Office of Attorneys for Children
Appellate Division, Fourth Department

Summer Case Digest
2024 Decision Lists Plus Select
Court of Appeals, Federal, and Other Cases of Interest

FOURTH DEPARTMENT CASES

ABUSE AND NEGLECT

Respondent Acted as a Functional Equivalent of a Parent in a Familial or Household Setting

Family Court found that respondent had abused the subject child. The Appellate Division affirmed. Respondent was the boyfriend of the child's mother and acted as the functional equivalent of a parent in a familial or household setting for the child. Family Court was entitled to draw the strongest possible inference against respondent in light of his failure to testify. Petitioner established a prima facie case against respondent and respondent failed to offer any explanation for the child's injuries or otherwise rebut the presumption of culpability.

Matter of Adam B.-L., 224 AD3d 1272 (4th Dept 2024)

The Clash of Judicial Roles in Which the Judge Acted Both as an Advocate and as the Trier or Fact at the Very Least Created the Appearance of Impropriety

Family Court placed the subject child with the Department of Children and Family Services (DCFS). The Appellate Division dismissed. In August of 2022, Family Court, on its own motion and over the objection of DCFS, held a fact-finding hearing to determine whether the subject child should be removed from the mother's care, and at the close of the hearing issued a temporary removal order. The Appellate Division dismissed the appeal as several superseding permanency orders were entered in which the mother stipulated that it would be in the child's best interests to continue in her placement. Moreover, during the pendency of the appeal, an order of release was issued returning the child to the mother with a 12-month order of supervision. Nevertheless, under the unusual circumstances of this case, the Appellate Division was compelled to express its deep concern with the Family Court Judge's abandonment of her neutral judicial role during the sua sponte removal hearing. The judge failed to properly balance her role in parens patriae with her statutory obligation to ensure that the parties received due process at the hearing, specifically with respect to the requirement that the hearing be conducted before an impartial jurist. At the hearing, the judge took on the function and appearance of an advocate by choosing which witnesses to call and extensively participating in both the direct and cross-examination of witnesses with a clear intention of strengthening the case for removal. When counsel for the mother objected, the judge overruled the objection stating that there was no one else to run the hearing except for her. She also introduced and admitted several written documents during the mother's testimony over the objection of counsel and despite the mother's statement that she could not read and was not familiar with the documents. This clash in judicial roles in which the judge acted both as an advocate and as the trier of fact, at the very least, created the appearance of impropriety. This was particularly true when the judge aggressively cross-examined the mother regarding topics that were not relevant to the issue of the child's removal and seemed designed to embarrass and upset the mother. Given the lack of

impartiality repeatedly exhibited by the judge, the Appellate Division strongly recommended that she consider whether recusal would be appropriate for future proceedings involving the mother.

Matter of Zyion B., 224 AD3d 1285 (4th Dept 2024) (see also *Matter of Anthony J.*, 224 AD3d 1319 [4th Dept 2024] at page 21).

Respondent Failed to Offer Any Explanation for the Child's Injuries and Simply Denied Inflicting Them

Family Court adjudged that respondent grandmother abused the subject child and neglected her four minor children. The Appellate Division affirmed. Petitioner established a prima facie case of abuse in that there was no dispute that the grandson's injuries, which included fractured ribs and a lacerated liver, were non-accidental and would not have occurred in the absence of abuse. The grandson had been in respondent's care for the four or five days prior to the onset of severe symptoms and had sustained the injuries during a time span within which respondent and the grandson's mother were his only caregivers. Respondent did not rebut the evidence of her culpability as she failed to offer any explanation for the child's injuries and simply denied inflicting them. With respect to respondent's appeal from the order regarding her four minor children, she failed to raise any contentions concerning that order in her main brief on appeal and thus that appeal was abandoned.

Matter of Leo M., 224 AD3d 1293 (4th Dept 2024)

The Children Were in Imminent Danger of Emotional Impairment Based Upon Repeated Incidents of Domestic Violence

Family Court adjudged that respondents neglected the subject children. The Appellate Division affirmed. The children were in imminent danger of emotional impairment based upon the alleged repeated incidents of domestic violence between respondents. The contention that police department records were not properly certified was not preserved for review and there was no indication that Family Court considered, credited, or relied on inadmissible hearsay in those records. Further, Family Court did not error in considering the maternal grandmother's testimony regarding statements made by the older child and the mother. The child's statements were sufficiently corroborated and any error with regard to the mother's statements was harmless. The father's contention with respect to hearsay testimony of a supervisor employed by petitioner, was rejected because that testimony was admitted conditionally. Family Court later noted explicitly that it might not consider the supervisor's testimony in reaching its decision, and there was no indication that Family Court relied upon that hearsay.

Matter of Adrian L., 225 AD3d 1166 (4th Dept 2024)

The Consistency of the Child's Out-of-Court Statements Describing the Sexual Conduct Enhanced the Reliability of Those Out-of-Court Statements

Family Court adjudged that respondent abused one of the subject children and derivatively abused the three youngest children, one of whom was his. The Appellate Division affirmed. The findings of abuse and derivative abuse were properly before the Court despite the fact that respondent entered into a contract for services in lieu of a dispositional hearing inasmuch as respondent contested the findings at the fact-finding hearing. The out-of-court statements of the eldest of the subject children were sufficiently corroborated by the testimony of caseworkers trained in forensic interviewing techniques, the child's age-inappropriate knowledge of sexual matters and language, a medical report indicating vaginal penetration of the child, and a caseworker's discovery of a bottle of lotion as and where described by the child in her out-of-court statements that detailed her sexual abuse. Moreover, the child gave multiple, consistent descriptions of respondent's abuse and, although repetition of the accusation by the child did not corroborate the child's prior account of abuse, the consistency of the child's out-of-court statements describing the sexual conduct enhanced the reliability of those out-of-court statements. Additionally, Family Court was entitled to draw the strongest inference against respondent that the opposing evidence permitted based upon his failure to testify. Further, the findings of derivative abuse were supported by the evidence inasmuch as the three other children were present in the home, or on at least one occasion, in the same room as respondent during the times that he sexually abused their eldest sibling.

Matter of Dorika S., 225 AD3d 1171 (4th Dept 2024)

The Statutory Test is Minimum Degree of Care—Not Maximum, Not Best, Not Ideal –and the Failure Must be Actual, Not Threatened

Family Court found that the mother neglected the subject children and placed the mother and the subject children under the supervision of petitioner. The Appellate Division reversed on the law and dismissed the petition. The underlying fact-finding order, wherein Family Court found that the mother neglected the subject children, was not supported by the requisite preponderance of the evidence. The statutory test for finding neglect is minimum degree of care – not maximum, not best, not ideal – and the failure to exercise the minimum degree of parental care must be actual, not threatened. Moreover, only the evidence presented at the fact-finding hearing may be considered by the court in determining whether the child is an abused or neglected child, not allegations drawn from the petition or evidence adduced at the dispositional hearing. Although there was evidence of some unsanitary conditions in the mother's apartment, petitioner's caseworker testified that the apartment met minimal standards. The older child had not yet attained the age of six by December 1 of the year in which the educational neglect was alleged to have taken place and thus his school attendance was not mandated, and the mother had no duty to supply the child with adequate education. Further, with respect to hygiene and clothing, the testimony of petitioner's witnesses demonstrated, at most, that the manner in which the children dressed and attended to hygiene was less than optimal, but it did not appear that those conditions resulted in any actual or imminent

impairment. With respect to the mother's mental health condition, petitioner did not present any diagnostic or medical evidence at the fact-finding hearing and instead relied entirely on the mother's purported paranoid and disoriented behavior and rambling conversational style to establish that the mother suffered from mental illness. Even assuming arguendo that petitioner established that the mother suffered from a mental illness, petitioner failed to establish a causal connection between the mother's condition and any actual or imminent harm to the children.

Matter of Justice H.M., 225 AD3d 1298 (4th Dept 2024)

Father Left the Children at the Mother's Home in Violation of an Order of Protection

Family Court adjudicated, inter alia, that the father neglected the subject children. The Appellate Division dismissed insofar as the appeal concerned the disposition and affirmed. The father consented to the disposition; however, the appeal from the order of disposition brought up for review the underlying neglect finding which was properly adjudicated. The father left the children at the mother's home, and in her long-term care, despite the fact that doing so was in violation of the order of protection that the father had previously sought and obtained. Further, the father failed to assist the mother with the children's mental health issues and multiple absences from school.

Matter of Landen S., 227 AD3d 1465 (4th Dept 2024)

Exposure of the Children to Domestic Violence Between the Parties May Form the Basis for a Finding of Neglect

Family Court determined that respondent neglected the subject children. The Appellate Division affirmed. The children's mother was stabbed in the leg during an altercation with respondent. The children were present at the scene when the police arrived; the children appeared scared and saw their mother bleeding and taken away in an ambulance. Although it was unclear whether the children were awake at the time of the altercation itself or whether they witnessed it, at some point, two of the children went down the street to get help from their aunt. One child later told the caseworker that he knew that the mother was hurt and that she needed help that night; a second child knew that the dining room table had been broken during the incident. The two youngest children were also home at the time of the incident. In addition, the children were present during a subsequent incident in which respondent climbed into the mother's house through a window in violation of the no-contact order of protection and had an altercation with the mother. One of the children was injured during that altercation, and respondent was thereafter charged with criminal contempt and endangering the welfare of a child. Respondent was arrested at the house again several months later, an event witnessed by at least some of the children.

