

September 2012 Case Law Update

Prepared by Tanya J. Conley
Director of Training and Appeals
Legal Aid Society of Rochester
tconley@lasroc.org

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Agenda

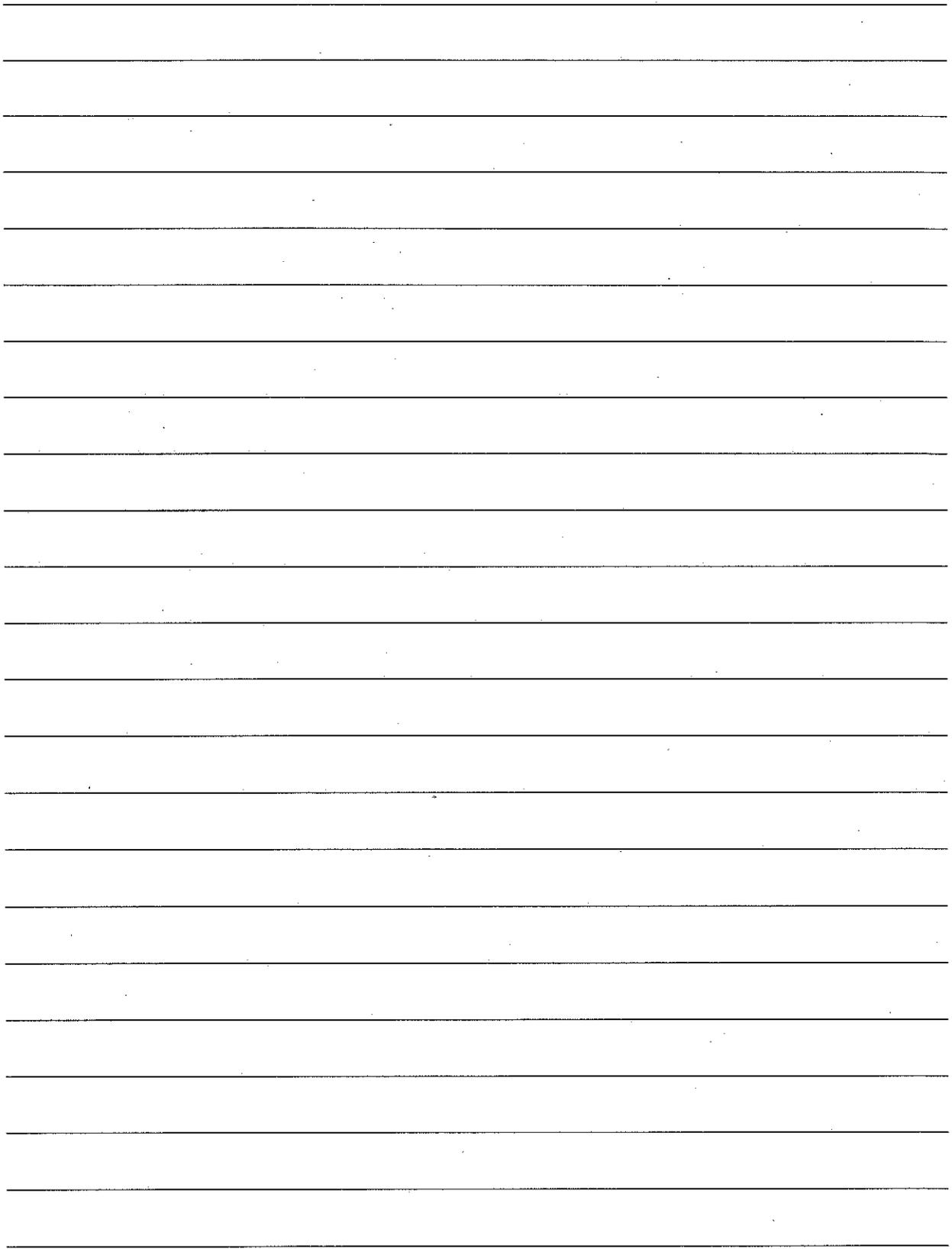
- Custody Trends – incarcerated parents, non-respondent parents, relocation, change of circumstances and domestic violence
- Neglect Trends – step-parent respondents, appellate advocacy, sex abuse and derivative neglect
- Juvenile Delinquency trends – stop and frisk and detention cases
- Freed Children – Reasonable efforts

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Overview

- Changing role or clarifying role of the Attorney for the Child?
- Zealous advocacy

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Attorney for the Child - Powerful or Powerless?

- What the Appellate Division Giveth, the Appellate Division Taketh Away – McDermott and Fontaine
- McDermott v. Bale, 94 A.D.3d 1542 (April 27, 2012) Judges Centra, Peradotto, Lindley, Sconiers and Martoche
- Fontaine v. Fontaine, 94 A.D.3d 1430 (April 20, 2012) Judges Scudder, Fahey, Lindley and Martoche

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Custody Trends – Incarcerated Parents

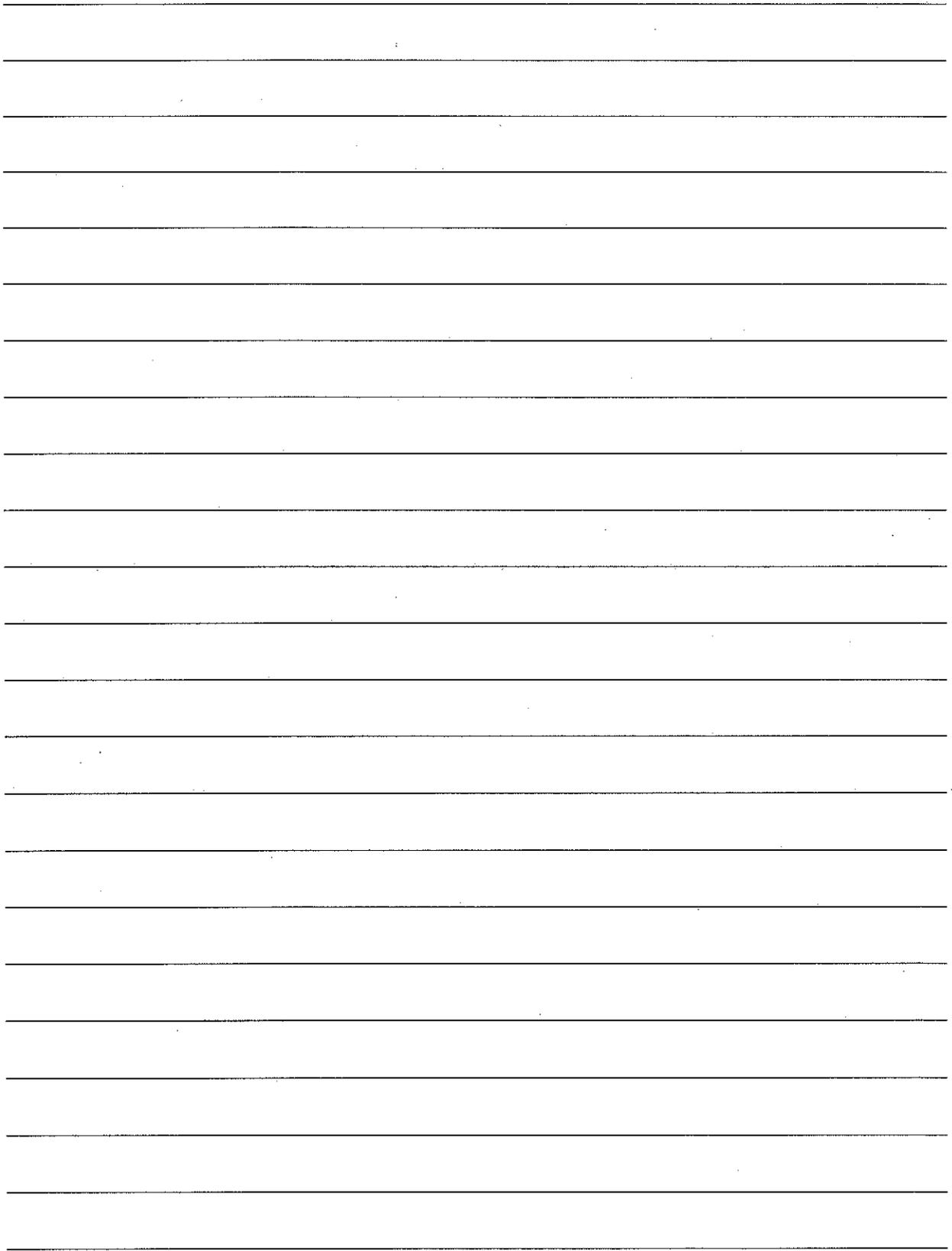
- Granger v. Misercola, 96 A.D.3d 1694 (June 29, 2012)
- Consilio v. Terrigino, 96 A.D.3d 1424 (June 8, 2012)
- Cardona v. Vantassel, 96 A.D.3d 1052 (2nd Dept. June 2012)
- Ildefonso v. Brooker, 94 A.D.3d 1344 (3rd Dept. 2012)

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Custody Trends – Non-respondent parents in Neglect Cases

- Cleophus B., 93 A.D.3d 1241 (4th Dept. 2012) – leave to appeal to Court of Appeals denied in June 2012
- Matter of DeAndre S. 92 AD3d 888 (2nd Dept. 2012)

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Custody Trends - Relocation

- *Matter of Ramirez v Velazquez*, 91 AD3d 1346 (4th Dept 2012)
- *Matter of Barlow v Smith*, 94 AD3d 1437 (4th Dept 2012)
- *Matter of Mineo v Mineo*, __AD3d __ (4th Dept 2012)
- *Matter of Saperston v Holdaway*, 93 AD3d 1271 (4th Dept 2012)

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Hailey ZZ 19 N.Y.3d 422 – Court of Appeals Overturns 4th Dept.

