion when it denied respondent's request for an ACD. A term of probation was the least restrictive dispositional alternative consistent with respondent's needs and the community's need for protection. The 12-month period of supervision was warranted by the seriousness of the respondent's violent attack on the victim, which outweighed the mitigating factors cited by respondent.

Matter of Sareta A., 111 AD3d 539 (1st Dept 2013)

When Selecting Dispositional Alternative, Court Entitled to Consider Respondent's Entire Background

Family Court adjudicated respondent to be a juvenile delinquent based upon his admission that he committed an act that, if committed by an adult, would constitute the crime of possession of graffiti instruments, and placed him with the Administration for Children's Services' Close to Home Program for a period of 12 months, with credit for time spent in detention. The Appellate Division affirmed. The disposition was the least restrictive dispositional alternative consistent with respondent's needs and the community's need for protection. Although the delinquency adjudication was based on a relatively minor offense, the court was entitled to consider respondent's entire background, which included a serious history of violence, as well as respondent's commission of unlawful acts while already on probation. Respondent's admission met all constitutional and statutory requirements. As in the comparable situation of a guilty plea entered by an adult, specific factual recitals supporting the elements of the crime were not required to support an admission of juvenile delinquency. Respondent's allocution neither negated any element nor cast doubt on his guilt.

Matter of Michael Joseph C., 111 AD3d 565 (1st Dept 2013)

Court Properly Awarded Respondent Credit for Only One Month Spent in Detention

Upon the admission of respondent, Family Court found that respondent violated the terms and conditions of probation previously imposed by the court in an order of disposition placing him on probation, vacated the prior order of disposition, and thereupon placed respondent in the custody of the New York State Office of Children and Family Services for a period of 12 months, with credit for only one month spend in detention. The Appellate Division affirmed. The court properly determined that giving respondent credit for the entire time that he spent in detention pending disposition would not serve respondent's needs and best interests or the need for the protection of the community. Family Court had broad discretion in determining the appropriate disposition in a juvenile delinquency case. Here, the court providently exercised its discretion. The disposition was the least restrictive alternative consistent with respondent's best interests and the needs of the community, in light of, among other things, respondent's need for supervision

and treatment in a structured setting, and the recommendations set forth in reports prepared by a psychologist and the Administration for Children's Services.

Matter of Anthony C., 111 AD3d 621 (1st Dept 2013)

Police Officer Had Objective, Credible Reason to Approach Respondent

Respondent was adjudicated to be a juvenile delinquent based upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of petit larceny and criminal possession of stolen property in the fifth degree, and placed him in the custody of the New York State Office of Children and Family Services (OCFS) for a period of 12 months. The Appellate Division affirmed the fact-finding determination. Contrary to respondent's contentions, the evidence at the suppression hearing established that the police officer who conducted the showup identification procedure involving respondent had an objective, credible reason to approach respondent, who was sitting on a bicycle and whose appearance sufficiently matched the description of an individual who had stolen a bicycle minutes earlier and a short distance away. It was proper for the officer to conduct an inquiry of respondent, given the officer's founded suspicion that criminal activity was afoot. Moreover, in light of respondent's questionable response to the officer's inquiry about his ownership of the bicycle, the officer had a reasonable suspicion of respondent's involvement in criminal activity, and it was proper for him to stop and detain respondent. The showup identification procedure conducted shortly thereafter, during which the complainant identified respondent, was not impermissibly suggestive because it was conducted in close spatial and temporal proximity to the crime.

Matter of Kareem J., 111 AD3d 637 (1st Dept 2013)

Probation Least Restrictive Dispositional Alternative

Family Court adjudicated respondent to be a juvenile delinquent based upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the fourth degree, menacing in the second degree, attempted assault in the third degree, and that she also committed the act of unlawful possession of a weapon by a person under 16, and placed her on probation for a period of 12 months. The Appellate Division affirmed. Family Court's finding was not against the weight of the evidence. The court properly exercised its discretion in adjudicating respondent a juvenile delinquent, rather than a person in need of supervision, in view of her violent conduct in the underlying act, including threatening her mother with a knife, and other violence and misconduct.

Matter of Davina A., 112 AD3d 443 (1st Dept 2013)

Placement With OCFS Least Restrictive Dispositional Alternative

Family Court adjudicated respondent to be a juvenile delinquent based upon his admission that he committed acts that, if committed by an adult, would constitute the crime of menacing in the second degree, and placed him with OCFS for 12 months. The Appellate Division affirmed. Placement was the least restrictive alternative in view of the fact that the underlying offense was a serious violent attack involving a weapon. Further, respondent displayed a pattern of aggressive behavior and the court had ample information indicating that he was not a suitable candidate for a community-based program.

Matter of Marlon C., 112 AD3d 521 (1st Dept 2013)

Showup Identification Was Not Impermissibly Suggestive

Contrary to the respondent's contentions, the evidence at the suppression hearing established that the police officer who conducted the showup identification procedure involving the respondent had an "objective, credible" reason to approach the respondent, who was sitting on a bicycle and whose appearance sufficiently matched the description of an individual who had stolen a bicycle minutes earlier and a short distance away. It was proper for the officer to conduct an inquiry of the respondent, given the officer's "founded suspicion that criminal activity [wa]s afoot". Also, in light of the respondent's questionable response to the officer's inquiry about his ownership of the bicycle, the officer

had a reasonable suspicion of the respondent's involvement in criminal activity, and it was proper for him to stop and detain the respondent (*see* CPL 140.50). The showup identification procedure conducted shortly thereafter, during which the complainant identified the respondent, was not impermissibly suggestive, as it was conducted in close spatial and temporal proximity to the crime.