Matter of Antonio S., 227 AD3d 1532 (4th Dept 2024)

The Duration of the Order of Protection Was Unlawful

Family Court found that the mother neglected the subject children. The Appellate Division modified on the law and as modified affirmed. The mother was aware that the children were in imminent danger from her boyfriend, and she failed to exercise a minimum degree of care in providing them with supervision. Even amidst the proceedings, the mother permitted the boyfriend to return to her home in violation of a temporary order of protection and continued to dismiss the children's allegations and side with the boyfriend. However, the duration of the order of protection was unlawful. Inasmuch as the mother's boyfriend was the biological father of one of the children and the children resided in the same household with the mother at the time of the disposition, the duration of the order of protection, which exceeded the duration of the dispositional order, was unlawful. The Appellate Division modified the order of protection to expire on the same date as the dispositional order.

Matter of Clarissa F., 227 AD3d 1543 (4th Dept 2024)

Respondent Engaged in Acts of Domestic Violence Against the Children's Mother While the Children were Present

Family Court adjudged that respondent had neglected five of the subject children and derivatively neglected the other child. The Appellate Division affirmed. Respondent engaged in acts of domestic violence against the children's mother while the children were present, including an incident in which he destroyed the mother's cell phone, choked her unconscious, threatened one of his children with an axe, and then prevented the mother and five of the children from leaving their home until the police arrived. Petitioner further established that the children were in imminent danger based on respondent's history of mental illness, alcoholism, and substance abuse issues for which he refused to seek treatment. Respondent also made inappropriate sexual comments to at least two of the children and inappropriately touched one of them by repeatedly rubbing up against her breasts and buttocks. Contrary to respondent's contention, the statements made by certain of the children provided sufficient cross-corroboration. Also, there was a sound and substantial basis to support the determination that respondent derivatively neglected the sixth child.

Matter of Jasmine L., ___ AD3d ____, 2024 NY Slip Op 03268 (4th Dept 2024)

Under the Circumstances of this Case, the Videos Were Sufficiently Authenticated

Family Court determined that the mother abused one subject child and derivatively abused the other child. The Appellate Division affirmed. Certain videos were discovered by the Federal Bureau of Investigation in late January 2022 during an unrelated investigation into the trading of child pornography. The suspect in that investigation admitted to an FBI special agent that he had been hacking into security web cameras and that, in 2019, he had hacked into a security camera and observed what he believed to be an adult male sexually abusing a teenage girl. Through the investigation, the FBI

determined that the videos came from a camera in the house in which the mother resided with the subject children and her boyfriend. Also, in the course of the investigation, the mother, who was shown screenshots from the videos, identified the two individuals as her daughter and her boyfriend. The testimony at the fact-finding hearing established that the video depicted the living room of the family home. Family Court determined that the parties and children were all easily identifiable in the videos and that the actions, dialogue, and behavior shown in the videos showed no indication of any tampering. The Appellate Division determined that petitioner established that the videos accurately represented the subject matter depicted, and further concluded that Family Court acted within its founded discretion in admitting the videos into evidence. In addition, although the mother did not directly participate in the boyfriend's sexual abuse of the daughter, the evidence permitted Family Court to infer that the mother knew or should have known about the abuse and did nothing to prevent it. The mother refused to view the videos of abuse; she returned to the home with her children even though the State Police asked her not to do so; and she chose not to refute any of petitioner's evidence. Contrary to the mother's further contention, the dispositional provisions of Family Court's order including those requiring her to engage in domestic violence counseling, attend a sexual abuse prevention program, and admit that the sexual abuse had occurred were consistent with the best interests of her son and supported by the record. One Appellate Division Justice dissented concluding that the facts of this case were materially indistinguishable from those in *People v Patterson,* 93 NY2d 80, 84 (1999).

Matter of Mekayla S., ___ AD3d ____, 2024 NY Slip Op 03584 (4th Dept 2024) (see also *Matter of Gabriel H.*, ___ AD3d ____, 2024 NY Slip Op 03588 [4th Dept 2024] below)

The Abuse of the Daughter Occurred in the Living Room of the House, Which Was Easily Accessible to Anyone in the House

Family Court determined that respondent abused the daughter of his girlfriend and derivatively abused her son. The Appellant Division affirmed. Family Court properly determined that the videos were sufficiently authenticated and that any alleged uncertainty went to the weight afforded to the evidence rather than its admissibility. The testimony of the special agent and detective authenticated the videos through circumstantial evidence of their appearance, contents, substance, internal patterns, and other distinctive characteristics. Respondent did not dispute that the acts shown on the videos constituted sex offenses, but he contended that the videos should be given little to no weight because they could be deepfakes. The Appellate Division agreed with Family Court's determination that the actions, dialog, and behavior shown in the videos showed no indication of any tampering. In addition, the finding of derivative abuse with respect to the son was supported by the preponderance of the evidence. The abuse of the daughter occurred in the living room of the house, which was easily accessible to anyone in the house. The son was depicted in one video just fifteen minutes before respondent abused the daughter. The abuse of the daughter was so closely connected with the care of the son as to indicate that the son was equally at risk. The issue of the order of protection issued against respondent in favor of the daughter was moot inasmuch as the order had been vacated and the issue of the order of protection issued against respondent in favor

of the son was not preserved for review. Two Appellate Division Justices dissented who agreed with and adopted the rationale of the dissent in the mother's appeal.

Matter of Gabriel H., ___ AD3d ____, 2024 NY Slip Op 03588 (4th Dept 2024) (see also *Matter of Mekayla S.*, ___ AD3d ____, 2024 NY Slip Op 03584 [4th Dept 2024] above)

Family Court Act Section 1056 (4) Allows a Court to Issue an Independent Order of Protection, But Only Against a Person Who Is Not Related by Blood or Marriage to the Child

Family Court placed the subject children in the care of petitioner and issued a complete stay-away order of protection on behalf of the subject children against both respondents. The Appellate Division modified on the law by vacating the order of protection against the maternal grandfather and as modified affirmed. Respondents were the maternal grandfather of the subject child and his stepsister. Petitioner established that the youngest child suffered numerous injuries that would not ordinarily occur absent an act or omission of respondents. Not only did petitioner elicit medical testimony of the child's injuries, it also elicited testimony of the children's disclosures of physical abuse inflicted on the youngest child at the hands of respondents. Petitioner further established that the youngest child failed to receive adequate nutrition in respondents' care. Respondents failed to rebut the evidence of culpability. However, Family Court erred in imposing orders of protection against respondent grandfather pursuant to Family Court Act § 1056 (4). Subdivision (4) of section 1056 allows a court to issue an independent order of protection, but only against a person who is not related by blood or marriage to the child.

Matter of Jaycob S., ___ AD3d ____, 2024 NY Slip Op 03595 (4th Dept 2024)

Petitioner's Inability to Pinpoint the Time and Date of Each Injury and Link It to an Individual Respondent Was Not Fatal to the Establishment of a Prima Facie Case of Abuse

Family Court adjudged that respondents abused the subject child and placed respondents under the supervision of petitioner. Family Court affirmed. Petitioner established that the child suffered multiple injuries that would ordinarily not occur absent an act or omission of respondents. Specifically, when the child was almost six months old he was diagnosed with acute on chronic subdural hematoma, ruptured bridging veins, bulging fontanel, retinal hemorrhages, and bruising on the back. Petitioner presented the unrebutted testimony of the attending physician and the child abuse specialist pediatrician, the second of which opined that the child had suffered multiple traumas rather than only one. Further, petitioner established that respondents were the caretakers of the child at the time the injuries occurred. Contrary to the mother's contention, petitioner's inability to pinpoint the time and date of each injury and link it to an individual respondent was not fatal to the establishment of a prima facie case of abuse. Petitioner established that respondents shared responsibility for the child's care during the time period in which the injuries were sustained and that the presumption of culpability extended to all three of them. In response, respondents failed to offer any explanation for the child's injuries and

simply denied inflicting them. Therefore, the mother failed to rebut the presumption of culpability.

Matter of Kevin V., ___ AD3d ____, 2024 NY Slip Op 03653 (4th Dept 2024)

ADOPTION

Resuming Contact with Biological Mother Was Not in Children's Best Interests

Family Court dismissed the biological mother's petitions. The Appellate Division affirmed. Petitioner sought to enforce a post-adoption contact agreement with respect to her two biological children, who had been adopted by respondents. The agreement permitted a minimum of three visits per year with the children, with petitioner being required to contact the adoptive parents to schedule those visitations. If petitioner missed two scheduled visits in a row, she would lose her right to future visitations. The agreement further provided for monthly phone contact with the children. Petitioner alleged that respondents improperly refused her visitation. Following a fact-finding hearing, Family Court dismissed the petitions on the grounds that petitioner failed to have regular visitation with the children and that resuming visitation was not in the children's best interests. The evidence established that petitioner made minimal and inconsistent efforts to schedule visits with the children and had not seen them for over two years. Petitioner did not attend at least one scheduled visitation. At the hearing, the children's treating psychologist opined that it was not in the children's best interests to resume contact with petitioner. His opinion was based, in part, on his observation that since the children's contact with petitioner had ceased, the children's behaviors had improved. Petitioner's further contention that the provision of the agreement allowing her monthly telephone contact with the children was severable from the other provisions and should be enforced was unpreserved for appellate review. In any event, given petitioner's inconsistent and minimal prior monthly phone contact with the children, it would not be in the children's best interests to enforce that provision. One Appellate Division Justice dissented with regards to the monthly phone contact.