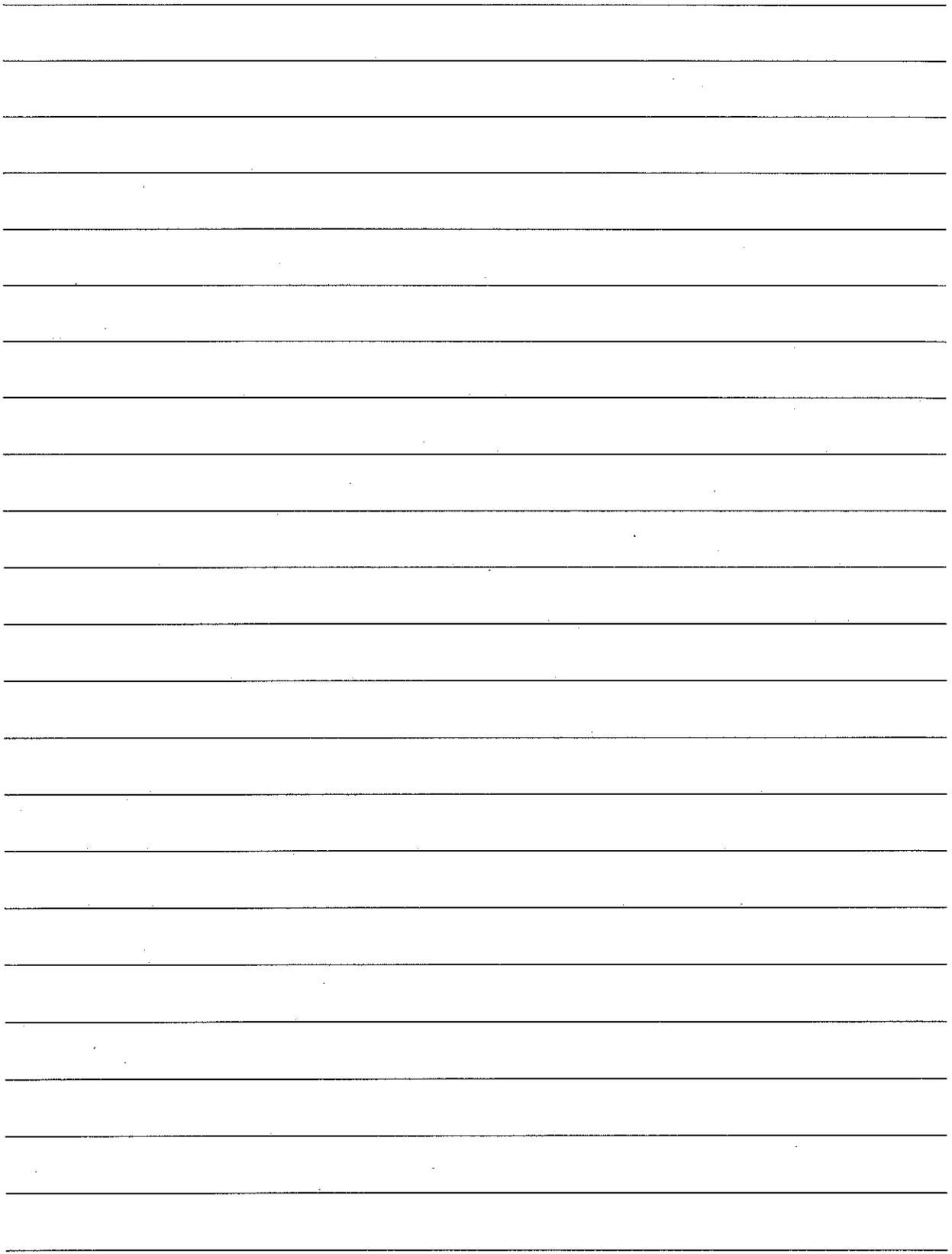
- No Post-Termination Visitation (PTV) following contested proceedings
- Current existing Court Orders directing PTV – enforceable?
- Retroactive application to cases currently pending?

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Article 10 Trends – Sex Abuse

- Post Afton C cases -

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Article 10 Trends – Appeal, Appeal Appeal!

- Matter of Hailey ZZ., ___ NY2d ___, dec'd 6/7/12 (2012)
- Matter of Jayden B., 91 AD3d 1344 (4th Dept. 2012)
- Matter of Ilona H., 93 AD3d 1165 (4th Dept. 2012)
- Matter of Damian G., 19 NY3d 841 (2012)
- Matter of Miranda F., 91 AD3d 1303(4th Dept. 2012)
- Matter of Liliana G., 91 AD3d 1325 (4th Dept. 2012)

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Article 10 Trends – Step-parent

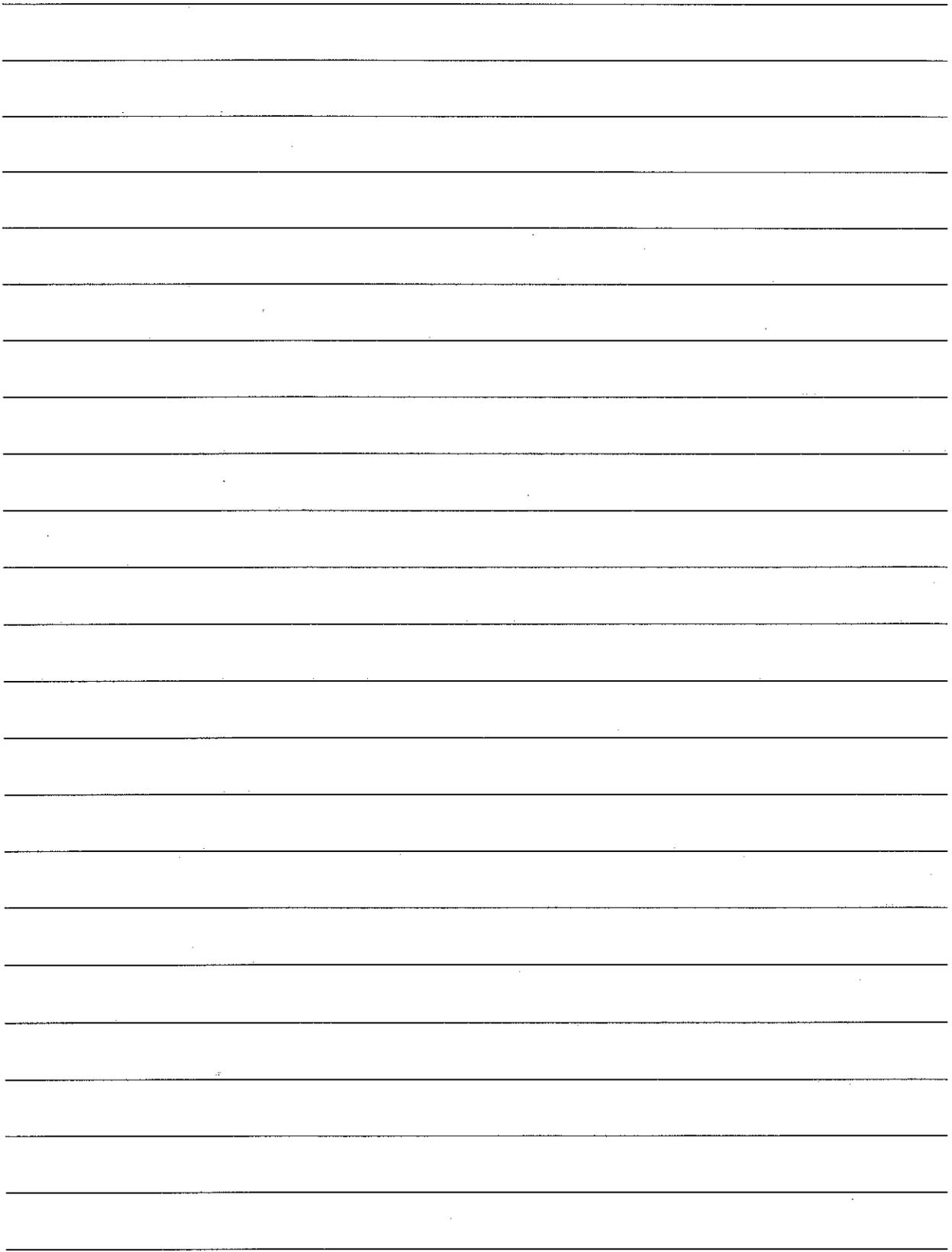
- Matter of Miranda F., 91 AD3d 1303(4th Dept. 2012)
- Matter of Kylani R., 93 AD3d 556 (1st Dept. 2012)
- Matter of Reeves v Erie County DSS
___AD3d___, dec'd 6/8/12 (4th Dept. 2012)

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Juvenile Delinquency Trends

- People v. Lee, 96 A.D.3d 1533 (June 2012)
- People v. Kims, 96 A.D.3d 1595 (2012)
- People v. Skinner, 94 A.D.3d 1516
- In re Christopher W., 96 A.D.3d 1591

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PINS

- In re Bianca S., 36 Misc.3d 478
- In re Michael S. and Shermart M. – Stay Application

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Freed Children - Permanency

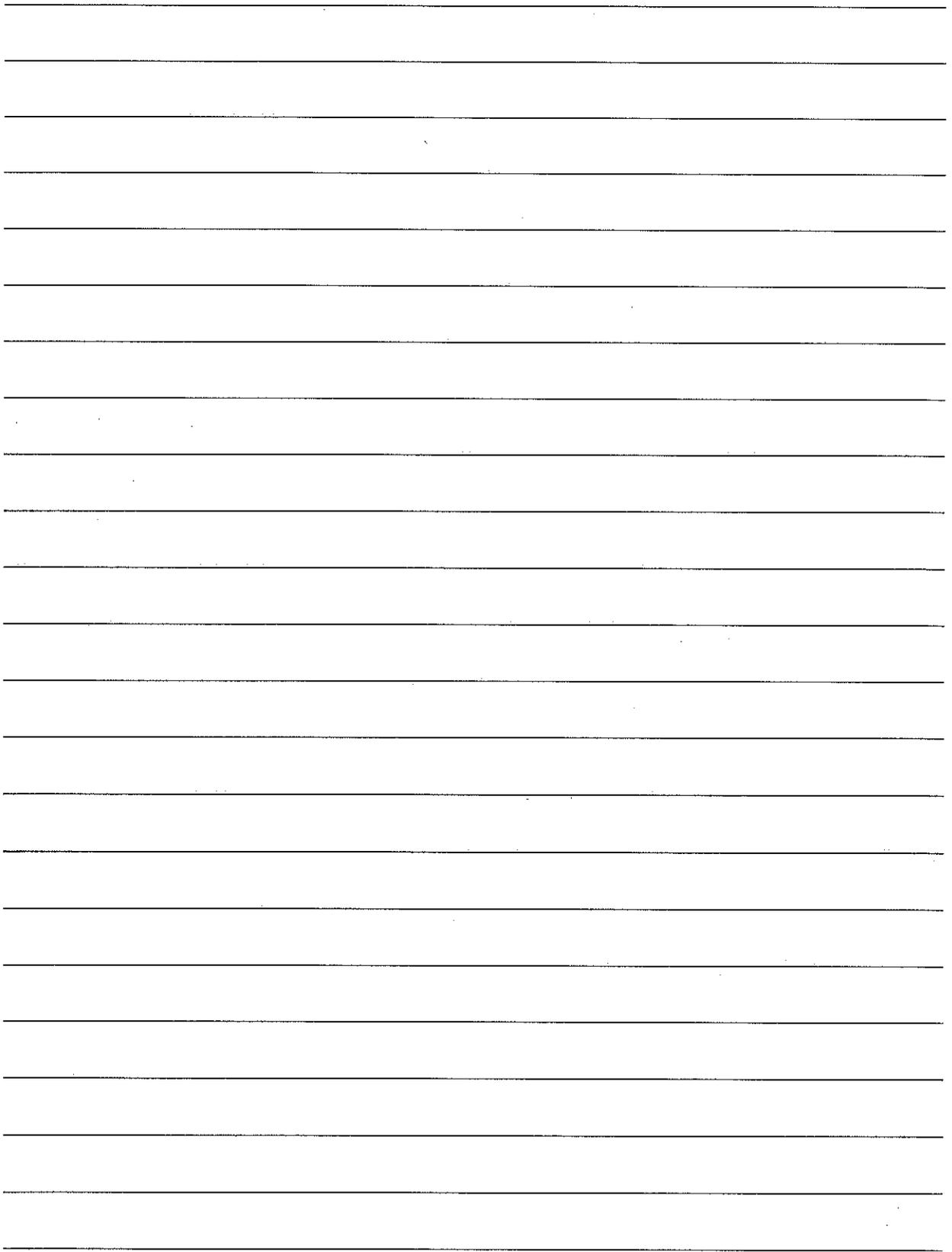
- Matter of Austin M., 96 A.D.3d 1424
- Reasonable efforts to effectuate adoption of older children with siblings

