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# **NEW YORK** **CHILDREN'S LAWYER**

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## **Raising the Age: New York's Archaic Age of Criminal Responsibility \***

By Merril Sobie \*\*

In 1899 the State of Illinois established the nation's first juvenile court. Illinois thereby eliminated the criminal prosecution, conviction, and incarceration of children, substituting the goals of rehabilitation and amelioration.<sup>1</sup> The court was quickly replicated throughout the country, and by 1925 46 of the 48 states, including New York, had established separate tribunals devoted to children's cases. Virtually every state initially restricted the court's jurisdiction to children less than 16 years of age. However, the overwhelming majority increased the juvenile delinquency jurisdictional age in the decades immediately following enactment. Today, in 48 states a child who is 16 years of age will be adjudicated in a juvenile or family court, and in most states a child of 17 will be similarly adjudicated (although children who have committed very violent offenses may be "waived" to the adult criminal courts). Only two states, New York and North Carolina, adhere to the early 20th century age limitation.

In the past two years legislative initiatives to join the overwhelming national consensus have been advanced in both New York and North Carolina. The momentum for change has been bolstered by recent neurological brain imaging studies proving that the older adolescent's brain has not fully matured (particularly those areas that govern judgment and impulse),<sup>2</sup> and also the sharply decreasing adolescent crime rate.<sup>3</sup> In early 2012 two "competing" bills were introduced in New York: the "Assembly Leadership Bill" and the

"Sentencing Commission Bill," introduced at the request of Chief Judge Jonathan Lippman, who has been a strong advocate for raising New York's age. Neither passed, but the proposals have generated widespread discussion and debate. The issue is likely to be seriously debated in the coming months and considered during the 2013 legislative session.

This article will outline and discuss the salient provisions which are incorporated in the two pending bills, commencing with the "Assembly Leadership" proposal. I shall also attempt to "bridge" the proposals, hopefully encouraging the enactment of an equitable and feasible measure.

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## **Assembly Leadership Bill**

The Assembly Leadership Bill would raise the age of criminal responsibility to 18 and simultaneously raise the age of Family Court jurisdiction. Every juvenile delinquency case would be initiated in the Family Court, and every Family Court Act provision would apply, from arrest to disposition. A 17-year-old accused of larceny would be treated identically as a 14-year-old accused of committing the same crime. Every alleged offense, from a minor traffic violation to a homicide case, would originate in Family Court.

The bill would also repeal the current Juvenile Offender Act, whereby 13-year-old children who are charged with murder and 14- and 15-year-old children accused of very violent offenses, such as first-degree robbery, are automatically prosecuted in the criminal courts (although the case may be subsequently "removed" to Family Court). Instead, those cases could be "transferred" from the Family Court to the Criminal Court after a hearing to determine the appropriate forum. Enacted in 1978, the Juvenile Offender Law is unique—no other state has enacted a similar measure. Nationally, every state except New York uses a "transfer" procedure to provide the alternative of criminal prosecuting and sentencing for adolescents who have been charged with extremely violent crimes (the exact age requirements, crimes, and procedures vary by state).

The Assembly Leadership Bill thus adopts the national model (although by including traffic offenses it exceeds the national norm—no other state includes those minor offenses). In a large sense, it represents a "purist" approach. The great disadvantage is its impracticality. The Family Court is overburdened as it is. Substantial new resources, judicial and non-judicial, would have to be allocated, either by transferring judges, staff and legal services (and the Family Court burden would be partially compensated by decreasing the caseload of the criminal courts), or by new appropriations, or both. The bill also poses political problems, particularly in the era of the government's reduced fiscal capacity.

## **Sentencing Commission Bill**

The Sentencing Commission Bill has been aptly referred to, by the commission itself, as a "hybrid" approach, one intended as a first step on the road to implementing a "raise the age" initiative. Jurisdiction would remain vested exclusively in the criminal courts, which would establish statutorily authorized "youth parts" to hear and determine criminal actions involving 16- and 17-year-old defendants. Unlike the Leadership Bill, the extreme ends of the penal law spectrum would be excluded; violent felony offenses would be heard in the regular parts of the superior criminal courts while traffic and other petty offenses would continue to be adjudicated by the local courts.

Under the proposal, the "youth parts" would be governed by a new code forged largely from the Criminal Procedure Law and the Family Court Act. The probation service would be granted the authority to "adjust" cases, a power which it has long exercised in Family Court. Of greater significance, the youth part dispositional structure would be similar to Family Court, i.e., a "convicted" youth (and criminal terminology rather than Family Court terminology is used throughout) would be deemed to be a juvenile delinquent with the same array of dispositional alternatives available, such as probation supervision or non-secure placement.

The advantage of the Sentencing Commission Bill is that it grants several "juvenile delinquency rights" to the 16- and 17-year-old age group, with only minimal disruption to the existing structure. Family Court would not be further burdened—instead, it would be bypassed. To a large degree the proposal is strikingly similar to the pre-1922 era, when the criminal courts maintained "children's parts" to adjudicate offenses involving children under the age of 16.<sup>4</sup> Eventually, the children court parts were separated from the criminal courts, forming the 1922 New York State Children Court. The sponsors' intention is that the same will ultimately occur if their bill is enacted.

## **Integration**

Clearly, the full integration of expanded age jurisdiction will be a lengthy process—in fact, every state that has raised the age in recent years has enacted a phased implementation schedule. However, a temporary measure that retains criminal court jurisdiction, with a combined complex application of provisions found in the Family Court Act and Criminal Procedure Law is unnecessarily complicated (interpreting the new "hybrid" code well could entail years of litigation), and compromise the goal of treating adolescents as delinquents rather than criminal defendants. In my opinion, there is a better way, one that would merge the competing bills and authorize full integration within the Family Court without creating a new structure or the necessity for further legislation. The age should be raised, perhaps in stages, and special Family Court parts should be authorized to be housed where necessary in criminal court courthouses (and staffed by criminal court personnel), with the objective of gradually integrating the "adolescent" parts into the Family Court itself.

The criminal court "youth parts" proposed by the Sentencing Commission would instead be designated as "Special Family Court parts," and the Family Court Act would be applied throughout, from a case's inception to its disposition. In fact, the perception that an amalgam of the two codes is necessary is erroneous. Family Court Act Article 3, which governs juvenile delinquency cases, already incorporates a huge array of CPL provisions, ranging from arraignment and motion practice to pleas and post-dispositional procedures. Parity is already required, thanks to the "equal protection" clauses of the federal and state constitutions.

Further, integration within the Family Court itself is more readily achievable than many believe. In half the state's counties, 30 to be exact, the Family Court judge is also the County Court judge (the so-called "two-hat" judge). In those counties, Family Court and criminal County Court cases are heard in the same courtroom, are conducted by the same judge, and are administered by the same court staff. Juvenile delinquency and "adolescent" criminal cases are currently heard in tandem on a daily basis. "Raising the age" in half the state (geographically) could be implemented

immediately and seamlessly.

In other counties, the County Court is housed in the same building and operates in close proximity to Family Court. For example, in Westchester, Family Court parts are located on the same floor as County Court parts. Designating a County Court courtroom adjacent to the Family Court as the "special Family Court part" would cause little disruption; at least de facto integration would be immediate. To be sure, the exact formula could not be used throughout the state. But that does not mean that special Family Court parts cannot be established and accommodated within criminal court facilities—just like the proposed adolescent criminal parts. The logistics are similar, and New York has long maintained a Unified Court System (if the Legislature simply raised the age, as proposed in the Assembly Leadership Bill, OCA could administratively accomplish the result I am advocating, though legislative authorization is clearly preferable). In due course, the "special Family Court parts" would become just Family Court parts, completing the integration process.

As noted, one great advantage is the fact that no further legislation would be required to fully implement "raise the age." The interim statutorily authorized parts could be integrated fully in the Family Court by OCA when fiscally and administratively feasible. The Legislature could set the outer time limit by including a "sunset" provision. Resources would be gradually reallocated and augmented. Most importantly, New York could quickly join every other state (save, perhaps, North Carolina) in treating almost all children under the age of 18 as, well, children.

## **Conclusion**

This brief article has outlined an admittedly "bare bones" structure. Much more work is needed. Decisions concerning, for example, prosecutorial authority (most advocates believe the district attorneys should maintain prosecutorial authority, whether the cases are heard in criminal or Family Court), the legal representation of the older adolescents, and the exclusion of very violent offenses, must be considered. So, too, the fiscal implications would have to be resolved (for example, the cost of providing children with legal representation in the Family Court is now borne entirely by the state,

whereas criminal defense costs are largely borne by the counties).

Lippman should be commended for raising the "raise the age" initiative. Many individuals and organizations have joined the movement. New York's children, including those who commit youthful mistakes, are no different than their counterparts in the rest of the country (and, for that matter, the rest of the civilized world, which uniformly maintains a higher juvenile jurisdictional age). The essential goal should be to indeed raise the age, and to raise it in the most equitable, effective and feasible manner.

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**Endnotes:**

1. The Illinois Juvenile Court also heard child protective cases; today every juvenile or family court hears a large array of cases involving children.
2. The U.S. Supreme Court has based several decisions, in part, on the neurological or psychological evidence concerning adolescence; see, e.g., [Roper v. Simmons](#), 543 U.S. 551 (2005), which determined that persons under the age of 18 could not be punished capitally.
3. Between 1994 and 2007, the national arrest rate of persons under the age of 18 decreased by more than 50 percent. The lower rate has stabilized in recent years.
4. Sec. L. 1903, c. 676, 677 which authorized the establishment of children's court parts throughout the state.

**New York**

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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, Suite 304, Rochester, New York 14604.

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Address changes should be directed to the Department's Attorneys for Children Program office in which you reside.

## NEWS BRIEFS

### SECOND DEPARTMENT NEWS

#### Governor Names Presiding Justice and Approves Associate Justice

The Hon. Randall T. Eng has been named by Governor Cuomo to serve as Presiding Justice of the Appellate Division Second Department. Justice Eng, who previously served as an Associate Justice in the Appellate Division Second Department, succeeds the Hon. William F. Mastro who served as Acting Presiding Justice following the Hon. A. Gail Prudenti who was appointed in December of 2011 as the Chief Administrative Judge of the Unified Court System. Additionally, the Hon. Sylvia O. Hinds-Radix has been appointed by Governor Cuomo to serve in the Appellate Division Second Department. Justice Hinds-Radix previously served as a Justice of the Supreme Court, and as Administrative Judge for Civil Matters in the Second Judicial District.

#### Continuing Legal Education Programs

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

On October 10, 2012, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. Gary Solomon, Esq., Legal Aid Society, NYC, Juvenile Rights Division, presented *Case Law and*

*Legislative Update*. Alan Sputz, Esq., Deputy Commissioner for Family Legal Services - Administration for Children's Services, and Jacqueline Sherman, Esq., Senior Advisor for Juvenile Justice Services - Administration for Children's Services, presented *Close to Home - a New Juvenile Justice Initiative*. This seminar was held at Brooklyn Law School, Brooklyn, New York.

#### **Tenth Judicial District (Nassau County)**

On October 23, 2012, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored the Mandatory Annual Fall Seminar. Gary Solomon, Esq., Legal Aid Society, NYC, Juvenile Rights Division, presented *Case Law and Legislative Update*; Anthony Zenkus, LMSW, Coalition Against Child Abuse and Neglect, presented *Looking At Child Sexual Abuse In a Family Context*; Robert C. Mangi, Esq., Attorney, Private Practice, presented *Article 8 Proceedings*; and the Honorable Arthur M. Diamond, Nassau County Supreme Court, presented *Electronic Evidence*. This seminar was held at Hofstra University Law School, Hempstead, New York.

#### **Tenth Judicial District (Suffolk County)**

On November 5, 2012, the Appellate Division, Second Judicial Department and the Attorneys for Children Advisory Committee co-sponsored the Mandatory Annual Fall Seminar. Margaret A. Burt,

Esq., Attorney at Law, presented *Child Welfare Law Update*; and Patty Ober, LMSW, Intake Supervisor and Court Liaison-Mercy First, together with Cara DeCostanzo, LMSW, Intake Supervisor and Court Liaison-Hope for Youth, presented *A Discussion of the Intake and Admission Process At Mercy First and Hope for Youth*. This seminar was held at the Suffolk County Supreme Court, Central Islip, New York.

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

On October 12, 2012, the Appellate Division, Second Judicial Department and the Attorneys for Children Program co-sponsored the Mandatory Annual Fall Seminar. Laura van Dernoot Lipsky, MSW, Director, The Trauma Stewardship Institute, presented *Raising Awareness and Responding to Trauma*; Margaret A. Burt, Esq., Attorney in Private Practice, presented *Child Welfare Law Update*; and Marguerite A. Smith, Esq., Attorney, Shinnecock Indian Nation, together with Margaret A. Burt, presented *Indian Children In Family Courts: Understanding and Applying ICWA*. This seminar was held at the Westchester County Supreme Court, White Plains, New York.

*The above seminars can be viewed on the Appellate Division Second Department's website at <http://www.nycourts.gov/courts/ad2/AttorneyforChildHome.shtml>.*

*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**

#### **Change to Court Rule § 835**

Please be advised that sections 835.2(a)(1) of Part 835 of the Rules of the Supreme Court, Appellate Division, Third Judicial Department (22 NYCRR 835.2) and section 835.3 of Part 835 of the Rules of the Supreme Court, Appellate Division, Third Judicial Department (22 NYCRR 835.3) have been amended to preclude from panel membership any attorney who has full-time employment by any governmental agency absent the express written permission of the employer, Family Court and the Office of Attorneys for Children. Any attorney who has full-time employment with any governmental agency cannot be assigned or accept assignment in any court as an attorney for the child without the express written permission of those three entities.

#### **Liaison Committees**

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts met this fall to discuss matters relevant to the representation of children in their counties. 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 will meet again in the Spring of 2013. Additionally, representatives are frequently in contact with the Office of Attorneys for Children on an interim basis. 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. If you would like to know the name of your county's representative, it is listed in the Administrative Handbook or you may contact the Office of Attorneys for Children at (518) 471-4825 or by e-mail at [ad3oac@nycourts.gov](mailto:ad3oac@nycourts.gov). Many thanks to the Liaison Representatives who have resigned this past year, for their years of dedicated service, including Ian Arcus (Albany), Carman Garufi (Broome), Richard Edwards (Franklin), and Diane Exoo (St. Lawrence). And welcome to the new members of the committee Christopher Pogson (Broome), Virginia Morrow (Franklin) and Paula Michaud (St. Lawrence).

#### **Advisory Committee**

The Departmental Advisory Committee oversees the operation of the Attorneys for Children Program and makes recommendations to the Presiding Justice with respect to promulgation of standards and administrative procedures for improvement of the quality of representation by attorneys for children in the department. In the past year we have lost two long-term members of the Advisory Committee with the passing of Professor Kathryn D. Katz of Albany Law School and Albany attorney, Sanford Soffer. We are grateful for their efforts, interest, enthusiasm and support

over the last 30 years and the November 3, 2012 "Children's Law Update '12-13" CLE seminar held in Latham, NY, was dedicated to their honor and memory.

Additionally, we thank past members, Ian Arcus, Esq., John D. Eggleston, Esq., Daniel J. Fitsimmons, Esq., and Kathleen A. Rapasadi, Esq. for their years of service to the Committee and the Office of Attorneys for Children.

Congratulations to our new members, recently appointed by Presiding Justice Karen K. Peters:

Hon. Mary M. Work (Ulster County Surrogate's Court)  
Professor Melissa Breger (Albany Law School)  
Marian B. Cocose, Esq. (Ulster County Panel Member)  
Cynthia Feathers, Esq. (Albany County Panel Member)  
Erika J. Leveillee (Professional Development Program)  
Geri Pomerantz, Esq. (Rensselaer County Panel Member)  
Michelle Stone, Esq. (Broome County Panel Member)

#### **Training News**

The following training is currently planned for the Spring 2013:

***Children's Law Topical*** will be held at the Holiday Inn on Wolf Road in Colonie, NY on Friday, April, 19, 2013 and will focus on Child Welfare proceedings. During the luncheon portion of the program we will be presenting the *John T. Hamilton, Jr., Esq.* Award for Excellence in the Representation of Children to a panel member. Nominations for the award will be sent out in February.

*Children's Law Update '12-13*, will be held on May 10, 2013 at the Crowne Plaza Resort in Lake Placid, NY.

**CLE News Alert** - We now have a 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. There are modules for a variety of proceeding types including custody/visitation, juvenile justice and child welfare. The series will be continually updated with additional modules to allow panel members to become familiar with a series of pertinent topics. 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](mailto:JLCONNOR@courts.state.ny.us)

#### **Website**

The Office of Attorneys for Children continues to update its web page located at [www.nycourts.gov/ad3/oac](http://www.nycourts.gov/ad3/oac). Attorneys have access to 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 (10/12) 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 newest feature is a *News Alert* which will include

recent program and practice developments of note.

#### **FOURTH DEPARTMENT NEWS**

##### **AFC Program Assistant Director Retired**

Christine Constantine retired effective September 10, 2013. We wish her well. It is expected that a new Assistant Director will be hired shortly after January 1, 2013.

##### **Spring Seminars/Seminar Times**

##### **Fundamentals of Attorney for the Child Advocacy Seminars**

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

##### **Thursday, March 21, 2013**

##### ***Fundamentals of Attorney for the Child Advocacy I– Juvenile Justice Proceedings***

Reidman Building, 45 East Avenue, Rochester, NY, across the street from the M. Dolores Denman Courthouse, Appellate Division, Fourth Department, 50 East Avenue, Rochester, New York

##### **Friday, March 22 2013**

##### ***Fundamentals of Attorney for the Child Advocacy II – Child Protective & Custody Proceedings***

Reidman Building, 45 East Avenue, Rochester, NY, across the street from the M. Dolores Denman Courthouse, Appellate Division, Fourth Department, 50 East

Avenue, Rochester, New York

The Program requires prospective attorneys for children to attend both seminars. In order to accommodate the commute time of attorneys from counties distant from Monroe County, the seminars will not begin until 9:45 A.M. A light breakfast and box lunch will be provided to all each day.

##### **Seminars for Attorneys for Children**

Dates and locations are tentative. You will receive agendas in the semi-annual mailing in January. The agendas also will be available in January under “seminars” at the Attorneys for Children Program link to the Appellate Division, Fourth Department website at <http://nycourts.gov/ad4>.

##### **March 26, 2013**

*Topical Seminar - Appeals* (full day)  
Inn on the Lake  
Canandaigua, NY

**This seminar will be taped and available for viewing on the AFC website.**

##### **March 29, 2013**

*Update for Attorneys for Children* (full day)  
Center for Tomorrow (University of Buffalo)  
Buffalo, NY

**This seminar will be taped and available for viewing on the AFC website.**

## **Your Training Expiration Date**

If you need to attend a training seminar or watch at least 5.5 hours of approved videos on the AFC website before April 1, 2012, to remain eligible for panel designation, you should have received a letter to that effect in November 2012. Please remember, however, that it is your responsibility to ensure that your training is up-to-date. Because of the new video option there will be no extensions.

If you are unable or do not want to attend live training you may satisfy your AFC Program training requirement for recertification by watching at least 5.5 hours of CLE video on the Attorneys for Children Program link to the Appellate Division, Fourth Department website at <http://nycourts.gov/ad4> . Once on the AFC page, click on “Training Videos” and then “Continuing Training.” Authority to view the online videos is restricted to AFC and is password protected. Your “User Id” is AFC4 and your “Password” is DVtraining.

You may choose the training segments that most interest you, but the segments you choose must add up to at least 5.5 hours. We are unable to process applications for AFC Program or NYS CLE for less than 5.5 hours credit. If you choose the video option instead of attending a live seminar, you must correctly fill out an affirmation and evaluation for each segment and forward all original forms together to Jennifer Nealon, AFC Program, 50 East Avenue, Rochester, NY 14604 by **March 15, 2013**. Incorrect or incomplete affirmations

will be returned.

There are directions on the “Continuing Training” page of the AFC website. Please read the directions carefully before viewing the videos. You are not entitled to video CLE credit if you attended the live program, and you must be admitted at least two years to receive NYS CLE credit. Please retain copies of your affirmations and your CLE certificates. We are unable to tell you what videos you viewed.