Matter of Tricia A.C. v Saul H. and Julie H., ___ AD3d ____, 2024 NY Slip Op 03242 (4th Dept 2024)

CUSTODY AND ACCESS

Although the AFC's Appeals Were Untimely, the AFC Was Not Seeking Affirmative Relief Beyond that Requested by Petitioner; Determination to Award Joint Custody to Petitioner and the Mother with the Goal of Ultimately Awarding Physical Custody to the Mother Lacked Basis in the Record

Family Court awarded petitioner and the mother joint legal custody of the subject child and dismissed petitioner's petition for sole legal and physical custody. The Appellate Division dismissed the AFC's appeals, reversed on the law, reinstated the petition, granted the petition, and remitted to Family Court. Although the AFC's notices of appeal were untimely and therefore dismissed, the Appellate Division considered the contentions raised in the AFC's brief inasmuch as such contentions were also raised by petitioner. The proceedings involved a custody dispute between the subject child's biological mother and petitioner, a former friend of the mother who had raised the child for the majority of her life. Testimony at the trial established that the mother left the child with petitioner when the child was only six months old. For several years thereafter, the mother was abusing drugs, attempting to evade law enforcement officials, or incarcerated. Even after the mother was released from jail, she did not visit the child. In fact, up until the time petitioner filed her petition, the mother had seen the child only once since leaving the child with petitioner. Meanwhile, the child had been living with petitioner, petitioner's five biological children, and petitioner's current husband. Petitioner commenced the proceeding when she learned that she lacked the legal authority to enroll the child, who was four years old at the time of trial, in school. Approximately nine months later, the mother filed her petition. Family Court's determination that extraordinary circumstances existed was not disputed on appeal. Thus, the only issue remaining concerned the best interests of the child, which the Appellate Division addressed as follows: The mother's decision to ask petitioner for help in caring for the child during a time of crisis did not establish that the mother was unfit as a parent. However, Family Court did not address the child's need for continuity and stability or the bonds and relationships that the child had formed over the last several years. Between the parties, petitioner had taken care of all of the child's medical needs without any support from the mother. Meanwhile, the mother repeatedly stated that, if and when she obtained custody of the child, she would cut off all contact with petitioner and petitioner's five children, thus effectively cutting all bonds with the only family the subject child had ever known. While petitioner and the mother testified inconsistently about petitioner's attempts to provide visitation between the mother and the child, irrefutable evidence established that petitioner attempted to arrange such visitation on numerous occasions and that the mother never took advantage of those attempts. In fact, the mother blocked contact from petitioner. Due to the child's age, Family Court did not conduct a Lincoln hearing, but the trial AFC advocated for petitioner to have sole legal and physical custody and the appellate AFC requested the same relief. In addition, according to the appellate AFC, the mother had failed to avail herself of the visitation awarded to her. Thus, there were no changed circumstances during the pendency of the appeals regarding the child's needs and interests that would support Family Court's award of joint custody or warrant a new hearing on the matter. Family Court gave too much weight to petitioner's actions in allowing the child to call her "mommy." Petitioner testified that, at first, she

corrected the child and attempted to have the child call her "Aunt," but she eventually stopped making such corrections due to a concern that the child would feel unloved or excluded from the family. Family Court should have awarded petitioner sole legal and physical custody of the subject child and dismissed the mother's petition. The Appellate Division remitted with respect to the issue of visitation between the child and the mother.

Matter of Dinoff v Knechtel, 224 AD3d 1288 (4th Dept 2024)

New Facts Put Forward by the AFC Indicated That the Record Was No Longer Sufficient for Determining Whether Relocation Was in the Child's Best Interests

Family Court granted the father permission to relocate to Wisconsin with the subject child. The Appellate Division reversed on the law and remitted to Family Court for an expedited hearing. The AFC submitted new information to the Appellate Division indicating that the child had been living with the mother in New York since December 2023 with the father's consent. In addition, the mother had been awarded temporary custody of the child. In light of the new information, the record was no longer sufficient for determining whether relocation was in the child's best interests.

Matter of Allen v Courtney, 224 AD3d 1346 (4th Dept 2024)

A Party Cannot Be Relieved from a Stipulation Upon an Appeal from the Order Entered Pursuant to Said Stipulation

Family Court granted the father virtual parenting time with the subject children on a weekly basis. The Appellate Division dismissed. The record established that the father, through his guardian ad litem, stipulated on the record in open court to the terms of the order. Although the father contended that his guardian ad litem did not have authority to enter into the stipulation on his behalf, a party cannot be relieved from a stipulation upon an appeal from an order entered pursuant to a stipulation. The proper remedy was a motion to vacate.

Matter of Provost-Lutz v Schmid, 224 AD3d 1355 (4th Dept 2024)

Summary Reversal Was Not Required Where the Record Was Adequate for Meaningful Appellate Review

Family Court awarded the father sole legal and primary physical custody of the subject child. The Appellate Division affirmed. By failing to object to the method used for reconstructing the 47 minutes of testimony that could not be transcribed due to a recording malfunction and failing to allege that the testimony was not properly reconstructed, the mother failed to preserve any claim of appellate prejudice. In addition, there was no basis to disturb Family Court's credibility assessment and factual findings.

Matter of Kirkland v Crawford, 225 AD3d 1127 (4th Dept 2024)

A Parent's Failure to Exercise Visitation for a Prolonged Period of Time Was a Relevant Factor When Determining Whether Visitation Was Warranted

Family Court awarded the mother sole custody of the subject children and suspended the father's visitation. The Appellate Division affirmed. The presumption that visitation with a noncustodial parent is in the best interests of the child, even when the parent seeking visitation is incarcerated, may be rebutted. The father made no meaningful effort to nurture a relationship with the children. He failed to exercise visitation when he was allowed to do so and did not take the opportunity to write letters or cards to the children during the proceedings. Family Court also properly took into consideration that the father was convicted of, inter alia, criminal contempt in the first degree for violating an order of protection issued in favor of the mother and the children, demonstrating no remorse or understanding that his actions were harmful to the children.

Matter of Fowler v Jones, 225 AD3d 1162 (4th Dept 2024)

Father Failed to Demonstrate that the Need for an Adjournment Was Not Due to His Refusal to Cooperate with His Assigned Counsel

Family Court awarded the mother sole legal and physical custody of the subject children. The Appellate Division affirmed. Family Court did not abuse its discretion in denying the father's adjournment request. The father failed to demonstrate that the need for an adjournment to prepare for a trial on a petition that had been pending for two years was not due to his refusal to cooperate with his assigned counsel without good cause.

Matter of Taggart v Sisk, 225 AD3d 1163 (4th Dept 2024)

Family Court Did Not Err in Refusing to Appoint New Counsel After the Mother Released Her Assigned Counsel; The Contention of the AFC Was Not Properly Before the Court as the AFC did not File a Notice of Appeal

Family Court modified a prior order of custody by awarding the father sole custody of the subject child. The Appellate Division affirmed. Family Court did not err in refusing to appoint new counsel for the mother after she released her assigned counsel after day two of the fact-finding hearing. The mother did not demonstrate that good cause existed for substitution of counsel. Rather, there was just a disagreement between the mother and her counsel over trial strategy and the mother's filing of pro se violation petitions. Also, Family Court advised the mother of the dangers of self-representation and conducted a searching inquiry to ensure that the mother's waiver of the right to counsel was knowing, intelligent, and voluntary. Family Court did not abuse its discretion in denying the mother's request for an adjournment on the third day of the trial as the mother's request resulted from her lack of due diligence in preparing for the hearing. The contention of the AFC that Family Court improperly exercised its discretion in granting the father sole custody was not properly before the Court as the AFC did not file a notice of appeal.

Matter of Bracken v Bracken, 225 AD3d 1241 (4th Dept 2024)

An Award of Custody Must be Based on the Best Interests of the Child and Not a Desire to Punish an Allegedly Recalcitrant Parent; The Disclosure of Any Statement Made by a Child During a Confidential *Lincoln* Hearing was Improper Regardless of How Innocuous That Statement May Appear to Be

Supreme Court granted the father primary physical custody of the subject child. The Appellate Division reversed on the law and facts, granted the mother's motion insofar as it sought primary physical custody of the subject child, denied the motion of the father insofar as it sought the same, and remitted to Supreme Court. Supreme Court's determination lacked a sound and substantial basis in the record. Both parties were fit parents with stable homes who were dedicated to guiding their child's well-being. Both parties had shown a willingness to coparent and foster the child's relationship with the other party for the benefit of the child. However, Supreme Court gave undue weight to the mother's residence in the Syracuse area. The record did not support the court's conclusion that the mother intentionally disregarded the child's best interest and interfered with the child's ability to bond with the father by moving away from the Buffalo area. Instead, four years prior to the instant proceeding, the mother relocated, with the father's full knowledge, out of practical necessity, at which time the parties established a plan for relatively equal access to the child. Further, by focusing almost exclusively on the expectation that the mother should move back to the Buffalo area, Supreme Court failed to make a careful and studied review of all of the relevant *Eschbach* factors. The evidence established that the mother's weekday and daytime work schedule more closely aligned with the child's school schedule. And, although the mother's workday would start earlier than the child's school day, the mother testified to the specific arrangement that she had made to allow the child to have a consistent morning routine. In contrast, the father's work schedule included at least two weeknight commitments and frequent out-of-town travel on weekends during the majority of the school year. The father had no specific plan for childcare during those times. Despite the fitness of both parents, it was in the best interests of the child to award primary physical residence to the mother. Also, the Appellate Division reminded Supreme Court that the disclosure of any statement made by a child during a confidential *Lincoln* hearing was improper, regardless of how innocuous that statement might appear to be.