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Summary

- Attorneys for Children retain ability and obligation to zealously represent clients in custody cases, despite our non-party status
- Don't give up! Appeal!
- Trends guide, but individual cases can be distinguished

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Where to Get More Information

- October 2, 2012 - The Batterer as parent
- Email TJ at tconley@lasroc.org
- Law Library at http://www.nycourts.gov/lawlibraries/lib_services.shtml

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

Case Digest

Summer 2012

Covers January through July 2012 Decision Lists

ADOPTION

Petitioner's Revocation of Extrajudicial Consent Not Given Effect

Family Court determined that it was in the subject child's best interests to award custody to the respondent adoptive parents and that petitioner biological mother's revocation of extrajudicial consent to adoption would not be given legal effect. The Appellate Division affirmed. On the day after the child's birth, petitioner signed an extrajudicial consent to allow respondents to adopt the child. Less than 24 hours later, but after respondents had taken the child home, petitioner executed a revocation of extrajudicial adoption. Respondents timely filed a notice of opposition to the revocation. After a best interests hearing, the court determined that although petitioner had potential to become a good parent, respondents had proven to be exceptional parents. Where the adoptive parents oppose the revocation, the biological parent has no right to custody of the child superior to the adoptive parents and custody must be awarded solely on the basis of the best interests of the child. There was overt manifestation by petitioner that her consent would become operative by allowing respondents to take physical custody of the child the day after he was born. The determination that it was in the best interests of the child to be adopted by respondents was entitled to great deference and would not be disturbed because it was based upon a weighing of the relevant factors.

Matter of Collin, 92 AD3d 1283 (4th Dept 2012)

CHILD ABUSE AND NEGLECT

Petitioner Failed to Submit Sufficient Evidence of Derivative Neglect

Family Court adjudged that respondent father abused his stepdaughter and derivatively abused his two biological daughters. The Appellate Division modified by reversing the adjudication of derivative neglect with respect to respondent's biological daughters. The attorney for the child's contention that the appeal should be dismissed insofar as the stepdaughter was concerned because the father failed to serve her with the notice of appeal was rejected. Because the attorney for the child filed a brief and participated in oral argument the defect in service was excused. Petitioner agency correctly conceded at oral argument on the appeal that it failed to submit sufficient evidence of derivative neglect with respect to the biological children. The court properly adjudicated the stepdaughter abused in light of the father's conviction of rape in the third degree with respect to her. Although petitioner did not submit nonhearsay evidence, the judge who decided the instant motion was the same judge who presided over the criminal case and thus was able to take judicial notice of the conviction.

Matter of Miranda F., 91 AD3d 1303 (4th Dept 2012)

Mother's Violation of Order of Protection And Knowingly Leaving Children With Abusive Father Constituted Neglect

Family Court adjudged that respondent mother neglected her three daughters and placed the mother under the supervision of petitioner agency. The Appellate Division affirmed. The findings of neglect were based on, among other things, the mother's violation of an order of protection requiring respondent father to stay away from the mother and prohibiting him from visiting the children. The record established that the mother left at least one of the children at her home in the care of the father, despite her awareness of his violent tendencies and the order of protection.

Matter of Claudina E.P., 91 AD3d 1324 (4th Dept 2012)

Dismissal of Neglect Petition Reversed

Family Court dismissed the article 10 petition against respondent. The Appellate Division reversed and granted the petition. The court erred in determining that petitioner failed to establish that the children were neglected based upon acts of domestic violence between respondent and the children's mother. Petitioner established by a preponderance of the evidence that the children were in imminent danger of emotional impairment based upon the alleged acts of domestic violence. In a separate neglect proceeding the mother admitted that she and respondent had several disagreements and that sometimes the children were afraid. Respondent did not attend the fact-finding hearing and she did not testify. The court's determination that the five-year-old child's statements were not corroborated did not have a sound and substantial basis in the record. Because the attorneys for the children did not take an appeal from the order,

contentions in their briefs not raised by petitioner were not considered.

Matter of Jayden B., 91 AD3d 1344 (4th Dept 2012)

Father's Prior Sexual Abuse of Stepsister And Reckless Behavior Constituted Neglect

Family Court adjudged that respondent father neglected his child. The Appellate Division affirmed. Petitioner met its burden to prove that the child's condition was in imminent danger of impairment based on respondent's failure to exercise a minimum degree of parental care in providing supervision. Petitioner presented evidence that respondent was convicted of attempted sodomy in the first degree and that he was a level two sex offender. Respondent admitted that his conviction arose out of an incident when he was 21 years old and sexually abused his 12-year-old mentally challenged stepsister while he was babysitting her. After he was released from prison in 2009 he did not voluntarily engage in or complete sex offender treatment, despite being notified that he needed to do so. Additionally, petitioner demonstrated that after his release from prison respondent was convicted of assault in the third degree for allegedly biting, pinching and threatening to kill respondent mother and two other convictions arising from an incident where he drove a van in excess of 80 miles per hour while fleeing the police with the mother in the vehicle. There were also several orders of protection issued against the father in favor of the mother, respondent's mother and the foster parents.

Matter of Makayla L. P., 92 AD3d 1248 (4th Dept 2012)

Neglect Adjudication Against Father Reversed

Family Court adjudged that respondent father neglected his child. The Appellate Division reversed. The only evidence of domestic violence presented by petitioner agency was that the father struck the child's mother on one occasion when the child was eight months old. The father testified that the altercation took place outside the presence of the child. Thus, petitioner did not prove by a preponderance of the evidence that the physical, mental or emotional condition of the child was placed in danger of impairment as a result of the father's conduct. There was no evidence that the domestic violence that occurred was anything other than an isolated incident with no negative repercussions on the child's well-being.

Matter of Ilona H., 93 AD3d 1165 (4th Dept 2012)

Children's Statements Sufficiently Corroborated

Family Court adjudged that respondent father abused his children. The Appellate Division affirmed. The out-of-court statements of the children were sufficiently corroborated by other evidence tending to support their reliability. The cross-corroborating accounts of the children with respect to the nature and progression of the

sexual abuse gave sufficient indicia of reliability to each child's out-of-court statements. The allegations of sexual abuse were further corroborated by the children's age-inappropriate knowledge of sexual matters.

Matter of Janiece B., 93 AD3d 1335 (4th Dept 2012)

Sufficient Evidence of Neglect and Derivative Neglect

Family Court adjudged that respondent mother abused and neglected her two-month-old child and derivatively abused and neglected her two-year-old child. The Appellate Division affirmed. Petitioner presented evidence, including the testimony of a physician, that the younger child sustained fractures of his left humerus, right humerus, left tibia and several ribs, and that the injuries were inflicted at different times. The mother failed to rebut the presumption of parental responsibility for the injuries. Petitioner also proved that the older child was derivatively neglected. The abuse and neglect of the younger child demonstrated such an impaired level of judgment by the mother to create a substantial risk of harm for any child in her care.

Matter of Wyquanza J., 93 AD3d 1360 (4th Dept 2012)

Sufficient Evidence of Sexual Abuse of Daughter and Derivative Neglect of Son

Family Court determined that respondent father sexually abused his daughter and derivatively neglected his son. The Appellate Division affirmed. The finding of sexual abuse of the daughter by the father was supported by a preponderance of the evidence. The daughter's out-of-court statements were sufficiently corroborated by the testimony of petitioner's expert, who found the daughter's consistent accounts of the abuse to be reliable and opined that her statements paralleled those normally made by abuse victims. Petitioner also proved that the son was derivatively neglected. The sexual abuse of the daughter demonstrated a fundamental flaw in respondent's understanding of parenthood.

Matter of Leeann S., 94 AD3d 1455 (4th Dept 2012)

Mother's Challenge to Provisions in Order of Protection in Article 10 Case Moot

Family Court adjudged that respondent mother neglected her child, placed her under the supervision of DSS and directed the mother to abide by certain conditions, including those set forth in an order of protection. The Appellate Division dismissed the mother's appeal as moot. The challenged order of protection had expired by its own terms and the exception to the mootness doctrine did not apply.

Matter of Romeo M., 94 AD3d 1464 (4th Dept 2012)

Petition Not Subject to Dismissal Because The Proof Did Not Conform to Petition

Family Court adjudged children under respondent's care to be abused and neglected. Before the hearing on the issue whether respondent was a "person legally responsible," he pleaded guilty to sexually abusing one child and was sentenced to a term of incarceration. The Appellate Division affirmed. The petition did not have to be dismissed because respondent pleaded guilty to a count in the indictment that alleged sexual contact in 2004, not 2006, as alleged in the petition. The proof at the hearing on whether respondent was a person legally responsible established that the sexual contact occurred in 2004. Because the proof did not conform to the allegations in the petition, the court could amend the allegations to conform to the proof and the petition was not subject to dismissal on that ground.

Matter of Samed S., AD3d (4th Dept 2012)

Order on Consent Not Appealable

Family Court placed respondent mother's child in petitioner's custody upon a finding that the mother neglected the child. The Appellate Division dismissed the appeal. Because the order was entered upon the mother's consent without admission the appeal was dismissed. Also, because the mother never moved to withdraw her consent, her contention that her consent was not knowing, voluntary and intelligent was not properly before the Appellate Division. The mother failed to show that her counsel was ineffective.