## RECENT BOOKS AND ARTICLES

### ADOPTION

Kim H. Pearson, *Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption*, 19 Mich. J. Gender & L. 149 (2012)

### ATTORNEY FOR THE CHILD

R. Daniel Okonkwo & Dylan Nicole De Kervor, *There are Two Sides to Every Story: Collaboration Between Advocates and Defenders in Achieving Systemic Juvenile Justice Reform*, 15 U. Pa. J. L. & Soc. Change 435 (2012)

Gregory Volz et. al., *Youth Courts: Lawyers Helping Students Make Better Decisions*, 15 U. Pa. J. L. & Soc. Change 199 (2012)

### CHILD WELFARE

Marnina Cherkin, *Three Shots in the Arm: The HPV Vaccine and Inclusive Health Policy*, 15 U. Pa. J. L. & Soc. Change 475 (2012)

Kip Nelson, *The Misuse of Abuse: Restricting Evidence of Battered Child Syndrome*, 75 Law & Contemp. Probs. 187 (2012)

Matthew Robinson-Loffler, *Passive Parenting and New York's Refusal to Recognize Parent-Child Actions for Negligent Supervision*, 5 Alb. Gov't L. Rev. 853 (2012)

### CHILDREN'S RIGHTS

Laura C. Hoffman, *Ensuring Access to Health Care for the Autistic Child: More is Needed Than Federal Health Care Reform*, 41 Sw. L. Rev. 435 (2012)

Michael W. Kessler & Matt Fahrenkopf, *The New York State Medical Indemnity Fund: Rewarding Tortfeasors who Cause Birth Injuries by Rationing Care to Their Victims*, 22 Alb. L. J. Sci. & Tech. 173 (2012)

Michael Stefanilo Jr., *Identity, Interrupted: The Parental Notification Requirement of the Massachusetts Anti-Bullying Law*, 21 Tul. J. L. &

Sexuality 125 (2012)

### CONSTITUTIONAL LAW

Teri Dobbins Baxter, *Constitutional Limits on the Right of Government Investigators to Interview and Examine Alleged Victims of Child Abuse or Neglect*, 21 Wm. & Mary Bill Rts. J. 125 (2012)

Mary Patricia Byrn & Rebecca Ireland, *Anonymously Provided Sperm and the Constitution*, 23 Colum. J. Gender & L. 1 (2012)

Marsha Levick et. al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood Adolescence*, 15 U. Pa. J. L. & Soc. Change 285 (2012)

Mike Rich, *Textbooks Disclaimed or Evolution Denied: A Constitutional Analysis of Textbook Disclaimer Policies and Academic Freedom Acts*, 63 Ala. L. Rev. 641 (2012)

### COURTS

Susan Crile, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 Am. U. L. Rev. 1783 (2012)

Richard Klein, *New Paths for the Court: Protections Afforded Juveniles Under Miranda, Effective Assistance of Counsel; And Habeas Corpus Decisions of the Supreme Court's 2010/2011 Term*, 28 Touro L. Rev. 353 (2012)

Shiv Narayan Persaud, *Is Color Blind Justice Also Culturally Blind?*, 14 Berkeley J. Afr.-Am. L. & Pol'y 23 (2012)

Rhona Schuz & Benjamin Shmueli, *Between Tort Law, Contract Law, and Child Law: How to Compensate the Left-Behind Parent in International Child Abduction Cases*, 23 Colum. J. Gender & L. 65 (2012)

## **CUSTODY AND VISITATION**

Jennifer Jack, *Child Custody and Domestic Violence Allegations: New York's Approach to Custody Proceedings Involving Intimate Partner Abuse*, 5 Alb. Gov't L. Rev. 885 (2012)

Chonayse R. Sellers, Debra H. V. Janice R.: *Proving that Love, Not Biology, Makes You a Parent*, 21 Tul. J. L. & Sexuality 179 (2012)

Ruth Sovronsky, *The Relocation Dilemma: In Search of "Best Interests,"* 75 Alb. L. Rev. 1075 (2011-2012)

Timothy E. Yahner, *Splitting the Baby: Immigration, Family Law, and the Problem of the Single Deportable Parent*, 45 Akron L. Rev. 769 (2011-2012)

## **DOMESTIC VIOLENCE**

Jeffrey R. Baker, *Trifling Violence: The U.S. Supreme Court, Domestic Violence and a Theory of Love*, 42 Cumb. L. Rev. 65 (2011-2012)

Brant Webb, *Unsportsmanlike Conduct: Curbing the Trend of Domestic Violence in the National Football League and Major League Baseball*, 20 Am. U. J. Gender Soc. Pol'y & L. 741 (2012)

Stewart M. Young, *Getting Away With Murder? Abolition of the Eagan Rule in Wyoming Domestic Violence/Murder Cases*, 12 Wyo. L. Rev. 49 (2012)

## **EDUCATION LAW**

Todd A. DeMitchell et. al., *Teach Effectiveness and Value-Added Modeling: Building a Pathway to Educational Malpractice?*, 2012 B.Y.U. Educ. & L. J. 257 (2012)

Preston C. Green III et. al., *The Legal and Policy Implications of Value-Added Teacher Assessment Policies*, 2012 B.Y.U. Educ. & L. J. 1 (2012)

Jamie Gullen, *Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should be Put Back on the Reform Agenda*, 15 U. Pa. J. L. & Soc. Change 251 (2012)

Nicole M. Oelrich, *A New "IDEA": Ending Racial Disparity in the Identification of Students With Emotional Disturbance*, 57 S.D. L. Rev. 9 (2012)

Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 Alb. L. Rev. 1855 (2011-2012)

Christopher A. Sickles, *Bridging the Liability Gap: How Kowalski's Interpretation of Reasonable Foreseeability Limits School Liability for Inaction in Cases of Cyberbullying*, 21 Wm. & Mary Bill Rts. J. 241 (2012)

## **FAMILY LAW**

Jessie R. Cardinale, *The Injustice of Infertility Insurance Coverage: An Examination of Marital Status Restrictions Under State Law*, 75 Alb. L. Rev. 2133 (2011-2012)

Martha M. Ertman, *Exchange as a Cornerstone of Families*, 34 W. New Eng. L. Rev. 405 (2012)

Nicole Stednitz, *Ending Family Trauma Without Compensation: Drafting § 1983 Complaints for Victims of Wrongful Child Abuse Investigations*, 90 Or. L. Rev. 1423 (2012)

Nancy Vollertsen, *Wrongful Conviction: How a Family Survives*, 75 Alb. L. Rev. 1509 (2011-2012)

Deborah A. Widiss, *Changing the Marriage Equation*, 89 Wash. U. L. Rev. 721 (2012)

## **FOSTER CARE**

Katherine Moore, *Pregnant in Foster Care: Prenatal Care, Abortion, and the Consequences for Foster Families*, 23 Colum. J. Gender & L. 29 (2012)

Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. Rev. 1474 (2012)

## **IMMIGRATION LAW**

Udi Ofer, *Protecting Plyler: New Challenges to the Right of Immigrant Children to Access a Public School*

*Education*, 1 Colum. J. Race & L. 187 (2012)

## **JUVENILE DELINQUENCY**

Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World*, 91 Neb. L. Rev. 1 (2012)

Jenna Rae Kring, *Caught in the Cycle of Sexual Violence: The Application of Mandatory Registration and Community Notification Laws to Juvenile Sex Offenders*, 18 Widener L. Rev. 99 (2012)

Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. Rev. 1502 (2012)

Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. Rev. 1584 (2012)

Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles With Adults After Graham and Miller*, 61 Emory L. J. 1445 (2012)

## **PATERNITY**

Nora Udell, *Riddle for Dr. Seuss “Are You My (Adoptive, Biological, Gestational, Genetic, De Facto) Mother (Father, Second Parent, or Step Parent)?” and an Answer for Our Times: A Gender-Neutral, Intention-Based Standard for Determining Parentage*, 21 Tul. J. L. & Sexuality 147 (2012)

## **TERMINATION OF PARENTAL RIGHTS**

Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 Yale J. L. & Feminism 175 (2012)

## FEDERAL COURTS

### **Child Must Return to Mexico Under Hague Convention**

The District Court granted plaintiff mother's petition for the return of her five-year-old child to Mexico. The Second Circuit affirmed. The child was a habitual resident of Mexico when defendant father retained her in the United States in violation of the mother's custodial rights under Mexican law. Therefore, the child had to be returned to Mexico pursuant to the Hague Convention and the International Child Abduction Remedies Act for custody proceedings. Until the child was brought to the United States in 2010, it was the parties' shared intention that the child would live in Mexico indefinitely. Although the father contended that in 2010 the parties had a new intention that the child would move to the United States, the record supported the district court finding that any agreement to that effect was conditioned on the child joining a household that included both parents. The record also supported the Court's inference that the mother's intention was that the child would always live with her. Although, in rare circumstances, the habitual residence of the child can shift when a child's degree of acclimatization to a new residence is so complete that serious harm can be expected to result from compelling the child to return to the family's intended residence, there was no such showing in this case.

*Mota v Castillo*, 692 F3d 108 (2d Cir. 2012)

### **NYS Prohibition Against Aversive Interventions Does Not Violate IDEA or Federal Constitution**

Plaintiffs brought this suit against defendant New York State Education Department, alleging that New York's prohibition of aversive interventions, which are negative consequences or stimuli administered to children who exhibit problematic and disruptive behavior, violated the IDEA and the Federal Constitution. The District Court granted defendant's motion to dismiss. The Second Circuit affirmed. Prohibiting one possible method of dealing with behavior disorders did not result in a constitutional due process or equal protection violation, or in a procedural

or substantive violation of the IDEA or a violation of the Rehabilitation Act. New York's regulation did not undermine a student's right to a free and appropriate public education or prevent administrators from enacting an individualized plan for the child's education. Rather, the regulation prohibited consideration of a single method of treatment, without foreclosing other options. Further, the prohibition represented a considered judgment regarding the education and safety of its children that conformed to the IDEA's preference for positive behavioral intervention and was consistent with the United States Constitution.

*Bryant v New York State Education Dept.*, 692 F3d 202 (2d Cir 2012)

### **"Now Settled" Defense Under Hague Convention Not Subject to Equitable Tolling**

In US District Court, separated parents disputed whether a UK or US Court should determine which of them had custody of their five-year-old child. The child was born in London. The couple lived with the child in London for three years. Mother then left the couple's apartment with the child and moved to a woman's shelter in London for a period of months before traveling to New York to live with the child at mother's sister's house. Thereafter, father filed a petition 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 is not subject to equitable tolling of the one-year period. A parent could still file a return petition after the one-year period has expired and the fact that the child was settled was not automatically

a sufficient ground for denial of the petition. The one-year period was designed to allow courts to take into account a child's interest in remaining in the country to which she has been abducted after a certain amount of time has passed, and equitable tolling would undermine that purpose. A child could develop such an interest regardless of her parents' efforts to conceal or locate her. Further, in deciding whether a child was settled under Article 12, her lack of legal immigrations status was but one factor among many to be considered.

*Lozano v Alvarez*, \_\_ F3d \_\_, 2012 WL 4479007, (2d Cir. 2012)

**Where Facebook Privacy Settings Allow Viewing by Friends Government Access to Postings Through Cooperating Witness Did Not Violate Fourth Amendment**

As part of a Grand Jury investigation, the Government applied for a search warrant for the content on defendant's Facebook account. The Magistrate found probable cause and issued the warrant. On defendant's motion to suppress evidence seized from his Facebook account, he presented a Fourth Amendment challenge to the Government's use of a cooperating witness, one of defendant's "friends," who gave the Government access to defendant's Facebook profile. The District Court denied defendant's motion to suppress. Defendant's Facebook profile allowed his Facebook "friends" to view a list of his other "friends" as well as messages and photographs the defendant and others posted to defendant's profile. By viewing defendant's profile through the Facebook account of one of defendant's "friends," the Government learned that defendant posted messages about prior acts of violence, threatened new violence to rival gang members, and sought to maintain the loyalties of other gang members. Defendant's legitimate expectation of privacy ended when he disseminated posts to his "friends" because those "friends" were free to use the information however they wanted - including sharing it with the Government. Because defendant surrendered his expectation of privacy, the Government did not violate the Fourth Amendment when it accessed defendant's Facebook profile through a cooperating witness.

*United States v Meregildo*, \_\_ F Supp3d \_\_, 2012 WL 3264501 (SDNY 2012)

## APPELLATE DIVISIONS

### ADOPTION

#### **Parent's Failure to Maintain Substantial and Continuous Contact With Child Makes His Consent to Her Adoption Unnecessary**

The Appellate Division held that the Surrogate Court had properly determined that respondent's consent to adoption of his biological child was not necessary as he had failed to maintain substantial and continuous contact with the child. The Court held that pursuant to DRL § 111[1][d], evidence of such contact could have been manifested by payment of a fair and reasonable sum of child support and monthly visitation with the child when physically and financially able to do so. If visitation was not a possibility, respondent could have fulfilled this condition by regularly communicating with the child or the child's custodian. In this case, although respondent lived in the same county as the child he only visited her one time years ago and there was no proof that he was physically or financially unable to do so. He had also failed to send the child any gifts or cards. Respondent argued he couldn't locate the mother but the record showed he never made even minimal efforts, to locate her. He did not ask the mother's father for her address although he knew where the maternal grandfather lived, and he did not think to look in the phone book to see if the mother's address was listed there. The two times he saw the mother in person he did not ask for her address, her phone number or inquired about the child.

*Matter of Asia ZZ.*, 97 AD3d 865 (3d Dept 2012)

### CHILD ABUSE AND NEGLECT

#### **Father Neglected Child by Committing Acts of Domestic Violence in Child's Presence**

Family Court found that respondent father neglected his children. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent neglected the child by committing acts of domestic violence against the child's mother in the child's presence. Respondent's contentions about hearsay were not preserved for review. In any event, the child's out-of-court statements that she saw respondent

choking, slapping and kicking her mother on one occasion and hitting her on another were corroborated by the caseworker's testimony and records admitted without objection. A preponderance of the evidence also supported the finding of educational neglect. The record showed that the child missed 59 days of school in a two-year period.

*Matter of Kaila A.*, 95 AD3d 421 (1st Dept 2012)

#### **Brief Period Between Mother's Drug Use And Child's Birth Supported Derivative Neglect Finding**

Family Court determined that respondent mother derivatively neglected her child. The Appellate Division affirmed. Respondent had a 13-year history of abusing illegal drugs and because of her addiction three of her other children had been removed from her care and her parental rights were terminated with respect to one of the children. The record also showed that respondent used drugs at least halfway through her pregnancy with the subject child and that she dropped out of a drug treatment program two months before his birth. Respondent's enrollment in an in-patient program two weeks before the child's birth was commendable, but it did not outweigh her significant history. Given the brief period between respondent's last drug use and the child's birth, the court properly found that the child was at risk of neglect.

*Matter of Messiah C.*, 95 AD3d 449 (1st Dept 2012)

#### **Child Properly Allowed to Testify Via Closed Circuit Television**

Family Court granted the application of the attorney for the child to allow the child alleged to be abused to testify via two-way closed circuit television, subject to contemporaneous cross-examination by the parties. The Appellate Division affirmed. The court properly balanced respondent mother's due process rights with the emotional well-being of the child in allowing the child to testify to years of sexual abuse by her stepbrother, which the mother disbelieved, outside their presence but visible via closed-circuit television and subject to contemporaneous cross-examination. The affidavit of the social worker who interviewed the child

on multiple occasions and who spoke to a social worker at the facility where the child was being treated, sufficiently established the potential trauma to the child, which would likely interfere with her ability to testify accurately and without inhibition.

*Matter of Giannis F.*, 95 AD3d 618 (1st Dept 2012)

### **Mother Failed to Show Credible Explanation For Child's Injuries**

Family Court determined that respondent mother abused and neglected her child. The Appellate Division affirmed. Petitioner made a prima facie showing that a spiral fracture of the infant's right humerus would ordinarily not have been sustained except by reason of respondent's acts or omissions and respondent failed to adequately rebut with a credible and reasonable explanation of how the child suffered the injury. There was no basis to disturb the court's credibility determination with respect to respondent's varying accounts of the occurrence or the court's decision to credit petitioner's expert over respondent's expert.

*Matter of Amire B.*, 95 AD3d 632 (1st Dept 2012)

### **Dismissal of Neglect Petition Reversed**

Family Court dismissed the neglect petition against respondent mother. The Appellate Division reversed, granted the petition, and remanded for a dispositional hearing. The caseworker testified that the child stated that respondent beat him with a cord on his back when he broke a toy. The child's statements were corroborated by a letter respondent wrote to her boyfriend in prison, which stated that she had just beaten the child as if it were "judgment day" for breaking the toy. The mother's statement that the letter was a "joke" and her claim that it was an expression of her feelings, not her actions, was not credible in light of the fact that the letter was entirely consistent with the four-year-old child's account of events. The fact that the caseworker did not see bruises on the child was not dispositive.

*Matter of Oluwashola P.*, 95 AD3d 778 (1st Dept 2012)

### **Mother Neglected Children by Committing Acts of Domestic Violence in Children's Presence**

Family Court determined that respondent mother neglected her children, released the children to their father's custody without supervision, awarded respondent supervised visitation, and ordered her to complete certain services and not to engage in any further acts of domestic violence in the presence of the children. The Appellate Division affirmed. The mother's actions placed the children in imminent risk of physical harm. The record established that while in the presence of the children, respondent attacked the father, hitting him over the head multiple times as he bent down to pick up the couple's one-year-old son. The attack rendered the father unconscious, and he awoke to the couple's six-year-old daughter crying and tending to his bleeding head wounds. When describing the incident to a social worker in the weeks and months thereafter, the daughter became visibly upset and emotionally distraught.

*Matter of Kelly A.*, 95 AD3d 784 (1st Dept 2012)

### **Single Incident of Impaired Judgment Sufficient to Find Neglect**

Family Court's determined that a single incident of a parent's strongly impaired judgment that exposed the child to a risk of substantial harm was sufficient to sustain a finding of neglect. The Appellate Division affirmed. The mother was in the park with her child when she began to hear voices telling her that a demon wanted to harm her son. Evidence showed that the mother had been experiencing delusions of demons since her childhood and had been involuntarily committed for a month, during which time she continued to be extremely delusional and psychotic with bizarre behavior. The mother also lacked insight into her mental illness.

*Matter of Isaiah M.*, 96 AD3d 516 (1st Dept 2012)

### **Acts of Domestic Violence Committed in the Presence of the Child Sufficient to Find Neglect**

Family Court determined that respondent father neglected his child. Respondent, in the presence of his then three-year-old child, struck the mother in the face

during an argument inside a van which was parked in a garage. The parents continued their argument outside the van and respondent struck the mother in the face several more times breaking her nose, bloodying her face and causing several bruises before bystanders could intervene. The child later relayed to caseworkers that she was “sad and upset” by the incident. The Appellate Division affirmed. The neglect finding was supported by a preponderance of the evidence because respondent’s actions caused the child to suffer emotional harm.

*Matter of Jeaniya W.*, 96 AD3d 622 (1st Dept 2012)

### **Petitioner Established Prima Facie Case with Medical Evidence**

Here, contrary to the Family Court's determination, the petitioner sustained its burden of proof by a preponderance of the evidence (*see* FCA §1046[b][I]) that the child was abused by the respondents and that the child’s sibling was derivatively abused by the respondents. The medical evidence presented by the petitioner established that the child, then three years old, had contracted gonorrhea while under the care and supervision of the respondents. Once the petitioner established a prima facie case the burden shifted to the respondents to rebut the evidence of parental culpability. The respondents, however, failed to rebut the petitioner's prima facie case of abuse. Further, a preponderance of the credible evidence supported a finding that the respondents the subject child. Finally, the proof of abuse and neglect by the respondents of the subject child was sufficient to establish that the respondents derivatively abused and neglected the child's sibling. Order reversed.

*Matter of Aliyah G.*, 95 AD3d 885 (2d Dept 2012)

### **Child’s Out-of-court Statement Sufficiently Corroborated**

The Family Court properly found that the mother violated an order of fact-finding and disposition and an order of protection by inflicting corporal punishment upon one of the subject children. The child's out-of-court statements that the mother twisted his ear were sufficiently corroborated by the photographs introduced into evidence at the hearing and the personal

observations of the father and the caseworker of the child's injuries, as well as the out-of-court statements by two of the child's siblings regarding similar incidents. Order affirmed.

*Matter of Adreanna M.*, 95 AD3d 1213 (2d Dept 2012)

### **Mother Engaged in Excessive Corporal Punishment**

Contrary to the mother's contention, the Family Court's finding of neglect of the child based on excessive corporal punishment was supported by a preponderance of the evidence. The Family Court's finding that the mother engaged in excessive corporal punishment when she initiated an altercation in which she slapped and scratched the child was supported by the evidence presented at the fact-finding hearing, which included testimony of a caseworker and a police officer, and a nurse's report that described the child's injuries. Order affirmed.

*Matter of Yanni D.*, 95 AD3d 1313 (2d Dept 2012)

### **Doctrine of Collateral Estoppel Was Applicable Where Father Plead Guilty to Rape of Subject Child**

The Family Court properly granted that branch of the motion of the Department of Social Services (DSS) which was for summary judgment on the issue of the father's derivative neglect. DSS met its prima facie burden of showing that the doctrine of collateral estoppel was applicable. The father's plea of guilty to rape in the second degree and criminal sexual act in the second degree constituted convictions (*see* CPL 1.20 [13]) for sexual crimes based upon the same acts constituting the allegations of sexual abuse as set forth in Family Court Act article 10 petitions. Further, since the father's plea of guilty and admission to repeatedly engaging in sexual intercourse with the subject child established a fundamental defect in the father's understanding of his parental duties relating to the care of children, DSS demonstrated, prima facie, that the other children were derivatively neglected (*see* FCA § 1046 [a] [I]).