Matter of Kareem J., 111 AD3d 637 (2d Dept 2013)

Testimony Established Respondent's Active Participation in Robbery

The respondent was accused of having participated in the robbery of the complainant. Although the respondent admitted that he was present during the incident, he insisted that he only watched and did not participate, and he claimed on appeal that the evidence of his participation was legally insufficient and that the fact-finding was against the weight of the evidence. The Appellate Division disagreed. The complainant's testimony in this case, when viewed in the light most favorable to the presentment agency, established that the respondent actively participated in the incident. Accordingly, the evidence was legally sufficient. Upon reviewing the record, the Appellate Division was satisfied that the Family Court's fact-finding determination was not against the weight of the evidence (*see* FCA § 342.2 [2]).

Matter of Chakelton M., 111 AD3d 732 (2d Dept 2013)

No Merit to Respondent's Claim That the Family Court Lacked Subject Matter Jurisdiction

Viewing the evidence in the light most favorable to the presentment agency, the Appellate Division found that it was legally sufficient to prove beyond a reasonable doubt that the respondent committed acts which, if had been committed by an adult, would have constituted the crimes of attempted robbery in the first degree, attempted robbery in the second degree, and menacing in the second degree (*see* PL §§ 110.00, 160.15 [4]; 160.10 [2] [b]; 120.14 [1]). Moreover, upon reviewing the record, the Appellate Division was satisfied that the Family Court's fact-finding determinations were not against the weight of the evidence.

Matter of Anthony S., 112 AD3d 948 (2d Dept 2013)

Family Court Had Discretion To Keep Records Unsealed

When the agency withdrew its designated felony petition against respondent, Family Court directed sealing of all records except the reports prepared by Rockland Psychiatric Center and the Bronx Child and Adolescent Sex Offender's Treatment Program. During this time, a neglect case was pending against respondent's mother based on allegations, involving respondent, that numerous sexual acts had occurred between respondent and his eight siblings in the mother's household. Family Court determined, that in the interests of justice, it was absolutely imperative that the records remained unsealed in order for the court to determine what services the children needed, whether the children should be reunited and if so, whether additional treatment would be necessary prior to reunification. The Appellate Division affirmed. Pursuant to FCA § 375.1(1), Family Court had the authority to direct that records remain unsealed. Here, sealing the reports would have hindered the court's ability to fashion an appropriate disposition for the children within the context of the neglect matter and would have impeded the court's ability to obtain necessary services and treatment for the respondent within the context of the neglect proceeding. The decision by Family Court to place respondent in a residential facility was in his best interests and supported by a sound and substantial basis in the record. While the evaluating psychologist's testimony regarding respondent should be discounted in its entirety, since he obtained access to the sealed records and there was no meaningful way to gauge how this impacted his decision, there was additional evidence to justify respondent's placement.

Matter of Dashawn Q., 112 AD3d 1250 (3d Dept 2013)

Evidence Legally Sufficient to Establish Respondent Intended to Cause Physical Injury

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that he committed acts that, if committed by an adult, would constitute the crime of assault in the third degree. The Appellate Division affirmed. Although a different result would

not have been unreasonable because respondent testified to a version of the incident different than that presented by petitioner, there was no basis to disturb the court's resolution of witnesses' credibility.

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

PATERNITY

Petitioner Equitably Estopped from Claiming Paternity

The petitioner appealed from an order of the Family Court, which, after a hearing, granted the motion of the attorney for the child to dismiss the proceeding on the ground that the petitioner lacked standing to commence the proceeding. The Appellate Division previously affirmed a determination that the petitioner was equitably estopped from asserting that he was the biological father of the child. Contrary to the petitioner's contention, the determination that he was equitably estopped from claiming paternity has res judicata effect in the instant case and precludes him from claiming that he is a parent of the child. Accordingly, the motion to dismiss the proceeding for lack of standing was properly granted.

Matter of Marquis B. v Alexis H., 110 AD3d 790 (2d Dept 2013)

Paternity Petition Properly Dismissed

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

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

SPECIAL IMMIGRANT JUVENILE STATUS

A Child Support Order Does Not Satisfy the Requirement for Special Immigrant Juvenile Status That a Child Be Dependent on a Juvenile Court

The Family Court's issuance of a child support order directing the mother to pay child support to the father did not qualify the parents' two children, who were born in Hong Kong and lived in the United States with their father, as "dependent on a juvenile court" or committed to the custody of an individual appointed by a State or juvenile court, as required for the children to qualify for special immigrant juvenile status (SIJS) under federal law (*see* 8 U.S.C.A. § 1101(a)(27)(J)(i)). The Family Court had not accepted jurisdiction over the custody of the children, there had been no need for intervention by the Family Court to ensure that the children were placed in a safe and appropriate custody, guardianship, or foster care situation, and the children had not been committed to the custody of any individual by any court. Accordingly, the Family Court's order denying the siblings' petitions for the issuance of special findings was affirmed.

Matter of Hei Ting C., 109 AD3d 100 (2d Dept 2013)

TERMINATION OF PARENTAL RIGHTS

TPR Based Upon Mental Illness And Permanent Neglect Affirmed

Family Court, upon fact-findings of permanent neglect and mental illness, terminated respondent mother's parental rights to the subject children. The Appellate Division affirmed. The finding that the mother suffered from a mental illness was supported by clear and convincing evidence. Testimony from a court-appointed psychologist who examined the mother for several hours and reviewed her medical history, supported the determination that the mother was presently and for the foreseeable future unable to provide adequate care of the children because of her mental illness. The psychologist testified that the mother suffered from schizoaffective disorder, had been hospitalized numerous times for her mental condition, abused alcohol and marijuana, and lacked insight into her condition. Although the mother had two younger children in her care, the psychologist testified that her condition was characterized by periods of relative

stability and periods of instability and the younger children had been in the mother's care for a limited period, and the addition of the subject children to the home might cause the mother to decompensate.

Matter of Kristian-Isaiah William M., 109 AD3d 759 (1st Dept 2013)

Father Abandoned Children

Family Court denied respondent father's motion to vacate an order that, upon his default, terminated his parental rights with respect to his child on the ground of abandonment. The Appellate Division affirmed. Respondent failed to demonstrate a reasonable excuse for his absence from the proceeding and a meritorious defense to the abandonment allegation. His conclusory statement that he was confused as to the date or time of the hearing was not a reasonable excuse for failing to appear. Further, respondent's assertion that he visited the children when he was in the neighborhood and called them on holidays and birthdays established nothing more than sporadic and minimal attempts to maintain a parental relationship, which was insufficient to prevent a finding of abandonment.