Matter of Violette K., AD3d (4th Dept 2012)

Order Granting Unsupervised Visitation Reversed

Family Court denied petitioner DSS's application to remove respondent father's daughter from his custody, granted the father unsupervised visitation with his son and determined that petitioner did not make reasonable efforts to prevent the removal of his children, but that the lack of such efforts was reasonable. The Appellate Division reversed. There was a sound and substantial basis in the record that the son was in imminent risk of harm. The evidence was overwhelming that the father slapped the son in the face, leaving marks in the morning. The testimony further established that the father often lost his temper with the children and the son had prior instances of bruising. A caseworker testified that she had seen the son cower and plead with the father not to hit him when the father became angry with the son. The record established that the daughter also was at risk of imminent harm and that the risk could not be mitigated by reasonable efforts to avoid removal. The court erred in allowing the father to have unsupervised visitation with the son because the record established that the father was unable to care for the child in a safe manner and there was the threat of future harm to him. The court also erred in finding that reasonable efforts were not made, but the lack of efforts was reasonable because anger management services were not identified as necessary until just before the hearing on removal of the children. The evidence at the hearing established that petitioner provided an intensive family coordinator who met with the father seven hours a week and a preventative caseworker who met with him

several times a month. Additionally, petitioner provided a mental health evaluation for the father, financial assistance, transportation assistance, emergency food vouchers, and case work counseling. Thus, petitioner established that it made reasonable efforts.

Matter of Austin M., AD3d (4th Dept 2012)

CHILD SUPPORT

Respondent Willfully Violated Child Support Order

Family Court determined that respondent father willfully violated a prior child support order and sentenced him to a term of six months in jail. The Appellate Division affirmed. Petitioner mother established that the father willfully violated a prior order by demonstrating that the father had not made the required child support payments. The father failed to meet his burden to present sufficient evidence of his inability to pay inasmuch as he failed to offer competent medical evidence to substantiate his claim.

Matter of Yamonaco v Fey, 91 AD3d 1322 (4th Dept 2012)

Reduction in Child Support Affirmed

Family Court denied the objections of petitioner mother to the order of the Support Magistrate modifying a prior order reducing petitioner father's child support obligation and his share of child care and unreimbursed medical expenses. The Appellate Division affirmed. Petitioner presented evidence that his income from employment decreased as a result of an involuntary reduction in his overtime hours and the determination that the loss of income was sufficiently substantial to warrant a downward modification was entitled to great weight.

Matter of Shields v Towery, 91 AD3d 1343 (4th Dept 2012)

Defendant Entitled to Pay Taxes on Marital Home and Deduct Amount From Child Support Obligation

Supreme Court denied plaintiff wife's motion seeking an order finding defendant husband in contempt and attorneys' fees and denied defendant's cross motion for a downward modification of child support. The Appellate Division modified by granting that part of defendant's motion seeking permission to pay property taxes on the marital home and deduct that amount from his child support payments unless plaintiff showed proof of payment of taxes and granted that part of plaintiff's motion seeking attorneys' fees in the amount of \$1,405. The court properly awarded child support on income exceeding the \$130,00 statutory cap, given that plaintiff had no discernable income, defendant's considerable assets, and the standard of living that the children would have had if the marriage had not ended. The court properly refused to force a sale of the marital residence. At least one child under the age of 18 resided in the marital residence, plaintiff could not obtain comparable housing at a lower cost, and defendant, with his considerable assets, failed to establish that he needed his share of the sale proceeds. Even though on appeal defendant abandoned his request for permission to pay property taxes on the marital residence and deduct that amount from child support payments, the Appellate Division granted permission. Plaintiff was entitled to attorneys' fees associated with the motion at issue in the appeal. There was a rebuttable presumption that attorneys' fees be awarded to the less monied spouse and the motion

at issue was predicated upon defendant's failure to pay the full amount of child support.

Juhasz v Juhasz, 92 AD3d 1209 (4th Dept 2012)

Father Not Entitled to Downward Modification

The Support Magistrate granted the father's amended petition in part by reducing his child support obligation. Family Court denied the objections of the father and modified the order by denying the amended petition in its entirety and increasing the father's support obligation. The Appellate Division affirmed. The father's contention that the Support Magistrate did not have jurisdiction to determine this proceeding because the father alleged that he was now the custodial parent was rejected. The Support Magistrate properly considered the current custodial arrangement in determining which parent was the custodial parent. The court properly imputed income to the father and denied his amended petition in its entirety. The father was not entitled to a downward modification of his child support obligation on the ground that he was no longer employed full-time because he presented no evidence that he diligently sought re-employment commensurate with his prior employment. Because the father did not have right to counsel in the child support proceeding and there were no extraordinary circumstances, his contention that he was denied effective assistance of counsel was not considered.

Matter of Leonardo v Leonardo, 94 AD3d 1452 (4th Dept 2012)

Court Had Personal Jurisdiction Over Respondents

In a July 2012 order, upon non-resident respondents parents' default, father was directed to pay \$775 per week in child support effective from the date the children were placed in foster care in New York and the stepmother was directed to notify the support unit of any change in employment status and health insurance benefits. The parents did not file objections to the July 2010 order. In October 2010, respondents moved to vacate the support orders and to dismiss the proceedings on the ground of lack of personal jurisdiction. In November, Family Court dismissed respondents' motion to vacate. Respondents filed objections to the November orders and the court dismissed those objections and affirmed the November order. The Appellate Division affirmed. Respondents' contention that the court erred in failing to review their challenge to the July orders in the context of the their objections to the November orders was rejected. Respondents moved to vacate the July orders on the basis of alleged lack of personal jurisdiction, not on the ground of excusable default. Respondents' contention that the court's jurisdictional determination was not based upon competent evidence also was rejected. The Support Magistrate was not required to hold a hearing on the issue of personal jurisdiction before issuing the July orders. Respondents waived any right to a hearing on jurisdiction by submitting their motion on papers only. Respondents failed to preserve their contention that the jurisdictional findings were not based upon competent evidence because they did not challenge the competence of the evidence in their motion to vacate the July orders. The court properly determined that it had personal

jurisdiction over respondents because the children began residing in New York as a result of acts or directives of respondents. The assertion of personal jurisdiction did not violate respondents' right to due process.

Matter of Chautauqua County Dept. of Social Servs. v Rita M.S., 94 AD3d 1509 (4th Dept 2012)

No Evidence that Mother Made Reasonable Efforts to Obtain Employment

Family Court determined that respondent mother willfully failed to pay child support and directed that she be incarcerated if she did not pay certain arrears within two weeks. The Appellate Division affirmed. Respondent's contention that the finding of willful violation of the support order was not supported by the evidence lacked merit. Respondent failed to submit some competent, credible evidence of her inability to make the required support payments. She also failed to establish that she made reasonable efforts to obtain gainful employment to meet her support obligations.

Jelks v Wright, AD3d (4th Dept 2012)

Court Erred in Determining Child Support Obligation

Family Court denied the objections of respondent father to the child support order of the Support Magistrate. The Appellate Division modified by vacating that part of the order providing that respondent's pro rata share of the basic child support obligation was \$410.69 per week and that part of the order providing that respondent pay petitioner mother \$374.06 per week for the basic child support payment, exclusive of health care expenses, and substituting provisions that respondent's pro rata share of the basic child support obligation was \$357.26 per week and that respondent pay to petitioner \$320.63 per week for the basic child support payment, exclusive of health care expenses. The Appellate Division also vacated that part of the order that provided that respondent pay to petitioner past child support in the amount of \$10,853.95 and remitted for a recalculation of past child support. The Support Magistrate erred in determining the amounts of rental and investment income the parties received and the amount of investment income the mother received.

Matter of Fendick v Fendick, __AD3d__ (4th Dept 2012)

CUSTODY AND VISITATION

Order Granting Father Sole Custody in Children's Best Interests

Family Court denied mother's petition for sole custody of the parties' child and granted the father's cross petition for sole custody. The Appellate Division affirmed. The court properly concluded that there was a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified. The deterioration of the parties' relationship and their inability to co-parent rendered the existing custody arrangement unworkable. The record included testimony from three psychologists that the mother interfered with the father's relationship with the child. The expert testimony uniformly supported the court's conclusion that the mother engaged in a pattern of conduct to exclude the father from the child's life, which was so inimical to the best interests of the child as to, per se, raise a strong possibility that the interfering parent was unfit to act as custodial parent. There was ample support in the record for the court's conclusion that, as between the two parents, the father is less likely than the mother to interfere with the other parent's relationship with the child.

Matter of Orzech v Nikiel, 91 AD3d 1305 (4th Dept 2012)

Order Granting Father Sole Custody in Children's Best Interests

Family Court granted father's petition for sole custody of the parties' child. The Appellate Division affirmed. The court's determinations that the father had a strong bond with the child and was better suited to provide a stable home for the child and that neither the mother or the maternal grandmother were credible witnesses, was entitled to great weight. There was a sound and substantial basis in the record for the court's determination that an award of sole custody to the father was in the child's best interests.

Matter of Smith v Ince, 91 AD3d 1323 (4th Dept 2012)

Petition Requesting Permission to Relocate Properly Denied

On a prior appeal, the Appellate Division remitted this case to Family Court for further proceedings after concluding that the mother established a prima facie case that relocation was in the children's best interests. After continuing the hearing, the court determined that the relationship between the father and children and other relatives would be adversely affected by the proposed relocation and it would not be in the children's best interests to relocate. The Appellate Division affirmed.

Matter of Ramirez v Velazquez, 91 AD3d 1346 (4th Dept 2012)

Award of Joint Physical And Legal Custody And Divided Decision-making Authority Affirmed

Family Court awarded the parties joint physical and legal custody of their children and divided their decision-making authority, granting mother sole decision-making with respect to the children's medical and religious interests and sole decision-making to the father with respect to the children's educational and extracurricular activities. The Appellate Division affirmed. Contrary to the mother's contention, the court properly refused to award her primary physical custody. Moreover, given the acrimony between the parties the court properly determined that it was appropriate to divide decision-making authority.

Matter of Delgado v Frias, 92 AD3d 1245 (4th Dept 2012)

Order Granting Father Sole Custody in Children's Best Interests

Family Court granted custody of the parties' children to petitioner mother with visitation to the father. The Appellate Division affirmed. There was a sufficient evidentiary basis for the determination of custody. The mother testified without contradiction that the father physically and verbally abused her, that he had physically abused one of the children, and that he had threatened her life shortly before the hearing. The court found the mother's testimony to be credible. Evidence of domestic violence demonstrated that the father possessed a character that was ill suited to the difficult task of providing his children with moral and intellectual guidance. The court had jurisdiction over the proceeding pursuant to Domestic Relations Law § 76-c based upon evidence that the father committed acts of physical violence against the mother and one of the children. Although emergency jurisdiction is generally temporary, the court was authorized to make a permanent custody award because no other custody proceeding had been commenced in another competing forum and New York had become the children's home state following commencement of the instant proceeding.