*Matter of Idhailia P.*, 95 AD3d 1333 (2d Dept 2012)

### **Severe Abuse of Biological Child Established**

The Family Court properly granted that branch of the motion of the Nassau County Department of Social Services (hereinafter DSS) which was for summary judgment on the issue of the appellant's severe abuse of his biological child (see SSL§ 384– b[8][a][iii][A] ). DSS established, prima facie, that the appellant had been convicted of, inter alia, murder in the first degree for killing the child's mother and that reasonable efforts to return the child to the home should be excused as being detrimental to the best interests of the child. Accordingly, the Family Court properly granted that branch of DSS's motion which was for summary judgment on the issue of the appellant's severe abuse of the child. However, the Family Court erred in granting that branch of DSS's separate motion which was for summary judgment on the issue of the appellant's severe abuse of the child's half-sister, for whom the appellant was legally responsible, and whose mother the appellant was convicted of murdering. SSL § 384–b(8)(a)(iii)(A) provides, in relevant part, that a child is severely abused by his or her parent if the parent of such child has been convicted of murder in the first degree as defined in Penal Law § 125.27 and the victim of such crime was the other parent of the child. Although Social Services Law § 384–b does not define “parent” except as to generally include an “incarcerated parent” (Social Services Law § 384–b[2] ), the statute “is unmistakably intended to establish necessary procedures and standards for the termination of parental rights and the weighing of those rights of birth parents vis-à-vis their children's rights to permanency.” Since the appellant was not the parent of the child's half-sister, and accordingly, no issue was raised with respect to the termination of the appellant's parental rights as to that child, he could not be found to have severely abused her within the meaning of Social Services Law § 384–b(8) (a)(iii)(A)). The failure of DSS to establish its prima facie entitlement to judgment as a matter of law on this issue required the denial of that branch of the motion, regardless of the sufficiency of the appellant's opposing papers. Thus, the Family Court erred in granting that branch of DSS's motion which was for summary judgment on the issue of the appellant's severe abuse of this child within the meaning of SSL§ 384–b(8)(a)(iii)(A). However, under the circumstances, the Appellate Division found that the appellant abused this child within the meaning of

FCA § 1012(e)(i), and modified the order accordingly.

*Matter of Leonardo V., Jr.*, 95 AD3d 1343 (2d Dept 2012)

### **Child's Out-of-Court Statement Not Sufficiently Corroborated**

Here, with regard to the allegations of abuse and neglect against the father, the Family Court properly found that the out-of-court statement of his daughter, the subject child, regarding sexual conduct was not sufficiently corroborated by other evidence tending to support the reliability of that statement. Contrary to the petitioner's contentions, neither the out-of-court statements of the father's other daughter, nor the drawing produced by the subject child, constituted reliable corroboration. While out-of-court statements of siblings may be used to cross-corroborate one another, the subject child's sibling specifically denied any sexual behavior and insisted that her sister was lying. Moreover, although the subject child's drawing was arguably a visual representation of her out-of-court statement, it was made at the same time she made her lone accusation of abuse and was made at the request of the detective who was interviewing her. Under these circumstances, the drawing was simply a repetition of the accusation, which did not serve to corroborate her prior account. Furthermore, the Family Court properly dismissed so much of the petitions as alleged neglect by the mother. While the mother permitted the father to transport her and the children home from day care one afternoon, in violation of an order of protection, “a violation of an order of protection, standing alone, is insufficient to establish neglect.” Under the circumstances here, where an emergency situation was presented and where the father's exposure to the children was minimal, the Family Court correctly determined that the mother did not engage in conduct that impaired or threatened the physical, mental, or emotional well being of the children. Order affirmed.

*Matter of Jada K.E.*, 96 AD3d 744 (2d Dept 2012)

### **Use of Excessive Corporal Punishment Supported by Preponderance of the Evidence**

The evidence presented at the fact-finding hearing established that the father hit the subject child several

times with an electrical cord, causing bruises to her arm and back. Thus, contrary to the father's contention, the Family Court's finding of neglect based on the use of excessive corporal punishment was supported by a preponderance of the evidence. Moreover, contrary to the father's contention, the evidence adduced at the fact-finding hearing, including the sworn testimony of the child, was sufficient to prove, by the requisite preponderance of the evidence, that he sexually abused her (see FCA § 1012 [e] [iii]; PL §§ 130.50, 130.55, 130.60 [2]). Thus, the Family Court properly determined that it was in the child's best interests to be placed with the Commissioner of Social Services.

*Matter of Candacy C.*, 96 AD3d 836 (2d Dept 2012)

#### **Evidence Presented Failed to Establish Causal Connection Between Father's Mental Illness and Any Impairment or Imminent Risk to Child**

The Family Court properly determined that the Administration for Children's Services (ACS) failed to meet its burden of proving that the father neglected the subject child on the ground of mental illness or domestic violence committed against the child's mother (see FCA § 1012 [f] [i] [B]). The evidence presented failed to establish a causal connection between the father's mental illness and any impairment or imminent risk of impairment to the child's physical, mental, or emotional health. Likewise, because the instances of the father's domestic violence against the mother were committed outside of the child's presence, ACS failed to establish the requisite causal connection between the domestic violence and an impairment or risk of impairment of the child's physical, mental, or emotional health. Order affirmed.

*Matter of Cyraia B.*, 96 AD3d 936 (2d Dept 2012)

#### **Order Directing Petitioner to File a Petition to Terminate Mother's Parental Rights Reversed**

Here, the petitioner failed to sustain its burden of establishing, by a preponderance of the evidence, that a plan to change the permanency goal from "reunification with the . . . parent" to "placement for adoption" was in the subject children's best interests. It was undisputed that the mother had fully complied with all services recommended by the petitioner, and that she had fully

cooperated with the petitioner. The mother had unsupervised visitation with the subject children, including overnight visits. The mother's service providers agreed that she had progressed substantially in addressing the issues which led to the removal of the subject children. Additionally, the mother had assistance from family members, and was willing to accept assistance recommended and offered by the petitioner. Under the particular circumstances of this case, the record did not support the Family Court's determination to change the permanency goal from "reunification with the . . . parent" to "placement for adoption," or its determination to direct the petitioner to file a petition, inter alia, to terminate the mother's parental rights. Accordingly, the matter was remitted to the Family Court for further proceedings to effectuate the appropriate permanency goal of reunification with the mother. Order reversed.

*Matter of Nazier B.*, 96 AD3d 1049 (2d Dept 2012)

#### **Permanency Goal of Adoption Was in the Child's Best Interests**

The mother appealed from an order of the Family Court, which, after a permanency hearing, continued the permanency goal of adoption with regard to the subject child. The record revealed that the evidence presented at the permanency hearing established that the mother arrived significantly late to most of her supervised visits with the child, and even left one visit before it started. During those visits, the mother was observed speaking inappropriately to the child and often used profanity in front of him. She was also belligerent toward the foster agency's staff. Further, for more than a year, she refused to let ACS inspect her home and the most recent inspection had shown the apartment, inter alia, lacking window guards for the child. Although she testified that she completed a parenting skills program, the mother failed to avail herself of any of the mental health counseling referrals provided by the foster agency. The evidence also showed that the child had bonded with his foster parents, with whom he had lived for almost all of his life, and that the foster parents were actively addressing his special needs. Order affirmed.

*Matter of Acension C.L.*, 96 AD3d 1059 (2d Dept 2012)

### **Father Was Not Deprived of Due Process or Confrontation Rights**

Upon reviewing the record, the Appellate Division found the Family Court's determination that the father sexually abused his daughter was supported by a preponderance of the evidence. The Court further found that the Family Court did not improvidently exercise its discretion in closing the courtroom to the public during a portion of the fact-finding hearing. Contrary to the father's contention, he was not deprived him of any due process rights or the Sixth Amendment right of confrontation when the Family Court allowed the child to testify outside of his presence. The father's attorney was present and was permitted to cross-examine the child.

*In re Gloria M.*, 96 AD3d 1060 (2d Dept 2012)

### **Nonparty Mother Did Not Have Standing Pursuant to ICPC**

Here, the nonparty mother appealed from an order of the Family Court which denied her motion, inter alia, to hold the Administration for Children's Services and St. Vincent's Services in civil contempt for failing to timely complete paperwork for implementation of a transfer of custody of the subject child to a nonrelative friend in Virginia pursuant to the Interstate Compact on the Placement of Children (ICPC). Contrary to the mother's contention, the Family Court properly determined that she did not have standing to move to hold ACS and SVS in civil contempt. Although FCA § 1035(d) affords a nonrespondent parent the right to intervene in an article 10 neglect proceeding "for the purpose of seeking temporary and permanent custody of the child," it does not give a nonrespondent parent the right to intervene to argue that a third party should be awarded custody of the child. The mother did not seek to regain custody of the child, and the ICPC which ACS and SVS allegedly failed to complete in a timely manner was necessary solely to facilitate the custody petition of the mother's nonrelative friend. Under these circumstances, FCA § 1035(d) did not confer standing on the mother to move to hold ACS and SVS in civil contempt for their alleged failure to complete the ICPC in a timely manner and for other related relief.

*In re Eric W.*, 97 AD3d 833 (2d Dept 2012)

### **No Appeal From Family Court's Denial of Motion for Pediatric Examination of Child**

DSS filed neglect petitions against a mother and her live-in boyfriend based on bruises and other injury sustained by the mother's child while she was in their care. The mother moved for an order directing that the child be examined by a pediatrician to determine whether the injuries were the result of a medical condition which causes easy bruising. Family Court denied her motion and subsequently at the neglect hearing, determined that the mother and her boyfriend had neglected the child. The mother appealed from the dismissal of her motion for pediatric examination. The Appellate Division dismissed the mother's appeal as moot since the neglect hearing had concluded and the issue raised by the mother would only have been reviewable in conjunction with an appeal of the final order, where the record as a whole could be properly evaluated.

*Matter of Ameillia RR.*, 95 AD3d 1525 (3d Dept 2012)

### **Continued Domestic Violence Supports Grant of Summary Judgment Motion for Derivative Neglect**

Parents of five children were twice found by Family Court in 2008, to have neglected their children due to the parents' repeated and escalating acts of serious domestic violence which resulted in the children being removed and placed in foster care, where they still remained. Shortly after their sixth child was born, DSS removed that child from the parents' home and commenced a neglect proceeding alleging derivative neglect. DSS moved for summary judgment urging the court to take judicial notice of the prior neglect adjudications in addition to the parents' continued failure to address their domestic violence issues. Family Court granted the motion finding that despite the parents' attempts to participate in some of the services, they had not substantially benefitted from them and thus no material question of fact was raised as to whether the child was neglected. At the 2008 disposition the parents were ordered to, among other provisions, participate in domestic violence and anger management counseling and orders of protection were issued against them barring them from having contact with each other. The parents violated that no contact order as they had conceived their sixth child during the

period of time the no contact order was in effect and were, at the time of the instant proceeding, still living together. During the previous year the police had to be called at the father's work place due to a domestic violence incident between the parties. The father had failed to take the court ordered programs, failed to complete domestic violence or anger management classes and the mother was taking the domestic violence program for the second time because the instructors felt she had not benefitted from it when she had taken it previously. The Appellate Division affirmed.

*Matter of Xiomara D.*, 96 AD3d 1239 (3d Dept 2012)

### **Appeal of Motion Granting Protective Order Moot**

DSS filed a neglect petition against the mother and her live-in partner alleging that the mother's child had sustained bruises and other injuries while under their care. The mother sought to depose the child's father and served him with a subpoena duces tecum requesting that all photographs taken of the child's injuries be provided to her and the father sought a protective order which Family Court granted. Subsequently there was a neglect hearing and the mother and her boyfriend were found to have neglected the child. The mother appealed from Family Court's decision granting the protective order. The Appellate Division dismissed the mother's appeal as moot since the neglect hearing had concluded.

*Matter of Ameillia RR.*, 96 AD3d 1244 (3d Dept 2012)

### **Court Abused its Discretion by Failing to Consider Transcript of Respondent's Criminal Plea Allocution**

The Appellate Division held that the decision whether to allow the introduction of evidence after the close of proof during a FCA Article 10 fact-finding hearing, is within the trial court's discretion. In this case at the fact-finding hearing DSS introduced a certificate of disposition from a criminal proceeding against respondent, indicating that he had plead guilty to assault in the third degree of his three and four year old children. DSS then rested relying on the doctrine of collateral estoppel to prove neglect. Respondent's attorney filed a CPLR 4401 motion to dismiss the

petitions and DSS responded by submitting, among other things, a certified copy of the transcript of respondent's plea allocution in criminal court. Family Court held that it would review the submissions and either set a new trial date for additional evidence to be submitted or schedule for disposition. Upon review of all submissions, Family Court determined it could not review the transcript of the plea allocution, dismissed the neglect petitions with prejudice determining that they did not establish the requisite factual connection between the criminal conviction and the conduct alleged in the petitions. The Appellate Division reversed finding that the court's denial in reviewing the transcript was an abuse of discretion, and held that the children had been neglected. The Appellate Division held that the trial court should have considered whether the movant had provided a sufficient offer of proof, whether the opposing party would be prejudiced and whether a significant delay in the trial would result if the motion were granted. In this matter, although DSS had not moved to re-open the proceedings, it had requested in its papers that the court receive into evidence the transcript of the respondent's plea and had made an appropriate offer of proof by articulating the substance of the transcript and linking the guilty pleas and admissions contained in the transcript to the allegations in the petitions. Additionally, the court's consideration of the transcript would not have caused any undue delay in the trial.

*Matter of Jewelisbeth JJ.*, 97 AD3d 887 (3d Dept 2012)

### **Failure to Act to Avoid Actual or Potential Impairment to Child, Supports Neglect Finding**

The Appellate Division affirmed Family Court's determination of neglect against the mother of two children and the father of the younger child. The mother had a long history of serious drug abuse and had failed to successfully complete drug treatment. She had tested positive for opiates and amphetamines at the time of birth of her younger daughter but denied using drugs. Additionally, prior to the younger child's birth, the mother had failed to submit to a drug and alcohol evaluation recommended by DSS, which caused her to lose her medical insurance coverage which in turn prompted her to discontinue pre-natal care during her pregnancy. The court further held that the father of the younger child had neglected the child as he was

someone who "knew or should have known of [the] circumstances which required action in order to avoid actual or potential impairment of the child and had failed to act accordingly". In this case the father had lived with the mother during her pregnancy and knew or should have known about her drug use and her discontinuance of prenatal care, but he had failed to ensure that the mother did not abuse drugs during her pregnancy.

*Matter of Stevie R.*, 97 AD3d 906 (3d Dept 2012)

### **Father's Status as Level II Sex Offender Does Not Establish Per Se Neglect**

Upon direction by Family Court, the attorney for the children filed an article 10 petition against the father of two children alleging that he had neglected his children because he was a sex offender who had refused treatment and had violated terms of his probation. The father and DSS moved to dismiss the petition and after a fact-finding hearing, the court found the children to be neglected. The father appealed and the Appellate Division reversed. The Court held that the father's status as a registered risk level II sex offender does not establish per se neglect or otherwise create a presumption of neglect. In this case the father had successfully completed sex offender treatment programs two years prior to the filing of the neglect petition and there was no evidence that he had committed any sex offenses since 2004. Although Family Court felt that the father had not meaningfully benefitted from the sex offender programs, this was belied by the testimony of one of the father's counselors. Although the terms of the father's probation prohibited him from consuming alcohol, his DWI and DUI convictions occurred two years prior to the neglect proceeding, and although the father presented his probation officer with falsified slips of having attended some Alcoholics Anonymous meetings, there was no evidence as to how this conduct rose to the level of creating any actual or imminent danger of impairment to the children to support a neglect finding. Additionally, as early as 2009, DSS had approved unsupervised visits between the father and the children and in 2010, DSS had approved the father taking custody of his children and step-children and had actively opposed the neglect petition filed by the children's lawyer.

*Matter of Hannah U.*, 97 AD3d 908 (3d Dept 2012)

### **Respondent's Guilty Plea to Sexual Misconduct of Biological Daughter is Sufficient Corroboration of Subject Child's Out-of-Court Allegations of Abuse Against Respondent**

Family Court held that respondent had abused the mother's child based on the child's two unsworn out-of-court statements in which she detailed her charges of rape against respondent. The court held that these statements by the child were corroborated by respondent's guilty plea of gross sexual misconduct of his biological daughter who lived in Maine. The court held that evidence of respondent's abuse of his own daughter, and the testimony of the caseworker and interviewer concerning the subject child's demeanor when making the out of court statements concerning the abuse, provided sufficient corroboration. Family Court also determined that the mother had neglected the subject child as well as her other three children as she had allowed contact between respondent and her children even though she was aware of the Maine criminal charges against him. The Appellate Division affirmed, finding any evidence tending to support the reliability of the child's statements, including proof of the abuse of another child is sufficient corroboration. Additionally, the Appellate Division held that the Family Court has considerable discretion in determining credibility issues and whether the evidence meets the relatively low threshold required for corroboration.

*Matter of Olivia C.*, 97 AD3d 910 (3d Dept 2012)

### **Father is Required to Participate in Services in Connection With 18-Year-Old Son Who Elected to Remain in Foster Care**

Family Court determined that the father had abused and neglected his two children. At the time of the dispositional hearing, both children had turned 18 and the son, who had significant mental health needs, opted to remain in foster care. The court issued an order of disposition, including provisions which directed the father to participate in anger management counseling, sexual abuse evaluation and mental health assessment. The father appealed arguing, among other things, that the court did not have jurisdiction to direct that he

participate in services as his son was 18. The Appellate Division affirmed noting that under the narrow circumstances of this case the court did not act beyond its jurisdiction in directing the father to participate in services, and as long as the child remained in foster care, Family Court had the authority to require respondent's participation in services designed to help ensure that his role and access were in the child's best interest. The father had not objected to the child's continued placement in foster care, he sought to remain in his child's life, had supervised visits with his son and asked to be present at his son's service plan meetings. In a footnote, the Appellate Division stated while the father's failure to participate in services could reduce his role in his son's life while the child was in DSS's custody, it could not result in an enforcement proceeding against him under FCA §1072 (b).

*Matter of Fay GG.*, 97 AD3d 918 (3d Dept 2012)

#### **Sound and Substantial Basis in the Record to Find Mother Sexually Abused Daughter and Derivatively Abused Son**

Family Court found, by a preponderance of the evidence, that the mother had sexually abused and neglected her daughter and derivatively abused and neglected her son. Evidence at the fact-finding hearing established that there was bleeding and significant trauma to the subject child's genital area and thighs that were not consistent with accidental injury but rather, was consistent with sexual abuse, namely, multiple attempts to penetrate the child's vagina and anus. The proof also showed that the mother was aware of her child's complaints about pain and discomfort in her genital area and was advised by school personnel to take the child to the doctor immediately but she did not seek prompt medical attention. Additionally, the child had been in her mother's care during the period of time the medical experts testified the injuries had likely occurred. The mother presented the testimony of a physician who did not examine the child but who had reviewed the photographs of her injuries and opined it was possible that they were caused by either non sexual blunt force trauma or bacterial infection. Family Court held that the mother had not rebutted the presumption of parental culpability, and also determined her son was derivatively abused and neglected as abuse of her daughter demonstrated an impaired level of parental

judgment. The Appellate Division affirmed finding that the court's decision was supported by a sound and substantial basis in the record.

*Matter of Loraida R.*, 97 AD3d 925 (3d Dept 2012)

#### **Sound and Substantial Basis in the Record to Find That it was in Child's Best Interest to be Placed in the Custody of DSS**

Respondents, the father and the mother, appealed from an order of disposition placing their youngest child in the custody of DSS and continuing the placement of their two older children who, based on prior neglect findings, were already in foster care. At the time the appeal was heard, the permanency order appealed from had been superceded by another permanency order. The Appellate Division held that the appeals pertaining to the two older children were moot but the appeal concerning the youngest child was not moot since this was an initial order of placement, and it could affect the respondents' parental rights in future proceedings. As to the merits, the Appellate Division affirmed finding there was sound and substantial basis in the record to support the court's determination that it was in the youngest child's best interest to be placed in the custody of DSS. The permanency hearing report revealed that the parents had failed to use appropriate disciplinary and supervisory techniques during supervised visits, continued to live in an unsanitary home unsuitable for the children, they permitted a man whom they knew to be a sex offender stay in their home for extended periods of time and let him spend time alone with the children, there was continuing domestic violence between the parents with the mother as the aggressor; the father had limited vision, suffered from depression, migraines and had temporary black outs and the mother suffered from depression, had suicidal thoughts that led to her hospitalization and she expressed to a caseworker that "she was fearful she would black out, become aggressive and lose her children forever."