Kaleta v Kaleta, 225 AD3d 1293 (4th Dept 2024)

The Period of Time for Which the Mother Sought Permission to Travel Expired During the Pendency of the Appeal

Family Court denied the mother's motion for permission for the subject children to travel with her on sabbatical to Barcelona, Spain. The Appellate Division dismissed. The mother's appeal was rendered moot because the period of time for which the mother sought permission to travel with the children expired during the pendency of the appeal. The exception to the mootness doctrine did not apply.

Matter of Melish v Rinne, 225 AD3d 1302 (4th Dept 2024)

Family Court Erred in Addressing the Merits of the Petition Without First Resolving Whether it had Subject Matter Jurisdiction; The Minimal and Speculative Evidence of the Alleged Drug Use Fell Far Short of Establishing Extraordinary Circumstances

Family Court granted joint custody of the subject child to petitioners and respondents with primary placement of the subject child with petitioners. The Appellate Division reversed on the law and dismissed the petition. Petitioners were the brother and sister-in-law of the subject child. The mother moved for summary judgment dismissing the petition on the ground that Family Court lacked subject matter jurisdiction. Family Court reserved decision on the mother's motion but nonetheless commenced a hearing on the merits of the petition. Over six months later, Family Court denied the mother's motion on the ground that issues of fact warranted a hearing on the jurisdictional issue. However, no such hearing was held. Following further appearances, Family Court issued an oral decision in which it found, without further elaboration, that extraordinary circumstances existed to award petitioners custody. Initially, Family Court erred in addressing the merits of the petition without first resolving whether it had subject matter jurisdiction. Further, Domestic Relations Law § 75-f expressly provides that, where a party raises an issue regarding the issue of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, that issue must be given priority on the calendar and handled expeditiously. Nonetheless, Family Court did have subject matter jurisdiction as there was a prior order and there was no evidence that Family Court had relinquished its jurisdiction. Indeed, the subject child had a significant continuing connection to New York in that the father, a joint custodian, was and remained a New York resident. However, Family Court's determination to award petitioners joint custody of the child lacked a sound and substantial basis in the record as petitioners failed to establish the existence of extraordinary circumstances. The mother's decision to leave the child with petitioners for a little over a month before seeking his return did not amount to abandonment. The record contained no evidence of physical abuse and the minimal and speculative evidence of the alleged drug use fell far short of establishing that the mother presented a danger to the child or that she could not provide the child a stable home.

Matter of Adams v John, 227 AD3d 1395 (4th Dept 2024)

The Mother and the Father Were Able to Cooperate with Regard to Raising the Child, Therefore Joint Custody Was Appropriate

Family Court granted the mother sole legal and primary physical custody of the subject child with visitation for the father. The Appellate Division modified on the law, affirmed as modified, and remitted to Family Court. There was a sound and substantial basis for Family Court's determination that primary physical residence with the mother was in the child's best interests. The mother was the more stable parent with a higher quality home and was better situated to serve as a primary placement parent. However, the record established that the mother and the father were able to cooperate with regard to raising the child and that the parties' relationship was not so severely antagonistic and embattled as to warrant sole custody. Further, Family Court acknowledged that the father should

have the benefits of joint custody as it awarded the father independent access to the child's records and ordered the mother to consult with the father on major decisions.

Matter of Robinson v Santiago, 227 AD3d 1415 (4th Dept 2024)

The Desire of the Oldest Child to Modify the Prior Custody Order Was Entitled to Great Weight

Family Court awarded the father primary physical custody of the subject children. The Appellate Division affirmed. The father established a change in circumstances in that the relationship between the parties had deteriorated, the mother's housing situation had changed, and one of the children had expressed a desire to modify the existing custody arrangement. In addition, the modifications to the prior custody order were in the best interests of the children. Among other things, the original custodial relationship had broken down and the father could provide a more stable home environment as demonstrated by the evidence that the mother temporarily became homeless and that one of the children asked to stay with the father during the mother's parenting time. Further, although both parents appeared fit and loving, the father had greater financial stability and was the only parent willing and able to pay for and drive the children to certain extracurricular activities. Additionally, the desire of the oldest of the two children to modify the prior custody order was entitled to great weight, particularly where her age and maturity made her input especially meaningful.

Matter of Jones v Brown, 227 AD3d 1523 (4th Dept 2024)

The Mother Established the Requisite Change in Circumstances

Family Court granted the father's motion and dismissed the mother's petitions which sought to modify a prior order. The Appellate Division modified on the law by denying the motion in part and reinstating the amended petition, as modified affirmed, and remitted to Family Court. The mother established the requisite change in circumstances. The mother was the child's primary caretaker from the child's birth until she was eight years old. The father obtained custody after an incident of domestic violence involving the mother's then boyfriend. The mother testified that, in the four years since the prior order of custody, she had moved out of the residence that she shared with the ex-boyfriend and no longer had contact with him, attended domestic violence support groups and counseling, and secured a new residence. The record further established that the father engaged in corporal punishment of the child which was prohibited by the prior order. Even accepting the father's explanation, his reaction supported the mother's position that he was unable to handle the child's outbursts. The evidence also established that the father did not ensure that the child continued counseling despite that direction in the prior order.

Matter of Osborne v Tulwits, 227 AD3d 1541 (4th Dept 2024)

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

Family Court suspended the visitation of respondent father with the subject child. The Appellate Division reversed on the law and remitted to Family Court. Although the amended order included a statement that it was entered on the incarcerated father's default, Family Court's bench decision clearly specified that it was granting the mother's modification petition based on the evidence adduced during the hearing during which the father was represented by counsel. Therefore, the amended order was not entered on default to the extent that it granted in part the mother's petition. In addition, Family Court completely failed to follow the well-established rule obligating a court to set forth those facts essential to its decision, either with respect to whether there had been a change in circumstances or the relevant factors that it considered in making a best interests of the child determination. Therefore, the Appellate Division remitted to Family Court to make a determination on the petition including specific findings.

Matter of Miller v Boyden, 227 AD3d 1545 (4th Dept 2024)

The Parties' Relationship Became Acrimonious and They Were Unable to Communicate About the Needs and Activities of their Child, Therefore Sole Custody Was Appropriate

Family Court awarded petitioner father sole legal and physical custody of the subject child. The Appellate Division affirmed. The mother failed to preserve for review her contention that the father failed to establish a change in circumstances. In any event, the father met his burden. The parties' relationship had become acrimonious, and they were unable to communicate about the needs and activities of their child. The Appellate Division did not disturb Family Court's custody determination inasmuch as the record established said determination was the product of the court's careful weighing of the appropriate factors. The mother failed to preserve for review her contention that Family Court improperly assumed the role of advocate depriving her of a fair trial, and in any event, the record did not support her contention.

Matter of Torres v Burchell, 228 AD3d 1303 (4th Dept 2024)

Dismissal of an Appeal by an AFC is Warranted Only When it Can Be Said that Entertaining the Appeal Would Force the Aggrieved yet Non-Appellant Parent to Litigate a Petition that They Have Since Abandoned; The AFC's Appeal Was Not Dismissed

Family Court adjudged that the father would continue to have sole legal and physical custody of the subject children. The Appellate Division affirmed. The AFC representing the older child appealed from the order insofar as it refused to award the mother unsupervised visitation. Where an aggrieved parent in a custody and visitation proceeding did not take or perfect an appeal, dismissal of an appeal by an AFC is warranted only when it can be said that entertaining the appeal would force the aggrieved yet non-appellant parent to litigate a petition that they have since abandoned. In this case, the

mother filed and served a notice of appeal but, after being denied poor person relief and assignment of counsel, the mother was unrepresented and unable to timely perfect her appeal. The mother nonetheless submitted a letter explaining that she remained steadfast in her disagreement with Family Court's order. Therein the mother expressed her support for the merits of the position taken by the AFC representing the older child. The mother also attempted to submit a brief in opposition to the brief of the AFC representing the younger sister which was rejected on the ground that the mother was not an appellant. Thus, it could not be said that entertaining the appeal by the AFC representing the older child would force the mother to litigate a petition that she had since abandoned, and therefore under the circumstances of this case, the AFC's appeal was not dismissed. Nonetheless, the Appellate Division rejected the contention of the AFC representing the older child that Family Court erred in refusing to award the mother unsupervised visitation.

Matter of Muriel v Muriel, 228 AD3d 1345 (4th Dept 2024)

Several Crucial Factors Decisively Weighed Against Awarding the Father Primary Physical Custody

Family Court granted the parties joint legal custody of the subject child and continued primary physical custody of the child with respondent mother. The Appellate Division affirmed. Although Family Court erred in failing to set forth those facts essential to its decision, the record was sufficiently complete for the Appellate Division to make its own findings. Several factors did not clearly favor either parent. For instance, both parents loved the child and wanted what was best for him. Both parents had a history of drug abuse and both struggled with addressing their drug problem. Indeed, at separate times during the pendency of the underlying proceedings, each parent relapsed into drug use. Nonetheless, several crucial factors decisively weighed against awarding the father primary physical custody. Most notably, the father had an explosive temper, a history of domestic violence, a lengthy criminal history, and had, at times, violated court orders. Further, the father's testimony established that he did not fully appreciate the extent of the child's special needs and would have greater difficulty than the mother providing the child with transportation to various places and in his financial ability to provide for the child. Finally, it was undisputed that the mother had been the child's primary caretaker for the vast majority of his life and that the child would greatly benefit from the stability and consistency that residency with the mother would provide.