Matter of Tin Tin v Kyi, 92 AD3d 1293 (4th Dept 2012)

Petition For Visitation Barred by Res Judicata

Family Court dismissed biological father's petition seeking visitation with respondents' daughter. The Appellate Division affirmed. The court had dismissed petitioner's prior petition seeking to establish paternity of the child. The court found that respondents were married at the time of the child's birth and it was not in the child's best interests to disrupt her legitimate paternal relationship with respondent father. Petitioner discontinued his appeal from that order when respondents agreed to DNA testing, which revealed a 99.99% probability that petitioner was the child's biological father, and also that petitioner could visit the child. The child subsequently began to receive Social Security benefits as petitioner's biological child. Thereafter, respondents refused to allow petitioner to visit the child and petitioner filed the instant petition. The court properly determined that it was prohibited by the doctrine of res judicata from considering petitioner's biological parental status as a basis for determining his standing to seek visitation.

Matter of Weaver v Durfey, 93 AD3d 1185 (4th Dept 2012)

Father Failed to Show Change in Circumstances

Family Court denied father's amended petition to modify a prior visitation order. The Appellate Division affirmed. The father failed to demonstrate a change in circumstances. The Referee properly directed that visitation be therapeutically supervised. The father failed to establish that he had fully complied with the preconditions to visitation that were set forth in the prior order to which he stipulated. The Referee did not err in reiterating a condition to visitation in the prior order that the father undergo a further evaluation by a psychologist who had previously evaluated him.

Matter of Harder v Phetteplace, 93 AD3d 1199 (4th Dept 2012)

Order Granting Father Primary Physical Custody in Child's Best Interests

Family Court denied mother's petition to modify a prior order of custody and visitation and granted father's cross petition by awarding him primary physical custody of the parties' child. The Appellate Division affirmed. The court properly concluded that there was a sufficient evidentiary showing of a change in circumstances based, among other things, upon the parties' inability to reach an agreement regarding certain aspects of the child's visitation schedule, and upon the changes in the child's school schedule since the prior order. Although both parties appeared to be fit and loving parents, the evidence established that the father was better able to provide for the child's educational and medical needs.

Matter of Stilson v Stilson, 93 AD3d 1222 (4th Dept 2012)

Court Erred in Suspending Mother's Visitation

Family Court granted sole legal and physical custody of the parties' child to petitioner father and suspended respondent mother's visitation with the child. The Appellate Division modified by vacating the directive suspending the mother's visitation. The father showed changed circumstances. Since the entry of a prior consent order, the mother failed to comply with court-ordered psychiatric treatment, failed to return the child from visitation on one occasion, filed unfounded child abuse claims against the father, and engaged in alienating behavior. The court erred in suspending visitation. The record lacked substantial evidence that visitation with the mother was detrimental to the child's welfare. The child wished to continue visitation, the father testified that he did not observe odd behavior when the child returned from visitation, and the father acknowledged that the child was generally happy to visit with her mother. Further, the psychologist acknowledged that the mother loves the child and the child was functioning well.

Matter of Fox v Fox, 93 AD3d 1223 (4th Dept 2012)

Hearing Warranted on Custody Modification

Family Court sua sponte dismissed mother's petition seeking modification of a prior custody order without conducting a hearing. The Appellate Division reversed. The petition alleged that modification of the prior order was warranted because the mother and her current husband had completed counseling and had a stable home and the mother's bill of particulars added the allegation that the father was not involved in the children's schooling and refused to obtain counseling for the children to enable them to address their adjustment and coping issues. That was a sufficient evidentiary showing of changed circumstances to warrant a hearing.

Matter of DiPaolo v Avery, 93 AD3d 1240 (4th Dept 2012)

Father Not Entitled to Custody

Family Court adjudicated father's child to be neglected by the mother, but dismissed the petition insofar as it alleged the father derivatively neglected the children. Thereafter, the father moved for summary judgment seeking to vacate the order of placement of the child in petitioner agency's care and to award him immediate custody. The court denied the motion, determining that the father failed to allege any facts demonstrating a present ability to care for the child, and then conducted a hearing. After the hearing, the court determined that extraordinary circumstances did not exist to continue placement with petitioner, released the child to the father's custody under the supervision of petitioner, and ordered the father to comply with random drug and alcohol testing. When the father failed to comply with drug testing, the court determined that it was in the child's best interests to remain in the custody of petitioner agency. The Appellate Division affirmed. The court did not err in denying the father's motion for summary judgment. Considering that the child had been in foster care for nine months prior to the motion, the court properly held a hearing to determine if the father was entitled to custody. The court had jurisdiction to impose conditions on his behavior as a prerequisite to returning the child to his care and custody. Family Court Act § 1054 (a) provides that the court may place the person to whose custody the child is released under supervision.

Matter of Cleophus B., 93 AD3d 1241 (4th Dept 2012)

Award of Physical Custody to Father Reversed

Family Court awarded the parties joint custody of their child and primary physical custody of the child to petitioner father. The Appellate Division modified by awarding primary physical custody of the child to respondent mother. Because the case was an initial custody determination, it was not a relocation case and the mother's relocation to Brooklyn was only one factor to be considered. The court erred in requiring the mother to establish by a preponderance of the evidence that her move to Brooklyn was in the child's best interests. Moreover, the court's best interests determination lacked a sound and substantial basis in the record. Prior to the commencement of this action, when the

child was 14 months old, the mother was the primary caretaker. Both parties had suitable homes. The mother demonstrated the greater ability to provide for the child's intellectual and emotional development. The court erred in concluding that the father was better able to provide financially for the child. He earned \$10,000 a year as a real estate agent and was dependant upon his parents for his standard of living. The court erred in admitting the father's journal into evidence and the error was not harmless because the journal had prejudicial "notes" concerning the mother and the court referred to the journal in its decision. The dissent would have affirmed and deferred to the court's assessment of credibility.

Matter of Saperston v Holdaway, 93 AD3d 1271 (4th Dept 2012)

Child's Wishes While Not Controlling Entitled to Great Weight

Family Court denied that part of father's petition seeking to modify the prior custody determination with respect to the parties' daughter. The Appellate Division affirmed. At the hearing on the petition, after the father rested, the mother moved for a directed verdict on the ground that the father failed to establish changed circumstances. The attorney for the child joined in the motion, stating that the child strongly preferred to live with the mother. Even assuming that the father established changed circumstances, a change in custody would not be in the daughter's best interests. Although both parties had problems, the mother was taking active steps to deal with her problems and, more importantly, the daughter was doing very well under the mother's care. Further, while not controlling, the wishes of the 15-year-old daughter were entitled to great weight.

Matter of Dingeldey v Dingelday, 93 AD3d 1325 (4th Dept 2012)

Custody of Child with Grandparents Not in Child's Best Interests

DSS commenced a neglect proceeding against the child's parents. The father agreed to the termination of his parental rights and the mother consented to the temporary removal of the child from the home where the child had been living with the mother and the mother's parents. The mother later stipulated to an order awarding custody of the child to DSS and DSS placed the child with a foster family. The child's grandparents filed a petition for custody of the child. Family Court continued placement of the child with DSS. The Appellate Division affirmed. The court properly determined that it was not in the child's best interests to award custody to the grandparents. The evidence established that the grandparents were already overwhelmed by the demands of raising four of their other grandchildren and that several of those children were troubled and difficult to control. Additionally, there was a pending child protective investigation of the grandparents and the grandmother was dealing with mental challenges of her own.

Matter of Angellynn S.H.W., 93 AD3d 1349 (4th Dept 2012)

Father Failed to Show Change in Circumstances

Family Court dismissed the petition of the father for increased visitation. The Appellate Division affirmed. Once the father's parental rights were terminated he no longer had standing to commence a proceeding for increased visitation. Contrary to the contention of the father and the attorney for children, the matter should not have been remitted for a dispositional hearing because the standing issue would have had to have been decided in the father's favor before the issue of the children's best interests could be considered.

Matter of Maria F., 93 AD3d 1351 (4th Dept 2012)

Order Not Entered Upon Father's Default

Family Court granted petitioner mother custody of the parties' child. The Appellate Division modified. The order was not entered upon respondent father's default. Although the order was denominated an "Order of Custody and Visitation on Default" the court repeatedly stated during the proceeding that the father was not in default and where an order and decision conflict, the decision controls. In any event, the father's attorney appeared at the proceeding and the order was modified accordingly. The court properly awarded sole custody to the mother. The bench decision demonstrated that the court carefully weighed the appropriate factors and its determination had a sound and substantial basis in the record.

Matter of Triplett v Scott, 94 AD3d 1421 (4th Dept 2012)

Matter Remitted: Insufficient Record For Appellate Review

Family Court granted petitioner supervised visitation with the parties' children and denied father's amended petition to modify a prior visitation order. The Appellate Division reversed. Because the record was insufficient for the Appellate Division to make the requisite findings of fact, the matter was remitted for a new hearing, including a new in-camera hearing with the children. The court did not improperly delegate the issue whether unsupervised visitation should resume and, if so, when, to the attorney for the children.

Matter of Fontaine v Fontaine, 94 AD3d 1430 (4th Dept 2012)

Court Properly Denied Mother Permission to Relocate

Family Court denied mother's amended petition to seeking to modify a prior custody and visitation order by granting her permission to relocate with the parties' children to Michigan. The Appellate Division affirmed. The mother failed to establish that her children's lives would be enhanced economically, emotionally or educationally. The court also properly determined that the children's relationship with respondent father would be adversely affected by the proposed relocation.

Matter of Barlow v Smith, 94 AD3d 1437 (4th Dept 2012)

Father Failed to Show Change in Circumstances

Family Court granted father's petition seeking to modify a prior order of custody and visitation by, among other things, awarding him joint custody of the parties' children. The Appellate Division modified. The father failed to demonstrate a change in circumstances. Father's new employment, which allowed him more free time to spend with the children, and his purchase of a new home, were insufficient to constitute changed circumstances. The court abused its discretion in setting a revised visitation schedule. The mother conceded that an increase in the father's visitation was in the children's best interests. The record was sufficient for the Appellate Division to fashion a visitation schedule that reflected a reasonable balance between the excessive visitation granted by the court and the limited prior visitation schedule.

Matter of Mathewson v Sessler, 94 AD3d 1487 (4th Dept 2012)

AFC Did Not Have "Veto" Power Over Parent's Stipulation

Family Court granted the parties joint custody of their children, with mother having primary physical residence. The attorney for the children appealed. The Appellate Division affirmed. Where the court in a custody matter appoints an attorney for the children, the attorney has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determined that the settlement was in the children's best interests.

Matter of McDermott v Bale, 94 AD3d 1542 (4th Dept 2012)

Mother Failed to Establish Change in Circumstances

Family Court denied mother's petition to modify a prior custody and visitation order. The Appellate Division affirmed. The mother failed to establish a change in circumstances sufficient to warrant a modification of custody. The court did not err in failing to sanction the father for violations of the prior order.