*Matter of Alexis AA.*, 97 AD3d 927 (3d Dept 2012)

#### **Changing Permanency Goal Not an Abuse of Discretion**

Family Court, with the consent of the father, issued an order of sole custody to the mother with specific and

restrictive supervised visitation provisions to the father. The court also issued an order of protection against the father set to expire in 2023. Four years after the custody order was issued, DSS became aware that the parents were living together and initiated neglect proceedings against them. The child was removed from the parents and with their consent, placed with an aunt. After a fact-finding hearing, the parents were found to have neglected the child and after a dispositional/permanency hearing, the court issued an order continuing placement with the aunt and also issued an order of protection. The parents appealed. On appeal the Appellate Division determined that the court's decision was supported by a preponderance of the evidence in the record. The father had a long history of violent behavior, including raping the mother while he left the child in the car and choking the mother in the parties' home when the child was in the home. Despite these violent acts against her, the mother violated the orders of custody and protection and continued to want the father in her life and in her child's life. Both parents involved the child in their lies and deception, and the child's behavior had begun to deteriorate around the time the parents were discovered to be living together. The Appellate Division held that the appeals from the dispositional part of the order were moot as the parents had consented to the aunt having custody of the child. With regard to the permanency hearing part, the Appellate Division held that there was no abuse of discretion by the trial court in changing the child's permanency goal from return to parent to placement with a fit and willing relative as the parents' were unwilling or unable to correct the conditions that led to the removal of the child from the home, and the goal at this point was to find a permanent, stable solution for the child as soon as possible.

*Matter of Dezerea G.*, 97 AD3d 933 (3d Dept 2012)

### **Family Court Erred in Changing Permanency Goal**

Even though all the parties, including DSS, advocated for the permanency goal to be return to parent, Family Court changed the goal to adoption, and stated that the basis for its determination was the mother's mental health issues and lack of housing, and directed DSS to file a termination petition against the mother on behalf of the children. On appeal the Appellate Division reversed, changing the goal back to return to parent.

Even though the mother had been diagnosed with depressive disorder, not otherwise specified, the caseworker and the mother's mental health counselor testified that she was making progress and had implemented newly acquired parenting and coping skills. Although the mother needed financial assistance to help with the rent payment, she now lived in a stable home and was looking for a larger home so all three children could live with her. The mother had completed parenting classes, attended group and individual therapy and attended family therapy with the children. She was able to recognize her past poor parenting and was able to identify the steps she needed to take to monitor the children and communicate with them more effectively. Although the older children were concerned about returning to her care, they were comfortable during their visitation with her. The Court held that the children's concerns could only be allayed by reassurance by the mother, and the mother needed to be given the opportunity to rebuild her relationship with them. The Appellate Division further held that the trial court had erred in refusing to grant unsupervised visitation to the mother as she remained actively involved in her children's lives and was working on rebuilding her relationship with them. Additionally, there was no evidence of inappropriate behavior on the mother's part.

*Matter of Kobe D.*, 97 AD3d 947 (3d Dept 2012)

### **Indicated Report of Child Maltreatment Supported by Substantial Evidence**

Maternal uncle sexually abused his niece, who was autistic. He was arrested and ultimately plead guilty to sexual abuse in the first degree and was sentenced to two-and-a-half years in jail followed by ten years of post-release supervision. A no contact order of protection was issued against the uncle on behalf of the niece and her two siblings. DSS also informed the parents of the three subject children, that the children were not to have any contact, verbal or otherwise, with their uncle. Thereafter, DSS "indicated" a report of child maltreatment against the parents for allowing contact between the children and their uncle. The report was based on the caseworker's interview with the children. The children reported that they had said "hi" to their uncle when they saw him at the duplex where they resided and at church, that the middle child was

allowed to answer the telephone when the caller identification revealed it was the uncle calling, and the mother had allowed the youngest child to go to the uncle's apartment to get a tool from him because she was physically unable to do so herself. The parents appealed the "indicated" report, requesting that it be amended to "unfounded" and expunged but were unsuccessful. The parents challenged the determination in an Article 78 proceeding. The Appellate Division affirmed the order finding that the report of maltreatment was supported by substantial evidence or rather, reasonable minds could accept that the administrative decision was based on relevant proof.

*Matter of John R. v State of N.Y. Off. of Children & Family Servs.*, 97 AD3d 958 (3d 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.*, 96 AD3d 1406 (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.*, 96 AD3d 1499 (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 to prevent or eliminate the need for removal.

*Matter of Austin M.*, 97 AD3d 1168 (4th Dept 2012)

## **CHILD SUPPORT**

### **Petitioner Was Entitled to be Reimbursed for Respondent's Frivolous Conduct**

Supreme Court confirmed the Referee's Report regarding defendant's retroactive child supports arrears and modified the Report for a miscalculation in attorney's fees. The Appellate Division affirmed. The record amply supported a finding of civil contempt against defendant and the order that he pay \$10,000 to petitioner. Respondent's frivolous conduct in failing to pay child support was based upon his intent to harass petitioner and DRL § 237(b) authorized the court to award petitioner counsel fees in enforcement actions. The parties also entered into an earlier stipulation that provided that petitioner would be entitled to an award of counsel fees for expenses incurred in connection with pursuing payment of add-on expenses. Respondent's argument that no order was issued by the court entitling petitioner to counsel fees was without merit.

*Kosovsky v Zahl*, 96 AD3d 420 (1st Dept 2012)

### **Modification of Interim Child Support Not Warranted**

Pending a trial for divorce, Supreme Court granted plaintiff's motion for pendente lite relief and directed defendant, who was an attorney, to provide plaintiff with monthly child support, 35% of their child's unreimbursed medical and dental expenses, and other relief, and denied defendant's request that plaintiff pay half his 2010 tax liability or give him 50% of her bonus. The court found that defendant failed to substantiate his claim of exigent circumstances warranting a modification of the temporary support order. Instead of providing the court with his 2010 tax return, he submitted documentation he had created for purposes of the instant litigation. The court based its decision on the parties' 2009 joint tax return, plaintiff's recent W-2, plaintiff's reasonable needs and defendant's financial ability, taking into consideration the parties' pre-separation standard of living. While the court agreed that defendant's tax liability constituted marital debt, it stated that the issue of apportionment of this debt was properly reserved for trial. The court awarded plaintiff counsel fees because defendant, who

represented himself, had engaged in extensive motion practice, including motions that had little merit. Plaintiff incurred extensive attorneys fees in responding to defendant's motions as well as bringing her own. Defendant also raised issues of parenting time with the child. While the court declined to order plaintiff to provide make up weekends for defendant and the child because defendant had been the one to cancel those visits, the court encouraged the parties to find additional parenting time for defendant. The court also declined to issue an order that defendant had the right to attend the child's school and extracurricular activities because defendant never alleged that plaintiff prevented him from doing so. The Appellate Division affirmed but noted that the court erred in omitting the word "reasonable" from the description of the unreimbursed medical and dental expenses that were to be paid by respondent.

*Schorr v Schorr*, 96 AD3d 583 (1st Dept 2012)

### **Downward Modification Not Warranted; Father Caused His Own Loss of Employment**

Here, the Family Court properly determined that the father failed to meet his burden of demonstrating a substantial and unanticipated change in circumstances warranting a downward modification of his child support obligation. The father caused his own loss of employment by failing to meet his child support obligation, which resulted in his incarceration for a period of six months. In addition, the father's unsubstantiated, conclusory allegations that he diligently sought employment commensurate with his qualifications and experience were insufficient to meet his burden. Order affirmed.

*Matter of Riendeau v Riendeau*, 95 AD3d 891 (2d Dept 2012)

### **Father Not Relieved of His Obligation to Pay Child Support for Oldest Child**

The Support Magistrate's finding that the father was not obligated to pay child support for the parties' youngest child because that child resided with the father was amply supported by the evidence adduced at the hearing. However, the Support Magistrate's finding that the father was not obligated to pay child support

for the oldest child was in error. Pursuant to the parties' agreement, a child's residence at college did not constitute emancipation, so as to relieve the father of his obligation to pay child support. Thus, the Support Magistrate erred in granting those branches of the father's petition which were to suspend his child support obligation and to adjust his child support arrears with respect to the oldest child. Moreover, the Support Magistrate erred in denying, as academic, those branches of the mother's petition which were to find the father in violation of his child support obligation and for an award of child support arrears with respect to the oldest child. The matter was remitted to the Family Court for a hearing on those branches of the mother's petition and a new determination thereafter of those branches of the petition.

*Matter of Williams v Randall-Williams*, 95 AD3d 1135 (2d Dept 2012)

#### **Support Magistrate Failed to Impute Father's Additional Income**

Under the circumstances of this case, where the father admitted that his company paid for him to lease a late model BMW, where BMW Financial Services documents revealed that he was a general manager with a gross annual salary of \$95,000, and where he failed to submit compulsory financial disclosure, it was an improvident exercise of discretion for the Support Magistrate to fail to impute additional income to the father, and instead accept his trial testimony that his income was between \$500 and \$600 a week, as such a determination was not supported by the record. Accordingly, upon renewal, the Family Court should have sustained the mother's objections to the Support Magistrate's determinations that additional income should not be imputed to the father and directing the father to pay child support in the sum of only \$404 per month. The order was reversed and the matter was remitted to the Family Court for a de novo determination of the appropriate amount of the father's child support obligation.

*Matter of Bershanskaya v Nemirovsky*, 95 AD3d 1209 (2d Dept 2012)

#### **Father Failed to Rebut the Prima Facie Evidence of Willfulness**

Contrary to the father's contention, the Family Court properly determined that he willfully violated the order of support. The mother, through the testimony of an investigator from the Department of Social Services Support Collection Unit, demonstrated that the father had failed to pay child support as ordered. This constituted prima facie evidence of the father's willful violation of the order of support (*see* FCA § 454 [3] [a]). The father, although testifying that he was unable to work because he suffered from post-traumatic stress disorder, failed to offer competent, credible evidence of his inability to pay and, thus, failed to rebut the prima facie evidence of willfulness. Order affirmed.

*Matter of Gumbs v Gumbs*, 95 AD3d 1323 (2d Dept 2012)

#### **Father Failed to Present Credible Evidence That He Was Disabled as a Result of a Car Accident**

The father failed to establish a substantial change in circumstances warranting a downward modification of his support obligation. He testified that he was disabled as a result of a car accident and that he was unable to work due to his disability. However, the father failed to present credible evidence that his symptoms or condition at the time of the petition and hearing prevented him from working. Contrary to the father's contention, and under the circumstances of this case, the evidence that he was receiving Social Security disability benefits did not, by itself, preclude the Family Court from finding that the father failed to establish that he was incapable of working. Order affirmed.

*Rodriguez v. Mendoza-Gonzalez*, 96 AD3d 766 (2d Dept 2012)

#### **Father Failed to Provide Any Medical Documentation to Support Claim That He Was Prevented from Seeking Re-employment Driving a Truck Because He Suffered from Sleep Apnea**

The father failed to establish that his loss of employment driving a hazardous materials truck was through no fault of his own or that he diligently sought re-employment. In addition, the father testified that he

was prevented from seeking re-employment driving a truck because he suffered from sleep apnea, but he failed to provide any medical documentation to support his claim. Accordingly, the Family Court properly denied the father's objections to the Support Magistrate's finding that the father was not entitled to a downward modification of his child support obligation.

*Atabay v. Cinar*, 96 AD3d 832 (2d Dept 2012)

### **Parties' Stipulation Did Not Preclude Application of Guidelines**

In a stipulation of settlement incorporated but not merged into their judgment of divorce, the parties agreed, among other things, to "waive their right to fix the child support obligations under the Child Support Standards Act for the period up to July 31, 2007," during which time the father, a licensed urologist who was attending law school, would make no payments to the mother for the support of the parties' child. The stipulation further provided: "Beginning August 1, 2007, the Husband agrees to pay the Wife child support pursuant to the Child Support Standards Act based upon his earnings at the time." In an April 2008, order, the father was directed to pay child support to the mother in the amount of \$818, twice per month, which was based upon the father's salary at the time of \$125,000 per year as a first year associate in a law firm. The mother commenced this proceeding in March 2010 for an upward modification, alleging that the father was now employed as a urologist earning approximately \$350,000 per year. Upon dismissal of the proceeding by the Support Magistrate on the ground that the mother failed to state a cause of action for modification, the mother filed objections with the Family Court, some of which were denied. Thereafter, the mother appealed. Upon reviewing the record, the Appellate Division found that with the exception of the period during which the father was finishing law school, "the parties clearly did not intend to 'opt-out' of the [Child Support Standards Act] guidelines, but intended to follow them", and held that the Family Court should have applied the standard for modification applicable to child support obligations set by the court and not by stipulation. The father's nearly three-fold increase in earnings was sufficient to state a cause of action for modification and, therefore, the proceeding should not have been dismissed. The matter was remitted to the

Family Court for further proceedings on the mother's modification petition.

*Green v Silver*, 96 AD3d 843 (2d Dept 2012)

### **Petition for Downward Modification Properly Denied**

The Family Court providently exercised its discretion in denying the father's objections to the Support Magistrate's order denying his motion to vacate an order of child support entered upon his default, since the father failed to establish a reasonable excuse for his default. To the extent that the father challenged the denial of his petition for downward modification, the Support Magistrate properly denied his petition. The father failed to establish that his child support obligation should have been reduced pursuant to FCA § 413(1)(d) or that he was entitled to a downward modification of his support obligation in any respect because, although he asserted that he had lost his job and was receiving public assistance, he did not sufficiently demonstrate that he diligently sought re-employment commensurate with his earning capacity.

*Martin v Cooper*, 96 AD3d 849 (2d Dept 2012)

### **Supreme Court Lacked Authority to Grant Father's Motion to Vacate Family Court Orders Awarding Mother Retroactive Increase in Child Support**

The Supreme Court properly exercised its concurrent jurisdiction with the Family Court (*see* N.Y. Const., art. VI, § 7 [a]) in entertaining the plaintiff's motion for a downward modification of his child support obligation. Moreover, on the merits, the plaintiff demonstrated his entitlement to a downward modification of his child support obligation. Here, the plaintiff showed that his prior employment was terminated through no fault of his own and that, despite his efforts to secure employment commensurate with his qualifications and experience, he was only able to obtain a position at a much lower salary. However, the Supreme Court should not have granted that branch of the plaintiff's motion which was to vacate orders of the Family Court granting the defendant a retroactive increase in child support. "A court of coordinate jurisdiction has no authority to rule on a matter already reviewed by another Judge of equal authority." Additionally, the

Supreme Court had “no discretion to reduce or cancel arrears of child support which accrue before an application for downward modification of the child support obligation.”

Order affirmed as modified.

*Grossman v. Composto-Longhi*, 96 AD3d 1000 (2d Dept 2012)

### **Defendant’s Cross Motion for Change of Venue Granted**

Under the circumstances of this case, the Supreme Court providently exercised its discretion in granting the plaintiff's cross motion for a change in venue, and in denying the defendant's motion without prejudice to renewal in the Family Court (see CPLR 510 [3]). The parties had litigated issues relating to child support in the Family Court since 2006. The so-ordered stipulation, which the defendant sought to modify, was entered in the Family Court. Further, the petitions filed by the defendant in the Family Court were apparently still pending, as the defendant filed objections to the Support Magistrate's order denying the petitions. The Family Court was familiar with the issues in the matter, while the Supreme Court had not been involved with the parties since the judgment of divorce was entered in February 1999.

*Kassotis v Kassotis*, 96 AD3d 1021 (2d Dept 2012)

### **Children Erroneously Granted Double Shelter Allowance**

The Supreme Court's directive that the plaintiff pay child support pursuant to the CSSA and the mortgage on the marital residence for the same period of time erroneously granted the children a double shelter allowance. Further, in calculating the plaintiff's child support obligation, which commenced on January 1, 2010, the Supreme Court deducted maintenance from the plaintiff's income notwithstanding that the plaintiff's obligation to pay maintenance only commenced on January 11, 2011, when the judgment of divorce was entered. Since the court erroneously deducted maintenance from the plaintiff's income in determining child support commencing January 1, 2010, it appears that the court contemplated that the judgment would be entered, and the maintenance obligation would

commence, shortly after January 1, 2010. Thus, the one-year delay in entering the judgment, until January 11, 2011, extended the plaintiff's support obligations for an additional year.

*Harris v Harris*, 97 AD3d 534 (2d Dept 2012)

### **Post-Judgment Motion Was a Proper Vehicle to Ascertain Defendant’s Child Support Arrears**

Contrary to the Supreme Court's determination that a plenary action was necessary to enforce the parties' stipulation of settlement incorporated but not merged into the judgment of divorce, the plaintiff's post-judgment motion was a proper vehicle to ascertain the defendant's child support arrears, if any, that had accrued under that judgment of divorce (see DRL § 244). Further, an order which determined the father's child support arrears did not modify the child support provisions of the parties' stipulation of settlement incorporated into the judgment of divorce, or set a new recurring amount of child support that the father was required to pay going forward.

*Marano v Marano*, 97 AD3d 548 (2d Dept 2012)

### **Increase in Father’s Child Support Obligation Warranted**

Contrary to the Family Court's determination, here, the mother established that an increase in the father's child support obligation was warranted by a change in circumstances. Specifically, the substantial reduction in the father's visitation with the child, which significantly reduced the amount of money the father was required to spend on the child, constituted an unanticipated change in circumstances that created the need for modification of the child support obligations. Furthermore, contrary to the Family Court's conclusion, the child's derivative Social Security benefits could not serve as a credit against the father's child support obligation. Accordingly, the order was reversed and the matter was remitted to the Family Court for a new determination of appropriate child support.

*Matter of McCormick v McCormick*, 97 AD3d 682 (2d Dept 2012)

### **In Calculating Child Support Court May Consider Income Tax Year Not Yet Completed**

Pursuant to FCA § 413 (1) (b) (5) (i), a court must begin its child support calculation with the parent's gross income "as should have been or should be reported in the most recent federal income tax return" (see DRL § 240 [1-b] [b] [5] [i]). However, the court may also consider income for the tax year not yet completed. Since the hearing in this case took place after the end of the 2010 tax year, but before either party had completed a 2010 tax return, it was appropriate for the Support Magistrate to base her calculation of the parties' incomes on their final 2010 pay stubs rather than their 2009 tax returns.

*Matter of Lynn v Kroenung*, 97 AD3d 822 (2d Dept 2012)

### **Father's Acknowledgment of Arrears Constituted Prima Facie Evidence of Wilful Violation**

The Support Magistrate held respondent was in wilful violation of the child support order and Family Court confirmed that respondent had wilfully failed to pay \$7,638.61 in child support. Respondent appealed and the Appellate Division affirmed. The Court held that respondent's acknowledgment that he was in arrears along with his failure to submit any evidence of an inability to pay, constituted prima facie evidence that he wilfully violated the order.

*Matter of Thomas v Sylvester*, 95 AD3d 1488 (3d Dept 2012)

### **Appeal is Moot as Jail Sentence Already Served**

Respondent appealed from Family Court's order revoking his suspended sentence and committing him to 60 days in jail. The court order was based upon respondent's violation of a prior order of child support. The Appellate Division dismissed respondent's appeal as there was nothing in the record to show what respondent was appealing from, and as respondent had already served the 60 day jail sentence imposed upon him, his appeal was moot.

*Matter of St. Lawrence County Dept. of Social Servs. v Fountain*, 96 AD3d 1114 (3d Dept 2012)

### **Order Revoking Suspended Sentence Reversed**

Family Court revoked respondent's suspended sentence and sentenced him to 60 days in prison. The Appellate Division reversed noting that while the court's order committing respondent to the county jail carried with it the implication that it agreed with the Support Magistrate's finding that respondent had wilfully violated the order of child support, the court had failed to state that it was confirming the Support Magistrate's findings and adopting his recommendation pursuant to FCA§ 439 [a], *Matter of Clark v Clark*, 85 AD3d 1161.

*Matter of Commissioner of Social Servs. v Dockery*, 96 AD3d 1119 (3d Dept 2012)

### **Family Court Judge Was Not Required to Recuse Himself**

Daughter left her father's home when she turned 18 and went to live with her mother and the mother filed for child support. The father responded with the affirmative defense of abandonment. Instead of referring this matter to the Family Court Judge, the Support Magistrate improperly ruled on the issue. The decision was appealed and the Appellate Division remitted the matter to Family Court for a new hearing. This case was heard again, this time by the Family Court Judge and after the hearing, the court determined that the father had failed to sustain his affirmative defense and ordered that he pay a certain sum of child support to cover the period of time when the child, who was by now emancipated, had resided with the mother. The father appealed arguing, among other things, that the Family Court Judge should have recused himself as he had been the Judge in the earlier proceeding to review the transcript from the prior hearing and affirm the Support Magistrate's decision. The Appellate Division dismissed the father's argument and held that the Family Court Judge had properly considered recusal but had determined, based on the evidence presented, he could consider the case fairly. The Appellate Division gave due deference to Family Court's credibility determinations and affirmed its decision.