Matter of Mariah A., 109 AD3d 751 (1st Dept 2013)

TPR Based Upon Mental Illness Affirmed

Family Court, upon a fact-finding determination that respondent mother suffered from mental illness, terminated her parental rights to the subject child. The Appellate Division affirmed. The finding that the mother suffered from a mental illness was supported by clear and convincing evidence. The report and testimony from a psychologist who reviewed respondent's medical records and conducted a clinical interview, finding that respondent suffers from schizophrenia and her prognosis was very poor, supported the determination that she was presently and for the foreseeable future unable to provide adequate care of the children. The court was allowed to draw a negative inference from the fact that the mother did not testify at the hearing. A separate dispositional hearing was not required in this case of termination of parental rights for mental illness.

Matter of Jeremiah M., 109 AD3d 736 (1st Dept 2013)

Respondent Violated Terms of Suspended Judgment

Family Court, upon a fact-finding determination that respondent mother violated the terms of a suspended judgment, terminated her parental rights and freed the child for adoption. The Appellate Division affirmed. The determination that respondent violated the terms of a suspended judgment was supported by a preponderance of the evidence. Respondent failed to consistently visit with the children, participate in individual therapy, obtain suitable housing for herself and the children, and obtain a source of income. It was in the best interests of the children to terminate respondent's parental rights. They had been in the same foster home for three years, and their foster mother, who provided for their special needs, wished to adopt them.

Matter of Dayjore Isaiah M., 109 AD3d 745 (1st Dept 2013)

Respondent Violated Terms of Suspended Judgment

Family Court revoked a suspended judgment, terminated respondent mother's parental rights to her children, and committed custody of the children to petitioner agency for the purpose of adoption. The Appellate Division affirmed. The determination that respondent violated the terms of a suspended judgment was supported by a preponderance of the evidence. Respondent failed to comply with the judgment that required, among other things, that she stay away from the children's father with whom there was a history of domestic violence and to refrain from alcohol use. It was in the best interests of the children to terminate respondent's parental rights. They had been in the same foster home for most of their lives, and their foster parents, who provided for their special needs, wished to adopt them.

Matter of Anthony Wayne S., 110 AD3d 464 (1st Dept 2013)

TPR Based Upon Mental Illness Affirmed

Family Court, upon a fact-finding determination that respondent father's consent was not required and that respondent mother suffered from mental illness, terminated the mother's parental rights and committed

custody of the child to petitioner Commissioner for the purpose of adoption. The Appellate Division affirmed. The finding that the mother suffered from a mental illness was supported by clear and convincing evidence, including testimony from a court-appointed psychologist who examined the mother. The psychologist testified that the mother suffered from, among other things, bipolar disorder, which interfered with her ability to care for the child, placing the child at risk of becoming neglected if she was returned to the mother's care. The mother's testimony confirmed that she lacked insight into the nature and extent of her mental illness. A suspended judgment was not available after a fact-finding determination of mental illness. There was clear and convincing evidence that the father did not satisfy Domestic Relations Law § 111 (1) (d) by providing the child with financial support and maintaining regular contact with the child or the agency. The agency's alleged failure to instruct the father to provide financial assistance did not excuse him from doing so.

Matter of Savannah Love Joy F, 110 AD3d 529 (1st Dept 2013)

Mother Violated Terms of Suspended Judgment

Family Court, upon a fact-finding determination that respondent mother violated the terms of the suspended judgments, terminated her parental rights and freed the children for adoption. The Appellate Division affirmed. A preponderance of the evidence supported the finding that the mother violated the terms of the suspended judgments. Notwithstanding the mother's efforts to comply with some of the terms of the suspended judgments, the credible evidence adduced at the hearing established, among other things, that she missed some of the planning conferences and her apartment was not maintained in a suitable manner due to mold and gnat infestation. Although the mother was required to remain drug and alcohol free, she relapsed approximately six months after the suspended judgment period began. Furthermore, because it might "hurt her case," the mother failed to obtain clearance for her live-in boyfriend or other friends that she allowed to live in her apartment. It was not necessary for a parent to violate all of the terms of a suspended judgment for a violation to be found.

Matter of Julien Javier F., 110 AD3d 562 (1st Dept 2013)

TPR Based Upon Permanent Neglect Affirmed

Family Court denied respondent mother's motion to vacate orders that terminated her parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. The Appellate Division affirmed. Respondent failed to demonstrate a reasonable excuse for her default and a meritorious defense to the petition. Her delay in obtaining a mental health treatment discharge report until the day she had to appear in court, and alleged public transportation difficulties on that same day, did not establish a reasonable excuse for the failure to appear, especially because respondent did not claim that she was unfamiliar with the public transportation system or had not previously used it to travel to Family Court. There was no evidence that respondent completed the mental health treatment program called for in her service plan within the relevant one-year period so as to demonstrate a meritorious defense to the allegations of permanent neglect. Indeed, the program discharge summary submitted by respondent stated that she was inconsistent and noncompliant with treatment, had no interest in treatment, and terminated treatment of her own accord.

Matter of Nasir Levon L., 110 AD3d 565 (1st Dept 2013)

Motion to Vacate TPR Properly Denied

Family Court properly denied respondent father's motion to vacate an order of disposition terminating his parental rights, based upon an earlier finding of permanent neglect. Although respondent claimed he was confused about when the dispositional hearings were scheduled, the record showed his counsel advised the court that he had spoken with respondent and informed him of the dates of both the fact-finding and dispositional hearings. Additionally, the evidence reflected respondent failed to contact his attorney, the court or the agency to ask about the scheduling of the hearing. Because respondent failed to offer a reasonable excuse for his default, there was no need to inquire whether he could offer a meritorious defense. However, the record supported both the permanent

neglect finding and the termination of respondent's parental rights.