Matter of Mason-Crimi v Crimi, 94 AD3d 1574 (4th Dept 2012)

Not In Child's Best Interests to Have Overnights With Incarcerated Mother

Family Court denied mother's petition to modify a prior stipulated order of custody that granted mother visitation with the parties' child on alternate Saturdays at the correctional facility where she was incarcerated. The mother sought to modify the order to allow overnight visitation through the Family Reunification Program at the correctional facility. The Referee concluded that the mother failed to establish a sufficient change in circumstances to warrant a modification, but nevertheless stated that it was not in the best interests of the child to have overnights with the mother at the correctional facility. The Appellate Division affirmed. Even assuming, for the purpose of argument, that the

mother established changed circumstances, the conclusion of the Referee that it was not in the best interests of the child to have overnights was supported by a sound and substantial basis in the record. Any error in admitting certain photos in evidence without proper authentication was harmless because the Referee did not rely on the photos in denying the petition.

Matter of Consilio v Terrigino, AD3d (4th Dept 2012)

Court Properly Changed Custody to Sole Custody to Father

Family Court modified the parties' existing custody arrangement by transferring custody of the parties' two children to petitioner father, granted the father sole custody of the children, and adjudicated the mother to have violated prior court orders. The Appellate Division affirmed. The court's determination that the mother willfully violated a prior court order by preventing the father from receiving custodial access had a sound and substantial basis in the record. The court did not err in considering testimony regarding matters that predated the parties' custody agreement and the custody order. The testimony was required to provide background regarding the nature of the parties' relationship before the custody order to enable the court to understand the reluctance of the older child to spend time with the father and to make a more informed decision on the father's modification petition. There was sufficient evidence of changed circumstances to warrant a review of the custody arrangement. Before the establishment of the custody arrangement, the parties had no issues with the father's custodial access, the father had successful visitation, and both children were loving in their interactions with the father and paternal grandparents. After the custody arrangement, the father was denied access to the children on at least three occasions, the older child began to exhibit hostility toward the father and paternal grandparents, showed an unwillingness to enjoy time with them, and began acting in a violent manner toward the father. The change in custody was in the children's best interests.

Matter of Tarrant v Ostrowski, __ AD3d__ (4th Dept 2012)

Court Should Have Granted Mother's Motion to Change Child's School District

Family Court dismissed mother's petition seeking an order allowing her to change the school district of the parties' child from the Grand Island School District to the Kenmore-Tonawanda School District. The Appellate Division reversed. Considering the facts in the light most favorable to the mother, accepting her proof as true and affording her every favorable inference, the mother met her initial burden on the petition. Because the father's attorney stated on the record that he would not have presented evidence at trial if the court denied the motion, the Appellate Division considered whether the proposed relocation was in the child's best interests and concluded that it was. The relocation would enhance the mother and child economically because it would alleviate the mother's burden of transporting the child to and from school or, in the alternative, finding new housing on Grand Island, and it would enable the mother to increase her efforts to obtain employment. There was no evidence that the Grand Island schools

were superior to the Kenmore-Tonawanda schools and there was no evidence that the father's access to the child would be affected by the change in school districts.

Matter of Mineo v Mineo, __AD3d__ (4th Dept 2012)

Court Properly Changed Custody to Primary Physical Custody to Father

Family Court modified the parties' prior custody order from shared custody of the parties' child to primary physical custody of the child with respondent father and visitation to petitioner mother. The Appellate Division affirmed. The parties agreed that there was a change of circumstances created by the fact that the child had reached school age, rendering the shared physical custody arrangement impractical. The court's determination that both parties were fit and loving parents but that the father was better able to provide for the child's needs was supported by a sound and substantial basis in the record.

Matter of Flint v Ely, __AD3d__ (4th Dept 2012)

Family Court Lacked Jurisdiction to Modify Surrogate's Order

Family Court denied the motion of respondent maternal aunt to vacate a stipulation and a related order modifying a decree of Surrogate's Court that granted letters of guardianship to respondent authorizing her as guardian of the child. The Appellate Division vacated the order of Family Court. The child's mother died in 2008. In 2009, when the father's health declined, he commenced proceedings in Surrogate's Court to designate respondent, a family friend, as the child's standby guardian. Surrogate's Court issued letters of guardianship to respondent in May 2010. Before the father died in August 2010 he named respondent as the child's guardian in his will. Five months after the letters of guardianship were issued to respondent, petitioner commenced this custody proceeding in Family Court. When two courts (such as Family and Surrogate's) have concurrent jurisdiction (over matter such as guardianship), once one has exercised jurisdiction in the matter, it should not be entertained by the other. Thus, Family Court erred in ignoring the letters of guardianship and the prior decree of Surrogate's Court, and in entertaining the petition because Family Court lacked jurisdiction from the onset.

Matter of Allen v Fiedler, __AD3d__ (4th Dept 2012)

Court Properly Awarded Visitation to Incarcerated Father

Family Court granted the father's petition for visitation with his child, awarding him one four hour visit during the months of January and April 2012, and then every other month commencing in July 2012. The Appellate Division affirmed. Before the father's incarceration he was present for the child's birth and he testified that during the six or seven months in which he was not incarcerated following the child's birth, he visited the child on approximately 12 occasions. Although the father had not seen the child since

his incarceration, the father has repeatedly requested that the mother transport the child to the correctional facility for visitation, and he had attempted to maintain a relationship with the child over the telephone and by sending letters, cards and gifts. Although the three-year-old child will be required to travel two hours each way to effectuate visitation, the father had arranged for his mother and sisters to transport the child. Although the child was not familiar with the father's mothers and sisters, the court purposely scheduled limited visits during the initial six-month period to afford the parties the opportunity to familiarize the child with those family members. The father's earliest release date was in September 2016 and such a long period of separation could be detrimental to the established relationship between father and child.

Matter of Granger v Misercola, __ AD3d__ (4th Dept 2012)

FAMILY OFFENSE

Respondent Committed the Family Offense of Disorderly Conduct

Family Court found that respondent husband committed acts constituting disorderly conduct. The Appellate Division affirmed. By requesting that the court limit the proof to events occurring within two years prior to the filing of the petition, respondent waived his contention that he was denied due process based upon the court's consideration of alleged instances of disorderly conduct that occurred during that time period and that the proceeding was barred by laches or the statute of limitations. A preponderance of the evidence established that respondent engaged in acts constituting disorderly conduct.

Matter of Marquardt v Marquardt, 94 AD3d 1436 (4th Dept 2012)

Respondent Committed the Family Offense of Disorderly Conduct

Family Court found that respondent wife committed acts constituting harassment in the first or second degree against petitioner husband. The Appellate Division reversed and dismissed the petition. The court concluded that respondent committed a family offense by cutting open her pills on the counter, knowing that petitioner had allergies to medications. With respect to harassment in the second degree, even assuming petitioner was alarmed or seriously annoyed by the pill cutting and assuming that respondent thereby intended to harass, annoy or alarm him, petitioner failed to establish that the conduct served no legitimate purpose. Petitioner testified that she took the medication for acid reflux and she opened the pills and ate it with food because she couldn't swallow it otherwise. Further, respondent failed to establish that he was allergic to the particular medication petitioner cut on the counter. With respect to harassment in the first degree, even assuming petitioner was in fear of physical injury when respondent opened her medication, petitioner failed to establish that his fear was reasonable. The dissent would have affirmed.

Matter of Marquardt v Marquardt, AD3d (4th Dept 2012)

JUVENILE DELINQUENCY

Evidence of Physical Injury Insufficient

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed an act which, if committed by an adult, would constitute the crime of assault in the third degree. The Appellate Division modified by substituting a provision adjudicating respondent a juvenile delinquent based upon a finding that he committed an act which, if committed by an adult would constitute the crime of attempted assault in the third degree. The evidence was legally insufficient to establish the victim sustained physical injury, i.e., impairment of physical condition or substantial pain. Respondent and another individual hit the victim several times in the face and the back of the head, causing minor cuts on the victim's face, swelling on his nose and behind his ear and a red bruise on his neck. The acts proved constituted the lesser included offense of attempted assault in the third degree. Respondent's intent to cause physical injury could be inferred from the act of repeatedly punching the victim in the head with a closed fist.

Matter of Shawn D.R. -S., 94 AD3d 1541 (4th Dept 2012)

Evidence Sufficient That Respondent Was Not Licensed or Privileged to be in Premises

Family Court adjudged respondent to be a juvenile delinquent based on the finding that he committed an act which, if committed by an adult, would constitute the crime of criminal trespass in the second degree. The Appellate Division affirmed. The evidence, viewed in the light most favorable to the presentment agency, was legally sufficient to establish that respondent was not licensed or privileged to be in or upon the premises. The testimony of the three residents of the home established that respondent entered the home through a locked back door, that respondent was located on the second floor of the home and that none of the residents gave him permission to enter or remain in the house.

Matter of Shawn D.R. -S., 94 AD3d 1544 (4th Dept 2012)

Court Erred in Dismissing JD Petition

Family Court granted respondent's motion to dismiss the instant juvenile delinquency petition as facially insufficient because the alleged victim, an infant, was unable to give sworn testimony. The Appellate Division reversed and reinstated the petition. The nonhearsay allegations in the petition, if true, established that respondent subjected the alleged victim to sexual contact by touching her vagina when she was three years old. The petition was therefore facially sufficient to allege that respondent committed acts that, if committed by an adult, constituted the crime of sexual abuse in the first degree. The fact that the alleged victim was unable to give sworn testimony was a latent defect that did not affect the facial sufficiency of the petition. The court's determination that the

alleged victim could not understand the nature of an oath and therefore could not provide the court with sworn testimony was not an implicit determination that she did not have sufficient intelligence and capacity to provide unsworn testimony.

Matter of Christopher W., __AD3d__ (4th Dept 2012)

PATERNITY

Order Denying Determination That Respondent Is Father And Liable For Child Support Affirmed

On a prior appeal the Appellate Division affirmed Family Court's denial of respondent father's objections to the order of the Support Magistrate. The Court of Appeals reversed, holding that under the circumstances of this case, where a father figure is present in the child's life, the biological father may assert a claim of equitable estoppel. On remittal and after a hearing on the merit's of respondent's claim of equitable estoppel and the best interests of the child, Family Court denied the petition seeking a determination that respondent was the father of the child and for child support. The Appellate Division affirmed. The attorney for the child waived her contention that the court erred in holding a *Lincoln* hearing and in relying upon statements the child made at the hearing because the hearing was held at the request of the attorney for the child. In any event, the court did not abuse its discretion in conducting the *Lincoln* hearing or in considering the child's statements at the hearing in determining best interests.

Matter of Aikens v Nell, 91 AD3d 1308 (4th Dept 2012)

PERSON IN NEED OF SUPERVISION

Respondent Waived Contentions Regarding Substitution of PINS Petition for JD Petition

Family Court adjudged that respondent was a person in need of supervision, and directed her to abide by certain conditions, including an order of protection. The Appellate Division affirmed. The court could substitute a petition alleging that respondent was a person in need of supervision for a petition alleging she was a juvenile delinquent. Here, respondent not only agreed to such substitution, she moved for the substitution. Respondent thus waived her contentions about the substitution. The non-hearsay allegations of the factual part of the petition or of any supporting depositions established, if true, every element of each of the crimes charged and respondent's commission of such crimes, specifically there were sufficient allegations that the victim suffered an impairment of physical condition or substantial pain.