*Matter of Barney v VanAuken*, 97 AD3d 959 (3d Dept 2012)

### **Record Supports Revocation of Suspended Jail Sentence**

Respondent consented to an order in 2009, which issued a suspended sentence of 180 days in jail for his willful violation of an earlier support order. Thereafter, respondent failed to make payments and following a hearing in 2011, Family Court revoked the suspension, committed respondent to jail for no more than six months, and imposed a purge amount of \$5,000. Respondent appealed and the Appellate Division affirmed. Respondent argued that the loss of his driver's license contributed to his failure to pay child support. However, he acknowledged that his job loss and loss of unemployment benefits were due to his misconduct at work, and the suspension of his driver's license was due to his failure to pay various fines. Evidence also showed that respondent could have obtained a conditional license if he had signed a confession of judgment as to his child support arrears but he had refused to do so. The Court found unpersuasive respondent's argument that he did not receive effective assistance of counsel and denied ruling on the propriety of the sentence imposed upon respondent as he had consented to the 2009 order and only appealed from the revocation of the suspended sentence.

*Matter of Bonneau v Bonneau*, 97 AD3d 917 (3d Dept 2012)

### **Court Erred in Determining Father was the Non-Custodial Parent for Child Support Purposes**

After trial, Supreme Court issued an order of joint legal custody of the child, with shared parenting time as set forth in the earlier temporary custody order. The court also deemed that for child support purposes, the father was the non-custodial parent as his income was greater than that of the mother. The father appealed and the Appellate Division reversed, finding that the trial court had erroneously designated the father as the non-custodial parent. The Appellate Division held that only when the parents' custodial arrangement splits the children's physical custody so that neither can be said to have physical custody of the children for a majority of the time, that the parent with the greater pro rata share of the child support obligation as determined by the CSSA, can be identified as the non-custodial parent. In

this case, the child spent 18 out of 28 nights during the school year with the father and only 10 nights with the mother. The parents shared equal time during the school recess and holidays. As "shared" custody is not the same as "equal" custody and as the father had the child for a majority of the time during the greater part of the year, the Appellate Division determined that the trial court had incorrectly determined he was the non-custodial parent for child support purposes.

*Matter of Smith v Smith*, 97 AD3d 923 (3d 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*, 96 AD3d 1554 (4th Dept 2012)

## **CRIMES**

### **Police Had Probable Cause to Stop Vehicle**

Appeal by the defendant from a judgment of the County Court, convicting him of criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence. The appeal from the judgment brought up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to

suppress physical evidence. Upon reviewing the record, the Appellate Division found that the police had probable cause to stop the vehicle in which the defendant was a passenger upon observing that it failed to signal when leaving the curb and entering a public highway (see VTL § 1163 [d]). Further, contrary to the defendant's contentions, the testimony of the officers at the hearing was not unbelievable. Based on the officers' testimony, the hearing court properly concluded that the frisking of the defendant which resulted in the seizure of a gun was supported by the requisite predicate of reasonable suspicion by the police that the defendant might be armed. Judgment affirmed.

*People v Wilson*, 96 AD3d 980 (2d Dept 2012)

### **Evidence Supported Finding That Defendant Recklessly Caused Infant Victim's Death**

Upon an independent review of the evidence pursuant to CPL 470.15(5), the Appellate Division found that the jury verdict convicting the defendant of murder in the second degree was against the weight of the evidence. The evidence supported a finding that the defendant acted recklessly in covering the infant victim's nose and mouth in a misguided effort to quiet the victim in order for her to sleep, but not as a part of a calculated effort to kill the victim, and, thus, the evidence was sufficient to support a finding that the defendant recklessly caused the victim's death, warranting a modification of judgment reducing the conviction from murder in the second degree to manslaughter in the second degree (see PL § 125.15(1)).

*People v Santiago*, 97 AD3d 704 (2d Dept 2012)

### **Motion to Suppress Statements Made at Crime Scene Properly Denied**

The County Court properly denied that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials. The evidence presented at the suppression hearing established that the defendant's initial statement at the crime scene was made in response to a police officer's simple question, "what happened?", which was justified to clarify the nature of the situation confronting the officer. Further, the statements made by the defendant in the booking room at police headquarters were spontaneous and not

triggered by police questioning or other conduct which reasonably could have been expected to elicit a declaration from him. Accordingly, neither the defendant's statements at the crime scene nor his statements in the booking room were the product of custodial interrogation improperly conducted without the administration of *Miranda* warnings. The hearing evidence also supported the County Court's determination that despite the fact that the defendant was suffering from a stab wound, his subsequent statements were voluntary because he was capable of, and did in fact, intelligently, knowingly, and voluntarily waive his *Miranda* rights.

*People v Williams*, 97 AD3d 769 (2d Dept 2012)

### **CUSTODY AND VISITATION**

#### **Award of Custody to Mother Had Sound and Substantial Basis in Record**

Family Court dismissed respondent father's petition alleging that petitioner mother violated a prior custody and visitation order, granted petitioner's cross petition to modify the order of custody, and awarded petitioner sole legal and physical custody of the child with liberal visitation to respondent. The Appellate Division affirmed. The award of custody to petitioner had a sound and substantial basis in the record. Respondent acknowledged that the child, who would soon turn 18, did not wish to live with him and there was testimony that on at least one occasion the police were called and the child was arrested after an altercation with respondent. Thus, petitioner established changed circumstances since a 2009 stipulation was entered and the change in custody was in the child's best interests. Because respondent's counsel called petitioner as a witness, but did not request that she be declared a hostile witness, the court properly sustained the objection to the leading questions counsel asked petitioner.

*Matter of Maria A.M. v Dexter N.*, 95 AD3d 578 (1st Dept 2012)

#### **Ample Basis For Court's Determination of Changed Circumstances**

Family Court granted respondent mother a two-year

order of protection against petitioner father; ordered that the father pay a fine for causing the mother to miss two visits with the parties' child; ordered that the father attend anger management and domestic violence classes; and granted the father's petition for a modification of custody and visitation with custody with the father and the mother to have supervised visitation. The Appellate Division modified by striking the portion of the order imposing a fine upon the father. The father's contentions about the family offense regarding incidents that occurred post-petition were unpreserved. Were the Appellate Division to reach the issue, vacatur of the protective order would not be required because the incidents alleged in the petition formed a sufficient basis for entry of the order. The evidence was sufficient to support a finding of aggravated harassment and to support the direction that the father undertake anger management and domestic violence counseling. The court erred in imposing a fine upon the father, however, because there was no contempt adjudication. The court properly determined that circumstances had changed sufficiently to modify the prior order of custody. The mother made derogatory remarks to the child and failed to appreciate how the remarks affected him emotionally. The record also showed that the mother had physically harmed the child. Beginning in 2007 the mother had no steady employment and was less able than the father to provide a stable financial situation for the child. The mother no longer provided the child with an appropriate place to live, instead staying with him in a storage area that had no sink or shower. Supervised visitation was warranted given the mother's pattern of destructive behavior toward the child, which continued even during supervised visits.

*Matter of Carl T. v Yajaiara A.C.*, 95 AD3d 640 (1st Dept 2012)

### **Appellate Division Increases Mother's Visitation With Child**

Family Court modified the parties' judgment of divorce to allow petitioner mother expanded visitation with the parties' child to the extent of granting alternate weekend visits, with petitioner responsible for pick ups and drop offs at respondent father's home and one week of summer vacation. The Appellate Division modified by granting petitioner two weeks of summer vacation

with the child and directed petitioner's alternate weekend visitation to be held on weekends when respondent was not working and directed that all exchanges be made at a subway station a few miles from respondent's home. The court's imposition upon petitioner of full responsibility for transporting the child to and from exchanges at respondent's home lacked a sound and substantial basis. The mother was of limited financial means and lived in lower Manhattan without access to a car. She testified that transporting herself, her other minor child, and the subject child to and from the father's house subjected her to a significant financial expense that was several times her monthly support obligation. It was significantly less of a burden for respondent, who had access to two cars, to pick the child up at a subway station near his home. The mother should have been granted two weeks summer vacation with the child. All parties agreed that at least two weeks was appropriate and the record revealed that the mother exercised two weeks visitation the previous summer without incident. Further, the child wished to spend more time with her mother.

*Matter of Jasmine L. v Ely G.*, 95 AD3d 698 (1st Dept 2012)

### **Award of Custody to Father Reversed**

Family Court granted father's petition for temporary custody of the parties' child and granted alternate weekend visitation to respondent mother. The Appellate Division reversed, vacated the order and reinstated the original custody arrangement granting primary physical custody to the mother. Pursuant to the parties' judgment of divorce respondent was awarded primary physical custody of the parties' child and petitioner was awarded liberal visitation. Thereafter, petitioner filed a petition to enforce his visitation rights. After respondent was diagnosed with a brain tumor, petitioner filed an order to show cause seeking temporary custody of the child, which was denied. At a November 2011 court appearance on the enforcement of visitation petition, petitioner made a *sua sponte* application again seeking a temporary change of custody, which the court granted without holding an evidentiary hearing. The Appellate Division reversed. Respondent was deprived of her fundamental rights when the court *sua sponte* converted the hearing on the visitation petition into one on custody and then

transferred custody of the child without notice and without giving her a hearing with the opportunity to present evidence and call and cross-examine witnesses. Because reports issued by two professional organizations confirmed that there was no immediate safety concerns or other risks concerning respondent's care of the child, there was no emergency situation to warrant the court's decision not to hold a hearing.

*Matter of Rodger W. v Samantha S.*, 95 AD3d 743 (1st Dept 2012)

### **Child's Best Interest to Award Sole Legal and Physical Custody to Father**

Family Court held that it was in the child best interest to award sole legal and physical custody to the father with visitation to the mother. The court found that the father was providing a healthy, stable environment for the child and provided for the child's needs since the child had come to live with him ten years earlier when a finding of neglect had been made against the mother. The mother, however, continued to suffer from emotional, physical and financial issues that prevented her from putting the child's needs before her own. Additionally, in view of the parties' acrimonious relationship an award of joint custody was not possible. The Appellate Division modified. The court's decision had a sound and substantial basis in the record but modification was necessary to provide mother with specific visitation on mother's day and holidays.

*Matter of Frances M. v Jorge M.*, 96 AD3d 424 (1st Dept 2012)

### **Father's Incarceration Is a Change in Circumstances**

Family Court found that the father's incarceration and his resulting inability to care for the children was a change in circumstances sufficient to support modification of the custody order. The totality of the circumstances justified the conclusion that returning the children to the father, twenty-one months later, when they had bonded with the mother and were thriving in her care, was not in the children's best interests. The children's preference, which was to live with the father, while a factor to be considered, was neither determinative nor binding on the court. The Appellate

Division affirmed. The father's claim that the forensic evaluation should have been updated was not preserved for review and even if it were, the court's initial custody determination was rendered only one month prior to the father's arrest, and the court possessed sufficient information to make a determination based on the children's best interests.

*Matter of Susan A. v Ibrahim A.*, 96 AD3d 439 (1st Dept 2012)

### **Mother's Dishonesty Weighs Heavily in Court's Denial of Relocation Petition**

Family Court denied the mother's petition to relocate with her child to Texas. When the parents became involved, the mother was living in California and the father was from New York. After their child was born, the mother petitioned for custody and child support in California. Thereafter, the parties attempted to work on their relationship and the mother moved to be with the father in New York. The parties agreed that if the relationship did not work out the mother would be able to return to California with the child. The relationship did not work out and the mother advised the father she wished to relocate with the child to Texas. The father filed an emergency application to prevent the mother from leaving with the child and sought joint legal custody. The mother, however, took a job in Texas but did not inform the father or the court. The father eventually discovered the truth and the court ordered extensive parenting time for the father. After a hearing, the Court ordered joint custody with residential custody to the mother if she maintained adequate housing in New York, substantial parenting time to the father, and residential custody to the father when the mother was in Texas. The Appellate Division affirmed. The court's decision was based on a substantial basis in the record inasmuch as the mother's dishonesty evidenced that she would be less than forthcoming with the father regarding the child's activities and well-being if she lived in Texas and would not likely foster a relationship between the child and the father. Additionally, testimony from the vocational and employability expert showed that the mother's job search in New York could have been more thorough and, with her credentials, it was likely she would have found a job in New York in her area of expertise within six to eight months. Although the psychologist testified that relocation

would be beneficial to the child, the testimony showed that this issue was a very close call for the therapist. The earlier agreement by the parties that allowed the mother to leave with the child if the relationship did not work out was entered into when the child was an infant, and the consequences of a move when the father became such an integral part of the child's life were unforeseen.

*Matter of Koegler v Woodard*, 96 AD3d 454 (1st Dept 2012)

### **Mother Failed to Make a Prima Facie Case Warranting Custody Modification**

Family Court granted the father's motion to dismiss the mother's custody modification petition. The Appellate Division affirmed. The mother failed to make a prima facie showing of a change in circumstances warranting a modification of the custody order. The record reflected that the mother failed to prove that the child was neglected by the father or that the child suffered from depression and needed therapy, or that the child was being verbally abused. There was no evidence to support the mother's allegation that the father discouraged attempts by DSS to have the child visit the mother during the times when the mother's other children visited. Further, because there was an order forbidding the mother from telephoning the child during the relevant period, the father's refusal to allow the child to call the mother on his cell phone did not constitute a substantial change in circumstances.

*Matter of Juelle G. v William C.*, 96 AD3d 538 (1st Dept 2012)

### **After Ten Years With Grandmother it Was in Children's Best Interest to Live With Mother**

When the mother was 16 years old, her children were removed from her care and placed with their maternal grandmother due to the domestic violence committed by the children's father in the parties' home. A decade later the grandmother filed for custody of the children, but Family Court returned custody of the children to their mother. The court found that the mother was living in a stable and loving home with a different partner and was able to provide the children with the discipline and structure they required. The mother had

consistently sought the return of her children during the relevant ten year period, she had complied with all the conditions imposed upon her and was involved with the children's day-to-day lives. Although the grandmother provided the children with a loving home and had met their needs, she was unable to control at least one of the children, had difficulty maintaining order in her home, and relied on the mother to keep the children from hurting each other. The Appellate Division affirmed. Upon consideration of the totality of the circumstances, the decision was in the children's best interests.

*Matter of Grace L. v James C.*, 96 AD3d 566 (1st Dept 2012)

### **Family Court Erroneously Dismissed Visitation Petition With Prejudice**

Family Court awarded full custody to respondent mother together with a one-year order of protection against petitioner father, which directed petitioner to stay away from the child except for court-ordered supervised visits after compliance with mental health treatment. Over a year later, father petitioned the court for visitation with the child. Family Court dismissed the petition with prejudice and enjoined petitioner from filing any more custody/visitation petitions regarding the child without prior court approval. The Appellate Division reversed and reinstated the petition. Petitioner alleged a change in circumstances inasmuch as the one-year order of protection had expired and there was no indication in the record that the order of protection was extended or that any other order concerning visitation was issued thereafter.

*Matter of Wilda C. v Miguel R.*, 96 AD3d 631 (1st Dept 2012)

### **Parents Acrimonious Relationship Insufficient Basis to Determine Grandparent Visitation Not in Child's Best Interest**

Family Court found that a grandparent, who lived in Georgia, did not have standing based on equitable circumstances, to seek visitation with her grandchild. The Appellate Division reversed. The record showed that the grandmother's relationship with the child became sporadic after the child turned two and the parents' relationship deteriorated. However, over the

course of the next seven years, although the grandmother attempted to see the child, she was prevented from doing so by the child's mother. The mother agreed in court that the grandmother could make telephone calls and visit the child when she came to New York, but when the grandmother attempted to do so, the mother refused to let her have access to the child and cut off communication because she said the grandmother was consorting with the child's father, who did not oppose the grandmother's petition. The acrimonious nature of the parents' relationship was an insufficient basis upon which to determine that visitation was not in the child's best interest. The matter was remanded to Family Court for a new hearing to determine whether it was in the child's best interest to recommence contact with the grandparent.

*Matter of Helen G.*, 96 AD3d 666 (1st Dept 2012)

### **Custody of Children Awarded to Aunt After Neglect Finding Against Mother**

Family Court found that the mother neglected her children based upon her history of mental illness and resistance to treatment and determined that it was in the children's best interests to grant custody to the children's aunt. The Appellate Division affirmed. The mother's severe mental illness was characterized by major depression, anxiety and trichotillomania, an anxiety disorder that resulted in the mother pulling out her hair and peeling the skin off her feet. The evidence showed that the mother's lack of insight into how her mental illness affected her children, and her non-compliance with treatment actually impaired the children inasmuch as her condition prevented her from adequately supervising the children, rendered her unable to provide them with adequate food, and the children had excessive school absences while in their mother's care. The court exercised sound discretion in denying the mother contact with the children. Throughout the proceedings the children had remained consistent in their position that they wanted no contact with their mother and they were thriving in their aunt's care.

*Matter of Princess Ashley C.*, 96 AD3d 682 (1st Dept 2012)

### **Dismissal of Modification Petition Without a Hearing Within Court's Discretion Where Allegations Were Speculative and Frivolous**

Without holding a hearing, Family Court granted the mother's motion to dismiss the father's custody modification petition. The Appellate Division affirmed. The court's discretionary powers supported its decision to decline holding a hearing where, as here, the father's claim that the mother medically neglected the child was speculative and frivolous. The court's dismissal of the father's motion to re-argue was not appealable.

*Matter of Antonio Dwayne G. v Ericka Monte E.*, 96 AD3d 697 (1st Dept 2012)

### **Father Awarded Sole Custody**

Contrary to the mother's contention, the Family Court properly determined that the best interests of the 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 and her family deliberately interfered with the father's relationship with the parties' son by omitting the father's name from the child's birth certificate, not including the father in the planning of the child's christening and first birthday party, and seeking police intervention to prevent the father from gaining access to the child. Furthermore, despite the mother's contention that the father was potentially violent and an unfit parent, the hearing testimony established that, prior to the commencement of this proceeding, the father had been, without incident, regularly taking care of the parties' son during the day while the mother was at work. Accordingly, there was a sound and substantial basis in the record for the Family Court's determination. Order affirmed.

*Matter of Purse v Crocker*, 95 AD3d 1216 (2d Dept 2012)

### **Family Court Was Not Required to Order a Forensic Evaluation**

The Family Court did not err in proceeding without the testimony of the forensic evaluator, as the court was not required to order a forensic evaluation. FCA§ 251(a)

provides that the Family Court may order a parent “to be examined by a physician, psychiatrist or psychologist . . . when such an examination will serve the purposes of this act, [and] the court may remand any such person, for [a] physical or psychiatric examination . . . or direct such person to appear for such examination.” However, the statute does not require such an examination. The recommendation of a court-appointed expert is but one factor to be considered, and it is entitled to some weight. Here, the Family Court found that such an examination would help it make its determination, and repeatedly asked the mother if she would cooperate. The mother repeatedly declined to cooperate with a forensic evaluation, stating that it would be a “waste of my time.” The Family Court made every effort to obtain an expert opinion in this case. Having refused to cooperate with the forensic evaluation, to stipulate to have the evaluator's report be admitted into evidence, or to have another evaluation done by a different evaluator, the mother could not then claim that the Family Court erred in making a determination without expert testimony or evidence. The Family Court did not simply dispense with a forensic evaluation; it attempted to obtain such an evaluation, and finally proceeded in the face of the mother's refusal to cooperate. Order affirmed.

*Matter of Rowe v ACS - Queens*, 95 AD3d 1220 (2d Dept 2012)

### **Modification Not Warranted**

Here, the Family Court properly concluded that the parents' relationship was too acrimonious to allow for joint decision-making and properly determined that it was in the child's best interests to award sole legal and physical custody to the father, with the mother retaining significant visitation. Accordingly, the court properly awarded sole custody to the father and denied the mother's amended petition to modify the prior order awarding joint custody of the subject child with sole physical custody to the father, so as to award her sole custody of the child. Order affirmed.

*Matter of Schweizer v Jablesnik*, 95 AD3d 1341 (2d Dept 2012)

### **State of Washington Was the Appropriate and Convenient Forum**

The Appellate Division found that the Family Court providently exercised its discretion in concluding that the State of Washington, rather than the State of New York, was the appropriate and convenient forum for the non-custodial father's petition for visitation with the child. The child and custodial mother had little if any remaining connection with the State of New York as evidence respecting the child's life and relationships was all in the State of Washington. Further, visits between the child and father, if any, should have occurred in the first instance in the State of Washington where the child lived. Order affirmed.

*Paderno v. Shvetsova*, 96 AD3d 762 (2d Dept 2012)

### **Mother's Petition to Relocate with Child to Virginia Denied**

The record contained a sound and substantial basis for the Family Court's determination which denied the mother's petition for leave to relocate with the child to Virginia. Although the mother presented evidence showing that relocation to Virginia would have decreased her housing costs and would have served the demands of her second marriage, she failed to demonstrate that her reasons justified the uprooting of the child from the only area she had ever known, where she was thriving academically and socially, and where a relocation would have qualitatively affected her relationship with her father. Order affirmed.