Matter of Rawleigh v Gallt, ___ AD3d ____, 2024 NY Slip Op 03612 (4th Dept 2024)

The Father Established a Change in Circumstances Based on His Compliance with the Terms of the Prior Order

Family Court denied the father's petition for modification of visitation. The Appellate Division reversed on the law, vacated the first ordering paragraph, granted the petition, and remitted to Family Court. Contrary to the father's contention, he was not denied due process by Family Court's consideration of evidence outside the record, specifically orders of protection issued against him. Pursuant to Family Court Act § 651 (e) (3) (ii),

Family Court was required to conduct a review of reports of the statewide computerized registry of orders of protection. However, Family Court erred in concluding that the father did not establish a change in circumstances. The prior order provided that sufficient compliance with the order for a period of six (6) months would constitute a change in circumstances for the father to re-petition for additional visitation time and overnights. The father testified that he had been exercising his visitation consistently until the mother moved to Arizona with the children. Also, the mother's relocation without permission constituted a change in circumstances because it resulted in a substantial interference with the father's visitation rights. In addition, based on the record, modification of the father's visitation schedule to include in-person visitation would serve the children's best interests.

Matter of Hudson v Carter, ___ AD3d ____, 2024 NY Slip Op 03615 (4th Dept 2024)

The Father Failed to Establish the Absence of Strategic or Other Legitimate Explanations for Counsel's Alleged Shortcomings

Family Court awarded primary physical custody of the subject child to the mother. The Appellate Division affirmed. The Appellate Division perceived no basis to disturb Family Court's credibility assessment and factual findings and concluded that the custody determination was supported by a sound and substantial basis in the record. Further, the Appellate Division rejected the father's contention that he received ineffective assistance of counsel insofar as the father failed to establish the absence of strategic or other legitimate explanations for counsel's alleged shortcomings.

Matter of Doner v Flora, ___ AD3d ____, 2024 NY Slip Op 03652 (4th Dept 2024)

The Father Failed to Demonstrate that the Mother's Mental Health Records Were Material and Necessary; The Child's Hearsay Statements Were Corroborated

Family Court awarded the mother sole legal custody of the children. The Appellate Division affirmed. Family Court did not err in denying the father's application for a judicial subpoena duces tecum with respect to the mother's mental health records. The father did not allege in his cross-petition that the mother's mental health was at issue and failed to demonstrate that the mental health records were material and necessary for the determination of the mother's petition. In addition, the child's hearsay statements were corroborated by the testimony of the mother, documentation contained in the child's school records, and the father's testimony on cross-examination.

Matter of King v Pelkey, ___ AD3d ____, 2024 NY Slip Op 03654 (4th Dept 2024)

The Father Drank Alcohol to Excess, Committed a Family Offense Against the Mother, and Violated the Temporary Order of Protection

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

order appealed from was an initial custody determination with respect to the parties' ten-month-old child. The parties separated and the father moved out of the residence when the child was two months old and after an altercation between the parties. In addition to the custody petition, the mother filed a family offense petition against the father and obtained a temporary order of protection. Since that time, the father had only supervised visitation with the child pursuant to a temporary order of custody. The Appellate Division concluded that Family Court set forth the facts essential to its decision, i.e., that the father drank alcohol to excess, committed a family offense against the mother, and violated the temporary order of protection.

Matter of Failing v Clark, ___ AD3d ____, 2024 NY Slip Op 03655 (4th Dept 2024)

TERMINATION OF PARENTAL RIGHTS

Mother Failed to Appeal from the Order of Disposition

Family Court terminated the mother's parental rights on the ground of severe abuse. The Appellate Division affirmed. The mother never appealed from the order of disposition in the Family Court Act Article 10 proceeding which clearly advised the mother of her obligation to timely appeal from that order. Therefore, her challenge to the court's severe abuse determination was not properly before the Appellate Division. The mother's remaining contention was without merit.

Matter of Adam M.C., 224 AD3d 1295 (4th Dept 2024)

Mother was Denied Due Process of Law Based Upon the Bias Displayed

Family Court terminated the mother's parental rights on the ground of permanent neglect. The Appellate Division reversed in the interest of justice and on the law and remitted to Family Court. The mother was denied due process of law based upon the bias displayed by the Family Court Judge. Although the mother's bias contention was unpreserved inasmuch as the mother did not make a motion for recusal, the Appellate Division exercised its power to review her contention in the interest of justice. The state must provide parents with fundamentally fair procedures during the fact-finding stage of a state-initiated permanent neglect proceeding, including the right to a hearing before an impartial factfinder. The record demonstrated that Family Court had a predetermined outcome in mind during the hearing. During a break in the case, Family Court's comments amounted to a threat that, should the mother continue with the fact-finding hearing, the court would terminate her parental rights. Those comments were impermissibly coercive and that the court made good on its promise to terminate the mother's parental rights could not be tolerated. The Appellate Division reminded the Family Court Judge that even difficult or obstreperous litigants are entitled to patient, dignified, and courteous treatment from the court. Given the preconceived opinion expressed and the lack of impartiality exhibited by the Family Court Judge, the Appellate Division remitted for a new hearing and determination by a different judge.

Matter of Anthony J., 224 AD3d 1319 (4th Dept 2024) (see also *Matter of Zyion B.*, 224 AD3d 1285 [4th Dept 2024] at page 3)

Petitioner Established Noncompliance with Terms of the Suspended Judgment

Family Court revoked the mother's suspended judgment and terminated her parental rights on the ground of permanent neglect. The Appellate Division affirmed. The mother violated the terms of the suspended judgment by failing to arrange for the children's transportation to the New Year's Day home visit in 2022, failing to confirm every scheduled visit 24 hours in advance when required to do so, and missing scheduled appointments or home visits with the caseworker. Although the mother's breach of the express conditions of the suspended judgment did not compel termination of her parental

rights, it was strong evidence that termination was, in fact, in the best interests of the children.

Matter of Zackery S., 224 AD3d 1336 (4th Dept 2024)

New Facts and Allegations Raised on Appeal Warranted Remittal for a New Dispositional Hearing

Family Court terminated respondent parents' parental rights on the ground of permanent neglect. The Appellate Division modified on the law by vacating the disposition with respect to the three oldest children, as modified affirmed, and remitted to Family Court. There was a sound and substantial basis to support Family Court's determination that at the time of the hearing, it was in the children's best interests to terminate respondents' parental rights. Nevertheless, the three oldest children, along with the father, asserted new facts and allegations on appeal that warranted remittal for a new dispositional hearing. Family Court's best interest determination was based, in part, on the fact that the oldest child had been successfully placed with a kinship guardian, and that the three younger children had long lived with foster parents who were willing to adopt them. The AFCs for the three oldest children reported on appeal that, in the intervening 20 months, the oldest child's kinship guardianship had been terminated, the second oldest child's adoptive placement had been disrupted inasmuch as he repeatedly absconded from the foster parents' home and his paternal grandmother had been awarded custody of him, and there was a pending custody petition by the paternal grandmother for the third oldest child, who would turn 14 that year and remained steadfast in his opposition to being adopted. Although other new facts and allegations asserted by petitioner suggested that termination of respondent's parental rights might have remained in the best interests of the three oldest children, the record before the Appellate Division was no longer sufficient for it to determine the issue. There were no new facts and allegations presented with respect to the youngest child and the conflict between the result with respect to the youngest child and the three older children was of no moment inasmuch as termination had been upheld with respect to younger siblings in similar circumstances.

Matter of Noah C., 225 AD3d 1178 (4th Dept 2024)

Mother Was Discharged from Mental Health Counseling, Anger Management Classes, and Substance Abuse Treatment for Failure to Attend

Family Court terminated the mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The mother was discharged from mental health counseling, anger management classes, and substance abuse treatment for failure to attend, thereby demonstrating that she failed to take meaningful steps to correct the conditions that led to the children's removal and did not successfully address or gain insight into the problems that led to the removal and continued to prevent their safe return. The mother's progress in her parenting classes, which was only one of several required services, was made after the termination of parental rights petitions were filed and she failed to complete that requirement or any of her other required services during the time

between when the petition was filed, and the hearing was concluded. Further, the children had spent a significant portion of their lives in the care of foster parents who desired to adopt them and established a bond with them that they lacked with the mother.