Matter of Sarah C. B., 91 AD3d 1282 (4th Dept 2012)

PINS Adjudication Reversed

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

Matter of Nicholas R. Y., 91 AD3d 1321 (4th Dept 2012)

Contentions About Placement Moot

Family Court adjudged that respondent was a person in need of supervision and placed her in the custody of the Commissioner of Social Services for one year. Respondent's contentions that the court failed to advise her of her right to remain silent at the dispositional hearing and that placement was not an appropriate disposition were moot because the order of placement had expired. Respondent's contention that the court failed to comply with the Family Court Act, which required it to review the pre-petition services at the initial appearance, was unpreserved and lacked merit. The petition and the attached documents established that petitioner complied with the Family Court Act and the court's comments at the initial appearance demonstrated that the court reviewed petitioner's efforts to divert the case.

Matter of Haley M.T., __AD3d__ (4th Dept 2012)

TERMINATION OF PARENTAL RIGHTS

Parental Rights Properly Terminated on Grounds of Permanent Neglect

Family Court terminated respondent mother's parental rights with respect to two of her children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the mother's relationship with the children but respondent was unable to keep her house clean, to budget properly or to parent the child properly. During the three years the proceeding was pending, respondent never progressed beyond supervised visitation with the children. The expert psychologists for both petitioner and respondent testified that respondent was not yet able to assume parenting duties for the children. Terminating respondent's parental rights was in the children's best interests. The children had been in petitioner's care for about four years when the order on appeal was entered and they were thriving in their foster home. In contrast, when the children were removed from respondent's care, the son was often nervous and uncontrollable, and the daughter experienced a physical failure to grow.

Matter of Gerald G., 91 AD3d 1320 (4th Dept 2012)

Court Erred in Determining Reasonable Efforts Not Required

Family Court granted petitioner's motion for a determination that reasonable efforts to unify respondent mother and child were no longer required. The Appellate Division reversed and remitted for further proceedings. Although the mother's parental rights had been involuntarily terminated with respect to two of the mother's other children, here the mother was entitled to a hearing on the child's best interests because there was an issue of fact raised by caseworker testimony that the child could safely be returned to the mother.

Matter of Liliana G., 91 AD3d 1325 (4th Dept 2012)

Respondent's Parental Rights Properly Terminated

Family Court terminated respondent mother's parental rights and freed two of her children for adoption. The Appellate Division affirmed. Respondent was not denied procedural due process because the court conducted a fact-finding hearing in her absence, while she was incarcerated. A parent's right to be present for fact-finding and dispositional hearings in termination cases is not absolute. Here, the court initially adjourned the hearing when respondent appeared without counsel and re-appointed her prior attorney to represent her. Respondent failed to appear in court on the adjourned date and although her attorney appeared, he stated that he did not know where respondent was and she had not met with him to prepare for the hearing. Respondent claimed she was incarcerated until the morning of the hearing but she made no attempt to contact the court to seek an adjournment. Respondent failed to ask the court to consider any post-termination contact with the child and failed to establish

that such contact would be in the child's best interests.

Matter of Atreyu G., 91 AD3d 1342 (4th Dept 2012)

Post-Termination Visitation Not in Child's Best Interests

After a finding of permanent neglect, Family Court terminated respondent father's parental rights with respect to the subject child and denied post-termination contact. The Appellate Division affirmed. The court did not err in denying respondent's request for post-termination contact. The evidence established that respondent was serving a 50-year to life sentence and he admitted that he had a single unsupervised visit with the child in the 18 months preceding the filing of the instant proceeding. His only other visitation during that period and the pendency of this proceeding occurred when petitioner's employees brought the child for supervised visitation with respondent in jail or prison. Additionally, the child had severe mental challenges and became agitated while traveling to prison.

Matter of Lashawnda G., 91 AD3d 1348 (4th Dept 2012)

Mother Was Not Denied Effective Assistance of Counsel

Family Court denied respondent mother's motion to vacate an order terminating her parental rights upon her default. The Appellate Division affirmed. The mother's counsel was not ineffective in failing to make a motion that was unlikely to be successful. The mother was not denied effective assistance of counsel based upon her attorney's failure to request an adjournment when the mother did not appear at the fact-finding and dispositional hearing. When the mother failed to appear her attorney asked to be relieved from his representation of the mother in order to preserve the mother's opportunity to move to vacate the default order entered against her. That tactical decision did not constitute ineffective assistance of counsel. The court properly exercised its discretion in denying the mother's motion to vacate the default order. The mother did not establish a reasonable excuse or a meritorious defense.

Matter of Kenneth L., 92 AD3d 1245 (4th Dept 2012)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights with respect to his children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the father's relationship with the children but the father continued to use drugs; lived in numerous temporary or rundown rooms that were unsuitable for children; continued to have aggression issues in general and to engage in domestic violence with the children's mother; and refused to participate in counseling. Termination of the father's parental rights was in the children's best interests and the court properly refused to allow any post-termination contact between the father and

children.

Matter of Justain R., 93 AD3d 1174 (4th Dept 2012)

Court Properly Suspended Judgment

Family Court revoked a suspended judgment and terminated respondent mother's parental rights with respect to her three children. The Appellate Division affirmed. The court was not required to hold a further dispositional hearing. The court had already considered the children's best interests when it suspended judgment and informed the mother that if she failed to comply with certain conditions, her parental rights could be terminated. Given that the children had spent most of their lives in foster care and were in a placement that was an adoptive resource and that the mother had been unwilling to confront her chemical dependency issues, it was in the children's best interests to terminate the mother's parental rights.

Matter of Jhanelle B., 93 AD3d 1201 (4th Dept 2012)

Father Was Not Denied Effective Assistance of Counsel

Family Court terminated respondent father's parental rights with respect to his five children. The Appellate Division affirmed. The father was not denied effective assistance of counsel based upon his attorney's recommendation that the father admit to the allegations of permanent neglect. The recommendation was a matter of strategy. Also, respondent failed to demonstrate that he was prejudiced by his attorney's advice.

Matter of Brandon B., 93 AD3d 1212 (4th Dept 2012)

Mother Physically Able to Plan For Children's Future

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that the mother was physically able to plan for her children's future, but failed to do so. During the first year the children were in foster care mother attended 31 of the 52 scheduled visits with the children. Some of the visits were cancelled because of mother's poor hygiene or because she had a fever. Visits were suspended when the mother failed to provide medical documentation that she did not have a contagious illness. Although the mother testified that she was unable to complete parenting classes, and substance abuse and mental health treatment because she suffered from depression and thereafter developed serious physical illnesses, a mental health diagnosis was not sufficient to establish a lack of physical ability to plan for the children's future and the mother failed to substantiate her alleged physical illnesses.

Matter of John B., 93 AD3d 1221 (4th Dept 2012)

Father's Parental Rights Properly Terminated Even Though Children Not Freed

For Adoption

Family Court terminated respondent father's parental rights to his children on the ground of abandonment. The Appellate Division affirmed. Respondent's parental rights could be terminated even though the children's mother retained her parental rights and the children were not freed for adoption. Petitioner established by clear and convincing evidence that respondent abandoned his children. Respondent failed to demonstrate that there were circumstances rendering contact with the children or petitioner infeasible or that he was discouraged from doing so by petitioner.

Matter of Drevonne G., AD3d (4th Dept 2012)

Motion to Vacate Default Properly Denied

Family Court denied respondent mother's motion to vacate a default judgment in a permanent neglect proceeding. The Appellate Division affirmed. Respondent's contention that she had a reasonable excuse based upon her lack of knowledge and her incarceration was not preserved for review and, in any event, she failed to establish a reasonable excuse. Further, respondent's unsubstantiated and conclusory assertion of partial compliance with prior dispositional order was insufficient to establish a meritorious defense.

Matter of Anastashia S., AD3d (4th Dept 2012)

No Error in Court's Consideration of Mother's 2007 Psychological Report

Family Court terminated respondent mother's parental rights with respect to her daughter. The Appellate Division affirmed. The court did not err in basing its determination in part upon a psychological report prepared in 2007 in connection with a parental evaluation of the mother. The report concerned the mental fitness of the mother and was therefore relevant to the best interests of the child.

Matter of Aubrey A., AD3d (4th Dept 2012)

Petitioner Made Diligent Efforts

Family Court terminated respondent father's parental rights to his child. The Appellate Division affirmed. When petitioner tries diligently to reunite parent and child but the parent is uncooperative or indifferent, petitioner is deemed to have fulfilled its duty. Here, initially the father did not believe the child was his. When respondent was adjudicated the father, he expressed no desire to have custody of the child and instead was in favor of an adoption plan. He was invited to all the service plan reviews with respect to the child but attended only one. The father failed to plan for the future of the child. The evidence established that the father was financially and physically able to take custody of the child since the time the child was placed in care but he did not do so. The court properly refused to issue a suspended judgment. The child had been

living in a kinship foster home in Florida for six months, had bonded with the foster mother, and was doing very well, while the father had minimal contact with the child and he had little to no bonding with the child.

Matter of Noah V.P., AD3d (4th Dept 2012)

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

Family Court terminated respondent mother's parental rights based upon mental illness. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that respondent could not adequately care for her child by presenting the testimony of a psychiatrist regarding respondent's mental illness. The court did not err in refusing to hold a dispositional hearing because there was no requirement for such hearing following a determination that a parent was incapable of caring for a child based on mental illness.

Matter of Alberto C., AD3d (4th Dept 2012)

Mother Failed to Address Issues Leading to Children's Removal

Family Court terminated respondent mother's parental rights with respect to three of her children on the ground of permanent neglect. The Appellate Division affirmed. The mother cared for the oldest child for only 10 months following her birth and her twin daughters were removed at birth and never returned to her care. Petitioner proved by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between mother and children. Although the mother completed a parenting and domestic violence program and regularly attended supervised visitation with the children, she refused to attend another domestic violence program after the children's father assaulted her and damaged her home and furniture. The mother also refused to attend recommended drug treatment and failed to provide petitioner's employees access to her home, the condition of which resulted in the removal of the oldest child.

Matter of Tiosha J., AD3d (4th Dept 2012)

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

In the Matter of the Permanency Hearing
Regarding

AUSTIN M [REDACTED]

DOCKET NO.: AS-[REDACTED]

A Child under the Age of 21 Who Has
Been Freed for Adoption

APPEARANCES:

Monroe County Law Department, by Patricia L. Woehrien, Esq., for Petitioner

~~The Legal Aid Society, by Katie E. Woodruff, Esq., Attorney for the Child~~

DECISION AND ORDER

Has Petitioner Monroe County Department of Human Services (MCDHS) exercised reasonable efforts in effectuating Austin M [REDACTED]'s permanency goal of adoption over the last six months? No, while the Court approves the goal of adoption for Austin, the Court also makes a no reasonable efforts finding.