*Matter of Raffa v Raffa*, 96 AD3d 855 (2d Dept 2012)

### **Evidence That Mother Interfered with Father's Visitation Did Not Justify Change of Custody**

Here, the Family Court's determination that there had not been a change of circumstances sufficient to warrant a change of custody was supported by a sound and substantial basis in the record. Although there was evidence that the mother had interfered with the father's visitation, her behavior was not sufficient to justify a change of custody. Although there was also evidence that the mother had denied the father midweek visitation on several occasions between September of 2007 and March of 2008 based on her interpretation of

the father's visitation rights under a prior order, that issue had been resolved and did not warrant a change of custody. Furthermore, contrary to the father's contention, the mother's handling of the children's health care does not warrant a change of custody. The evidence established that the children were "well cared for and thriving under [their] mother's care," and there was nothing to suggest "that the father was a more fit parent or that he would be able to provide a better home environment or better care for the child[ren]". Order affirmed.

*Ross v Ross*, 96 AD3d 856 (2d Dept 2012)

### **Maternal Grandmother Awarded Sole Physical Custody**

The Family Court properly determined that the maternal grandmother sustained her burden of establishing extraordinary circumstances in this case by showing that the mother surrendered the child to the maternal grandmother shortly after the birth of the child. In addition, the maternal grandmother demonstrated that she, along with her husband, the child's maternal grandfather, provided a home for the child that met all of his financial, educational, and emotional needs, with no contribution from the mother. Moreover, the Family Court's determination that it was not in the child's best interest to award joint legal custody to the mother and maternal grandmother, while it awarded sole physical custody to the maternal grandmother, was supported by a sound and substantial basis in the record. Order affirmed.

*Matter of Ruiz-Thomas v Ruiz*, 96 AD3d 859 (2d Dept 2012)

### **Hearing on Application to Relocate Warranted**

Here, the defendant mother established that there had been a sufficient change in circumstances to warrant a hearing on her application to relocate to Florida with the subject children. Accordingly, the matter was remitted to the Supreme Court for a hearing and, thereafter, a new determination on whether the relocation to Florida was in the best interests of the children. In the interim, the children were to remain in Florida with the defendant, on the condition that she continued to provide airline transportation for the

subject children to Syracuse, New York, at her expense, for visitation with the plaintiff pursuant to the schedule set forth in the parties' May 2011 stipulation. Order reversed.

*Abbott v Abbott*, 96 AD3d 887 (2d Dept 2012)

### **Father Awarded Sole Custody**

The Family Court's determination that joint custody of the mother and father's child was no longer a viable option had a sound and substantial basis in the record, where there was increased animosity between the mother and father. The court's determination that an award of sole custody of the child to the father was in the child's best interests had a sound and substantial basis in the record, where the evidence demonstrated that the father was more likely to put the child's best interests ahead of his own and to foster a relationship between the child and the mother. Additionally, the mother waived any objection to the father's representation in these child custody proceedings by an attorney who was counsel to the mother's live-in boyfriend in a separate proceeding to which neither the mother nor the father were parties. The mother was aware of the representation eight months prior to the custody hearing but did not raise the issue until after the hearing was underway.

*Matter of Aaron v Shannon*, 96 AD3d 960 (2d Dept 2012)

### **Parent's Criminal History Not an Absolute Bar to Custody**

The evidence established that the mother engaged in a course of conduct which intentionally interfered with the relationship between the children and the father. Although the mother attempted to excuse her behavior based upon her allegations of domestic violence by the father, the Family Court concluded that her allegations were not supported by credible evidence, and thus it properly discounted that explanation. Likewise, although the mother's contention is correct, that "[a] parent's criminal history may militate against an award of custody", a parent's criminal history is not an absolute bar to custody and must, as with any other factor, be considered in the totality of the circumstances". Here, the Family Court's

determination that the father “appear[ed] to have refocused his life without further criminal behavior” and that awarding him custody was in the children's best interest, was supported by the record.

*Matter of Jones v Pagan*, 96 AD3d 1058 (2d Dept 2012)

### **Family Court Gave Appropriate Weight to Wishes Expressed by Child During in Camera Interview**

The father appeals from an order of the Family Court, which, after a hearing, denied his petition to modify the visitation provisions set forth in a stipulation of settlement which was incorporated but not merged into the parties' judgment of divorce, and granted the mother's petition to modify the visitation provisions to the extent of limiting his visitation and directing him to participate in counseling. The Family Court's visitation determination was supported by a sound and substantial basis in the record. The father did not dispute that the breakdown in his relationship with his then 11-year-old daughter and the temporary suspension of visitation constituted a change of circumstances warranting modification of the visitation provisions set forth in the parties' stipulation of settlement. Further, the record supported the Family Court's determination that it would be in the best interests of the child for visitation to resume incrementally by permitting the father telephone contact three times per week, and weekly unsupervised visitation on Saturdays, which could expand to overnight visits without further court order upon the child's consent. The Family Court gave appropriate weight to the wishes expressed by the child during her in camera interview without improperly basing its visitation determination solely upon her wishes. Under the circumstances of this case, the Family Court also properly directed the father to participate in counseling as a component of the visitation determination.

*Matter of Boggio v Boggio*, 96 AD3d 834 (2d Dept 2012)

### **Grandmother Had Standing to Seek Visitation**

Contrary to the mother's contention, given the nature and extent of the relationship between the petitioner, who was the paternal grandmother of the subject child,

and the child, and the grandmother's efforts to maintain that relationship, the Family Court providently exercised its discretion in concluding that the grandmother had standing to seek visitation pursuant to the equitable circumstances clause of Domestic Relations Law § 72 (1). The Family Court also providently exercised its discretion in determining that it was in the best interests of the child to grant the grandmother's petition for visitation to the extent of allowing her to have any visitation that the father of the child chose not to use. The record showed that the grandmother and child had a meaningful, loving relationship, and the animosity between the grandmother and the mother was not a proper basis for denial of visitation to the grandmother.

*Matter of Gort v Kull*, 96 AD3d 842 (2d Dept 2012)

### **Record Supported Award of Sole Legal and Physical Custody to the Mother**

The mother and the father each testified at the hearing on the father's petition, and the court held separate in camera interviews with the child and his two half-brothers. The mother and the father both testified, inter alia, that they were the child's primary caregivers until they separated, and asserted that they each would respect the other parent and foster that parent's relationship with the child. However, the testimony also established that the father would only communicate with the mother by e-mail and text messages, and did not inform the mother that the child had a medical condition which required surgery until an hour before the child underwent surgery for the condition. The father also failed to inform the mother that he was taking steps to enroll the child in a private school near his home in Rhode Island, which included the child being interviewed three separate times, without the mother's knowledge. Here, the Family Court's determination denying the father's petition and awarding sole legal and physical custody to the mother as being in the best interests of the child was supported by a sound and substantial basis in the record. The evidence demonstrated that, although both the father and the mother had the ability to provide the child with more than adequate material support, the father excluded the mother from participating in significant issues relating to the child's health and welfare. In addition, the child and his half-siblings had a close and

healthy relationship.

*Matter of Brown v Brown*, 97 AD3d 568 (2d Dept 2012)

### **New York Not the Child's Home State**

Here, the Family Court properly determined that New York was not the child's home state since, as the father concedes, the child did not live in New York for at least six consecutive months immediately before the commencement of this child custody proceeding (see DRL § 75-a [7]), and New York was not the home state of the child within six months before the commencement of the proceeding (see DRL § 76 [1] [a]). Furthermore, contrary to the father's contention, the Family Court did not have continuing jurisdiction pursuant to DRL § 76-a (1), inasmuch as no prior custody determination had been made. Accordingly, the Family Court properly dismissed the petition for lack of jurisdiction.

*Matter of Malik v Fhara*, 97 AD3d 583 (2d Dept 2012)

### **Father Awarded Sole Custody; AFC Did Not Raise New Facts So as to Render the Record Insufficient**

The Family Court's determinations that there had been a change in circumstances since the issuance of the order awarding the parties joint custody of the subject children, and that an award of sole custody of the subject children to the father was in the their best interests, had a sound and substantial basis in the record. It was noted that the new facts that the attorney for the subject children set forth on appeal did not demonstrate that the record before the Appellate Division was no longer sufficient for determining the best interests of the subject children. Order affirmed.

*Matter of Cooper v Robertson*, 97 AD3d 743 (2d Dept 2012)

### **Siblings Had Standing to Commence Visitation Proceeding with Half Sibling; AFC Was a "Proper Person" to Commence Proceeding on Their Behalf**

Pursuant to DRL § 71, a sibling may commence a proceeding to seek visitation with a whole or half sibling who is under the care, custody, and control of a

parent or other person or party. Where the sibling seeking such relief is a minor, "a proper person" may seek such relief on his or her behalf (see DRL § 71). Contrary to the Family Court's determination, the petitioners who were seeking visitation with their half brother, had standing to commence this proceeding. Moreover, the petitioners' attorney was a "proper person" to commence this proceeding on their behalf (see DRL § 71; see FCA § 241; and 22 NYCRR 7.2 [d] [2]).

*Matter of Alexandra D. v Santos*, 97 AD3d 746 (2d Dept 2012)

### **Record Amply Supported Court's Determination That Modification Was Not Warranted**

Here, the Family Court properly determined that the father failed to establish that a change in circumstances warranted modification of the visitation provision of a prior order denying him visitation. The father had a history of abusive behavior, and a forensic evaluator, who had an opportunity to interview the parties, concluded, among other things, that the father had failed to take responsibility for his actions or rectify his behavior. Considering the evaluator's recommendation that no visitation be awarded, the father's offensive demeanor during the hearing, and the fact that the father was arrested for domestic violence while the proceeding was pending, the Family Court's determination that therapeutic visitation was not in the best interests of the children remained undisturbed. Further, contrary to the father's contention, the Family Court providently exercised its discretion in declining to conduct in camera interviews with the children. Order affirmed.

*Matter of Giannoulakis v Kounalis*, 97 AD3d 748 (2d Dept 2012)

### **Non-Biological Grandfather Did Not Have Standing to Seek Visitation**

The record revealed that the petitioner was not the biological grandfather of the subject child, and he was not a legal grandfather by virtue of adoption. He was, therefore, not the child's grandparent within the meaning of DRL § 72, which governs the standing of grandparents to seek visitation, and had no right

thereunder to visitation. Order affirmed.

*Matter of Chifrine v Bekker*, 97 AD3d 574 (2d Dept 2012)

### **Sufficient Change in Circumstances to Modify Custody**

The Appellate Division affirmed Family Court's determination that there had been a sufficient change in circumstances since the parties' stipulation of joint legal and physical custody had been issued and that it was in the children's best interests to award sole legal and physical custody to the father and parenting time to the mother. The evidence showed that the father had difficulty communicating with the mother as she would either disconnect her phone or fail to answer the phone when he called to ask about the children. When he did speak with her, she would not tell him who was watching the children while she was at work, and the children experienced anxiety due to the weekly change of physical custody. The father, who had married, had a stable home and stable employment. Both he and his wife were involved with the children's educational needs. The mother on the other hand, had failed to show up for the fact-finding hearing and had left her four other children, ages 2-16, unsupervised, while she went out of town for several days.

*Matter of Coley v Sylva*, 95 AD3d 1461 (3d Dept 2012)

### **Ample Support in Record to Award Custody to Non-Parent**

Neglect petitions were filed against the parents of one child. The child was removed from their care and, at the father's suggestion, the child was placed in the care of the father's cousin and his wife, who resided in another county. A neglect finding was made against the parents along with a permanency plan of placement of the child in the cousin's home with the goal of reunification with the parents. Thereafter, the case was transferred to another county as the mother lived there and the father was incarcerated there. The permanency plan was then modified from reunification with parents, to placement with a fit and willing relative. The cousin and his wife filed for custody of the child as did the father's aunt, whose petition was supported by the father, and the attorney retained by the father

represented both the father and the aunt. Thereafter, the aunt withdrew her custody petition and a friend of the father, supported by the father, filed for custody of the child, and she too was represented by the same lawyer who represented the father. At the next permanency hearing the parties agreed that the court could consider the custody petitions and after a hearing, the court awarded custody of the child to the cousin and his wife with monthly prison visits to the father. The father appealed arguing, among other issues, that he did not receive effective assistance of counsel. The Appellate Division affirmed. The Court held that the father had legal counsel at the specific proceeding he was alluding to, and although the same attorney represented the father, the aunt and the friend, this did not deprive the father of effective assistance of counsel as the father's interests were the same as that of the other two and his counsel provided meaningful representation. As to the merits, the Court held extraordinary circumstances existed in this case as the child had been living in the cousin's household for a substantial period of time, the father was sentenced to a lengthy prison term, the child was doing well and it was in his best interest to remain with the cousin and his wife.

*Matter of Holly J. v Frederick X.*, 95 AD3d 1595 (3d Dept 2012)

### **Sound and Substantial Basis in the Record to Modify Visitation**

As a result of the parents' incarceration for various periods of time, their three-month-old child was placed in the care of a third party. The child had limited contact with his father during the father's incarceration but after the father's release, the parties stipulated to extended visits to the father providing him with weekly evening visits as well as alternate weekend, overnight visits. Thereafter, the mother, who was then residing with the third party caregiver, filed to modify visitation to the father, seeking to restrict the father's parenting time and the father filed a violation petition alleging his parenting time with the child was being interfered with by the mother and the third party. After an in-camera interview with the child and a fact-finding hearing, Family Court limited the father's visitation to therapeutically supervised visitation. On appeal, the Appellate Division held that there was sound and substantial evidence in the record to show that there

was a sufficient change of circumstances to modify the prior visitation order. Among other factors, the child's behavior became progressively worse when he had to see his father to the point where he was "kicking and screaming" at the thought of the pending visit, the child had been injured by his half-sibling at the father's home, the father was upset the child wasn't using his surname, the child became anxious and had a difficult time adjusting to changes in his routine and the father denied the fact that the child was in distress. During the pendency of the court proceeding, the father failed to participate in the child's counseling because he felt he had not done anything wrong, he failed to exercise visitation with the child, had minimal communication with the child, failed to attend the child's sports activities or remain informed about the child's educational and health matters. In a footnote the Appellate Division noted that while generally post-petition conduct may not be considered in determining whether there is a change in circumstances, in this case, such evidence was admissible as it was relevant to "a determination of the child's best interest in fashioning a new visitation order".

*Matter of Klee v Schill*, 95 AD3d 1599 (3d Dept 2012)

### **Sound and Substantial Basis in the Record to Modify Custody**

Parties had joint legal custody of their two children with primary, physical custody to the mother. Thereafter, DSS removed the children from their mother's home based on neglect allegations and placed them in care of their father. The mother ultimately consented to a finding of neglect and in time completed all the services and programs as directed by the permanency order. DSS then moved to terminate placement of the children with their father and return them to their mother. The father responded by filing a custody modification petition seeking to retain custody of the children. Family Court held that the neglect finding against the mother constituted a substantial change in circumstances to warrant a review of the prior custody order and after a hearing, determined that it was in the children's best interests to award sole custody to the father. The court based its decision on many factors including but not limited to, the older child's significant academic improvement since living

with the father, the father's stable home environment and his active involvement in meeting his children's medical, educational and emotional needs. While the mother had made some improvement in her parenting skills, her counselor testified that returning the children to her would be a "significant stressor". As the parents relationship was hostile and acrimonious, the court held that joint legal custody would be unworkable and not in the children's best interests. The Appellate Division affirmed.

*Matter of Mark RR.v Billie RR.*, 95 AD3d 1602 (3d Dept 2012)

### **Authority to Determine Visitation Cannot be Delegated To Parent**

Family Court, upon the father's default, awarded custody of three children to the mother with visitation to the father at the mother's discretion. Four years later another custody proceeding was held where the father once again failed to appear and the court continued the same order. Thereafter, the father filed a pro se petition seeking modification of the prior order of custody and visitation. The mother moved to dismiss and the father, with the assistance of counsel, amended his custody petition. Family Court granted the mother's motion to dismiss determining that the father's petition, which related to incidents and conduct by the mother which predated the prior order, was insufficient to warrant an evidentiary hearing. While the Appellate Division affirmed Family Court's determination with respect to the custody matter, it held that the court was in error in delegating its authority to determine visitation to the mother, and remitted the matter for a hearing on the issue of visitation.

*Matter of Taylor v Jackson*, 95 AD3d 1604 (3d Dept 2012)

### **Relocation Not in Children Best Interests**

Parties divorced and entered into a stipulation of joint legal custody with primary physical to the mother and specific, extensive parenting time to the father. Thereafter, the mother remarried and her new husband, who shared custody of his five children, lived over two hours away from the father. The mother petitioned to relocate with her children to be with her husband. The

father opposed the move and after a hearing, Family Court held that the mother had failed to show by a preponderance of the evidence that relocation would be in the children's best interests. The court stated that while both parents had a good relationship with the children and were actively involved in the children's lives, the move would deprive the father of his frequent dinner and other visits with the children and would make it difficult for him to attend their school and athletic activities. Even though the mother's husband was earning a comfortable salary and this would allow the mother to quit her full time job and get a part time job if she moved, her husband still had child support and college expenses on behalf of his children therefore making it unclear whether the mother's financial circumstances would be enhanced by the move. Finally, the move would result in the children living away from the home, school and community where they had grown up and they would know no one if they moved except their step-father and step-sisters, whom they had not known very long. The mother was not able to offer any credible evidence to show that the move would enhance the children's educational situation and the children strongly desired to remain in their current school and be near their friends. The Appellate Division affirmed finding that Family Court's determination had sound and substantial basis in the record.

*Matter of Feathers v Feathers*, 95 AD3d 1622 (3d Dept 2012)

### **Child's Best Interest For Father to Have Primary Physical Custody**

Parents entered into a consent order of joint legal custody with primary, physical custody to the father and parenting time to the mother. Within days of entering into this stipulation the mother petitioned to modify custody. Family Court treated the matter as an initial determination and after a Lincoln and fact-finding hearing, deemed it would be in the child's best interest to award joint legal custody with primary, physical custody to the father and parenting time to the mother. In arriving at its determination the court considered, among other factors, the parents ability to provide a stable home environment for the child, the child's wishes, the parents' past performances, relative

fitness, ability to guide and provide for the child's overall well-being and the willingness of each parent to foster a relationship between the child and the other parent. In this case, the child had always lived in the father's home which was a small working farm and the child had a close relationship with the paternal grandmother who also resided with the father. Although the father's home was cluttered, the child's medical, emotional or social health was not affected by this and the home was in the same condition when the mother resided there. The mother lived in an urban setting and a grant of custody to her would require the child to leave her home, her school, her horse and other pets and adapt to a lifestyle different from the one to which she was accustomed. The Appellate Division affirmed.

*Matter of Barker v Dutcher*, 96 AD3d 1313 (3d Dept 2012)

### **Court Erred in Dismissing Petition Due to Pending Appeal**

The father appealed from a consent custody order entered into by the parties. While the appeal was pending, the mother filed to modify the order and the father filed three enforcement petitions. Family Court dismissed all the petitions, sua sponte, on the sole basis of the father's pending appeal, stating it was the court's position "not to entertain any new petitions until an appeal has been determined...as to do so would usurp the authority of the Appellate Division." The father withdrew his appeal of the custody order, but then appealed from Family Court's order of dismissal. The Appellate Division held that the court's dismissal of the father's enforcement petitions was error and lacked legal basis as FCA § 1114 (a) specifically provides that filing of a notice of appeal from a Family Court order does not give rise to an automatic stay, and the fact that the outcome of the appeal may nullify or alter the order sought to be modified or enforced is irrelevant. If subsequent proceedings in Family Court superceded or replaced provisions of the order that is sought to be modified or enforced, the Appellate Division could always dismiss the appeal as moot.

*Matter of Whiting v Ward*, 97 AD3d 861 (3d Dept 2012)

### **Non-biological, Non-adoptive Parent Has No Standing to Seek Visitation**

Family Court dismissed petitioner's visitation petition for lack of standing. Petitioner, who had lived with the mother and the subject child, stated that although he lacked a biological relationship with the child he did have a longstanding relationship with the child and previously he had been awarded joint custody and visitation. Petitioner argued that the doctrine of equitable estoppel required Family Court to consider the child's best interest in ruling on his petition. The Appellate Division dismissed his argument and held that a "non-biological, non-adoptive parent does not have standing to seek visitation when a fit biological parent opposes it and that equitable estoppel does not apply in such situations even where the non-parent has enjoyed a close relationship with the child and has exercised some control over the child with the parent's consent" (*Debra H. v Janice R.*, 14 NY3d 576).

*Matter of Palmatier v Dane*, 97 AD3d 864 (3d Dept 2012)

### **Failure to Appoint an Attorney for the Child is Not an Error**

Married parents of one child shared custody even after their separation. Thereafter, the mother filed for custody seeking to relocate with the child and the father counter filed for joint legal custody. The court did not appoint an attorney for the child and after a hearing, Family Court awarded joint legal custody to the parents with primary, physical custody to the father, parenting time to the mother and denied the mother's petition to relocate with the child from Canton to Watertown. The mother's basis for relocation was that the lease on her apartment had expired, she had found better employment in the Watertown area and she was in a stable relationship with her boyfriend. The evidence showed that the mother did not have secure employment, her relationship with her boyfriend was not stable and she had no extended family in the Watertown area. On the other hand, the father had steady employment in Canton and planned to remain in the family home. If the child lived with him she would stay in the same school which she had been attending since she started school, she would continue to live with her two half brothers with whom she had a loving

and close relationship and she would remain near her father's large extended family, including her cousins who were similar in age to the child. Additionally, the father was willing to foster a relationship between the child and the mother. The mother appealed from both the decision and the court's failure to appoint an attorney for the child. The Appellate Division affirmed the decision finding there was ample evidence in the record to support the court's ruling. As to the issue of the failure to appoint an attorney for the child, the Appellate Division stated that while such appointment in a contested custody matter remains the strongly preferred practice, such appointment is discretionary. In this case, the parties and their witnesses were able to provide the court with neutral accounts concerning the disputed issues raised, there was no substantial question about the father's fitness or serious allegations concerning the child's emotional and physical health, and given the child's age the failure to assign an attorney for the child was not an error.