Matter of Patience E., 225 AD3d 1181 (4th Dept 2024)

Finding of Permanent Neglect Was Not Undermined By the Evidence that Petitioner Took Steps to Arrange for Discharge of the Children Prior to the Father's Newly Disclosed and Unaddressed Auditory Hallucinations

Family Court terminated the father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner alleged that the father permanently neglected the children on the ground that the father failed for a period of at least one year – specifically December 1, 2020 to December 22, 2021 – to plan for the future of the children. Petitioner alleged that the father disclosed to a psychiatrist in June 2021 that he had been hearing voices telling him to sexually abuse the children and that he failed to comply with the service plan and failed to ameliorate the problems preventing the safe return of the children to his care. The father was correct that, prior to June 2021, petitioner had considered the father to be in compliance with the service plan such that the children were scheduled to return to their biological parents that month. However, petitioner's excusable misperception of the father's progress at that point was, through no fault of its own, based on the father's active concealment that he was experiencing auditory hallucinations. Following the father's disclosure, the caseworker asked him to enroll in a counseling program that treated people with sexualized behaviors, which the father failed to do prior to the end of the statutory period alleged. Additionally, the father neither completed nor made substantial progress in a mental health treatment program, and after June 2021 he failed to complete a domestic violence education program. During the subsequent supervised visitation, the children would often run from the father and would refer to him as scary daddy. Visitation with the father was later terminated in October of 2021. Thus, under the circumstances of this case, the finding of permanent neglect was not undermined by the evidence that petitioner took steps to arrange for the discharge of the children to the father. Further, a different result was not warranted even if Family Court erred in admitting the full testimony of the psychiatrist on the ground of privilege. The psychiatrist was required to report that he had reasonable cause to believe the children were being mistreated. Inasmuch as the father thereafter failed to comply with the requested services, the father did not successfully address or gain insight into the problems that continued to prevent the children's return. Finally, even assuming arguendo, that Family Court erred into admitting in evidence the father's hospital records and in considering one exhibit that had not been properly received into evidence, any error was harmless. Two Appellate Justices dissented on the ground that such errors were not harmless and as such there was no proper evidence of the father's failure to plan for the children from December 2020 to April 2021.

Matter of Tori-Lynn L., 227 AD3d 1455 (4th Dept 2024)

Mother Failed to Maintain Substantial Contact with the Children as She Often Left the Visits Early and Spent Much of Her Time at Visits Focusing on the Neglect Proceedings Rather than Building Relationships with the Children

Family Court terminated the mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. When considering the totality of the record, it was clear that the mother was aware of the dangers and disadvantages of proceeding without counsel and nevertheless made a knowing, intelligent, and voluntary waiver of her right to the same. Further, the mother failed to maintain substantial contact with the children. She often left visits early when she grew frustrated with the children's behavior and spent much of her time at visits focusing on the neglect proceeding rather than spending time building her relationship with the children. In addition, despite the fact that the children were removed due in part to concerns over domestic violence, the mother refused to acknowledge the history of domestic violence between her and the father and failed to take meaningful steps to correct the conditions that led to the children's removal.

Matter of Danyel J., 227 AD3d 1484 (4th Dept 2024)

A Suspended Judgment Rather Than Termination Was in the Children's Best Interests

Family Court terminated the father's parental rights on the ground of permanent neglect. The Appellate Division modified, as modified affirmed, and remitted to Family Court. The Father was incarcerated during the relevant time period and petitioner demonstrated that its caseworker sent the father a series of letters that informed him of the status of the children and invited him to participate in service plan reviews. The father repeatedly failed to respond but did ultimately communicate with the caseworker by telephone identifying his sister, a resident of the state of Florida, as a potential placement resource. The caseworker informed the father that his sister was not responding to contact attempts but the father did not provide any alternative resources. Where, as here, an incarcerated parent failed on more than one occasion while incarcerated to cooperate with an authorized agency in its efforts to assist such parent to plan for the future of the child, diligent efforts to encourage and strengthen the parental relationship were not required. Additionally, inasmuch as the resources proposed by the father were not realistic alternatives to foster care, there was a sound and substantial basis to support Family Court's determination of permanent neglect. However, Family Court abused its discretion in refusing to issue a suspended judgment. At the time of the dispositional hearing – just two months after his release from prison – the father had found full-time employment, participated in weekly visitation with the children, had started communicating regularly with the with the children's foster family regarding the children, and was in the process of finding housing and completing a mental health evaluation and parenting classes. In addition, the children were reportedly happy to be visiting with the father regularly. Given the children's young ages, the father's recommencement of regular visitation, the sustained efforts on the part of the father following his release from prison, and the Legislature's express desire to return children to their natural parents whenever possible,

the father should have been granted a second chance in the form of a suspended judgment.

Matter of Rodcliffe M., Jr., 228 AD3d 1304 (4th Dept 2024)

The Agency Was Permitted to Evaluate and Plan for Other Potential Future Goals Where Reunification with a Parent Was Unlikely

Family Court terminated the mother's parental rights on the ground of permanent neglect and placed the children in the custody of an authorized agency and the maternal grandmother. The Appellate Division dismissed in part and affirmed in part. The appeal insofar as it concerned the disposition with respect to the older child was moot because that child had reached the age of 18. Nevertheless, the mother's challenge to the finding of permanent neglect was not academic since such a finding constituted a permanent and significant stigma. Contrary to the mother's contention, Family Court did not impose concurrent permanency goals. Rather, the goal remained return to parent. The agency was permitted to evaluate and plan for other potential future goals where reunification with a parent was unlikely and simultaneously considering adoption and working with a parent was not necessarily inappropriate. Also, contrary to the mother's further contention, although petitioner made affirmative, repeated, and meaningful efforts to assist the mother, its efforts were fruitless because the mother was utterly uncooperative.

Matter of Steven S., ___ AD3d ____, 2024 NY Slip Op 03946 (4th Dept 2024)

OTHER CASES OF INTEREST FROM COURTS IN THE FOURTH DEPARTMENT

Substantial Evidence Did Not Support the ALJ's Determination that the Acts of Child Maltreatment Were Relevant and Reasonably Related to Employment in the Childcare Field

Pursuant to CPLR Article 78, Supreme Court transferred the proceeding to review the part of the Administrative Law Judge (ALJ)'s determination that petitioner's acts of child maltreatment were relevant and reasonably related to employment in the childcare field. The Appellate Division modified the determination on the law by annulling part of the determination and precluding New York State Office of Children and Family Services from informing a provider or licensing agency that petitioner was the subject of an indicated child maltreatment report. Petitioner, at the age of 17 years old, gave birth to the subject child. Thereafter, petitioner and the child's father, who was several years older than petitioner, continued a relationship during which time the father subjected petitioner to severe physical and emotional domestic violence. Eventually, when the child was in her early teenage years, petitioner and the child resided together in an apartment. During his frequent visits to the apartment the father would scream at, use derogatory names for, and threaten petitioner in the child's presence. Later, tensions increased with a series of acrimonious incidents. Even though the father did not have legal custody of her at the time, the child began staying at the father's residence. Petitioner, fearing that the child was not safe with the father and was being unduly influenced by him, made two desperate attempts within a matter of weeks to get the child to leave the father and come with her by, among other things, physically grabbing the child. Following an investigation, the Office of Children and Family Services determined that the allegations of inadequate guardianship were substantiated with respect to the two incidents and filed an indicated report against petitioner. The matter proceeded to a fair hearing before an ALJ. The ALJ thereafter rendered a determination finding that the county had met its burden and further found that the indicated report was relevant and reasonably related to employment in the childcare field. Without providing any explanatory rationale, the ALJ proclaimed that the indicated report remained relevant to childcare issues for the following reasons: (1) number of incidents involved in report; (2) seriousness of incidents; (3) recency of report; and finally (4) lack of rehabilitative evidence. However, nothing in the record suggested any allegations or risk of repeat misbehavior, much less any actual repeated acts of child abuse or maltreatment and there was no evidence that petitioner had committed abuse or maltreatment prior to the indicate report. In addition, the uncontroverted evidence in the record established that petitioner took responsibility for her actions, acknowledged that she endangered the child, and that she rehabilitated herself by successfully attending professional therapy and addressing the causes of her detrimental behavior. Specifically, petitioner's therapist submitted a letter explaining that petitioner had suffered from PTSD as a result of the relationship with the father, but that petitioner had made an enormous amount of progress, had reached her treatment goals, and in no way presented as an unfit parent during the course of her treatment. The other factors upon which the ALJ relied did not provide the requisite evidence to support his determination. Further, the ALJ failed to sufficiently address other relevant guideline factors. Most significantly, the ALJ overlooked the relevant events and circumstances surrounding petitioner's actions. The

record indisputably established that petitioner acted out of desperate concern about the child's safety in the care of the father, a person who had an unmitigated, long-term history of engaging in severe domestic abuse against petitioner. In addition, the child suffered no physical injury as a result of petitioner's actions and petitioner had demonstrated prior success as a substitute teacher.

Matter of Hastings v New York State Off. of Children and Family Servs., 227 AD3d 1446 (4th Dept 2024)

In the Absence of a Written Record, if a Court Finds by Clear and Convincing Evidence That at the Time of Assisted Reproduction the Intended Parents Agreed to Conceive and Parent a Child Together, That Court is Not Precluded from Finding That Consent Existed

The Support Magistrate dismissed Amy Z.'s parentage petition as untimely. Family Court vacated the dismissal and restored the matter to its calendar. Family Court found that Amy Z. had proven by clear and convincing evidence that she should rightfully be named the subject children's parent and ordered that an order of parentage would issue. Lisa N., the children's biological mother, and Amy Z. were in a committed relationship when they decided to start a family. They pursued the expense and rigors of assisted reproduction together. Before the babies were born, the couple posted announcements that they were preparing to be mothers together. They had a gender reveal party and baby showers where they were both recognized as guests of honor. Amy Z. was present for the children's birth and cut the umbilical cords. She participated in naming the children, including giving one boy her grandfather's name as a middle name. Amy Z. took paid family leave from work and participated in pediatric appointments and special evaluations. She participated in all of the ordinary parenting tasks – bathing, feeding, changing, traveling, celebrating milestones, and identifying herself to the children and the world as their mother. After the parties separated, they agreed to co-parent the children and created a calendar allowing regular and frequent parenting time with both parties. All of these facts supported the simple, logical conclusion that the best interests of the children were served by designating Amy Z. their intended, lawful parent. Family Court decided that Amy Z. would have equal standing to Lisa N. to seek custody and parenting time, be required to support the children, and that the children may inherit from her the same as they would from Lisa N.