Matter of Yadori Marie F., 111 AD3d 418 (1st Dept 2013)

Respondent Father Failed to Overcome Problem With Domestic Violence

Family Court properly determined that respondent father permanently neglected the subject children and terminated his parental rights. The agency proved by clear and convincing evidence that it made diligent efforts to reunite the family, through, among other things, drug treatment and parenting skills programs, anger management and domestic violence programs, and scheduling and supervising visitation. However, despite completion of many programs, respondent was unable to show he could overcome his problem with domestic violence or meet the children's special needs. A suspended judgment was properly rejected given the long history of failed attempts to return the children to their parents. The children's therapists noted that the foster parents were able to provide stability for the children and meet their special needs, which was paramount to the children's growth.

Matter of Julian Raul S., 111 AD3d 456 (1st Dept 2013)

Respondent Violated Terms of Suspended Judgment

Family Court, upon a fact-finding determination that respondent mother violated the terms of a suspended judgment, terminated her parental rights and, upon the additional finding that respondent father's consent was not required, freed the child for adoption. The Appellate Division affirmed. The father failed to demonstrate that he provided the child with fair and reasonable financial support, according to his means. Therefore, even assuming that he visited regularly, he failed to satisfy the requirements of "consent father" under Domestic Relations Law Section 111 (1)(d). As a "notice father," his rights were limited to notice of the proceedings and an opportunity to be heard concerning the child's best interests, which he received. The record supported the finding that the mother failed to comply with the terms of the suspended judgment by failing to obtain suitable housing for the child during the term of suspended judgment. During that time, the mother continued to reside in shelter housing for couples with the father. Although she located an apartment after the expiration of the term of the suspended judgment, the court properly determined that her anticipated move to an apartment with the father, who continued to abuse drugs and refuse treatment, would not provide suitable housing for the child. Thus, the mother failed to demonstrate that she made any progress in overcoming the specific problems that led to the child's removal. The record did not present exceptional circumstances that would warrant a one-year extension of the suspended judgment.

Matter of Sjaqwan Anthony Zion Perry M., 111 AD3d 473 (1st Dept 2013)

Clear and Convincing Evidence That Diligent Efforts Were Made But Respondents' Failed to Plan for Children's Future

Family Court determined respondent parents permanently neglected the children and terminated their parental rights. The Appellate Division affirmed. The agency proved by clear and convincing evidence that diligent efforts were made to reunite the parents and children. Despite these efforts, respondents failed to improve or gain insight into their children's special needs or the reason for their placement in foster care. The mother continued to ignore the agency's attempts to reach out to her, and unsupervised visits between the parents and children had to be twice suspended because the children returned with bruises and scratches, which respondents failed to adequately explain. The children also returned from these visits with stained clothing, they reeked of urine, and one of the children's diaper rash became worse after being left unsupervised in respondents' care. A suspended judgment was not warranted and it was in the children's best interests to be freed for adoption. Respondents offered no evidence of realistic plans for providing an adequate and stable home for the children. The children had been living for most of their lives with the foster mother, in whose care they were thriving, and she was able to handle their special needs.

Matter of Jaileen X.M., 111 AD3d 502 (1st Dept 2013)

Agency's Case Records Properly Admitted Under

Business Records Exception to Hearsay Rule

Family Court, after a hearing, found that respondent mother permanently neglected her child, terminated her parental rights, and committed custody of the child to petitioner agency for the purpose of adoption. The Appellate Division affirmed. The mother failed to preserve for review her contention that the agency's case record should not have been admitted without an adequate testimonial foundation. In any event, the records were properly admitted under the business exception to the hearsay rule based upon the certification and delegation of authority to sign the certification. Petitioner agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship by arranging for visitation with the child, referring the mother to programs for drug treatment and money management, and assisting her with housing concerns, but the mother failed to keep numerous appointments, even after the agency assisted her with rescheduling and she failed to take appropriate steps to provide a clean and suitable home for the child. A suspended judgment was not warranted because the mother admitted that she was not ready to care for the child because she was still in single room occupancy and she was unemployed. It was in the child's best interests to be freed for adoption by her foster parents with whom she had lived for most of her life and where she was well cared for.

Matter of Samantha M., 112 AD3d 421 (1st Dept 2013)

TPR Based Upon Mental Illness Affirmed

Family Court, upon a fact-finding determination that respondent mother suffered from mental illness, terminated her parental rights to the subject child, and committed custody of the child to petitioner agency for the purpose of adoption. The Appellate Division affirmed. The finding that the mother suffered from a mental illness was supported by clear and convincing evidence. As a result of respondent's mental illness, she was presently and for the foreseeable future unable to provide adequate care for the child. The court properly relied upon the unrebutted testimony and diagnosis of a court-ordered expert concerning the nature and severity of respondent's mental illness. Respondent's testimony demonstrated, among other things, that respondent lacked insight into her mental illness and her compromised ability to care for the child. A dispositional hearing was not required in this case of termination of parental rights for mental illness.

Matter of Abigail Bridget W., 112 AD3d 468 (1st Dept 2013)

TPR Based Upon Mental Illness Affirmed

Family Court, upon a fact-finding determination that respondent father suffered from mental illness, terminated his parental rights to the subject child, and transferred custody of the child to the Commissioner of Social Services and the agency. The Appellate Division affirmed. Clear and convincing evidence, including expert testimony from a court-appointed psychologist, who examined respondent on two occasions and reviewed all his available medical records, supported the determination that he was presently and for the foreseeable future unable to provide adequate care for his child. Respondent had periods of noncompliance with his medications and exhibited symptoms regularly, regardless whether he was compliant with treatment.