*Matter of Ames v Ames*, 97 AD3d 914 (3d Dept 2012)

### **Child's Best Interest to Live in the More Stable and Supportive Environment**

Parents met in Michigan, the mother's home state, then moved to Broome County where they had a child. Three years later, the mother moved back to Michigan with the subject child and also her second child who was fathered by another man. Four months later, the subject child came to visit the father in Broome county and the father filed for custody of the child. After a fact-finding hearing, Family Court awarded joint legal custody to the parties, with primary, physical custody to the father and parenting time to the mother. The court held while both parents were unable to care for and support the child without assistance from their families, and while they had a history of domestic violence and serious substance abuse for which neither parent completed all recommended services, the father's home was the more stable. The father had married, had a child with his wife and all three lived with the father's parents. The father was under-employed, the paternal grandfather was a retiree and the paternal grandmother was a substance abuse counselor. Both grandparents had an extraordinarily close relationship with the child who had lived near them all his life. The paternal grandparents had always helped take care of the child

when the parents lived together in Broome county, especially when the parties were abusing drugs and then while they obtained addiction treatment. On the other hand, the mother, who had left Broome county due to her tumultuous relationship with the father, was unemployed, lived with the maternal grandmother upon whom she was dependant, was receiving public assistance and had failed to continue with addiction treatment. The Appellate Division affirmed and held that the court had issued a well-reasoned decision.

*Matter of Bambrick v Hillard*, 97 AD3d 921 (3d Dept 2012)

### **Failure to Object to Lincoln Hearing at Trial Level Precludes Raising the Issue on Appeal**

Parties entered into a consent order of custody which awarded the father custody and the mother visitation one weekend per month, no overnights and other visitation as the parents could agree. Thereafter, the father filed to modify and after the fact-finding and Lincoln hearings, the court made a minor modification to the order. The mother appealed arguing, among other things, that the child should have been compelled to testify in open court. The Appellate Division affirmed and held that as the mother had failed to object to the Lincoln hearing during the court proceeding, she could not do so now. The Court found her remaining contentions to lack merit.

*Matter of Washington v Marquis*, 97 AD3d 930 (3d Dept 2012)

### **Squalid Conditions of Mother's Home and Parents' Inability to Communicate Supports An Award of Sole Custody to Father**

Parents agreed to a consent order of joint legal custody with primary physical to the mother. Thereafter the father discovered that the mother and child were living in squalid conditions and filed to modify the order. After a fact-finding hearing Family Court awarded sole legal custody to the father and specific visitation times to the mother. The evidence at the fact-finding hearing showed that the mother's home was in a deplorable condition whereas the father's home was spacious and clean. Since living with the father, the child's social and verbal skills had improved and he was healthier. Additionally, as the parents were unable to

communicate effectively or cooperate to raise the child, an award of sole custody was not appropriate in this case. The Appellate Division affirmed and held that the court's order was supported by a sound and substantial basis in the record. In a footnote, the Appellate Division commented that it was inexplicable that no action was taken by DSS, despite its awareness two years prior to the modification petition filed by the father, of the wretched condition of the mother's home.

*Matter of Michael GG. v Melissa GG.*, 97 AD3d 993 (3d 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*, 96 AD3d 1424 (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*, 96 AD3d 1580 (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*, 96 AD3d 1617 (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*, 96 AD3d 1681 (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*, 96 AD3d 1682 (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*, 96 AD3d 1694 (4th Dept 2012)

### **FAMILY OFFENSE**

#### **Court's Dismissal of Petition For Order of Protection Reversed**

After a fact-finding hearing Family Court dismissed the

mother's petition for an order of protection. The Appellate Division reversed and remanded the matter. Petitioner filed a petition against respondent in January 2009, alleging two incidents that occurred in November 2008 and March 2007. Hearing testimony established that in November 2008 respondent went to petitioner daughter's babysitter's home and attempted to initiate a physical altercation with a man who was with petitioner and he also tried to get his girlfriend to initiate a physical altercation with petitioner. Respondent admitted that he challenged petitioner's friend to a fight and that his conduct was the result of being in a "rage that day." Petitioner testified that respondent was in her face and she was frightened and scared. Petitioner gave her daughter to the babysitter and told her to go back into the apartment. Respondent fled when the babysitter called the police but he told petitioner he would get her next time. Testimony also established that in March 2007, while respondent was having visitation with the parties' son, he called petitioner to complain that child was crying and when petitioner asked him to return the child he cursed at her and said he would never return the child. Later that day when respondent's girlfriend returned the child, respondent cursed at the girlfriend and petitioner and told them that something was going to happen to them. Petitioner filed a second petition in 2009, alleging that respondent and his brother used foul and abusive behavior to threaten and harass petitioner while they were in the waiting area of the court. Although the court credited petitioner's testimony and respondent admitted to most of the conduct, it dismissed the petition. That was error. At the very least, respondent's words and acts in November 2008 placed or attempted to place petitioner in fear of death, imminent serious physical injury or physical injury and thus established the family offense of menacing in the third degree.

*Matter of Melind M. v Joseph P.*, 95 AD3d 553 (1st Dept 2012)

#### **Reasonable Excuse for Failure to Appear, However, No Potentially Meritorious Defense to Petition**

Here, the father had failed to appear for a hearing on the mother's family offense petition. In moving to vacate the resulting order of protection entered on his default, the father provided a reasonable excuse for his failure to appear, but no potentially meritorious defense

to the petition. His conclusory assertion that he had a meritorious defense was insufficient. The father's remaining contention with respect to the Family Court's denial of his motion were without merit. Consequently, the Family Court did not err in denying the father's motion.

*Matter of Mongitore v Linz*, 95 AD3d 1130 (2d Dept 2012)

### **Record Did Not Support Determination That Father Committed Family Offenses**

Upon reviewing the record, the Appellate Division found that the Family Court erred in granting the mother's family offense petition dated July 31, 2008, to the extent of finding that on August 8, 2007, and February 15, 2008, the father committed acts against the mother constituting harassment in the second degree and disorderly conduct within the meaning of FCA § 812. The record did not support a determination that the father committed family offenses on those dates (see FCA §§ 812 [1]; 832). As to the issue of custody, contrary to the father's contention, the Family Court's determination that an award of sole legal and physical custody to the mother was in the best interests of the subject children had a sound and substantial basis in the record. Joint custody was not feasible, since the parties failed to communicate and work together in parenting the children. As to visitation, the Appellate Division agreed with the father that the Family Court's elimination of his previously scheduled visitation with the children after school on Mondays was unsupported by the record. Consequently, the Court added a provision to the order dated August 9, 2010, awarding the father visitation with the children on Mondays from the conclusion of school until 8:00 p.m. Order modified.

*Matter of Brown v Brown*, 97 AD3d 673 (2d Dept 2012)

### **Evidence Supported Family Court's Determination That Husband Committed Family Offense of Harassment**

Here, a fair preponderance of the credible evidence supported the Family Court's determination that the husband committed the family offense of harassment in

the second degree when, on March 7, 2011, he made a telephone call to the wife and threatened to kill her and send her in a box or coffin to her parents (see PL § 240.26 [1]; FCA § 812). However, the Family Court improperly found that the husband committed the family offense of harassment in the second degree with respect to an incident that occurred in February 2011, since that incident was not charged in the petition. Order modified.

*Matter of Salazar v Melendez*, 97 AD3d 754 (2d Dept 2012)

### **Wife Did Not Commit Family Offense**

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*, 97 AD3d 1112 (4th Dept 2012)

### **JUVENILE DELINQUENCY**

#### **New Fact-finding Hearing Violated Respondent's Constitutional Protection From Double Jeopardy**

Family Court adjudged respondent to be a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute

possession or sale of a toy or imitation firearm and placed him with OCFS for 12 months. The Appellate Division reversed and dismissed the petition. Respondent's fact-finding hearing commenced in December 2009. At some point in early January 2010 the judge presiding over the hearing advised the parties that he would be transferred to another court. Thereafter, respondent's counsel moved to dismiss on the ground that the judge was forcing the completion of the trial at the expense of respondent's right to adequately prepare his defense. She also argued that the relocation of the judge for administrative reasons did not constitute "manifest necessity" warranting a mistrial. The motion was denied and respondent's counsel objected. Thereafter, respondent's counsel was hospitalized for a sudden illness. About two months after the trial began the Supervising Judge declared a mistrial and adjourned for a new hearing. On the day of the hearing before a different judge, respondent moved to dismiss on the ground that the new hearing placed respondent in double jeopardy. The motion was denied and respondent subsequently admitted to having an imitation gun in satisfaction of the petition. The commencement of a new fact-finding hearing violated respondent's constitutional protection from double jeopardy. The court failed to explain how the original judge's transfer was an impediment to his completing the trial, in light of the facts that the hearing was almost completed and the court to which the judge was reassigned was a few blocks away from the Family Court. Further, there was nothing in the record to suggest that it was physically impossible for the judge to finish the case because of death or illness. Because there was no evidence that the mistrial was manifestly necessary, rather than merely convenient, the declaration of a mistrial was an abuse of discretion. Respondent's admission to the petition, without expressly waiving the double jeopardy claim, did not waive respondent's challenge on appeal.

*Matter of Marcus B.*, 95 AD3d 15 (1st Dept 2012)

### **Respondent's Conduct Was Not Consistent With That of a Mere Bystander**

Family Court adjudicated respondent to be a juvenile delinquent, upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree

and grand larceny in the fourth degree and placed him on probation for a period of 12 months. The Appellate Division affirmed. The court's finding was based upon legally sufficient evidence and was not against the weight of the evidence. Respondent's conduct before, during, and after the robbery, including his demeanor and his positioning in relation to the victim and the other participants, was inconsistent with that of a mere bystander. Rather, respondent's pattern of conduct established his accessorial liability.

*Matter of Richard C.*, 95 AD3d 455 (1st Dept 2012)

### **Enhanced Supervision Probation Least Restrictive Alternative**

Family Court adjudicated respondent a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the first degree and placed him on enhanced supervision probation for 18 months. The Appellate Division affirmed. The record established that probation was the least restrictive alternative consistent with respondent's needs and the needs of the community given that the underlying offense was a violent sexual attack. Further, respondent had a poor disciplinary and attendance record at school and admitted using marijuana and alcohol.

*Matter of Wilbert L.*, 95 AD3d 568 (1st Dept 2010)

### **Showup Identification Suppressed**

This juvenile delinquency proceeding arose out of an incident in which the complaining witness allegedly was accosted by a group of four boys who attempted to rob him, and was punched by two of them. Approximately three weeks after the incident, during a showup procedure at a police station, the complaining witness identified the respondent as one of the perpetrators. The Presentment Agency conceded that the showup identification should have been suppressed at the fact-finding hearing, and the Family Court conducted a hearing on the issue of whether there was an independent source for an in-court identification of the respondent by the complaining witness. Where a showup identification is shown to be unduly suggestive, an in-court identification by the witness who made the showup identification also must be suppressed unless

the prosecution establishes by “clear and convincing evidence” that an in-court identification would be “neither the product of, nor affected by, the improper pretrial showup.” Accordingly, upon the Presentment Agency's representation that the deprivation of the witness's in-court identification of the respondent had rendered the sum of proof available to it insufficient as a matter of law, the Family Court properly dismissed the petition with prejudice. Order affirmed.

*Matter of Kamal C.* 96 AD3d 938 (2d Dept 2012)

### **Petition Was Found to Have Satisfied Facial Sufficiency Requirements of the FCA**

The respondent was charged with acts which, if committed by an adult, would have constituted the crimes of attempted gang assault in the first degree (see PL §§ 110.00, 120.07), assault in the third degree (see PL § 120.00[1]), and menacing in the third degree (see PL § 120.15). In the supporting depositions that accompanied the petition, two complainants alleged that they were attacked by a group of teenaged boys, including the respondent and two co-respondents. In an order dated June 2, 2011, the Family Court granted that branch of the respondent's motion which was to dismiss the petition and, in effect, dismissed the petition. The Family Court concluded that the petition did not “specify which complainant is the alleged victim in each count.” Further, the Family Court stated “there is no separate accusation or count to address each crime charged.” The Presentment Agency appealed, and the Appellate Division reversed. Here, contrary to the Family Court's determination, when the petition is read, as it must be, together with the supporting depositions, the petition satisfies the facial sufficiency requirements of the Family Court Act (see FCA §§ 311.1[1]; 311.2). The petition and the supporting depositions provided reasonable cause to believe that the respondent committed the crimes with which he was charged and contained nonhearsay allegations that established, if true, every element of the crimes charged and his commission thereof. Specifically, the alleged victims, the alleged perpetrators, and the crimes charged were clearly identified.

*Matter of Shakeim C.*, 97 AD3d 675

### **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.*, 96 AD3d 1591 (4th Dept 2012)

### **PATERNITY**

#### **Putative Father's Equitable Estoppel Defense Lacks Merit**

Petitioner, an Alabama resident, commenced a paternity proceeding under UIFSA seeking DNA testing of the putative father of her ten-year-old child. The putative father moved to dismiss the petition on the grounds of equitable estoppel arguing that the mother's friend, Eddie, had served as the child's father since the child was three months old, that the mother had told others that he was the father of her child and the child referred to him as his father. After a hearing, the court dismissed the equitable estoppel defense finding that there was nothing in the record to show that Eddie had played a significant role in raising, nurturing or caring for the child. He had lived intermittently with the mother and child, there were three other male figures in the child's life who had served as father figures for the child and the child referred to the mother's current boyfriend as "dad". The Appellate Division affirmed.

*Matter of Starla D. v Jeremy E.*, 95 AD3d 1605 (3d Dept 2012)

## **PERSON IN NEED OF SUPERVISION**

### **Appropriateness of Placement Based on Best Interest of the Child**

After consenting to a PINS finding, respondent challenged Family Court's dispositional order placing him in the custody of DSS, arguing that the disposition was not the least restrictive alternative. The Appellate Division stated that the test to assess the appropriateness of placement is not whether it is the least restrictive alternative but whether the placement addresses the child's best interest. In this case, placement with DSS was not an abuse of discretion by the court as respondent had a significant legal history including eight separate instances where he was charged with criminal conduct, two prior PINS adjudications and a prior placement with DSS. Respondent had previously received services through the probation department and while on probation had discharged a BB gun at another child striking him in the leg. Respondent had also made poor adjustment to supervision, demonstrated a lack of respect for authority, damaged the property of others, assaulted other children and during the pendency of the instant petition, was charged with petit larceny. Based on the record the Appellate Division held that Family Court had properly determined that placement at home would not be in the child's best interest.

*Matter of Tayler BB.*, 97 AD3d 1075 (3d 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.*, 96 AD3d 1549 (4th Dept 2012)

## **TERMINATION OF PARENTAL RIGHTS**

### **TPR by Reason of Mental Illness Affirmed**

Family Court, upon a finding of mental illness, terminated respondent mother's parental rights to her child. The Appellate Division affirmed. The court's determination that respondent's untreated mental illness rendered her unable, at present and for the foreseeable future, to provide proper and adequate care for her children, was supported by clear and convincing evidence. The court properly allowed the court-appointed psychologist to testify about respondent's mental illness. Further, respondent's testimony demonstrated that she was unable to acknowledge her mental illness and that she believed that she did not need medication to manage her condition.

*Matter of Mar de Luz R.*, 95 AD3d 423 (1st Dept 2012)

### **Diligent Efforts Not Required Where Child Traumatized by Witnessing Mother's Alleged Killing of Child's Father**

Family Court, upon a fact-finding determination of permanent neglect, terminated respondent mother's parental rights to her child and transferred custody and guardianship of the child to petitioner agency for the purpose of adoption. The Appellate Division affirmed. The agency was excused from making diligent efforts because such efforts would be detrimental to the child's best interests. An expert in child psychology and early childhood trauma testified that the child had been traumatized by witnessing the mother's alleged killing of the child's father, and that after supervised visits and telephone contact, the child had intense instances of post-traumatic stress disorder to the extent that visits and calls had to be terminated. In any event, the agency did make diligent efforts by scheduling supervised visits and implementing a service plan that included therapy and classes in domestic violence, parenting skills, and anger management. Despite those efforts, the

mother failed to obtain housing, complete anger management or therapy or gain insight into the reasons for the child's placement. It was in the child's best interests to free him for adoption by his foster parents, who wished to adopt him and provided loving and appropriate care.

*Matter of Darryl Clayton T.*, 95 AD3d 562 (1st Dept 2012)

### **Father Permanently Neglected His Child**

Family Court terminated respondent father's parental rights to his child upon a fact-finding determination that he permanently neglected the child and committed her custody and guardianship to the agency and ACS for the purpose of adoption by her foster mother. The Appellate Division affirmed. Petitioner engaged in diligent efforts to strengthen the father's relationship with the child by making referrals for appropriate services, monitoring his progress with the services, scheduling visitation, and providing a visiting coach to assist the father during visits with the child. Despite these efforts, respondent failed to consistently comply with services, including mental health services, failed to benefit from services, and sporadically attended visitation. It was in the child's best interests to terminate respondent's parental rights to enable the child to be adopted by her maternal grandmother with whom she had lived nearly her entire life and who wished to adopt her. A suspended judgment was not warranted given respondent's failure to make sufficient progress in overcoming his mental health issues.

*Matter of Marah B.*, 95 AD3d 604 (1st Dept 2012)

### **Respondent Permanently Neglected Children by Failing to Complete Drug Treatment**

Family Court terminated respondent mother's parental rights to her child upon a fact-finding determination of permanent neglect and placed her in the custody of petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence established that despite petitioner's diligent efforts, respondent failed to complete her service plan by failing to complete drug treatment. Respondent continually failed to attend intake appointments set up

via the agency's numerous referrals and thus failed to plan for the child's return. It was in the child's best interests to terminate respondent's parental rights to enable the child to be adopted by her foster parents, with whom she had lived virtually her entire life with her other siblings. The foster parents wished to adopt her and had been tending to her special needs and she was thriving in their care. A suspended judgment was not warranted.

*Matter of Jada Dorithah Solay McM.*, 95 AD3d 615 (1st Dept 2012)

### **Respondent Permanently Neglected Children by Failing to Complete Drug Treatment**

Family Court terminated respondent mother's parental rights to her child upon a determination of permanent neglect and committed the child's custody and guardianship to ACS and the agency for the purpose of adoption. The Appellate Division affirmed. Petitioner established that it made diligent efforts to assist respondent in overcoming her lifelong drug abuse problems, including repeated relapses, mental health concerns, and resistance to the agency's efforts. Moreover respondent's drug addiction and antisocial personality disorder impeded her ability to care for the child, who has profound special needs. Respondent admitted that when the child was in her care, she regularly sent him to school dirty, unkempt, smelling of urine, and with a sore on his head. It was in the child's best interests to terminate respondent's parental rights given her inability to overcome her deficiencies as a parent in the approximately three years since placement.

*Matter of Brandon R.*, 95 AD3d 653 (1st Dept 2012)

### **Failure to Plan For Children's Future Supports TPR**

Family Court held that the father's consent for adoption of his son, but not his daughter, was necessary and in the alternative determined that he permanently neglected both the children, terminated his parental rights and transferred custody and guardianship of the children to petitioner agency for adoption purposes. The court reasoned that because the daughter had been born out of wedlock and the father failed to pay an

appropriate amount of child support, his consent to her adoption was not required. The court determined that the agency showed, by clear and convincing evidence, that diligent efforts had been made to encourage and strengthen the parental relationship, but the father failed to plan for the children's future by failing to remain drug free and complete his service plan. The Appellate Division affirmed and also denied the father's request for a suspended sentence because this issue was raised for the first time on appeal, the children had been in foster care for many years, the father had failed to complete any of the requirements of the service plan and was currently incarcerated.

*Matter of Jules S.*, 96 AD3d 448 (1st Dept 2012)

### **Evidence of Post-Filing Matters Relevant to Child's Best Interest in Dispositional Hearing**

Family Court terminated respondent mother's parental rights based upon a finding that she violated the terms of a suspended judgment by not obtaining suitable housing. The Appellate Division reversed and remanded for a hearing on the child's best interests. The court properly limited the evidence during the fact-finding phase of the trial to matters that occurred prior to the filing of the violation petition, but evidence of matters that occurred after the filing of the petition should have been considered during the dispositional phase because such evidence was relevant to the child's best interests, especially where, as here, the mother complied with all the other agency requirements and by the time of the dispositional hearing the mother had obtained suitable housing.