Matter of Sabastian N., ___ NYS3d ____, 2024 NY Slip Op 24069 (Fam. Ct., Erie Co. 2024)

CASES OF INTEREST FROM COURTS IN THE FIRST DEPARTMENT

A Finding of Neglect Against the Mother Was Not a Bar to Her Being Awarded Custody

Family Court granted the parties joint legal custody with final decision-making authority and physical custody to the mother and parenting time to the father. The Appellate Division, First Department affirmed. The mother had been the child's primary caregiver for the majority of his life and had taken a more proactive role in attending to the child's medical, educational, and extracurricular needs. The father's involvement with the child during the first nine years of his life was limited. The fact that the father had temporary custody during the pendency of the neglect and custody proceedings was not determinative. Similarly, a finding of neglect against the mother was not a bar to her being awarded custody, especially as she completed all the required services in connection with the neglect proceedings, separated from her abusive partner, had the younger child returned to her care without ACS supervision, and demonstrated a great deal of insight into the reasons why the children were removed. Family Court also properly considered the effects of domestic violence on the subject child. The record demonstrated that the mother separated from her abuser immediately after a domestic violence incident, obtained an order of protection against him, and moved to a confidential domestic violence shelter. Additionally, evidence at the hearing showed that the mother and the children no longer had any contact with the abuser.

Matter of D.T. v A.G., 226 AD3d 451 (1st Dept 2024)

There Was No Evidence That the Father Lost Self-Control During Repeated Bouts of Excessive Drinking and Such Evidence was Necessary to Trigger the Presumption of Neglect

Family Court found that the father neglected the subject children. The Appellate Division, First Department modified and vacated so much of the neglect finding as it was based on the father's abuse of alcohol, and otherwise affirmed. The finding of neglect was supported by a preponderance of the evidence regarding the father's acts of domestic violence. The children's out-of-court statements were reliable and corroborated. They were in their bedroom when they became frightened because they heard their parents fighting and called their maternal grandmother for help. The children's statements cross-corroborated each other and one child's out-of-court statement to the caseworker that she asked her grandmother to summon the police during the incident was corroborated by an oral report transmission. However, petitioner did not satisfy its burden of proving that the father neglected the children by abusing alcohol. There was no evidence that the father lost self-control during repeated bouts of excessive drinking and such evidence was necessary to trigger the presumption of neglect under Family Court Act § 1046 (a) (iii).

Matter of G.B., 227 AD3d 581 (1st Dept 2024)

A Respondent Parent Whose Parental Rights Were Not Surrendered or Terminated Was Considered a Party to a Permanency Proceeding and Was Entitled to Notices and Reports, Notwithstanding the Lack of Consent by a Child Who Opted to Remain in Foster Care After Turning 18 Years Old

Family Court denied the subject child's application to preclude respondent father from receiving notice of her permanency hearings and obtaining a copy of the permanency hearing reports. The Appellate Division, First Department affirmed. As a preliminary matter, the child's appeal was timely as there was no indication that the order was served on the AFC by any of the methods authorized by the statute. With regards to the merits, Family Court Act §1089 (b) (1) (i) is unambiguous: A respondent parent whose parental rights are not surrendered or terminated is considered a party to a permanency proceeding and is entitled to notices and reports, notwithstanding the lack of consent by a child who opted to remain in foster care after turning 18 years old. The Appellate Division noted that the child's privacy concerns were reasonable. However, both the Health Insurance Portability and Accountability Act of 1996, 42 USC § 1320d—1, et seq. (HIPPAA) and the CPLR provided appropriate safeguards in the form of qualified protective orders to prohibit the parties from using or disclosing the protected information for any purpose other than the litigation or proceeding for which such information was requested.

Matter of Parvati D., 227 AD3d 605 (1st Dept 2024)

Family Court's Continuation of the Children's Visitation with the Former Foster Mother Was an Appropriate Exercise of its Obligation

Family Court denied the application of petitioner Administration for Children's Services to discontinue supervised visits between the former foster mother and the subject children. The Appellate Division, First Department modified on the law and facts to specify that such visits would be supervised and that the foster mother's partner would not be present, and otherwise affirmed. Family Court's continuation of visitation with the former foster mother was an appropriate exercise of its authority under Family Court Act § 1089, was tailored to the particular circumstances of these children, and was in keeping with the legislative goal of ensuring the children's well-being. The Appellate Division specifically did not hold that this case created standing for legal strangers to seek visitation in foster care cases. The Appellate Division also noted that Family Court was required to consider the children's wishes and the children expressed a strong desire to continue to visit with the former foster mother.

Matter of AL.C., ___ AD3d ____, 2024 NY Slip Op 03799 (1st Dept 2024)

Where Petitioner's Counsel Was a Member of the Child's Family and Maintained a Relationship with the Child as Her Grandfather, Disqualification Was Appropriate

Family Court determined that disqualification was appropriate where petitioner's counsel was a member of the child's family and maintained a relationship with the child as her

grandfather. By virtue of paternal grandfather's representation of petitioner in the matter, paternal grandfather's right to communicate with the child was limited by Rule 4.2 of the New York Rules of Professional Conduct. A child who might not be privy to or fully understand all of the issues involved in the litigation might not recognize if and when pleasantries turned into communications involving the subject of representation and a child should not be burdened with the risk that the litigation would be discussed when interacting with her grandfather in the absence of her attorney. Nor should a child suffer the potential negative impact of having a family member advocate for one parent over the other or be deprived of healthy contact with a grandparent due to their professional involvement in the litigation. In addition, by observing interactions between petitioner and the child, paternal grandfather had personal knowledge of relevant information and could be called as a witness at trial. Accordingly, Family Court granted the AFC's motion and disqualified paternal grandfather from representing petitioner in the action.

Matter of E.M. v G.M., 81 Misc.3d 1237(A) (Fam. Ct., New York Co. 2024)

CASES OF INTEREST FROM COURTS IN THE SECOND DEPARTMENT

In Light of the Elapsed Time and the Pace of the Child's Psychological Development, the Record Was No Longer Sufficient to Determine Best Interests

Family Court dismissed the father's petition to modify a prior order of custody. The Appellate Division, Second Department reversed and remitted to Family Court. New developments were brought to the Court's attention by the AFC, including that the child, who was four years old at the time the petition was filed and was now eight years old, had expressed a desire to spend more time with the father. In light of the time that had elapsed and the pace of the psychological development of the child whose best interests were the primary concern, the Court concluded that the record before it was no longer sufficient for determining the ultimate issues presented.

Matter of Martynchuk v Vasylovska, 223 AD3d 819 (2d Dept 2024)

There Was No Intimate Relationship Between the Appellant and the Subject Children Within the Meaning of Family Court Act § 812 (1) (e)

Family Court issued an order of protection against appellant in favor of petitioner's four children. The Appellate Division, Second Department reversed, dismissed the petition insofar as asserted on behalf of the four children, and vacated the order of protection. The appellant and subject children were not related by blood or marriage, but three of the subject children had the same biological father as the appellant's children. The appellant and the subject children did not reside together and there was no evidence that they had any direct interaction. Accordingly, there was no intimate relationship between the appellant and the subject children within the meaning of Family Court Act § 812 (1) (e).

Matter of Watson v Brown, 225 AD3d 613 (2d Dept 2024)

The Foster Parents Acted as the Functional Equivalent of the Child's Parents for an Extended Period of Time

Family Court granted petitioner's motion to dismiss the application of non-party foster parents for a hearing pursuant to Family Court Act § 1028 to determine whether the subject child should be returned to their care. The Appellate Division, Second Department reversed on the law, denied the motion to dismiss, and remitted to Family Court. In November 2015, the subject child was found to be neglected by his parents and placed in the custody of his maternal aunt, a non-party. In November 2017, the child returned to the father's custody. In July 2018, the child was again placed in the custody of the maternal aunt. In May 2021, the child was placed in DSS's legal custody while he remained placed in the care of his maternal aunt and her paramour, now the child's foster parents. In February 2023, DSS removed the child from the care of the foster parents and sought to place him in a qualified residential treatment program. Thereafter, the foster parents filed an application for a hearing to determine whether the child should be returned to their care. DSS moved to dismiss the application and Family Court granted

DSS's motion. The Court of Appeals, in interpreting Family Court Act § 1012 (g), has held that the common thread running through the various categories of persons legally responsible for a child's care is that these persons serve as the functional equivalent of parents. Factors to be considered include: (1) the frequency and nature of the contact, (2) the nature and extent of the control exercised by the applicant over the child's environment, (3) the duration of the applicants' contact with the child, and (4) the applicant's relationship to the child's parents. The child, eight years old at the time of the foster parent's application, had been under the foster parents' care for most of his life. As the foster parents acted as the functional equivalent of the child's parents for an extended period of time, they qualified as persons legally responsible for the care of the child. Thus, the foster parents were entitled to a hearing pursuant to Family Court Act § 1028.