Matter of Christopher B., 112 AD3d 519 (1st Dept 2013)

Respondent Permanently Neglected Her Children

Family Court terminated respondent mother' parental rights upon a finding of permanent neglect and transferred custody of the children to the Commissioner of Social Services and the agency for the purpose of adoption. The Appellate Division affirmed. During the relevant period, respondent was incarcerated and subject to an eight-year order of protection precluding contact with the children following her guilty plea to an assault charge related to the underlying neglect proceeding. Nevertheless, the agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship, including developing an appropriate service plan tailored to the situation, regularly updating respondent on the children's progress, and continually reminding her to comply with the service plan. Despite those efforts, respondent failed to comply with critical components of the service plan. Respondent also lacked

insight into her behavior and failed to accept any responsibility for the severe physical abuse of one of the children, which affected the other children who were present, and led to their removal and her incarceration. The court properly drew a negative inference from respondent's failure to testify or to present evidence to rebut the agency's case. A suspended judgment was not warranted because respondent failed to gain insight into the needs or care of the children. It was in the best interests of the children to terminate respondent's parental rights. They had bonded with their respective foster families where they were well cared for and wished to remain.

Matter of Deime Zechariah Luke M., 112 AD3d 535 (1st Dept 2013)

Despite Diligent Efforts Mother Failed to Complete Necessary Programs

The Family Court properly found that the mother permanently neglected the subject children. The petitioners established by clear and convincing evidence that they made diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [7]). These efforts included facilitating visitation, repeatedly providing the mother with referrals for parenting skills classes and mental health evaluations and counseling, and repeatedly advising the mother of the need for her to attend and complete such programs. Despite these efforts, the mother failed to plan for the children's future by failing to complete the necessary programs. Furthermore, the Family Court properly determined that it was in the best interests of the children to terminate the mother's parental rights.

Matter of Darryl A.H., 109 AD3d 824 (2d Dept 2013)

Remaining with Foster Parents Was in the Child's Best Interests

The record revealed no sound and substantial basis for the hearing court's determination that it was in the best interests of the child to move to the home of her maternal uncle, where the child's sibling resided, rather than remain with her foster parents for the purpose of adoption. As the siblings had never shared a household, the Family Court erred in concluding that this consideration outweighed the benefit to the child of remaining in her foster home, where she had resided since infancy. The record clearly reflected that the child had bonded with her foster family, and was healthy, happy, and well provided for in her foster home.

Matter of Ender M. Z.-P., 109 AD3d 834 (2d Dept 2013)

Order Suspending Judgment Did Not Set Any Terms and Conditions

The two children who are the subjects of these proceedings are now 17 and 14 years old, respectively. They have been in foster care since 2006. The respondent, their father, has served several periods of incarceration in the past, and he is incarcerated now. In an order of fact-finding and disposition dated May 7, 2010, made after a hearing, the Family Court found that the father permanently neglected both children. The Family Court entered an order suspending judgment, which was to be effective "for one year from the date of [the father's] release from incarceration." The order suspending judgment did not specify any terms and conditions. About two years later, the petitioner moved to vacate the order suspending judgment, contending that it was illegal, and that the children remained in foster care with uncertain futures. The Family Court granted the motion and vacated the order suspending judgment, recognizing that the order suspending judgment violated FCA § 633(b), which provides that "[t]he maximum duration of a suspended judgment under this section is one year." Then, after conducting a very brief dispositional hearing, during which it recognized that the father was still incarcerated, the Family Court, in the order of disposition appealed from, reinstated and extended the suspended judgment for a period of one year. Again, however, the Family Court did not specify any terms and conditions. The Appellate Division found, as the Family Court realized, that the original order suspending judgment was defective because it was for an indefinite period—"one year from the date of [the father's] release from incarceration"—and thus violated FCA § 633(b). Accordingly, the Family Court properly granted the petitioner's motion to vacate the order suspending judgment. The Appellate Division found, however, that the Family Court's new order, also was defective as it did not set forth any terms and conditions. FCA §

633(c) provides that an order suspending judgment "must set forth the ... terms and conditions of the suspended judgment" (*see also* 22 NYCRR 205.50[b]) so that the Family Court may determine whether the parent has violated it. Accordingly, the order was reversed, and the matter was remitted to the Family Court for a new dispositional hearing to be convened expeditiously, and thereafter, a new disposition forthwith. It was noted by the Appellate Division that a suspended judgment may not be entered if the best interests of the children, for whom uncertainty has existed far too long, would require a termination of parental rights.

Matter of Jesse D., 109 AD3d 990 (2d Dept 2013)

Mother's Default at Dispositional Hearing Barred Her from Appealing Order of Disposition

The Family Court held separate fact-finding and dispositional hearings. The mother failed to appear at a continuation of the fact-finding hearing, and her attorney requested an adjournment. After the court denied that request, the mother's attorney continued to participate in that hearing, at the end of which the court made findings of permanent neglect. Thereafter, when the mother failed to appear at the dispositional hearing, her attorney, although present, did not participate. Since the fact-finding was not made upon default, but the disposition was made upon default, the mother could appeal from the fact-finding portions of the Family Court's orders, which found that she had permanently neglected her children, but not from the dispositional portions of those orders, which terminated her parental rights and placed the custody and guardianship of the children with the petitioner agency for the purpose of adoption (*see* SSL § 384–b). At the fact-finding hearing, the petitioner agency established by clear and convincing evidence that, despite its diligent efforts to encourage and strengthen the relationship between the mother and each of the subject children, the mother failed to plan for their future. Accordingly, the petitioner agency met its burden of proving that the mother permanently neglected her children.