*Matter of Gianna W.*, 96 AD3d 545 (1st Dept 2012)

### **Motion to Transfer Permanency Hearing From Referee to Judge Properly Denied**

Family Court denied respondent mother's motion to transfer the permanency hearing from the Referee to the Family Court Judge or, in the alternative, to permit the Referee to hear and report rather than hear and determine the case. The Appellate Division affirmed. The denial of the motion was appealable because the prior order of reference affected the mother's substantial right to have the proceeding determined by a Judge. Further, the mother was an aggrieved party

because she had a direct interest in the neglect proceeding. On the merits, while there was no indication that the mother was provided written consent to the order of reference for the Referee to hear and determine the matter as required by CPLR § 4317(a), she implicitly consented by actively participating before the Referee and pursuing two appeals of his rulings. The child's contention that the mother's appeal was moot because the permanency hearing for the subject child as well as the child's siblings had been scheduled before a Family Court Judge was without merit. The issues giving rise to this appeal were not resolved by the scheduled permanency hearing. The case had not been consolidated and the determination that the mother was entitled to visit the child was made by a Referee, not a judge, without the mother's written consent. The interests of justice and judicial economy did not favor revocation of the reference to allow one judge to consider all issues relating to one family. The subject child's case had not been consolidated with that of her siblings, her case was more advanced, and permanency for the child should not be delayed to accommodate later filed proceedings.

*Matter of Carlos G.*, 96 AD3d 632 (1st Dept 2012)

### **Clear and Convincing Evidence that Mother Permanently Neglected the Children**

Family Court's determined that ACS showed by clear and convincing evidence that respondent mother permanently neglected her children and terminated her parental rights. The Appellate Division affirmed. The record showed that ACS made diligent efforts to encourage and strengthen the parental relationship by, among other things, assisting the mother in filling out housing applications and helping her challenge the denials of the applications, referring her to mental health and drug treatment programs, and scheduling visitation. Despite these attempts, the mother failed to maintain contact with the children on a consistent basis and refused drug treatment. A preponderance of the evidence showed that termination of the mother's rights was in the children's best interests -- they had been in foster care for more than four years and at the time of the dispositional hearing date the mother's problems were still unresolved.

*Matter of Shaqualle Khalif W.*, 96 AD3d 698 (1st Dept 2012)

**Post-termination Visitation Granted Between Mother and Child Who Was Severely Disabled**

Contrary to the mother's contention, the Family Court properly found that she permanently neglected the two subject children. The petitioner established by clear and convincing evidence that it made diligent efforts to assist the mother in maintaining contact with the children and planning for the children's future. These efforts included repeated referrals of the mother to drug treatment programs, the monitoring of her progress in these programs, repeated advice to the mother that she must attend and complete the drug treatment programs, and the scheduling of regular visits between her and the children. Furthermore, the Family Court properly determined that it was in the best interests of the children to terminate the mother's parental rights. Under the facts of this case, however, where one child was severely disabled, and required 24-hour professional care in a nursing facility, and where, as conceded by the petitioner, he remained emotionally attached to his mother, the Appellate Division modified the order of disposition with respect to him so as to provide for post-termination visitation by the mother. Accordingly, the matter was remitted to the Family Court to determine, following a hearing, if necessary, the extent and frequency of post-termination visitation between the mother and that child that would be in his best interests.

*Matter of Kyshawn F.*, 95 AD3d 883 (2d Dept 2012)

**Mother Failed to Comply with Certain Conditions of Suspended Judgment; Parental Rights Terminated**

Here, while the mother made some efforts to comply with the conditions of the suspended judgment, the Family Court correctly determined that the mother's failure to attend certain sessions at her drug and alcohol treatment program constituted a violation of the order of disposition, which required her to attend 95% of all scheduled sessions at the drug and alcohol treatment program until successfully discharged. Also, the mother's discharge from the Family Support Program for nonattendance and noncompliance constituted a violation of the order of disposition, which required the mother to participate in the Family Support Program. Accordingly, the mother failed to demonstrate that

progress had been made to overcome one of the specific problems which led to the removal of the subject children, that is, her failure to plan for the return of her children by failing to consistently attend substance abuse treatment sessions. The Family Court properly determined, by a preponderance of the evidence, that the mother failed to comply with certain conditions of the suspended judgment. Thus, the Family Court properly revoked the suspended judgment and terminated the mother's parental rights. Further, contrary to the mother's contention, under the circumstances of this case, the Family Court providently exercised its discretion in determining that a separate dispositional hearing was not required before terminating the mother's parental rights. The Appellate Division noted that the Family Court may enforce a suspended judgment without the need for a separate dispositional hearing, particularly where the court has presided over prior proceedings from which it became acquainted with the parties, and the record shows that the court was aware of and considered the children's best interests.

*Matter of Carmen C.*, 95 AD3d 1006 (2d Dept 2012)

**Mother Abandoned Child**

The evidence adduced at the fact-finding hearing established, by clear and convincing evidence, that the mother abandoned the subject child because she had no contact with him or MercyFirst, the foster care agency where the subject child had been placed, during the six-month period immediately prior to the filing of the petition (see SSL § 384-b [4] [b]). Moreover, the mother failed to satisfy her burden of proving that she suffered from a severe hardship that so permeated her life that attempts at communication were not feasible. Further, following a dispositional hearing, the court properly determined that termination of the mother's parental rights and freeing the child for adoption was in the child's best interest.

*Matter of Keymani R.J.*, 95 AD3d 1213 (2d Dept 2012)

**Father Unable to Vacate Default**

After the father defaulted at a dispositional hearing and his parental rights were terminated in 2010, the father moved to vacate the order entered upon his default.

The petitioner consented to that relief, and the father's default was vacated. When the matter subsequently appeared on the Family Court's calendar for a new dispositional hearing in January 2011, the father again defaulted, and the Family Court again terminated his parental rights after conducting a hearing. The father again moved to have his default vacated. This time, however, the Family Court denied his motion. In order to vacate his default, the father was required to establish that he had a reasonable excuse for the default and a potentially meritorious defense to the termination petition (see CPLR 5015 [a]). He established neither. Consequently, the Family Court did not improvidently exercise its discretion in denying his motion to vacate the order entered upon his default. Under the circumstances of this case, the Family Court did not improvidently exercise its discretion in denying the father's application for contact with the subject children after the termination of his parental rights.

*Matter of Andrea C.B.B.*, 95 AD3d 1308 (2d Dept 2012)

#### **Mother's Parental Rights Terminated: Suspended Judgment Not Appropriate Where Children Had Bonded with Foster Mother**

Contrary to the mother's contention, the Family Court properly determined that she had permanently neglected the subject children in that she failed for a period of more than one year following the placement and commitment of the children in the care of the petitioner, substantially, continuously, and repeatedly to plan for the future of the children although physically and financially able to do so (see SSL § 384-b [7] [a]). The petitioner established, by clear and convincing evidence, that it exercised diligent efforts to encourage and strengthen the parental relationship by, among other things, facilitating regular visitation with the children and repeatedly referring the mother to drug treatment programs, although the mother's behavior was uncooperative and her compliance inconsistent. Moreover, the Family Court properly concluded that it was in the children's best interests to terminate the mother's parental rights and free them for adoption by the foster mother (see FCA § 631). A suspended judgment was not appropriate in this instance, because, despite the mother's recent efforts to avail herself of the services offered to her, the children have bonded with

the foster mother, who had consistently provided for them, and it would not be in the children's best interests to prolong foster care.

*Matter of Ty-Wan Jayden H.*, 95 AD3d 1324 (2d Dept 2012)

#### **Mother Failed to Plan for Children's Future Despite Diligent Efforts**

The Family Court properly found that the mother permanently neglected the subject children. 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, regularly visiting and speaking with the mother by telephone, repeatedly providing the mother with referrals for drug treatment programs 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 attend visitation sessions regularly, failing to participate in a substance abuse treatment program, continuing the use of illegal drugs, and failing to attend therapy and take her medication consistently. Moreover, based on the evidence adduced at the dispositional hearing, the Family Court properly determined that it was in the best interests of the children to terminate the mother's parental rights.

*Matter of Joseph W.*, 95 AD3d 1347 (2d Dept 2012)

#### **Petitioner Established That Mother Abandoned Subject Children**

The petitioner established by clear and convincing evidence that the mother abandoned the subject children by failing to visit or communicate with the children or the petitioning agency during the six-month period immediately prior to the date on which the petition was filed. Moreover, the mother failed to show good reason for not contacting the children or the custodial agency during the subject period as she did not demonstrate that the lack of contact "was a result agency" or that she was discouraged from making such contact by the agency. Contrary to the mother's contention, under the circumstances, the Family Court providently exercised its discretion in terminating her

parental rights without first conducting a dispositional hearing. Order affirmed.

*In re Donna E.J.*, 96 AD3d 746 (2d Dept 2012)

### **Mother Unable to Provide for Child Due to Mental Illness**

There was clear and convincing evidence to support the Family Court's determination that the mother was then, and for the foreseeable future, unable, by reason of mental illness, to provide proper and adequate care to the subject child (see SSL § 384–b[4][c]). The court-appointed psychologist, after interviewing the mother and reviewing a previous forensic report of the mother performed by another court-appointed psychologist, hospital records, and the records of a prior neglect proceeding, testified that the mother suffered from severe depression, with psychotic features, and a personality disorder. The psychologist opined that if the child were returned to the mother, she would be at risk of being neglected due to the nature of the mother's illness, the mother's lack of insight about her illness, and the mother's inability to act in accordance with her child's needs due to her illness.

*In re Hope K.W.*, 96 AD3d 864 (2d Dept 2012)

### **TPR Served Best Interests of Child Who Suffered from Severe Cognitive Limitations**

The mother's knowing and voluntary admission in open court satisfied the burden of proof necessary for the Family Court's finding of permanent neglect. Additionally, the Family Court properly found that the best interests of the subject child would be served by terminating the mother's parental rights and freeing him for adoption. The child, who suffers from severe cognitive limitations, including an inability to communicate, and who requires constant supervision, had bonded with his foster family with whom he had lived for more than four years at the time of the dispositional hearing. In addition, the foster parents were involved in developing the child's life skills, responding appropriately to his behavior, and in planning for how to help him reach his potential, while the mother exhibited an inability to appreciate the extent of the child's limitations. The mother also responded inconsistently, at best, to the child's

behavior, and displayed an inability to learn and implement programs necessary to help him reach his potential. In these circumstances, termination of parental rights served the best interests of the child.

*Matter of Adam L.*, 97 AD3d 581 (2d Dept 2012)

### **DSS Not Required to Make Diligent Efforts To Reunify Parent and Child**

Family Court granted a motion by DSS, excusing them from providing diligent efforts to reunify respondent and his child based on the termination of respondent's parental rights with regard to another child. Respondent appealed arguing that the court should have held a hearing before deciding the motion. The Appellate Division held that pursuant to FCA §1039-b[b][6], the court did not need to hold a hearing where, as in this case, respondent's rights to the sibling of the subject child had been involuntarily terminated. Family Court had sufficient information to make a determination based on respondent's extensive child protective history and reasonable efforts to reunify were not in the child's best interest as it was unlikely such efforts would result in a reunification between respondent and the child in the foreseeable future. The Court noted while constitutional notions of due process require such a hearing be held in cases where "genuine issues of fact are created by answering papers", in this case, respondent had waited more than a year after the relevant time period to comply with services, and it was unclear whether his recent efforts to complete substance abuse and sex offender treatment programs would prevent him from future improper conduct.

*Matter of Harmony P. v Christopher Q.*, 95 AD3d 1608 (3d Dept 2012)

### **Clear and Convincing Evidence to Support Permanent Neglect Finding**

The Appellate Division affirmed Family Court's determination that respondent had permanently neglected his three children by failing to realistically plan for their future, and terminated his parental rights. Respondent, who was incarcerated during much of these proceedings, failed to identify possible resources for his children during his period of incarceration. He first offered then later retracted his mother as a possible

resource and then he named his sister as a resource. Both relatives had CPS histories so neither were deemed acceptable by DSS. Respondent then suggested that the children remain in foster care while he focused on being a good father and proposed he would work on getting them back after his release from prison. He gave no details as to how he would work to get his children back and the court held his plan to leave the children in long-term foster care was not a realistic plan or in the children's best interests. Upon release from prison, respondent failed to comply with program recommendations, failed to adequately care for and provide supervision to his children when he visited them and despite the caseworker's repeated warnings, continued to berate the children's mother in their presence. Family Court held that a suspended sentence was not in the children's best interests and terminated his parental rights as respondent continued to remain unemployed, had a history of substance abuse and mental health issues, was homeless and if reunified with his children, planned to support them through food stamps and public assistance. On the other hand, the children, two of whom had special needs, had bonded with their foster parents who wished to adopt them.

*Matter of Hannah T.*, 95 AD3d 1609 (3d Dept 2012)

### **Respondent's Infrequent Contact with Children Too Insubstantial to Defeat Abandonment Finding**

The Appellate Division affirmed Family Court's determination that respondent had abandoned his four children, and terminated his parental rights. Testimony from DSS caseworkers and the children's foster parent showed that during the relevant period, respondent had only visited the children twice although he was scheduled to visit them every two weeks, spoke with two of the children once by telephone in a call initiated by the foster parent and failed to offer any reason for not communicating with the children. Respondent telephoned the caseworker one time and left a voice mail which she returned but he did not call her back. He also called the caseworker twice to discuss transportation problems. He sent no cards or letters to the children and he failed to attend meetings regarding their status. The court held that these infrequent and insubstantial contacts were insufficient to defeat the claim of abandonment. The court found incredible respondent's claim that he had transportation problems

that prevented him from seeing his children as he admitted he was able to arrange transportation for other purposes. His claim that he intentionally forfeited visits with the children so that their mother could have more visits was also not credible as the mother already had substantial visitation with the children.

*Matter of Jamal B.*, 95 AD3d 1614 (3d Dept 2012)

### **No Clear and Convincing Evidence of Failure to Plan for Children's Future**

Family Court determined that while DSS had shown by clear and convincing evidence that it had made diligent efforts to strengthen the mother's relationship with her children, it had not proven by clear and convincing evidence that the mother had failed substantially and continually or repeatedly to maintain contact with or plan for her children's future within the relevant statutory period. The initial neglect finding was based on the domestic violence committed in the home by the mother's paramour. The court found that while the mother had initially failed to understand the gravity of the risk posed by her paramour, she had thereafter ended her relationship with him, obtained an apartment of her own, made progress in engaging in mental health and other services, had a car, regular employment and avoided using drugs. Although the mother had setbacks during the relevant period due to a brief contact with her paramour, one time marijuana use, violation of her visitation contract with the children by allowing a male to be present during the visit, and losing her car due to an accident which resulted in the loss of her employment and apartment, she once again rebounded by successfully completing a domestic violence education program and came to recognize that her paramour had hurt her children. Additionally, throughout the proceedings, the mother continued to maintain a close relationship with her children. Taken as a whole, Family Court found that the record did not show that the mother had failed to take "meaningful steps to correct the conditions that led to the children's removal". The Appellate Division affirmed.

*Matter of Victor WW.*, 96 AD3d 1281 (3d Dept 2012)

### **DSS Relieved From Making Reasonable Efforts to Reunite Parent and Child**

Family Court granted DSS's motion relieving it from making reasonable efforts to reunite respondent with his three-year-old daughter, adjudicated the subject child to be permanently neglected and terminated respondent's parental rights. Some years earlier, respondent's rights had been involuntarily terminated with regard to three of his five children due to his repeated sexual abuse of his then ten-year-old daughter. He had been convicted of sodomy in the first degree and sentenced to prison. DSS established by clear and convincing evidence that respondent had failed to gain any insight into the circumstances that led to the subject child's removal and had failed to meaningfully benefit from the services provided to him. Although respondent had participated in the services provided to him he continued to deny that he had engaged in certain acts of sexual abuse of his older daughter although he had previously allocuted to those charges in criminal court. While respondent admitted to engaging in one act of reciprocal oral sex with his older daughter, he minimized the severity of the situation, blamed his ex-wife, his mother and at times his daughter for manufacturing the allegations against him and for blowing things out of proportion. Although his incest offender group counselor opined that offenders such as respondent needed at least 3-5 years of treatment, he denied he needed that much treatment. Respondent's plan for the subject child was to have her remain in foster care for as long as it took him to be deemed safe to take custody of her. Based on the record, the Appellate Division held that Family Court's finding of permanent neglect was supported by a sound and substantial basis in the record and held that termination of respondent's parental rights was in the child's best interest.

*Matter of Dakota Y.*, 97 AD3d 858 (3d Dept 2012)

### **Respondent's Failure to Address Longstanding Mental Illness Issues Results in TPR**

Respondent consented to a finding of neglect based on her inability to properly care for her two children and her mental illness issues. She was ordered to engage in services, including mental health treatment. She failed to comply with services and thereafter DSS filed a

permanent neglect petition against her. Supreme Court found, by clear and convincing evidence, that DSS had made diligent efforts to strengthen and encourage the relationship between respondent and children. DSS had referred respondent to mental health counseling and parenting classes, provided the children access to a therapist and arranged visits and contact between the children and respondent despite the children's strong desire to avoid any contact with respondent. The DSS caseworker maintained regular contact with respondent, counseled her regarding appropriate topics of conversation and how to communicate with the children and held family team meetings. The court determined, however, that respondent had failed to adequately plan for the children's future. The respondent denied having any mental health issues, denied the need for counseling, did not understand why the children were afraid of her although the children claimed she was unpredictable, had hit them, locked them in their rooms and withheld food. Respondent blamed the foster parents for brainwashing the children and blamed her lack of progress on DSS. She refused to acknowledge her children's feelings or her role in causing their removal. Finally, the court found it was in the children's best interests to terminate respondent's parental rights and denied her request for a suspended sentence. In addition to her failure to address her mental illness issues in a timely manner or appreciate her children's feelings towards her, the children exhibited signs of distress, including hysterical crying, not sleeping, encopresis and bed wetting both before and after visiting respondent and were diagnosed as suffering from post traumatic stress disorder. They were thriving in the home of the foster parents, had bonded with them and the foster parents intended to adopt them. The Appellate Division affirmed.

*Matter of Neal TT.*, 97 AD3d 869 (3d Dept 2012)

### **Termination of Parental Rights in Child's Best Interest**

Respondent's sexual abuse of his two daughters led to the removal of his son from his home and later Family Court determined respondent had permanently neglected his son and terminated his parental rights. Respondent appealed and the Appellate Division affirmed finding Family Court's determination was

supported by the record. Respondent was currently serving a lengthy prison sentence as a result of the crimes he had committed against his daughters; there was an order of protection in effect prohibiting any contact between the respondent and his son; the son had witnessed some of the abuse respondent inflicted upon his sisters; for several years the son had not had, nor did he want, any contact with the respondent; and the son had not maintained a relationship with respondent. If his rights were not terminated the respondent would continue to receive information about his son, and his son did not want this to happen. Additionally, the son's therapist stated that termination was in the son's best interest and continuation of any parental rights would be detrimental to the child's recovery efforts.

*Matter of Bradley A.*, 97 AD3d 931 (3d Dept 2012)

### **Children's Best Interests to Terminate Respondent's Parental Rights**

Respondent was incarcerated in 2005. Four years later, in April 2009, while the respondent was still incarcerated, his children were removed from the custody of their mother, with her consent, and placed in foster care with maternal relatives. Respondent was aware of this placement and although he was released from prison in December 2009, he was reincarcerated for parole violation in May 2010 and remained incarcerated until May 2011. In March of 2011, DSS filed a permanent neglect petition against respondent. After fact-finding and disposition hearings, the court determined that respondent had permanently neglected his children and terminated his parental rights. The Appellate Division affirmed the decision. The record showed that even though DSS had failed to contact respondent during the period he was incarcerated, during the six months when respondent was released from prison, the caseworker, among other things, met with respondent and arranged for respondent to have regular visits with his children. Because respondent's one bedroom apartment was too small, the caseworker encouraged him to find employment so that he could get a larger apartment which would be suitable for overnight visits with the children. The caseworker also contacted respondent's probation officer in order to assist respondent in complying with probation terms and conditions. However, respondent failed to engage in the services offered and ended up violating the terms

of his parole which resulted in his reincarceration. His only plan for his children's future was for them to return to their mother, and upon future release he intended to become an involved and good parent. At the time of the dispositional hearing, respondent had been out of prison for about two months but had not yet completed a substance abuse evaluation as was required by the conditions of his parole and had not obtained his own apartment. The court denied his request for a suspended sentence as the children had been in foster care for over two years, were doing well, and the foster parents wished to adopt them.

*Matter of James J.*, 97 AD3d 936 (3d Dept 2012)

### **Parental Rights Properly Terminated 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.*, 96 AD3d 1348 (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.*, 96 AD3d 1442 (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.*, 96 AD3d 1459 (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.*, 96 AD3d 1472 (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.*, 96 AD3d 1487 (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.*, 96 AD3d 1498 (4th Dept 2012)