Matter of Samson R., 227 AD3d 911 (2d Dept 2024)

The Alleged Recantation Was Vague and the Witness's Testimony Was Insufficient to Rebut the Finding of Abuse

Family Court, after a reopened fact-finding hearing, dismissed the petition. The Appellate Division, First Department reversed on the law and facts, reinstated the petition, made a finding that the father abused the subject child, and remitted to Family Court for a dispositional hearing and a determination thereafter. Petitioner commenced the proceeding alleging that the father sexually abused the subject child. After a fact-finding hearing, Family Court found that the father abused the child. Thereafter the father moved to vacate the order of fact-finding and to reopen the fact-finding hearing, identifying purportedly newly discovered evidence that the child had allegedly recanted her allegations against him. Family Court granted the father's motion, after a reopened fact-finding hearing found that the father had successfully rebutted petitioner's prima facie showing of sexual abuse, and dismissed the petition. Petitioner and the child separately appealed. During the fact-finding hearing, the child's testimony was consistent and detailed, and any minor inconsistencies did not render such testimony unworthy of belief. The child's testimony was sufficient to establish a finding of sexual abuse pursuant to Family Court Act § 1046 (b) (i). At the reopened fact-finding hearing, the mother of the father's other children testified that the child recanted her allegations of abuse. However, the child's recantation of allegations of abuse did not necessarily require Family Court to accept the later statements as true because it is accepted that such a reaction is common among abused children. Rather the recantation simply created a credibility issue. Still, even assuming the witness's testimony was credible, it was insufficient to warrant dismissal of the petition. The alleged recantation, as described by the witness, was vague and the witness's testimony was insufficient to rebut the finding of abuse.

Matter Kenyana D., ____ AD3d ____, 2024 NY Slip Op 03746 (2d Dept 2024)

An Unresolved Issue Existed as to Whether There Was a Manifestation of Mutual Assent to the Terms Set Forth in the Custody Order

Family Court denied, without a hearing, the mother's motion to vacate an order. The Appellate Division, Second Department reversed on the law and remitted to Family Court for a hearing on the mother's motion and a new determination thereafter. During a hearing on their petitions for custody of the children, the parties reached a settlement. Family Court, without stating the terms of the settlement on the record, allocuted the parties who both stated that they had reviewed the settlement with their respective attorneys and were agreeing to the settlement voluntarily and freely. Thereafter, Family Court, inter alia, awarded the parties joint legal custody of the children. The mother filed a petition to modify the custody order and then moved to vacate the custody order. In support of her motion, the mother submitted an affidavit in which she averred, inter alia, that she had not consented to the terms of the custody order. CPLR § 2104 did not require the parties or a court to place on the record the agreement between the parties that was reduced to an order. However, failing to do so made the agreement open to collateral litigation. In light of the mother's averment that she did not consent to the terms of the custody order, the fact that the terms of the settlement were not placed on the record, and the fact that there was no writing subscribed by the parties, there was an unresolved issue as to whether there was a manifestation of mutual assent as to the terms set forth in the custody order.

Matter of Izzo v Salzarulo, ____ AD3d ____, 2024 NY Slip 03751 (2d Dept 2024)

On the Child's Appeal from a Stipulation of Settlement, Family Court Improvidently Exercised Its Discretion in Failing to Conduct an In-Camera Interview

Family Court ordered the stipulation of settlement over the objection of the AFC. The Appellate Division, Second Department reversed on the law and in the exercise of discretion and remitted to Family Court for an in-camera interview and a new determination on the issue of parental access. The parties entered into a stipulation of settlement which provided, inter alia, that the mother would have sole custody and that the father would have supervised and therapeutic parental access with the child. When the parties appeared in Family Court, the AFC raised an objection indicating that the child wished to have no contact with the father. Family Court so-ordered the stipulation of settlement over the objection of the AFC. The child appealed. Family Court improvidently exercised its discretion in failing to conduct an in-camera interview of the child particularly given the child's position as stated by the AFC regarding his fear and hatred of the father, his expressed concerns about the father's lifestyle, and his strong wishes not to have parental access with the father. The child was of such an age and maturity that his preferences were necessary to create a sufficient record to determine what parental access would be in his best interests. Further, under the circumstances of the case, where the child was adamantly opposed to parental access, that portion of the order that permitted the expansion of parental access from supervised parenting time upon the parties' consent alone was not proper. The child's rights did not evaporate upon the conclusion of the case in the hearing court.

Matter of Dionis F. v Daniela Z., ____ AD3d ____, 2024 NY Slip Op 03822 (2d Dept 2024)

A Recording of a Conversation Between Respondent Father and the Subject Child Was Admissible During a Best Interests Hearing Where Neither Parent Was Aware the Child Was Recording the Conversation

Family Court held that an audio recording made by an 11-year-old child of a conversation between herself and the father was admissible for impeachment purposes. An adequate foundation was laid for the introduction of the recording during the AFC's cross-examination of the father. The father confirmed that he was a participant in the conversation, the voice on the recording was that of the child, the conversation took place in a certain time frame, and the recording was an accurate depiction of the conversation he had with the child. Family Court met with the child during two in-camera interviews and was able to assess her maturity and her ability to consent to recording the conversation and found that the child was fully able to do so. The fact that the AFC, as a direct advocate for the child, sought to introduce the contents of the recording into evidence meant that the child wished the court to hear to contents of the recording and consider it in its decision. Recognizing that this was only one conversation that the father had with the child, Family Court would determine the proper weight to give it in light of all the other evidence before the Court.

S.G. v K.W., 81 Misc.3d 1243(A) (Fam. Ct., Kings Co. 2023)

CASES OF INTEREST FROM COURTS IN THE THIRD DEPARTMENT

The Gender Recognition Act and Civil Rights Law Article 6 Promote the Sealing of Name Change Applications by Transgender Applicants

Family Court granted petitioners' petition on behalf of their minor child requesting that the child's name and sex designation be changed but declined to seal the record of the proceeding. The Appellate Division, Third Department modified by reversing the order so much thereof as denied petitioners' request to seal the court records, granted petitioners' application to that extent, and as so modified, affirmed. The Gender Recognition Act amended Civil Rights Law Article 6, governing name changes, and the newly created Civil Rights Law 6-a, governing changes in sex designation. Both articles require a court immediately upon the commencement of a proceeding thereunder to order information contained in any pleadings or papers submitted to the court to be safeguarded and sealed in order to prevent their inadvertent or unauthorized use or disclosure while the matter is pending. With regard to the permanent sealing of the court records, pursuant to Civil Rights Law Article 6-a, court records are required to be sealed, in accordance with the clearly stated statutory command. Relative to name changes, Civil Rights Law article 6 has a different sealing standard that nevertheless expressly recognizes an applicant's transgender status as a ground for sealing the records. This is for good reason – risk to one's safety is always present upon public disclosure of one's status as transgender or otherwise gender non-conforming. Therefore, although Civil Rights Law 64-a continues to allow some limited discretion in respect to name change applications, application of the statutory terms also requires a substantial basis for finding that the public interest outweighs the need for protection; that would be the extraordinary rather than the customary case.

Mater of Cody V.V., 226 Ad3d 24 (3d Dept 2024)

Family Court Improperly Intervened in the Parties' Religious Dispute

Family Court modified a prior order of custody. The Appellate Division, Third Department vacated Family Court's directives in part. No reference was made to religion in the underlying custody order. The child was not of an age so as to allow him to have developed actual religious ties to a specific religion. Nor did the record reveal that the father's religious beliefs violated a state statute or threatened the child's well-being. As a result, Family Court improperly intervened in the parties' religious dispute. Thus, the Appellate Division vacated the following parts of Family Court's directives: 1) that neither parent permit the child to attend religious services or instruction until an agreement between the parties was reached on the issue; 2) to address the issue of religion while participating in court-ordered coparenting counseling; and 3) that a failure to reach an agreement with regard to religion would – after completing the court-ordered number of co-parenting sessions – constitute a change in circumstances for purposes of modification.

Matter of Joseph X.X. v Jah-Rai Y.Y., 226 AD3d 49 (3d Dept)

The Execution of an Order for Vaccination of a Child Can Be Stayed – if Necessary and Appropriate – to Preserve the Opportunity to Seek Appellate Review

Family Court granted petitioner Department of Social Services' motion for permission to vaccinate one of the subject children. The Appellate Division dismissed the appeal as moot. In January 2022, petitioner, by order to show cause, sought an order that the child be vaccinated against COVID-19 so that he could remain in a particular residential program. The child was placed at that specific facility due to petitioner's determination that it was be suited to meet the needs of the child, due to his autism and related behavior. The mother and the father opposed. The AFC stated that the child was unable to verbalize any opinion that he might have. Nonetheless, the AFC supported petitioner's request because she recommended that the child remain in the residential program. Following a hearing, Family Court granted petitioner's request and ordered petitioner to immediately schedule a vaccine. The mother appealed. As the child had already received the vaccine and had been returned to the parents' custody, the mother's rights would not be directly affected by an appellate determination and therefore the issue was moot. The Appellate Division, Third Department declined to find that the exception to the mootness doctrine applied. Disputes between children in the custody of the state and the child's parents regarding vaccination decisions were likely to reoccur. Although a stay was not sought here, the issue was not likely to evade review as the execution of an order for vaccination of a child can be stayed – if necessary and appropriate – to preserve the opportunity to seek appellate review.

Matter of Zaya A., 227 AD3d 1133 (3d Dept 2024)