Matter of Jahira N.D., 111 AD3d 826 (2d Dept 2013)

Family Court Failed to Hold a Hearing on Drug Treatment Violation and Failed to Consider Best Interests of the Subject Children

Upon the parents' admissions, the Family Court found that the parents permanently neglected the children. In separate orders of disposition dated November 16, 2011, the Family Court suspended judgment against the parents for a period of one year. The suspended judgments included the condition that the parents complete substance abuse treatment programs. At a later hearing, held on January 17, 2012, the parents were directed to submit to immediate drug testing, and that day, the father tested positive for marijuana and the mother refused to take the drug test. The petitioner thereafter sought to revoke the suspended judgments, and moved to hold the parents in violation of the drug-treatment condition, submitting, inter alia, a court activity file summary for January 17, 2012, regarding the court-ordered drug tests. The Family Court found that the parents failed to comply with the drug-treatment condition, based on the results of the father's drug test and the mother's refusal to take the test, with respect to which the court made an adverse inference against her. In an order dated May 18, 2012, the Family Court, based solely upon the papers submitted by the petitioner, and without holding a hearing, in effect, granted the petitioner's motion to hold the parents in violation of the drug-treatment condition, and revoked the suspended judgments. In an order of fact-finding and disposition dated June 14, 2012, the Family Court, upon the order dated May 18, 2012, terminated the parents' parental rights and transferred custody of the subject children to the petitioner for the purpose of adoption. The parents separately appealed. The record revealed that the Family Court conducted no hearing at all on the motion to hold the parents in violation of the drug-treatment condition, and the record did not otherwise show that the Family Court made an inquiry into or adequately considered the best interests of the children in terminating the parents' parental rights (*see* 22 NYCRR 205.50[d][5]). Accordingly, under the circumstances of this case, the Family Court improvidently exercised its discretion in terminating the parents' parental rights in the absence of a new dispositional hearing that adequately considered the best interests of the children. The matter was remitted for a hearing on the petitioner's motion to hold the parents in violation of the drug-treatment condition, to be convened and conducted expeditiously, a

determination on that motion thereafter, and, if warranted, a new dispositional hearing thereafter.

Matter of Timmia S., 111 AD3d 838 (2d Dept 2013)

Mother's Rehabilitative Efforts Did Not Constitute Meritorious Defense to Default

The record revealed that the mother failed to appear in court for cross-examination during a fact-finding hearing. Thereafter, the Family Court struck her direct testimony, found that she permanently neglected the subject children, and proceeded to a dispositional hearing. During the dispositional hearing, the mother's counsel moved to vacate her default and the finding of permanent neglect, and requested a continuation of the fact-finding hearing. The Family Court denied the motion and continued the dispositional hearing. At the conclusion of the dispositional hearing, the court determined that it was in the best interests of the children to terminate the mother's parental rights. On appeal, the mother, while conceding that she was in default by failing to appear in court for cross examination, argued that the court should have granted that branch of her motion which was to vacate her default because she had a reasonable excuse for failing to appear and a potentially meritorious defense. The Appellate Division found that the mother did not meet her burden of establishing a potentially meritorious defense to the proceeding. Under the circumstances of this case, the mother's rehabilitative efforts did not constitute a potentially meritorious defense. Regardless, the Appellate Division found, having considered the mother's direct testimony, that the Family Court did not err in finding that she permanently neglected the children. The petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the subject children (*see* SSL § 384-b;). These efforts included setting up meetings with the mother to review the service plan, discussing the importance of compliance with that plan, providing referrals to the mother for substance abuse treatment, parenting classes and nutrition classes, discussing with the mother the importance of obtaining suitable housing, assisting the mother with her housing application, and scheduling visitation between the mother and the children. Despite these efforts, the mother failed to plan for the children's futures. Furthermore, under the circumstances of this case, the Family Court properly determined that it was in the best interests of the children to terminate the mother's parental rights.

Matter of Jalaya A.C., 112 AD3d 623 (2d Dept 2013)

Father's Consent to Adoption Not Required

In a proceeding pursuant to terminate the mother's parental rights on the ground of permanent neglect, the father appealed, from so much of an an order of fact-finding and disposition of the Family Court, which, after fact-finding and dispositional hearings, determined that he was not a father whose consent to the adoption of the subject child was required pursuant to DRL § 111 and transferred guardianship and custody of the subject child to the petitioner for the purpose of adoption. The Family Court's determination that the father's consent to the adoption of the subject child was not required was supported by clear and convincing evidence. The father failed to meet his burden of establishing that he maintained substantial and continuous or repeated contact with the child through the payment of support and either regular visitation or other communication with the child.

Matter of Angelina J., 112 AD3d 932 (2d Dept 2013)

Record Supported Family Court's Determination That Termination of the Mother's Parental Rights, Rather than Entry of a Suspended Judgment, Was in Child's Best Interests

The Family Court properly found that the petitioner established by clear and convincing evidence that the mother permanently neglected the subject child (*see* SSL § 384-b [7] [a]). The petitioner presented evidence that it made diligent efforts to encourage and strengthen the parental relationship by, inter alia, providing the mother with multiple referrals for substance abuse and mental health clinics, providing her with the means to travel to the clinics, and consistently attempting to maintain phone and letter correspondence with her. Despite these efforts, the mother failed to plan for the child's future by not completing any of the substance abuse and psychotherapy programs to which she was referred, testing positive for illegal drugs on one occasion, and not obtaining suitable housing for herself

and the child. Further, the Family Court did not err in drawing the "strongest possible negative inference" against the mother that the record would allow for her failure to testify at the fact-finding hearing. Moreover, the Family Court properly determined that termination of the mother's parental rights, rather than the entry of a suspended judgment, was in the child's best interests.