Austin M [REDACTED] (dob: [REDACTED]00) and his biological brother Brandon (dob: [REDACTED]02) were both removed from their biological mother and placed in foster care in 2004. Brandon was freed for adoption in June 2006 and subsequently adopted by his foster mother Jeanette S [REDACTED] in 2007. Austin was freed for adoption in November 2007; since the Court has conducted permanency hearings for Austin twice annually which have approved the reasonable efforts of the MCDHS to effectuate Austin's permanency goal of adoption. Since being freed for adoption Austin has been in residential treatment and in two prospective adoptive homes which failed; his only consistency Jeanette S [REDACTED] and Brandon, who visited him, until all sibling visitation ceased when Austin was placed in the Kross foster home.

At the most recent permanency hearing held on September 13, 2010 the Court learned that Austin's proposed adoptive placement with the Kross family had disrupted and Austin was placed at the Titan House Program of New Directions. On consent of the parties the Court continued the goal of adoption and found reasonable efforts. ~~the Court~~ *the Court however emphasized that Austin was to have contact with his brother Brandon that could begin with telephone contact but would quickly be expanded to visits no shorter than one hour in duration.* On September 14, 2010 Jeanette S. [REDACTED] wrote a letter to MCDHS reiterating her desire to be considered a foster care placement for Austin. On November 10, 2010, by Order to Show Cause, Austin's attorney requested that Austin be immediately placed in Jeanette S. [REDACTED]'s home with his brother.

At the scheduled permanency hearing on February 17, 2011, Austin's attorney refused to consent to MCDHS's reasonable efforts to effectuate Austin's adoption, arguing that it is MCDHS's burden to demonstrate its efforts. Petitioner presented one witness: Monroe County Department of Human Services Senior Caseworker for the Adoption Unit Mary Schiller. The Court also previously heard *in camera* testimony from Austin regarding the order to show cause filed by his attorney and as the Court is required to engage in an age appropriate consultation with the child (Family Court Act § 1089 [d] [2] [iii]), it considered this testimony as well.

After each permanency hearing, a court shall, upon the proof adduced, which includes age-appropriate consultation with the child, and in accordance with the best interests and safety of the child, determine and issue its findings including the permanency goal and determining whether reasonable efforts have been made to

effectuate the child's permanency plan (Family Court Act § 1089 [d] [2] [iii]). Where a child has been freed for adoption, the permanency order may also direct that such child be placed for adoption in the foster family home where he or she resides or has resided or with any other suitable person or persons (Family Court Act § 1089 [d] [2] [viii] [B] [i]).

Caseworker Schiller testified that commencing in August 2010 MCDHS conducted a targeted homestudy to locate a new adoptive placement for Austin, after Austin was removed from the Kross family foster home due at least in part to inappropriate behavior by the foster father. MCDHS determined that Austin's placement must be with: (1) a pre-adoptive home located in western New York to facilitate visitation between Austin and Brandon; (2) a two-parent family with a nurturing but limit-setting Father figure; (3) a "seasoned" family to better understand Austin's trauma; and (4) a family where Austin could be the only child or the youngest child. The caseworker testified that she solicited home studies from twelve agencies and received eight home studies, including the Morgott family from Hillside and Jeanette S. [REDACTED] from Gateway-Longview. She testified that Ms. S. [REDACTED] homestudy was conducted in June 2010 and she gave it serious consideration but her home did not meet the criteria and the caseworker had serious concerns about Austin living with Brandon. Austin was instead placed with the Morgott family in February 2011, despite that the Morgott family also does not meet MCDHS's criteria as they have a three-year-old foster son and their grandchildren visit their home frequently.

Austin was placed with Jeanette S. [REDACTED] for a short time prior to being hospitalized at Western New York Psychiatric Center in 2005. Schiller testified that when Austin was first placed in foster care in 2004 he injured Brandon by punching him and pushing

him downstairs. Prior to being hospitalized in August 2005 Austin put a pillow over Brandon's face and chanted "you like him better." After being stabilized at the Western New York Psychiatric center Austin moved to the Conners Residential Treatment Center and was placed in the Reinhardt and Kross foster homes. Ms. S [REDACTED] and Brandon consistently visited Austin when he was in residential treatment and in the Reinhardt family foster home. Visitation however ceased when Austin was placed with the Kross family. Austin's *in camera* testimony made clear that Austin knows and loves both Ms. S [REDACTED] and Brandon.

In *Matter of Taylor EE* (80 AD3d 822 [3d Dept 2011]) the Appellate Court affirmed Family Court's findings of no reasonable efforts where the Petitioner did not find a permanency resource for a child placed in residential care. There, although the child's three siblings were adopted by one family, petitioner did not inquire of the adoptive mother whether she would consider to be a permanency resource for the child until the day of the hearing (*compare Matter of Michael WW.*, 45 AD3d 1227, 1228-1229 [3d Dept 2007] [efforts reasonable to achieve permanency goal of adoption where petitioner listed child in photo-list; maintained contact with a former foster parent and current foster parent for child's brother and kept Family Court informed of its placement progress through biweekly written reports]; *Matter of Bianca QQ*, 80 AD3d 809 [3d Dept 2011] [efforts reasonable to achieve permanency goal of return to parent despite that petitioner should provide more specificity in its permanency reports regarding dates services were provided]).

Family Court Act § 1055 (i) and Social Services Law § 358-a (11) (b) and 384-a

(1) (a) state:

Placement or *regular visitation and communication* with siblings or half-siblings shall be presumptively in the child's best interests unless such placement or visitation and communication would be contrary to the child's health, safety or welfare, or the lack of geographic proximity precludes or prevents visitation [emphasis added].

Foster children who are siblings may be separated only if proven after evaluation by professional staff that placement together is contrary to the health, safety or welfare of one of more of the children (18 NYCRR § 431.10 [a] [b]).

Here Austin and Brandon were together removed from the home of their biological mother where they witnessed domestic violence in 2004; the latest incidents of Austin's displays of aggression against his brother were *six years ago* when the boys were not yet freed for adoption; since that time Brandon has been in continuous treatment and therapy and many positive visits between the brothers occurred until visitation ceased. Despite the lack of visits, Ms. S. [REDACTED] continued to advocate for Austin and continued to advocate for visits between her son Brandon and Austin. The Attorney for the Child has continued to advocate for visits between Austin and Brandon. At each and every permanency the Court has continued to emphasize that the brothers should maintain a relationship - most recently the Court *required* that the visits were to occur during the six months immediately preceding the current hearing.

Schiller testified that Austin continues to exhibit assaultive behaviors with peers and screams, kicks, bites and punches. She further testified that Brandon has high needs and in July 2009 Brandon was approved post-adoption to receive an exceptional subsidy rate. She said that because both brothers have exceptional needs and

experienced domestic violence while in the same household that they have a tendency to display aggression when together. She further testified that the Director of the Titan House Margaret Flannery told Caseworker Marcia Miller that Austin is an "emotionally fragile child that will not be able to live with his brother." Austin's counselor and clinician at the Titan House Mark Minca reported that Austin's biggest trigger is with peers and although Austin is receptive to counseling, he is not able to implement skills even though he is able to articulate them.

While this hearsay evidence is admissible at the permanency hearing, there was neither proof of how either Ms. Flannery or Mr. Minca arrived at their opinions, nor their credentials to make such opinions. MCDHS failed to proffer evidence of a recent evaluation of Austin prohibiting placement with Brandon - or at the very least consistent visitation as required unless contrary to the health, safety or welfare of Austin and/or Brandon (18 NYCRR § 431.10 [a] [b]). To the contrary both Brandon's mother and the Attorney for the Child maintain residing together would be in the brothers' best interest.

The Court therefore approves Austin's permanency goal but finds that Petitioner did not make reasonable efforts towards this goal by failing to at the least provide adequate sibling visitation - and home visits to Ms. S█████ to make an appropriate inquiry as to whether she would be an appropriate foster care placement. The Court hereby orders that a minimum of weekly visitation shall take place between Austin and Brandon and MCDHS shall arrange for a further homestudy and seriously consider Ms. S█████ as an adoptive resource for Austin in accordance with Family Court Act § 255 (Family Court Act § 1089 [d] [2] [viii] [H]). The Court will not order Austin's immediate placement with Ms. S█████ - though it could (see Family Court Act § 1089 [d] [2] [viii] [B]

[I]; *Matter of Adrienne M.*, 201 AD2d 938 [4th Dept 1994]) - as such placement would be premature without further inquiry.

NOW, THEREFORE, it is hereby

ADJUDGED that Monroe County Department of Human Services did not engage in reasonable efforts to effectuate Austin M [REDACTED]'s permanency goal of adoption for the time period; and it is further

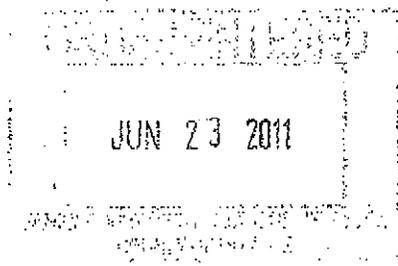
ORDERED that the permanency goal for Austin M [REDACTED] is adoption; and it is further

ORDERED that Monroe County Department of Human Services is charged with investigating Jeanette S [REDACTED] as a potential adoptive resource for Austin Medina and shall report to the Court regarding such investigation; and it is further

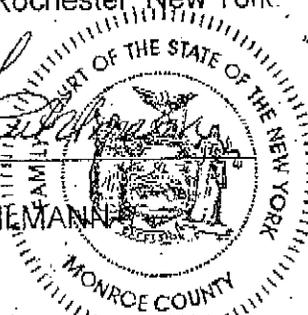
ORDERED that Austin M [REDACTED] shall have sibling visits with his brother Brandon at least once weekly supervised by Jeanette S [REDACTED], and it is further

ORDERED that Monroe County Department of Human Services shall arrange or provide transportation for such visitation.

Dated this 23rd day of June, 2011 at Rochester, New York.



Dandrea L. Ruhemann
HON. DANDREA L. RUHEMANN
FAMILY COURT JUDGE



PURSUANT TO § 1113 OF THE FAMILY COURT ACT, AN APPEAL MUST BE TAKEN WITHIN THIRTY DAYS OF THE RECEIPT OF THE ORDER BY APPELLANT IN COURT, THIRTY-FIVE DAYS FROM THE MAILING OF THE ORDER TO THE APPELLANT BY THE CLERK OF THE COURT, OR THIRTY DAYS AFTER SERVICE BY A PARTY OR LAW GUARDIAN UPON THE APPELLANT, WHICHEVER IS EARLIEST.

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MONROE COUNTY