Matter of Amonte M., 112 AD3d 937 (2d Dept 2013)

Lack of Proper Foundation Results in Reversal of TPR Based on Mental Illness

Respondent mother was twice found to have neglected her two children and the children were placed in foster care. Thereafter, during the course of a permanency hearing and after a mental health evaluation of the mother had been conducted by a psychologist, the Agency commenced a permanent neglect proceeding against her and the father of one of the children. After several witnesses testified, Family Court recessed the hearing to inquire into the appropriateness of the combined proceedings given the mother's mental health. The Agency withdrew its permanent neglect petition against respondent mother and instead filed to terminate her parental rights based on mental illness. After a hearing, Family Court terminated respondent's parental rights. The Appellate Division reversed. Clear and convincing evidence of a parent's inability to provide proper and adequate care of the child at present and in the foreseeable future and testimony from appropriate medical witnesses particularizing how a parent's mental illness affects the parent's present and future ability to care for the child is necessary in order to terminate parental rights. Here, no proper foundation was laid for the expert who evaluated the mother, and therefore neither his testimony nor his report were admissible. The expert testified he conducted personal interviews with caseworkers, counselors and others. Pursuant to the professional reliability exception to the hearsay rule, an expert witness may rely on information that would otherwise be hearsay if it's of a kind accepted in the profession as being reliable when forming a professional opinion, or if it comes from a witness who will be subject to full cross-examination. Here, some of the individuals with whom the expert spoke testified but others did not. And the expert was not asked and offered no opinion as to whether the information he gleaned from the interviews with the individuals who did not testify was professionally accepted as reliable in performing mental health evaluations. Additionally, the psychologist appointed to perform the statutorily required mental health evaluation testified the mother's mental condition did not prevent her from providing her children with adequate care.

Matter of Dakota F., 110 AD3d 1151 (3d Dept 2013)

Respondent's Parental Rights Properly Terminated

Family Court determined the father had permanently neglected his children and terminated his parental rights. The Appellate Division affirmed. Here, respondent father had a history of drug abuse and failure to comply with drug treatment. He was also incarcerated, due to violation of his probation after the children were removed from his care. The caseworker made diligent efforts to facilitate respondent's relationship with his children. Prior to respondent's incarceration, she met with him on multiple occasions, arranged for visits with his children and provided him with updates as to their placement and progress. Although respondent lost contact with the caseworker for extended periods of time due to his failure to appear at the drug treatment facility, she attempted to communicate with him through letters, visits to his home and phone calls. Additionally, during his incarceration, she met with respondent to discuss permanency plans for the children and their progress. Respondent failed to substantially and continuously or repeatedly maintain contact with his children or plan for their future. After the children were removed from his care, he failed to seek treatment for his drug issues, failed to maintain contact with the caseworker for four out of the five months preceding his incarceration, and missed numerous meetings with his children. His belated suggestion, which was made more than a year after the children's removal, that his girlfriend take custody of them, was not viable. It was in the children's best interests
for respondent's rights to be terminated. The children had bonded with their foster parents who wished to adopt them and the children were thriving in their care.

Matter of Joannis P., 110 AD3d 1188 (3d Dept 2013)

Neither Parent Addressed Issues That Led to Removal of Child

Family Court determined respondent parents had permanently neglected the subject child and terminated their parental rights. The Appellate Division affirmed. The mother's substance abuse, mental health issues, criminal history, history of domestic violence with the father and lack of appropriate housing led to the child's removal. Despite diligent efforts by the agency to assist the mother in overcoming these problems, the mother frequently relapsed and her criminal behavior caused a disruption of the mental health treatment she might have received. While the mother maintained contact with the child and participated in various substance abuse programs, she was unable to remain sober for any appreciable length of time prior to the filing of the permanent neglect petition. She continued to relapse after being discharged from drug treatment programs. Since the mother failed to meaningfully benefit from the services offered and to correct the conditions which led to the child's removal, Family Court properly found she had permanently neglected the child. Respondent father argued that the Agency did not establish he failed to plan for the child's future. However, like the mother, the father failed to correct the conditions which led to the child's removal, namely, his substance abuse, criminal activity and domestic violence. He tested positive for four illegal substances, including cocaine and heroin, prior to the filing of the instant petition. He also failed to complete mandated mental health services as well as domestic violence and anger management programs. It was in the child's best interests for the parental rights to be terminated. The child, who had been in foster care for most of her life, was thriving in the care of her pre-adoptive foster parents.

Matter of Arianna BB., 110 AD3d 1194 (3d Dept 2013)

Mother Failed to Plan for Children's Future

Family Court properly determined that respondent mother had permanently neglected her three children and terminated her parental rights. The older two were removed when the mother, intoxicated and pregnant with her third child, threatened to commit suicide. When the third child was born, he tested positive for cocaine and was protectively removed. The agency made diligent efforts to reunite respondent with her children but despite its diligent efforts, respondent did not substantially plan for the future of the children nor did she take meaningful steps to correct the conditions that led to the children's removal. She failed over a course of 2 ½ years to obtain stable housing, continued to reside at the YWCA and refused assistance. Respondent missed appointments, failed to participate in the recommended programs, and failed to progress or meet most of her treatment goals. While she apparently achieved sobriety two years after the children were removed, she was nevertheless discharged thereafter from a court drug treatment program as "unsuccessful". It was in the children's best interests to be freed for adoption by their long term foster parents, with whom they had a close relationship and who were able to provide all three children with a safe and stable home.

Matter of Cory N., 111 AD3d 1079 (3d Dept 2013)

Agency Did Not Prevent Contact Between Father and Child

Family Court terminated respondent father's parental rights following a fact-finding hearing, at which he failed to appear, and determined he had abandoned the child. The Appellate Division affirmed. After the child's mother surrendered her parental rights to the child, the agency filed a petition to establish respondent was the father, and an order of filiation was issued against him. Thereafter, the only visit that occurred between respondent and the child was prior to the six-month period and the meeting was stressful for the child since respondent was a stranger to her. During the six-months prior to the filing of the petition, respondent father failed to contact or communicate with the agency despite the agency's repeated requests that he inform them of his plan for the child. While respondent argued he sent the child gifts and cards, it was unclear if it had been the respondent or his mother who had done so, and even if

it had been respondent, such sporadic and limited contact was insufficient to defeat the agency's showing of abandonment. Respondent's argument that the agency prevented him from contacting the child by leading him to believe they would initiate ICPC proceedings (as he resided in another state) was found unpersuasive.

Matter of Jazmyne OO., 111 AD3d 1085 (3d Dept 2013)

Sound and Substantial Basis in the Record

Family Court determined respondent father and mother had permanently neglected their three children and terminated their parental rights, and also found they had derivatively abused their fourth child and continued placement of that child with the Agency. The Appellate Division affirmed, determining there was a sound and substantial basis in the record that termination was in the best interests of the three children. Testimony showed that one of the three children, when less than two-months old, had been admitted to the hospital with a skull fracture, severe brain damage and other bone fractures. Respondent failed to acknowledge the child had been abused or that he and the mother were responsible for the abuse and gave implausible reasons for the child's injuries. Respondent continued to deny he severely abused the child despite his unsuccessful appeal to the Appellate Division. The fact that he continued to maintain contact with the Agency and participated in services did not preclude a finding of permanent neglect since he continued to deny responsibility for the injuries sustained by the then two-month old child. He failed to gain any insight into how to address the issues that led to the children's removal from his care in the first place. It was in the children's best interests to terminate respondent's parental rights. The three children had been living together in the same foster home since their removal from respondents' care. At the time of the hearing, the father was unemployed and both parents were accusing each other of domestic violence. The severe abuse inflicted on the two-month old evidenced fundamental flaws in respondent's understanding of parental duties as to place any child in his care at risk, and therefore the court's finding that he had derivatively abused the fourth child was supported by a fair preponderance of the record.

Matter of Kayden E., 111 AD3d 1094 (3d Dept 2013)

Finding of Abandonment Based on Clear and Convincing Evidence

Family Court terminated respondent mother's parental rights following a fact-finding determination of abandonment. The Appellate Division affirmed. The finding of abandonment was based on clear and convincing evidence. During the six-month period prior to the filing of the petition, respondent mother failed to contact the child or the agency despite being able to do so. While Respondent had periods of homelessness, difficulties in arranging transportation and lack of finances, at some points during this period she had housing and employment. Therefore, it would have been possible for her to contact the agency or the child during such times. Furthermore, respondent failed to show that the agency prevented her from visiting or communicating with the agency or her child.

Matter of Erving BB., 111 AD3d 1102 (3d Dept 2013)

Abandonment TPR Confirmed

Family Court terminated respondent’s parental rights following a fact-finding determination of abandonment. The Appellate Division affirmed. The finding of abandonment was based on clear and convincing evidence. During the six months prior to the filing of the petition, respondent father failed to contact the subject child or agency although he was able to do so and was not prevented from doing so. Respondent’s contention that the petition was defective in that it failed to specify the precise date on which the six-month statutory period began was raised for first time on appeal and thus was not preserved for review. The Court noted that between the filing date of the abandonment petition and the Family Court hearing date, respondent made no requests for visits with the child.

Matter of Carter A., 111 AD3d 1181 (3d Dept 2013)

Despite Significant Progress Made by Mother, TPR in Child's Best Interests

Family Court terminated respondent mother's parental rights following a fact-finding determination of permanent neglect. The Appellate Division affirmed. The respondent's only contention on appeal was that Family Court abused its discretion by not issuing a suspended sentence. A suspended sentence may be issued if it's in the best interests of the child to allow the parent additional time to improve parenting skills and demonstrate fitness to care for the child. Such was not the case here. At the time of the dispositional hearing, the respondent had completed a long-term drug rehabilitation program and was residing in a supportive living program. She had maintained her sobriety for approximately seven months and terminated her volatile relationship with the child's father. However, she was also in a diversionary program after pleading guilty to grand larceny in the fourth degree, had a history of relapse into substance abuse, described herself as being in "early recovery" and her ability to cope with the day-to-day stresses of parenting were untested. The child was thriving in her pre-adoptive foster home, where she had resided since she was 7-months-old, and had formed a strong bond with her foster parents and her biological sister, who had already
been adopted by them. Despite the significant progress made by respondent mother, termination of parental rights was in the child's best interests.

Matter of Madalynn I., 111 AD3d 1205 (3d Dept 2013)

Family Court Did Not Err in Terminating Respondent's Parental Rights

Family Court correctly found that respondent mother had permanently neglected the subject child and terminated her parental rights. The court also properly declined to place the child with his great-grandmother, who had filed for custody. The agency met its burden of establishing, by clear and convincing evidence, that it made diligent efforts to reunite respondent with her son. Although respondent regularly visited with the child, she failed to adequately plan for his future. Despite the agency's attempts to assist her, respondent did not obtain stable housing, continued to associate with volatile people which resulted in numerous emergency phone calls to police for assistance. She continued to abuse drugs and failed to follow through with mental health treatment. Family Court did not err in terminating respondent's parental rights rather than granting a suspended sentence. Respondent admitted to continued drug use, was charged with several crimes and was involved in a domestic dispute with her daughter's father just prior to the dispositional hearing . It was in the child's best interest to be adopted by his pre-adoptive parents and not placed in the custody of his great-grandmother. The child had been living with his pre-adoptive parents for almost a year, had bonded with them and had only seen the great-grandmother a few times while he was in placement. The great-grandmother had a history of alcohol abuse, and a neglect case had been brought against her previously on behalf of respondent and respondent's sister.

Matter ofJah'Meir , 112 AD3d 1014 (3d Dept 2013)

Failure to Comply With Suspended Sentence Strong Evidence to TPR

Family Court determined respondent parents had permanently neglected their five children and issued a suspended sentence for one year. Thereafter, the agency filed violation petitions against respondents, seeking revocation of their sentence and after a hearing, Family Court terminated respondents' parental rights. The Appellate Division affirmed. Respondent father did not dispute that he violated the suspended sentence, but argued that termination of his rights was not in the children's best interests. While not determinative, the failure to comply with the terms of a suspended sentence is considered strong evidence that termination is in the children's best interests. As part of the suspended sentence, respondent was ordered to undergo substance abuse screening and maintain stable housing and employment, which he failed to do. He also violated the order of protection issued against him. The court considered the length of time the children had been in foster care and the fact that respondent had failed to address the issues that led to the removal of the children in any meaningful manner. Under these circumstances, the court's decision was based on a sound and substantial basis in the record.

Matter of Madelyn D., 112 AD3d 1165 (3d Dept 2013)